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Reserved

Case :- JAIL APPEAL No. - 7728 of 2010

Appellant :- Kailash
Respondent :- State of U.P.
Counsel for Appellant :- From Jail,Gagan Pratap Singh
Counsel for Respondent :- A.G.A.

With

Case :- CRIMINAL APPEAL No. - 7484 of 2010

Appellant :- Baba Thakur Urf Parvesh Kumar Singh
Respondent :- State of U.P.
Counsel for Appellant :- Rajeev Sharma,Ajay Kumar Pandey,Anadi Krishna Narayana,Saurabh Gour,Vijay Singh Kushwaha
Counsel for Respondent :- Govt. Advocate

Hon'ble Suneet Kumar,J.
Hon'ble Vikram D. Chauhan,J.

(Per:Vikram D. Chauhan, J.)

1. Heard Sri Gagan Pratap Singh, learned Amicus Curiae for the Appellant in Jail Appeal No.7728 of 2010 and Sri Anadi Krishna Narayana, learned counsel for the Appellant in Criminal Appeal No.7484 of 2010 and learned A.G.A. for the State and perused the record.

2. The present appeal is filed by Appellants challenging judgment and order dated 20th October, 2010 passed by the Special Judge (DAA), Agra. By means of impugned judgment, Appellants-Kailash and Baba Thakur @ Prawesh Kumar Singh has been convicted under Section 394 I.P.C. and sentenced to undergo 10 years rigorous imprisonment and Rs.5000/- fine.

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Further, Appellants have been convicted under Section 302/34 I.P.C. and sentenced to undergo life imprisonment and Rs.10,000/- fine; Appellant-Kailash has also been convicted under Section 411 I.P.C. and sentenced to undergo 2 years rigorous imprisonment; Appellant-Kailash has further been convicted under Section 25 of Arms Act and sentenced to undergo 3 years rigorous imprisonment and Rs.10,000/- fine.

3. The prosecution case as per first information report is that on 23rd June, 2005 at about 6.30 pm, informant (PW1) Babua along with his son Aslam (PW2) were going to tempo stand Mantola road to meet informant's second son Arif. When they reached near Subhash Road then one cloth agent Amar Nath (PW4) made distress call that his belongings have been taken away forcefully and on aforesaid distress call, informant and his son saw that two persons were running towards the powerhouse in which one was having countrymade pistol and a bag and the other accused was having countrymade pistol. On hearing distress call of Amar Nath, the son of informant deceased-Arif and Aslam (PW2), Shahid Anwar, Mohd. Shahid, Fateh Singh (Tempo Driver), Ilbas, Rakesh Sharma, Muhiuddin and Amar Nath started running to catch aforesaid accused persons and caught hold of one of the accused-person, who on being caught, fired which hit son of informant, namely, Arif, who suffered firearm injury and as a result of the same, accused person was led free and on the same occasion one tempo driver hit his tempo with the accused person, as a result of same, he sustained injury and fell down. Thereafter, Amar Nath got back his bag, which was forcefully taken by accused person and when informant and his son Aslam reached the spot, accused was having countrymade pistol in his hand and there were four live cartridges in his pocket, which was taken in custody.

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Accused person informed that his name is Kailash s/o Asharfi Lal. Injured-Arif was brought to the hospital by Aslam and other persons and in intervening period police personnel came. The weapon cartridges and bag of Amar Nath was deposited in the police station and first information report was lodged after being scribed by Nasruddin and on the basis of the same, Case Crime No.98 of 2005, under Section 394, 411, 302 I.P.C. and Case Crime No.99 of 2005 under Section 25 Arms Act was registered at 19.20 hours on the same day.

4. The investigation in present case was carried on and panchayatnama of deceased was prepared on 23rd June, 2005. The panchayatnama was held at the S.N. Hospital, Agra on 23rd June, 2005 at 20.20 pm and same was completed at 22.05 pm. The panch witnesses of panchayatnama were Haji Mohd. Gulfam, Abdul Haneef, Mohd. Muim, Shamimoddin, Allauddin and as per opinion of panch witnesses deceased Arif died on account of firearm injury. Thereafter, body was sent for post mortem examination and post mortem held on 24th June, 2005 at 10.00 am. The post mortem was conducted by Dr. A.P. Singh (PW-6). The following injuries were found in the post mortem report:-

> “Firearm wound of entry 0.4 cm X 0.4 cm situated on the anterior wall of stomach in the upper part 0.5 cm left to the midline at a level 2 cm below xephisterum. Cavity deep on probing probe reaches on the peritoneal cavity. Blackening and tatooing present.
>
> Fracture of 3rd lumber vertebra. Metallic bullet 3 cm X 0.8 cm recovered from this bone.”

5. As per post mortem report deceased Arif died due to shock and haemorrhage as a result of ante-mortem injury. Investigating Officer prepared the site plan of place of incident on 23th June, 2005. On 8th September, 2005 identification proceeding in respect of accused Baba Thakur @ Prawesh

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Kumar Singh was held by Investigation Officer.

6. After investigation, chargesheet was submitted against the Appellants by the Investigation Officer.

7. The trial court framed charge on 23rd January, 2006 against Appellant-Kailash under Section 25 Arms Act and Section 411 I.P.C. The trial court further framed charges against Appellants Kailash and Baba Thakur @ Prawesh Kumar Singh under Sections 394 and 302 read with Section 34 I.P.C. Appellants denied the charges and claimed to be tried.

8. The prosecution in support of its case produced following witness:-

(a) Babua (P.W.1), who is informant of case, has stated that on 23rd June, 2005 at about 5.30 pm informant and his son Aslam went to meet his second son Arif, who was working at Tempo Stand Mantola and when they reached Shubhas Nagar then they heard distress call of agent Amar Nath shouting that he has been looted and then informant and his son saw two accused persons running towards the powerhouse in which one was having countrymade pistol and a bag in his hand and other person was having countrymade pistol. On hearing distress call, his son Arif and Aslam and other persons Shahid and Anwar and Mohd. Shahid Qureshi, Fateh Singh (Tempo Driver), Mohd. Ilyas and others ran towards aforesaid accused persons; person whose bag was forcefully taken away also ran behind accused persons. While running towards accused persons his son Arif caught hold of one of the accused person. However, he fired on his son Arif and as a result of the same, Arif sustained firearm injury; aforesaid accused person was let of from the custody of the Arif. Later on one tempo driver has hit aforesaid

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accused person with his tempo as a result of same, he was injured and fell down. In the intervening period, Amar Nath took the bag from injured accused person. Informant took away countrymade pistol and four live cartridges from the pocket of injured accused person. Injured accused person informed his name as Kailash, s/o Asharfi Kashyap and further informed that other accused person is Baba Sindhi resident of Gurudwara Etah.

Infomant (PW1) thereafter, send his injured son Arif to hospital for medical treatment with the help of his second son Aslam and other persons. Police personnel came on place of occurrence and on his instructions first information report was scribed by Nuruddin and countrymade pistol, live cartridges and bag of Amar Nath recovered from accused Kailash was taken to police station Rakabganj and first information report was lodged. The witness has identified the first information report dated 23rd June, 2005 and same was marked as Ex.Ka.1 before trial court; recovered countrymade pistol and live cartridges were also handed over to police and a recovery memo was prepared and recovered articles were sealed in presence of the informant (P.W.1.) Informant has also stated that Mustaqeem and Sajid had signed and informant had given his thumb impression; witness has identified recovery memo dated 23rd June, 2005 and the same was marked as Ex.Ka.2 before the trial court. Witness has further testified that accused person who ran away from the place of occurrence was Baba Sindhi and he is also known as Baba Thakur. After incident he along with his son Aslam, Shahid, Anwar and Rakesh Sharma went to jail for identifying Baba Sindhi @ Baba Thakur; All the four persons had identified the accused and the identification memo is marked as Ex.Ka.3. Countrymade pistol and four live

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cartridges was exhibited as Ex.Ka.6 and the bag of Amar Nath was exhibited as Ex.Ka.8. Witness has further stated that both the accused persons are present in the court and as such he has identified the accused person before the trial court.

