

\$~

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

+ **CRL.A.1433/2010**

Prakash Kumar @ Pakka Appellant
Through: Mr. Ajay M. Lal, Advocate

versus

STATE Respondent
Through: Ms. Ritu Gauba, APP

AND

+ **CRL.A. 1194/2010**

Jai Kishan @ Jacky Appellant
Through: Mr. Mohit Garg, Advocate

versus

STATE Respondent
Through: Ms. Ritu Gauba, APP

AND

+ **CRL.A. 1432/2010**

Suraj Kumar Thakur Appellant
Through: Mr. G.S. Sharma, Advocate

versus

STATE Respondent
Through: Ms. Ritu Gauba, APP

Date of Decision: May 16, 2013

CORAM:

HON'BLE MS. JUSTICE REVA KHETRAPAL

HON'BLE MS. JUSTICE SUNITA GUPTA

J U D G M E N T

: SUNITA GUPTA, J.

1. These appeals have been preferred under Section 374 of Criminal Procedure Code, 1973 assailing the order dated 26th August, 2010 vide which the appellants Prakash Kumar @ Pakka, Suraj Kumar Thakur and Jai Kishan @ Jacky were held guilty for offences under Section 302/34 IPC while co-accused Prakash Raj @ Pintu was acquitted giving him benefit of doubt. Vide order dated 30th August, 2010, all the appellants were sentenced to undergo life imprisonment and also to pay a fine of Rs.1,000/- in default to undergo simple imprisonment for two months.

2. Prosecution case succinctly stated is as follows.

3. Police machinery was set in motion on receipt of an information regarding stabbing of one person, namely, Ram Chander on 22nd January, 2004 on the basis of which DD No. 16A, Ex. PW22/A was recorded in the Police Station, Patel Nagar. The said DD was handed over to SI Suresh Kumar who along with Constable Suresh Kumar reached the place of occurrence at Jhuggi No. WZ 157/207, Gali No. 1, Prem Nagar, Patel Nagar, Delhi. On reaching there, he came to know that Ram Chander was removed to hospital in PCR. No eye witness was available at the spot. After leaving Constable Suresh Kumar at the spot, SI Suresh Kumar went to DDU Hospital. In the

meanwhile, Constable Kishan Singh reached DDU Hospital and handed over DD No.44B, Ex. PW 22/B mentioning about the death of Ram Chander to SI Suresh Kumar. Inspector Ram Sewak, SHO, Police Station, Patel Nagar also reached the DDU Hospital on being apprised about both the DD entries. SI Krishan Kumar collected the MLC of deceased Ram Chander on which the doctor had mentioned 'brought dead to casualty'. On inspection of dead body, one stab injury on left side of the chest of the deceased was noticed. Ramadheen @ Molla, elder brother of the deceased met the police officials in the hospital and SI Suresh Kumar recorded his statement Ex. PW3/A, which became bedrock of investigation. FIR Ex.PW2/A was recorded.

4. Scene of the occurrence was inspected by the Investigating Officer of the case. The Crime Team and the photographer arrived at the spot and photographs were taken. Site Plan of the scene of occurrence was prepared at the instance of Ramadheen @ Molla. Blood lying in the Jhuggi, earth control, blood stained stones were lifted from the spot and were seized vide seizure memos Ex. PW-3/B to Ex.PW3/D. Post mortem of the dead body of the deceased Ram Chander was conducted by Dr. M.M.Narnaware who gave his report Ex.PW12/A. After post mortem, the dead body of deceased Ram Chander was handed over to his brother and wife, vide handing over memo Ex. PW3/F.

5. It is further the case of the prosecution that on 1st February, 2004, accused Suraj was apprehended from the gate of Railway Station, Patel Nagar at the identification of complainant Ramadheen.

He was arrested vide memo Ex. PW3/G. On 13th April, 2004 accused Prakash Kumar @ Pakka and accused Prakash Raj @ Pintu were apprehended on the basis of secret information from Punjabi Basti, Baljit Nagar, Delhi. Both of them were interrogated and their disclosure statements Ex. PW-3/P and Ex. PW-3/Q were recorded. Both the accused were arrested. Both the accused pointed out the place of incident. In pursuance to the disclosure statement made by the accused Prakash Kumar @ Pakka, one button actuated knife was recovered from the bushes near Railway line, which was seized vide seizure memo Ex. PW3/U. The case properties were deposited in Malkhana. Subsequent opinion of the Doctor regarding weapon of offence was obtained. Search for remaining accused were made but they could not be arrested as such charge sheet was submitted against three accused, namely, Suraj Kumar, Prakash @ Pakka and Prakash Raj @ Pintu. Accused Jai Kishan @ Jacky and Vikram were put in column No.2.

6. During the course of trial, accused Jai Kishan @ Jacky who was earlier declared proclaimed offender was arrested on 26th February, 2005 and supplementary charge sheet was filed against him. However, Vikram @ Vakhat Ram could not be arrested and he was declared proclaimed offender.

7. After the case was committed for trial, charge for offence under Section 302 IPC was framed against the accused Suraj Kumar Thakur, Prakash @ Pakka and Prakash Raj @ Pintu on 7th October 2004 whereas accused Jai Kishan @ Jacky was charged for the same offence on 15th July, 2008. All the accused pleaded not guilty to the

charge and claimed trial.

