

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

Date of Hearing : 30th March, 2011

Date of Decision : 28th April, 2011

+ CRL.A No.10/2011

MURARI

... APPELLANT

Through: Mr.Sameer Chandra, Advocate.

Versus

STATE

... RESPONDENT

Through: Mr.Jaideep Malik, APP for the State

AND

CRL.A No.228/2011

SANDIP @ SANJU

... APPELLANT

Through: Ms.Meenakshi Lekhi, Advocate.

Versus

STATE

... RESPONDENT

Through: Mr.Jaideep Malik, APP for the State

AND

CRL.A No.241/2011

CHANDAN @ CHANDU

... APPELLANT

Through: Mr.Ranjit Singh, Advocate.

Versus

STATE

... RESPONDENT

Through: Mr.Jaideep Malik, APP for the State

AND

CRL.A No.139/2011

RAKESH

... APPELLANT

Through: Mr.Sameer Chandra, Advocate.

Versus

STATE

... RESPONDENT

Through: Mr.Jaideep Malik, APP for the State

AND

CRL.A No.11/2011

SURESH

... APPELLANT

Through: Mr.Sameer Chandra, Advocate.

Versus

STATE ... RESPONDENT

Through: Mr.Jaideep Malik, APP for the State

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE G.P.MITTAL

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

J U D G M E N T

G.P. MITTAL, J.

Crl. A. Nos. 10/2011, 228/2011, Crl. A. Nos. 241/2011, 139/2011 & 11/2011

1. Criminal law was set into motion when on the basis of information given by operator S-53 (of PCR) that there was a quarrel at Lado Sarai T point, near Masjid and a person was lying there in a serious condition, DD No.41/A (PW17/A) recorded in Police Station (PS) Mehrauli was handed over to Head Constable Mahender Bhardwaj for necessary action. Since the area of the incident fell within the jurisdiction of Police Post (PP) Saket, HC Mahender Bhardwaj transmitted the said information to the Police Post which was recorded by Constable Satbir at 10:50 P.M. by DD No.29 (Ex.PW27/A). DD No.29 was assigned to SI Aishvir Singh in charge PP Saket. He (SI Aishvir Singh) left for the spot along with HC Shiv Kumar, HC Devender and HC Jagdish.
2. On reaching the spot PW-29 SI Aishvir Singh (the SI) found a pool of blood at two places. One big stone and one small stone (both blood stained) were lying there. A motor cycle (Hero Honda Splendor) bearing No.DL3SAJ 7048 was parked at a distance of 50-60 metres from the spot. On inquiry SI Aishvir Singh came to know that the injured had been removed to AIIMS in his vehicle by a public person. HC Jagdish was directed to remain present at the spot to secure it. The SI proceeded to AIIMS along with other members of the staff.

3. On reaching AIIMS, the SI obtained the MLC (Ex.PW16/A) of Jitender Panwar (the deceased) who had been declared brought dead at 11:15 P.M. One Mohd. Sagir (PW-9A) met him who claimed to have seen the incident. The deceased's belongings were handed over to him by the Duty Constable Satish which were seized by him by memo Ex.PW12/A. SI recorded Mohd. Sagir's statement (Ex.PW-9A). He made an endorsement Ex.PW29/A and sent the same to the Police Station for registration of the case.
4. The SI along with his staff, the deceased's car and witnesses, namely, Nand Kishore, Naveen Kumar, Mohd. Sagir and Fakre Alam reached the spot at 12:45 A.M. He requisitioned the crime team.
5. Inspector Pankaj along with SHO and other staff met him at the spot. The investigation of the case was handed over to Inspector Pankaj (IO). He (SI) entrusted him (the IO) DD No.29 and MLC Ex.PW16/A of the deceased.
6. According to the prosecution, the crime team reached the spot at about 12:50 A.M. SI Vinod Kumar and Constable Girdhar of the crime team took photographs of the spot from various angles. The crime team gave its report to the IO at 1:25 A.M. with direction to send the dead body to the autopsy surgeon to ascertain the cause of death. The IO prepared the site plan Ex.PW-9/B at the instance of Mohd Sagir PW-9A. The IO lifted the blood from the spot. Blood stained earth and control earth were seized from the spot. The articles seized were given various serial numbers and were taken into possession by the IO by memo Ex.PW-9/A. A "Splendor" motorcycle bearing No. DL 3SAJ 7048 was seized by memo Ex.PW-9/D. Two blood stained teeth were found in the backseat of the Maruti Zen car bearing no. DL2CN 7646. They were kept in a plastic box, which was converted into a pulanda and sealed with the seal of 'PS'. The seat cover also had blood stains. These were kept in a plastic bag sealed with a seal of 'PS' and seized by memo Ex.PW9/F. A blood stained large stone was kept in a plastic bag whereas a blood stained *roda* was kept in a separate white plastic bag. SI Aishvir Singh got the names of registered owners of

both motorcycles bearing No. DL3SAJ 7048 (make Splendor) and DL 4SAU 5239 (make CBZ) from the traffic helpline. Case property was deposited by Inspector Pankaj at Police Post Saket. The police party then reached H.No.C-18, JJ Colony, Khanpur, the residence of Mukesh (registered owner of the Splendor motorcycle). He informed the IO that the said motor cycle was taken by Appellant Suresh. According to the prosecution at about 9:30 A.M. Inspector Pankaj along with other police staff again went to AIIMS where he met the relatives of the deceased, namely, Dharmender Panwar and Sunil. The IO recorded their statements Ex.PW-7/A and Ex.PW-1/A regarding identification of the dead body. He held the inquest proceedings and sent the body for post mortem examination.

