**(2011) 05 SC CK 0063**

**Supreme Court of India**

**Case No:** Criminal Appeal No"s. 2231, 2476, 2477-2483 and 2484 of 2009

| | |
|---|---|
| Satyavir Singh Rathi | APPELLANT |
| Vs | |
| State thr. C.B.I. | RESPONDENT |

**Date of Decision:** May 2, 2011

**Acts Referred:**

- Arms Act, 1959 - Section 25
- Bombay Police Act, 1951 - Section 161(1)
- Criminal Procedure Code, 1973 (CrPC) - Section 161, 163, 197, 208, 209
- Delhi Police Act, 1978 - Section 140, 140(1), 42, 80
- Ev

**Citation:** AIR 2011 SC 1748 : (2011) AIRSCW 2874 : (2011) CriLJ 2908 : (2011) 3 Crimes 27 : (2011) 3 RCR(Criminal) 805 : (2011) 5 SCALE 339 : (2011) 6 SCC 1 : (2011) 2 SCC(Cri) 782 : (2011) 4 Supreme 416

**Hon'ble Judges:** H. S. Bedi, J; Chandramauli Kumar Prasad, J

**Bench:** Division Bench

**Final Decision:** Dismissed

**Judgement**

Harjit Singh Bedi, J.
This judgment will dispose of Criminal Appeal Nos. 2231 of 2009, 2476 of 2009 and 2477-2484 of 2009. The facts have been taken from Criminal Appeal No. 2231 of 2009 Satyavir Singh Rathi v. State thr. C.B.I.

2. On the 31st March 1997 Jagjit Singh and Tarunpreet Singh PW-11 both hailing from Kurukshetra in the State of Haryana came to Delhi to meet Pradeep Goyal in his office situated near the Mother Dairy Booth in Patparganj, Delhi. They reached the office premises between 12.00 noon and 1.00 p.m. but found that Pradeep Goyal was not present and the office was locked. Jagjit Singh thereupon contacted Pradeep Goyal on his Mobile Phone and was told by the latter that he would be reaching the office within a short time. Jagjit Singh and Tarunpreet Singh, in the meanwhile, decided to have their

lunch and after buying some ice-cream from the Mother Dairy Booth, waited for Pradeep Goyal''s arrival. Pradeep Goyal reached his office at about 1.30 p.m. but told Jagjit Singh and Tarunpreet Singh that as he had some work at the Branch of the Dena Bank in Connaught Place, they should accompany him to that place. The three accordingly left for the Bank in the blue Maruti Esteem Car bearing No. UP-14F-1580 belonging to Pradeep Goyal. Mohd. Yaseen, a hardcore criminal, and wanted by the Delhi Police and the police of other States as well, in several serious criminal cases, was being tracked by the Inter-State Cell of the Crime Branch of the Delhi Police and in the process of gathering information of his movements, his telephone calls were being monitored and traced by PW-15 Inspector Ram Mehar. The Appellant Satyavir Singh Rathi, Assistant Commissioner of Police and the In-Charge of the Inter-State Cell, received information that Mohd. Yaseen would be visiting a place near the Mother Dairy, Patparganj, Delhi at about 1.30 p.m. on the 31st March 1997. Inspector Anil Kumar (Appellant in Criminal Appeal No. 2484 of 2009) of the Crime Branch was accordingly detailed by ACP Rathi to keep a watch near the Mother Dairy Booth in Patparganj and he was actually present at that place when Tarunpreet Singh and Jagjit Singh met Pradeep Goyal in his office. Jagjit Singh who was a cut haired Sikh (without a turban though he sported a beard) was mistaken for Mohd. Yaseen by Inspector Anil Kumar. As the Inspector was, at that stage, accompanied only by two police officials, Head Constable Shiv Kumar and Constable Sumer Singh, he called for reinforcements from ACP Rathi who was at that time present in his office in Chanakayapuri. On receiving the call, ACP Rathi briefed the staff in his office and told them that two young persons had been spotted near the Mother Dairy Booth in Patparganj and that one of them, a bearded young man, resembled Mohd. Yaseen, the wanted criminal. The ACP, along with a police party consisting in all of 12 persons, left the Inter-State Cell office at 1.32 p.m. to assist the police team led by Inspector Anil Kumar. As per the record, barring Head Constable Srikrishna and Constable Om Niwas, all the officials, including ACP Satyavir Singh Rathi were armed with service weapons. The police officials and the weapons they were carrying are given hereunder:

| | | |
|---|---|---|
| (i) | ACP Satyavir Singh Rathi | 9 MM Pistol No. 0592 |
| (ii) | Insp. Anil Kumar | .38 Revolver No. 1147 |
| (iii) | SI Ashok Rana | .38 Revolver No. 1139 |
| (iv) | SI A Abbas | .38 Revolver No. 1114 |
| (v) | ASI Shamsuddin | .38 Revolver No. 1112 |
| (vi) | HC ShivKumar | .38 Revolver No. 1148 |

| | | |
|---|---|---|
| (vii) | HC Mahavir Singh | .38 Revolver No. 0518 |
| (viii) | HC Tej Pal | .38 Revolver No. 1137 |
| (ix) | Ct.Sunil Kumar | SAF carbine |
| (x) | Ct. Subhash Chand | .38 Revolver No. 1891 |
| (xi) | Ct. Kothari Ram | AK-47 No. 5418 |
| (xii) | Ct. Bahadur Singh | AK-47 No. 2299 |
| (xiii) | Ct. Sumer Singh | .38 Revolver No. 1906 |

3. In the meanwhile, the Maruti Esteem car, which had been followed by Inspector Anil Kumar and the other two officials with him, stopped at the Dena Bank at 2.00 p.m. Pradeep Goyal then got down from the car, leaving Jagjit Singh and Tarunpreet Singh behind. Jagjit Singh, however, on the request of Pradeep Goyal, occupied the driver''s seat so that the car was not towed away by the police. Pradeep Goyal then went on to the Dena Bank where two of his employees Vikram and Rajiv were waiting for him outside the Bank. The three then went inside the Bank whereafter Vikram returned to the car to pick up a briefcase belonging to Pradeep Goyal. Tarunpreet Singh also accompanied Vikram to the Bank while Jagjit Singh continued to sit alone in the driver''s seat. Pradeep Goyal came out from the Bank at about 2.30 p.m. and after giving instructions to his employees, sat in the Esteem car on the front left seat whereas Tarunpreet Singh got into the rear seat. The car driven by Jagjit Singh thereafter moved on towards Barakhamba Road. As the car halted at the red light on Barakhamba Road, the two police parties, one headed by ACP Satyavir Singh Rathi and other by Inspector Anil Kumar, joined forces. The car was immediately surrounded by the police officials who fired from almost all sides killing Pradeep Goyal and Jagjit Singh instantaneously and causing grievous injuries to Tarunpreet Singh. The three occupants were removed to the RML Hospital in a Police Control Room Gypsy, but Pradeep Goyal and Jagjit Singh were declared dead on arrival. On receiving information with regard to the shootout, Inspector Niranjan Singh- PW 42, the SHO of Police Station, Connaught Place, New Delhi, rushed to the place of incident followed by senior police officials, including the DCP. On an inspection of the car, Inspector Niranjan Singh PW recovered a 7.65 mm pistol loaded with 7 live cartridges in the magazine, a misfired cartridge in the breech and two spent cartridge cases of 7.65 mm bore from inside the car. These items were taken into possession. Inspector Anil Kumar also handed over a written complaint with regard to the incident to Inspector Niranjan Singh, who in turn sent the same to the Police Station with his endorsement, and an FIR No. 448/97 dated 31st March 1997 under Sections 186/353/307 of the IPC and Section 25 of the Arms Act was registered against the occupants of the Car. In the complaint, Inspector Anil Kumar recorded that after the Car had stopped at the red light, it had been surrounded by the police and that he had thereafter knocked at the driver''s

window asking the occupants to come out but instead of doing so, Jagjit Singh had started firing at the police party from inside the car resulting in gun shot injuries to Constables Sunil Kumar and Subhash Chand and that it was thereafter that the police personnel had opened fire at the car in self defence with a view to immobilizing the occupants and to prevent their escape. The incident, however, sparked a huge public outcry. The very next day Dinesh Chand Gupta, father-in-law of Pradeep Goyal, made a complaint to the Lt. Governor, Delhi on which another FIR No. 453/97 was registered at Police Station Connaught Place, New Delhi against the police personnel involved in the shootout for an offence punishable u/s 302/34 of the IPC. In the complaint, it was alleged that the police officials had surrounded the car and had fired indiscriminately and without cause, at the occupants killing the two and causing grievous injuries to the third. The initial investigation with regard to the incident was carried out by Inspector Niranjan Singh but pursuant to the orders of the Government of India made on the 1st April of 1997 the investigation was handed over to the Central Bureau of Investigation (hereinafter called the CBI) and the two FIRs were amalgamated for the purpose of investigation. The CBI, on investigation, came to the conclusion that the police party headed by ACP Satyavir Singh Rathi and Inspector Anil Kumar had fired on the Maruti Esteem car without provocation and that FIR No. 448/97 dated 31st March 1997, registered on the complaint of Inspector Anil Kumar, was intended to act as a cover-up for the incident and to justify the police action. The CBI accordingly found that no shot had been fired from inside the car by Jagjit Singh, as alleged, and that the claim in this FIR that two police officials, who were a part of the police party, had sustained gun shot injuries as a result of firing from the Car, was false. The investigation also found that the 7.65 MM pistol and cartridges allegedly recovered from inside the car had actually been planted therein by members of the police party with a view to creating a defence and screening themselves from prosecution. As a result of the investigation made in both the FIRs, a charge sheet was filed before the Chief Metropolitan Magistrate on the 13th June 1997. The said Magistrate took cognizance for the offences punishable u/s 302/307/201/120B/34 by his order dated 10th July 1997 against 10 members of the police party and in addition, u/s 193 of the IPC against Inspector Anil Kumar for having lodged a false report with regard to the incident. The matter was then committed for trial. The trial court recorded the evidence of 74 witnesses and also took in evidence a large number of documents, including the reports of the Forensic Science Laboratory. In the course of a very comprehensive judgment dated 10th July, 1997 the trial court recorded the conviction and sentence as under:

| Name of appellant | Offence for which convicted | Sentence awarded |
|---|---|---|

| | | |
|---|---|---|
| Satyavir Singh Rathi, ACP, Delhi Police | Under Sections 120B IPC,302 IPC read with 120B IPC, 307 IPC read with 120B IPC, 193 IPC read with 120B IPC, 193 IPC, 201/34 IPC and 203/34 IPC | Under Section 120B IPC imprisonment for life & a fine of Rs. 100/-.<br><br>Under Section 302 IPC read with Section 120B IPC - imprisonment for Life and a fine of Rs. 100/-.<br>Under Section 307 IPC Read with Section 120B IPC - imprisonment for life and a fine of Rs. 100/-<br><br>Under Section 193 IPC read with Section 120B IPC - rigorous imprisonment for 7 years and a fine of Rs. 100/-<br><br>Under Section 201 IPC - rigorous imprisonment for 7 years and a fine of Rs. 100/-<br><br>Under Section 302 IPC - rigorous imprisonment for 2 years. |
| Anil Kumar, Inspector Of Police, Delhi Police | Under Sections 120B IPC, 302 IPC r/w 120B IPC, 307IPC r/w 120B IPC 193 IPC r/w 120B IPC, 193 IPC, 201/34 IPC And 203/34 IPC | Under Section 120B IPC - imprisonment for life and a fine of Rs. 100/- |

Under Section 302 IPC read with Section 120B IPC - imprisonment for life and a fine of Rs. 100/-

Under Section 307 IPC r/w Section 120B IPC - imprisonment for life and a fine of Rs. 100/-.