8. In order to substantiate its case, prosecution examined 27 witnesses.

9. All the incriminating evidence was put to the accused persons while recording their statements under Section 313 Cr. P.C. All the accused pleaded their innocence and alleged false implication in the case. Prakash @ Pakka and Prakash Raj @ Pintu examined DW-1 Constable Lachha Ram who proved the DD No. 421 dated 9th April, 2004, DD No. 464 dated 10th April, 2004, DD No.465 dated 10th April, 2004 and DD No. 503 dated 11th April, 2004(Ex. DW1/A to DW1/D). Accused Suraj examined DW-2 Sh. Subhash Kumar, his father, who deposed that he was lifted by Delhi Police on 30th January, 2004 from the house at about 11:00 pm by SI Babu Lal. He was taken to police station at Patel Nagar and was detained there for 2-3 days. Thereafter his son was forced to surrender in the police station Patel Nagar and only thereafter he was allowed to leave the police station.

10. After hearing learned counsel for the parties vide impugned order, accused Prakash @ Pukka, Suraj Thakur and Jai Kishan @ Jacky were held guilty for offence under Section 302/34 IPC while accused Prakash Raj @ Pintoo was acquitted granting him benefit of doubt. The said order of conviction has been assailed by all the three convicted appellants by filing the present appeal.

11. We have heard Mr. Ajay M. Lal, Mr. Mohit Garg and Mr.G.S. Sharma, counsel for the appellants and Ms. Ritu Gauba, learned APP. It was submitted by learned counsel for the appellants that the prosecution's case hinges on the testimony of PW-3 Ramadheen, PW-

4 Sonu, PW-6 Seema and PW-7 Rekha, who are relatives of the deceased. However, PW-4 Sonu has not supported the case of prosecution. PW-6 Seema, wife of the deceased has admitted that she was not present at the place of incident and her testimony was only hearsay. PW-3 Ramadheen is the complainant, however his testimony has not even been relied upon by the learned trial court regarding main incident of stabbing but was referred to on collateral points. Testimony of PW-7 Rekha also suffered from material improvements. According to her, her statement was recorded at 4:15 pm even before the injured was taken to hospital and before the statement of her husband was recorded. If that be so, FIR should have been recorded immediately on her statement but it was recorded only after 7:00 pm. On the statement of Ramadheen, in fact, none of the witnesses were present at the spot. Otherwise they being close relatives of the deceased would have been the first persons to take him to the hospital but as per MLC, the deceased was brought to the hospital by the police officials. Even PW-23 deposed that injured was lying on the road and they removed him to hospital.

12. It was further submitted that the prosecution heavily relied upon motive to commit the crime by alleging that the accused persons used to indulge in indecent activities and used to tease girls, which was objected to by the deceased and his brother. However, no other person of the locality has been examined to prove this fact. There is no complaint by any mohalla person regarding this fact. Moreover, different versions are forthcoming inasmuch as according to wife of the deceased, the relations of deceased with the accused persons were

cordial and they even used to visit her house whereas PW-7 Rekha at the outset of her examination-in-chief deposed that their relations were strained. Motive is, however, a double edged weapon and that may be a reason for falsely implicating the accused persons in such a heinous crime. It was further submitted that although accused Prakash @ Pakka and Prakash Raj @ Pintu were shown to have been arrested from A-170, Punjabi Basti, Baljit Nager, Delhi. However, the appellants examined DW-1 Constable Lachha Ram, who brought DDs to prove that the accused were arrested under Section 41(3)/109 Cr. P.C. in Rajasthan. They were produced before the SDM, Police Station Sumer Pur, who had released them on executing a personal bond for six months. Subsequently, on 11th April, 2004, they were again called in police station Sumer Pur and were handed over to SI Kishan from police station, Patel Nagar, Delhi. In view of this documentary evidence, the oral testimony of the witnesses that the accused were arrested from Punjabi Basti, Baljit Nagar, Delhi stands falsified and therefore, the subsequent recovery of knife allegedly at the instance of accused Prakash @ Pakka also does not deserve any credence.

13. Learned counsel for the accused Jai Kishan besides supporting the submissions made by the other co-accused, submitted that the question of law involved in the instant case qua this accused is the applicability of Section 299 of the Code of Criminal Procedure. It was submitted that this appellant was shown in column No. 2 in the charge sheet submitted on 27th April, 2004. Thereafter, he was declared as proclaimed offender by virtue of proceedings under Section 82 of the

Code of Criminal Procedure, 1973 on 22nd September, 2004. The Magistrate committed the case to the Court of Sessions vide order dated 27th April, 2004 and at that point of time there was no mention of any order under Section 299 Cr. P.C. and in fact, no request was made throughout the proceedings and no order under Section 299 Cr. P.C. was passed by the trial court. As such, the evidence led against the other accused persons could not be read against this appellant inasmuch as the provisions of Section 299 Cr. P.C. have not been complied with. Even though this accused was arrested in the year 2005, charge was framed only on 15th July, 2008 by observing that non framing of the charge against this accused was just an irregularity. It was submitted that framing of charge is not a technical formality and in fact it is the very foundation of the case against the accused. After the arrest of the accused the material witnesses were not recalled for the purpose of examination qua this accused and as such their testimony cannot be read in evidence against him which form the basis of his conviction. As such, it was submitted that his conviction is also liable to be set aside on this ground. Reliance was placed on ***Jayender Vishnu Thakur Vs. State of Maharashtra and Anr.***, (2009) 7 SCC 104.