7. According to the prosecution, on 17.07.2007 at about 2:00 P.M. the IO received secret information regarding the presence of the four accused near a food *rehri* at T point Khanpur and arrested Appellants Rakesh, Suresh, Sandip and Chandan on identification by a secret informer. Motorcycle bearing No. DL 4SAU 5239 was parked near these four Appellants. After personal search of the Appellant Sanjay keys of the Splendor motorcycle bearing No. DL3SAJ 7048 were also recovered. The keys were converted into a packet and sealed with a seal of 'PS'.
8. Appellants Suresh, Sandeep, Rakesh and Chandan made disclosure statements Ex.PW12/P, Ex.PW12/Q, Ex.PW12/R and Ex.PW12/S respectively. The four Appellants then led the police party to the spot and pointed out the place of incident. The IO prepared the pointing out memo Ex.PW12/T. Appellant Rakesh got a helmet recovered (Ex.P12/3) from the left side of the road at Anuvart Marg which was seized by memo Ex.PW12/V. Appellant Sandeep got recovered a helmet (Ex.P12/4) which was seized by memo Ex.PW12/W. Appellant Chandan took the police party to a place in front of a CNG petrol pump and took out a *danda* lying adjacent to the MCD office. The said *danda* was seized by memo Ex. PW12/X after preparing it into a sealed packet. Appellants Chandan, Sandeep, Suresh, Rakesh were found wearing blood stained shirts. They

were asked to take them off; the shirts were seized by memos Ex.PW12/Y, Ex.PW12/Z, Ex.PW12/Z1 and Ex.PW12/Z2 respectively. According to the prosecution, the four Appellants were instructed to muffle their faces when they were produced in the Court on 18.07.2007.

9. On 18.07.2007 at about 6:00 P.M. Appellant Murari was arrested from his house No.L-I/150, Gali No.13, Sangam Vihar and arrest memo Ex.PW12/Z3 was prepared. He took out a white colour shirt from his bath room; it had blood stains on its left shoulder and arm. The shirt was seized by seizure memo Ex.PW12/Z6 after converting it into a *pulanda* and sealing it with a seal of 'PS'.
10. During investigation the Appellants refused to join the Test Identification Proceedings. Autopsy on the dead body of the deceased was performed by Dr. B.L. Choudhary (PW-24) who found seven injuries. He opined the cause of death to be coma as a result of head injury (injury No.1). The IO of the case produced a sealed bag with a seal of 'PS' seeking his opinion regarding the stone recovered from the spot. PW-24 testified that on opening the sealed bag it was found to contain one stone weighing 20 kg with dimension 40x27x21 cms. of irregular size. He along with Dr. Raghvender Kumar, a junior resident opined that injuries No. 1 to 6 were possible due to impact of that stone. PW-24 was also shown the *danda* seized during investigation. PW-24 opined that injury No.7 was possible from this *danda*. After completion of investigation a report under Section 173 Cr.P.C was filed in the Court.
11. The Appellants pleaded not guilty to the charge for the offence punishable under Section 302 read with Section 34 IPC. The prosecution, in order to prove its case examined 29 witnesses. PW-2 Fakre Alam, PW-9A Mohd. Sagir and PW-22 Constable Rohtash claimed to be eye witnesses. PW-16 Dr. Sunil Kumar medically examined the deceased when he was removed to the casualty section of AIIMS. He declared the patient brought dead and proved his report Ex.PW16/A. PW-24 Dr. B. L. Choudhary performed the autopsy and proved post mortem report Ex.PW-24/A and gave his opinion in respect of the weapon of offence as Ex.PW-24/B.

PW-7 Dharmender Panwar, (brother of the deceased) deposed that on 16.07.2007 (at about 10:30/11:00 P.M.) receiving a telephone call from a police man from AIIMS that his brother Jitender Panwar had met with an accident. He, along with his father reached AIIMS and identified his brother's corpse. On 17.07.2007 during cross-examination, the witness deposed having reached AIIMS between 10:30/11:00 P.M. and he was there till 4:00 /5:00 A.M. He met a police man, Shiv Kumar. He did not meet anyone else. Rest of the witnesses are police officials and have deposed about the part played by them during investigation of the case.

12. PW-9A Mohd. Sagir is an eye witness to the incident. The FIR was recorded on the basis of his statement Ex.PW9/A. He (PW-9A) deposed that on 16.07.2007 he along with Fakre Alam was returning from Lado Sarai park after seeing a cricket match. At about 10:30 P.M. they reached Lado Sarai Red Light, T-point, when they saw one Maruti Zen car bearing No.7646. In the meanwhile, one Hero Honda Splendor bearing No. DL3SAJ 7048 hit the bumper of the said car. Deceased Jitender Panwar (whom they knew previously) got down from the car and argued with the two boys on the motor cycle. The two boys started arguing with Jitender Panwar (the deceased). Jitender Panwar picked up a *danda* from his car and showed it to those boys and then sat in his car. In the meanwhile, three persons reached on a motorcycle CBZ No. 5239. They had a word with the two persons on the other motorcycle (who had argued with the deceased) and started abusing Jitender Panwar. He proceeded further and stopped at the Traffic Signal in front of the Masjid. He went out from the car with a *danda*. The said five persons too reached the spot and got off their motor cycles. There was a quarrel between Jitender Panwar and those five persons. The two persons who were driving the motor cycle started beating Jitender Panwar with the help of helmets whereas the others (three persons) kicked him and gave fist blow and snatched the *danda*. He was given *danda* blows as a result of which he fell down on the road. They gave beatings to Jitender Panwar while he was lying on the road. They picked up a stone lying nearby and started hitting the deceased's head with it. They (PW9A and PW-2) raised an alarm and

tried to chase the five culprits. In the meanwhile, one police man also reached the spot and accompanied them in their chase to catch the culprits. The three persons on the CBZ motorcycle fled on the bike. One of the other two tried to start the other motor cycle in order to escape, but could not start it. He, therefore, tried to run with the motor cycle. The fifth man ran towards Lado Sarai. Since the motorcycle (the Hero Honda) did not start, its rider ran towards the forest after leaving it on the left side of the bus stand. The witnesses' chase to catch the culprits was unsuccessful; therefore, they returned to the spot and found that members of the public had taken Jitender Panwar to AIIMS in his (deceased's) car. They also reached AIIMS where Jitender Panwar was found declared "brought dead".

