

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

% *Judgment Reserved On: 17th August, 2009*
Judgment Delivered On: 16th September, 2009

+ **CRL.A. 75/2001**

JOGINDER Appellant
Through: Ms. Anu Narula, Advocate

versus

STATE Respondent
Through: Ms. Richa Kapoor, Advocate

CRL.A. 543/2001

VIJAY Appellant
Through: Mr. Sumeet Verma, Advocate

versus

STATE Respondent
Through: Ms. Richa Kapoor, Advocate

CRL.A. 151/2001

SHAMIM Appellant
Through: Ms. Anu Narula, Advocate

versus

STATE Respondent
Through: Ms. Richa Kapoor, Advocate

CRL.A. 214/2001

SURJIT SINGH Appellant
Through: Ms. Anu Narula, Advocate

versus

STATE Respondent
Through: Ms. Richa Kapoor, Advocate

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE INDERMEET KAUR

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

PRADEEP NANDRAJOG, J.

1. Vide impugned judgment and order dated 19.01.2001 the appellants; Vijay, Shamim @ Munna, Surjit Singh and Joginder have been convicted for the offence of having murdered Devender (hereinafter referred to as the "Deceased"). For which offence, vide order dated 22.1.2001 they have been sentenced to undergo imprisonment for life and pay fine in sum of Rs.1,000/- each; in default to undergo simple imprisonment for 2 months. Additionally, appellants Joginder and Vijay, have been convicted for the offence of having attempted to cause culpable homicide not amounting to murder qua Durgpal, the father of the deceased, for which offence they have been sentenced to undergo rigorous imprisonment for three months and pay a fine in sum of Rs.1,000/- each; in default to undergo simple imprisonment for 2 months. Appellant Surjit Singh has also been convicted for the offence of having unlawfully possessed a knife, for which

offence he has been sentenced to undergo rigorous imprisonment for three months and pay a fine in sum of Rs.1,000/- each; in default to undergo simple imprisonment for 2 months.

2. Criminal law was set into motion when police received an information that a person has been stabbed with a knife at a house bearing Municipal No.B-I/34, Raghubir Nagar, New Delhi.

3. On receiving the aforesaid information, ASI Gangaram PW-12, reached the spot where he saw appellant Vijay in an injured condition. ASI Gangaram PW-12, removed appellant Vijay to DDU Hospital where his MLC was prepared. We note that on MLC Ex.DW-1/1 of appellant Vijay, following was recorded:-

“....Name of relative or friend ASI Gangaram PCR

....

Date and hour of arrival 7/11/97 (10pm)

.....

L/E

CLW (4 cm long) just above occipital region, in the centre, vertically placed

Swelling (7x6 cm) in rt parietal region

Swelling and tenderness of latnasal wall

Sign of old blood clot present in both nostril

No sign of active bleeding.....”

4. In the meantime, SI Swadesh Prakash PW-14, accompanied by Const.Vinod Kumar PW-1, reached the spot and on learning that Devender who was stabbed with a knife has been removed to DDU Hospital, proceeded to DDU Hospital where they were informed that the deceased is unfit for making a statement as noted in the MLC Ex.PW-10/A of the deceased. We note that on MLC Ex.PW-10/A of the deceased, following is recorded:-

“...Name of relative or friend...B/by Ravinder Kumar
Brother

....

Date and hour of arrival...7/11/97....9.30 PM.....”

5. At the hospital, SI Swadesh Prakash PW-14 and Const.Vinod Kumar PW-1, met Durgpal PW-6, the father of the deceased, who claimed to have witnessed the incident in question. Durgpal PW-6, was also medically examined at DDU Hospital. We note that on MLC Ex.PW-10/B of Durgpal, following is recorded:-

“Name of relative or friend...Self.....Date of
examination....7/11/97 at 11.40 PM

Date and hour of arrival....7/11/97 11.40 PM

.....ORTHO NOTES

Patient (case) absconded from the casualty

.....

- L/E- 1) Swelling and tenderness of the left thumb
- 2) Abrasion seen on the left knee
- 3) Abrasion on the Rt.arm
- 4) Abrasion on the Rt parietal regions of scalp.....”

6. Since Durgpal claimed to have witnessed the incident in question, SI Swadesh Prakash PW-14, recorded his statement Ex.PW-6/A and made an endorsement Ex.PW-3/B thereon, and at around 10.50 PM forwarded the same through Const.Vinod Kumar PW-1, for registration of an FIR. Const.Vinod Kumar took Ex.PW-3/B to the police station and handed over the same to HC Satyavan PW-3, who recorded the FIR No.942/97, Ex.PW-3/A.

7. In his statement Ex.PW-6/A, Durgpal stated that he resides in house bearing Municipal No.B-1/34, Raghubir Nagar, New Delhi with his family. Tonight, at around 8.15 PM he was having dinner at his house when someone informed him that his son is quarrelling with someone on the road outside his house. Along with his wife he went to the road where they met Devender. Upon making enquiries, Devender told him that Munna and his associates had threatened him with a katta on the eve of Diwali and that today also they quarrelled with him. He brought Devender to the house. After about 15-20 minutes

when they were standing on a street outside their house, four boys, one of whom was Vijay s/o Jwala Rai r/o B-2 133/134 Raghubir Nagar village Virpur Police Station Radhopur District Vaishali Vihar and another boy Munna s/o Rafiq R/o B-I 21 Raghubir Nagar village Virla District Aligarh UP came there. That he does not know the names and residential addresses of the other two boys, but he can recognize them. The said boys were having lathis in their hands. He asked as to what is the matter, upon which Vijay and another boy started assaulting him with the lathis which they were carrying in their hands. His son Devender was standing behind his back. Munna and another boy caught hold of his son and gave knife blows in the stomach of the deceased. He cried for help upon which number of persons gathered there. The persons gathered at the spot apprehended Vijay whereas other three boys managed to escape from there. Thereafter he removed his son to DDU Hospital in a TSR. He also suffered injuries in his hand and head. Vijay, Munna and their associates have caused hurt to him and his son with knives and lathis with an intention to kill them. Vijay was beaten by the people who had gathered at the spot. An action be taken against the said persons.

8. After obtaining the MLC's Ex.PW-10/A and Ex.PW-10/B of the deceased and Durgpal, SI Swadesh Prakash PW-14, went to

the place of occurrence. SI Swadesh Prakash prepared the rough site plan, Ex.PW-14/A of the place of occurrence; recording therein, at points 'A' and 'B', the spots where the appellants quarrelled with the deceased and his father and where the deceased was stabbed with a knife.