14. Rebutting the submissions of learned counsel for the appellants, it was submitted by learned public prosecutor that merely because material prosecution witnesses are relatives of the deceased is no ground to discard their testimony inasmuch as they would be the last person to falsely implicate the accused persons and allow the real accused to go scot free. Reliance was placed on ***Gajoo Vs. State of***

Uttarakhand, (2012) 9 SCC 532; *Mookkiah and Anr. Vs. State*, (2013) 1 SCC (Cri) 848 and *Hari vs. State of Maharastra*, (2009) 3 SCC (Cri) 1254.

15. It was further submitted that even if PW-4 Sonu did not support the case of prosecution, however, that part of the testimony which supports the case of prosecution, still can be considered. Reliance was placed on *Ramesh bhai Mohan bhai vs. State of Gujarat*, (2011) 3 SCC (Cri) 102. Mere fact that witnesses did not accompany the deceased to hospital is no ground to doubt their presence at the spot. Reliance was placed on *Abu Thakur and Ors. Vs. State of Tamil Nadu*, (2010) 2 SCC (Cri) 1258. Further the ocular testimony of the prosecution witnesses find due corroboration from the medical evidence. After the arrest of the accused when knife was recovered, it was sent to the doctor and subsequent opinion was received that the injuries were possible by the recovered weapon. Further, human blood was found on the concrete material and stones at the Railway line which is another incriminating piece of evidence against the accused persons. Prosecution has also proved motive to commit the crime inasmuch as the deceased and his family members used to object to the indecent activities of the accused persons whereby they used to tease girls of the locality and the accused persons had even earlier threatened the deceased and on the fateful day, they came armed with knife and gave knife blow on the left side of the chest of the deceased which proved fatal. The deceased was unarmed and the accused persons took undue advantage. That being so, the offence under Section 302 IPC was squarely made out against them. Reliance

was placed on *Satbir @ Lakha vs. State of Haryana*, (2013) 1 SCC (CrI) 129 and *Rajpaul Singh & Ors vs. State*, (2013) 1 SCC (CrI) 7. All the accused shared common intention, as such were rightly held guilty under Sections 302/34 IPC. Reliance was placed on *Mrinal Das vs. State of Tripura* AIR 2011 SC 3753; *Mano Dutt and Anr. Vs. State of U.P.* (2012) 2 SCC (Cri) 226; *Nand Kishore vs. State of M.P.*, (2012) 1 SCC (Cri) 378; *Abdul Mannan vs. State of Assam*, (2010) 2 SCC (Cri) 75 and *Deepak Verma vs. State of Himachal Pradesh* (2012) 1 SCC (Cri) 203.

16. As regards accused Jaikishan, it was submitted that charge was framed against him on 15th July, 2008 which was never challenged by the accused as such the same attained finality. The prosecution moved an application under Section 311 Cr.P.C. for recalling PW-3 Ramadheen and PW-7 Rekha after the arrest of this accused. However, sincere efforts were made to trace these witnesses even through DCP but the witnesses could not be traced. Under the circumstances, their testimonies were rightly relied upon by learned trial court under Section 299 Cr.P.C. qua this accused. Under the circumstances, while supporting the judgment pronounced by learned trial court, it was submitted that there is no merit in the appeals and the same are liable to be dismissed.

17. We have given our considerable thoughts to the respective submissions of learned counsel for the parties and have perused the records.

18. As regards the actual incident, prosecution case rests on the testimonies of PW-3 Ramadheen, PW-4 Sonu, PW-6 Seema and PW-7

Rekha.

19. PW-3 Ramadheen @Molla testified that he was doing cobbler's job. On the date of incident he returned from his job and was taking bath outside his house. He asked his deceased brother to bring food for him. His brother came back and told him that accused Prakash @ Pakka, Pintu, Suraj, Jai Kishan and Vikram were coming to beat him. Thereafter all the three accused started beating his brother and in the meantime, accused Prakash @ Pakka asked accused Suraj to take out a knife . Suraj took out a knife from his pocket and thereafter churi was taken by accused Prakash @ Pakka and he gave that churi blow on the left side of chest of his brother Ram Chander. He got scared and to save himself he went to hide himself in another room. After changing his clothes he came out and found his brother unconscious. His wife was also present and he asked his wife to tie the wound with the help of chunni. His friend Sonu was also present there and he asked him to take his brother to hospital. He also called the police at 100 number. Police came and took his brother to hospital. Later on, he also reached hospital. On enquiry he was informed that his brother had already expired. Police met him in the hospital and recorded his statement Ex. PW 3/A. In cross-examination, he deposed that incident took place at

about 3:45 p.m. He was taking bath at a distance of 2-3 paces from the Jhuggi. He denied the suggestion that since he was taking bath he had not seen accused Prakash @ Pakka giving churi blow on the chest of his brother – Ram Chander. He was confronted with some of the portions of the statement Ex.PW3/A, where some of the facts as deposed in the Court did not find mention.

20. PW4 Sonu is the friend of PW3 Ramadheen. This witness, however, did not support the case of the prosecution in as much as he deposed that after finishing his work, he was coming to his house and saw Ram Chander having a stab injury lying on his bed inside the house. At the instance of his elder brother he took him to the hospital. Since the witness did not support the case of the prosecution, he was cross-examined by learned Public Prosecutor and in cross-examination, he denied having made any statement to the police to the effect that on 22.01.2004 at about 3:45 p.m., he was present at the Jhuggi or that accused Prakash @ Pakka, Jai Kishan and Suraj entered the Jhuggi or that accused Suraj gave knife to Prakash @ Pakka and Prakash @ Pakka inflicted knife injuries on the chest of Ram Chander.