Under Section 193 IPC r/w Section 120B IPC - rigorous

imprisonment for 7 years and a fine of Rs. 100/-.

Under Section 201 IPC - rigorous imprisonment for 7 years and a fine of Rs. 100/-.

Under Section 203 IPC - rigorous imprisonment for 2 years.

| | | |
|---|---|---|
| Ashok Rana,Sub-Inspector of Police, Delhi Police | Under Sections 120B IPC, 302 IPC r/w 120B IPC, 307 IPC r/w 120B IPC, 193 IPC r/w 120B IPC | Under Section 120B IPC - imprisonment for life and a fine of Rs. 100/-<br><br>Under Section 302 IPC r/w Section 120B IPC - imprisonment for life and a fine of Rs. 100/-<br><br>Under Section 307 IPC r/w Section 120B IPC - imprisonment for life and a fine of Rs. 100/-.<br><br>Under Section 193 IPC r/w Section 120B IPC - rigorous imprisonment for 7 years and a fine of Rs. 100/-.<br><br>Under Section 201 IPC - rigorous imprisonment for 7 years and a fine of Rs. 100/-.<br><br>Under Section 203 IPC - rigorous imprisonment for 2 years. |

| | | |
|---|---|---|
| Ashok Rana, Sub-Inspector of Police, Delhi Police | Under Sections 120B IPC, 302 IPC r/w 120B IPC, 307 IPC r/w 120B IPC, 193 IPC r/w 120B IPC | Under Section 120B IPC - imprison -ment for life and a fine of Rs. 100/-<br><br>Under Section 302 IPC r/w Section 120B IPC-imprisonment for life and a fine of Rs. 100/-.<br><br>Under Section 307 IPC r/w Section 120B IPC - imprisonment for life and a fine of Rs. 100/-.<br><br>Under Section 193 IPC r/w Section 120B IPC - rigorous imprisonment for 7 years and a fine of Rs. 100/-. |
| Shiv Kumar, Head Constable,Delhi Police | 120B IPC,302 IPC r/w 120B IPC 307 IPC r/w 120B IPC, 193 IPC r/w 120B IPC | Under Section 120B IPC- -<br><br>imprisonment for life and a fine of Rs. 100/-<br><br>Under Section 302 IPC r/w Section 120B IPC - imprisonment for life and a fine of Rs. 100/-.<br><br>Under Section 307 IPC r/w Section 120B IPC - imprisonment for life and a fine of Rs. 100/-.<br><br>Under Section 193 IPC r/w Section 120B IPC - rigorous imprisonment for 7 years and a fine of Rs. 100/- |

| | | |
|---|---|---|
| Taj Pal Singh,Head Constable,Delhi Police | 120B IPC,302 IPC r/w 120B IPC,307 IPC r/w 120B IPC, 193 IPC r/w 120B IPC | Under Section 120B IPC - imprisonment for life and a fine of Rs. 100/-<br><br>Under Section 302 IPC r/w Section 120B IPC - imprisonment for life and a fine of Rs. 100/-<br><br>Under Section 307 IPC r/w Section 120B IPC - imprisonment for life and a fine of Rs. 100/-.<br><br>Under Section 193 IPC r/w Section 120B IPC-rigorous imprisonment for 7 years and a fine of Rs. 100/- |
| Mahavir Singh,Head | 120B IPC,302IPC r/w<br><br>imprisonment for 120B IPC, 193 IPC r/w 120B IPC | Under Section 120B IPC -<br><br>life and a fine of Rs. 100/- u/s 302 IPC r/w Section 120B IPC - imprisonment for life and a fine of Rs. 100/-<br><br>Under Section 307 IPC r/w Section 120B IPC - imprisonment for life and a fine of Rs. 100/-.<br><br>Under Section 193 IPC r/w Section 120B IPC - rigorous imprisonment for 7 years and a fine of Rs. 100/-. |

| | | |
|---|---|---|
| Sumer Singh, Const. Delhi Police. | 120B IPC,302 IPC r/w 120B IPC 307 IPC r/w 120B IPC, 193 IPC r/w 120B IPC | Under Section 120B IPC - imprisonment for life and a fine of Rs. 100/-.<br><br>Under Section 302 IPC r/w Section 120B IPC - imprisonment for life and a fine of Rs. 100/-.<br><br>Under Section 307 IPC r/w Section 120B IPC - imprisonment for life and a fine of Rs. 100/-<br><br>Under Section 193 IPC r/w Section 120B IPC - rigorous imprisonment for 7 years and a fine of Rs. 100/-. |
| Subhash Chand,Const. Delhi Police | 120B IPC,302 IPC r/w 120B IPC,307 IPC r/w 120B IPC, 193 IPC r/w 120B IPC | Under Section 120B IPC - imprisonment for life and a fine of Rs. 100/-.<br><br>Under Section 302 IPC r/w Section 120B IPC - imprisonment for life<br><br>and a fine of Rs. 100/-.<br><br>Under Section 307 IPC r/w Section 120B IPC - imprisonment for life and a fine of Rs. 100/-<br><br>Under Section 193 IPC r/w Section 120B IPC - rigorous imprisonment for 7 years and a fine of Rs. 100/-. |

| | | |
|---|---|---|
| Sunil Kumar,Const. Delhi Police | 120B IPC,302 IPC r/w 120B IPC, 307 IPC r/w 120B IPC, 193 r/w 120B IPC | Under Section 120B IPC - imprisonment for life and a fine of Rs. 100/-.<br><br>Under Section 302 IPC r/w Section 120B IPC - imprisonment for life and a fine of Rs. 100/-.<br><br>Under Section 307 IPC r/w Section 120B IPC - imprisonment for life and a fine of Rs. 100/-.<br><br>Under Section 193 IPC r/w Section 120B IPC - rigorous imprisonment for 7 years and a fine of Rs. 100/-. |
| Kothari Ram, Const. Delhi Police | 120B IPC,302 IPC r/w 120B IPC, 307 IPC r/w 120B IPC, 193 IPC r/w 120B IPC | Under Section 120B IPC - imprisonment for life and a fine of Rs. 100/-.<br><br>Under Section 302 IPC r/w Section 120B IPC - imprisonment for life and a fine of Rs. 100/-.<br><br>Under Section 307 IPC r/w Section 120B IPC - imprisonment for life and a fine of Rs. 100/-.<br><br>Under Section 193 IPC r/w Section 120B IPC - rigorous imprisonment for 7 years and a fine of Rs. 100/-. |

4. All the substantive sentences were directed to run concurrently. The matter was thereafter taken in appeal to the Delhi High Court which re-examined the entire evidence and concluded that the conviction of the Appellants u/s 302/120B of the IPC could not be

sustained and they were entitled to acquittal of that charge, but their conviction and sentence under Sections 302 and 307 of the IPC was liable to be maintained with the aid of Section 34 of the IPC instead of Section 120B of the IPC. It was also directed that the conviction and sentence of ACP Rathi and Inspector Anil Kumar under Sections 193, 201/34 and 203/34 of the IPC was liable to be maintained. The appeals were accordingly allowed to this very limited extent. It is in this background that the matter is before us after the grant of Special leave on the 23rd November 2009.

5. We have heard the learned Counsel for the parties in extenso in arguments spread over several days. Mr. Amrendra Sharan, the learned senior counsel appearing in the lead case i.e. the appeal of ACP Satyavir Singh Rathi, has raised several arguments in the course of the hearing. He has first pointed out that the prosecution story and the findings of the trial court as well as of the High Court with regard to the manner of the incident and how it happened were erroneous and the defence version that the Appellants had fired at the car in self-defence after Jagjit Singh had first fired a shot through the window injuring two policemen was, in fact, the correct one in the light of the prosecution evidence itself that a 7.65 mm bore pistol, and two fired cartridge cases had been found and recovered from the car itself as deposed to by PW13, PW15, PW35, PW41 and PW57 and as these witnesses had not been declared hostile the prosecution was bound by their statements. In this connection, the learned Counsel has placed reliance on Javed Masood & Anr. vs. State of Rajasthan 2010 (3) SCC 538 It has also been pleaded that the fact that a single shot had been followed by a volley had been deposed to by PW-26 Avtar Singh who was an injured witness and also by ASI Om Bir-PW who was in a police control room Gypsy stationed closed by. It has further been pointed out that from the evidence of the aforesaid witnesses it was clear that all the window panes of the car had been broken which indicated that a shot had indeed been fired from inside the car. In addition, it has been urged by Mr. Sharan that the investigation made by the CBI was completely partisan and though a large number of independent witnesses had been examined at site, none had been cited as witnesses, and that even Dr. V. Tandon, who had extracted the bullet from the person of Constable Sunil Kumar, had not been produced as a witness. It has been highlighted that no investigation had been made as to the ownership of the 7.65 mm pistol or as to how and who had planted it in the car, as alleged. It has further been submitted that there was no common intention on the part of ACP Rathi along with his co-accused to commit the murders as he was sitting in his Gypsy far away from the place of the shoot out and there was no evidence whatsoever to suggest that he had either encouraged or directed the other police officials to shoot at the car and as such his conviction with the aid of Section 34 of the IPC, could not be sustained. He has, in this connection, cited Ram Nath Madhoprasad & Ors. vs. State of M.P. AIR 1953 SC 420 . As a corollary to this argument, the learned Counsel has also emphasized that as the trial court had framed a charge u/s 302/120B and in the alternative u/s 302/34 of the IPC but had chosen to record a conviction under the former provision only and had not rendered any opinion on the alternative charge, it amounted to a deemed acquittal of the alternative charge and as the