9. On the next day i.e. 08.11.1997 the deceased succumbed to his injuries at DDU Hospital. The body of the deceased was transferred to the mortuary of DDU Hospital where Dr.L.K.Barua PW-8, conducted the post-mortem and gave his report Ex.PW-8/A which records following injuries on the person of the deceased:-

- "1. Stitched wound in midline vertically and length 23 cm long.
2. Another stitched wound left side abdomen. 7 cm long.
3. Incised wound left flank abdomen. Size 2.6 cm
4. One rubber drainage tube left flank abdomen.
5. Stitched wound left lower lateral chest. Size 6.5 cms.
6. 1/ wound left forearm 3 cm x 2 cm.
7. 1/ wound left elbow back 9 cm x 3 cm
8. 1/w left thigh back 4.7 cm x 1 cm
9. Stitched wound rt ankle 3 cm.
10. Stitched wound rt para umbilical area 1.3 cm"

10. He opined that injuries No.(1), (2) and (4) were surgical insertions. He further opined that the other injuries were ante-

mortem in nature and caused by a sharp-edged weapon. It was opined that injury No.(3) was sufficient to cause death in the ordinary course of nature; and that the other injuries were collectively sufficient to cause death in the ordinary course of nature. The cause of death was opined to be haemorrhagic shock resulting from the injuries.

11. After the post-mortem, Dr.L.K.Barua handed over the blood stained clothes of the deceased to Const.P.P.Verghese PW-11, Duty Constable, DDU Hospital, who in turn handed over the same to SI Swadesh Prakash PW-14, vide memo Ex.PW-11/A. Dr.L.K.Barua also handed over the blood sample of the deceased on a gauze to SI Rajinder Singh PW-9, who seized the same vide memo Ex.PW-1/E.

12. On the same day i.e. 08.11.1997 the investigation of the case was taken over by Inspector Rajender Prashad PW-15.

13. The statement Mark DA of a friend of the deceased; namely, Mohan Lal PW-7, who also claimed to have witnessed the incident was recorded under Section 161 Cr.P.C. wherein he also indicted the appellants as the assailants of the deceased.

14. Since the two eye-witnesses; namely Durgpal PW-6 and Mohan Lal PW-7, had indicted the appellants of having murdered the deceased, the police set out to apprehend them.

15. On 10.11.1997 Inspector Rajender Prasad PW-15, arrested appellants Shamim and Vijay from their residences in the presence of Durgpal PW-6 and Mohan Lal PW-7. The appellants were interrogated and their confessional statements were recorded. We need not note the contents of their confessional statements inasmuch as the same are completely inadmissible in evidence as they admit of guilt. We note that no recovery was effected nor was a fact discovered by the police pursuant to the said statements made by appellant Shamim and Vijay.

16. On the same day i.e. 10.11.1997 Inspector Devinder Singh PW-2, prepared the site plan to scale Ex.PW-2/A of the place of occurrence; at the instance of Inspector Rajinder Prasad PW-15.

17. On 12.11.1997 Inspector Rajinder Prasad PW-15, arrested appellant Surjit from his residence. On being interrogated by Inspector Rajinder Prasad PW-15, in the presence of SI Swadesh Prasad PW-14 and Const.Vinod Kumar PW-1, appellant Surjit made a disclosure statement Ex.PW-1/A

wherein he confessed to have murdered the deceased and stated that he can get recovered the knife used by him for murdering the deceased. Pursuant thereto, he led the aforesaid police officers to a park near his residence and got recovered a knife from underneath some bricks which were lying at the said park. The said knife was seized vide memo Ex.PW-1/B. Inspector Rajinder Prasad PW-15, prepared the sketch of the said knife; being Ex.PW-1/C.

18. On the intervening night of 14/15.11.1997 Inspector Rajinder Prakash PW-15, arrested appellant Joginder from his house. Appellant Joginder took out a lathi from underneath a cot lying in a room of his house and handed over the same to Inspector Rajinder Prakash PW-15, who seized the same vide memo Ex.PW-4/C.

19. In the month of January 1998, applications were filed by the Investigating Officer before the court of Metropolitan Magistrate for conduct of Test Identification Proceedings of appellants Surjit and Joginder. S.S.Handa PW-13, Metropolitan Magistrate, conducted the TIP of the said appellants and prepared the records Ex.PW-12/A and Ex.PW-12/B in said regard. The records Ex.PW-12/A and Ex.PW-12/B notes that appellants Surjit and Joginder refused to participate in the TIP

proceedings on the ground that they were already shown to the witnesses.

20. The seized materials; viz. the clothes and blood sample of the deceased, vest and blood sample of appellant Vijay and the knife recovered from appellant Surjit were sent to FSL for serological examination. Vide FSL reports Ex.PW-15/A, it was opined that human blood was detected on the underwear of the deceased, group whereof could not be determined; that human blood of group 'A' was found on the vest and pant of the deceased; that blood group of the deceased was 'A'; that human blood was detected on the knife recovered at the instance of appellant Surjit, group whereof could not be determined and the blood sample of appellant Vijay had putrefied and therefore no opinion could be given about the same.

21. From the narrative of the investigation, it is apparent that the prosecution relied upon the testimony of Durgpal PW-6 and Mohan Lal PW-7, the two eye-witnesses; the disclosure statement of appellant Surjit and the recovery of the knife at his instance; the recovery of lathi from the possession of appellant Joginder; the report of the Serelologist with respect to the blood group of the deceased and that human blood of same group detected on the clothes of appellant Vijay to bring

home the guilt of the appellants. Needless to state, the motive projected by the prosecution for the crime was the quarrel which had taken place between the deceased and appellants i.e. past enmity.

22. Charges were framed against the appellants for having committed an offence punishable under Section 302/34 IPC. Additionally, a charge was framed against appellants Vijay and Shamim for having committed offence punishable under Section 308/34 IPC. A charge was also framed against appellant Surjit for having committed offence punishable under Section 27 of Arms Act.

23. At the trial, the prosecution examined 15 witnesses.

24. Ignoring the testimony of few formal police witnesses who deposed to the receipt of various articles in the maalkhana and further movement thereof to FSL, we note the testimonies of the other witnesses of the prosecution.

25. Const.Vinod Kumar PW-1, deposed that he participated in the investigation of the present case on 07/08.11.1997. He took the endorsement Ex.PW-3/B prepared by SI Swadesh Prakash PW-14, to the police station for the purposes of registration of an FIR. A knife was recovered at the instance of appellant Surjit in his presence.

26. ASI Gangaram PW-12, deposed that on 07.11.1997 at about 9.10 P.M. he reached the place of occurrence where he saw appellant Vijay lying in an injured condition. He removed appellant Vijay to DDU Hospital in a PCR van.

