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***IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Reserved on : 6th September, 2016**
Date of decision : 20th December, 2016

\+ **CRL.A. No.540/2000**

NARESH KUMAR ..... Appellant
Through: Mr. S.D. Singh and
Mr. Rahul Kumar Singh,
Advs.

versus

STATE OF DELHI ..... Respondent
Through: Mr. Varun Goswami, APP
for the State

CRL.A. No.764/2000

MAHENDER KUMAR ..... Appellant
Through: Mr. Krishan Kumar,
Ms. Vidushi Sharma and
Ms. Sunita Arora , Advs.

versus

STATE OF DELHI ..... Respondent
Through: Mr. Varun Goswami, APP
for the State

CORAM:
HON'BLE MS. JUSTICE GITA MITTAL
HON'BLE MR. JUSTICE R.K. GAUBA

JUDGMENT

GITA MITTAL, J.

1. A trivial incident, one summer evening involving a few drops of water spilling over on to the *chhajja* (parapet) of a neighbour's house has resulted in fatal injuries to one person; injuries to several other persons of that family and these protracted proceedings which commenced on 14th of June, 1995 with the registration of FIR No.466/95 registered by the police under Section 302/307/308/324/147/148/149/34 of the IPC and Sections 25/54/59 of the Arms Act by the Police Station Patel Nagar. It has also led to implication of four sons (Mahender, Naresh, Kundan and Jagdish) of Ramji; one grandson Sanjay Son of Mahinder and one outsider Ajay; resulting in conviction for commission of the offence of murder and life imprisonment to two brothers Mahender and Naresh as well as conviction of Sanjay for commission of offence under Section 324 IPC. While on the other side, fatal injuries resulted to Arun, son of Mehar Chand as well as injuries to his wife Prem Devi (PW8) (a government servant); his son Anand Kumar (PW22); grandson Sanjay son of Virender(PW20) and a nephew Anil Kumar (PW7).

2. Mahender Kumar and Naresh Kumar stand convicted for commission of offences under Section 302 read with Section 34 of the Indian Penal Code by the judgment dated 31st August, 2000 passed by the learned Additional Sessions Judge in Sessions Case No. 3/97 arising out of the FIR. Pursuant to the conviction by the order dated 31st August, 2000, the trial court has sentenced the

appellants to undergo rigorous life imprisonment for commission of the offence under Section 302/34 of the IPC with a fine of ₹2,000/- each and in default of payment of fine, it is directed that they would undergo simple imprisonment for one year each.

Additionally, the appellant Mahender stands sentenced for conviction under Section 27 of the Arms Act to undergo rigorous imprisonment of three years with a fine of ₹1,000/-. In default of payment of fine, it has been directed that he shall undergo simple imprisonment for three months. The sentences imposed on the appellant Mahender Kumar have been directed to run concurrently. The two brothers have challenged their convictions and sentences by way of the present appeals. In as much as the impugned judgment arises out of a common trial, we have taken up these appeals together and are deciding them by one judgment.

3. The genesis of the matter relates to an incident which had occurred on 14th June, 1995 at 8.45 p.m. in front of the premises no. A-195, DDA Flats, New Ranjit Nagar, New Delhi between members of two families, who were neighbours. The details of the incident are found recorded in the statement (Exh.PW7/A) of Anil Kumar son of Jai Prakash (who appeared as PW 7) given by him to the police based whereon the case was registered by police station Patel Nagar.

4. In this statement, Anil Kumar had disclosed that on the fateful night of 14th June, 1995 at about 9 p.m., his cousin Arun Kumar (son of Mehar Chand) and he were sitting on two separate cots in the street in front of their houses in front of a park. Arun

was eating his dinner at that time while his sister Laxmi was washing the parapet (*chhajja*) of the second floor of the House No. A-195 when some drops of water fell on the roof of the adjacent house No. A-194 in which Naresh (son of Ramji) was residing. Because of this, Meena (‘*bahu*’-*wife of Naresh*) started hurling filthy abuses at Laxmi. Naresh also came out and started abusing as well. Arun requested him not to abuse his sister, whereupon Naresh called out to his brother and exhorted him to finish their lives (“*aaj inko jaan se hi khatam karde”).* His brother, Mahender came out wielding a knife in his right hand. Naresh caught hold of Arun Kumar while Mahender stabbed him on the chest repeatedly with the knife. Seeing this, Arun Kumar’s mother Prem Devi as well as he (Anil Kumar) tried to intervene and save him. At this, Sanjay (Mahender’s son) inflicted knife injury on Anil Kumar’s right hand and Prem Devi’s stomach. In the meantime, Sanjay (son of Arun’s cousin Virender) as well as his brother Anand Kumar reached there. Then Kundan (who was a son of Ramji) (another brother of Naresh and Mahender) hit Anand Kumar with a rod on his head while Jagdish had caught hold of Anand Kumar. Thereafter Ajay caught hold of Sanjay (son of Virender) while Mahender attacked his chest, shoulders and right ribs with a knife as a consequence thereof Sanjay also received injuries.

5. Because of the injuries received by him, Arun Kumar became unconscious and he was rushed to the Ganga Ram Hospital by his brother Anand Kumar (PW 22). Sanjay (son of Virender) was also sent to the hospital. In his statement, Anand Kumar has

stated that Naresh, Mahender and their associates had inflicted a life endangering attack on them. He also stated that this incident was witnessed by their sister Madhu as well as several people of the *mohalla* and that legal action should be taken.

6. The police intervention in the matter commenced on information being received by the police control room through the wireless operator on 1^{4th} June, 1995 that 6/7 persons had been attacked with knives at A-195, New Ranjit Nagar. This information was conveyed at about 10.15 p.m. in the night to the police station Patel Nagar and came to be logged by Ct. Ashok Kumar (PW27) as DD No. 61B (Exh.PW27/A). The DD entry was handed over to Ct. Sukhram for delivery to SI Hari Om (PW 2).

7. SI Hari Om (PW 2) has stated that on receipt of DD 61B, he had proceeded to the spot alongwith Ct. Rakesh Kumar (PW11) and Ct. Dinesh where they met SI Kali Ram (PW25)who had already reached the spot. SI Kali Ram recorded the above statement of Anil Kumar.

8. This statement was scribed by SI Kali Ram (PW 25) and made his endorsement thereon (Exh.PW 25/A) and sent the same to Ct. Rakesh Kumar at about 12.10 in the night to the police station Patel Nagar recommending registration of the case. SI Kali Ram (PW 25) left SI Hari Om on the spot. Since Anil Kumar was also having injury, SI Hari Om was directed that he should also be got medically examined.

9. At the hospital, SI Kali Ram (PW 25) obtained the MLC of Arun Kumar wherein the doctor had opined that he had been brought dead. As per the MLC of Arun Kumar, the following injuries are mentioned thereon :-

> "O/E – 5 stab wounds on anti chest wall.
>
> 1) Two on 4th intercostals space on right and one left side of sternum;
>
> 2) One stab wound on the left intercostals space in mid claviculer line;
>
> 3) 2 stab wounds on margin of rib cage"

10. SI Kali Ram (PW 25) learnt that other persons also injured in the incident had gone to the RML Hospital and he accordingly proceeded to the hospital. At the RML Hospital, he learnt about the admission of three such injured persons, namely, Sanjay (son of Virender), Anand Kumar and Smt. Prem Devi and collected their MLCs. SI Kali Ram (PW25) recorded the statements of the three injured persons.

11. Seizure of the clothes of the injured persons Sanjay and Prem Devi in two sealed parcels was also effected by SI Kali Ram vide seizure memo Exh.PW 9/B and thereafter he returned to the spot. At the spot, Ct. Rakesh Kumar (PW 11) handed over the *rukka* and the formal FIR to SI Kali Ram (PW 25).

12. The clothes of Prem Devi (PW8)were also seized by the police. It is in the evidence of Madhu (PW19) that her mother

Prem Devi had tried to lift her injured brother Arun in which process her clothes had got smeared with blood.