State had not challenged the matter in appeal, the High Court was not justified in an appeal filed by the accused in altering the conviction from one u/s 302/120B of the IPC to one u/s 302/34 of the IPC. In this connection, the learned Counsel has placed primary reliance on Sangaraboina Sreenu vs. State of A.P. 1997 (5) SCC 348 and Lokendra Singh v. State of M.P. 1999 SCC 371 and Bimla Devi & Anr. vs. State of J & K 2009 (6) SCC 629 and in addition on Kishan Singh v. Emperor AIR 1928 P.C. 254, The State of Andhra Pradesh vs. Thadi Narayana 1962 (2) SCR 904 and Lakhan Mahto vs. State of Bihar 1966 (3) SCR 643 . The learned Counsel has also urged that it was settled beyond doubt that the provisions of Section 313 of the Code of Criminal Procedure had to be scrupulously observed and it was obligatory on the trial court to put all the incriminating circumstances in the prosecution story to an accused so as to enable him to effectively meet the prosecution case and if some material circumstance was not put to an accused, it could not be taken into account against him and had to be ruled out of consideration in the light of the judgments reported as Hate Singh Bhagat Singh vs. State of Madhya Bharat AIR 1953 SC 468 Vikramjit Singh v. State of Punjab 2006 (12) SCC 306 and Ranvir Yadav vs. State of Bihar 2009 (6) SCC 595 The learned Counsel has also furnished a list of 15 circumstances which had not been put to the accused, particularly to ACP Rathi, at the time when his statement had been recorded. It has, in addition, been pleaded that the prosecution was barred as the cognizance in this case had been taken beyond the period of 3 months as envisaged in Section 140 of the Delhi Police Act, 1978 and on the factual aspect has referred us to various dates relevant in the matter. In this connection, the learned Counsel has placed reliance on Jamuna Singh & Ors. vs. Bhadai Shah AIR 1964 SC 1541 and Prof. Sumer Chand vs. Union of India & Ors. 1994 (1) SCC 64 It has finally been submitted by Mr. Sharan that the sanction u/s 197 of the Code of Criminal Procedure too had been given without application of mind and as the entire record was not before the Lt. Governor, all relevant material had not been considered and for this additional reason also, the prosecution was not justified. In this connection the learned Counsel has placed reliance on State of Karnataka v. Ameerjan 2008 (1) SCC 130. Mr. Uday U. Lalit, the learned senior counsel appearing for Head Constable Mahavir Singh, the Appellant in Criminal Appeal No. 2476/2009, has pointed out that there were 15 persons in all in the police party and of them only 10 persons had been sent for trial and of the 5 left out, three had not used the firearms which they had been carrying and Head Constable Mahavir Singh (as per the evidence on record) had not fired into the car, his case fell in the category of those who had not been sent up for trial and, as such, he too was entitled to acquittal. It has also been pointed out that after the dead body of Jagjit Singh had been cremated, a bullet had been recovered from his ashes allegedly fired from the weapon of Head Constable Mahavir Singh but as the High Court had disbelieved the evidence of this recovery, there was no evidence against him. He has, in addition, supported Mr. Sharan''s arguments on Section 313 of the Code of Criminal Procedure and has contended that the scope and rigour of Section 313 remained unchanged despite the introduction of Section 315 of the Code of Criminal Procedure which now made an accused a competent witness in his defence.

6. Mr. Balasubramaniam, the learned senior counsel for Inspector Anil Kumar in Criminal Appeal No. 2484 of 2009, has also supported the arguments raised by the other counsel with regard to the common intention of the Appellant more particularly as he had not fired at the car though armed. He has also pleaded that even accepting the prosecution story as it was, the only inference that could be drawn was that the police party had fired at the car in self-defence and that such an inference could be drawn from prosecution story had been accepted by this Court in Mohan Singh & Anr. vs. State of Punjab AIR 1963 SC 174 .

7. Mr. Vineet Dhanda, the learned Counsel for the Appellants in Criminal Appeal Nos. 2477-2483 of 2009, has pointed out that although the Appellants in these matters had admitted that they had fired into the car yet the fact that Mohd. Yaseen was a dreaded criminal with 21 criminal cases against him including 18 of murder, the police party had to be careful and they had fired back only after the first shot by Jagjit Singh. The learned Counsel, however, has confined his primary argument to the fact that the Appellants were acting on the orders of ACP Rathi, who was their superior officer, and as they had taken an oath at the time of induction to office to follow the orders of superior officers, they were liable for exoneration of any kind of misconduct as per Section 79 of the IPC. He has also pointed out that the Appellants had, in their statements recorded u/s 313 of the Code of Criminal Procedure, unanimously stated that the orders for the firing had been given by ACP Rathi.

8. Mr. Harin Rawal, the Additional Solicitor General representing the CBI has, however, controverted the submissions made by the counsel for the Appellants. It has been pointed out that the investigation had revealed that the incident had happened as the police party was under the impression that Jagjit Singh was in fact Mohd. Yaseen and in their anxiety to get at him, had decided to eliminate him pursuant to their common intention. It has been highlighted that the defence that Jagjit Singh had first resorted to firing from inside the car had been found to be unacceptable by both the courts below and a positive finding had been recorded that the 7.65 mm bore pistol had been surreptitiously placed in the car to create a defence. He has further pointed out that the prosecution story with regard to the incident had been proved by independent evidence and as the investigation was being handled by the Delhi Police at the initial stage, some attempt had apparently been made to help the Appellants in order to create a cover-up story. The argument that the CBI had conducted a partisan investigation has also been controverted. It has been highlighted that all relevant evidence had been produced before the Court and nothing had been withheld and that in any case allegations of a partisan investigation could be made against an individual officer but could not be generalized against an organization as vast as the CBI and no argument had been addressed identifying any officer(s) of the CBI of any misconduct. It has also been submitted that from the evidence of the prosecution witnesses and the conduct of the Appellants pre and post-facto the incident indicated that the murders had been committed pursuant to their common intention and this was also supported by the fact that a false story had been put up in defence. It has also been

pointed out that deemed acquittal theory projected by Mr. Sharan could not be applied in the present case as the judgment reported in Lokendra Singh"s case cited by him had been doubted in Lakhjit Singh and Anr. v. State of Punjab 1994 Suppl. (1) SCC 173 and the matter had thereafter been referred to a larger Bench which in the judgment reported in Dalbir Singh vs. State of U.P. 2004 (5) SCC 334 had over-ruled the judgment in Lokendra Singh"s case (supra) and that the judgment in Dalbir Singh"s case had subsequently been followed in Dinesh Seth vs. State of NCT of Delhi 2008 (14) SCC 94 It has been highlighted that the judgment in Bimla Devi"s case (supra) relied upon by Mr. Sharan had not taken note of the last two cited cases. It has, further been contended by Mr. Rawal that though it was a matter of great importance that all incriminating circumstances must be put to an accused, but if some material had been left out it would not ipso-facto mean that it had to be ruled out of consideration as it was for an accused to show that prejudice had been suffered by him on that account. It has been pointed out that the issue of prejudice ought to have been raised by the Appellants at the very initial stage before the trial court and as this had not happened, the prosecution was fully justified in arguing that no prejudice had been caused. The learned ASG has placed reliance on Shobhit Chamar & Anr. vs. State of Bihar 1998 (3) SCC 455 and Santosh Kumar Singh vs. State thr. CBI 2010 (9) SCC 747 for this submission. The arguments raised by Mr. Sharan with regard to Section 140 of the Delhi Police Act and Section 197 of the Code of Criminal Procedure have also been controverted. It has been submitted that Section 140 of the Delhi Police Act would apply only to offences committed under that Act and not to other offences and that in any case in order to claim the protection u/s 140, the act done by a police officer had to be "under the colour of duty" and as "murder" would not come in that category, no protection thereunder was available. In this connection, the learned ASG has placed reliance on The State of Andhra Pradesh vs. N.Venugopal & Ors. AIR 1964 SC 33 State of Maharashtra vs. Narhar Rao AIR 1966 SC 1783 , State of Maharashtra v. Atma Ram AIR 1966 SC 1786 Bhanuprasad Hariprasad Dave and Anr. v. The State of Gujarat AIR 1968 SC 1323, and Prof. Sumer Chand"s case (supra) as well. In so far as the sanction u/s 197 of the Code of Criminal Procedure is concerned, it has been pleaded that the Lt. Governor had all relevant material before him when the order granting sanction had been made and that the material was adequate for him to take a decision and merely because some of the evidence had been received by the CBI after the grant of sanction, would not invalidate the sanction. In this connection, the learned ASG has placed reliance on S.B.Saha & Ors. vs. M.S.Kochar AIR 1979 SC 1841

9. The learned ASG has also controverted Mr. Lalit"s arguments with regard to the culpability of Appellant Head Constable Mahavir Singh. It has been pointed out that the bullet recovered from the ashes of Jagjit Singh had been found to have been fired from the weapon of Head Constable Mahavir Singh but the High Court had declined to accept this part of the prosecution story as Didar Singh PW who had produced the bullet before the Haryana Police after picking it up from the funeral ashes, had not deposed in his evidence that he had handed over the bullet to the Police. It has, however, been

submitted that Head Constable Mahavir Singh had indeed fired his weapon had been admitted by him and the story that he had fired in the air to disperse a huge and turbulent crowd that had collected, was not borne out by the evidence. Mr. Balasubramaniam''s argument with regard to the involvement of Inspector Anil Kumar has also been challenged by the ASG by urging that though he admittedly had not fired his weapon but his case did not fall in the category of those police officials who had not been sent for trial. It has been submitted that the Appellant had in fact been the prime mover in the entire story. Dealing with the arguments addressed by Mr. Vineet Dhanda, the learned ASG has highlighted that there was no evidence to suggest that it was on the orders of ACP Rathi that the firing had been resorted to, except for the self-serving statements made by the Appellants u/s 313. It has, accordingly, been pointed out that this set of Appellants could not claim the benefit of Section 79 of the Indian Penal Code.