27. Inspector Devender Singh PW-2, deposed that the site plan to scale Ex.PW-2/A of the place of occurrence was prepared by him under the instructions of Inspector Ravinder Prakash. HC Satyavan PW-3, deposed that the FIR Ex.PW-3/A was recorded by him. Dr.L.K.Barua PW-8, deposed that the post-mortem report Ex.PW-8/A of the deceased was prepared by him. SI Rajinder Singh PW-9, deposed having handed over the blood sample of the deceased to Investigating Officer vide memo Ex.PW-1/E. Const.P.P.Verghese PW-11, deposed having handed over the clothes and blood sample of the deceased and the vest and the blood sample of appellant Vijay to the Investigating Officer vide memos Ex.PW-11/A and Ex.PW-11/DA respectively. JC Vashist PW-10, Record Clerk, DDU Hospital, deposed that the MLCs Ex.PW-10/A and Ex.PW-10/B were prepared by Dr.Ravindra Kumar and Dr.Sanchita respectively and that he can identify their signatures on the said MLCs.

28. Durgpal PW-6, the father of the deceased, deposed on the lines of his statement Ex.PW-6/A. He deposed that appellants Joginder and Vijay had assaulted him with the

lathis. Appellant Shamim caught hold of the deceased and appellant Surjit had given knife blows to the deceased. Appellant Vijay was arrested by the police in his presence. In other words, the two boys whose names were not disclosed by him in his statement Ex.PW-6/A, but in respect of whom, he had described the role played and had stated that if produced before him he can identify them, he identified in Court as to who did what.

29. On being cross-examined about the presence of blood on the clothes worn by him at the time of the incident, he replied that his clothes were stained with blood and that the said clothes were not seized by the police. On being questioned about the identity of appellant Joginder, he stated: (Quote) '*I came to know about name of Joginder from police paper. I knew Joginder by face...I did not know accused Joginder prior to the incident*'. On being questioned about the place and the time when his statement Ex.PW-6/A was recorded he stated that the said statement was recorded at the hospital at about 10/11 PM on 08.11.1997. On being questioned about his presence at DDU Hospital on the day of the incident, he stated: (Quote) '*I was not admitted in hospital. I was only checked. My statement recorded after my check-up.....I did not abscond from hospital. I did not leave hospital on that night at*

1 am of 8/11/97.' On being questioned about the presence of Mohan Lal, he stated that Mohan Lal was present with him at the time when he removed the deceased to the hospital. On being questioned about the presence of his mother when the incident took place he stated that his mother was not alive at the time of the incident. On being questioned about the presence of Mohan Lal at the time of the incident he stated that Mohan Lal was present at the time of the incident and witnessed the incident in question. On being questioned as to where his wife was standing when the incident took place and where was Mohan Lal standing at the time of the incident he stated: (Quote) *'My son was with Mohan Lal outside gali when I met him after hearing about previous incident....Mohan Lal was standing by side of my deceased son. My wife was standing by my side'*. On being questioned about the presence of his other sons Ashok and Ravinder at the time of the incident, he stated: (Quote) *'My son Ashok was not there. It is incorrect to suggest that my son Ashok gave beatings to Vijay at that time as result of which he became unconscious. My son Ravinder might have come at the place of incident later on. I cannot say whether my son Ravinder was also there and he gave beating to Vijay.....It is incorrect to suggest that when the accused were passing through the Gali in front of our house. My son*

Devender and Ravinder quarrelled with Surjit and when Vijay intervene to pacify the dispute, Davender and Ravinder started him beating and has been falsely implicated. On being questioned about the presence of his son Ravinder at the hospital on the day of the incident, he stated: (Quote) 'Ravinder also came to hospital, he did not sign in my presence any hospital paper....It is wrong that my son Ravinder was also at my house and he with me took deceased son to hospital...He came in hospital but, I can't tell time of arrival in hospital'. On being questioned about the time of arrival of the police at the hospital, he stated: (Quote) 'Police came at the hospital after half an hour of our reaching there. It must be 10.30/11 P.M. My statement was recorded by the police in the hospital at about 10.30 P.M./11 P.M.' On being questioned about the recording of the statement of Mohan Lal, he stated: (Quote) *'Statement of Mohan Lal was not recorded in my presence on that day.....Statement of Mohan Lal was recorded at my house on 10.11.97 at 9.30/10 A.M.'* On being questioned about the conduct of Mohan Lal at the time of the incident, he stated: (Quote) *'I can't tell if Mohan Lal tried to save my son when he was caught by accused Munna.'* On being questioned about the exhortation given by appellant Vijay to appellant Surjit to kill the deceased, he stated: (Quote)

'I do not remember whether I stated in any of my statement made before police that Vijay extorted Surjit "Mar Saale Ko".

30. Mohan Lal PW-7, a friend of the deceased, deposed that on 07.11.1997 at about 8.00 PM he, along with the deceased, was standing in front of a shop when appellants Surjit and Shamim came there and quarrelled with the deceased. Surjit broke a coca-cola bottle and tried to assault the deceased with the same. However, he and other persons intervened and saved the deceased. Surjit and Shamim left. After sometime, the deceased and he started proceeding to the house of the deceased. On the way he saw the appellants. When the deceased and he reached the corner of the street outside the residence of the deceased, they met the father of the deceased who made enquiries from them. The deceased told his father that appellant Shamim and his associates had threatened him with a katta on the eve of Diwali. At that point of time, the accused came. Appellants Joginder and Vijay were carrying lathis in their hands while Surjit and Shamim were concealing something in their armpits. The father of the deceased asked the appellants as to what the matter was, upon which appellants Joginder and Vijay assaulted him with lathis. Appellant Shamim caught hold of the deceased and appellant Vijay exhorted Surjit to kill the deceased by saying

'Mar Saale Ko'. Pursuant thereto, Surjit gave 2-3 knife blows in the stomach of the deceased. On hearing the noises, persons from the public gathered there. Along with the father of the deceased, he took the deceased to DDU hospital. Vijay was apprehended and beaten by the persons gathered at the spot. Appellants Shamim and Vijay were arrested by the police in his presence. The father of the deceased was also present at the time of arrest of appellants Shamim and Vijay.

31. On being questioned about the lathis possessed by the appellants at the time of the incident, he stated: (Quote) *'One lathi was lying at place of incident. It was left by accused there. I can't say whether that lathi was taken into possession by police or not'*. On being questioned about the presence of blood on the clothes worn by him at the time of the incident, he stated that his clothes were stained with blood and that the said clothes were not seized by the police. On being questioned about the admission of Durgpal in DDU Hospital on the day of the incident, he stated that Durgpal was not admitted in DDU Hospital. On being questioned about the presence of brother of the deceased Ravinder at DDU hospital on the day of the incident, he stated: (Quote) *'Ravinder came to hospital after 10/15 minutes of reaching there. He also remained there throughout. I alongwith Durgpal admitted*

Devender in hospital.' On being questioned about the identity of the appellants, he stated: (Quote) *'I know all accused present in court. I know all accused before date of incident. I have seen them on road. However, I did not meet them ever. Names of accused were told by my friend Sandeep. This fact was disclosed by him after incident when Sandeep and Surjit taking liquor. This fact told by my friend Sandeep to me. This fact was told to me after ½ day of incident. I knew Munna before incident by name but names of other were revealed to me after incident.'* On being questioned about the presence of the mother of the father of the deceased, he stated that the mother of the father of the deceased was accompanying the father of the deceased at the time when he met him and the deceased at the street outside the house of the deceased. On being questioned about the presence of the brothers of the deceased Ravinder and Ashok at the time of the incident, he stated: (Quote) *'It is wrong that Vijay was beaten by Devinder, Durgpal and his brother Ravinder and Ashok.'* On being questioned about the presence of wife of Durgpal at the time of the incident, he stated that he did not see the wife of Durgpal at the time of the incident. On being questioned about his conduct at the time of the incident, he stated: (Quote) *'I do not remember whether I tried to intervene at*

time of assault with lathi on person of Durgpal'. On being questioned about the exhortation given by appellant Vijay to appellant Surjit to kill the deceased, he stated: (Quote) 'I told police that Vijay exorted Surjit "Mar Saale Ko" it is not so recorded conf. with Mark DA.'