13. In the meantime, the crime team and the photographer had inspected the spot and taken photographs.

14. Upon his return, SI Kali Ram (PW 25) prepared the site plan (Exh.PW 25/B) at the pointing out of Anil Kumar.

15. It is in his testimony that SI Kali Ram (PW25) lifted a knife from the spot and a sketch thereof was prepared (Exh.PW 2/A). The total length of the knife was 10 inches with a blade of 5.5 inches. The handle which was made of steel and plastic was 4.5 incheslong. On the blade of the knife, the words 'ATTOR MADE IN SPAIN' were found inscribed; seized blood from an electric pole on the spot; seized bloodstained earth as well as sample earth from different spots; converted them into sealed parcels which were sealed with the seal of KRS. SI Kali Ram also seized the two pairs of plastic *chappals* with one *chappal* having bloodstains lying at the spot as well as a knife and its cover from the spot. The knife was proved on record as Exh.P1 while its cover was proved as Exh.P2. These articles were converted into eight sealed parcels with the seal of KRS and taken into possession vide memo Exh.PW 2/B which was duly witnessed by SI Hari Om and Anil Kumar.

The seized articles were duly deposited with the MHC(M) at the police station Patel Nagar.

16. The accused persons were not traceable on the spot.

17. At the Ganga Ram Hospital, the dead body of Arun Kumar was identified by his father Shri Mehar Chand (PW 5) vide a memo Exh.PW 5/A as well as by Shri Mohinder Kumar (PW 6) vide memo Exh.PW 6/A.

SI Kali Ram (PW 25) requested for a post mortem examination on the body of the deceased.

18. Pursuant to secret information received by the SHO Police Station Patel Nagar to the effect that on 15th of June, 1995, the accused persons Mahender, Jagdish, Kundan were present at the house of the in-laws of Mahender at the Pitam Pura Water Work Quarters, they were arrested from there and were subjected to personal search vide memo Exh.PW 10/A, 10/B and 10/C.

19. The three accused persons Jagdish, Kundan and Mahender had made disclosure statements (Exh.PW 10/D, 10/E and 10/F) giving details of the occurrence. Pursuant to the disclosure statements, Mahender had led the police to certain bushes near the Rohini Canal but nothing could be recovered on account of darkness. Kundan had led the police to the *ganda nala*, Ranjit Nagar but nothing could be recovered on account of darkness.

20. It is evidence that on 16th of June, 1995, Mahender led SI Kali Ram and ASI Satbir Singh to a place near the Pitampura Canal and from there, among the bushes, Mahender had taken out a *buttondar* knife which could be closed with operation of a button. The sketch of the knife was prepared by SI Kali Ram (Exh.PW 16/A) and it was kept into custody vide memo Exh.PW 16/B. This knife was proved in court as Exh.P3.

21. Our attention is drawn to inscription of the words "*STEENLESS ROSTFREI*" on the steel blade of the knife as depicted in the sketch (Exh.PW16/A). The police officer has carefully noted the measurement of the knife Exh.PW16/A. We find the knife had a steel blade of 3.3 inches; it had handle of 4.7 inches while the total length of the knife is mentioned as 8 inches.

22. The recovery memo of this knife (Exh.PW16/B) mentions that there was a button near the joint of its handle. The knife opened if the button was pushed up and closed when pushed down. Exh.PW16/B mentions that steel was at the joint as well as at the end of the handle. This memo also noted that the words "*STEENLESS STEEL ROSTFREI*" were inscribed on its blade.

23. Naresh Kumar and Ajay Kumar, who were also implicated in the incident surrendered on 17th June, 1995 at the police station. They were arrested and subjected to personal searches vide memo Exh.PW 25/E and Exh.PW 25/F. These persons had made disclosure statements Exh.PW 18/A and 18/B.

24. On 29th July, 1995, Sanjay (son of Mahender) was also apprehended near the bus stop at Shadipur Depot and his personal search was conducted vide Exh.PW 15/B. Sanjay had made a disclosure statement Exh.PW 15/A disclosing that the *chhuri* (knife) had fallen while he was trying to escape at the time of the incident.

25. The scaled site plan (Exh.PW21/A) was prepared by Inspector Devender Singh (PW 21) of the Crime Branch who visited the place of occurrence on 6th September, 1995 and took

rough notes and measurements of the various points shown to him at the instance of Smt. Prem Devi (PW 8), Anand Kumar (PW 22). Based thereon, a scaled site plan (Exh.PW 21/A) alongwith marginal notes was prepared and proved in evidence.

26. The scaled site plan prepared by PW 21 Inspector Devender Singh has been proved as Exh.PW 21/A.

27. SI Kali Ram had inspected the spot and prepared the rough sketch of spot (Exh.PW 25/B) at instance of PW7 Anil Kumar.

28. We may also note the proceedings undertaken by Inspector G.L. Mehta who was at the relevant time posted as the SHO, Police Station Patel Nagar on 14th June, 1995. After giving instructions at the spot to SI Kali Ram and SI Hari Om, he had proceeded in the search of the suspects. The proceedings under Section 174 CrPC with regard to the request for the autopsy to be conducted on the body of the deceased vide Exh.PW26/B on 15th June, 1995 as well as the arrest and recording of all the disclosure statements was undertaken by him. He had also directed that the seized articles be sent for the forensic science examination.

29. Anil Kumar-PW7 was taken to the DDU Hospital by Ct. Narsh Kumar and produced in DDU Hospital. His MLC No. 4409/95 has been proved on record as Exh.PW 23/A by the prosecution. He was examined by Dr. R. Chawla (PW 23) who proved his report as Exh.PW 23/A. Upon a local examination, the doctor had found a half inch long muscle deep clear incised wound as having been inflicted in an assault upon this patient.

30. On 15th June, 1995, a post mortem was conducted on the body of the deceased by Dr. L.K. Baruah (PW 17) who proved the report as Exh.PW 7/A. The doctor has noted the following external and internal injuries on the body of the deceased at the time of the post mortem :

> "1. Incised wound size 1.3 cm.x0.5 cm. On the left side front of chest. There is 1-1/2 medial to the left nipple placed abliquely.
>
> 2. Incised wound size .3 cm.x0.5 cm.x? on the middle of chest situated 1.5 cm. Right to the mid line and below a line drawn between two nipples.
>
> 3. Two incised wounds size 1.3 cm. And other 1.5 cm. In the right epigeastric region.
>
> 4. Incised wounds left side lower part of chest 9 cm. Below left nipple size 1.4 cm.x2.3 cm.
>
> 5. Abrasion on the dorsom left forearm and hand.
>
> 6. Abrasion seen below left eye."

31. The doctor had opined that the injuries were ante-mortem in nature and caused by sharp edged weapon (incised wound) and were sufficient to cause death in the ordinary course of nature. The abrasions had been caused by friction against rough surfaces. So far as the cause of death was concerned, the doctor had opined death was due to haemorrhagic shock. Time since death was about 16 hours. The doctor had additionally preserved a blood sample of the deceased which was sealed and handed over to the police alongwith a sample seal.

32. On 4th July, 1995, Additional SHO Ved Prakash of the Police Station Patel Nagar had made an application to Dr. L.K. Baruah for giving an opinion upon examination of the knife recovered at the instance of Mahender Kumr as to whether it could have been used to inflict injuries noted by the doctor on the post mortem report no. 1724 dated 15th June, 1995 on the body of the deceased. The application and the knife were sent to the doctor vide road certificate no.53/21. The knife was produced before the doctor sealed with the seal of KRS which was opened by the doctor. In the sealed packets, the doctor found a button actuated stainless steel knife with the handle in black with black metal with the words '*super automatic*' scribed on the handle. The doctor carefully prepared a sketch on the application form on 17th July, 1995 and after examining the knife as well as the injuries in the post mortem report opined that the injuries on the body of Arun Kumar were possible by the knife. The doctor proved his opinion on record as Exh.PW 17/B. This knife was produced on record as Exh.P3 by SI Kali Ram.

33. The recovered knife was produced before the doctor in the court who confirmed that the knife Exh.P3 was the same regarding which he had given his opinion Exh.PW 17/B.

