

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

Reserved on : 19.04.2012

Decided on : 26.04.2012

+ **Criminal Appeal No. 279/2011**

MOHD AFSAR Appellant

Through: Mr. Mukesh Kalia and Mr. Varun
Jamwal, Advocates.

Criminal Appeal No. 1327/2011, Crl. M.(B) No.1865/2011

SHAHID AHMED Appellant

Through: Mr. Avadh Kaushik, Adv.

versus

STATE (NCT OF DELHI) Respondent

Through: Ms. Richa Kapoor, APP

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

MR. JUSTICE S.P. GARG

MR. JUSTICE S.RAVINDRA BHAT

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1. The Appellants Mohd. Afsar and Shahid Ahmed (referred to by their names) have been convicted by the learned Additional Sessions Judge, Delhi for offences punishable under Sections 302/34 IPC and sentenced to undergo life imprisonment, and to pay fine.

2. The prosecution allegations, briefly are that on 02.11.2005, one Rakesh along with his brother Monu visited their sister Renu, who was residing with her

husband Subhash at C-18, JJ Colony, Khayala, Delhi. About a month prior to that, Subhash and his friend Abdul and his brothers had quarreled with Shahid and Afsar, due to which Shahid sustained injuries; a case was registered in that regard against accused Subhash and his brother. Due to that quarrel, accused Shahid and Afsar harboured a grudge against Subhash and used to threaten to kill him. On the day of the incident, i.e. 02.11.2005 when they were returning, Subhash came to drop them at Keshopur Depot Bus Stand. They drank water outside the depot and later went towards Najafgarh drain to relieve themselves. Afterwards, at about 11.00 PM, when they were returning, Mohd. Afsar went near them, riding a motorcycle; Shahid was seated on the pillion. He drove the motorcycle close to Subhash; Shahid attacked Subhash with a knife, on the back. Both thereafter fled the spot. Rakesh and Monu raised an alarm. They stopped a car and took Subhash to the nearby Park Hospital. They were asked to take the injured to the DDU Hospital; Rakesh took Subhash to the DDU Hospital, in a TSR, and asked Monu to fetch Renu (Subhash's wife) and bring her to the hospital. In the hospital, Subhash was declared "brought dead". The statement of Rakesh was recorded by the police; it formed the basis for registration of the FIR. On 03.11.2005, both the accused were arrested, when they were riding a motorcycle. Their disclosure statements were recorded. That led to the recovery of the dagger used by Shahid to kill Subhash.

3. After conclusion of the investigations, the prosecution filed a charge sheet. The accused, on being arraigned for the offences, claimed trial, after entering the plea of not guilty. The prosecution relied on the testimonies of 22 witnesses besides documentary evidence, such as the post-mortem report, report of the Forensic Science Laboratory (FSL) Medico legal reports, etc. After considering all these, as well as the submission of counsel for the parties, the Trial Court held that

the accused were guilty of the offences they were charged with, and sentenced them to prison terms, in the manner described earlier in this judgment.

4. It was argued on behalf of the appellants that the two eyewitnesses did not support the prosecution. PW-12 had not supported the prosecution case at all and he stated that he did not witness the incident; nor was he present or on duty on the date of the incident. He received information from his friend Dhanraj that his Jija Subhash had been murdered, at which he reached the house of his sister. He was called to the Police Station Vikas Puri where the police obtained his signatures. In cross examination by the learned Addl. PP nothing material could be elicited.

5. It was argued that as regards PW-4, the witness deposed on 29.03.2007 under the pressure of the police and identified the accused. He clearly stated that police had asked him to identify the accused persons and he identified them. The police obtained his signatures on the blank papers; he was not a witness to the incident. He also deposed that his signatures were obtained on statements which were not read over to him and that there was no light on the spot. Learned Counsel contended that these showed clearly that there was no eye witness in the case and the two alleged eye-witnesses had not supported the prosecution. Therefore, the accused persons had to be acquitted. Instead, the Trial Court discarded the testimony of PW-4 in the cross examination, and chose to rely only on a portion of the examination in chief. It was not possible for the Court to do so, when the only other witness had turned hostile. The court's approach amounted to resting the entire conviction on the examination in chief evidence of one witness, who had partly not supported the prosecution, particularly when the other witness did not support the prosecution testimony at all.