32. In their examination under Section 313 Cr.P.C., the appellants pleaded innocence and stated that they were falsely implicated.

33. In defence, the appellants examined Dr.Vatsala as DW-1. She deposed that the MLC Ex.DW-1/1 contains her name as also the name of Dr.Jitender Singh. That she cannot identify the signatures or handwriting of Dr.Jitender Singh. That MLC Ex.DW-1/1 must have been prepared by Dr.Jitender Singh.

34. Believing the testimony of Durgpal PW-6 and Mohan Lal PW-7, to be creditworthy, the learned Trial Judge has convicted the appellants.

35. At the hearing of the appeals, learned counsel for the appellants advanced under-noted 13 submissions:-

A The first submission advanced was predicated upon the statement Ex.PW-6/A of Durgpal, which statement has formed the basis of the FIR registered in the present case.

Counsel urged that there is not a word about the presence

of Mohan Lal at the time of the occurrence in the statement Ex.PW-6/A of Durgpal and therefore the claim of Mohan Lal that he witnessed the incident in question is most doubtful.

B The second submission advanced was predicated upon the conduct of Mohan Lal at the time of the occurrence. Counsel drew attention of the court to the deposition of Durgpal PW-6 in his testimony that *'I can't tell if Mohan Lal tried to save my son when he was caught by accused Munna'* and the deposition of Mohan Lal PW-7, in his testimony that *'I do not remember whether I tried to intervene at time of assault with lathi on person of Durgpal'*. Counsel urged that the aforesaid two depositions show that no attempt was made by Mohan Lal to save the deceased or his father. Counsel further urged that the said conduct of Mohan Lal of watching the occurrence in question as mere onlooker despite being a close friend of the deceased is most unnatural.

C The third submission advanced was predicated upon the conduct of Durgpal. In this regards, counsel drew attention of the court to the recording contained in the MLC Ex.PW-10/B of Durgpal that *'patient (case) absconded from the casualty'*. Counsel urged that the conduct of

Durgpal of leaving the hospital at the time when his son i.e. the deceased was battling for life is most unnatural. Counsel further submitted that the aforesaid recording contained in the MLC Ex.PW-10/B of Durgpal also belies the claim of Durgpal that he did not leave the hospital on the date of the incident.

D The fourth submission advanced was predicated upon the MLC Ex.PW-10/A of the deceased, MLC Ex.PW-10/B of Durgpal and the endorsement Ex.PW-3/B. Counsel urged that MLC Ex.PW-10/A of the deceased records that the deceased was brought to the hospital by his brother Ravinder Kumar which is in contradiction to the claim made by Durgpal and Mohan Lal their respective testimony that they had brought the deceased to the hospital. Counsel further urged that the MLC Ex.PW-10/A of the deceased records that the deceased was brought at the hospital at 9.30 PM whereas the MLC Ex.PW-10/B of Durgpal records that Durgpal arrived at the hospital at 11.40 P.M. As per the counsel, the difference in the timing of arrival of the deceased and Durgpal at the hospital further belies the claim of Durgpal and Mohan Lal that they brought the deceased to the hospital. Counsel next urged that Durgpal deposed in his testimony that his

statement Ex.PW-6/A was recorded by the police at 10/11 PM after his medical examination which is in contradiction to the facts which emerge from the endorsement Ex.PW-3/B and the MLC Ex.PW-10/B of Durgpal inasmuch as the endorsement Ex.PW-3/B records that the statement Ex.PW-6/A of Durgpal was recorded at 10.50 PM and that MLC Ex.PW-10/B of Durgpal records that the medical examination of Durgpal was conducted at 11.40 PM Counsel submitted that aforesaid discrepancies in the evidence of Durgpal and Mohan Lal leads to a strong inference that Durgpal arrived at the hospital subsequent to the admission of the deceased in the hospital. Counsel lastly submitted that said infirmity in the evidence of Durgpal and Mohan Lal seriously dents the credibility of the said witnesses.

E The fifth submission advanced was that Durgpal deposed in his testimony that his wife was present with him at the time of the occurrence and that his mother was not alive at that time whereas Mohan Lal deposed that the mother of Durgpal was present at the place of occurrence and that he did not see the wife of Durgpal at that time. As per the counsel, the said contradiction in the evidence of

Durgpal and Mohan Lal seriously dents the credibility of their evidence.

F The sixth submission advanced was that both Mohan Lal and Durgpal deposed that the clothes which they were wearing at the time of the incident got stained with blood and that the police did not seize the said clothes. Counsel urged that the fact that clothes worn by the said persons at the time of the occurrence were not seized by the police leads to a strong inference that their clothes were not stained with blood which in turn shows that the said persons did not remove the deceased to the hospital as alleged by them in their respective testimony.

G The seventh submission advanced was that Mohan Lal deposed that one of the lathis used by the appellants for assaulting the father of the deceased was left by them at the place of occurrence whereas no lathi was seized by the police from the place of occurrence. Counsel urged that the conduct of the Investigating Officer of not seizing the lathi from the place of occurrence is a serious lacuna in the investigation which is fatal to the case of the prosecution.

H The eighth submission advanced was that an adverse inference needs to be drawn against the prosecution for not examining the wife of Durgpal who as per Durgpal was present at the place of occurrence at the time of the incident and Ravinder Kumar, the brother of the deceased, who could have explained the facts pertaining to the removal of the deceased to the hospital.

I The ninth submission advanced was that the conduct of the Investigating Officer of not promptly conducting the TIP of appellants Surjit and Joginder is fatal to the case of the prosecution inasmuch as the identity of the said appellants was not known to the so-called eye-witnesses.