34. After completion of the investigation, a final charge sheet came to be filed against the accused persons before the learned Metropolitan Magistrate who committed the case to the court of the learned Sessions Judge. After examining the material on record, by

an order dated 23rd July, 1997, the trial court framed the following charges :

Charges		
Accused	***Act***	***Offence***
Mahinder Kumar	*Inflicting knife blows on the person of Arun Kumar in furtherance of their common intention to commit murder.*	*Section 302 r/w Section 34 IPC*
	Causing hurt to Sanjay by means of knife in furtherance of their common intention.	*Section 324 r/w Section 34 IPC*
	Being in possession of a knife which was used by him as a weapon of offence in the commission of murder of Arun Kumar.	*Section 27 Arms Act*
Naresh Kumar	*Having caught hold of deceased Arun Kumar when Accused Mahinder inflicted knife blows in furtherance of their common intention to commit murder.*	*Section 302 r/w Section 34 IPC*
Ajay Kumar	*Having caught hold of Sanjay when Accused Mahinder caused hurt to him by means of knife in furtherance of their common intention.*	*Section 324 r/2 Section 34 IPC*
Sanjay (s/o Mahinder)	*Causing hurt to Prem Devi & Anil Kumar by means of chhuri.*	*Section 324 IPC*

35. The prosecution examined 22 witnesses in support of its case. The incriminating evidence was put to the accused persons and their statements recorded under Section 313 of the CrPC. No defence evidence was led by the accused persons. After consideration of the matter at length, the learned Trial Judge has passed the impugned judgment dated 31st August, 2000 detailed as above.

36. The conviction of the appellants rests primarily on the eye witnesses account of the entire incident in the words of Anil Kumar (PW 7); Smt. Prem Devi (PW8); Ms. Madhu (PW19); Sanjay (PW20) and Anand Kumar (PW22).

The appellant Mahender was acquitted of the charge under Section 324 of the IPC.

37. Crl.Appeal No.540/2000 filed by Naresh Kumar was admitted for hearing on 11th September, 2000 and Crl.Appeal No.764/2000 filed by Mahender Kumar was admitted for hearing on 8th December, 2000. The sentence imposed upon appellant-Naresh Kumar was suspended by the order dated 14th March, 2005 in view of the fact that the sentence imposed on the co-convict Mahender Kumar had been suspended by the order dated 22nd July, 2002 noting that Naresh Kumar had already undergone more than five years in custody.

38. Despite the graphic ocular evidence of the manner in which the events unfolded in the oral testimony of Anil Kumar, Prem Devi, Anand Kumar and Sanjay, all eye witnesses, the primary ground of challenge to their conviction has been laid by Mr.

Krishan Kumar, learned counsel on behalf of appellant Mahender Kumar and Mr. S.D. Singh, learned counsel on behalf of Naresh Kumar on the non-examination of Laxmi who was washing the *chhajja* of the property no. A-195, New Ranjit Nagar. It is their main contention that Laxmi was the root cause of the incident without whom the incident would not have happened at all and she was the most material witness. The submission is that adverse inference, therefore, ought to have been drawn against the prosecution for withholding material evidence. In support thereof, reliance has been placed on the pronouncement of the Supreme Court reported at ***(2001) 6 SCC 145 Takhaji Hiraji v Thakore Kubersing Chamansingh & Ors.***

39. The appellants also call upon this court to doubt the disclosure statements attributed to Mahender Kumar (Exh.PW10/F) submitting that though nothing was alleged to have been recovered on the 15th of June, 1995, however, as per the recovery memo Exh.PW16/B the knife alleged to have been recovered only on 16th June, 1995. It is further contended that the recovery from bushes near the Pitampura Canal was an open place accessible to all and beyond the control of the appellants, therefore, is of no consequence.

In this regard, reliance is placed on the pronouncement of this court dated 12th December, 2014 in ***Crl.A.No.979/2012 Heera Lal @ Heera v State, Government of NCT***.

Challenge to the ocular eyewitness evidence

40. The appellants have primarily challenged the credibility evidence of Prem Devi (PW8). Let us first and foremost examine the testimony of PW8 Prem Devi.

41. While the victims were members of the family of Mehar Chand or related to him, the accused persons were sons of Ramji, that is to say real brothers.

42. The prosecution witnesses including Amit Kumar (PW7), cousin of deceased Arun Kumar, Madhu (PW19)- Prem Devi (PW8) of Sh. Mehar Chand. daughter and wife respectively were all residing with the deceased Arun Kumar in the premises no. A-195, New Rajinder Nagar, New Delhi. Sanjay (PW20) (who was the son of Virender Kumar, another son of Mehar Chand) was residing in the premises no. A-218, DDA Flats, New Ranjit Nagar alongwith his father. Sanjay (PW20) has stated that on the fateful day, he was present near Arun's house.

43. The complainant Anil Kumar (PW7) was also a relative and also residing in the vicinity at A-214, DDA Flats, New Ranjit Nagar, whose first statement to the police (Exh.PW7/A) has been extracted above by us. His testimony recorded on 10th February, 1998 corroborates the statement given by him to the police on the night of the incident.

44. The accused persons Mahender and his son Sanjay; Naresh as well as Jagdish were living in the property A-194 and their brother Kundan was living in the premises A-196, DDA Flats, New

Ranjit Nagar. Ajay, another co-accused was a resident of X-345, C, Ranjit Nagar.

45. Let us reconstruct the scenario in which the incident occurred. We are concerned with properties in close proximity in a DDA colony having narrow lanes (*galis)*. The evidence on record shows that the parties were residing in close proximity in DDA Flats. These blocks are three storeyed flats in the colony which consisted of 384 such three storeyed flats.

46. The incident happened on 14th day of June at about 8.45 i.e. the summer evening.

47. PW22 Anand Kumar has stated that whenever there was electricity failure, the inhabitants in the area used to come out into the *gali.* The witness said that on that fateful day, electricity was not off and they were in the *gali* since 8/8.30 p.m.

48. It is in the evidence of PW8 Prem Devi that the electricity in the area had gone off about ten minutes prior to the whole occurrence. But the same could not have impacted the capacity to identify the perpetrators of the violence in the case for the reason that the consequences of the electricity going off is amply illustrated in the testimony of the various witnesses.

49. PW8 has proved that she was standing in the *gali* after having prepared *chapattis* on a *chula* in the gallery of the 3rd floor of the property where they were residing. PW7, 8, 10, 20 and 22 established that the deceased was sitting on a cot in the *gali* and eating his food in front of the house opposite the park. Anil's (PW7) stated that he was present near where the deceased Arun

was sitting on a cot and eating his food corroborates his mother Prem Devi's statement that she had prepared the *chapattis*; that she had not taken food and only the food of Arun had been brought down and she was standing near there.

50. An effort has been made to impute a motive to Prem Devi (PW8) for implicating the accused persons. The defence has attempted to suggest that the ground floor persons were objecting to the noise and disturbance made by deceased Arun Kumar and his friends after consuming liquor in a jhuggi set up by Prem Devi's family s an encroachment on government land on the ground floor. But this has not been proved as a fact.

51. So far as the narration by PW8 about the unfolding of events in the incident involving the spilling of the water drops; hurling abuses on her daughter Laxmi by Meena as well as Naresh; the futile intervention by the deceased Arun Kumar as well as the subsequent events involving Naresh calling out to Mehar Chand, his exhorting Mahender and their attack on Arun Kumar is concerned, we findt hat it is on all fours with the testimony of Anil (PW7) and his statement Exh.PW7/A. The witness has clearly described the attack on Arun Kumar in which Naresh has caught hold of the deceased Arun Kumar and Mahender had given knife blows on his chest. The witness has stated that she was crying and had intervened and also that Anil Kumar, son of Jai Prakash had also tried to stop the accused person. She clearly stated that Sanjay Mahender's son had given her a knife blow in her stomach

and that he had also inflicted a knife injury on the hand of Anil when they had tried to save deceased Arun from the attack.

The witness Prem Devi (PW8) was, therefore, not only an eye witness but one who had suffered injury in the incident.

52. We find Prem Devi was subjected to a medical examination at the RML Willingdon Hospital and the MLC recorded by the doctor notes that she has a cut mark on left side of umbilicus. The medical report of Anil Kumar Exh.PW 23/A also notes half inch long muscle deep clear incised wound corroborating the ocular evidence. The medical evidence of the injuries corroborates the oral testimony given by them about the incident and the attack on them as well.

53. It is noteworthy that with regard to the incident on 14th June, 1995 in which Prem Devi's son suffered fatal injuries, she was examined as a witness in court three years later on 10th February, 1998. It needs no elaboration that with passage of time, her memory must fade. Yet, the witness has deposed with clarity and her testimony has been corroborated not only by the medical evidence but also by the ocular evidence of the several other eye witnesses.