6. Learned counsel for appellants argued that as far as the motive is concerned, there was no evidence that the accused had any motive to commit Subhash's murder. No quarrel took place between Subhash and the accused and they had never extended any threat to the deceased. The so called public witnesses did not support the prosecution case about the accused threatening the deceased. It was also argued that as regards PW-2, she did not witness the incident and her testimony was wholly hearsay and therefore, inadmissible. Similarly, argued counsel, there was nothing to establish the motive made out and alleged against the accused, since PW-2 admitted that the details of the previous quarrel had not been witnessed by her, but were told by the deceased Subhash. Neither PW-4 nor PW-12 had witnessed the incident. Therefore, the whole prosecution story was tenuous and unbelievable.

7. It was argued that the whole prosecution story could not be believed, because in this case, the MLC Ex. PW-18/A which was recorded at 11:55 PM, showed that Renu had taken the deceased to the hospital. According to the testimony of PW-4, the deceased was first taken to another hospital (Park Hospital) from where they were turned away; the witness stated that he took the deceased then to the DDU hospital in a TSR. He did not inform his sister; nor did she go to Park hospital, which would have been normal. She too did not mention having gone there first, and then to DDU, with PW-4. Similarly, the MLC did not reveal the presence of PW-4 as the individual accompanying the injured Subhash. These contradictions were material enough to throw doubts about the credibility of the prosecution's version, and ought to have led the Trial Court to acquit the accused. Counsel submitted, in the alternative, that even if the accused are held guilty, they could not have been convicted for murder. Reliance was placed on Section 304-I IPC, having regard to the nature of the injury, i.e. a single knife blow. It was

submitted that the decisions in *Camilo Vaz v State of Goa* 2000 (9) SCC 1; *Bunnilal Chaudhary v State of Bihar* 2006 (10) SCC 639; *Tholan v State of Tamil Nadu* 1984 (2) SCC 133, *Kandaswamy v State of Tamil Nadu* 2008 (11) SCC 97, and *Preetam Singh v State of Rajasthan* 2003 (12) SCC 594 show that in such circumstances, it would not be appropriate to record a conviction under Section 302, IPC, but to convict under Section 304-II IPC. As regards Afsar, it was submitted that the principle of joint responsibility would not be attracted, because there was no evidence to show that he was a party to the previous quarrel, or shared Shahid's grudge against Subhash. Since the evidence of the previous quarrel was sketchy, and suggested that its origin was on account of Subhash's friend Abdul getting angry, it was not correct on the part of the Trial Court to attribute common intention to Afsar for the crime committed by Shahid. There was certainly no reason to assume that Afsar knew that Shahid would inflict the knife injury; there was no evidence that he knew that the co-accused Shahid was armed with a knife. The mere fact that he slowed down near Subhash did not mean that he knew that Afsar would inflict a knife injury on the deceased.

8. It was submitted by the State that PW-2 and PW-4 both corroborated each other on all aspects. PW-2 was not cross-examined on facts such as Rakesh and Monu visiting her house or that Subhash had not gone to drop them at Keshopur Bus Depot or that no such incident was witnessed by PW-4 and PW-12. It was argued that that the Appellants had suggested to PW-2 that she did not witness the incident and that Rakesh and Monu witnessed the incident. Since the testimony of PW-2 was unchallenged about the visit by Rakesh and Monu to her house and that Subhash had accompanied them to drop them, and that they witnessed the incident and, importantly that their presence was admitted by the appellants, these aspects could not be disputed at all. Further, stated the APP,

PW-4 fully supported the prosecution case, but his cross-examination was conducted after a lapse of two years and during these two years, he was won over and he resiled from his earlier statement. The fact that he was not telling the truth during the cross-examination on 23.04.2009 was since he deposed that there was no criminal case against his deceased brother-in-law, whereas he had deposed in his examination in chief that a case was registered against his brother-in-law and there is documentary evidence to this fact.