J The tenth submission advanced was predicated upon the statement Ex.PW-6/A of Durgpal and the statement Mark DA of Mohan Lal. Counsel urged that the fact that appellant Vijay gave an exhortation to appellant Surjit to kill the deceased is neither mentioned in the statement Ex.PW-6/A of Durgpal nor in the statement Mark DA of Mohan Lal which clearly shows that the depositions of Durgpal and Mohan Lal that appellant Vijay gave an exhortation to appellant Surjit to kill the deceased is an

after-thought. Without prejudice to the above submission,

counsel next urged that the only overt acts attributed to appellants Joginder Vijay were that they caught hold of the father of the deceased and that appellant Vijay gave an exhortation to appellant Surjit to kill the deceased. As per the counsel, in such circumstances, it cannot be said that appellants Joginder and Vijay were sharing any common intention with the other appellants to kill the deceased, therefore, they ought not to have been convicted under Section 302 read with Section 34 IPC for committing the murder of the deceased.

K The eleventh submission advanced was predicated upon the MLC Ex.DW-1/1 of appellant Vijay. The counsel urged that the fact that the injuries were found on the person of appellant Vijay as noted in the MLC Ex.DW-1/1 probablize the version of appellant Vijay that the deceased and his brothers quarrelled with him and that he was injured by them.

L The twelfth submission advanced was that there were serious discrepancies in the evidence of the witnesses of purported recoveries made at the instance of appellants.

M The thirteenth submission advanced was that the circumstance pertaining to presence of blood of same group as that of the deceased on the t-shirt of appellant Vijay which he was wearing at the time of the occurrence ought to be rejected inasmuch as the fact that appellant Vijay was still wearing the same t-shirt which he was wearing at the time of occurrence at the time of his arrest which was 3 days after the occurrence is highly improbable.

36. Since the first few submissions advanced by the learned counsel for the appellants pertain to the alleged discrepancies in the ocular evidence of Durgpal PW-6 and Mohan Lal PW-7, we first proceed to consider the veracity of the evidence of said witnesses.

37. In dealing with the submissions pertaining to the credibility of the witnesses; Durgpal PW-6 and Mohan Lal PW-7, we first proceed to note the following observations made by a Division Bench of this Court of which one of us, namely, Pradeep Nandrajog, J. was a member of, in Criminal Appeal No.327/2007 titled '*Akbar & Anr. vs. State*' decided on 29.05.2009:-

49. The appreciation of ocular evidence is a Herculean task. There is no fixed or strait-jacket

formula for appreciation of ocular evidence. The judicially evolved principles regarding the appreciation of the ocular evidence in a criminal case can be enumerated as under:

I While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the Court to scrutinize the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief.

II If the Court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial Court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details.

III When eye-witness is examined at length it is quite possible for him to make some discrepancies. But courts should bear in mind that it is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the Court is justified in jettisoning his evidence.

IV Minor discrepancies on trivial matters not touching the core of the case, hyper technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole.

V Too serious a view to be adopted on mere variations falling in the narration of an incident (either as between the evidence of two witnesses or as between two statements of the same witness) is an unrealistic approach for judicial scrutiny.

VI By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.

VII Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.

VIII The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind whereas it might go unnoticed on the part of another.

IX By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.

X In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person.

XI Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.

XII A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing

cross examination by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him.

XIII A former statement though seemingly inconsistent with the evidence need not necessarily be sufficient to amount to contradiction. Unless the former statement has the potency to discredit the later statement, even if the later statement is at variance with the former to some extent it would not be helpful to contradict that witness.

(These principles have been culled out from the decisions of Supreme Court reported as Bharwada Bhoginbhai Hirjibhai v. State of Gujarat 1983CriLJ1096 Leela Ram v. State of Haryana 1997CriLJ3178 and Tahsildar Singh v. State of UP 1959CriLJ1231). (Emphasis Supplied)

38. It is significant to note that Durgpal PW-6, is an injured witness.

39. When the evidence of an injured eye-witness is to be appreciated, the under-noted legal principles enunciated by the Courts are required to be kept in mind:-

(a) The presence of an injured eye-witness at the time and place of the occurrence cannot be doubted unless there are material contradictions in his deposition.

(b) Unless, it is otherwise established by the evidence, it must be believed that an injured witness would not allow the real culprits to escape and falsely implicate the accused.

(c) The evidence of injured witness has greater evidentiary value and unless compelling reasons exist, their statements are not to be discarded lightly.

(d) The evidence of injured witness cannot be doubted on account of some embellishment in natural conduct or minor contradictions.

(e) If there be any exaggeration or immaterial embellishments in the evidence of an injured witness, then such contradiction, exaggeration or embellishment should be discarded from the evidence of injured, but not the whole evidence.

(f) The broad substratum of the prosecution version must be taken into consideration and discrepancies which normally creep due to loss of memory with passage of time should be discarded.

40. From the afore-noted judicial principles, it is clear that the first step in appreciating the evidence of a witness is to examine his evidence de-hors the discrepancies appearing

therein and to see whether the evidence appears to be a truthful account.

41. In the instant case, the incident occurred around 8.30 PM on 07.11.1997. The statement Ex.PW-6/A of Durgpal, which formed the basis of the FIR Ex.PW-3/A, was recorded at 10.50 PM on 07.11.1997. The statement Ex.PW-6/A of Durgpal was recorded at DDU Hospital as evident from the deposition of SI Swadesh Prasad PW-14, the scribe of statement Ex.PW-6/A, that he recorded the said statement at the hospital, which deposition was not controverted by the defence. It can reasonably be taken that it must have taken at least 30 minutes for Durgpal in reaching DDU Hospital from the place of occurrence. In these circumstances, the possibility of Durgpal contriving facts and spinning a false story in such less time is remote.

42. There is yet another fact which needs to be noted. In the decision reported as Malkiat Singh vs. State of Punjab (1991) 4 SCC 391 Supreme Court has held that it is settled law that the First Information Report is not substantive evidence. It can only be used to contradict the maker thereof or for corroborating his evidence and also to show that the implication of the accused was not an after-thought. In the instant case, the FIR Ex.PW-3/A records that Durgpal has

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stated that appellant Surjit gave knife blows in the stomach of the deceased. The findings of the doctor who had conducted the post-mortem of the deceased after the registration of the FIR as recorded in the post-mortem report Ex.PW-8/A are that two wounds were found on the abdomen of the deceased. Therefore, the FIR Ex.PW-3/A duly corroborates the testimony of Durgpal, for the reason, unless Durgpal had seen appellant Surjit giving knife blows to the deceased, he could not have correctly stated the situs of the injuries suffered by the deceased, prior to the conduct of the post-mortem of the deceased.

43. It is further relevant to note that the recording contained in the FIR Ex.PW-3/A that Durgpal has stated that he suffered injuries on his head and hand at the time of the incident stands corroborated by the MLC Ex.PW-10/B of Durgpal which records presence of injuries on the left thumb and the scalp of Durgpal.

44. The uncontroverted testimony of SI Swadesh Prasad PW-14, that he recorded the statement Ex.PW-6/A of Durgpal PW-6, at DDU Hospital corroborates the testimony of Durgpal that he had removed the deceased to the hospital, which in turn, establishes his presence at the place of occurrence at the time of the incident.