21. PW6 Smt. Seema is the wife of the deceased and has deposed

that her husband was stabbed by Prakash @ Pakka and Suraj and one more person. These boys used to come to the street and used to tease girls to which her husband raised objection. On this the accused persons extended threats to kill her husband. Her husband was removed to hospital from the spot and he died in the hospital. In cross-examination, she admitted that she was not present at Jhuggi No. WZ 157/207, Prem Nagar, Gali No.1, Delhi and did not witness the occurrence. The incident was narrated to her by her sister-in-law.

22. PW7 Rekha is the wife of complainant PW3 Ramadheen. It has come her deposition that the accused Prakash @ Pakka and Suraj used to come in the street and used to tease girls. Even 3-4 days prior to the date of the incident both of them came to the street. Her brother-in-law Ram Chander asked them not to visit the street and not to tease the girls, on which they left from the spot and next day again came along with three more persons. Ram Chander again raised objection on which all the five boys extended threat to him by saying '*Tu kaun hota hai tera kaam tamam kar denge*'. Then, they left from there and again came on the next day. Accused Prakash @ Pakka, Suraj and Jai Kishan entered the Jhuggi. Accused Prakash @ Pakka asked Jai

Kishan and Suraj to catch hold of the hands of her brother-in-law – Ram Chander and asked Suraj to give him a knife. Thereupon Suraj gave him a knife and Prakash @ Pakka inflicted knife blow on the chest of Ram Chander. At that time her husband was taking bath and due to the incident she, her husband and Sonu ran from there. Accused Prakash @ Pakka followed her husband, then she, her husband and Sonu hide themselves to save themselves from accused persons. Later on, Ram Chander was removed to hospital where he succumbed to the injuries.

23. Testimonies of all these witnesses have been assailed by learned counsel for the appellant on the ground that PW4 - Sonu has not supported the case of the prosecution. Remaining witnesses are relations of deceased. PW6 Seema has admitted that she was not present in the Jhuggi at the time of incident and her testimony is only hear say based on information given to her by the Bhabi of her husband. As far as the complainant – Ramadheen is concerned, he also could not have witnessed the incident in as much as per his own version, he was taking bath at a distance of 2-3 paces away from the Jhuggi. Testimony of PW7 Rekha suffers from improvement. As such,

no credence can be given to her testimony. Moreover, the conduct of the witnesses reflects that they were not present at the spot in as much as had they been present over there, they would have removed the injured to hospital, but as per the MLC and testimony of police officials injured were removed to hospital by police officials.

24. As regards the fact that PW4 Sonu did not support the case of prosecution, firstly, it may be mentioned that it is a settled legal proposition that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him hostile and cross examine him. The evidence of such witness cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent that their version is found to be dependable on a careful scrutiny thereof. Vide *Bhagwan Singh Vs. State of Haryana*, (1976) 1 SCC 389, *Rabindra Kumar Dey Vs. State of Orissa*, (1976) 4 SCC 233, *Khuji Vs. State of M.P.*, (1991) 3 SCC 627 and *Rameshbhai Mohanbhai Koli* (supra).

25. Moreover, it has to be kept in mind that he was only neighbour of the complainant and that being so, it is quite possible that he is trying to suppress the manner in which Ram Chander sustained

injuries by deposing that he did not witness the incident. However, he admitted that at the instance of his elder brother he removed injured to hospital- meaning thereby he is not denying his presence at the spot, but for reasons best known to him he is trying to suppress the genesis of the case. It will be advantageous to produce the observations made by Hon'ble Supreme Court in *Krishna Mochi vs. State of Bihar*, 2002 6 SCC 81 in this regard:-

“It is matter of common experience that in recent times there has been sharp decline of ethical values in public life even in developed countries much less developing one, like ours, where the ratio of decline is higher. Even in ordinary cases, witnesses are not inclined to depose or their evidence is not found to be credible by courts for manifold reasons. One of the reasons may be that they do not have courage to depose against an accused because of threats to their life, more so when the offenders are habitual criminals or high-ups in the Government or close to powers, which may be political, economic or other powers including muscle power. A witness may not stand the test of cross-examination which may sometimes be because he is a bucolic person and is not able to understand the question put to him by the skilful cross-examiner and at times under the stress of cross-examination, certain answers are snatched from him. When a rustic or illiterate witness faces an astute lawyer, there is bound to be imbalance and, therefore, minor discrepancies have to be ignored. These days it is not difficult to gain over a witness by money power or giving him any other all urence or giving out threats to his life and/or property at the instance of persons, in/or close to powers and muscle men or their associates. Such instances are also not uncommon where a witness is not inclined to depose because in the prevailing social structure he wants to remain indifferent.”

26. Furthermore the prosecution case does not rest solely on his testimony but there are other witnesses, which are PW-3 PW-6 and PW-7. Although a submission was made that they are relations of the deceased and as such no reliance can be placed on their testimony, however, relationship is not a factor to affect credibility of a witness. It is very often said that near relations would not conceal actual facts and make allegations against any innocent person. They would not allow the real culprits to go scot free and to rope in falsely innocent persons.

27. In *Hari* (supra) it was observed by Hon'ble Supreme Court that relationship by itself cannot be a ground to discard their evidence. In that case the occurrence had taken place within the house and it was observed that in such a situation only relations would be witnesses. The Hon'ble Supreme Court relied upon *Dalip Singh vs. State of Punjab*, AIR 1953 SC 364 where the law relating to appreciation of evidence by relations was laid down with such lucidity that it was quoted as :-

“26. ...Ordinarily, a close relation would be the last to screen the real culprit and falsely implicate an innocent person. It is true,

when feelings run high and there is personal cause for enmity, that here is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalisation. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts.”