9. The Learned APP argued that having regard to the fact that cross-examination of PW-4 was conducted after two years and that he was won over during that period, it was safe to rely upon the statement recorded during his examination-in-chief. In support of this argument reliance was placed upon the judgment in *Khujji vs. State of Madhya Pradesh*, AIR 1991 SC 1853, which declared the principles that were applied to the facts of this case. Counsel urged that the Trial Court quite properly relied on the ruling, to rest its reasoning while convicting the appellants in this case.

10. Ld. Addl. PP submitted that so far as the testimony of Monu is concerned, he too was examined on 23.04.2009, when the cross examination of PW-4 took place. He resiled from his statement recorded during the investigation. This clearly proved that both witnesses, who were closely related to the deceased, being his brothers in law, had either been won over by the accused, or had been threatened into deposing in his favour. As a result, the Court was within its rights in discarding the testimony of PW-2, and altogether ignoring the deposition of PW-4, recorded during the cross-examination. It was urged that the Appellants did not, during cross-examination of PW-2 dispute that PW-12 was present at the spot. Monu, took his sister PW-2 to the hospital and at the same time, Rakesh along with

injured Subhash too reached there. Rakesh, asked Monu, who was with him, to bring sister Renu to the DDU Hospital. Upon this, Monu brought PW-2 to the hospital. This clearly proved that Monu was won over by the appellants which was the reason for his resiling from his testimony.

11. Learned counsel also submitted that in this case, there was no scope for manipulation at all, because the *rukka* was recorded at the earliest opportunity, i.e. 1:45 AM, the next morning; the MLC (Ex. PW-18/A) was recorded at 11:55 AM. The FIR was registered, therefore, within reasonable time of the incident. The statements of the material witnesses and the complainant were also recorded by the police. Furthermore, the Crime team investigation report pursuant to inspection showed that the investigators had reached the spot, at 2:30 AM, and concluded the investigation by 3:00 AM in the morning. Also, the postmortem report, Ex. PW-3/A stated that the time of death was 16-18 hours from the time when the postmortem commenced (which was at 2:35 PM the next day). The attack and death took place at around 10:45 PM or so, which was in close proximity with the time mentioned by the prosecution witnesses, i.e. 11 PM. All these materials, and the testimonies of witnesses, were sufficient to prove that the accused were perpetrators of the crime, and justly convicted for the offences.

12. Renu, wife of the deceased who deposed as PW-2 stated that a month prior to the incident, Shahid had a quarrel with Abdul regarding a scooter. Abdul was a friend of Subhash, who had intervened and in that scuffle during Shahid sustained some injuries. She stated that on 2.11.2005, Rakesh and Monu came to her in the day time and at night at around 10.30 PM, they left her house and her husband accompanied them. Her brothers were going to their house at Uttam Nagar. Her husband did not return till 11.00 PM. At about 11.00 PM, her brother came to

her house and told her that her husband had been stabbed near Keshopur Depot. She went to the DDU hospital with her brother Monu; in the meanwhile, her brother Rakesh also reached there, with her husband and got him admitted there. Her husband was declared 'brought dead' by the doctor. She also stated that prior to the incident, the accused Mohd. Afsar and Shahid had threatened her husband that they would kill him. During cross-examination, PW-2 stated that she had been only informed about the stabbing incident by her brothers, and had not seen the accused stabbing him. She deposed that her brothers Monu and Rakesh had witnessed the incident. She denied as wrong the suggestion that Subhash had not been threatened by the accused prior to this incident or that she was not informed by her brother Monu.

13. Dr. Lalit Kumar, who conducted the postmortem was examined as PW-3. He proved the report Ex. PW-3/A according to which death was due to hemorrhagic shock as a result of injury to left kidney. All injuries were *ante mortem* in nature and were of the same duration. Injury no. 1 was sufficient to cause death in normal course of nature and could have been caused by a sharp edged weapon. He deposed to preparing a sketch of the weapon and also to giving the opinion that injuries on the body could have been caused by that weapon. He was cross-examined by the counsel for the appellants, during which he deposed that he could not say if the death took place due to delay in providing medical treatment since he conducted only the postmortem.