45. The two eye-witnesses; Durgpal PW-6 and Mohan Lal PW-7, have corroborated each other on material aspects relating to the incident.

46. Therefore, the conclusion which emerges from the first reading of the evidence of the witnesses in question is that they are prima facie truthful witnesses.

47. Next, it needs to be considered, whether the so-called discrepancies pointed out by learned counsel in the evidence of Durgpal PW-6 and Mohan Lal PW-7, are in effect discrepancies. If yes, the effect thereof?

48. As already noted herein above, the first discrepancy pointed out by the learned counsel is that the presence of Mohan Lal at the time of the incident does not find mention in the statement Ex.PW-6/A of Durgpal.

49. In this regards, it is most apposite to note the following observations of Supreme Court in the decision reported as Babu Singh v State of Punjab (1996) 8 SCC 699:-

“7. So far as PW 14 is concerned one of the arguments advanced by the learned counsel for the appellant is the fact that his name did not find place in the FIR as a witness to the occurrence. FIR can be used only for the purpose of corroborating or contradicting the maker thereof. That apart, the FIR was lodged by the father who has stated to have seen the ghastly occurrence, one son killing the other and at that juncture if he did not mention the name of Jai

Narayan to be a witness to the occurrence, the evidence of Jai Narayan cannot be doubted on that score. It is well settled that if the witness is found to be independent and reliable and is believed to be present during the occurrence then his evidence cannot be rejected on the sole ground that his name has not been mentioned in the FIR. Non-mention of name of a witness may be an honest omission, inadvertent mistake or may be due to various other conceivable reasons. It has been held by this Court in the case of *Nirpal Singh v. State of Haryana*¹, that the name of the witness examined on trial not having been given in the FIR though may be of some relevance but by itself would not entail rejection of his evidence. On examining the first information report we find that no mention has been made as to who are the witnesses to the occurrence. That by itself cannot be the ground to discard the evidence of the witness who has stated to have witnessed the occurrence if intrinsically nothing has been brought out in the cross-examination to impeach his testimony. In the circumstances we are unable to persuade ourselves to agree with the submission of the learned counsel for the appellant that non-mention of the name of Jai Narayan in the FIR is sufficient to impeach his veracity.....” (Emphasis Supplied)

50. In the decision reported as *State of UP v Man Singh* (2003) 10 SCC 414 Supreme Court observed as under:-

“10. One of the circumstances highlighted by the High Court to discard the evidence of PW 8 is non-mention of his name in the FIR. As stated by this Court in *Chittar Lal v. State of Rajasthan*³ evidence of the person whose name did not figure in the FIR as a witness does not perforce become suspect. There can be no hard-and-fast rule that the names of all witnesses, more particularly eyewitnesses, should be indicated in the FIR. As was observed by this Court in *Shri Bhagwan v. State of Rajasthan*⁴ mere non-mention of the name of an eyewitness does not render the prosecution version fragile.”

51. In the instant case, the FIR Ex.PW-3/A was prepared on the basis of the statement of Ex.PW-6/A of Durgpal, the father of the deceased. Durgpal witnessed the deceased being brutally attacked by the appellants just about two hours prior to the recording of his statement Ex.PW-6/A. In such circumstances, the possibility that Durgpal being in a state of shock at the time of the recording of his statement Ex.PW-6/A forgot to mention about the presence of Mohan Lal in said statement cannot be ruled out. Therefore, the evidence of Mohan Lal cannot be doubted on the score that his name does not find a mention in the FIR Ex.PW-3/A.

52. The matter can also be looked from another angle.

53. It may be noted that no question was put to Durgpal regarding the non-mention of the name of Mohan Lal in the statement Ex.PW-6/A. Had he been questioned, Durgpal may have given a satisfactory answer. Be that as it may, since the accused chose not to confront Durgpal of his not having so stated before the police, the appellants can take no advantage of said issue.

54. Having given no opportunity to Durgpal to explain the non-mention of the name of Mohan Lal in his statement Ex.PW-6/A, no adverse inference can be drawn against the prosecution.

55. In taking the said view, we are supported by a decision of Supreme Court reported as Rahim Khan v Khurshid Ahmad AIR 1975 SC 290 wherein it was observed as under:-

“.....The entry with which we are concerned is 5072A and this is not unusual when by mistake a clerk has written identical figures for two entries. Moreover there is no cross-examination on this point and in the absence of cross-examination giving an opportunity to the witness to explain the circumstances from which an inference is sought to be drawn, no such inference--particularly of forgery and publication of documents--can be permitted to be raised.” (Emphasis supplied)

56. In the decision reported as State of UP V Anil Singh 1988 (Supp) SCC 686, the eye-witness wrote a report giving fairly all the particulars of the occurrence and lodged the same with the report within few minutes of the occurrence. An argument was raised by the defence that it was impossible for the witness to prepare such an exhaustive report and lodge the same with the police so soon after the occurrence. The said argument was repelled by Supreme Court on the ground that the witness in question was not specifically cross-examined on said point.

57. In the decision reported as Sunil Kumar v State of Rajasthan (2005) 9 SCC 298 great stress was laid by the defence on the facts that there was delayed dispatch of the

FIR to the Ilqa Magistrate and delayed recording of the statements of the witnesses under Section 161 Cr.P.C. One of the reasons which weighed with Supreme Court for not drawing an adverse inference against the prosecution was that no question was put to the Investigating Officer regarding the aforesaid delay.

58. Since the next two submissions advanced by the learned counsel are predicated upon the conduct of the witnesses Durgpal PW-6 and Mohan Lal PW-7, we note the decision of Supreme Court reported as State of Karnataka v Yellapa Reddy AIR 2000 SC 185 wherein it was held that unless the reaction demonstrated by an eye-witness is so improbable or so inconceivable from any human being pitted in such a situation it is unfair to dub his reaction as unnatural.

59. In the backdrop of afore-noted dictum, it needs to be judged whether the conduct of witness Mohan Lal of not attempting to save the deceased and his father from the appellants was unnatural or not.

60. In the instant case, both Durgpal and Mohan Lal have categorically deposed that all the appellants were armed with weapons at the time of the incident. In such circumstances, can the conduct of Mohan Lal of not attempting to save the

deceased and his father from the clutches of the appellants who were armed with weapons particularly when he was unarmed and had seen that the appellants caused hurt to the father of the deceased when he tried to stop them from attacking the deceased be termed as so inconceivable from the conduct of any human being pitted in such a situation? The answer to the said question is an emphatic NO.

61. Insofar as the conduct of Durgpal leaving the hospital at the time when the deceased was battling for life at the hospital is concerned, it is most important to note that Durgpal deposed in his testimony that he was medically examined at the hospital but was not admitted therein. It is further important to note that both Durgpal and Mohan Lal categorically deposed that Durgpal did not leave the hospital on the day of the incident. From a conjoint reading of the aforesaid two depositions it is apparent that Durgpal got himself medically examined at the casualty ward of the hospital but did not get himself treated and left the casualty ward in order to be at the side of the deceased who was battling for his life. The recording contained in the MLC Ex.PW-10/B of Durgpal that he absconded from the casualty merely means that Durgpal left the casualty ward of the hospital and not that he left the hospital.