10. On hearing the learned Counsel for the parties, several facts appear to be admitted on record but are compounded by a tragedy of errors. These relate to the place and time of incident, the presence of the Appellants duly armed with most of them having fired into the car with their service weapons, that Mohd. Yaseen was admittedly a notorious criminal and that Jagjit Singh (deceased) had been mistaken by Inspector Anil Kumar for Mohd. Yaseen, and that Pradeep Goyal owned a blue Esteem Car with a Uttar Pradesh number plate, and had his office in Patparganj near the Mother Dairy Booth. It is in this background that the prosecution and the defence versions have to be examined. The prosecution story has already been narrated above and does not require any recapitulation in detail. Suffice it to say that Inspector Anil Kumar and his two associates had followed the car driven by Pradeep Goyal to the Dena Bank Branch at Connaught Place and it was after Pradeep Goyal and the others had left the Dena Bank premises and were near the Barakhamba Road crossing that the two police parties, one headed by Inspector Anil Kumar, and other by ACP Rathi, had joined forces and surrounded the car as it stopped at a red light, and had fired into it killing two persons and injuring one. It is at this stage that the prosecution and the defence deviate as it is the case of the defence that after the car had been surrounded, Inspector Anil Kumar had knocked at the driver''s window asking the occupants to come out but instead of doing so Jagjit Singh had fired two shots at the police which had led to a fusillade in self defence. It is true that Avtar Singh PW, who was an injured witness and ASI Ombir Singh, PW-13 did say that the multiple firing had been preceded by one solitary shot which apparently is in consonance with the defence version. Likewise, PW-13 ASI Ombir Singh, PW15 Inspector Ram Mehar, PW-35 Inspector Rishi Dev, PW41 Constable Samrat Lal, and PW-57 S.I. Sunil Kumar testified that a 7.65 mm bore pistol along with two fired cartridges and 7 live cartridges in the magazine and one misfired cartridge in the breech, had been recovered from the car. This story too appears to support the case of the defence. It is equally true that it is not always necessary for the accused to plead self- defence and if the prosecution story itself spells it out, it would be open to the court to examine this matter as well, as held by this Court in Mohan Singh''s case (Supra) and in James Martin vs. State of Kerala 2004 (2) SCC 203 . Likewise, it is now well settled in the light of the

judgment in Javed Masood''s case (supra) that if a prosecution witness is not declared hostile by the prosecution, the evidence of such a witness has to be accepted by the prosecution. It must also be observed that though the prosecution is bound to prove its case beyond reasonable doubt, the obligation on an accused u/s 105 of the Indian Evidence Act, 1872 is to prove it by a preponderance of probabilities. We have, accordingly, examined the evidence under the above broad principles.

11. As already indicated above, PW''s Avtar Singh and Ombir Singh did state that a single shot had been followed by multiple shots thereafter. Avtar Singh, however, apparently did not receive a bullet injury as the simple abrasion on him had been apparently caused by a flying splinter from the tarmac but we have extremely independent evidence on this score as well. PW-1 Geeta Ram Sharma, the Chief Photographer of the Statesman Newspaper, which has its office adjacent to the red light on Barakhamba Road, deposed that on the 31st March 1997 at about 2 - 2.30 p.m. while he was sitting in his room along with his colleagues PWs Sayeed Ahmed and Shah Nawaz, they had heard the sound of firing from the Barakhamba Road side and that he along with the other PWs had come out to the crossing along with their camera equipment and had seen a blue Esteem Car standing there with two bodies lying alongside and one injured person sitting on the road with a large number of police men, including some in mufti, present. He stated that on his directios Shah Nawaz and Sayeed Ahmed had taken a large number of photographs of the site and 14 of them were also produced as Exs. P-1 to P-14. He further stated that Vijay Thakur, one of the Reporters of the Statesman had also been present. Sayeed Ahmed and Shah Nawaz aforementioned appeared as PW-2 and PW-67 and supported the story given by PW-1 Geeta Ram Sharma. He also proved the photograph marked Ex. `X'' which shows that the driver''s window was intact. We have perused the photograph ourselves and find that the driver''s window was definitely intact. The photograph is in black and white and has been taken through the driver''s window and the man wearing white with a dark tie seen in the photograph has two shades of white, the portion through the window having a dull hue and the portion above, far brighter. It has come in the evidence of PW-Tarunpreet that the car A.C. was on when the firing took place and the windows had been drawn up. We can also take notice that in this background, the windows and windshield would be of tinted glass. Likewise, we are also of the opinion that had the shots been fired through the driver''s window or the windshield some powder residues would have been left around the bullet holes as the shots would have been fired from almost a touching distance. PW-37 Roop Singh from the Central Forensic Science Laboratory, who had examined the car very minutely detected no such residue and also testified that the appreciable powder distance of a 7.65 mm pistol could be one to two feet but would depend on the sitting posture of the person firing. He also stated that in all at least 29 bullet holes had been detected on the car of 9 mm, 7.62 mm and .380 calibre weapons and that most of the seven exit holes in the car could have been caused by bullets fired from the rear and left side into the car and exiting thereafter, although the possibility of an exit hole being caused by a bullet fired from inside the car could also not be ruled out. He further pointed out that as the bullet fired at Constable Subhash Chand

remained embedded in his body and had not been taken out for medical reasons, it was not possible to give an opinion whether it was a bullet of 7.65 mm calibre. The defence story that Constables Sunil and Subhash had suffered injuries on account of the firing of two shots from inside the car, is further belied by the medical evidence. PW-16-Dr. Harmeet Kapur carried out the medico legal examination of Constable Subhash Chand Ex.PW16/B. He found three bullet injuries on his person, which indicated blackening. These injuries could not have been caused by firing from inside the car as the blackening from a pistol would be, at the most, from a foot or two. Likewise, PW-17 Dr. Neeraj Saxena who had examined Constable Subhash Chand, also found three separate gun shot injuries on his person. He also produced in evidence his treatment record Ex.PW17/B. This doctor was not even cross-examined by the prosecution. It needs to be emphasized that all the weapons used in the incident fired single projectiles (i.e. bullets), whereas the distance between the gun shot injuries on the two injured policemen show at least 3 different wounds of entry on each of them. On the contrary, it appears that the injuries suffered by them were caused by the firing amongst the policemen as they had surrounded and fired into the car indiscriminately and without caution ignoring that they could be a danger to themselves on cross-fire on uncontrolled firing. It has, in fact, been pointed out by Mr. Sharan that ACP Rathi had written to his superiors pointing to the ineptitude of his team of officers but he had been told that no other staff was available. The present case illustrates and proves the adage that a weapon in the hands of an ill trained individual is often more of a danger to himself than a means of defence. In this background, the evidence of PW"s Geeta Ram Sharma, Sayeed Ahmad and Shah Nawaz, PW-50 Constable K.K. Rajan and PW-51 Constable Rajinderan Pilley becomes extremely relevant. PW-13 ASI Ombir Singh who was the Officer In-Charge of the PCR Gypsy parked near the Fire Station Building adjoining Barakhamba Road, had undoubtedly supported the defence version that a single shot had been followed by a volley. Constable Rajan and Constable Pilley, who were present along with ASI Ombir Singh, categorically stated that they had not heard any single fire and it was only the continuous firing that had brought them rushing to the site and having reached there, they had taken the three victims to the R.M.L. Hospital. Their story is corroborated by the evidence of the three newspaper employees. Tarunpreet Singh PW was also categoric that no shot had been fired from inside the car. The story therefore that Jagjit Singh had fired at the police party when accosted is, therefore, on the face of it, unacceptable. In this overall scenario even if it is assumed that the driver"s window had. Appeal No. 2231/2009 etc. been found broken as contended by the defence, it would still have no effect on the prosecution story.

12. We now come to the question as to the recovery of the 7.65 mm bore pistol allegedly used by Jagjit Singh as this fact is intimately connected with the defence version. First and foremost, it appears that even prior to the arrival of PW-42 SHO Niranjan Singh, the Car had already been searched and the site violated as a cell phone belonging to one of the victims had been picked up by Appellant ASI Ashok Rana and handed over to the SHO. The fact that undue interest had been taken by the offending police officials is also

clear from Ex. P/10 a photograph showing the ASI looking into the car. More significantly, however, PW-12 Sant Lal, the official Photographer of the Delhi Police, took two photographs Ex. PW12/28 and PW12/29 of the driver''s seat from very close range but they show no pistol or empty shells. Even more significantly ACP Rathi submitted a detailed written report Ex.D.16/8 on the 1st of April 1997 to his superior officer in which he talks about the firing by Jagjit Singh but makes no mention as to the recovery of a pistol from the car although as per the defence story the weapon had been picked up by the SHO soon after the incident. Likewise, in the report Ex. PW-42/C lodged by Inspector Anil Kumar Appellant with the Connaught Place Police immediately after the incident, there is no reference whatsoever to the presence of a 7.65 mm pistol in the car. It is also relevant that the pistol had been sent to the Central Forensic Science Laboratory but PW-46 S.K. Chadha who examined the weapon, could find no identifiable finger prints thereon.

13. The cumulative effect of the above evidence reveals the starkly patent fact that the defence story projected was a palpably false one and the police officials involved having realized almost immediately after the incident (perhaps on questioning Tarunpreet Singh-PW) that they had made a horrific mistake, immediately set about creating a false defence. The trial court and the High Court have accordingly opined on the basis of the overall assessment that the defence version was a concoction and that the prosecution story that it was the unprovoked firing by the Appellants which had led to the death of Jagjit Singh and Pradeep Goyal and grievous gun shot injuries to Tarunpreet Singh, had been proved on record.

14. This finding also completely dislodges Mr. Subramaniam''s argument that in case the defence, as laid, was not entirely acceptable, the accused were nevertheless entitled to claim the benefit of Exception 3 to Section 300 of the Indian Penal Code. This Exception pre-supposes that a public servant who causes death, must do so in good faith and in due discharge of his duty as a public servant and without ill-will towards the person whose death is caused. In the light of the fact that the positive case set up the defence has been rejected by the trial court, the High Court as well as by us, the question of any good faith does not arise. On the contrary, we are of the opinion that the Appellants had fired without provocation at the Esteem Car killing two innocent persons and injuring one. As already mentioned above, the obligation to prove an exception is on the preponderance of probabilities but it nevertheless lies on the defence. Even on this touchstone the defence cannot succeed. It is true that the High Court has acquitted the Appellants of planting the 7.65 mm bore pistol in the car. However, this acquittal has been rendered only on the ground that it was not possible to pinpoint the culprit who had done so. This can, by no stretch of imagination, be taken to mean that the story that the pistol had been planted in the car has been disbelieved by the High Court. The reliance of the defence on Mohan Singh''s case and James Martin''s Case (supra) is, therefore, irrelevant on the facts of this case. It is true that the Prosecution is bound by the evidence of its witnesses as held in Javed Masood''s case. In the present matter, however, we see that the recovery of the 7.65 mm weapon appears to be an admitted fact, but with the

rider that it had been planted to help the defence.