14. Rakesh Kumar was examined as PW-4. He was with the deceased at the time of incident; he stated that Subhash had a quarrel with both the accused a month before he was murdered, in which they were injured and a case was registered against him, i.e. Subhash. Thereafter both the accused threatened Subhash that they would kill him. On 02.11.2005, he and PW-12 went to their

sister's house at C-18, Khyala. At 11.00 PM, Subhash was going to board them on the bus at Keshopur Depot. After reaching the bus stop they went to drink water. When they were returning after urinating, the accused came on a bike from behind. Afsar was driving the bike and Shahid was the pillion. They stopped the bike; Shahid gave a knife blow to Subhash on the back. After this, both accused fled the spot. Both brothers took Subhash to Park Hospital in a car. The hospital asked them to take him to Din Dayal Upadaya Hospital as it was a police case. The witness took Subhash to DDU Hospital in a TSR. PW-12 went to call his sister; both later reached the DDU hospital, where Subhash was declared brought dead. The doctor declared Subhash as dead. Police came there and recorded his statement, Ex. PW-4/A. The witness also stated that on 03.11.2005, the police got the scene of occurrence photographed and lifted blood stained earth and earth control from the spot, which was seized by memo Ex. PW-4/B. He deposed that the next day, on 04.11.2005, the accused were arrested at about 10.00 AM and the motorcycle was seized. The cross examination was deferred at the request of Shahid's counsel. His cross-examination was conducted two years later, on 23.04.2009. He resiled from his earlier statement and did not support the prosecution case. He even stated that there was no criminal case against Subhash. PW-12, Monu, the other brother of Renu, completely resiled from his statement recorded under Section 161 Cr.PC.

15. It can be seen from the above discussion that the prosecution had relied on the testimony of two eye-witnesses, i.e. PW-4 and PW-12. While the former deposed in favour of the prosecution about having witnessed the incident, in the examination in chief, he resiled from the version, in the cross examination conducted two years later. PW-12 did not support the prosecution story at all. The Trial Court chose to discard the cross examination deposition of PW-4, and relied

only on his testimony recorded during examination in chief. It felt that he had been either won over or intimidated during the two year interval (between his examination in chief, and the time when his cross examination took place).

16. In this regard, this court recollects the law declared by the Supreme Court in *Syad Akbar Vs. State of Karnataka* (1980) 1 SCC 30 that:

“As a legal proposition, it is now settled by the decisions of this Court, that the evidence of a prosecution witness cannot be rejected wholesale, merely on the ground that the prosecution had clubbed him 'hostile' and had cross-examined him.”

In *Sat Paul v. Delhi Administration* 1976 CriLJ 295, similarly, it was observed that:

“Even in a criminal prosecution when a witness is cross-examined and contradicted with the leave of the Court, by the party calling him, his evidence cannot, as a matter of law, be treated as washed off the record altogether. It is for the Judge of fact to consider in each case whether as a result of such cross-examination and contradiction, the witness stands thoroughly discredited or can still be believed in regard to a part of his testimony. If the Judge finds that in the process, the credit of the witness has not been completely shaken, he may, after reading and considering the evidence of the witness, as a whole, with due caution and care, accept, in the light of the other evidence on the record, that part of his testimony which he finds to be creditworthy and act upon it. If in a given case, the whole of the testimony of the witness is impugned, and in the process, the witness stands squarely and totally discredited, the Judge should, as a matter of prudence, discard his evidence in toto.”

In *Khujji alias Surendra Tiwari Vs. State of Madhya Pradesh* (1991) 3 SCC 627, relied upon by the Trial Court in this case, it was held that:

“It seems to be well settled by the decisions of this Court Bhagwan Singh v. State of Haryana 1976 CriLJ 203; Rabinder Kumar Dey v. State of Orissa 1977 CriLJ 173 and Syed Akbar v. State of Karnataka 1979 CriLJ 1374 that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined

him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent their version is found to be dependable on a careful scrutiny thereof.”