62. The ostensible discrepancy between the MLC Ex.PW-10/A of the deceased which records that the deceased was brought to the hospital by his brother Ravinder Kumar and the evidence of Durgpal and Mohan Lal that they brought the deceased to the hospital is explainable from the evidence on record. Durgpal and Mohan Lal have categorically deposed that they brought the deceased to the hospital and that Ravinder Kumar came to the hospital after the admission of the deceased at the hospital. Mohan Lal deposed that Ravinder Kumar arrived at the hospital after 10-15 minutes of their arrival at the hospital. The first endeavour of the doctor who attended to the deceased at the hospital would have been to treat the deceased as the deceased was in a serious condition and not to make MLC of the deceased. The doctor would have prepared the MLC of the deceased only after providing the necessary treatment to the deceased. It is quite possible that by the time the doctor proceeded to prepare the MLC of the deceased Ravinder Kumar arrived at the hospital and interacted with the doctor at the time when he prepared the MLC of the deceased, thus the doctor recorded the name of Ravinder Kumar as the person who brought the deceased to the hospital in the MLC Ex.PW-10/A of the deceased.

63. Likewise, the ostensible discrepancy between the MLC Ex.PW-10/A of the deceased which records that the deceased was brought to the hospital at 9.30 PM on 07.11.1997 and the MLC Ex.PW-10/B of Durgpal which records that Durgpal arrived at the hospital at 11.40 P.M. is explainable. It is an admitted fact that the deceased was in a serious condition at the time when he was brought to the hospital. The utmost concern of Durgpal at that time would have been the well-being of the deceased. It is inconceivable that Durgpal would have proceeded to get treated himself for the minor injuries suffered by him at the time when the deceased was battling for his life. Durgpal would have proceeded to get himself medically examined only when he would have been ensured by the doctors that the medical condition of the deceased has improved or when he could no longer bear the pain resulting from the injuries suffered by him. In such circumstances, the time difference of about two hours between the time of arrival of the deceased and Durgpal at the hospital recorded in the MLCs Ex.PW-10/A and Ex.PW-10/B does not mean that Durgpal has deposed falsely that he along with Mohan Lal brought the deceased to the hospital.

64. Insofar as the discrepancy between the endorsement Ex.PW-3/B which records that the statement of Durgpal was

recorded at the hospital at 10.50 PM, the MLC Ex.PW-10/B of Durgpal which records that he was medically examined at 11.40 PM on 07.11.1997 and the evidence of Durgpal that his statement was recorded subsequent to his medical examination is concerned, suffice would it be to state that ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused or mixed up when interrogated later on about the sequence of events which happened on the incident in question.

65. In dealing with the discrepancy relating to the wife and mother of Durgpal in the evidence of Mohan Lal, it is most significant to note that Mohan Lal is an illiterate person. When scanning the evidence of the various witnesses the Court has to take care of the fact that variances on the fringes, discrepancies in details, contradictions in narrations and embellishments in inessential parts cannot militate against the veracity of the core of the testimony provided there is the impress of truth and conformity to probability in the substantial fabric of testimony delivered. Even a wholly truthful witness is liable to be overawed by the court atmosphere and piercing cross-examination by counsel out of nervousness mix up facts. Considering that Mohan Lal is an

illiterate person, it is most likely that he has got confused while answering the questions pertaining to the wife and mother of the deceased and thus has given discrepant answers. Be that as it may, minor discrepancies on trivial matters not touching the core of the case do not permit rejection of the whole evidence given by a witness.

66. The submission pertaining to non-seizure of the clothes of the eye-witnesses needs to be noted and dealt with in the context of the decision of the Supreme Court reported as Gurunath Donkappa Keri & Ors v State of Karnataka 2009 (7) SCALE 482 wherein a similar contention was advanced on behalf of the accused persons. Repelling the said contention, it was held by the Court that the said fact merely points out an error on part of the Investigating Officer and the same, by itself, is not sufficient to discard the entire prosecution case. In the decision reported as Harpal Singh v Devinder Singh (1997) 6 SCC 660 Supreme Court observed that no investigating agency would normally take the trouble to seize the clothes worn by the witnesses at the time when they saw the occurrence because their clothes too had collected stains of blood during any post-event activities. At any rate, the said omission on the part of the investigating agency is not a flaw

of the type to invite the consequence of jettisoning evidence of a eye-witness.

67. Insofar as the non-seizure of the lathi lying at the place of occurrence is concerned, the sequence of the events which happened on the day of the incident needs to be noted. It has come on record that number of persons from the public gathered at the spot after the deceased and his father were attacked by the appellants. Thereafter the deceased was removed to the hospital. After the deceased was removed to the hospital, the police arrived at the spot wherefrom it proceeded to the hospital where the deceased was taken. After some time, the police returned from the hospital to the spot to conduct the investigation. From the conspectus of above facts, it can reasonably be assumed that someone from the crowd removed the lathi which was lying at the spot before the conduct of spot investigation by the police. Be that as it may, it is settled law that when the direct testimony of the eye-witnesses inspires confidence and fully establishes the prosecution version, the failure or omission or negligence of the police officer cannot affect the credibility of the case of the prosecution. (See the decision of Supreme Court reported as Ram Behari Yadav v State of Bihar AIR 1988 SC 1850)

68. It is now well-settled principle of law that whom to cite as a witness and whom not to cite is within the domain of the prosecution. It is primarily for the prosecutor to decide which witness it should examine in order to unfold the prosecution story. (See the decisions of Supreme Court reported as State of UP v Ganga Ram (2005) 13 SCC 239 and Harpal Singh v Devinder Singh (1997) 6 SCC 660)

69. No doubt, Ravinder Kumar and the wife of Durgpal would have been a material witness. But, merely because they were not examined by the prosecution, a criminal court would not lean to draw an adverse inference that if they were examined, they would have given a contrary version. The illustration (g) in Section 114 of the Evidence Act is only a permissible inference and not a necessary inference. Unless there are other circumstances also to facilitate the drawing of an adverse inference, it should not be a mechanical process to draw the adverse inference merely on the strength of non-examination of a witness even if the witness is a material witness. We do not see any justification, in this case, in drawing such an adverse inference against the prosecution due to non-examination of Ravinder Kumar and the wife of Durgpal.