(b)Aslam (P.W.2), s/o Haji Babua has stated that on 23rd June, 2005, occurrence took place. He along with his father Haji Babua went to tempo stand, to meet his brother at about 6.30 pm and when they reached Subhash Bazar, they heard distress call of Amar Nath who shouted that he has been looted and witness saw that two accused persons ran towards powerhouse in which one was having countrymade pistol and a bag and the other accused was having a countrymade pistol. On hearing distress call, Arif, Shahid, Anwar and Shahid Qureshi and other persons went behind aforesaid accused persons and when they caught hold of one of the accused persons, said accused person with the intention to kill fired and as a result of the same his brother Arif sustained firearm injury. Accused person was let out of custody and was trying to run away, in the meantime, one tempo driver dashed with accused person, as a result of the same, accused person sustained injury and fell down. Amar Nath (PW4) thereafter, took his bag; witness further stated that his father took the countrymade pistol and four live cartridges from injured accused. Injured accused informed that his name is Kailash and accused person who has ran away from the spot his name is Baba Sindhi. In the meantime, police came and witness took his brother with the help of other persons to the S.N. Hospital where the doctors have declared his brother dead. Witness has identified Appellants in court.

(c) Mahavir Singh Chauhan (P.W.3), S.O. Nai Ki Mandi,

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Agra has stated that on 23rd June, 2005 he was posted as Chowki In-charge Fort under Police Station Rakabganj. He has stated that on the said date he had conducted panchayatnama of the deceased Arif at S.N. Medical College in front of panch witnesses. Witness has identified panchayatnama and same was marked as Ex.Ka.4 before the trial court. Witness has further submitted that letter to the C.M.O., photo lash, challan nash was filled by the aforesaid witness and was duly signed and the same was marked as Ex.Ka.5, Ex.Ka.6 and Ex.Ka.7 respectively.

(d) Amar Nath (P.W.4), s/o Late Sri Sewaram has stated that on 23rd June, 2005 he went to Etah and after recovering money from cloth retailers he kept money in his bag and was going to Subhash Bazar; When he reached near tempo stand at about 6.30 pm two persons who were carrying countrymade pistols and one of the accused person hit with butt of the countrymade pistol and thereafter, forcefully took away the bag and ran towards the powerhouse. Witness made distress call and on hearing the same, some persons came and ran towards the accused person to catch them and as a result of the same, one of accused person fired; present witness and Arif sustained injuries and accused person was let off. Later on, one tempo hit one of the accused person and bag of witness was recovered. Family members of the person who sustained firearm injury in the meantime came and from the custody of one of accused person countrymade pistol and four live cartridges were recovered; accused person who was caught on the spot disclosed his name as Kailash and he also disclose the name of other accused as Baba Thakur. Injured was taken to the hospital and father of the deceased went to the police station. He has also stated that police has also prepared papers in respect of recovery of

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countrymade pistol, live cartridges and bag. Witness has not been able to identify the accused person as the occurrence is old.

(e) Manoj Kumar Shukla (P.W.5), S.P., Police Station Maniyaon, Lucknow has stated that on 23rd June, 2005 he was posted at Police Station Rakabganj as H.M. and chik FIR in the present case on the basis of the first information report was lodged by Babua. He has identified the chik FIR and the same was exhibited as Ex.Ka.9 before the trial court.

(f) Dr. A.P. Singh (P.W.6), District Women Hospital, Hathras Mahamaya Nagar has stated that on 24th June, 2005 he was posted at District Women Hospital, Agra and on the aforesaid date he had conducted post mortem of deceased Arif at 10.00 am; deceased died on account of ante-mortem firearm injures; injuries could have been sustained on 23rd June, 2005 at 6.30 pm and were firearm injuries.

(g) Baleshwar Prasad Tripathi (P.W.7), S.I., Police Station Kotwali has stated that on 23rd June, 2005 he was posted at Police Station Rakabganj as S.I. and was the Investigating Officer; On the same day he had prepared the nakal chik, nakal rapat and recorded the statement of Head Moharrir Manoj Kumar, informant Haji Babua and also prepared site plan after visiting the place of occurrence. Statement of accused Kailash was also recorded on 26th June, 2005: Statement of panchayatnama witness was recorded and statement of S.I. Mahavir Singh was also recorded in the case diary: On 1st July, 2005 recorded statement of Aslam and Mustaqeem, Mohd. Sajid and Rakesh Sharma.

(h) Sri Ambesh Chand Tyagi (P.W.8), Dy. S.P., Gautam

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Budh Nagar has stated that on 9th July, 2005 he was posted as In-charge Inspector, Police Station Rakabganj. On 11th July, 2005 statement of S.I. Mahavir Singh was recorded. On 16th July, 2005 accused Baba Thakur was arrested and his statement was recorded and he was kept hidden. On 10th August, 2005 statement of Mustaqeem and on 15th August, 2005 statement of Mohd. Sajid was recorded. On 12th September, 2005 recovered articles were sent for forensic examination. On 15th August, 2005 chargesheet was filed against accused Kailash. On 8th September, 2007 identification of Baba Thakur was held and thereafter, chargesheet was submitted, which is Ex.Ka.15.

9. The accused persons did not examine any witness in support of their defence and their statement under Section 313 Cr.P.C. was recorded by the trial court on 26th July, 2010.

10. Appellant-Kailash in his statement under section 313 of the criminal procedure code has denied charges/allegations against him and has stated that he had come to meet his relative and one tempo has hit him and as a result he sustained injury and all the tempo drivers assembled. He has not fired on deceased nor he has any revolver.

11. The Appellant-Baba Thakur in his statement under section 313 of the criminal procedure code has denied the charges and stated that he was not present at the place of occurrence and has no knowledge with regard to the occurrence. It is further stated that the witness has not identified the Appellant.

12. As per prosecution case on 23rd June, 2005 at about 6:30 PM when P.W.4 – Amarnath was travelling near powerhouse area, police station – Rakabganj, District – Agra along with bag

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containing tiffin in which cash was kept then Appellant – Kailash and Baba Thakur alias Prawesh Kumar snatched away bag of Amarnath. At the same time informant (PW1) Babua along with his son namely Aslam (PW2) were going to tempo stand Mantola road to meet informant's second son Arif. On hearing distress call of Amarnath that accused persons has forcibly taken away bag containing cash; informant and his son saw accused persons running towards Powerhouse, one was having country-made pistol & a bag and other accused person was having country made pistol.

13. On hearing distress call, son of informant deceased-Arif and Aslam (PW2), Shahid Anwar, Mohd. Shahid, Fateh Singh (Tempo Driver), Ilbas, Rakesh Sharma, Muhiuddin and Amar Nath started running to catch the aforesaid accused persons and caught hold of one accused-person, who on being caught, fired which hit son of informant, namely, Arif, who sustained firearm injury and as a result of same, aforesaid accused person was let free and at the same time one tempo driver hit his tempo with accused person, as a result of the same, he sustained injury and fell down. Thereafter, Amar Nath got back his bag, which was forcefully taken by accused person and when informant and his son Aslam reached the said place, accused was having countrymade pistol in his hand and there were four live cartridges into his pocket, which was taken in custody.

14. The aforesaid accused person informed that his name is Kailash, s/o Asharfi Lal. Accused Kailash disclosed the name of other accused person as Baba Sindhi, Near Gurudwara Colony, Etah who ran away from place of occurrence. Injured Arif was brought to hospital by Aslam and other persons and in intervening period police personnel came. Countrymade pistol,

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cartridges and bag of Amar Nath was deposited in police station and first information report was lodged after being scribed by Nasruddin.

15. Prosecution witnesses has supported the prosecution story. P.W.4 – Amarnath supporting prosecution case has stated that on 23rd June, 2005 he went to Etah and after recovering cash from cloth merchants which was kept in a bag; came back by bus from Etah to Agra. After he de-boarded the bus and was travelling through Subhash baazar at about 6:30 PM, two persons with country made pistol came. One person hit him with the butt and second person snatched away the bag and ran towards powerhouse. When Amarnath made distress call then common people ran towards accused person and caught hold of one person who fired on being caught and as a result of the same, Arif got injured and person who was caught was let off but fell down after being dashed with tempo. The bag of Amarnath was recovered and country made pistol and live cartridges were also recovered from the aforesaid person, who was caught; aforesaid person disclosed his name as Kailash and disclosed the name of accused who ran away as Baba Sindhi. The aforesaid statement of P.W.4 is supported by P.W.1 who is father of the deceased and P.W.2 who is brother of the deceased. P.W.1 & P.W.2 identified the Appellants before the trial court. Accused Baba Thakur was identified by prosecution witness in jail also.