17. The question is whether the Trial Court was justified in rejecting the cross examination deposition of PW-4 and solely relying on the testimony made in examination in chief. There is no ambiguity in the examination in chief; he clearly supported the prosecution allegations totally, about the previous incident, where the accused were worsted, the intention expressed by them to kill Subhash, and the circumstances surrounding the attack, and all the attendant facts. This finds corroboration in Ex. PW-18/A, the MLC which is the earliest available objective document; it records that the deceased was taken to the DDU hospital at 11:55 PM. No doubt, it mentions PW-2 as the person accompanying Subhash; nevertheless, it says that she and other family members were present. The *rukka* was recorded at 1:45 AM, the next morning; the FIR was registered, thereafter at around 2 AM (Ex. PW-7/A). All these show timely recording of the information, which detailed the names of the accused, as well as the role played by them. In these circumstances, the reliance placed on, or the preference given by the Trial Court to the examination in chief of PW-4, on the one hand, and discarding the statement in cross examination, was not improper. The medical evidence, too vitally supports that version, since the death occurred due to one fatal blow.

18. As far as the evidence of PW-2 is concerned, there is no doubt that she did not witness the incident; she did not claim to be an eyewitness. She went to the hospital, on being told about the attack by her brothers. The only question is whether her statement to the extent it described the previous incident, can be accepted. Here again, in her deposition she admits that the details about the incident which took place earlier, were narrated by the deceased Subhash, during

his life time, to her. Therefore, that is inadmissible, being hearsay, as the witness had not seen the attack.

19. The appellants had urged that not only did the Trial Court err in relying only on the examination in chief evidence of PW-4, but also that in the absence of any other testimony, his testimony could not have been the sole basis of conviction, as he was a relative, and reliance on a sole witness's deposition would be unsafe. As a matter of law, there are Supreme Court judgments (*Bhimappa Chandappa Hosamani and Ors. Vs. State of Karnataka* (2006)11SCC 323 and *Namdeo Vs. State of Maharashtra* 2007 CriLJ 1819) that the testimony of a solitary witness can be made the basis of conviction. The credibility of the witness has to be tested with reference to the quality of his evidence which must be free from blemish or suspicion and must impress the Court as natural, wholly truthful and convincing, that there is no hesitation in recording a conviction solely on his uncorroborated testimony. The appellants have not shown how and for what reason PW-4 had any motive to falsely implicate them, or that their relationship was inimical. Therefore, this Court is of the opinion that the impugned judgment cannot be faulted in relying only on the testimony of PW-4 to convict the Appellants.

20. The next question is whether Shahid, who inflicted the fatal blow upon Subhash, is guilty of murder, or any other offence. It was held, while discussing the difference between the offences under Sections 302 and 304 IPC, in *Augustine Saldhana v State of Karnataka* AIR 2003 SC 3843, which had considered several previous decisions, and applied them, that:

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

15. In Virsa Singh v. State of Punjab, Vivian Bose, J. speaking for the Court, explained the meaning and scope of Clause (3). It was observed that the prosecution must prove the following facts before it can bring a case under Section 300, "thirdly". First, it must establish quite objectively, that a bodily injury is present; secondly the nature of the injury must be proved. These are purely objective investigations. Thirdly, it must be proved that there was an intention to inflict that particular injury, that is to say, that it was not accidental or unintentional or that some other kind of injury was intended. Once these three elements are proved to be present, the enquiry proceeds further, and fourthly it must be proved that the injury of the type just described made up of the three elements set out above was sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.

16. The ingredients of clause "Thirdly" of Section 300 IPC were brought out by the illustrious Judge in his terse language as follows:

"To put it shortly, the prosecution must prove the following facts before it can bring a case under Section 300, "thirdly".

First, it must establish, quite objectively, that a bodily injury is present.

Second, the nature of the injury must be proved. These are purely objective investigations.

Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say that it was not accidental or unintentional, or that some other kind of injury was intended.

Once these three elements are proved to be present, the enquiry proceeds further and,

Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender."