70. The necessity for holding a Test Identification Proceedings arises only when the accused persons are not previously known to the witnesses. Non-holding of Test Identification Proceedings does not assume any materiality if either the witness had known the accused earlier or where the reasons for gaining an enduring impress of the identity on the mind and memory of the witness are, otherwise, brought out. (See the decisions of Supreme Court reported as *Hari Nath v State of UP* 1998 (1) SCC 14 and *Munshi Singh Gautam v State of MP* 2005 (9) SCC 631)

71. In the instant case, Mohan Lal PW-7, categorically deposed that he knew appellants Surjit and Joginder prior to the incident though he was not aware about their names at that time. Nothing could be elicited from his cross-examination which could cast a doubt upon the truthfulness of the aforesaid deposition of Mohan Lal. In such circumstances, the delay on the part of the Investigating Officer to expeditiously apply for a Test Identification of Surjit and Joginder is not fatal.

72. Section 34 IPC does not create a substantive offence. It means that if two or more persons intentionally do a thing jointly, it is just the same as if each of them has done it intentionally. The constructive liability under this Section would arise if following two conditions are fulfilled: - (a) there

must be common intention to commit a criminal act; and, (b) there must be participation of all the persons in doing of such act in furtherance of that intention. Common intention requires a prior concert or pre-planning. Common intention to commit a crime should be anterior in point of time to the commission of the crime, but may also develop at the instant when such crime is committed.

73. It is difficult, if not impossible, to procure direct evidence of common intention. In most cases it has to be inferred from the act or conduct of the accused persons and other relevant circumstances of the case. This inference can be gathered by the manner in which the accused arrived on the scene and mounted the attack, the determination with which the injury was inflicted, the concerted conduct of the accused persons during the commission of the offence and subsequent to the commission of the offence. In other words, intention has to be gathered from the acts of the accused persons and the attendant relevant circumstances enwombing the act. 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 he could be convicted.

74. In the decision reported as Suresh vs. State of UP (2001)

3 SCC 673, the Supreme Court observed:-

“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.” (Emphasis Supplied)

75. In the instant case, there is no allegation in the FIR Ex.PW-3/A or in the statement Mark DA of Mohan Lal PW-7, that appellant Vijay gave an exhortation to appellant Surjit to kill the deceased. In such circumstances, we do not consider it safe to rely upon the evidence of Durgpal PW-6 and Mohan Lal PW-7, that appellant Vijay gave an exhortation to appellant Surjit to kill the deceased.

76. The position which now emerges is that appellant Vijay and Joginder caught hold of the father of the deceased i.e. Durgpal and assaulted him with lathis, appellant Shamim caught hold of the deceased and appellant Surjit gave knife blows in the abdomen of the deceased.

77. The question which needs consideration is that whether appellants Vijay and Joginder can be attributed with the intention of murdering the deceased.

78. To determine the extent of culpability of appellants Vijay and Joginder, we proceed to analyze the evidence by recreating what had happened on the date of the incident. A quarrel took place between appellants Shamim and Surjit and

the deceased. With the intervention of the persons from the public, peace was restored. Shamim and Surjit left and came to the residence of the deceased within a few minutes with Vijay and Joginder. Vijay and Joginder were armed with lathis. As per Mohan Lal PW-7, Shamim and Surjit were concealing knives in their armpits. It is apparent that the appellants came to the residence of the deceased to resume the quarrel. Now, it is apparent that the accused must have thought of an action plan which the prosecution could not unearth. One thing is certain. The appellants returned with an intention of doing something. When the father of the deceased tried to intervene, Vijay and Joginder caught hold of him and assaulted him with lathis. Simultaneous with the action of Vijay and Joginder catching hold of the father of the deceased, Shamim caught hold of the deceased and Surjit gave knife blows in the stomach of the deceased. Thus, Joginder and Vijay prevented the father of the deceased from coming to the rescue of the deceased.

79. Seven injuries were found on the person of the deceased as noted in the post-mortem report Ex.PW-8/A of the deceased. Evidence proves that Vijay and Joginder caught hold of the father of the deceased and assaulted him Appellants Vijay and Joginder, instead of preventing each other from

resorting to violence, participated in the incident to fullest extent i.e. continued to hold the father of the deceased till the last injury was inflicted upon the person of the deceased.

80. In the decision reported as Kishore Eknath Nikam v State of Maharashtra (2006) 10 SCC 666, the appellant prevented a witness from saving the deceased from the clutches of the co-accused and inflicted a knife injury on the person of the said witness during the said process. Holding that the appellant was rightly convicted under Section 302 read with Section 34 IPC, Supreme Court observed as under:-

“10. A perusal of the statements of all PWs 1, 2 and 3 shows that there is no manner of doubt that the accused-appellant in furtherance of the common intention of A-1 Jagdish tried to prevent PWs 2 and 3 from intervening in the matter. So much so that PW 3 who wanted to intervene, effectively was prevented by causing knife injury by the accused-appellant. Therefore, this conduct of the accused-appellant is sufficient to attract Section 34 IPC because he acted in furtherance of common intention of accused A-1. Looking to the facts of the present case there remains no manner of doubt that the accused-appellant was acting in furtherance of the common intention and prevented PWs 2 and 3 to save the deceased. He facilitated the commission of the offence in furtherance of common intention of A-1 Jagdish in commission of the murder of the deceased Parshant. Therefore, Section 34 is attracted in the present case and the accused-appellant was rightly convicted under Section 302 read with Section 34 IPC.”

81. We thus hold that appellants Vijay and Joginder by their acts of catching hold of the father of the deceased, causing injuries on his person and continuing to catch hold of him till the very end, having participated in the incident to the fullest

extent and facilitating the commission of the murder of the deceased, have evidenced their intention common with that of appellants Surjit and Shamim and hence are vicariously liable for the action of Surjit and Shamim.

82. Insofar as the submission pertaining to the injuries found on the person of appellant Vijay is concerned, suffice would it be to state that the MLC Ex.DW-1/1 of Vijay has not been proved in accordance with law. Dr.Vatsala DW-1, has not identified the signatures or handwriting of Dr.Jitender Singh, the purported scribe of the said MLC, on the said MLC. She has stated that Dr.Jitender Singh must have been prepared the said MLC. A document cannot be proved on the basis of opinion of a witness.

83. Be that as it may, far from supporting the defence of appellant Vijay, the injuries found on the person of appellant Vijay, supports the version of the prosecution that appellant Vijay was apprehended and beaten up by the persons from the public on the day of the occurrence.

84. We need not note the submissions pertaining to the recoveries made at the instance of the appellants for it is settled law that where there are eye-witnesses to an incident whose testimony inspires confidence, minor issues pertaining to recoveries etc have to be considered as supporting

evidence, unless there is evidence of planting, for planting always is a serious issue. (See the decision of this Court in Criminal Appeals Nos.948-949/2005 titled as '*Rafi Ahmad vs. State*' decided on 17.04.2009)

85. In view of the above discussion, we find no merits in the appeals. The same are dismissed.

**(PRADEEP NANDRAJOG)
JUDGE**

**(INDERMEET KAUR)
JUDGE**

**September 16, 2009
mm / dk**