15. The argument that the CBI had conducted a partisan and motivated investigation, is based largely on three premises; firstly, that all the independent witnesses whose statements had been recorded u/s 161 of the Code of Criminal Procedure at the site, had not been brought in evidence, secondly, that Constables Sunil Kumar and Subhash Chand had suffered gun shot injuries but the CBI had tried to create evidence that these injuries were as a consequence of firing by their co-Appellants in that an effort had been made to show that the bullet recovered from the ashes of Jagjit Singh after his cremation had been fired from the weapon carried by Head Constable Mahavir Singh, thirdly, that Dr. V. Tandon who had extracted the bullet from the hand of Constable Sunil Kumar, had not been even cited as a witness.

16. As against this, the learned ASG has pointed out that it was not necessary to produce every person whose statement had been recorded u/s 161 and as the incident was admitted by the defence, though a counter version had been pleaded, the Court was called upon to decide which of the two versions was correct, and in this background all witnesses who were material had been examined. It has further been pointed out that the bullet which had allegedly been recovered from the ashes of Jagjit Singh, had been handed over to Sub-Inspector Ram Dutt of the Haryana Police who in turn had handed it over to the investigating officer of the CBI and as such, the CBI had nothing to do with that recovery.

17. It is true that all witnesses have not been examined but we find that in the circumstances this was not necessary. It will also be seen that as per the prosecution story, Appellants Sunil Kumar and Subhash Chand, had been caused injuries by shots fired from the weapons of Head Constable Tej Pal Singh and Constable Kothari Ram Appellants. As per the report of the CFSL Ex.P/37F, the bullet recovered from the person of Constable Sunil Kumar had been fired from the .380 revolver of Head Constable Tej Pal Singh and as per the evidence of PW-37 Roop Singh, the possibility that the metallic bullet which was embedded on the person of Constable Subhash Chand Appellant could be the steel core portion of a shattered 7.62 mm bullet of the weapon of Constable Kothari Ram. Much argument has, however, been made by the learned defence counsel on the evidence of PW-37 Roop Singh wherein some doubt has been expressed as to the identity of the bullet allegedly recovered from the hand of Constable Sunil Kumar. He stated in his examination-in-chief that he had received parcel No. 12 along with a covering letter dated 7th April, 1997 referring to the bullet recovered from Sunil Kumar''s hand. He further stated that he had opened the parcel and had found one .380 calibre bullet and no other object therein and that he had re-sealed the bullet in the parcel. It appears from the evidence of PW-37 that parcel No. 12 was again opened in Court and at that stage it was found to contain not only a .380 calibre bullet but also one fired 7.65 mm bullet. The witness, however, stated that when the parcel had been received by him in the Ballistics Department from the Biology Department of the Laboratory, the 7.65 mm bullet had not been in it. A pointed question was thereafter put to him as to how he could

explain the presence of the 7.65 mm bullet in parcel No. 12. In answer to this question, he stated as under:

When this parcel was opened on the earlier hearing and at that time after .380 bullet was exhibited the other bullet i.e. 7.65 mm (Ex.PW37/24) was found lying on the table, and so in these circumstances the said 7.65 mm bullet was exhibited.

18. Taken aback by this unforeseen development, the prosecution filed an application dated 4th December 1999 for clarification. A reply thereto was filed by the defence on the 4th of January 2000. On re-examination, the witness suggested that the 7.65 mm bullet had been mixed up with the .380 bullet by some Advocate when the parcel had been opened in Court on an earlier date during court proceedings. In the light of the fact that the trial court and the High Court have already held (and also held by us) that no shot had been fired from inside the car from the 7.65 mm pistol, the possibility of a 7.65 mm bullet being in the parcel becomes suspect and it appears that some mischief was being played out. We must also notice that we are dealing with Appellants who are all police officials and the trial court has clearly hinted that there appeared to be some connivance between the Appellants and the investigation. In any case, the creation of some confusion vis-`-vis the bullets, is a matter which would undoubtedly help the defence and a presumption can thus be raised that this had been stage managed by the defence. This aspect too cannot be ignored. The argument raised by the learned Counsel for the Appellants, therefore, that the application filed for clarification had been withdrawn as the prosecution was shying away from the truth is not sustainable as this had happened in the light of the clarification given by PW-37 Roop Singh. Nothing ominous or sinister can be read into this.

19. The learned Counsel has also challenged the recovery of the bullet from the ashes of Jagjit Singh. This submission is based on the evidence of PW-8 Didar Singh, the elder brother of Jagjit Singh and PW-49 ASI Ram Dutt to whom the bullet had been handed over by Didar Singh and the statements of Dr. G.K. Sharma and PW-24 Yashoda Rani who had X-rayed the dead body and found no image of a bullet therein. It has accordingly been argued that this too was the brainchild of the CBI and a crude attempt to inculpate Constable Mahavir Singh. The trial court had accepted the prosecution story that this spent bullet had been recovered from the ashes of Jagjit Singh. This part of the prosecution story has, however, been rejected by the High Court by observing that the trial court had ignored the evidence on this score as Didar Singh PW-8 had nowhere stated that he had picked up of a bullet from the ashes and handed it over to Sub-Inspector Ram Dutt and more particularly as the two doctors who had X-rayed the dead body had found no trace of a bullet. We endorse this finding of the High Court in the light of the uncertain evidence on this score but to allege that the CBI officials had a hand in planting the bullet, is unwarranted. It will be seen from the evidence of PW-49 Ram Dutt that Jagjit Singh had been cremated on the 2nd of April 1999 and the bullet had been recovered the next day when the ashes were being collected and had been handed over to him the same day and that it had thereafter been sealed and deposited in the

Malkhana. The CBI, at this stage, had nothing to do with the recovery of the bullet as PW-72 Inspector Sumit Kumar of the CBI had taken it into possession duly sealed vide Memo Ex. PW49/A dated 11th April, 1999. It is also relevant that the weapon bearing Butt No. 518 carried by Head Constable Mahavir Singh had been seized by the Delhi Police on the 1st April 1997 itself and the CBI did not have access to it which could have enabled it to create any false evidence on this score. We must also recall that the police party comprised 15 personnel. Only 10 who played an active role had been prosecuted. This background points to a fair investigation. We are, therefore, of the opinion that no fault whatsoever can be found in the investigation made by the CBI.

20. The primary argument, however, of the Appellants that even assuming the prosecution story to be the correct, there was no common intention on the part of the Appellants to commit murder, must now be examined. Highlighting the role attributed to the two Appellants ACP Rathi and Inspector Anil Kumar, it has been submitted that ACP Rathi had not fired at the car and was in fact sitting 20 meters away from the firing site. Mr. Lalit, appearing for Inspector Anil Kumar, has also supported this argument and submitted that Inspector Anil Kumar too had not fired at the car and the only role attributed to him was a knock at Jagjit Singh''s window calling upon him to step out but instead of doing so he had fired back leading to a nasty shoot out.

21. It has, accordingly, been submitted by the learned Counsel that the finding of the High Court that all the Appellants were guilty u/s 302/34 etc. was wrong.

22. The learned ASG has, however, submitted that the question as to whether Section 34 of the IPC would apply would depend upon the facts of the case and for this reason, the sequence of events preceding the incident, the actual incident itself, and post facto the incident, would have to be taken into account.

23. We have considered the arguments of the learned Counsel very carefully. It bears reiteration that the trial court had convicted all the Appellants on the primary charge u/s 302 read with Section 120B of the IPC, but the High Court has acquitted them under that provision and convicted them u/s 302/34 etc. of the IPC instead. This aspect would have to be examined in the background of the defence story that had been projected and as the entire police operation had been conducted in a secret manner as no outsider had any access to what is going on in the matter relating to Mohd. Yaseen. Admittedly, the target was Mohd. Yaseen, concededly a notorious criminal with a bounty on his head, as he had been involved in a large number of very serious criminal matters. The incident happened on account of a mistake as to the identity of Jagjit Singh who could pass off as a Muslim and it is nobody''s case that the police party had intended to eliminate Jagjit Singh and his friends. The courts below have been very clear on this score and have observed that keeping in mind the background in which the incident happened, that it was not the outcome of an act in self defence but was pursuant to the common intention to kill Mohd. Yaseen. The possibility of a hefty cash reward and accelerated promotion acted as a catalyst and spurred the police party to rash and hasty action. As to the role of ACP

Rathi and Inspector Anil Kumar, the High Court has found that it was Rathi who was the leader of the police party in his capacity as the ACP and therefore, it was not necessary for him to be in the forefront of the attack on the Esteem car and Inspector Anil Kumar who had admittedly knocked at the window could be treated likewise as being the next officer in the hierarchy. We have seen the site plan and notice that ACP Rathi was sitting in his Gypsy about 15 meters away from the car when the incident happened. It has come in evidence that when Inspector Anil Kumar had conveyed the fact of Jagjit Singh''s and Tarunpreet Singh''s presence at the Mother Dairy Booth at Patparganj, the ACP had got together a police party of heavily armed officers, briefed them, and they had thereafter moved on to Connaught Place. It has been found as a matter of fact that when Inspector Anil Kumar had followed the Car to the Dena Bank, Jagjit Singh had been left behind in the car alone for quite some time but Inspector Anil Kumar and his two associates had made absolutely no attempt to apprehend him at that stage or to counter check his identity as the Inspector had Mohd. Yaseen''s photograph with him. Even more significantly the Inspector made no attempt to identity Pradeep Goyal or Tarunpreet Singh whatsoever, although admittedly he was in close wireless contact with ACP Rathi. This is the pre-incident conduct which is relevant. The facts as brought reveal a startling state of affairs during the incident. It is the case of the defence that the car had been surrounded to immobilize the inmates and to prevent them from escaping and that it was with this intention that Inspector Anil Kumar had knocked on the driver''s window asking the inmates to get out but he had been answered by firing from inside the car. This plea cannot be accepted for the reason that the defence has already been rejected by us. Moreover PW-37 testified that there were no bullet marks on the tyres and they remained intact even after the incident, despite 34 shots being fired at the car, and 29 bullet holes, most of them of entry, thereon. On the other hand, the Appellants presupposed that one of the inmates was Mohd. Yaseen, the wanted criminal and that the firing was so insensitive and indiscriminate that some of the shots had hit Constables Subhash Chand and Sunil Kumar. The post-facto conduct of the Appellants is again relevant. Inspector Anil Kumar gave a report on the 1st April 1997 immediately after the incident, which was followed by a report by ACP Rathi the next day giving the counter version. This has been found by us to be completely untenable. The High Court was, therefore, justified in holding that in the light of the above facts, it was not necessary to assign a specific role to each individual Appellant as the firing at the Car was undoubtedly with a clear intent to annihilate those in it and was resorted to in furtherance of the common intention of all the Appellants. In Abdul Sayeed Versus State of M.P. 2010 (10) SCC 259, it has been held as under:

49. 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 the offence. The phrase "common intention" implies a prearranged plan and acting in concert pursuant to the plan. Thus, the common intention must be there prior to the commission of the offence in point of time. The common intention to bring about a particular result may also well develop on

the spot as between a number of persons, with reference to the facts of the case and circumstances existing thereto. The common intention u/s 34 IPC is to be understood in a different sense from the "same intention" or "similar intention" or "common object". The persons having similar intention which is not the result of the prearranged plan cannot be held guilty of the criminal act with the aid of Section 34 IPC. (See Mohan Singh v. State of Punjab.)