16. The post-mortem of deceased was held on 24th June, 2005 by P.W.6 – Dr A.P.Singh; aforesaid witness has proved post-mortem report and same was marked as Ex Ka – 11 before trial court. As per post-mortem report deceased – Arif died due to shock and haemorrhage as a result of anti-mortem firearm

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injury. The deceased suffered firearm injury in stomach. Blackening and tattooing was present. Lumber Vertebra was fractured and a bullet was recovered from body of deceased. P.W.6 has further testified that death was possible from firearm injury. The opinion of said witness was that death could have occurred at 6 PM.

17. It is submitted by learned counsel for Appellants that in present case P.W.1 – father of the deceased and P.W.2 – Aslam (Brother of deceased) are not the independent witness and testimony of P.W.4 does not prove prosecution case. The trial court has recorded finding that no enmity has been shown between Appellants and P.W.1 & P.W.2. Trial court has further recorded finding that presence of the aforesaid witnesses have been shown on the basis that they had gone for talks of marriage of sister of deceased which is natural event.

18. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is often the case that offence is witnessed by a close relative of the victim, whose presence on the scene of offence would be natural. The evidence of such a witness cannot automatically be discarded by labelling witness as interested. It is worthy to note that there is a distinction between a witness who is related and an interested witness. A relative is a natural witness. The Apex Court in **Kartik Malhar Vs. State of Bihar, (1996) 1 SCC 614** has opined that a close relative who is a natural witness cannot be regarded as an interested witness, for the term "interested"

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postulates that the witness must have some interest in having the accused, somehow or the other, convicted for some animus or for some other reason.

19. Merely because the witnesses are family members their evidence cannot *per se* be discarded. When there is allegation of interestedness, the same has to be established. Mere statement that being relatives of the deceased they are likely to falsely implicate the accused cannot be a ground to discard the evidence which is otherwise cogent and credible. Relationship is not a factor to affect credibility of a witness. It is more often than not that a relative would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. There is no bar in law on examining family members as witness. Evidence of a related witness can be relied upon provided it is trustworthy.

20. The Supreme Court in **State of Uttar Pradesh Vs. Samman Dass, (1972) 3 SCC 201** observed as under:-

> **"23...**It is well known that the close relatives of a murdered person are most reluctant to spare the real assailant and falsely involve another person in place of the assailant**..."**

21. In **Khurshid Ahmed Vs. State of Jammu and Kashmir (2018) 7 SCC 429,** Supreme Court on the issue of evidence of a related witness observed as under :-

> **"31.** There is no proposition in law that relatives are to be treated as untruthful witnesses. On the contrary, reason has to be shown when a plea of partiality is raised to show that the witnesses had reason to shield actual culprit and falsely implicate the accused.**"**

22. The Apex Court in **Mohd. Rojali Ali v. State of Assam,**

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(2019) 19 SCC 567 in respect of related witness has observed as under :-

> **"13.** As regards the contention that all the eyewitnesses are close relatives of the deceased, it is by now well-settled that a related witness cannot be said to be an "interested" witness merely by virtue of being a relative of the victim. This Court has elucidated the difference between "interested" and "related" witnesses in a plethora of cases, stating that a witness may be called interested only when he or she derives some benefit from the result of a litigation, which in the context of a criminal case would mean that the witness has a direct or indirect interest in seeing the accused punished due to prior enmity or other reasons, and thus has a motive to falsely implicate the accused (for instance, see *State of Rajasthan* v. *Kalki* [*State of Rajasthan* v. *Kalki*, (1981) 2 SCC 752 : 1981 SCC (Cri) 593] ; *Amit* v. *State of U.P.* [*Amit* v. *State of U.P.*, (2012) 4 SCC 107 : (2012) 2 SCC (Cri) 590] ; and *Gangabhavani* v. *Rayapati Venkat Reddy* [*Gangabhavani* v. *Rayapati Venkat Reddy*, (2013) 15 SCC 298 : (2014) 6 SCC (Cri) 182]). Recently, this difference was reiterated in *Ganapathi* v. *State of T.N.* [*Ganapathi* v. *State of T.N.*, (2018) 5 SCC 549 : (2018) 2 SCC (Cri) 793] , in the following terms, by referring to the three-Judge Bench decision in *State of Rajasthan* v. *Kalki* [*State of Rajasthan* v. *Kalki*, (1981) 2 SCC 752 : 1981 SCC (Cri) 593] : (*Ganapathi case* [*Ganapathi* v. *State of T.N.*, (2018) 5 SCC 549 : (2018) 2 SCC (Cri) 793] , SCC p. 555, para 14)
>
> > "*14*. "Related" is not equivalent to "interested". A witness may be called "interested" only when he or she derives some benefit from the result of a litigation; in the decree in a civil case, or in seeing an accused person punished. A witness who is a natural one and is the only possible eyewitness in the circumstances of a case cannot be said to be "interested"."
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> **14.** In criminal cases, it is often the case that the offence

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is witnessed by a close relative of the victim, whose presence on the scene of the offence would be natural. The evidence of such a witness cannot automatically be discarded by labelling the witness as interested. Indeed, one of the earliest statements with respect to interested witnesses in criminal cases was made by this Court in *Dalip Singh* v. *State of Punjab* [*Dalip Singh* v. *State of Punjab*, 1954 SCR 145 : AIR 1953 SC 364 : 1953 Cri LJ 1465] , wherein this Court observed: (AIR p. 366, para 26)

> "*26*. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily a close relative would be the last to screen the real culprit and falsely implicate an innocent person."

15. In case of a related witness, the Court may not treat his or her testimony as inherently tainted, and needs to ensure only that the evidence is inherently reliable, probable, cogent and consistent. We may refer to the observations of this Court in *Jayabalan* v. *State (UT of Pondicherry)* [*Jayabalan* v. *State (UT of Pondicherry)*, (2010) 1 SCC 199 : (2010) 2 SCC (Cri) 966] : (SCC p. 213, para 23)

> "*23*. We are of the considered view that in cases where the court is called upon to deal with the evidence of the interested witnesses, the approach of the court, while appreciating the evidence of such witnesses must not be pedantic. The court must be cautious in appreciating and accepting the evidence given by the interested witnesses but the court must not be suspicious of such evidence. The primary endeavour of the court must be to look for consistency. The evidence of a witness cannot be ignored or thrown out solely because it comes from the mouth of a person who is closely related to the victim."

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23. The Apex Court in ***Kulwinder Singh v. State of Punjab*, (2015) 6 SCC 674** held that the case of the prosecution cannot be rejected solely on the ground that independent witnesses have not been examined when, on the perusal of the evidence on record the Court finds that the case put forth by the prosecution is trustworthy. When the evidence of the official witnesses is trustworthy and credible, there is no reason not to rest the conviction on the basis of their evidence.

24. In ***Harbans Kaur* v. *State of Haryana*, (2005) 9 SCC 195,** the Hon'ble Supreme Court observed that:

> "*6.* There is no proposition in law that relatives are to be treated as untruthful witnesses. On the contrary, reason has to be shown when a plea of partiality is raised to show that the witnesses had reason to shield actual culprit and falsely implicate the accused."

25. It is held in recent judgement rendered in ***Surinder Kumar v. State of Punjab AIR 2020 Supreme Court 303*** that merely because prosecution has not examined any independent witness, same would not necessarily lead to the conclusion that the appellant has been falsely implicated.

26. In **M. Nageswara Reddy v. State of Andhra Pradesh (SC) – 2022 CrLJ 2254** the Apex Court has observed that merely because the witnesses were the relatives of the deceased, their evidence cannot be discarded solely on the aforesaid ground.

27. It is further to be seen that in the present case no material has been shown to demonstrate that there was any prior enmity between P.W.1 and P.W.2 and accused person. No reasons have been assigned as to why aforesaid witness would falsely

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implicate the Appellant's. There is one more aspect of the matter that in the present case P.W.4 – Amarnath is an independent witness who was travelling with the money bag and incident had occurred in presence of aforesaid witness. The said witness is the eyewitness of the aforesaid incident and as such it cannot be said that there is no independent witness to support the prosecution case.

28. It is further submitted by learned counsel for the Appellant that in present case, scribe of first information report – Nooruddin and tempo driver who had hit accused Kailash has not been examined and an important evidence has been detained by the prosecution and as such the Appellant could not have been convicted for the alleged offence. In the present case, first information report was scribed on the dictation of the first informant and informant has testified on oath before the trial court and has proved the first information report, under the aforesaid circumstances non-production of the scribe of first information report will not adversely affect prosecution case. Further, tempo driver who had hit the Appellant – Kailash with the Tempo was seen by PW-1, PW-2 and PW-4 and Appellant-Kailash were caught at the place of occurrence with countrymade pistol and bag and same has been proved by prosecution by testimony of prosecution witnesses and as such the non-examination of the Tempo Driver will not affect the prosecution case.