54. Learned counsel for the appellant has strongly emphasised the response to a defence suggestion noted in her cross examination to the effect that "it was correct that after the quarrel, she came to know that somebody had stabbed her son Arun Kumar". This isolated suggestion is of no consequence. In fact, it appears to be an erroneous record in as much as the preceding and subsequent

evidence establishes that she was physically present in the quarrel. Immediately before responding to this suggestion, it is noted that PW8 only knew that the abuses ended in 5 to 10 minutes and the beating and stabbing ended within one second. The witness had herself suffered physical injury when she intervened to save her son. So there is no question of her coming to know of the incident only after the quarrel had ended. Given the number of the injured persons and the assailants attack on anybody who intervened, certainly PW8 would have had opportunity to attend to her son only once the accused persons left the spot. We have no manner of doubt that PW8 is a reliable witness.

55. Similar is the challenge to one sentence lifted out of context in the entire testimony of PW22 Anand Kumar who was also a brother of the deceased who, alongwith his nephew Sanjay, was also standing in the *gali* below the house. He has also given a graphic account of the entire incident including the exhortations to Mahender. From the testimony of this witness, it would appear that he was residing on the second floor of the same building. There is no material contradiction in his statement even if he was not physically present when the incident commenced in the *gali* but came down after he heard the noise. The defence has not been able to shake his testimony so far as the manner in which the events unfolded after Arun's intervention in the incident. The defence has not been able to cast a doubt his presence at the spot. Anand Kumar (PW22) has stated that abuses were heard from first floor to second floor.

56. Again, so far as Sanjay (PW20) is concerned, learned counsel for the appellants have lifted one sentence out of context in his cross examination to lay a challenge to his entire testimony. The presence of this witness at the spot is established in his examination in chief. The narration of the manner about the abuses as well as exhortations by Mahender to attack at Arun Kumar, the intervention by Prem Devi and Anil Kumar to save Arun and the assault by Sanjay are all established on record.

57. This witness (PW20) has also stated that Ajay caught hold of him and caused injury to him on his chest, left shoulder and left waist. The trial court has disbelieved this witness in view of the challenge laid by the defence to his testimony in view of PW20's statement in his cross examination that he could not notice properly as to who caused the injuries to him on account of the dark and that he had repeated what was told by his relatives on this aspect to the police. He further stated that he had repeated the statement made by him to the police in his testimony. In view thereof, in para 28, the trial court has held that it was not "safe to place reliance upon his statement and at last some doubt has been created on his testimony regarding injuries caused to him". For this reason, Ajay and Mahender who had been implicated by Sanjay (PW 20) for having caused knife injury to the witness have been given the benefit of doubt and acquitted.

58. No appeal has been filed by the State to the acquittal, and therefore so far as the infliction of injuries to the witness Sanjay son of Virender is concerned or the finding of the trial court is

concerned in this regard, it would have to stand even though we may be of a different view. However, the rest of the testimony of this witness cannot be faulted. The witness is only confused about the manner in which injuries were inflicted to his own person. However, the defence has not challenged the rest of the narration of the unfolding of events by this witness. This witness has also not stated that it was completely dark.

59. Madhu (PW19) was the widowed daughter of Mehar Chand who was also residing with the deceased in the property no. A-195 with her father. She has also testified that on 14th June, 1995, she was also sitting on a cot below the house in the *gali* while her brother Arun Kumar was sitting some distance away on a cot taking his food. She also refers to her sister Laxmi washing the *chhajja* of their house when some water fell on Naresh's house who resides in A-194 which was lower than A-195 because of which his wife started abusing Laxmi. The witness refers to the presence of the other witness and also details the incident in which injuries were caused to all of those who attempted to intervene.

60. Learned counsels for the appellants have tried to cast a doubt on the identification of the assailants by this prosecution witness drawing attention to the testimony of Prem Devi (PW8) as well as Sanjay (PW20) that there was no electricity at that time. We have noted above that the time in question was only about 8.45 p.m. in the peak summer month of June in 1995. The colony appears to be consisting of three storeyed flats in close proximity having narrow streets (*galis)* in front. The evidence makes out a typical mohalla

with narrow streets where people traditionally eat meals on cots (*charpoys)*, chatting with neighbours. It is in evidence that as is traditional, people in the colony would spread cots in the street in front of the house and lounge there. This would be more so when there is a power break down in the summer and everybody converges outside their houses seeking air.

61. So far as the persons involved in the incident are concerned, both the victims and the assailants were living in close proximity, in fact adjacent houses, and would be seeing each other every day. Being such close neighbours, they would be identifiable even if it could be held that it was dark or that there was insufficient light.

62. It is further in evidence that Naresh had called out to Mahender to come out. Each of the prosecution witnesses have referred to abuses being hurled by Naresh and his wife Meena which were audible even on the first and second floors of the property. Exhortation is attributed to Naresh pursuant whereby Mahender had come out of the upper floor of his house wielding a knife with which he has inflicted injuries not only widespread Arun Kumar but also open to all the witnesses PW7 and PW8. Therefore, apart from physically viewing the assailants, the neighbours had access to their voices for identification as well.

63. The unfolding of the events also shows that the stab injuries have been inflicted at close range when Anil (PW7) and Prem Devi (PW8) tried to save Arun Kumar from the attack. Their injuries have been established in the medical examinations on record. Thus, though elaborate submissions have been made with regard to

the challenge to the testimony of the prosecution witnesses, we find that the assailants were not unknown intruders whose identification was not possible. For this reason, the challenge to the identification on behalf of the appellants by the prosecution witnesses is of no merit and has to be rejected.

64. It is trite that it is sufficient to prove an offence beyond reasonable doubt on the testimony of a single reliable witness and it is completely unnecessary for the prosecution to burden court record with multiple witnesses of the same fact.

65. We may refer to the pronouncement of the Supreme Court reported at ***(2012) 1 SCC 10 Prithipal Singh & Ors. v. State of Punjab & Ors.*** in this regard wherein it was observed as under :

> ***"Evidence of the sole eyewitness***
>
> **49.** This Court has consistently held that as a general rule the court can and may act on the testimony of a single witness provided he is wholly reliable. There is no legal impediment in convicting a person on the sole testimony of a single witness. That is the logic of Section 134 of the Evidence Act. But if there are doubts about the testimony, the court will insist on corroboration. In fact, it is not the number or the quantity, but the quality that is material. The time-honoured principle is that evidence has to be weighed and not counted. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy or otherwise. The legal system has laid emphasis on value, weight and quality of evidence, rather than on quantity, multiplicity or plurality of witnesses. It is, therefore, open to a competent court to fully and completely rely on a solitary witness and record conviction. Conversely, it may acquit the accused in spite of testimony of several witnesses if it

> is not satisfied about the quality of evidence. [See *Vadivelu Thevar* v.*State of Madras* [AIR 1957 SC 614 : 1957 Cri LJ 1000] , *Sunil Kumar* v. *State (Govt. of NCT of Delhi)* [(2003) 11 SCC 367 : 2004 SCC (Cri) 1055] , *Namdeo* v. *State of Maharashtra* [(2007) 14 SCC 150 : (2009) 1 SCC (Cri) 773] and *Bipin Kumar Mondal* v. *State of W.B.* [(2010) 12 SCC 91 : (2011) 2 SCC (Cri) 150 : AIR 2010 SC 3638]]"

This judgment has also been relied upon in ***AIR 2016 SC 310 Sudip Kr. Sen alias Biltu v. State of West Bengal & Ors.***

66. In the instant case, it became necessary for the prosecution to examine the several eye witnesses because of the reason that there were multiple injured persons with regard to the incident.

67. We also find that no challenge has been made and rightly so to the testimony of PW7. In fact, a conviction could have been based on the sole unchallenged truthful graphic account of PW7 Anil Kumar in the present case.

68. As a plea of desperation, learned counsels would contend that the witnesses were close relatives and therefore were interested witnesses.