17. The learned Judges explained the third ingredient in the following words (at page 468):

"The question is not whether the prisoner intended to inflict a serious injury or a trivial one but whether he intended to inflict the injury that is proved to be present. If he can show that he did not, or if the totality of the circumstances justify such an inference, then of course, the intent that the section requires is not proved. But if there is nothing beyond the injury and the fact that the appellant inflicted it, the only possible inference is that he intended to inflict it. Whether he knew of its seriousness or intended serious consequences, is neither here or there. The question, so far as the intention is concerned, is not whether he intended to kill, or to inflict an injury of a particular degree of seriousness but whether he intended to inflict the injury in question and once the existence of the injury is proved the intention to cause it will be presumed unless the evidence or the circumstances warrant an opposite conclusion."

18. These observations of Vivian Bose, J. have become locus classicus. The test laid down by Virsa Singh's case (supra) for the applicability of clause "Thirdly" is now ingrained in our legal system and has become part of the rule of law. Under clause thirdly of Section 300 IPC, culpable homicide is murder, if both the following conditions are satisfied: i.e. (a) that the act which causes death is done with the intention of causing death or is done with the intention of causing a bodily injury; and (b) that the injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. It must be proved that there was an intention to inflict that particular bodily injury which, in the ordinary course of nature, was sufficient to cause death, viz., that the injury found to be present was the injury that was intended to be inflicted.

19. Thus, according to the rule laid down in Virsa Singh's case, even if the intention of accused was limited to the infliction of a bodily injury sufficient to cause death in the ordinary course of nature, and did not extend to the intention of causing death, the offence would be murder. Illustration (c) appended to Section 300 clearly bring out this point.

20. Clause (c) of Section 299 and Clause (4) of Section 300 both require knowledge of the probability of the act causing death. It is not necessary for the purpose of this case to dilate much on the distinction between these corresponding clause. It will be sufficient to say that Clause (4) of Section 300 would be applicable where the knowledge of the offender as to the probability of death of a person or persons in general as distinguished from a particular person or persons - being caused from his imminently

dangerous act, approximates to a practical certainty. Such knowledge on the part of the offender must be of the highest degree of probability, the act having been committed by the offender without any excuse or incurring the risk of causing death or such injury as aforesaid.

Previously, in *Anda v State of Rajasthan* AIR 1966 SC 148, a four judge Bench of the Supreme Court observed that:

“7. The third clause views the matter from a general stand point. It speaks of an intention to cause bodily injury which is sufficient in the ordinary course of nature to cause death. The emphasis here is on the sufficiency of the injury in the ordinary course of nature to cause death. The sufficiency is the high probability of death in the ordinary way of nature and when this exists and death ensues and the causing of such injury is intended the offence is murder. Sometimes the nature of the weapon used, sometimes the part of the body on which the injury is caused, and sometimes both are relevant. The determinant factor is the intentional injury which must be sufficient to cause death in the ordinary course of nature. If the intended injury cannot be said to be sufficient in the ordinary course of nature to cause death, that is to say, the probability of death is not so high, the offence does not fall within murder but within culpable homicide not amounting to murder or something less. The illustration appended to the clause 3rdly reads:

"(c) A intentionally gives Z a sword-cut or club-wound sufficient to cause the death of a man in the ordinary course of nature. Z dies in consequence. Here A is guilty of murder, although he may not have intended to cause Z's death."

The sufficiency of an intentional injury to cause death in the ordinary way of nature is the gist of the clause irrespective of an intention to cause death. Here again, the exceptions may bring down the offence to culpable homicide not amounting to murder.”

21. In the present case, the death occurred very proximately after the injury was inflicted, even before the victim could receive medical treatment. The injury, inflicted on the deceased's back, was 7 cm deep, and the knife cut was downwards. It caused hemorrhagic shock, and ruptured or affected internal organs. Whatever be

the reasons for the attack, there can be no doubt that the use of the 14 cm knife, in this case, was with deadly intent, and put to use quite effectively. Clearly, the case was covered by Section 300 thirdly, and amounted to murder, and an offence under Section 302 IPC. Shahid's conviction, in these circumstances, was justified and cannot be faulted.