25. The said principle was also followed by a Constitution Bench in **Masalti and Ors. v. State of Uttar Pradesh**, AIR 1965 SC 202. The Constitution Bench speaking through Chief Justice Gajendratgadkar approved the decision in the case of **Dalip Singh** (supra) and held as under:

“14. ...But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses. Often enough, where factions prevail in villages and murders are committed as a result of enmity between such factions, criminal Courts have to deal with evidence of a partisan type. The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard and fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct.”

26. Justice Thomas, speaking for Apex Court, in the case of **State of Rajasthan v. Teja Bahadur and Ors.**, 2001 (3) Crimes 360 (SC) held that over insistence on witnesses having no relation with the victim will result in the criminal justice system going awry. In SCC P.513, para 20, the learned Judge held that when any incident happens in a dwelling house, the most natural

witnesses would be the inmates of the house and in such a situation "it is unpragmatic to ignore such natural witnesses and insist on outsiders who would not have even seen anything".

27. The learned Judge further clarified: (Teja Ram case, SCC P.513 para 20)

“...The prosecution can be expected to examine only those who have witnessed the events and not those who have not seen it though the neighborhood may be replete with other residents also.”

The aforesaid observation fits in with the fact situation in this case in as much as the incident took place within the precincts of the house of the deceased and the relations are the only natural witnesses.

28. Substantially similar view was taken in *Mookkiah* (supra) and *Gajoo* (supra). In view of these authoritative pronouncements, the submission that witnesses being close relations and consequently being partisan witnesses, should not be relied upon has no substance. The only caution is that the Court has to adopt a careful approach and analyse evidence to find out whether it is cogent and reliable. In this background the testimonies of PW-3, PW-6 and PW-7 are to be scrutinised.

29. So far as PW-3 Ramadheen is concerned, although it has come in his testimony that he was taking bath outside the house but it was only 2-3 paces away from the jhuggi and therefore it cannot be said

that the witness could not have witnessed the incident. He has denied in the cross examination that the incident was not witnessed by him. Moreover the presence of the witness at the spot stands proved in view of the fact that it was he who had informed the PCR and also asked PW-4 Sonu to take his brother to hospital.

30. As regards PW-6 Seema wife of the deceased, it is true that it has come in her cross examination that she was not present at the spot at the time of the incident and she did not witness the occurrence. Her version was based on the narration of facts given to her by her Jethani. As such, as regards the incident, her testimony is hearsay. Even PW-7 Rekha has admitted that at the time of the incident Seema was not present in the house.

31. Even if the testimony of PW-6 Seema is not to be considered being hearsay and witnessing the occurrence by PW-3 Ramadheen is not proved beyond doubt, even then there is the testimony of PW-7 Rekha. This witness has given a vivid narration of the entire incident by deposing that the accused persons used to tease girls in the street which was objected to by her husband Ramadheen and her brother-in-law who used to ask them not to visit the street and to tease girls. This

was not liked by the accused persons and they extended threats to her brother-in-law. On the day of the incident the accused persons came to the jhuggi. Accused Prakash @ Pakka asked Jai Kishan and Suraj to catch hold of her Dewar. Prakash @ Pakka also asked Suraj to give knife to him . Thereupon Suraj gave him knife and Prakash @ Pakka inflicted knife blow on the left side of the chest of deceased Ram Chander. She became scared and she along with her husband ran away from the spot. Her testimony has been assailed on the ground that in cross examination she has deposed that her statement was recorded in the night as well as on the next date of incident and that her statement was recorded even prior to taking the injured to hospital and even before the statement of her husband was recorded. It was submitted that if that had been the case why the FIR was not recorded on her statement. It has come in evidence that the witness is illiterate and as such may not be intelligent enough in narrating the sequence of events which had taken place. However, she had been very specific in assigning the role of each and every accused by deposing that on the asking of Prakash @ Pakka, Suraj and Jai Kishan caught hold of the hands of Ram Chander. Suraj gave knife to Prakash @ Pakka who

inflicted the same on the left side chest of Ram Chander. She reiterated in cross examination that accused Suraj gave knife to Pakka and stabbed her brother-in-law. As regards the identification of the accused persons is concerned, she deposed that Suraj and Prakash @ Pakka were known to her prior to the incident as they used to come to the locality. However, accused Prakash Raj started visiting the locality just about three days prior to the incident. The suggestions given to the witness reflects that accused Prakash Raj is not even disputing his presence at the spot inasmuch as it was suggested to her that when the “marpit incident” started then she came to the spot. While denying the suggestion she reiterated that she was already present at the spot. The facts unfolded by this witness are found to be consistent. No inherent infirmity attacking the substratum of the case is noted in her testimony. She projected the sequence of events in a cohesive manner. True account of events has been projected by her. She fared well during the course of cross examination. Defence could not dispel the case detailed by this witness. She is a reliable witness and accountability of the accused can be adjudged on her sole testimony. It is well settled that in a criminal trial, even a solitary

witness can form the basis of conviction. Law does not postulate or require that a particular number of eye witness should depose before conviction of murder can be sustained. It is not the number but credibility which can be attached to a statement that matters. Conviction is possible on the basis of statement made by sole eye witness where his presence at the spot is established and proved. The incident in the instant case has taken place in the jhuggi of this witness and her presence at the spot is established. Variation in the testimony of the witness is not on basic substratum of the case. Identity of the accused person is not doubtful as all the accused were well known to her from before. Even if some minor contradiction or improvement has taken place that does not affect the sub stratum of the case. In fact, there are catena of decisions to the effect that human memory fades away with lapse of time and some minor inconsistencies and discrepancies are bound to be there.