13. PW-2 Fakre Alam and PW-22 Constable Rohtash gave their own account of the incident which we would discuss in a later part of the judgment.
14. On close of the prosecution evidence, the Appellants were examined under Section 313 Cr.P.C in order to enable them to explain the incriminating circumstances on the record against them. All of them denied involvement in the incident and took the plea that they were falsely accused in the case by the police. They stated that eye witnesses were planted by the police and had deposed falsely.
15. The Appellants Murari, Suresh and Rakesh produced, DW-1 Ram Avtar, DW-2 Mohd Farooque and DW-3 Ghanshaym to prove that at the time of the alleged incident they were with them.
16. DW-1 Ram Avtar deposed that he knew Appellant Murari for the last 10-12 years. On 16.07.2007 at about 9:00 P.M. the Appellant went to his house to clear the dues on account of milk supplied by him. He (Murari) had his dinner with him (DW-1) and left his house at 11:30 P.M.
17. DW-2 Mohd. Farooque testified that on 16.07.2007 at about 8:45 P.M. he and Appellant Suresh were present at Sainik Farms Gate No.1 and they had proceeded to Pali for loading a truck. The Appellant Suresh remained with him till 11:45 P.M.

18. Similarly, DW-3 Ghanshyam deposed that Appellant Rakesh was his neighbour. On 16.07.2007 at about 9:00 P.M. the Appellant Rakesh went to attend the birthday party of his daughter and he remained at his (DW-3) residence till 11:00 P.M.
19. By impugned judgment the learned Additional Sessions Judge (ASJ) found that Appellants Murari and Suresh were responsible for causing Injury No.1 on the person of the deceased which proved fatal. They were thus, individually and jointly held liable under Section 300 (3) read with Section 302 IPC. It was further held that the Appellants Sandeep, Chandan and Rakesh had shared the common intention of causing serious injuries on the person of the deceased and thus they were also held vicariously liable for the acts of the Appellants Murari and Suresh. Accordingly, all the Appellants were convicted under Section 302 read with Section 34 IPC and sentenced as stated earlier.
20. We have heard Mr. Sameer Chandra Advocate for Appellants Murari, Rakesh and Suresh, Ms. Meenakshi Lekhi Advocate for Appellant Sandeep, Mr. Ranjit Singh Advocate for Appellant Chandan and Mr. Jaideep Malik, Additional Public Prosecutor for the State and have perused the record.
21. It is urged by the learned counsel for the Appellants that PW-2 and PW-9A who were claimed by the prosecution to be eye witnesses to the occurrence are chance witnesses. Their testimonies do not inspire confidence as their conduct was unnatural. PW-22 (Constable Rohtash) who claimed himself to be an eye witness was disowned by the IO to be so. The testimonies of the three witnesses (i.e. PW-2, PW-9A and PW-22) are discrepant on major aspects of the prosecution version. Mohd. Sagir (PW-9A) did not give even the slightest description of the assailants; Constable Rohtash (PW-22) an alleged eye witness was associated in the search and apprehension of the culprits, though the culprits were previously not known to him which would make the investigation tainted and unfair. Therefore, it would be unsafe to rely upon their testimonies to base conviction of the Appellants.

22. Learned counsel for the Appellants referred to the crime team report Ex.PW-11/A which does not mention the weapon used, the name of the complainant is mentioned as 'PCR' though the FIR had already been recorded on the basis of the statement of PW-9A. It is contended that as per the prosecution version the statement Ex.PW-9/A of Mohd. Sagir was recorded at about 12:15 A.M. on 17.07.2007 on the basis of which the FIR was allegedly recorded immediately which is falsified by the scribe (of Ex.PW-9/A) SI Aishvir Singh initial IO of the case, who testified that the statements of Fakre Alam and Mohd. Sagir were recorded later, after completing search for the accused persons at about 6:00 A.M.
23. It is pleaded that the story of the arrest of the four Appellants Sandeep, Chandan, Rakesh and Suresh on 17.07.2007 at 2:00 P.M. at the pointing out of the secret informer at Khanpur T Point where the Appellants were allegedly standing near a food *rehri* is improbable and unbelievable. It is contrary to normal human conduct that four persons after committing a crime would casually stand near the place of the incident, wearing blood stained shirts. It is submitted that it has been stated by PW-24 Dr. B.L. Choudhary that "*blood could not have splashed after the face of the deceased was hit with the stone as there was no large size damage of the arteries*" and thus, there cannot be any blood stains on the clothes of the Appellants.
24. It is submitted that the prosecution version was that the quarrel took place all of a sudden, on a spur of moment without any preconcert or pre-planning and the Appellants were not armed with any weapon. Thus, the Appellants cannot be made liable for the act of others with the aid of Section 34 IPC.
25. On the other hand, it is contended on behalf of the State that there are some minor variations and discrepancies here and there in the testimonies of the three eye witnesses which do not affect the main substratum of the prosecution version. The recovery of *danda* and blood stained clothes at the instance of the Appellants has put a seal of authenticity on the

prosecution version. The two public witnesses are reliable and trustworthy and thus the Appeals are liable to be dismissed.