29. It is further submitted by counsel for the Appellant that there is a contradiction in the statement of witnesses. It is submitted that one witness has stated that he was hundred metre away and caught hold the accused person by running whereas the other witness has stated that witness was near the place of

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occurrence. It is also submitted that informant has stated that the alleged occurrence is of 5:30 PM whereas other witness has stated that alleged incident is of 6:30 PM and as such there is contradiction. It is to be noted that the statement of the prosecution witness no 1 and 2 was recorded before the trial court in the year 2008 and incident has taken place on 23rd June, 2005 and as such the statement itself are recorded after three years of the date of occurrence. It is further to be noted that in first information report being Exhibit Ka.-1, time of alleged incident has been stated to be 6:30 PM. The memory of the witness fades with the passage of time and as such unless the contradiction is material the same by itself cannot demolish the prosecution case specifically when the first information report has been duly proved by the prosecution witness no 1. It is also to be noted that contradiction in the statement of witness has not been confronted with aforesaid witness in cross examination.

30. Minor variations in the accounts of witnesses are often the hallmark of the truth of their testimony. When the discrepancies were comparatively of a minor character and did not go to the root of prosecution story, they need not be given undue importance. Mere congruity or consistency is not the sole test of truth in the depositions. In the depositions of witnesses there are always normal discrepancy, however honest and truthful they may be. Such discrepancies are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence, and the like. Material discrepancies are those which are not normal, and not expected of a normal person. Corroboration of evidence with mathematical niceties cannot be expected in criminal cases. Minor embellishment,

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there may be, but variations by reason therefor should not render the evidence of eye witnesses unbelievable.

31. Unless a contradiction is proved by putting it to the person who records the original statement, such contradiction is of no consequence.

32. The very purpose of putting the contradiction to the witness is to give an opportunity to him/her to explain contradictory statement, if any. While appreciating the evidence, the Court must examine the evidence in its entirety, upon reading the statement of a witness as a whole, and if the Court finds the statement to be truthful and worthy of credence, then every variation or discrepancy particularly which is immaterial and does not affect the root of prosecution case, would be of no consequences.

33. It is further submitted by learned counsel for Appellant that P.W.1 is father of the deceased and P.W.2 is brother of deceased however the P.W.1 went to the police station after his son was injured by gunshot injury nor blood stain clothes of the brother has been recovered and as such the testimony of aforesaid witnesses is not natural. The trial court has rejected the aforesaid contention raised by counsel for the Appellant. In the present case P.W.1 in his testimony has stated that deceased was taken by his son and other persons to hospital and in the meantime the police personnel came at the place of occurrence and as such the first information report was scribed on the dictation of the informant and he went to the police station for lodging of first information report. Police personnel had already come to the place of occurrence and as such once the deceased was sent to the hospital along with son of the informant and

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other persons then it is in the natural course of event that informant went to the police station for lodging the first information report immediately. It is further to be noted that just because the prosecution has not collected evidence with regard to blood stain on the clothes of the P.W.1 and P.W.2 would not demolish the prosecution case specifically when there are eyewitness of the alleged incident who have supported prosecution case before the trial court.

34. It is submitted by learned counsel for the Appellant-Baba Thakur that as per the prosecution case two accused persons were involved in the alleged occurrence. Appellant-Kailash was caught hold by prosecution witnesses and other persons at the place of occurrence. While the other accused person had fled away from the place of occurrence. Appellant-Kailash when caught by mob has disclosed name of other accused person as Baba Sindhi. The statement of the co-accused as per learned counsel for the Appellant is not of substantive evidence against the other co-accused in the trial but can only be used for lending reassurance if there are any other substantive evidence. In this reference learned counsel for the Appellant has relied upon the judgement of the apex court in **Paramhans Yadav and Sadanand Tripathi Vs State of Bihar and others, AIR 1987 SC 955**. It is submitted that the Appellant is Parvesh kumar Singh and it is not proved that Baba Sindhi, Baba Thakur and Parvesh Kumar Singh are one and the same person.

35. As per section 9 of the Evidence Act, a fact which establishes the identity of anything or person whose identity is relevant are relevant fact. The principle in the section is a exception to the general rule that the evidence of collateral facts is not usually receivable.

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36. It is often important to establish the identity of a person who witness testifies that he saw on the particular occasion. Sometimes, a witness may not recognise the person but he may still testify that on subsequent event he was able to identify the person he had initially seen on the particular occasion. The subsequent event may be formal such as test identification parade or informal for instance seeing a person on a road or receiving information with regard to identity from some other person who was present at the time of occurrence. The fact of identification of the accused person is relevant fact as the same points towards the person who has committed the offence.

37. In the present case, two persons are alleged to have participated in the alleged occurrence as per the prosecution case. One accused person namely Appellant-Kailash was caught on the place of occurrence by the prosecution witnesses. The occurrence is of a public place. When Appellant-Kailash was caught by P.W.1, 2 and 4, Appellant-Kailash has disclosed the identity of the other accused person as Baba Sindhi. The aforesaid disclosure of identity of other accused person was made by Appellant-Kailash at the place of occurrence just after he was caught by the prosecution witness.

38. P.W.1 and P.W.2 has identified accused person-Appellants' before the trial court. In the first information report dated 23rd June, 2005, name of the Appellants' have been disclosed. The first information report has been lodged by P.W.1-Babua who is father of the deceased and was present at the time of alleged occurrence.

39. Appellant-Baba Sindhi was seen by the prosecution witness at the time of alleged occurrence. The identity of the

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aforesaid Appellant was disclosed by accused Kailash. The fact regarding disclosure of identity by the accused Kailash is proved by the statement of prosecution witness no 1, 2 & 4. The fact relating to identity of accused person is relevant and has been proved by prosecution witnesses before trial court. It is to be noted that evidence may be given under section 3 of the evidence act in any proceedings of existence or non-existence of every fact in issue and such other facts as our declared relevant. The fact with regard to identity of the Appellant – Baba Sindi as has been disclosed by Appellant – Kailash is a relevant fact and as such the evidence in respect of the same can be given to prove the aforesaid fact. It is also important to note that the identity of the Appellant – Baba Sindhi has been disclosed at the place of occurrence just after the incident has occurred. The name of the Appellant – Baba Sindhi is stated as co-accused in the first information report lodged by P.W.1. The Appellants were seen by prosecution witnesses at the time of occurrence however the name of the aforesaid persons were disclosed when Appellant – Kailash was caught and he has disclose the name of other accused person.

40. It is further to be noted that Appellants including Baba Sindhi has been identified before trial court by the eyewitnesses and the same is corroborated by the identification of the accused person at the time of identification parade. The fact relating to identity of a person who is involved in the alleged crime is a relevant fact which conforms the presence of the Appellant at the time of occurrence. Once the accused person have been identified by the eyewitnesses as perpetrator of crime before the trial court and the same is corroborated by the test identification parade then it is not open for Appellants to submit that disclosure of co-accused cannot be a foundation for conviction of the Appellant.

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41. It is further submitted by learned counsel for Appellant-Baba Sindhi that name of the Appellant is Prawesh Kumar Singh and he is not known by any other name, namely, Baba Sindhi and Baba Thakur. In this respect, counsel for the Appellant submits that P.W.1 has stated that the co-accused Kailash has disclosed the name of Appellant who has fled the place of occurrence as Baba Sindhi. He has further stated that the Appellant is also known as Baba Thakur. Similarly, P.W.4 has stated that the accused who fled from the place of occurrence was Baba Sindhi however how he come to know that the name was Baba Thakur is not known.

42. One of accused persons namely Appellant – Kailash was caught at place of occurrence by prosecution witnesses. The occurrence is a public place. When Appellant – Kailash was caught by P.W.1, 2 and 4, the aforesaid Appellant – Kailash has disclosed the identity of other accused person as Baba Sindhi.

43. On the aforesaid basis, first information report was lodged by P.W.1 against Appellant's. Name of Appellant was disclosed as Baba Sindhi in the first information report.