32. In **Krishna Pillai Vs. State of Kerala, 1981 Cr.L.J. 1743 : AIR 1981 SC 1237**, it was held as under :-

"The prosecution evidence no doubt suffers from inconsistencies here and discrepancies there, but that is a short coming from which no criminal case is free. The main thing to be seen is whether those inconsistencies

etc. go to the root of the matter or pertain to insignificant aspects thereof. In the former case, the defence may be justified in seeking advantage of the incongruities obtaining in the evidence. In the latter, however, no such benefit may be available to it. That is a salutary method of appreciation of evidence in criminal cases."

33. In **Sidhan Vs. State of Kerala, 1986 Cr.L.J. 470**, it was held :--

"Minor discrepancies regarding minute details of the incident including the sequence of events and overt acts are possible even in the versions of truthful witnesses. In fact such discrepancies are inevitable. Such minor discrepancies only add to the truthfulness of their evidence. If, on the other hand, these witnesses have given evidence with mechanical accuracy that must have been a reason to contend that they were giving tutored versions. Minor discrepancies on facts which do not affect the main fabric need not be taken into account by the Courts if the evidence of the witnesses is found acceptable on broad probabilities."

"The principles that can be culled out from the aforesaid decisions are minor discrepancies and inconsistencies cannot give (sic) importance. The Court has to see whether inconsistencies can go to the root of the matter and affect the truthfulness of the witnesses while keeping in view that discrepancies are inevitable in case of evidence of rustic and illiterate villagers, who speak them after long lapse of time."

34. In **2010 III AD (Delhi) 34 Gore Lal vs. State**, Division Bench of this Court observed 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 their testimony, provided there is the impress of truth and conformity to probability in the substantial fabric of the testimony delivered. High Court relied upon Crl. A.No.327/2007 **Akbar & Anr. Vs State**, and decisions of Hon'ble Supreme Court reported as **Tahsildar Singh vs State of UP**, AIR 1959 SC 1012, **Bharwada Bhoginbhai Hirjibhai vs. State of Gujarat**, AIR 1983 SC 753 & **Leela Ram (Dead) through Dulichand vs. State of Haryana**, AIR 1999 SC 3717 and observed that 13 principles are to be followed while evaluating evidence of eye witnesses:

I. While appreciating the evidence of a witness, the approach must be whether the evidence of a 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 estimate 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 be 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.

35. A minute scrutiny of the testimony of PW-7 Rekha reveals that she has passed the test of reliability and her version is natural, probable, coherent and cogent.

36. Much emphasis was laid by learned counsel for the appellant for submitting that had these witnesses been present at the spot the natural conduct would have been to remove the injured to hospital. Even after noticing that the real brother has sustained such serious injuries, Ramadheen did not took him to hospital rather asked PW4 – Sonu to take him to hospital.

37. In *Rana Partap and Ors. Vs. State of Haryana*, 1983 (3) SCC 327, Hon'ble Supreme Court observed that every witness, who witnesses a murder reacts in his own way. Some are stunned, some become speechless and stand rooted to the spot. Some become hysteric and start wailing. Some start shouting for help. Others run away to keep themselves as far removed from the spot as possible. Yet others rush to the rescue of the victim, even going the extent of counter-attacking the assailants. Every one reacts in his own special

way. There is no set rule of natural reaction. To discard the evidence of witnesses on the ground that he did not react in any particular manner is to appreciate evidence in a wholly unrealistic and unimaginative way.

38. In *Abu Takiar* (supra) it was held by the Apex Court that behavioural pattern of individual differs and response of each individual may not be similar. In that case, after witnessing ghastly attack on deceased, witnesses fled away from place of occurrence and did not report the matter to police, it was held that presence of witnesses at place of occurrence cannot be disbelieved on that ground.

39. Under the circumstances, the mere fact that Ramadheen or for that matter, Rekha did not remove the injured to hospital does not cast doubt about their presence at the spot.

40. It has further come in evidence of PW-3 Ramadheen that the police came to the spot and lifted the earth control (blood) etc. from the spot and the seizure memos Ex. PW-3/B, PW-3/C & PW-3/D bears his signatures. PW-22 Inspector Suresh Kumar and PW-27 Inspector Ram Sewak have also deposed that blood lying in the

Jhuggi, earth control and blood stained stones were lifted and were seized vide seizure memo Ex. PW-3/B, PW-3/C and PW-3/D. During the course of investigation, the same were sent to FSL and the report Ex. PY was given by Sh. V. Sankaranarayanan, Senior Scientific Assistant, Biology, opining that blood was detected on blood stained concrete material and piece of stone. It was further opined that origin of blood was "Human". Although, on blood stained concrete material, blood group could not be given, however, blood sample of the deceased was taken which was opined to be of AB group and on the piece of stone also human blood of AB group was opined. This is also an incriminating piece of evidence against the accused persons.

41. The ocular testimony of PW-7 Rekha that after taking knife from accused Suraj, accused Prakash @ Pakka inflicted knife blow on the left side of the chest of Ram Chander, finds corroboration from the medical record inasmuch as after intimation was given to PCR, Head Constable Giriraj, PW-23 reached the spot and removed injured Ram Chander to DDU Hospital. In DDU Hospital PW-5 Dr. Nishu Dhawan examined the patient vide MLC Ex. PW-5/A and found:-

“stab injury of size about 3 x 0.5 cm cavity deep on left seventh inter central space mid axillary line and

opined that the person was brought dead.”