50. The establishment of an overt act is not a requirement of law to allow Section 34 to operate inasmuch this section gets attracted when a criminal act is done by several persons in furtherance of the common intention of all. What has, therefore, to be established by the prosecution is that all the persons concerned had shared a common intention. (Vide Krishnan v. State of Kerala and Harbans Kaur v. State of Haryana".)

24. In conclusion, we must hold that the Appellants were liable to conviction under Sections 302/34 etc. of the IPC.

25. We now come to Mr. Sharan''s connected argument with regard to the deemed acquittal theory of the Appellants for the offence under Sections 302, 307 read with Section 34 of the IPC by the trial court. At this stage, we may recall that the trial court had framed a charge u/s 302/307 read with Section 120B of the IPC and an alternative charge u/s 302/307 read with Section 34 of the IPC but without opining on the alternative charge, had convicted the Appellants for the offence u/s 302/307 read with Section 120B of the IPC. It has accordingly been contended that as the Appellants had been deemed to have been acquitted of the charge of having the common intention of committing the murders and there was no appeal by the State against the deemed acquittal against under that charge, it was not open to the High Court to alter or modify the conviction. The learned ASG has, however, pointed out that a contrary view had been expressed earlier in Lakhjit Singh''s case (supra) and as a consequence of this apparent discordance, the matter had been referred to a Bench of three Judges in Dalbir Singh''s case (supra) which had over ruled the judgment in Sangaraboina Sreenu''s case (supra) and by implication over-ruled Lokendra Singh''s case (supra) as well. He has further highlighted that the judgment in Dalbir Singh''s case (supra) had been followed in Dinesh Seth''s case (supra) but both these cases had not even been alluded to in Bimla Devi''s case (supra). He has accordingly pointed out that the very basis of Mr. Sharan''s argument on the theory of deemed acquittal was lacking.

26. We have considered the arguments of the learned Counsel very carefully. We must, at the outset, emphasize that the judgments referred to above and cited by Mr. Sharan are largely on the basis that a charge for the offence of which the Appellants had ultimately been acquitted, had not been framed and therefore, it was not possible to convict an accused in the absence of a charge. For example, in Sangaraboina Sreenu''s case (supra) a judgment rendered in two paragraphs, this Court held that only a charge u/s 302 had been framed against the accused, therefore, he could not be convicted u/s 306 of the IPC although the Court noticed that the offence u/s 306 was a comparatively

minor offence, within the meaning of Section 220 of the Code of Criminal Procedure It was also noticed that the basic constituent of an offence u/s 302 was homicide whereas the offence u/s 306 was suicidal death and abetment thereof. This judgment was followed in Lokendra Singh''s case (supra) wherein a similar situation existed. It appears, however, that both these judgments had over looked the judgment in Lakhjit Singh''s case (supra) as in this case a Division Bench of this Court had held that a conviction u/s 306 of the IPC could be recorded though a charge u/s 302 had been framed. In arriving at this conclusion, the Bench observed that the accused were on notice as to the allegations which would attract Section 306 of the IPC and as this section was a comparatively minor offence, conviction thereunder could be recorded. On account of this apparent discordance of opinion over the issue involved, the matter was referred to a Bench of three Judges in Dalbir Singh''s case (supra). By this judgment, the opinion rendered in Sangarabonia Sreenu''s case (supra) was over-ruled, as not being correctly decided. Ipso facto, we must assume that the decision in Lokender Singh''s case (supra) must also be read as not correctly decided. The judgment in Dalbir Singh''s (supra) has subsequently been followed in Dinesh Seth''s case (supra). We must, therefore, record that the judgment rendered in Bimla Devi''s case (supra) which does not take into account the last two cited cases, must be held to be per incuriam. Kishan Singh''s and Lakhan Mahto''s cases (supra) were cases where no charge had been framed for the offences under which the accused could be convicted whereas Thadi Narayana''s case was on its own peculiar facts.

27. We find the situation herein to be quite different. We must notice that the charges had indeed been framed in the alternative and for cognate offences having similar ingredients as to the main allegation of murder. Section 386 of the Code of Criminal Procedure refers to the power of the appellate court and the provision in so far relevant for our purpose is Sub-clause (b) (ii) which empowers the appellate court to alter the finding while maintaining the sentence. It is significant that Section 120B of the IPC is an offence and positive evidence on this score has to be produced for a successful prosecution whereas Section 34 does not constitute an offence and is only a rule of evidence and inferences on the evidence can be drawn, as held by this Court in Lachhman Singh & Ors. vs. The State AIR 1952 SC 167 We are, therefore, of the opinion that the question of deemed acquittal in such a case where the substantive charge remains the same and a charge u/s 302/120B and an alternative charge u/s 302/34 of the IPC had been framed, there was nothing remiss in the High Court in modifying the conviction to one u/s 302/307/34 of the IPC. It is also self evident that the accused were aware of all the circumstances against them. We must, therefore, reject Mr. Sharan''s argument with regard to the deemed acquittal in the circumstances of the case.

28. The learned Counsel for the Appellants have also argued on the failure of the court in putting all relevant questions to them when their statements u/s 313 of the Code of Criminal Procedure had been recorded. Mr. Sharan has also given us a list of 15 questions which ought to have been put to the ACP as they represented the crux of the

prosecution story. It has been submitted that on account of this neglect on the part of the court the Appellants had suffered deep prejudice in formulating their defence. Reliance has been placed on Hate Singh Bhagat Singh, Vikramjit Singh and Ranvir Yadav"s cases (supra). It has however been pointed out by the learned ASG that the 15 questions referred to were largely inferences drawn by the courts and relatable to the evidence on record, and the inferences were not required to be put to an accused. He has further submitted even assuming that there had been some omission that by itself would not a fortiori result in the exclusion of evidence from consideration but it had to be shown further by the defence that prejudice had been suffered by the accused on that account inasmuch that they could claim that they did not have notice of the allegations against them. In this connection, the learned ASG has placed reliance on Shivaji Sahebrao Bobde vs. State of Maharashtra AIR 1973 SC 2622 and Santosh Kumar Singh and Shobit Chamar"s cases (supra).

29. Undoubtedly, the importance of a statement u/s 313 of the Code of Criminal Procedure in so far as the accused is concerned, can hardly be minimized. This statutory provision is based on the rules of natural justice for an accused must be made aware of the circumstances being put against him so that he can give a proper explanation and to meet that case. In Hate Singh"s case (supra) it was observed that:

the statements of an accused person recorded under Ss.208,209 and 342 are among the most important matters to be considered at a trial. It has to be remembered that in this country an accused person is not allowed to enter the box and speak on oath in his own defence. This may operate for the protection of the accused in some cases but experience elsewhere has shown that it can also be a powerful and impressive weapon of defence in the hands of an innocent man. The statements of the accused recorded by the Committing Magistrate and the Sessions Judge are intended in Indian to take the place of what in England and in America he would be free to state in his own way in the witness-box. They have to be received in evidence and treated as evidence and be duly considered at the trial.

This means that they must be treated like any other piece of evidence coming from the mouth of a witness and matters in favour of the accused must be viewed with as much deference and given as much weigh as matters which tell against him. Nay more. Because of the presumption of innocence in his favour even when he is not in a position to prove the truth of his story, his version should be accepted if it is reasonable and accords with probabilities unless the prosecution can prove beyond reasonable doubt that it is false. We feel that this fundamental approach has been ignored in this case.

30. It must be highlighted that the judgment in this case was rendered in the background that in the absence of any provision in law to enable an accused to give his part of the story in court, the statement u/s 342 (now 313) was of the utmost important. The aforesaid observations have now been somewhat whittled down in the light of the fact that Section 315 of the Code of Criminal Procedure now makes an accused a competent

witness in his defence. In Vikramjit Singh''s case (supra), this Court again dwelt on the importance of the 313 statement but we see from the judgment that it was primarily based on an overall appreciation of the evidence and the acquittal was not confined only to the fact that the statement of the accused had been defectively recorded. In Ranvir Yadav''s case (supra) this Court has undoubtedly observed that even after the incorporation of Section 315 in the Code of Criminal Procedure, the position remains the same, (in so far as the statements u/s 313 are concerned) but we find that the judgment was one of acquittal by the Trial Court and a reversal by the High Court and this was a factor which had weighed with this Court while rendering its judgment. In any case the latest position in law appears to be that prejudice must be shown by an accused before it can be held that he was entitled to acquittal over a defective and perfunctory statement u/s 313. In Shivaji''s case (supra), a judgment rendered by three Hon''ble Judges, it has been observed in paragraph 16 as under:

It is trite law, nevertheless fundamental, that the prisoner''s attention should be drawn to every inculpatory material so as to enable him to explain it. This is the basic fairness of a criminal trial and failures in this area may gravely imperil the validity of the trial itself, if consequential miscarriage of justice has flowed. However, where such an omission has occurred it does not ipso facto vitiate the proceedings and prejudice occasioned by such defect must be established by the accused. In the event of an evidentiary material not being put to the accused, the court must ordinarily eschew such material from consideration. It is also open to the appellate court to call upon the counsel for the accused to show what explanation the accused has as regards the circumstances established against him but not put to him and if the accused is unable to offer the appellate court any plausible or reasonable explanation of such circumstances, the court may assume that no acceptable answer exists and that even if the accused had been questioned at the proper time in the trial court he would not have been able to furnish any good ground to get out of the circumstances on which the trial court had relied for its conviction. In such a case, the court proceeds on the footing that though a grave irregularity has occurred as regards compliance with Section 342, Code of Criminal Procedure, the omission has not been shown to have caused prejudice to the accused.

31. The judgment in Santosh Kumar Singh''s case (supra) is to the same effect and is based on a large number of judgments of this Court.