26. PW-2 Fakre Alam is a resident of Ward No.1 Mehrauli, whereas PW-9A Mohd. Sagir is a resident of Ward No.6 Mehrauli. Deceased Jitender Panwar was not their immediate neighbour. The two public witnesses and the deceased were not travelling together. The incident took place at quite a distance from the place of their residence. According to PW-2 he along with Mohd. Sagir (PW-9A) was returning to his home in the *Wagon R* when they had seen this incident. If by a coincidence or by chance someone happens to be at a crime scene at the time it takes place, he is called a “chance witness”. And if he or she happens to be a relative or friend of the victim or is inimically disposed towards the accused then his being a chance witness is viewed with suspicion. (*Bahal Singh v. State of Haryana*, 1976 SCC (Cri.) 461). Of course, testimony of such a witness cannot be discarded such witness *ipso facto* is not unworthy of credence. The testimony of such witness, however has to be scrutinized with due care.
27. Both PWs 2 and 9A claim to have witnessed the incident from the *Wagon R* in which they were travelling. PW-2 deposed that on the way they noticed a Zen Car bearing No.7646. A black coloured motor cycle (Splendor make) with two boys hit the rear of the Zen. Jitender (deceased whom they knew previously) came out of the Zen Car; there was an altercation between the boys (on the motorcycle) and the deceased. Another motor cycle with three boys reached there. This resulted in an altercation between the five boys and the deceased. The deceased took out a *danda* from the car and showed it to the five boys. The red light turned green, the deceased’s car and the motor cycles went ahead. At Anuvart Marg in front of the Masjid the two motor cycles went in front of the deceased’s car. He went out and hit one of the boys and they snatched the *danda*. Those boys hit the deceased on his head with helmets and the *danda* which they had snatched (from the deceased). He fell down. Two boys came towards the foot path, picked up a stone and hit the deceased

on the head. The witnesses raised alarm; the three boys on the CBZ motor cycle escaped, one boy who wielded the stone ran towards Lado Sarai; the other boy wheeled the motor cycle, and could not start it. He later left the motor cycle, and ran towards the jungle. A police man came. Mohd. Sagir, PW-2 and the police man followed the CBZ motor cycle in their *Wagon R*, but could not nab the assailants. The witnesses and the policeman returned to the spot. They learnt that some persons had removed the deceased to AIIMS.

28. PW-9A on the material aspect as to what happened after hitting of the car by the motor cyclist deposed that the deceased came down from the car and scolded the two boys. The said two boys started arguing with the deceased. The deceased picked up a *danda* from his car and showed it to them. Thereafter, the deceased sat in the car. In the meanwhile, three persons reached there on a CBZ motor cycle. They had a word with the two boys and then started hurling abuses at the deceased. The deceased proceeded further and the five persons on the two motor cycles chased him. The deceased crossed the traffic signal and stopped the car in front of a Masjid and got down with a *danda*. The five persons who reached the spot on the motor cycles also got down and a scuffle took place. Two persons who were riding the motor cycles started beating the deceased with their helmets and others started giving kick and fist blows to the deceased. They snatched the *danda* from him and beat him with it as a result of which he fell on the road. They gave beating to the deceased with *danda* while he was lying on the road. They picked up a stone lying nearby and started hitting the deceased on his head. The witnesses raised alarm and tried to chase the five culprits. In the meanwhile, one police Constable reached there. He accompanied them in their chase of the culprits. Three of them escaped on the CBZ motor cycle while one of them tried to start the other motor cycle could not do so. He, therefore, held the handle of Hero Honda motor cycle and tried to flee. The fifth attacker of them ran towards Lado Sarai. The accused who was wheeling Hero Honda Motor cycle (on foot) parked it to the left of the bus stand and ran towards the jungle after crossing the iron fencing. They tried

unsuccessfully to chase above said five assailants in their car. They returned to the spot and saw that some members of the public had removed the deceased to AIIMS.

29. Constable Rohtash PW-22 testified that on 16.07.2007 at about 10:30 P.M. he was patrolling the area on his motor cycle. He stopped his motor cycle at the Lado Sarai traffic signal and MB Road crossing. He noticed five persons quarreling with someone near the Mosque. They were giving leg and fist blows to a man and beating him with *danda* and helmets. As soon as the signal turned green the witness went forward and saw Appellants Murari and Suresh giving a stone blow on the head of that person. Appellants Rakesh and Sandeep were beating with the helmets. The Appellant Chandan was beating that person with a *danda*. He parked his motor cycle on one side of the road and raised an alarm *pakro-pakro*, the Appellant Murari fled towards Lado Sarai on foot, the Appellant Sandeep dragged the motor cycle by the handle as it did not start. Appellants Rakesh, Suresh and Chandan fled on the CBZ motor cycle towards traffic signal of Anuvart Marg and Aurbindo Marg. Appellant Sandeep parked his motor cycle near a bus stand as it did not start and ran towards the jungle. They unsuccessfully chased the Appellants Suresh, Chandan and Rakesh till Adhchini. He, therefore, returned to the spot. Some public persons had removed the injured in his vehicle to AIIMS. When cross-examined, this witness deposed that he chased the accused persons on his motor cycle and the two public persons were sitting on his motor cycle at that time.
30. There is contradiction in the testimony of the two public witnesses and Constable Rohtash about the role assigned to each of the Appellants. There is also contradiction between the statement Ex.PW-9/A on the basis of which the FIR was recorded and the testimony of PW-9 Mohd. Sagir where the manner in which the incident took place is recorded. Similarly, there is contradiction on some aspects of the prosecution version in the statement under Section 161 Cr.P.C. of PW-2 Fakre Alam and his statement in the Court. The witnesses were cross-examined and also

confronted with their earlier statements with regard to the improvements. We may not attach much importance to them as the witnesses are not expected to have a photographic memory. They are bound to mix up certain facts, particularly when, the number of assailants are five.