69. It is a settled proposition of criminal jurisprudence that 'related' witnesses are not the same as 'interested' witnesses. In this regard we may advert to the pronouncement of the Supreme Court reported at ***(2008) 16 SCC 73 State of Uttar Pradesh v. Kishanpal & Ors.*** wherein it was held thus:

> **" 17.** The plea of "***interested witness***", "***related witness***" have been succinctly explained by this Court in *State of Rajasthan* v. *Kalki* [(1981) 2 SCC 752 : 1981 SCC (Cri) 593] . The following conclusion in para 7 is relevant: (SCC p. 754)
>
> > "*7.* As mentioned above the High Court has declined to rely on the evidence of PW 1 on two grounds: (1) she was a 'highly interested' witness because she 'is the wife of the deceased', and (2) there were discrepancies in her evidence. With respect, in our opinion, both the grounds are invalid. For, in the circumstances of the case, she was the only and most natural witness; she was the only person present in the hut with the deceased at the time of the occurrence, and the only person who saw the occurrence. True, it is, she is the wife of the deceased; but she cannot be called an 'interested' witness. She is related to the deceased. '***Related' is not equivalent to 'interested'***. A witness may be called 'interested' only when he or she derives some benefit from the result of a litigation; in the decree in a civil case, or in seeing an accused person punished. A witness who is a natural one and is the only possible eyewitness in the circumstances of a case cannot be said to be 'interested'."
>
> From the above it is clear that "related" is not equivalent to "interested". The witness may be called "interested" only when he or she has derived some benefit from the result of a litigation, in the decree in a civil case, or in seeing an accused person punished. A witness, who is a natural one and is the only possible eyewitness in the circumstances of a case cannot be said to be "interested"."

70. In ***Kishanpal*** it was expounded that plea of defence to the effect that it would not be safe to accept the evidence of related witness was rejected by the Supreme Court and it was further held thus:

18. The plea of defence that it would not be safe to accept the evidence of the eyewitnesses who are the close relatives of the deceased, has not been accepted by this Court. There is no such universal rule as to warrant rejection of the evidence of a witness merely because he/she was related to or interested in the parties to either side. In such cases, if the presence of such a witness at the time of occurrence is proved or considered to be natural and the evidence tendered by such witness is found in the light of the surrounding circumstances and probabilities of the case to be true, it can provide a good and sound basis for conviction of the accused. Where it is shown that there is enmity and the witnesses are near relatives too, the court has a duty to scrutinise their evidence with great care, caution and circumspection and be very careful too in weighing such evidence. The testimony of related witnesses, if after deep scrutiny, found to be credible cannot be discarded.

19. ***It is now well settled that the evidence of witness cannot be discarded merely on the ground that he is a related witness, if otherwise the same is found credible***. The witness could be a relative but that does not mean his statement should be rejected. ***In such a case, it is the duty of the court to be more careful in the matter of scrutiny of evidence of the interested witness, and if, on such scrutiny it is found that the evidence on record of such interested witness is worth credence, the same would not be discarded merely on the ground that the witness is an interested witness***. Caution is to be applied by the court while scrutinising the evidence of the interested witness.

20. It is well settled that it is the ***quality of the evidence and not the quantity of the evidence which is required to be judged*** by the court to place credence on the statement. The ground that the witness being a close relative and consequently being a partisan witness, should not be relied upon, has no substance. Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be

laid if plea of false implication is made. In such cases, the court has to adopt a careful approach and analyse the evidence to find out whether it is cogent and credible. (Vide *State of A.P.* v. *Veddula Veera Reddy*[(1998) 4 SCC 145 : 1998 SCC (Cri) 817] , *Ram Anup Singh* v. *State of Bihar*[(2002) 6 SCC 686 : 2002 SCC (Cri) 1466] , *Harijana Narayana* v. *State of A.P.*[(2003) 11 SCC 681 : 2004 SCC (Cri) 65] , *Anil Sharma* v. *State of Jharkhand*[(2004) 5 SCC 679 : 2004 SCC (Cri) 1706] , *Seeman* v. *State* [(2005) 11 SCC 142 : 2005 SCC (Cri) 1893] , *Salim Sahab* v. *State of M.P.* [(2007) 1 SCC 699 : (2007) 1 SCC (Cri) 425] , *Kapildeo Mandal* v. *State of Bihar* [(2008) 16 SCC 99 : AIR 2008 SC 533] and *D. Sailu* v. *State of A.P.* [(2007) 14 SCC 397 : (2009) 1 SCC (Cri) 898 : AIR 2008 SC 505])

21. In *Kulesh Mondal* v. *State of W.B.* [(2007) 8 SCC 578 : (2007) 3 SCC (Cri) 741] this Court considered the reliability of interested/related witnesses and has reiterated the earlier rulings and it is worthwhile to refer the same which reads as under: (SCC pp. 580-81, para 11)

> "*11*. '*10*. We may also observe that the ground that the [witnesses being close relatives and consequently being partisan witnesses,] should not be relied upon, has no substance. This theory was repelled by this Court as early as in*Dalip Singh* v. *State of Punjab* [AIR 1953 SC 364] in which surprise was expressed over the impression which prevailed in the minds of the members of the Bar that relatives were not independent witnesses. Speaking through Vivian Bose, J. it was observed: (AIR p. 366, para 25)
>
> > "*25*. We are unable to agree with the learned Judges of the High Court that the testimony of the two eyewitnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their

testimony, we know of no such rule. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this Court endeavoured to dispel in *Rameshwar* v. *State of Rajasthan* [AIR 1952 SC 54] (AIR at p. 59). We find, however, that it unfortunately still persists, if not in the judgments of the Courts, at any rate in the arguments of counsel."

11. Again in *Masalti* v. *State of U.P.* [AIR 1965 SC 202] this Court observed: (AIR pp. 209-10, para 14)

"*14*. But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses. … The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard-and-fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct."

12. To the same effect is the decision in *State of Punjab* v. *Jagir Singh*[(1974) 3 SCC 277 : 1973 SCC (Cri) 886] , *Lehna* v. *State of Haryana* [(2002) 3 SCC 76 : 2002 SCC (Cri) 526] …. As observed by this Court in *State of Rajasthan* v. *Kalki* [(1981) 2 SCC 752 : 1981 SCC (Cri) 593] ***normal discrepancies in***

evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not normal, and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorised. While ***normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so***. These aspects were highlighted recently in *Krishna Mochi* v. *State of Bihar* [(2002) 6 SCC 81 : 2002 SCC (Cri) 1220] .' [**Ed.**: As observed in *Bhargavan* v. *State of Kerala*, (2004) 12 SCC 414, at pp. 420-21, paras 10-12.]"

(Emphasis supplied)

71. It is contended that no public and independent witness has been examined. This submission is completely misconceived in light of the aforenoted legal propositions. The witnesses may have been related but this would in fact be a motivation for ensuring that the real culprits are brought to book.

72. Three of the eye witnesses have themselves suffered injuries which have been established by the independent medical evidence on record. There would be no motive for false implication on the part of these witnesses i.e. mother, brother and cousins of the deceased who were also injured while trying to save him. None has been in fact proved or for that matter suggested. No material discrepancy is pointed out. It would be unfortunate to disbelieve the clear and credible evidence of the eye witnesses only for the

reason that they were related to the deceased Arun Kumar. We have no hesitation in rejecting this ground of challenge by the appellants.

Withholding the material witness

73. We now examine the primary ground of challenge by the appellants which is that the prosecution case must fail as Laxmi, who was the geneis of the dispute, has not been examined.

74. So far as the failure to examine Laxmi is concerned, the only role attributed to her by the prosecution is that of washing the parapet of her residence in the property no. A-195.

75. As noted above, all the eye witnesses have given credible evidence with regard to drops of water on the property falling of the appellants in A-194 and the ensuing abuses and violence. All these persons were physically present when the incident unfolded. No gap or infirmity results in the prosecution case merely because Laxmi was not examined. In the facts and circumstances of the case, she would have merely been the additional witness to the events which occurred.

76. We also find that it was the abuses hurled by Meena and her appellant husband Naresh, which really generated the heat. Arun Kumar (the deceased) had objected to these abuses which was resented by Naresh igniting his anger and leading to the brutal and vicious attack. Laxmi had no role in the incident.

77. For all these reasons, the principle laid down by the Supreme Court in ***(2001) 6 SCC 145 Takhaji Hiraji v. Thakore Kubersing Chamansing & Ors.*** has no application at all.