42. Thereafter, post mortem on the dead body was conducted by Dr. M.M. Narware whose report was proved by PW-12 Dr. L.K. Barua as the doctor had since expired. On post mortem examination, the doctor found the following injuries on the person of Ram Chander:-

One spindle shaped penetrating wound seen on lateral aspect of left side of chest, located at 9.5 cm from left nipple and 12.5 cm from axilla. The margins are clean cut and well defined. Both the angles are acute. Size was 2.5 cms x 1cm x cavity deep. In the course of injury, it penetrated the chest wall, entered the left thoracic cavity then pierced the left lung.

It was opined that injury number 1 was, in ordinary cause of nature, sufficient to cause death.

43. The other incriminating piece of evidence against accused Prakash @ Pakka is the recovery of weapon of offence at his instance. It has come in the testimony of PW-27 Inspector Ram Sewak that on 13th April, 2004, accused Prakash @ Pakka and accused Prakash Raj @ Pintu were apprehended on the basis of secret information from Punjabi Basti, Baljit Nagar. PW-16 Constable Ajit Singh, PW-26 SI Sudesh Pal were also present. PW-3 Ramadheen also reached the spot and he identified both the accused. ASI Sudesh Pal also identified

accused Prakash @ Pakka as he had arrested him earlier in another case. Both the accused made disclosure statements Ex. PW-3/Q and PW-3/P and they also pointed out the place of incident vide memo Ex. PW-3/R and Ex. PW-3/S. Pursuant to his disclosure statement accused Prakash Kumar @ Pakka led them to the bushes near Railway line and pointed out the bushes and got recovered one button actuated knife. Thereafter, remaining proceedings viz. preparation of sketch of knife Ex. PW-3/T, converting it into a cloth parcel and sealing the same vide seizure memo Ex. PW-3/U were conducted. Site plan of the place of recovery of knife, Ex. PW-27/D was also prepared. The recovery was effected in the presence of PW-3 Ramadheen and this witness has supported the case of prosecution regarding recovery of knife at the instance of accused Prakash @ Pakka from the bushes near his jhuggi and significantly, his testimony was not challenged in cross-examination. That being so, the same goes un-rebutted, unchallenged and unshattered. It is settled law that where a party fails to avail right of cross examination of witness despite there being sufficient opportunity and testimony of such witness remains unrebutted and unimpeached then in such circumstances, such

testimony has to be given due credence vide *Mst. Qaisar Jahan Begum vs. Ramzan Karim_ and Ors.*, 1998 (46) DRJ 7, *Rajinder Prasad by LRs vs. Smt. Darshana Devi*, 93 (2001) DLT 1 (SC), *Sterling Holiday Resorts (India) Ltd. Vs. Mr. Manohar*, 2011 (1) AD (Delhi) 387. Moreover, all the police officials referred above also corroborated testimony of each other regarding recovery of knife at the instance of accused Prakash @ Pakka. Ramadheen has identified the knife to be the same with which injuries were inflicted on the person of his brother. During the course of investigation, the knife was sent to FSL from where report Ex. PX was received. The blood, however, could not be detected on the same. It may be due to the reason that although the incident had taken place on 22nd January, 2004, however, recovery was effected only on 13th April, 2004. The parcel containing knife was received in FSL on 30th June, 2004. This time gap was sufficient for non-detection of blood on the knife. However, that itself is not sufficient to presume that this was not the knife used in the commission of offence. In *Mookkiah* (supra) also the articles were allegedly blood stained but no blood was found by FSL. It was explained that since these objects were lying on the earth and

due to efflux of time, no blood was found. It was held that recovery itself cannot be doubted when articles concerned were duly received in presence of witness. Subsequent opinion was also sought from the doctor and Dr. M.M. Narware gave his opinion Ex. PW-28/A opining that the injuries as per post mortem report could have been caused from the weapon, which was produced before him. Under these circumstances, even if PW-4 Sonu did not support the case of prosecution, PW-6 Seema is not an eye witness of the incident and to some extent it cannot be said with certainty that PW-3 Ramadheen who although was present at the spot had actually witnessed the incident but PW-7 Smt. Rekha has proved the case of prosecution.

44. Motive to commit the crime is also duly proved. PW3 Ramadheen and PW7 Rekha have deposed that accused Prakash @ Pakka and Suraj used to come in their street and used to do indecent activities, and tease the girls. Even 3-4 days prior to the incident they had come in the street, which was objected by PW3 Ramadheen and his deceased brother Ram Chander. Deceased Ram Chander had asked them not to visit the street, not to tease the girls and not to keep ill will against the women of the locality. At that time they had left from

there. Rekha has further deposed that on the next day these two accused came along with three more persons. Deceased Ram Chander again objected to their act. All the boys extended threats to him by saying *“Tu Kaun hota hai tera kaam tamam kar denge”*. PW6 – Seema has also deposed that accused Prakash @ Pakka, Suraj and one more person used to come to their street and used to tease the girls. Her deceased husband had raised objection not to tease them. She further deposed that accused Jai Kishan used to come to street to tease girls, which was objected by her deceased husband. Even two days prior to the incident all the four accused had extended threats to kill her husband by saying *“Kaam Tamam kar denge”*. The fact that accused used to indulge in indecent activities in the area prior to the incident is not even disputed by the accused persons in as much as a categorical suggestion was given to PW7 Rekha and she deposed:-

“It is correct that accused persons used to do indecent activities in the area prior to the incident also but we did not lodge any complaint against them in this respect.”