31. There is a contradiction on an important aspect of the prosecution version which a witness is not likely to forget or make a mis-statement even after a long lapse of time. According to PW-2 and PW-9A, Constable Rohtash (PW-22) chased the culprits in their *Wagon R*. The chase according to PW-22 was by him on his motor cycle and the two public persons were sitting on the pillion seat. Even if, it is assumed that the two public persons (sitting on his motor cycle) were other than PW-2 and PW-9A, yet there is no explanation as to how Constable Rohtash could accompany PW-2 and PW-9A in their *Wagon R*. It has emerged in the cross-examination of these witnesses that 20 minutes after the chase they returned to the spot, when the injured had already been taken to AIIMS. As per the prosecution version, (which has been corroborated by PW-2, PW-9A and PW-22) the Splendor motor cycle did not start, as a result of which it was dragged by the Appellant Sandeep, on foot. According to the prosecution, when the motor cycle did not start, it was parked near the bus stand on the left side. A perusal of the site plan Ex.PW-9/B reveals that the altercation took place between the two Appellants and the deceased at Point A, the assault of the deceased by the Appellants took place at Points B and C and the Splendor motor cycle was parked near the bus stand at Point D. PWs 2 and 9A claim to have chased the Appellants in their *Wagon R* whereas PW-22 (the police Constable) claimed to have chased them on his motor cycle. As noticed earlier, one of the culprits, Sandeep was dragging the motor cycle on foot (as it did not start). The distance between the place of the occurrence and the place where the motor cycle was found parked is about 50-60 metres. It would be very easy for anyone to apprehend someone who is wheeling (and not riding) a motorcycle, because its weight would slow him. In the instant case, the chase was on a motor cycle and in a car which in any case would be swifter than someone dragging a motor cycle for 50-60 metres. It is highly improbable, rather

impossible that three persons chasing a person situated in a position such as the Appellant Sandeep would not be in a position to apprehend him even if it is believed that the other culprits could manage to escape.

32. According to the prosecution, PWs 2 and 9A and the police constable gave a chase in pursuit of the culprits and could return to the spot only after 20 minutes. Though, we are not even inclined to believe that a police Constable would chase a culprit than taking a mortally injured public person to a nearby hospital, yet the two acquaintances i.e. PWs 2 and 9A obviously would be more interested in saving the life of their friend rather than chasing the assailants and that too for as long as 10 minutes in a *Wagon R* (assuming that 10 minutes were spent in chasing and 10 minutes in returning to the spot). While dealing with this contention the Trial Court held that it would be the mental state of a witness which would govern which course to follow. We do not agree. PWs 2 and 9A were quite close to the deceased's car. Once the five Appellants had gathered and one of them had snatched the *danda* from the deceased and started giving him blows (while two others started giving him helmet blows) it would be the natural conduct of PWs 2 and 9A who were also young boys to intervene and save the deceased from the clutches of the five Appellants. If they preferred not to intervene, (though there was no reason not to intervene) as the Appellants were not armed with any weapon, it cannot be expected that they would give a chase to the Appellants instead of helping the deceased. Similarly, PW-22 was riding a motor cycle. He could have reached the spot in no time to intervene and save the deceased. The conduct of PW-22 also creates doubts about his presence at the time of the incident. In fact, PW-27 Inspector Pankaj Singh admitted (when cross examined) that PW-22 was not an eye witness to the incident.
33. At this time, the testimony of PW-7 Dharmender Panwar, brother of the deceased assumes importance. He deposed that on 16.07.2007 at about 10:30 /11:00 P.M. he received a telephone call from a police man (from AIIMS) in his house that Jitender Panwar (his brother) had met with an accident. He reached AIIMS along with his father. In cross-examination,

he deposed to having remained in AIIMS till about 4:00 / 5:00 A.M. He met a police man named Shiv Kumar and other police men were also present there. He, however, did not meet anyone else. If the brother (PW-7) of the deceased was present in AIIMS from 11:00 P.M. till at least 4:00 A.M. he would naturally have met PWs 2 and 9A (Mohd. Sagir and Fakre Alam) who knew the deceased. A specific reply regarding the absence of any person other than the police personnel negates the presence of PW-2 Fakre Alam and PW-9A Mohd. Sagir (whose statement Ex.PW-9/A was recorded in AIIMS by SI Aishvir Singh on the basis of which the present case was registered).

34. We would like to refer to the crime team report Ex.PW-11/A at this stage. According to PW-27 (IO) and PW-29 (SI) the crime team was summoned to the spot by PW-29. Both these witnesses were present at the spot at 12:50 A.M. at the time of the arrival of the crime team. The crime team (as per Ex.PW-11/A) inspected the spot from 12:45 A.M. to 1:20 A.M. The name of the deceased is mentioned as Jitender Panwar, aged about 35 years. The date and time of occurrence is mentioned as 16.07.2007, about 10:45 P.M. This information must have been given either by the SI (PW-29) or by the IO (PW-27). The name of the complainant is mentioned as PCR and the *modus operandi* is mentioned as by beating “*with a blunt weapon*”. The absence of the complainant’s name i.e. Mohd. Sagir and the weapon used in the assault in the crime team report Ex.PW-11/A by 1:20 A.M. shows that the SI (PW-29) and the IO (PW-27) were not aware of the complainant’s name and the weapon used by that time. In other words, the statement of PW-9A (Ex.PW-9/A) on the basis of which the FIR was registered had not been recorded by that time. This shows that the IO had not even met Mohd. Sagir by that time. This inference is supported by the SI (PW-29). Though, PW-29 stated in his examination-in-chief that on reaching AIIMS he recorded statement of Mohd. Sagir, yet when cross-examined by the counsel for the Appellants Suresh, Rakesh and Murari, he stated that “*statements of Fakre Alam and Sagir were recorded later on after completing the search of the accused persons when it was about 6:00 A.M. and thereafter they were sent to their houses*”.