78. In our view, no adverse inference can be drawn in the present case against the prosecution for failing to examine Laxmi.

Intention to commit the offence under Section 34 of the IPC

79. Mr. S.D. Singh, learned counsel for the appellant Naresh Kumar has placed reliance on the pronouncement of the Supreme Court reported at ***AIR 1984 SC 1717 Dajya Moshya Bhil & Ors. v. State of Maharashtra*** to contend that the prosecution has to establish that each of the participating culprit had the same intention to commit a certain act. There can be no dispute at all with this well settled principle.

80. In the present case, the prosecution has led evidence and established the exhortation by Naresh resulting in Mahender storming out of the house armed with a knife with which he had inflicted a fatal injury upon the deceased and also caused injury to the two prosecution witnesses. In view thereof, the prosecution has adequately established the words attributed to Naresh itself establishing the intention to cause the death of Arun Kumar who had objected to the abuses being hurled by him at his sister, and the deliberate acts of Mahender pursued thereto.

81. In facts of the case before the Supreme Court in ***1982 SCC (Crl)264 Shambhu Kuer v State of Bihar***, it had been held that the appellant was merely holding the deceased and scuffling with him while the co-accused had taken out the knife and commenced the assault. It was held by the court that from this fact, it could not be beyond reasonable doubt that the appellant shared the intention of the co-accused to murder the deceased. It was so held purely in the facts of the case. As noted above, in the present case, angered by Arun's objection to his act of hurling abuses at Arun's sister, it was Naresh who had called out Mahender with the exhortation that the deceased had to be finished resulting in Mahender causing the fatal injury helped by Naresh.

82. Mr. S.D. Singh, learned counsel for Naresh Kumar has placed reliance also on the pronouncement of the Supreme Court reported at ***(1989) SCC (Cri) 357, Sukhram s/o Ramratan v. State of U.P.*** contending that acquittal of one of the named accused would stand in the way of the appellant being convicted constructively under Section 34 for the substantive offence under Section 302 and 436 of the IPC. This judgment has also been passed in the facts and circumstances of the case. In the present case, the witnesses have categorically described the roles of both the appellants and despite extensive cross examinations, the appellants have been unable to shake the credible testimony of the eye witnesses to the occurrence. This judgment also has, therefore, no application at all to the facts of the present case.

83. In this regard, Mr. Varun Goswami, learned APP for the State has placed the pronouncement of the Supreme Court reported at ***(2001) 3 SCC 673 Suresh & Anr. v. State of U.P.*** to urge that preconcert or preplanning may develop at the spur of the moment. We may usefully extract the relevant portion of this judgment on the issue which reads thus :

> **"19.** Hence, under Section 34 one criminal act, composed of more than one act, can be committed by more than one persons and if such commission is in furtherance of the common intention of all of them, each would be liable for the criminal act so committed.
>
> **20.** To understand the section better it is useful to recast it in a different form by way of an illustration. This would highlight the difference when several persons do not participate in the crime committed by only one person even though there was common intention of all the several persons. Suppose a section was drafted like this: "When a criminal act is done by one person in furtherance of the common intention of several persons each of such several persons is liable for that act in the same manner as if it were done by all such persons."
>
> **21.** Obviously Section 34 is not meant to cover a situation which may fall within the fictitiously concocted section caricatured above. In that concocted provision the co-accused need not do anything because the act done by the principal accused would nail the co-accused also on the ground that such act was done by that single person in furtherance of the common intention of all the several persons. But Section 34 is intended to meet a situation wherein all the co-accused have also done something to constitute the commission of a criminal act.

22. ***Even the concept of presence of the co-accused at the scene is not a necessary requirement to attract Section 34, e.g. the co-accused can remain a little away*** and supply weapons to the participating accused either by throwing or by catapulting them so that the participating accused can inflict injuries on the targeted person. Another illustration, with advancement of electronic equipment can be etched like this: One of such persons, in furtherance of the common intention, overseeing the actions from a distance through binoculars can give instructions to the other accused through mobile phones as to how effectively the common intention can be implemented. We do not find any reason why Section 34 cannot apply in the case of those two persons indicated in the illustrations.

23. Thus to attract ***Section 34 IPC two postulates are indispensable: (1) The criminal act (consisting of a series of acts) should have been done, not by one person, but more than one person. (2) Doing of every such individual act cumulatively resulting in the commission of criminal offence should have been in furtherance of the common intention of all such persons.***

24. Looking at the first postulate pointed out above, the accused who is to be fastened with liability on the strength of Section 34 IPC should have done some act which has nexus with the offence. Such an act need not be very substantial, it is enough that the act is only for guarding the scene for facilitating the crime. The act need not necessarily be overt, even if it is only a covert act it is enough, provided such a covert act is proved to have been done by the co-accused in furtherance of the common intention. Even an omission can, in certain circumstances, amount to an act. This is the purport of Section 32 IPC. ***So the act mentioned in Section 34 IPC need not be an overt act, even an illegal omission to do a certain act in a certain situation can amount to an act***, e.g. a co-accused, standing near the victim face to

face saw an armed assailant nearing the victim from behind with a weapon to inflict a blow. The co-accused, who could have alerted the victim to move away to escape from the onslaught deliberately refrained from doing so with the idea that the blow should fall on the victim. Such omission can also be termed as an act in a given situation. Hence an act, whether overt or covert, is indispensable to be done by a co-accused to be fastened with the liability under the section. But if no such act is done by a person, even if he has common intention with the others for the accomplishment of the crime, Section 34 IPC cannot be invoked for convicting that person. In other words, ***the accused who only keeps the common intention in his mind, but does not do any act at the scene, cannot be convicted with the aid of Section 34 IPC***.

25. There may be other provisions in the IPC like Section 120-B or Section 109 which could then be invoked to catch such non-participating accused. Thus participation in the crime in furtherance of the common intention is a sine qua non for Section 34 IPC. ***Exhortation to other accused, even guarding the scene etc. would amount to participation***. Of course, when the allegation against an accused is that he participated in the crime by oral exhortation or by guarding the scene the court has to evaluate the evidence very carefully for deciding whether that person had really done any such act.

xxx xxx xxx

30. Mr Pramod Swarup, learned counsel for the State invited our attention to the decision of this Court in *State of U.P.* v. *Iftikhar Khan* [(1973) 1 SCC 512 : 1973 SCC (Cri) 384] in which it was observed that to ***attract Section 34 IPC it is not necessary that any overt act should have been done by the co-accused***. In that case four accused persons were convicted on a fact situation that two of them were armed with pistols and the other two were armed with lathis and all the four

together walked in a body towards the deceased and after firing the pistols at the deceased all the four together left the scene. The finding of fact in that case was also the same. When a plea was made on behalf of those two persons who were armed with lathis that they did not do any overt act, this Court made the above observation. From the facts of that case it can be said that there was no act on behalf of the two lathi-holders although the deceased was killed with pistols alone. The criminal act in that case was done by all the persons in furtherance of the common intention to finish the deceased. Hence the observation made by Vaidialingam, J., in the said case has to be understood on the said peculiar facts."

(Emphasis supplied)

84. On the same aspect, Mr. Varun Goswami, learned APP has placed the pronouncement of the Supreme Court reported at ***AIR (2016) SC 310, Sudip Kr. Sen alias Biltu v. State of West Bengal & Ors.*** to urge that the intention of the appellant Naresh has to be gathered from his conduct and that his action in exhorting the other accused in the present case conclusively establishes his common intention for commission of the offences with which they have been charged and found guilty.

85. In the judgment reported at ***AIR 2016 SC 310 Sudip Kr. Sen alias Biltu v. State of West Bengal & Ors.*** it was held as follows :

> **"14.** ***Section 34 IPC embodies the principle of joint liability in the doing of a criminal act and essence of that liability is the existence of common intention. Common intention implies acting in concert and existence of a pre-arranged plan which is to be proved/inferred either from the conduct of the accused persons or from attendant***

circumstances. To invoke Section 34 IPC, it must be established that the criminal act was done by more than one person in furtherance of common intention of all. It must, therefore, be proved that:

(*i*) there was common intention on the part of several persons to commit a particular crime, and

(*ii*) the crime was actually committed by them in furtherance of that common intention.