32. It is clear from the record herein that the Appellants, all police officers, had been represented by a battery of extremely competent counsel and in the course of the evidence, the entire prosecution story with regard to the circumstances including those of conspiracy and common intention had been brought out and the witnesses had been subjected to gruelling and detailed cross-examinations. It also bears reiteration that the incident has been admitted, although the defence has sought to say that it happened in different circumstances. It is also signally important that all the accused had filed their detailed written statements in the matter. All these facts become even more significant in the background that no objection had been raised with regard to the defective 313

statements in the trial court. In Shobhit Chamar''s case (supra) this Court observed:

We have perused all these reported decisions relied upon by the learned advocates for the parties and we see no hesitation in concluding that the challenge to the conviction based on non-compliance of Section 313 Code of Criminal Procedure first time in this appeal cannot be entertained unless the Appellants demonstrate that the prejudice has been caused to them. In the present case, as indicated earlier, the prosecution strongly relied upon the ocular evidence of the eye witnesses and relevant questions with reference to this evidence were put to the Appellants. If the evidence of these witnesses is found acceptable, the conviction can be sustained unless it is shown by the Appellants that a prejudice has been caused to them. No such prejudice was demonstrated before us and, therefore, we are unable to accept the contention raised on behalf of the Appellants.

33. These observations proceed on the principle that if an objection as to the 313 statement is taken at the earliest stage, the court can make good the defect and record an additional statement as that would be in the interest of all but if the matter is allowed to linger on and the objections are taken belatedly it would be a difficult situation for the prosecution as well as the accused. In the case before us, as already indicated, the objection as to the defective 313 statements had not been raised in the trial court. We must assume therefore that no prejudice had been felt by the Appellants even assuming that some incriminating circumstances in the prosecution story had been left out. We also accept that most of the 15 questions that have been put before us by Mr. Sharan, are inferences drawn by the trial court on the evidence. The challenge on this aspect made by the learned Counsel for the Appellants, is also repelled.

34. Mr. Sharan has also referred us to Section 140 of the Delhi Police Act, 1978 to contend that as the cognizance in the present matter had been taken more than three months from the date of the incident, the prosecution itself was barred. Elaborating on this aspect, the learned Counsel has submitted that the incident had happened on the 31st March 1997 and an incomplete charge-sheet had been filed within three months i.e. on the 13th June 1997 but cognizance in the matter had admittedly been taken beyond three months i.e. on the 10th July 1997. The learned Counsel has, in support of this plea, relied on the judgment in Jamuna Singh and Prof. Sumer Chand''s case (supra) to argue that the provisions of Section 140 of the Delhi Police Act had to be strictly applied, more particularly where the act complained of had been done in the discharge of official duty. The learned ASG has, however, submitted that the provisions of Section 140 of Delhi Police Act would be applicable only to offences referred to in the Act itself and found largely in Section 80 onwards and not to cases where the offence was linked to any other penal provision and that in any case the police official involved had to show that the action taken by him had been taken under colour of duty. The learned Counsel has in this connection relied on N. Venugopal, Narhar Rao, Atma Ram, Bhanuprasad Hariprasad Dave and on Professor Sumer Chand''s cases (supra).

35. Before we examine the merits of this submission, we need to see what the High Court has held on this aspect. The High court has observed that an incomplete charge- sheet had been filed within time inasmuch that the statements of the witnesses recorded u/s 161 of the Code of Criminal Procedure had not been appended therewith and we quote:

and the prosecuting agency had, therefore, taken adequate care in filing the charge-sheet well within time and could not, thus, have anticipated that the Court of the learned Chief Metropolitan Magistrate would have its own problems in taking immediate cognizance of the offences on the charge-sheet within three months from the date of commission of the crimes, it could not have applied for a sanction for prosecution u/s 140 of the Act as it was not at all required in that situation. If the Court of learned Chief Metropolitan Magistrate had difficulty in taking cognizance of the offences for absence of the copies of statements u/s 161 Code of Criminal Procedure, it could have very well posted the case for a shorter date before expiry of three months and could have required the CBI to make available the copies of required material for taking cognizance of the offences. We are unable to find from the proceedings recorded by the learned Chief Metropolitan Magistrate the reason as to why instead of requiring the CBI to produce the copies of required material within a day or two, such a longer date was fixed for according consideration for taking cognizance of the offences. Whatever be the reason for delay in taking cognizance of the offences in the facts and circumstances of the case, we are unable to accept the plea that any sanction u/s 140 of the Delhi Police Act was required to sustain the prosecution against the Appellants, particularly when the charge-sheet had been filed in the Court well before the expiry of three months'' period.

36. We are, however, not called upon to go into the correctness or otherwise of the observations of the High Court, as we intend giving our own opinion on this score.

37. Sub-section (1) of Section 140 is reproduced below:

Bar to suits and prosecutions.- (1) In any case of alleged offence by a police officer or other person, or of a wrong alleged to have been done by such police officer or other person, by any act done under colour of duty or authority or in excess of any such duty or authority, or wherein it shall appear to the court that the offence or wrong if committed or done was of the character aforesaid, the prosecution or suit shall not be entertained and if entertained shall be dismissed if it is instituted, more than three months after the date of the act complained of.

Provided that any such prosecution against a police officer or other person may be entertained by the court, if instituted with the previous sanction of the Administrator, within one year from the date of the offence.

(2) ....

(3) ....

38. This Section postulates that in order to take the shelter of the period of three months referred to therein the act done, or the wrong alleged to have been done by the police officer should be done under the colour of duty or authority or in excess of such duty or authority or was of the character aforesaid, and in no other case. It must, therefore, be seen as to whether the act of the Appellants could be said to be under the colour of duty and therefore, covered by Section 140 ibidem.

39. At the very outset, it must be made clear from the judgment of this Court in Jamuna Singh''s case (supra) that the date of cognizance taken by a Magistrate would be the date for the institution of the criminal proceedings in a matter. The facts given above show that the cognizance had been taken by the Magistrate beyond three months from the date of incident. The larger question, however, still arises as to whether the shelter of Section 140 of the Delhi Police Act could be claimed, in the facts of this case. We must, at the outset, reject the learned ASG''s argument that Section 140 would be available to police officials only with respect to offences under the Delhi Police Act and not to other penal provisions, in the light of the judgment in Professor Sumer Chand''s case (supra) which has been rendered after comparing the provisions of the Police Act, 1861 and Section 140 of the Delhi Police Act, 1978 and it has been held that the benefit of the latter provision would be available qua all penal statutes.

40. The expression `colour of duty'' must now be examined in the facts of this case. In Venugopal''s case (supra), this Court held as under:

It is easy to see that if the act complained of is wholly justified by law, it would not amount to an offence at all in view of the provisions of Section 79 of the Indian Penal Code. Many cases may however arise wherein acting under the provisions of the Police Act or other law conferring powers on the police the police officer or some other person may go beyond what is strictly justified in law. Though Section 79 of the Indian Penal Code will have no application to such cases, Section 53 of the Police Act will apply. But Section 53 applies to only a limited class of persons. So, it becomes the task of the Court, whenever any question whether this section applies or not arises to bestow particular care on its decision. In doing this it has to ascertain first what act is complained of and then to examine if there is any provision of the Police Act or other law conferring powers on the police under which it may be said to have been done or intended to be done. The Court has to remember in this connection that an act is not ''under'' a provision of law merely because the point of time at which it is done coincides with the point of time when some act is done in the exercise of the powers granted by the provision or in performance of the duty imposed by it. To be able to say that an act is done ''under'' a provision of law, one must discover the existence of a reasonable relationship between the provisions and the act. In the absence of such a relation the act cannot be said to be done ''under'' the particular provision of law.

41. This judgment was followed in Narhar Rao''s case (supra). This Court, while dealing with the question as to whether the acceptance of a bribe by a police official with the

object of weakening the prosecution case could be said under to be under `colour of duty'' or in excess of his duty, observed as under:

But unless there is a reasonable connection between the act complained of and the powers and duties of the office, it cannot be said that the act was done by the accused officer under the colour of his office. Applying this test to the present case, we are of the opinion that the alleged acceptance of bribe by the Respondent was not an act which could be said to have been done under the colour of his office or done in excess of his duty or authority within the meaning of Section 161(1) of the Bombay Police Act. It follows, therefore, that the High Court was in error in holding that the prosecution of the Respondent was barred because of the period of limitation prescribed u/s 161(1) of the Bombay Police Act. The view that we have expressed is borne out by the decision of this Court in State of Andhra Pradesh vs. N.Venugopal, AIR 1964 SC 33 , in which the Court had construed the language of a similar provision of Section 53 of the Madras District Police Act (Act 24 of 1859). It was pointed out in that case that the effect of Section 53 of that Act was that all prosecutions whether against a police officer or a person other than a police officer (i.e. a member of the Madras Fire Service, above the rank of a fireman acting u/s 42 of the Act) must be commenced within three months after the act complained of, if the act is one which has been done or intended to be done under any of the provisions of the Police Act. In that case, the accused police officers were charged under Ss.348 and 331 of the Indian Penal Code for wrongly confining a suspect Arige Ramanua in the course of investigation ad causing him injuries. The accused were convicted by the Sessions Judge under Ss.348 and 331 of the Indian Penal Code but in appeal the Andhra Pradesh High Court held that the bar u/s 53 of the Police Act applied and the accused were entitled to an acquittal. It was, however, held by this Court that the prosecution was not barred u/s 53 of the Police Act, for it cannot be said that the acts of beating a person suspected of a crime or confining him or sending him away in an injured condition by the police at a time when they were engaged in investigation are acts done or intended to be done under the provisions of the Madras District Police Act or Code of Criminal Procedure or any other law conferring powers on the police. The appeal was accordingly allowed by this Court and the acquittal of the Respondent set aside.

42. Both these judgments were followed in Atma Ram''s case (supra) where the question was as to whether the action of a Police Officer in beating and confining a person suspected of having stolen goods in his possession could be said to be under colour of duty. It was held as under:

The provisions of Ss.161 and 163 of the Code of Criminal Procedure emphasize the fact that a police officer is prohibited from beating or confining persons with a view to induce them to make statements. In view of the statutory prohibition it cannot, possibly, be said that the acts, complained of, in this case, are acts done by the Respondents under the colour of their duty or authority. In our opinion, there is no connection, in this case between the acts complained of and the office of the Respondents and the duties and obligations imposed on them by law. On the other hand, the alleged acts fall completely

outside the scope of the duties of the Respondents and they are not entitled, therefore, to the mantle of protection conferred by Section 161 (1) of the Bombay Police Act.

43. Similar views have been expressed in Bhanuprasad Hariprasad Dave''s case (supra) wherein the allegations against the police officer was of taking advantage of his position and attempting to coerce a person to give him a bribe. The plea of colour of duty was negatived by this Court and it was observed as under:

All that can be said in the present case is that the first Appellant a police officer, taking advantage of his position as a police officer and availing himself of the opportunity afforded by the letter Madhukanta handed over to him, coerced Ramanlal to pay illegal gratification to him. This cannot be said to have been done under colour of duty. The charge against the second Appellant is that he aided the first Appellant in his illegal activity.