35. As stated earlier, the IO admitted, in his cross-examination, that PW-22 was not an eye witness to the incident. If we apply the test of caution while analysing the testimony of chance witnesses as held in ***Bahal Singh (supra)*** we have no option except to hold that their presence at the spot at the time of the incident is extremely doubtful.
36. Appellants Sandip @ Sanju, Chandan @ Chandu, Rakesh and Suresh were arrested on 17.07.2007 by the IO in presence of SI Aishvir Singh and HC Shiv Kumar. PW-27 (the IO) deposed that on 17.07.2007 at about 2:00 P.M. he along with SI Aishvir, HC Shiv Kumar, HC Devender and Constable Rohtash reached Khanpur T Point. He called HC Jagdish, Constable Jitender, Constable Bijender and Constable Rajender there. A secret informer informed the SHO that the two persons who were standing near the food *rehri* were Rakesh and Suresh (the Appellants) and two persons who were standing near the motor cycle were Sandip and Chandan (the Appellants) who were involved in the case. He interrogated and arrested them. It is quite strange that the aforesaid four Appellants were found wearing blood stained shirts at the time of their arrest. The Trial Court while dealing with this contention held that the police had conducted the raids on the night of the incident at the houses of the accused and had deputed PW-5 and other police Constables there which could have alerted the Appellants to change the blood stained clothes before they were apprehended. We are not convinced with the reasoning given by the Trial Court. The presence of the four Appellants near the place of incident and that too wearing blood stained shirts is improbable and highly suspect. If we go by the reasoning of the Trial Court that the police personnel were stationed near the Appellants' houses and had no opportunity to return to their houses and were therefore out of the house the whole night till their arrest, there was no reason for their presence near the place of the incident. Rather, they would have kept themselves away from the area and would have destroyed or washed the blood stained clothes (if there was any blood thereon).

37. In *Khalil Khan v. State of M.P.*, 2004 SCC Cri. 1052, the Supreme Court declined to rely upon the recovery of the blood stained clothes made in similar circumstances. Moreover, it is also doubtful that the clothes of the five Appellants could be stained with the blood of the deceased if the incident took place in the manner as alleged by the prosecution.
38. According to the prosecution, two Appellants gave beatings to the deceased with their helmets, (there is discrepancy in the statements of PW-2 and PW9A, as PW-2 deposed in his examination-in-chief that Sandip and Rakesh gave helmet blows and in cross-examination he deposed that Chandan hit the deceased with the helmet whereas PW-9A testified that Sandip and Rakesh hit the deceased with the helmets, one Appellant (Chandan) gave a *danda* blow and two Appellants (Murari and Suresh) gave the fatal blow with the big stone). After the fatal blow no other injury was inflicted by any of the Appellants. PW-24 stated in his cross-examination that blood could not have splashed after the face of the deceased was hit with the stone as there was no large size damage of the arteries. There could have been presence of blood stains on the clothes of one or two of the Appellants who were in close contact of the deceased (in the absence of any splash of blood). Thus, the presence of blood stains on the shirt of all the five Appellants itself is suspect and points to its being planted by the police.
39. This conclusion is strengthened from the entry in register No.19 Ex.PW-15/A. The blood stained shirt of Appellant Murari was seized on 18.07.2007 as he was arrested only on that day. As per Ex.PW-15/A the shirt (though recovered on 18.07.2007) was deposited in the malkhana with PW-15/A HC Banwari Lal on 17.07.2007. It is not a case of the date being mentioned wrongly in the malkhana register because there is an entry regarding deposit of the articles belonging to the deceased by SI Aishvir Singh on 17.07.2007 after the deposit of the shirt of the Appellant Murari. This also shows that the investigation was unfair and tainted.
40. The presence of the big stone weighing 20kg at the spot is very doubtful as it does not find mention in the Crime Team Report Ex. PW11/A.

Moreover, if two persons lift a stone weighing 20 kg and hit someone on the head, the head/face would be totally smashed or crushed. The assailant in the given situation would not like to hold the stone and give only a mild blow to the victim.

41. The prosecution heavily relies on the refusal of the Appellants to join the Test Identification Parade (TIP) coupled with the identification of the Appellants in the Court by the two public witnesses. Refusal to participate in TIP would lead to an inference that if the Appellants had joined the TIP they would have been identified by the witnesses. This does not necessarily mean proof of guilt. There could be justification on the part of an accused to refuse to join a TIP for either he or his photograph had been shown to the witnesses or there could be other opportunities to the witnesses to see him.
42. According to the prosecution, Appellants Suresh, Rakesh, Sandip and Chandan were arrested on 17.07.2007 at about 3:00 P.M. They were also taken to the spot. No evidence has been produced by the prosecution to show that the Appellants were instructed to keep their faces muffled at the time of their arrest. Moreover, if the investigation is not fair, there is every possibility of the Appellants being shown to the witnesses. Although, Constable Rohtash was alleged to be an eye witness, yet he was associated by the IO in the search of the assailants (the Appellants). Moreover, not even a bare minimum description of the assailants (the Appellants) was given in his statement Ex.PW-9/A by Mohd. Sagir. Even the age, the build, the height or the clothes worn by the assailants were not mentioned in the statement. After the apprehension of the Appellants TIP has to follow when the crime was committed by unknown persons. Associating Constable Rohtash in search of the Appellants casts serious reflection on the fairness of the investigation by the IO. While refusing to participate in the TIP, the five Appellants stated that their photographs were taken through mobile phone and they were shown to the witnesses. This plea of the Appellants cannot be easily brushed aside. Even otherwise, the refusal to join the TIP itself is not sufficient to hold the Appellants guilty.