Common intention implies pre-arranged plan. Under Section 34 IPC, a pre-concert in the sense of a distinct previous plan is not necessary to be proved. The essence of liability under Section 34 IPC is conscious mind of persons participating in the criminal action to bring about a particular result. The question whether there was any common intention or not depends upon inference to be drawn from the proved facts and circumstances of each case. The totality of the circumstances must be taken into consideration in arriving at the conclusion whether the accused had a common intention to commit an offence with which they could be convicted.

15. Considering the facts and circumstances of the case in hand, it is evident that there was prior concert and that the appellants have acted in furtherance of common intention. As seen from the evidence of PW 6, all the appellants and another co-accused Sk Kochi were doing illegal business of extorting money from the flat owners. On the date of occurrence, all the appellants and another co-accused Sk Kochi came together and Sudip Kumar Sen alias Biltu (A-3) started abusing the deceased and ***Apu Chatterjee (A-6) exhorted others that if the men of Khoka were not killed, there would be no peace. On such exhortation, Tapas Das and Sankar Das (A-2 and A-4) caught hold of the deceased, and Goutam Ghosh and Sk Kochi (A-1 and A-5) fired at the deceased. The facts and circumstances clearly establish meeting of minds and common intention of the appellants in committing the***

murder of Saikat Saha and the appellants were rightly convicted under Section 302 read with Section 34 IPC. No ground for interference under Article 136 of the Constitution of India is made out."

86. In this case, the appellants were alleged to be doing illegal business of extracting money from flat owners. On the date of the incident, all the appellants came together at the place of occurrence. One of the appellants started abusing the deceased. On such exhortation, two of the appellants caught hold of the victim and the other two appellants fired at him. It was held that the facts and circumstances (including the exhortation) clearly establish meeting of minds and common intention of the appellants in committing the murder and therefore, the conviction of the appellants under Section 300 with the aid of Section 34 was proper.

This judgment squarely applies to the present case.

We are satisfied that the trial court has rightly concluded that, the ingredients of Section 34 of the IPC have been satisfied in the present case.

Forensic evidence

87. The counsel for the appellants have also urged that it was not only possible, but essential for the investigating agency to have ascertained not only the presence of the blood group on the recovered articles including the knife but also the grouping of the

blood of the deceased and presence of blood of such group on the recovered knife.

88. The following articles were seized by the Investigating Officer from the spot and from RML Hospital which were sent to the Forensic Science Laboratory for opinion :

1.	Clothes of Sanjay, Anand and Prem Devi sealed in a *pulanda* with the seal of CMO	From RML Hospital	Ex.9/A
2.	Knife (Ex.2/A) in a plastic cover total length of which was 10", blade 5.5", handle 4.5", handle made of steel plastic	From the spot	Ex.2/B
3.	Blood sample from electric pole sealed in a cloth parcel with the seal KRS	From the spot	
4.	Two pairs of plastic chappals. One pair blood stained. Letter 'M' written on left foot blood stained chappal and letter 'R1' written on the right foot blood stained chappal. Sealed separately in two parcels with the seal KRS.	From the spot	
5.	Blood stained earth and samples earth from the spot. Samples sealed separately with seal of KRS.	From the spot	

89. In this regard, we may note that on a serological examination, the Forensic Science Laboratory vide its report dated

29th March, 1996 (Exh.PY) has reported presence of human blood on the following five exhibits :

Exhibits	Species of Origin	ABO Group remarks
2 blood stained cotton wool	Human	No reaction
3 pair of sleepers	Human	No reaction
4 blood stained earth	No reaction	-
5 cemented and concrete material	Human	'B' Group
6 earth control	No reaction	-
7 ***shirt***	***Human***	***'B' Group***
8 ***Ladies Shirt***	***Human***	'B' Group
9 Blood stained gauze cloth	Human	'B' Group -
10a Shirt	No reaction	
10b Pants with belt	No reaction	-
11 knife	No reaction	-

90. It is to be noted that Exh.P9 i.e. the bloodstained gauze has the blood sample of the deceased on which B Group blood has been identified. The same blood group has been identified on Exh.P7 (the shirt) and P8 as well as the ladies shirt belonging to Prem Devi (PW8).

91. It is in the evidence of Madhu (PW19) that Prem Devi (PW8) had picked up their injured son Arun.

The forensic evidence thus corroborates the ocular evidence and established the presence of PW8 Prem Devi at the spot.

92. We also note that the forensic evidence has also reported no blood on the recovered knife.

Challenge to the recovery of the knife

93. It has been contended at some length the disclosure statements attributed to the appellant Mahender Kumar dated 15th June, 1995 Exh.PW10/F but nothing was recovered pursuant thereto. The alleged disclosure was admittedly made on 15th June, 1995. However, the prosecution has attributed recovery of a knife pursuant thereto on the 16th June, 1995 and have relied upon a recovery memo (Exh.PW16/A) in this regard.

An absolute proposition is pressed before us that the recovery of the knife having been effected from an open place must be disbelieved.

94. Mr. Krishan Kumar, learned counsel for Mahender Kumar would also contend that the weapon of offence recovered from the

appellant was engraved with the words "*STEENLESS STEEL ROSTFREI*" as per Exh.PW6/A. However, the knife produced for opinion before Dr. L.K. Baruah was engraved with the words '*Super Automatic*' as per Exh.PW17/B. It is pointed out that the knife which was sent to the forensic science laboratory was also found engraved with the words '*Super Automatic*'. The submission, therefore, is that the knife allegedly recovered at the instance of the appellant was not the one sent either to the post mortem doctor or for the forensic science laboratory and was not the one used for the commission of the offence.

95. Learned counsel would also doubt the recovery contending that as per the disclosure statements, the knife had been concealed in bushes near the Rohini canal whereas recovery was effected from the bushes near the Pitampura Canal bushes.

96. Mr. S.D. Singh would also want the court to doubt the recovery for the reason that when the recovered knife was subjected to an FSL examination, it was reported vide Exh.PX and PY that the knife gave "no reaction" so far as the presence of original human blood was concerned under the column "species of origin" is concerned in the report Exh.PY. In this regard, learned counsel would rely on the pronouncement of this court reported at ***1997 (2) Crimes 714 Sita Ram v. State (Delhi Administration).***

97. Our attention has been drawn to the statements attributed to the appellant Mahender in Exh.PW10/F to the effect that he could get recovered the knife which had been hidden in bushes near the Rohini canal.

98. Mr. Krishan Kumar, learned counsel would point out that as per Exh.PW16/B, the police has claimed to have recovered a knife on the pointing out of the appellant Mahender from some bushes on the right side of the Pitampura canal. As per the recovery memo (Exh.PW16/A) and its sketch (Exh.PW16/A), this knife was described was having a total length of 8 inches with the blade of 3.3 inches and the handle of 4.7 inches. On the blade of the knife, the words "*STEENLESS STEEL ROSTFREI*" were inscribed; near the joint, there was a button and the knife opened upon the button being pushed upwards and closed upon the button being brought down. On the joint and the lower portion of the handle, steel had been affixed. This knife was sealed in a pullanda with the seal of KRS, both of which were taken into possession.

99. The seized articles were stored in the malkhana on 16th June, 1995 and deposited with Ct. Prithivipal Singh (PW13) who was posted as MHC(M) with the police station Patel Nagar. The sealed knife was handed over to SI Kali Ram (PW25) on 4th July, 1995 with the seal intact and an entry was made about it in the register no.19. The extract of the malkhana register which has been proved on record as Exh.PW13/E records the full description of the knife. The witness has clearly stated that so long as the property remained in his custody, the same was not tampered with. Despite opportunity being given, this witness has not been cross examined.

100. SI Kali Ram (PW25) has clearly described the manner in which Mahender led the police to the place near the Pitampura Canal and got recovered the knife. The witness has also stated that

on the directions of the SHO on 4th July, 1995, he had taken this weapon in sealed condition duly sealed with the seal of KRS to the mortuary and submitted it to the doctor for his opinion with the seal intact, as to whether it could be the weapon of offence.

101. The doctor, upon examination, opined that the injuries on the body of deceased Arun Kumar were possible with that knife. His opinion has been proved on record as Exh.PW17/B. This knife was proved in evidence as Exh.P3.