44. After the lodging of the first information report, investigation was carried on by Investigating Officer and in case diary dated 26th June, 2005 it has been recorded by the Investigating Officer that Sub- Inspector Jitendra Singh along with other police officials went in search of accused Baba Sindhi however on reaching the place where the aforesaid accused was residing it has come to knowledge that the correct name of the accused is Baba Thakur and was also known as Baba Sindhi in the area.

45. The Appellant in a statement under section 313 of the

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Code of Criminal Procedure has got recorded his name as Baba Thakur alias Pravesh kumar. In a statement under section 313 Cr.P.C. the aforesaid accused – appellant has not stated that he is not known as Baba Sindhi. The memo of appeal has been filed by Appellant in name of Baba Thakur alias Parvesh Kumar Singh before this court. The P.W.7 in his cross examination has stated that in his investigation the name of accused Baba Thakur has come during investigation. P.W.1 in his statement has identified Appellant Baba Thakur alias Sindhi alias Parvesh Kumar. Under the circumstances, Baba Sindhi, Baba Thakur and Parvesh Kumar are same person who has been identified by prosecution witness before the trial court as the person who is one of the accused involved in alleged crime.

46. It is further submitted on behalf of the Appellant-Baba Thakur that none of the witnesses of the alleged occurrence has seen the Appellant at the place of incident.

47. The testimony of the prosecution witness who are the eyewitness of alleged incident is a substantive piece of evidence before the trial court. P.W.1 has identified the Appellants' before the trial court. P.W.1 was present at the place of occurrence on 23rd June, 2005 as he had gone to to meet his son Aslam. The alleged occurrence has taken place in presence of P.W.1. Appellants have also been identified by the aforesaid witness in the identification parade.

48. Similarly, P.W.2 has also identified the Appellants' before the trial court. The aforesaid witness has further stated that he had seen the accused persons; accused person who ran away from the place of incident was seen by him from a distance of 20 steps; both the accused persons were involved in the alleged

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occurrence. It is to be noted that prosecution witness no 1 and 2 are the relative of the deceased.

49. The P.W.4 has supported the prosecution story however has stated that the co-accused Kailash has disclosed the name of Baba Thakur and has further stated that he is not in a position to recognise the accused person before the trial court as sufficient time has passed when the alleged occurrence took place. It is to be noted that the alleged incident is of 23rd June, 2005 and the statement of P.W.4 was recorded on 16th March, 2010 and as such in case there is a minor variation in the statement of prosecution witness the same will not in any manner affect the prosecution case specifically when P.W.1 and P.W.2 have identified accused persons and have supported the prosecution case.

50. It is further submitted on behalf of Appellant-Baba Thakur that identification parade was held on 8th September, 2005 whereas the alleged occurrence has taken place on 23rd June, 2005. He submits that there is inordinate delay in holding the test identification parade and as such the identification itself loses its credibility. Learned counsel for the Appellant has further relied upon the judgement of the apex court in **Hari Nath Vs State of U.P., AIR 1988 SC 345** in this respect.

51. In the present case, alleged occurrence has taken place on 23rd June, 2005 and thereafter the Appellant – Baba Sindhi was arrested on 16th July, 2005 and test identification parade was held in jail on 8th September, 2005. The accused person have been identified by P.W.1 and 2 before the trial court. The aforesaid witness were present at the time of alleged occurrence and are related to the deceased.

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52. The necessity for holding an identification parade can arise only when the accused persons are not previously known to the witnesses. The whole idea of a test identification parade is that witnesses who claim to have seen the culprits at the time of occurrence are to identify them from the midst of other persons without any aid or any other source. The test is done to check upon their veracity. In other words, the main object of holding an identification parade, during the investigation stage, is to test the memory of the witnesses based upon first impression and also to enable the prosecution to decide whether all or any of them could be cited as eyewitnesses of the crime.

53. The identification parades belong to investigation stage and they serve to provide investigating authority with materials to assure themselves if the investigation is proceeding on the right lines. In other words, it is through these identification parades that investigating agency is required to ascertain whether the persons whom they suspect to have committed the offence were the real culprits. There is no provision in the Code which obliges the investigating agency to hold or confers a right upon the accused to claim, a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of Code of Criminal Procedure. Failure to hold a test identification parade would not make inadmissible the evidence of identification in Court.

54. Test identification parade is not substantive evidence and it can only be used as corroborative of the statement in court. The facts, which establish the identity of the accused persons, are relevant under Section 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in Court.

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55. In ***Malkhansingh* v. *State of M.P.*, (2003) 5 SCC 746** a three-Judge Bench of Apex Court observed as under:-

> "7. It is trite to say that the substantive evidence is the evidence of identification in court. Apart from the clear provisions of Section 9 of the Evidence Act, the position in law is well settled by a catena of decisions of this Court. The facts, which establish the identity of the accused persons, are relevant under Section 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. The identification parades belong to the stage of investigation, and there is no provision in the Code of Criminal Procedure which obliges the investigating agency to hold, or confers a right upon the accused to claim a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code of Criminal Procedure. Failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification should be a matter for the courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration."

56. The value to be attached to test identification parade would depend on the facts and circumstances of the case and no hard and fast rule can be laid down. Where, however, court is satisfied that witnesses had ample opportunity of seeing the accused at the time of commission of offence and there is no chance of mistaken identity, delay in holding test identification parade may not be held to be fatal.

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57. In ***Lal Singh* v. *State of U.P.*, (2003) 12 SCC 554,** the Apex Court in paras 28 and 43 dealt with the value or weightage to be attached to test identification parade and the effect of delay in holding such test identification parade.

> "28. The next question is whether the prosecution has proved beyond reasonable doubt that the appellants are the real culprits. The value to be attached to a test identification parade depends on the facts and circumstances of each case and no hard-and-fast rule can be laid down. The court has to examine the facts of the case to find out whether there was sufficient opportunity for the witnesses to identify the accused. The court has also to rule out the possibility of their having been shown to the witnesses before holding a test identification parade. Where there is an inordinate delay in holding a test identification parade, the court must adopt a cautious approach so as to prevent miscarriage of justice. In cases of inordinate delay, it may be that the witnesses may forget the features of the accused put up for identification in the test identification parade. This, however, is not an absolute rule because it depends upon the facts of each case and the opportunity which the witnesses had to notice the features of the accused and the circumstances in which they had seen the accused committing the offence. Where the witness had only a fleeting glimpse of the accused at the time of occurrence, delay in holding a test identification parade has to be viewed seriously. Where, however, the court is satisfied that the witnesses had ample opportunity of seeing the accused at the time of the commission of the offence and there is no chance of mistaken identity, delay in holding the test identification parade may not be held to be fatal. It all depends upon the facts and circumstances of each case.
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> 43. It will thus be seen that the evidence of identification has to be considered in the peculiar facts and circumstances of each case. Though it is desirable to hold the test identification parade at the earliest-possible opportunity, no hard-and-fast rule can be laid down in this regard. If the delay is inordinate and there is evidence probabilising the possibility of the accused having been shown to the witnesses, the court may not act on the basis of such evidence. Moreover, cases where the conviction is based not solely on the basis of identification in court, but on the basis of other corroborative evidence, such as recovery of looted articles, stand on a different footing and the court has to consider the evidence in its entirety."

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58. In the present case, the alleged occurrence took place on 23rd June, 2005 and the Appellant was arrested on 16th July, 2005 and the test identification parade was held on 8th September, 2005. P.W.1 and 2 in their testimony before the trial court has identified Appellants as persons involved in the alleged crime on 23rd June, 2005. P.W.1 and 2 are related to the deceased. Witnesses are not known to the Appellants prior to the alleged occurrence. No prior enemity has been shown between prosecution witness and the Appellants. Prosecution witnesses were involved in catching hold one of the Appellant namely Kailash and the other Appellant namely Baba Sindhi fled away from the place of occurrence. Appellants have been identified by the prosecution witness in the test identification parade held on 8th September, 2005. As per P.W.1 they were present in the market when the Appellants took bag of P.W.4 and started running towards powerhouse. On the distress call of P.W.4, son of the Appellant namely Arif (deceased) and Aslam went to catch the appellants. One of the Appellant's, namely, Kailash fired on Arif (deceased) as a result of same he sustained injuries and subsequently died. The firearm wound of deceased as per the post-mortem report shows blackening and tattooing which is indicative of the fact that firing was made by Appellant at a close range.

59. P.W.1 has stated that when accused person was caught he had fired. The fire was made from 2 to 3 steps. Further, P.W.2 has also stated that when accused person was caught one of them fired and arif was injured. He has further stated that the bag was being taken back from the accused person when he fired. The said witness has stated that he had seen the incident from 20 steps. P.W.8 was one of the investigating officer when

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the test identification parade was held. He has stated that the Appellant's face were hidden (baparda).