22. The next question is the extent of Afsar's criminal responsibility. Here, the Trial Court took the aid of Section 34 and concluded that he too shared Shahid's intention to kill Subhash. Now, there is no evidence that Afsar's grievance against Subhash was to the extent that he wanted him dead. The account of PW-2 and PW-4 about the previous incident was that Abdul got angry with the accused for returning the motorcycle late; he picked up a quarrel. Subhash tried to intercede and Shahid was beaten up. Therefore, Afsar could not have harboured the intensity of feelings which Shahid felt. The prosecution story reveals that the attack took place and got over within a couple of minutes. Although in his previous statement under Section 161, Cr. PC, PW-4 mentioned that the motorcycle was ridden by Afsar in such manner that he slowed down very near the deceased, to facilitate the attack, in the deposition in court, he only said that the motorcycle had been slowed down. Being the motorcyclist, who was driving the bike, Afsar's role was as a facilitator. There is however, no evidence that Afsar knew that Shahid carried a knife, and that even if he did know, he knew that he would be using it in the manner he did on the fateful day. If there was such knowledge, it can be successfully argued that he shared Shahid's intention. If on the other hand, the mere fact that he slowed the bike, to enable Shahid to do something – either hit the deceased, or have a quarrel with him, may not be determinative enough to hold him criminally responsible to the extent of Shahid.

23. This Court is alive to the fact that it is often quite difficult to adduce proof of intention, under Section 34 IPC because at times intention can be forged at the spur of the moment having regard to the principle presented for the crime. The Privy Council in *Mehbub Shah Vs. King Emperor* 1945 LR 72 IA 148 observed that

“the partition which divides their bounds is often very thin; nevertheless, the distinction is real and substantial, and if over looked will result in miscarriage of justice.....the inference of common intention should never be reached unless it is necessary inference deducible from the circumstances of the case.”

24. These views were quoted with approval in *Pandurang, Tukia and Bhillia Vs. State of Hyderabad* AIR 1955 SC 216. In *Joginder Ahir & others Vs. State of Bihar*, AIR 1971 SC 1834, the Supreme Court highlighted the need to focus on the specific acts of each accused to discern whether he shared common intention for the particular crime. The absence of an overt act was held to be determinative in that case and the accused were held not guilty by association for the intention to murder. Similarly the decision in *Krishna Govind Patil Vs. State of Maharashtra* AIR 1963 SC 1413, highlighted that different acts of individuals who are said to have common intention may not lead to different consequences. Earlier in *Anda & Others Vs. State of Rajasthan* AIR 1966 SC 148, a four Judge decision of the Supreme Court while reiterating that Section 34 applies where there is common intention for a crime act done in furtherance to the common intention of all, noticed that Section 35 IPC requires the existence of knowledge or intent in each accused before he can be held liable for the criminal act. The Supreme Court’s observations are illuminating:

“Thus if two persons beat a third and one intends to cause his death and the other to cause only grievous injury and there is no common intention, their offences will be different. This would not be the case if the offence is committed with a common intention or each accused possessed the

necessary intention or knowledge. Section 38 provides for different degrees of responsibility arising from the same criminal act. The illustration brings out the point quite clearly:

“A attacks Z under such circumstances of grave provocation that his killing of Z would be only culpable homicide not amounting to murder. B having ill-will towards Z and intending to kill him, and not having been subject to the provocation assists A in killing Z. Here, though A and B are both engaged in causing Z’s death, B is guilty of murder, and A is guilty only of culpable homicide.””

25. Clearly, the role of Afsar was that of an accessory or accomplice to the crime. The prosecution also showed that he slowed down upon spotting Subhash. This provided the window of opportunity to Shahid to attack the victim murderously. Therefore, the Court is of the view that though Afsar shared a common intention with Shahid, it was not to commit the offence punishable under Section 302 IPC, but the offence punishable under Section 304-I IPC.

26. In view of the above discussion, the Court is of the opinion that Afsar’s appeal has to succeed in part. His conviction is altered to one under Section 304 –I IPC. The sentence is reduced to eight years rigorous imprisonment. The other sentences imposed on him are left undisturbed. Shahid’s appeal is, for the reasons mentioned above, dismissed. CrI. A. No.279/2011 is partly allowed in the above terms; for the same reasons CrI. A No.1327/2011 is dismissed.

**S. RAVINDRA BHAT
(JUDGE)**

April 26, 2012

**S.P. GARG
(JUDGE)**