We find that in the recovery memo (Exh.PW16/B) the words '*STEENLESS STEEL ROSTFREI*' on the steel blade of the knife are noted.

So far as the words '*Super Automatic*' are concerned, we find that in his opinion, Exh.PW17/B, Dr. L.K. Baruah has noted that the same are written on the handle part in black metal which has the button.

We find that no question at all has been put to the doctor as to whether there was anything written on the blade.

We also find that on the aspect of the recovery of the knife as well as challenge to the knife on which the opinion had been sought, neither SI Kali Ram (PW25) nor Inspector G.L. Mehta (PW26) who was the SHO have been cross examined. No suggestion even has been given that Exh.P3 which was produced in court was not the knife which was recovered on the pointing out of Mahender or that it was not the knife which was shown to the doctor. No question has been put to the investigating officer on

the other police witnesses as to whether there was anything written on the handle of the recovered knife.

102. The investigating officer and the doctor have noted what to them was the most distinguishing feature of the knife. The defence does not point out that the words '*STEENLESS STEEL ROSTFREI'* are not appearing on the blade of the knife Exh.P3 in the evidence. Or that the words *'Super Automatic'* do not appear on its plastic handle.

103. The measurements of the knife, its shape, size and description, as well as the sketch of the knife prepared by the doctor being Exh.PW17/B, match those in the recovery memo Exh.PW16/A prepared by the investigating officer.

104. We are, therefore, unable to disbelieve the recovery of the knife on the pointing out of the appellant Mahender or that the recovered knife was not the one which was sent to the doctor for recording his opinion as to whether it could be the weapon of the offence as opined in Exh.PW17/B. Such challenge laid for the first time by way of the present appeal is rejected.

105. So far as the failure of the police to recover the weapon on 15th June, 1995 is concerned, the evidence on record would show that the place where the knife was hidden was in bushes on the banks of a canal. No cross examination of the witnesses has been effected on this aspect of the matter. Merely because the recovery was not effected on in the late night hours of 15th June, 1995 itself, but could be effected only on the 16th June, 1995 would be no reason to disbelieve the same.

106. The proposition that recovery of an article from open place must always be disbelieved stands rejected by the Supreme Court in the pronouncement reported at ***(1999) 4 SCC 370 State of Himachal Pradesh v. Jeet Singh***. In this regards, it was held thus:

> "26. There is nothing in Section 27 of the Evidence Act which renders the statement of the accused inadmissible if recovery of the articles was made from any place which is "open or accessible to others". ***It is a fallacious notion that when recovery of any incriminating article was made from a place which is open or accessible to others, it would vitiate the evidence under Section 27 of the Evidence Act. Any object can be concealed in places which are open or accessible to others.*** For example, if the article is buried on the main roadside or if it is concealed beneath dry leaves lying on public places or kept hidden in a public office, the article would remain out of the visibility of others in normal circumstances. Until such article is disinterred its hidden state would remain unhampered. The person who hid it alone knows where it is until he discloses that fact to any other person. ***Hence the crucial question is not whether the place was accessible to others or not but whether it was ordinarily visible to others. If it is not, then it is immaterial that the concealed place is accessible to others.***
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> xxx xxx xxx
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> 28. In the present case, the fact discovered by the police with the help of (1) ***the disclosure statements*** and (2) the recovery of incriminating articles on the ***strength of such statements is that it was the accused who concealed those articles at the hidden places***. It is immaterial that such statement of the accused is inculpatory because Section 27 of the Evidence Act renders even such inculpatory statements given to a police officer admissible in evidence by employing the

words: "Whether it amounts to confession or not".
(Emphasis by us)

107. The knife had been concealed in bushes in a place along side a canal, certainly which place was known only to the person who has concealed it there and could get it recovered.

108. There is, however, one material fact which would lend support to the appellant's contention that the recovered knife could not have been the weapon of offence. The forensic science report extracted above would show that no human blood was detected as present on the knife. It is in evidence that the deceased was subjected to a vicious attack and inflicted with several knife blows. As per the post mortem report, the first injury which was the incised wound on the left side front of chest had entered the chest cavity between 4th and 5th rib and had cut the left ventricule of the heart. The second injury had entered the chest cavity through 4th inter costal and had cut the apex of the heart; the 4th injury had entered the chest cavity through 5th intercostals space and had cut the left ventricular of the heart. The 3rd injury noted by the doctor consists of two injuries, one is skin to muscle deep and other had entered the abdominal cavity and cut the stomach. The chest cavity of the deceased was full of blood. There is no evidence that the knife had been washed or cleaned after the murder. It is impossible for a knife which had caused such deep and grievous injuries to not be smothered in blood, at least to have traces thereof. The recovered knife had not the least evidence of any samples of blood

on it. It is, therefore, impossible that the injuries were inflicted with the knife in question.

109. We are supported in the conclusion which we have arrived at by the pronouncement of the Supreme Court reported in ***1997 Crime 714 Sita Ram v. State(Delhi Administration)*** wherein the court had held as follows :

> "(2) The prosecution case as revealed from the record, is that Mahender Singh son of Ram Bilas Singh, who hails from Village Locha, P.S. Gaighat, District Mujaffarpur, Bihar and who works at Village Samaipur, Delhi had a quarrel with one Ram Chander – Vakil over said Mahender Singh kidnapping a girl; that Mahender had threatened Ram Chander, to do away with him as former was insulted by the latter in presence of the Panchayat; that Ram Chander had come to Azad Pur, Delhi at the place of his brother Mithilesh Singh since the last 15 days in order to provide medical treatment to his son at All India Institute of Medical Sciences, New Delhi; that Ram Chander had come to the tea stall at Railway Station, of Mithlesh at 12 noon on 14.12.1986, accompanied by Sita Ram and one unknown person, wherefrom, Ram Chander was taken by Sita Ram to Samai Pur along with him; that during the night of 14/15.12.1986, Ram Chander was murdered and his dead body was found in the house of Lachhman Mandal and Narain Mandal; that Mithlesh Singh was informed about the incident by one Ravindra whereupon Mithlesh lodged FIR with P.S. Samai Pur, Delhi on 15.12.1986. The offence was registered. On completion of usual investigation, charge sheet came to be filed against this appellant and two other accused persons, namely, Lachhman Mandal and Narain Mandal with Mahender Singh as P.O. Charge came to be framed against the appellant, Lachhman Mandal and Narain Mandal for the offence punishable u/s. 302/34 Indian Penal Code. The

> accused denied the charge and claimed trial. The prosecution, in order to bring guilt home to the accused, adduced oral as well as documentary evidence. On appreciation of evidence and the further statements under Section 313 Criminal Procedure Code., the trial court found the appellant Sita Ram guilty for the offence charged and sentenced the appellant, as aforestated. The two other accused persons, namely, Narain Mandal and Lachhman Mandal were acquitted of the charges levelled against them. It is this judgment of conviction and sentence, which is assailed by the appellant/convict Sita Ram in this appeal."

110. In view thereof, we agree with learned counsel for the appellant that the finding of the trial judge that the recovered knife Exh.P3 was the weapon of offence could not be so. This finding has to be set aside and it is so held. However, this by itself can not impact the outcome of the present appeal.

Result

111. In view of the above, the judgment of conviction dated 31st August, 2000 passed by the trial judge in Sessions Case No. 3/97 arising out of FIR No. 466/95 registered by the police under Section 302/307/308/324/147/148/149/34 of the IPC and Sections 25/54/59 of the Arms Act by the Police Station Patel Nagar and order of sentence of the even date is upheld.

In the result, the appeals are found devoid of substance and, therefore, dismissed.

112. The sentence awarded against the appellant-Mahender Kumar in Crl.A.764/2000 was suspended by an order dated 22nd

July, 2002 and appellant-Naresh Kumar in Crl.A.540/2000 was suspended by an order dated 14th March, 2005 pending hearing on these appeals. They are now directed to surrender to custody within 30 days of this judgment and undergo the punishment awarded in this case. The learned trial court (or the successor court) and the station house officer of the police station shall take suitable steps to ensure compliance with these directions.

Copy of this judgment be made available to the appellants forthwith and be sent to the Superintendent, Tihar Jail.

GITA MITTAL, J

R.K. GAUBA, J

DECEMBER 20, 2016/kr