43. We are conscious of the fact that an accused cannot be acquitted merely on the ground that the investigation is defective or is tainted. (*Paras Yadav v. State of Bihar*, 1999 (2) SCC 126 and *Zahira Habibulla H. Sheikh v. State of Gujarat*, (2004) 4 SCC 158). The probability that PWs 2, 9A and 22 were not present at the spot at the time of the actual incident is too strong and cannot be ignored rendering their testimonies to be suspect and unworthy of reliance.
44. In view of the foregoing discussions, we are of the view that there are grave doubts in the case of the prosecution in the manner the occurrence took place, who participated in the assault and whether all the five Appellants were at all present at the spot during the incident. The Appellants are entitled to the benefit of the doubt.
45. There is another aspect of the prosecution case. All the Appellants have been convicted by the aid of Section 34 IPC. In criminal law, every accused is responsible for his own act of omission or commission. This rule is subject to the exception of vicarious liability enshrined under Section 34 IPC. Direct proof of common intention is seldom available and therefore such intention can only be inferred from the facts and circumstances of each case. In *Munni Lal v. State of M.P.* 2009 (11) SCC 395, it was held as under:-

*“.....In order to bring home the charge of common intention, the prosecution has to establish by evidence, whether direct or circumstantial, that there was a plan or meeting of minds of all the accused persons to commit the offence for which they are charged with the aid of Section 34, be it prearranged or on the spur of the moment; but it must necessarily be before the commission of the crime. The true contents of the section are that if two or more persons intentionally do an act jointly, the position in law is just the same as if each of them has done it individually by himself. As observed in *Ashok Kumar v. State of Punjab* the existence of a common intention amongst the participants in a crime is the essential element for application of this section. It is not necessary that the acts of the several persons charged with commission of an offence jointly must be the same or identically similar. The acts may be different in character, but must have been actuated by one and the same common intention in order to attract the provision.*”

The section does not say 'the common intentions of all', nor does it say 'an intention common to all'. Under the provisions of Section 34 the essence of the liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. As a result of the application of principles enunciated in Section 34, when an accused is convicted under Section 302 read with Section 34, in law it means that the accused is liable for the act which caused death of the deceased in the same manner as if it was done by him alone. The provision is intended to meet a case in which it may be difficult to distinguish between acts of individual members of a party who act in furtherance of the common intention of all or to prove exactly what part was taken by each of them. As was observed in Chinta Pulla Reddy v. State of A.P. Section 34 is applicable even if no injury has been caused by the particular accused himself. For applying Section 34 it is not necessary to show some overt act on the part of the accused."

46. According to the prosecution version, after the altercation between the deceased and the Appellants at Lado Sarai T point, the deceased proceeded further on Anuvrat Marg and the five boys on their motor cycles followed him. The deceased got down from his car while holding a *danda* in his hand. The five boys also got down from their respective motor cycles. There was a scuffle between the deceased and these five boys. The deceased gave *danda* blows to the boys. Two of the boys inflicted helmet blows on the head of the deceased whereas the third one snatched the *danda* and gave *danda* blows on the head of the deceased. The two boys on the Splendor lifted a big stone lying nearby on the pavement and hit it on the head of the deceased.
47. It is evident that the five boys were unarmed whereas the deceased was the aggressor who took out the *danda* from his car simply because the bumper of his car was struck by one of the motor cyclists. It was he who started the attack by giving them *danda* blows. The Trial Court relied upon ***Pandu Rao v. State of Hyderabad***, AIR 1955 SC 216 where it was held as under:-

"The plan need not be elaborate, nor is a long interval of time required. It could arise and be formed suddenly, as for example when one man calls on bystanders to help him kill a given individual and they, either by their words or their acts, indicate their assent to him and join him in the assault. There is then the necessary meeting of the minds."

There is a pre-arranged plan however hastily formed and rudely conceived.”

48. The Trial Court held that the common intention which initially was merely to teach a lesson to the deceased progressed into common intention to cause serious injuries after the deceased came out with his *danda* from the car. We do agree that there may have been a common intention to teach the deceased a lesson who himself was an aggressor or to cause serious injuries on his person as he (the deceased) himself had given *danda* blows to the five boys. It was stated by PW-22 in his cross-examination that it took one or two minutes for the first incident (Lado Sarai T point where altercation took place) and one/two minutes for the second incident. True, common intention can develop at the spot or on the spur of moment. Even if, the prosecution version given in the FIR is admitted as it is, in our view, there was no common intention to cause any injury till the deceased got down and gave *danda* blows to the five boys. Thereafter, the acts of the assailants were spontaneous. At the most there could be common intention to cause serious injuries on the person of the deceased but there was no common intention to cause injuries with the intention or knowledge to cause death of the deceased.
49. Therefore, the three Appellants Sandip, Rakesh and Chandan could not be fastened with the vicarious liability of committing murder with the aid of Section 34 IPC. Even if, the prosecution case is accepted as it is, they could have been held guilty for the offence punishable under Section 325 read with section 34 IPC.
50. It is argued by the learned counsel for the Appellants that no injury was caused on the person of the deceased by any big stone as is the case of the prosecution. The learned counsel cited several reasons for the same.
51. We have been taken through the report of the crime team Ex.PW-11/A. The crime team was summoned to the spot by the IO after recording statement Ex.PW-9/A of Mohd. Sagir wherein he had disclosed the injuries inflicted with the stone on the person of the deceased. According to the report Ex.PW-11/A the crime team made an inspection between 12:45 A.M. to 1:20 A.M. The presence of any stone is absent in the report.