60. There is one more aspect of the issue, in the cross examination of prosecution witnesses accused has not put any question with regard to delay in holding the test identification parade. It was the duty of the accused to question the Investigating Officer, if any advantage was sought to be taken on account of the delay in holding the test identification parade. The burden of establishing the guilt is on the prosecution but that theory cannot be carried so far as to hold that prosecution must lead evidence to rebut all possible defences. If test identification parade was held in an irregular manner then Investigating Officer ought to have been cross-examined in that behalf. The purpose of cross-examination is to test evidence of a witness, to expose weaknesses where they exist and if so, to undermine the account the witness has given. This gives prosecution witness the opportunity to respond to the defence case and either agree or disagree with it. Once such an opportunity to respond to the defence case is not given to prosecution witness by not cross-examining in that behalf then it would not be open to accused person to challenge the veracity of the test identification parade at the appellate stage. In the present case we find that defence has not imputed any motive to the prosecution for the delay in holding the test identification parade, nor has the defence alleged that there was any irregularity in the holding of the test identification parade before the trial court. The evidence of investigating officer has gone unchallenged in this respect.

61. In ***Pramod Mandal v. State of Bihar*****, (2004) 13 SCC 150,** the Apex Court has observed as under:-

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> **“18.** Learned counsel for the State submitted that in the instant case there was no inordinate delay in holding the test identification parade so as to create a doubt on the genuineness of the test identification parade. In any event he submitted that even if it is assumed that there was some delay in holding the test identification parade, it was the duty of the accused to question the investigating officer and the Magistrate if any advantage was sought to be taken on account of the delay in holding the test identification parade. Reliance was placed on the judgment of this Court in Bharat Singh v. State of U.P. [(1973) 3 SCC 896 : 1973 SCC (Cri) 574] In the aforesaid judgment this Court observed thus: (SCC p. 898, para 6)
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>> “6. In Sk. Hasib v. State of Bihar [(1972) 4 SCC 773 : AIR 1972 SC 283] it was observed by the Court that identification parades belong to the investigation stage and therefore it is desirable to hold them at the earliest opportunity. An early opportunity to identify tends to minimise the chances of the memory of the identifying witnesses fading away due to long lapse of time. Relying on this decision, counsel for the appellant contends that no support can be derived from what transpired at the parade as it was held long after the arrest of the appellant. Now it is true that in the instant case there was a delay of about three months in holding the identification parade but here again, no questions were asked of the investigating officer as to why and how the delay occurred. It is true that the burden of establishing the guilt is on the prosecution but that theory cannot be carried so far as to hold that the prosecution must lead evidence to rebut all possible defences. If the contention was that the identification parade was held in an irregular manner or that there was an undue delay in holding it, the Magistrate who held the parade and the police officer who conducted the investigation should have been cross-examined in that behalf.”

In the instant case we find that the defence has not imputed any motive to the prosecution for the delay in holding the test identification parade, nor has the defence alleged that there was any irregularity in the holding of the test identification parade. The evidence of Magistrates conducting the test identification parade as well as the investigating officer has gone unchallenged. Learned counsel for the State is, therefore, justified in contending that in the facts and circumstances of this case the holding of the test identification

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parade, about one month after the occurrence, is not fatal to the case of the prosecution as there is nothing to suggest that there was any motive for the prosecution to delay the holding of the test identification parade or that any irregularity was committed in holding the test identification parade.

20. It is neither possible nor prudent to lay down any invariable rule as to the period within which a test identification parade must be held, or the number of witnesses who must correctly identify the accused, to sustain his conviction. These matters must be left to the courts of fact to decide in the facts and circumstances of each case. If a rule is laid down prescribing a period within which the test identification parade must be held, it would only benefit the professional criminals in whose cases the arrests are delayed as the police have no clear clue about their identity, they being persons unknown to the victims. They, therefore, have only to avoid their arrest for the prescribed period to avoid conviction. Similarly, there may be offences which by their very nature may be witnessed by a single witness, such as rape. The offender may be unknown to the victim and the case depends solely on the identification by the victim, who is otherwise found to be truthful and reliable. What justification can be pleaded to contend that such cases must necessarily result in acquittal because of there being only one identifying witness? Prudence therefore demands that these matters must be left to the wisdom of the courts of fact which must consider all aspects of the matter in the light of the evidence on record before pronouncing upon the acceptability or rejection of such identification."

62. In **Raja v. State By The Inspector of Police,** Criminal Appeal No. 740 of 2018 decided on 10.12.2019 the Apex Court has observed:-.

"It is, thus, clear that if the material on record sufficiently indicates that reasons for "gaining an enduring impression of the identity on the mind and memory of the witnesses" are available on record, the matter stands in a completely different perspective. This Court also stated that in such cases even non-holding of identification parade would not be fatal to the case of the prosecution."

63. In the facts and circumstances of the present case, witnesses had ample opportunity of seeing the accused at the time of the commission of the offence and there is no chance of mistaken identity, delay in holding the test identification parade

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may not be held to be fatal. Further, facts and circumstances are indicative of enduring impression of the identity on the mind and memory of the witnesses.

64. It is further submitted by learned counsel for Appellant-Baba Sindhi that even assuming that Appellant was present with accused at place of occurrence even then Appellant could not have been convicted under section 302 read with 34 of Indian Penal Code. He submits that there was no intention to commit murder and common intention was to commit robbery and run away. There was no premeditation to commit murder. It is further submitted that the co-accused in order to save himself has fired which resulted in death of the deceased as such the provisions of section 34 of Indian Penal Code would not be attracted to convict Appellant-Baba Sindhi under section 302 of Indian Penal Code.

65. Section 34 of the Indian Penal Code provides that when criminal act is done by several persons in furtherance of the common intention of all, each of such person is liable for the act in the same manner as if it were done by him alone.

66. Section 34 IPC carves out an exception from general law that a person is responsible for his own act, as it provides that a person can also be held vicariously responsible for the act of others if he has the “common intention” to commit offence. This section has been enacted on the principle of joint liability in the doing of a criminal act. The section is only a rule of evidence and does not create a substantive offence. The distinctive feature of the section is the element of participation in action. The liability of one person for an offence committed by another in course of criminal act perpetrated by several

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persons arises under Section 34 if such criminal act is done in furtherance of a common intention of the persons who join in committing the crime.

67. The section recognises the principle of constructive liability and essence of that liability is the existence of a common intention. It is to be noted that section 34 of the Indian penal code has used the expression “criminal act” and not “offence”. Section 33 of the Indian Penal Code provides that the word “act” denotes as well a series of acts as a single act. Section 34 of the Indian Penal Code is to be read along with the preceding section 33 which makes it imperative that the act referred to in section 34 of the Indian penal Court includes series of acts as a single act. All such acts which were either contemplated and were to be done in furtherance of the common intention will be included in criminal act.

68. In **Krishnamurthy @ Gunodu v. State of Karnataka (SC) : Criminal Appeal No.288 of 2022** (Arising out of Special Leave Petition (Crl.) No.6893 of 2021), decided on 16.2.2022, the Apex Court has observed as under:-

> **“**10. Appropriate at this stage would be reference to an earlier decision of this Court in Afrahim Sheikh and Others v. State of West Bengal, AIR 1964 SC 1263, which referred to with approval the following quote on the expression "act" explained by Judicial Commissioner in Barendra Kumar Ghosh v. The King-Emperor, ILR (1925) 52 Cal. 197:
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> > "criminal act means that unity of criminal behaviour, which results in something, for which an individual would be punishable, if it were all done by himself alone i.e. a criminal offence".
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> This "criminal act" under Section 34 IPC, it was held, applies where a criminal act is done by several persons in furtherance of common intention of all. The criminal offence is the final result or outcome but it may be

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> through achievement of individual or several criminal acts. Each individual act may not constitute or result in the final offence. When a person is assaulted by a number of accused, the "ultimate criminal act" normally will constitute the offence which finally results or which may result in death, simple hurt, grievous hurt, etc. This is the final result, outcome or consequence of the criminal act, that is, action or act of several persons. Each person will be responsible for his own act as stipulated in Section 38 IPC. However, Sections 34 and 35 expand the scope and stipulate that if the criminal act is a result of common intention , every person, who has committed a part of the criminal act with the common intention, will be responsible for offence."