44. These judgments have been considered by this Court in Professor Sumer Chand''s case (supra) which has been relied upon by both sides. In this case, Professor Sumer Chand and several others were brought to trial initiated on a first information report but were acquitted by the trial court. Professor Sumer Chand thereupon filed a suit against the Investigating officer and other police officials for malicious prosecution claiming Rs. 3 Lacs as damages. This Court held that the prosecution had been initiated on the basis of a First Information Report and it was the duty of a Police Officer to investigate the matter and to file a charge-sheet, if necessary, and that there was a discernible connection between the act complained of by the Appellant and the powers and duties of the Police Officer. This Court endorsed the opinion of the High Court that the act of the Police Officer complained of fell within the description of `colour of duty''.

45. In the light of the facts that have been found by us above, it cannot, by any stretch of imagination, be claimed by anybody that a case of murder would fall within the expression `colour of duty''. We find absolutely no connection between the act of the Appellants and the allegations against them. Section 140 of the Delhi Police Act would, therefore, have absolutely no relevance in this case and Mr. Sharan''s argument based thereon must, therefore, be repelled.

46. The learned Counsel has also raised an argument that the sanction u/s 197 of the Code of Criminal Procedure had been mechanically given and did not indicate any application of mind on the part of the Lt. Governor. It has accordingly been prayed that the entire prosecution was vitiated on this score. Reliance has been placed by Mr. Sharan for this argument on Ameerjan''s case (supra). This argument has been controverted by the learned ASG who has pointed out that a bare reading of the sanction order as well as the evidence of PW-48 C.B. Verma, the concerned Deputy Secretary in the Delhi Government who had forwarded the file to the Lt. Governor, revealed that all material relevant for according the sanction had been given to the Lt. Governor. The learned ASG has placed reliance on S.B. Saha''s case (supra) as well as on Ameerjan''s case

above-referred.

47. We have considered this argument very carefully in the light of the evidence on record. We first go to the evidence of PW-48 C.B. Verma. He deposed that a request had been received from the CBI for according sanction for the prosecution of the Appellants along with the investigation report and a draft of the sanction order. He further stated that on receipt of the aforesaid documents the matter had been referred first to the Law Department of the Delhi Administration and then forwarded to the Home Department and then to the Chief Secretary and finally, the entire file had been put up before the Lt. Governor who had granted the sanction for the prosecution of the ten officials. It is true that certain other material which was not yet available with the CBI at that stage could not obviously have been forwarded to the Lt. Governor, but we see from the various documents on record that even on the documents, as laid, adequate material for the sanction was available to the Lt. Governor. We have perused the sanction order dated 10th of October 2001 and we find it to be extremely comprehensive as all the facts and circumstances of the case had been spelt out in the 16 pages that the sanction order runs into. In Ameerjan''s case (supra) which was a prosecution under the Prevention of Corruption Act (and sanction u/s 19 thereof was called for), this Court observed that though the sanction order could not be construed in a pedantic manner but the purpose for which such an order was required had to be borne in mind and ordinarily the sanctioning authority was the best person to judge as to whether the public servant should receive the protection of Section 19 or not and for that purpose the entire record containing the materials collected against an accused should be placed before the sanctioning authority and in the event that the order of sanction did not indicate a proper application of mind as to the materials placed before the sanctioning authority, the same could be produced even before the Court. Admittedly, in the present case only the investigation report and the draft sanction order had been put before the Lt. Governor but we find from a reading of the former that it refers to the entire evidence collected in the matter, leaving the Lt. Governor with no option but to grant sanction. In S.B. Saha''s case (supra), this Court was dealing primarily with the question as to whether sanction u/s 197 of the Code of Criminal Procedure was required where a Customs Officer had misappropriated the goods that he had seized and put them to his own use. While dealing with this submission, it was also observed as under:

Thus, the material brought on the record up to the stage when the question of want of sanction was raised by the Appellants, contained a clear allegation against the Appellants about the commission of an offence u/s 409, Indian Penal Code. To elaborate, it was substantially alleged that the Appellants had seized the goods and were holding them in trust in the discharge of their official duty, for being dealt with or disposed of in accordance with law, but in dishonest breach of that trust, they criminally misappropriated or converted those goods. Whether this allegation or charge is true or false, is not to be gone into at this stage. In considering the question whether sanction for prosecution was or was not necessary, these criminal acts attributed to the accused are to be taken as

alleged.

48. As already indicated above, the Lt. Governor had enough relevant material before him when he had accorded sanction on the 10th October 2001.

49. We now come to the other appeals in which some additional arguments have been raised. In Criminal Appeal No. 2476/2009 of Head Constable Mahavir Singh, Mr. Lalit has argued that 15 persons in all had constituted the police party and 10 persons had been sent up for trial including ACP Rathi and Inspector Anil Kumar and five others, three of them armed who had not fired any shot, and two other who had not been armed, had not been prosecuted and as Head Constable Mahavir Singh had also not fired at the car, his case fell amongst the five and he was, therefore, entitled to be treated in a like manner. In addition, it has been submitted that Head Constable Mahavir Singh did not share the common intention with the other nine accused. Mr. Lalit has also referred us to question No. 53 put to the Head Constable by which the circumstances pertaining to the actual incident had been put to him and he had answered as under:

I was behind the entire team. Then the team was left with no option but to return fire in self defence and to save members of the public as a large crowd had started gathering suddenly on hearing the faring from inside the car. Some members of our team returned fire. As I was behind and a little away from the car, I held back my fire. But on seeing a crowd gathering and to prevent the members of general public from coming close to the car, I fired one shot in the air. In the meanwhile I heard Constable Subhash Chand scream that he had been hurt. Then the firing was ordered to be stopped. Within moments a PCR Gypsy also arrived. Then the efforts were made to take the injured out and send them to hospital. In the meanwhile press photographers, police of the PS C.P. and Sr. officers also arrived.

50. He has found support for his arguments from the Panchnama Ex. B-67/2 prepared by P. Kailasham, Executive Engineer, CBI on the 11th April, 1997 on the observations of three Shri Ohri, DSP and Sri Sree Deep. It has accordingly been argued by Mr. Lalit that the defence taken by Head Constable Mahavir Singh that he had fired to keep the crowd away was clear from the record and as the incident had happened in a very busy locality i.e. the outer circle of Connaught Place, a crowd had undoubtedly collected. He has further pointed out that the story that a bullet fired by Head Constable Mahavir Singh from his 7.62 mm AK-47 rifle at Jagjit Singh had been disbelieved by the High Court and the falsity of the prosecution story was, thus, clearly spelt out.

51. We have considered the arguments advanced by the learned Counsel. Admittedly, as per his own showing, Head Constable Mahavir Singh had used his service weapon and fired one shot therefrom. The prosecution story is that he had fired at the car whereas the defence is that he had fired the shot in the air to keep the crowd away. This argument is based on a clear misconception and does not take into account the normal tendency of a person at a crime scene, (more particularly where indiscriminate gun fire had been

resorted to) would be to run far and away. It appears that the crowd had collected only after the shooting had ceased. There is no evidence whatsoever to show that any crowd had collected while the firing was going on or that a single shot had been fired after the volley of 34 shots. We have also perused the large number of photographs of the site and see that the crowd that had gathered after the shooting, was perfectly disciplined and keeping a reasonable distance away from the Esteem car and the dead bodies lying around it. Admittedly also, there is absolutely no evidence with regard to the defence taken by Constable Mahavir Singh. An effort could have been made by the defence to elicit some information about the behaviour of the crowd from the policemen and the Statesman employees who had appeared as prosecution witnesses. Not a single question was, however, put to them on this aspect. We are therefore of the opinion that the story projected by him in his 313 statement is not supported by any evidence whatsoever. His case, therefore, cannot be distinguished from the other seven accused who had admittedly fired at the car.

52. We have already dealt with Mr. Balasubramaniam''s arguments in the case of Inspector Anil Kumar who has filed Criminal Appeal No. 2484/2009 while dealing with the question of common intention and the self-defence claimed by the Appellant. No further discussion is, therefore, required in this appeal.

53. We finally take up Criminal Appeal Nos. 2477-2483 of 2009 in which the arguments have been made by Mr. Vineet Dhanda, Advocate. It is significant that these seven police officers had admitted firing into the vehicle but it is their case in their statements u/s 313 of the Code of Criminal Procedure as also their written statements that they had done so only on the direction of ACP Rathi, a superior officer. They have accordingly sought the benefit of Section 79 of the IPC which provided:

Act done by a person justified, or by mistake of fact believing himself justified, by law.---Nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith, believes himself to be justified by law, in doing it.

54. In the written submissions filed by Mr. Vineet Dhanda long after the judgment had been reserved and beyond the time fixed by us for the filing of the written submissions (which have nevertheless been taken on record) the stand taken is completely different and in accordance with that of Mr. Sharan and Mr. Lalit with regard to the defence claimed by the Appellants. Mr. Dhanda has also filed a large number of judgments on this aspect. These judgments had not been cited by the learned Counsel at the time of hearing. We have however gone through the judgments and find nothing different therein from the judgments cited by the other learned Counsel. We, therefore, deem it unnecessary to advert to them at this stage.

55. We have nevertheless examined the submissions with regard to Sections 76 to 79 of the IPC. We see absolutely no evidence that the firing had been resorted to by the seven

Appellants on the order of ACP Rathi as we have found that it was pursuant to the common intention of all the accused that the incident had happened. It is also relevant that the statements made by these seven Appellants are not admissible in evidence against ACP Rathi, being a co-accused, in the light of the judgment of this Court reported in Vijendrajit Ayodhya Prasad Goel vs. State of Bombay AIR 1953 SC 247 and S.P.Bhatnagar & Anr. vs. The State of Maharashtra AIR 1979 SC 826 This Court in the former case has observed that a statement u/s 342 of the Code of Criminal Procedure (now Section 313) cannot be regarded as evidence. The observations in the latter case are equally pertinent wherein it has been held that a defence taken by one accused cannot, in law, be treated as evidence against his co-accused. As already observed, Section 315 of the Code of Criminal Procedure now makes an accused a competent witness in his defence. Had the Appellants in this set of appeals chosen to come into the witness box to support their plea based on the orders of ACP Rathi, a superior officer, and claimed the benefit of Section 79 of the IPC, something could be said in their behalf but in the face of no evidence the story projected by them cannot be believed.

56. On an overall view of the evidence in the case and in the light of the arguments raised by the learned Counsel for the parties, we find no fault with the judgments of the trial court as well as the High Court. We, accordingly, dismiss all these appeals.