According to the IO and SI Aishvir Singh the stone was seized from the spot along with the other articles just after 2:10 A.M. The two stones/*roda* having blood stains were kept in separate white plastic bags were converted into two packets, sealed with the seal of 'PS' and seized by memo Ex.PW-12/D. All these articles were deposited in Police Post Saket at 3:30 A.M. A perusal of register No.19, Ex.PW-15/A however reveals that the blood stained stone was deposited after the helmets, blood stained *danda*, blood stained clothes of the accused persons (which were recovered at the instance of some of the Appellants at 3:00 P.M.) and box containing viscera were deposited on 17.07.2007.

52. This is not the end of the matter. PW-2 and PW-9A the two public witnesses, who according to the prosecution witnessed the occurrence, returned to the spot from AIIMS along with the IO. Though, PW-9A Mohd. Sagir is a witness to the seizure of blood, blood stained earth, Splendor motor cycle, blood stained shoes of the deceased and blood stained seat cover of the Maruti Zen Car (belonging to the deceased) which are Exs. PW-9/C, PW-9/D, PW-9/E and PW-9/F respectively, he is not a witness to the recovery of the blood stained *roda* and stone Ex.PW-12/B and Ex.PW-12/C respectively. This shows that the stone and the *roda* were not seized in presence of PWs 2 and PW9A.
53. The autopsy on the dead body was performed by Dr. B.L. Choudhary on 17.07.2007 and the Post Mortem report was immediately made available. The big stone in a sealed bag was produced before PW-24 for his opinion only on 21.08.2007. PW-24 gave the dimensions of the stone as *40 cms x cms x 21 cms* and to be of an irregular shape. The doctor further opined that injuries No.1,2,3,4,5 and 6 were possible by impact of this stone. The stone Ex.PW12/1 was seized from the spot in the wee hours of 17.07.2007 this would have been shown to the doctor either before the post mortem or immediately thereafter. The fact that the IO waited for over a month to produce the big stone Ex.PW-12/1 before PW-24 makes the recovery in the manner alleged by the prosecution doubtful.

54. In view of the reasons recorded above, the contention raised on behalf of the Appellants that the big stone Ex.PW-12/1 was subsequently planted cannot be easily brushed aside.
55. The *Danda* Ex.P-12/5 is alleged to have been recovered at the instance of Appellant Chandan from near the petrol pump in pursuance of the disclosure statement Ex.PW-12/S purported to have been made by Appellant Chandan. According to the prosecution version, the Appellants including the Appellant Chandan ran away after inflicting injuries on the person of deceased. PWs 2, 9A and 22 chased the Appellants in order to catch them. If *danda* was thrown by Appellant Chandan, it must have been noticed by PWs 2, 9A and 22. In any case, the *danda* Ex.P-12/5 could not have been hidden by the Appellant Chandan. The recovery of *danda* at the behest of the Appellant Chandan therefore cannot be believed.
56. In this view of the matter, Appellants Murari and Suresh cannot be held liable for committing murder of the deceased either individually or collectively with the aid of Section 34 IPC.
57. On filing appeal being Criminal Appeal No.139/2011 an application was moved by the Appellant Rakesh claiming himself to be a juvenile on the date of the commission of the offence. A plea with regard to juvenility can be raised at any stage and even in Appeal. (*Jyoti Prakash Rai v. State of Bihar*, AIR 2008 SC 1696; *Pratap Singh v. State of Jharkhand*, AIR 2005 SC 2731; *Gurpreet Singh v. State of Punjab*, 2005 (12) SCC 615; *Jitender Ram v. State of Jharkhand*, 2006 (9) SCC 428; *Rajnit Singh v. State of Haryana* 2008 (9) SCC 453). By order dated 03.02.2011, this Court directed an enquiry to be conducted by the Trial Court. As per the report dated 01.03.2011, Appellant Rakesh was 17 years and 24 days on the date of the commission of the offence. Thus, he was a juvenile on the date of the commission of the offence and, therefore, could not have been tried by any Court. On the other hand, only an inquiry could have been conducted by the Juvenile Justice Board under Section 14 of Juvenile Justice Act of 2000.

58. Since we have already taken a view that the case against the Appellants including the juvenile is not free from doubts, we do not, therefore, consider appropriate to remit the case of the Appellant Rakesh to the Juvenile Justice Board for inquiry under Section 14 of the Juvenile Justice Act of 2000.
59. In view of foregoing discussion, we are of the view that there are grave and serious doubts in the prosecution version. The learned Additional Sessions Judge fell into error in convicting the Appellants under Section 302 read with Section 34 IPC. The Appeals have to succeed. Accordingly, we set aside the judgment and order of the Trial Court and acquit the Appellants of the charge framed against them. Their personal bonds and surety bonds are discharged. They are ordered to be set at liberty.

(G.P. MITTAL)
JUDGE

(S. RAVINDRA BHAT)
JUDGE

APRIL 28, 2011
sa/vk