69. In case of **Sudip Kr. Sen @ Biltu and others v. State of W.B. & Ors. (2016) 3 SCC 26**, Supreme Court has held as under :-

> "14. Section 34 IPC embodies the principle of joint liability in the doing of a criminal act and essence of that liability is the existence of common intention . Common intention implies acting in concert and existence of a pre-arranged plan which is to be proved/inferred either from the conduct of the accused persons or from attendant circumstances. To invoke Section 34 IPC, it must be established that the criminal act was done by more than one person in furtherance of common intention of all. It must, therefore, be proved that:-
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> (i) there was common intention on the part of several persons to commit a particular crime and
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> (ii) the crime was actually committed by them in furtherance of that common intention."

70. In **Balu @ Bala Subramanium and Anr. v. State (UT of Pondicherry) (2016) 15 SCC 471,** the Supreme Court has observed as under :-

> "14. Common intention is seldom capable of direct proof, it is almost invariably to be inferred from proved circumstances relating to the entire conduct of all the persons and not only from the individual act actually performed. The inference to be drawn from the manner of the origin of the occurrence, the manner in which the

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> accused arrived at the scene and the concert with which attack was made and from the injuries caused by one or some of them. The criminal act actually committed would certainly be one of the important factor to be taken into consideration but should not be taken to be the sole factor."

71. In **Krishnamurthy @ Gunodu v. State of Karnataka (SC) : Criminal Appeal No.288 of 2022** (Arising out of Special Leave Petition (Crl.) No.6893 of 2021), decided on 16.2.2022, the Supreme Court has observed as under:-

> **"**19. Section 34 IPC also uses the expression "act in furtherance of common intention". Therefore, in each case when Section 34 is invoked, it is necessary to examine whether the criminal offence charged was done in furtherance of the common intention of the participator. If the criminal offence is distinctly remote and unconnected with the common intention, Section 34 would not be applicable. However, if the criminal offence done or performed was attributable or was primarily connected or was a known or reasonably possible outcome of the preconcert/contemporaneous engagement or a manifestation of the mutual consent for carrying out common purpose, it will fall within the scope and ambit of the act done in furtherance of common intention. Thus, the word "furtherance" propounds a wide scope but should not be expanded beyond the intent and purpose of the statute. Russell on Crime, (10th edition page 557), while examining the word "furtherance" had stated that it refers to "the action of helping forward" and "it indicates some kind of aid or assistance producing an effect in the future" and that "any act may be regarded as done in furtherance of the ultimate felony if it is a step intentionally taken for the purpose of effecting that felony." An act which is extraneous to the common intention or is done in opposition to it and is not required to be done at all for carrying out the common intention, cannot be said to be in furtherance of common intention.**"**

72. In the present case the prosecution case based on the fact that the Appellants took away the bag of one Amar Nath

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(P.W.4) from the marketplace and deceased and other prosecution witness ran towards the Appellants to catch them and one of the Appellant-Kailash was caught by the prosecution witness who has disclosed the name of other Appellant-Baba Sindhi. When one of the Appellant, namely, Kailash was caught he fired as a result of the same deceased Arif sustained firearm injury and later he died in the hospital. Appellant Kailash has disclosed the name of the Appellant-Baba Thakur alias Baba Sindhi. The two Appellants were engaged in a robbery of bag of Amarnath from a public place and when Kailash was caught by the prosecution witnesses, he fired on deceased.

73. The common intention of both the accused person was to commit robbery and the act of firing on the deceased was done at the time when Appellant-Kailash was caught by the deceased while both the Appellants were running away with the bag of Amarnath. The criminal offence was attributable or connected or possible outcome of the preconcert/contemporaneous engagement or a manifestation of the mutual consent for robbery and it will fall within the scope and ambit of the act done in furtherance of common intention. The Appellant – Kailash has fired on the deceased in the act of committing robbery and as such co-accused baba Thakur will be liable for such act has been done in furtherance of the common intention of committing an offence and would come within the scope of Section 34 of the Indian Penal Code. It is to be noted that the Appellant-Kailash was carrying a fire arm while committing robbery itself is indicative of intention of the Appellants at the time of committing of crime. The manner of the origin of the occurrence, manner in which the accused arrived at the scene and concert with which attack was made and from the injuries caused by one of them leaves no doubt that accused person had

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common intention to commit crime and acts done in furtherance of common intention would come within the ambit of section 34 of the Indian Penal Code.

74. The Apex Court in ***State of A.P. v. M. Sohan Babu*, (2010) 15 SCC 69 : (2013) 2 SCC (Cri) 123 : 2010 SCC** has observed as under:-

> **"9.** We find that in the facts of the case, the observations given above are not correct. It cannot be ignored that the two accused had entered the premises at midnight duly armed with the intention of committing robbery. They were also charged under Section 460 IPC on that account. It is also in evidence that the deceased had managed to pin A-2 down to the ground and A-2 had caused one injury in the stomach of the deceased while he lay on top of him. Two injuries were thereafter caused on the thigh of the deceased by A-2 and the other accused. It is also in evidence that when the neighbours arrived on the scene they too were caused injuries and threatened with dire consequences. To say, therefore, that there was no intention on the part of the accused to cause death would be carrying the matter a little too far.
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> **10.** The High Court has been influenced by the fact that there was no common intention on the part of the accused to commit murder. We see, however, that the common intention can be inferred from the circumstances of the case and that the intention can be gathered from the circumstances as they arise even during an incident. The initial purpose was to commit robbery, but as the accused were armed with knives which they had used repeatedly and effectively, they were willing to kill as well and that they could not cause more damage as they were overwhelmed and pinned down."

75. It is further submitted by learned counsel for the Appellant-Baba Sindhi that the Appellant-Kailash cannot be held guilty for an offence under section 302 of the Indian penal

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code. It is submitted that the act of firing from country made pistol by Appellant-Kailash in worst-case scenario was done with the knowledge that it is likely to cause death but the act was not done with any intention to cause death or to cause such bodily injury as is likely to cause death. He submits that the act of firing was without premeditation and in a sudden fight in the heat of passion upon sudden quarrel. In view of the aforesaid the appellant Kailash is liable to be convicted under section 304 (II) of the Indian penal code.

76. Homicide is killing of a human being by another human being. It may either the lawful or unlawful. The lawful homicide includes several cases falling under the general exceptions provided under chapter IV of the Indian penal code. The unlawful homicide includes culpable homicide not amounting to murder (section 299), murder (section 300), rash or negligent homicide (section 304A), suicide (section 305 and 306).

77. Section 299 of the Indian Penal Code provides that whoever causes death by doing an act with intention of causing death or with the intention of causing such bodily injury as is likely to cause death or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

78. Culpable homicide is murder under section 300 of the Indian Penal Code where the act is done intentionally or with the knowledge or means of knowing that is the natural consequences of the act. The intention or knowledge necessary in order to render culpable homicide must be clearly proved by the prosecution which can usually be done by proof of the

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circumstances which prove the act or omission in question for the presumption that the person knows the probable result of his conduct. An offence cannot amount to murder unless it falls within the definition of culpable homicide but an offence may also amount to culpable homicide without amounting to murder. To render culpable homicide to be murder, the case must come within the provisions of clause 1, 2, 3 or 4 of section 300 of the Indian penal code.

79. In ***Satish Narayan Sawant v. State of Goa*, (2009) 17 SCC 724 : (2011) 2 SCC (Cri) 110 : 2009 SCC OnLine SC 1638 at page 738,** the Apex Court has observed as under:-

> **35.** Section 299 and Section 300 IPC deal with the definition of culpable homicide and murder respectively. Section 299 defines culpable homicide as the act of causing death (*i*) with the intention of causing death, or (*ii*) with the intention of causing such bodily injury as is likely to cause death, or (*iii*) with the knowledge that such act is likely to cause death. The bare reading of the section makes it crystal clear that the first and the second clauses of the section refer to intention apart from the knowledge and the third clause refers to knowledge alone and not intention. Both the expressions "intent" and "knowledge" postulate the existence of a positive mental attitude which is of different degrees. The mental element in culpable homicide i.e. mental attitude towards the consequences of conduct is one of intention and knowledge. If that is caused in any of the aforesaid three circumstances, the offence of culpable homicide is said to have been committed.
>
> **36.** Section 300 IPC, however, deals with murder although there is no clear definition of murder provided in Section 300 IPC. It has been repeatedly held by this Court that culpable homicide is the genus and murder is species and that all murders are culpable homicide but not vice versa. Section 300 IPC further provides for the exceptions which will constitute culpable homicide not

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> amounting to murder and punishable under Section 304. When and if there is intent and knowledge then the same would be a case of Section 304 Part I and if it is only a case of knowledge and not the intention to cause murder and bodily injury, then the same would be a case of Section 304 Part II. The aforesaid distinction between an act amounting to murder and an act not amounting to murder has been brought out in the numerous decisions of this Court.

80. In ***Abdul Waheed Khan* v. *State of A.P.*** **[(2002) 7 SCC 175 : 2005 SCC (Cri) 1301]** observed as follows: (SCC pp. 184-87, paras 13-22)

> "*13*. Clause (*b*) of Section 299 corresponds with clauses (2) and (3) of Section 300. The distinguishing feature of the mens rea requisite under clause (2) is the knowledge possessed by the offender regarding the particular victim being in such a peculiar condition or state of health that the internal harm caused to him is likely to be fatal, notwithstanding the fact that such harm would not in the ordinary way of nature be sufficient to cause death of a person in normal health or condition. It is noteworthy that the 'intention to cause death' is not an essential requirement of clause (2). Only the intention of causing the bodily injury coupled with the offender's knowledge of the likelihood of such injury causing the death of the particular victim, is sufficient to bring the killing within the ambit of this clause. This aspect of clause (2) is borne out by Illustration (*b*) appended to Section 300.
>
> *14*. Clause (*b*) of Section 299 does not postulate any such knowledge on the part of the offender. Instances of cases falling under clause (2) of Section 300 can be where the assailant causes death by a fist-blow intentionally given knowing that the victim is suffering from an enlarged liver, or enlarged spleen or diseased heart and such blow is likely to cause death of that particular person as a result of the rupture of the liver, or spleen or the failure of the heart, as the case may be. If the assailant had no such knowledge about the disease or special frailty of the victim, nor an intention to cause death or bodily injury

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sufficient in the ordinary course of nature to cause death, the offence will not be murder, even if the injury which caused the death, was intentionally given. In clause (3) of Section 300, instead of the words 'likely to cause death' occurring in the corresponding clause (*b*) of Section 299, the words 'sufficient in the ordinary course of nature' have been used. Obviously, the distinction lies between a bodily injury likely to cause death and a bodily injury sufficient in the ordinary course of nature to cause death. The distinction is fine but real and if overlooked, may result in miscarriage of justice. The difference between clause (*b*) of Section 299 and clause (3) of Section 300 is one of degree of probability of death resulting from the intended bodily injury. To put it more broadly, it is the degree of probability of death which determines whether a culpable homicide is of the gravest, medium or the lowest degree. The word 'likely' in clause (*b*) of Section 299 conveys the sense of probable as distinguished from a mere possibility. The words 'bodily injury … sufficient in the ordinary course of nature to cause death' mean that death will be the 'most probable' result of the injury, having regard to the ordinary course of nature.

15. For cases to fall within clause (3), it is not necessary that the offender intended to cause death, so long as the death ensues from the intentional bodily injury or injuries sufficient to cause death in the ordinary course of nature. *Rajwant Singh* v. *State of Kerala* [AIR 1966 SC 1874] is an apt illustration of this point.

20. Thus, according to the rule laid down in *Virsa Singh case* [AIR 1958 SC 465] even if the intention of the accused was limited to the infliction of a bodily injury sufficient to cause death in the ordinary course of nature, and did not extend to the intention of causing death, the offence would be murder. Illustration (*c*) appended to Section 300 clearly brings out this point.

21. Clause (*c*) of Section 299 and clause (4) of Section 300 both require knowledge of the probability of the act causing death. It is not necessary for the purpose of this case to dilate much on the distinction between these corresponding clauses. It will be sufficient to say that clause (4) of Section 300 would be applicable where the

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> knowledge of the offender as to the probability of death of a person or persons in general as distinguished from a particular person or persons being caused from his imminently dangerous act, approximates to a practical certainty. Such knowledge on the part of the offender must be of the highest degree of probability, the act having been committed by the offender without any excuse for incurring the risk of causing death or such injury as aforesaid."

81. In ***State of A.P.* v. *Rayavarapu Punnayya* [*State of A.P.* v. *Rayavarapu Punnayya*, (1976) 4 SCC 382 : 1976 SCC (Cri) 659]** the distinction between the two provisions was noted by apex court in paragraph 12 and 13 which is quoted herein below.

> "*12*. In the scheme of the Penal Code, "culpable homicide" is genus and "murder" its specie. All "murder" is "culpable homicide" but not vice-versa. Speaking generally, "culpable homicide" *sans* "special characteristics of murder", is "culpable homicide not amounting to murder". For the purpose of fixing punishment, proportionate to the gravity of this generic offence, the Code practically recognises three degrees of culpable homicide. The *first* is, what may be called, "culpable homicide of the first degree". This is the greatest form of culpable homicide, which is defined in Section 300 as "murder". The *second* may be termed as "culpable homicide of the second degree". This is punishable under the first part of Section 304. Then, there is "culpable homicide of the third degree". This is the lowest type of culpable homicide and the punishment provided for it is, also, the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second part of Section 304.
>
> *13*. The academic distinction between "murder" and "culpable homicide not amounting to murder" has vexed the courts for more than a century. The confusion is caused, if courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the

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interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Sections 299 and 300."

In *Pulicherla Nagaraju* v. *State of A.P.*, (2006) 11 SCC 444, this Court had an occasion to consider the case of culpable homicide not amounting to murder and the intention to cause death. It was observed and held by this Court that the intention to cause death can be gathered generally from a combination of a few or several of the following, among other, circumstances:

(*i*) nature of the weapon used;

(*ii*) whether the weapon was carried by the accused or was picked up from the spot;

(*iii*) whether the blow is aimed at a vital part of the body;

(*iv*) the amount of force employed in causing injury;

(*v*) whether the act was in the course of sudden quarrel or sudden fight or free-for-all fight;

(*vi*) whether the incident occurs by chance or whether there was any premeditation;

(*vii*) whether there was any prior enmity or whether the deceased was a stranger;

(*viii*) whether there was any grave and sudden provocation, and if so, the cause for such provocation;

(*ix*) whether it was in the heat of passion;

(*x*) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner;

(*xi*) whether the accused dealt a single blow or several blows.

82. In the present case, the appellant's forcefully took away the bag of one Amar Nath and while they were running away they were caught by the prosecution witness and deceased whereafter accused Kailash has opened fire on the deceased as a result of the same the deceased sustain firearm injury in the abdomen. The post-mortem of the deceased was conducted on 24th June, 2005 and as per the post-mortem report the death of the deceased was due to shock and haemorrhage as a result of antemortem injury.

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83. The doctor who has conducted the post-mortem in his testimony before the trial court has stated that the death could have occurred as a result of antemortem injuries sustained by the deceased. It is to be noted that the blackening and tattooing was present on the injury sustained by deceased. The aforesaid is indicative of the fact that the firearm weapon was used from close range. The nature of injury sustained by the deceased and place where the injuries have been sustained it can be said that the Appellant-Kailash fired on the deceased with the intention of causing injury as is likely to cause death or the injuries were sufficient in the ordinary course of nature to cause death. Further the injuries and act of the Appellant-Kailash was imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death.

84. It is further to be noted that carrying firearm weapon at the place of occurrence is itself indicative of intention of accused person to cause death or such injury as is likely to cause death. The injury has been caused on the vital part by accused person. Under the circumstances the Appellant-Kailash is liable to be convicted under section 302 of the Indian penal code for the act of murder.

85. Considering the overall circumstances and submissions of learned counsel for the Appellants, learned A.G.A. for the State and after going through the evidence and lower court record, we are unable to persuade ourselves in taking a different opinion from that of trial court. The trial court was fully justified in convicting the Appellants.

86. Learned counsel for the Appellants failed to point out any illegality, infirmity or perversity in the judgment of the trial court.

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87. Both the appeals lack merit and are, accordingly, **dismissed.**

88. Registrar General of this Court is directed to pay an honorarium of Rs. 25,000/- to Sri Gagan Pratap Singh, learned Amicus Curiae for rendering effective assistance in the appeal

89. Let the lower court record be transmitted back to court below along with a copy of this order.

Order Date:-6.1.2023
Bhaskar

(Vikram D. Chauhan, J.) **(Suneet Kumar, J.)**