45. The mere fact that no complaint was made by the witnesses either to the Pradhan or to the police does not mean that the accused did not indulge in such activities. As such, since objections were

raised by the deceased and his brother, the accused persons were nurturing grudge against them and on that fateful day, armed with knife entered the Jhuggi of Ramadheen and inflicted knife blow on the person of Ram Chander, which proved fatal. The submission of learned counsel for the appellant that motive is a double edged weapon is true, however, it is to be kept in mind that there was no personal enmity between the accused and the deceased or his family members, and it was only on moral/ethical grounds that the conduct of the accused persons was objected to by the deceased and his family members, therefore it cannot be said that for that reason they will implicate them falsely in such a serious case and will allow the real culprits to go scot free. Moreover, when direct evidence regarding the assault is worthy of credence and can be believed, the question of motive more or less become academic as held in *Molu versus State of Haryana*, 1976 (4) SCC 362.

46. In *Bhagirath and Ors. vs. State of Haryana*, AIR 1996 SC 3431, it was held that all that is required is to scrutinise the evidence of the witnesses very carefully. Motive is a double edged weapon. It is well settled that when prosecution relies upon the evidence of the eye

witnesses to prove the incident, motive assumes a secondary role. In the present case testimony of PW7 Rekha has been found to be acceptable and therefore adequacy of motive is not relevant.

47. Coming to the defence of accused, DW-2 Subhash, father of Suraj deposed that he was detained in the police station for 3-4 days and was allowed to leave the police station only after accused Suraj surrendered there. However, it was admitted by him that he did not make any complaint against the conduct of the police officials before any authority or to any senior officers, as such no reliance can be placed on his testimony. As regards DW-1, the accused have tried to raise a defence that they were arrested by Police Station Sumer Pur in Rajasthan and were falsely shown to be arrested in Delhi. Learned trial court has rightly observed that as per DD dated 9th April, 2004, Ex. DW1/A, both the accused Prakash Kumar @ Pakka and Prakash Raj @ Pintu were arrested under Section 41(3)/109 Cr. P.C. in Rajasthan and they were produced before the SDM, Police Station Sumer Pur where they were released on executing personal bond for six months. Subsequently, on 11th April, 2004 they were again called in Police Station Sumer Pur and were handed over to SI Krishan from

PS Patel Nagar, Delhi. Nothing has been brought on record to show as to why and in what capacity the accused persons were asked to appear in the Police Station on 11th April, 2004 after they were released by SDM on 10th April, 2004. It was submitted that it has come in the statement of the Investigating Officer that SI Kishan was posted in Police Station, Patel Nagar during that period and as per the DD Ex. DW-1/D they were handed over to him by Rajasthan Police. Had that been the case, before bringing the accused persons from Rajasthan, the Delhi Police would have sought transit remand of the accused or would have arrested them and their arrest-memo would have been prepared there only. DD Ex. DW-1/D only mentions that accused persons were handed over to SI Krishan but accused have not examined SI Krishan to prove that accused were handed over to him or he had brought them to Delhi. Under the circumstances, the accused do not get any benefit from these DDs.

48. Coming to the submission of learned counsel for the appellant Jaikishan that the testimony of PW-3 and PW-7 cannot be read in evidence against him inasmuch as these witnesses were not recalled for further examination after the arrest of this accused and proper

proceedings under Section 299 Cr. P.C. were not initiated, the submission is devoid of merit. Before coming to the submission, it will be appropriate to consider the relevant provisions of the Code.

49. Chapter XXIII of the Code provides for evidence in inquiries and trials. Section 273 of the Code mandates that all evidence taken in the course of the trial or other proceedings shall be taken in the presence of the accused or, when his personal attendance is dispensed with, in the presence of his pleader, which was specifically provided.

50. Section 299 of the Code expressly provides for the power of the Court to record evidence in absence of the accused in the following term:-

299. Record of evidence in absence of accused:- (1) If it is proved that an accused person has absconded, and that there is no immediate prospect of arresting him, the Court competent to try or commit for trial, such person for the offence complained of, may, in his absence, examine the witnesses (if any) produced on behalf of the prosecution, and record their depositions and any such deposition may, on the

arrest of such person, be given in evidence against him on the inquiry into, or trial for, the offence with which he is charged, if the deponent is dead or incapable of giving evidence or cannot be found or his presence cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable.

(2) If it appears that an offence punishable with death or imprisonment for life has been committed by some person or persons unknown, the High Court or the Sessions Judge may direct that any Magistrate of the first class shall hold an inquiry and examine any witnesses who can give evidence concerning the offence and any depositions so taken may be given in evidence against any person who is subsequently accused of the offence, if the deponent is dead or incapable of giving evidence or beyond the limits of India.

51. It is neither in doubt nor in dispute that Sub-section (1) of the said provision is in two parts. The first part provides for proof of jurisdictional fact in respect of abscondence of an accused person and

the second that there was no immediate prospect of arresting him. In the event, an order under the said provision is passed, deposition of any witness taken in absence of an accused may be used against him if the deponent is dead or incapable of giving evidence or cannot be found or his presence cannot be procured without any amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable.

52. Now, we may also take note of Section 33 of the Evidence Act, 1872, which reads as under:

33. Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated. Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or

expense which, under the circumstances of the case, the Court considers unreasonable;

Provided that-,

the proceeding was between the same parties or their representatives in interest;

that the adverse party in the first proceeding had the right and opportunity to cross-examine;

that the questions in issue were substantially the same in the first as in the second proceeding.

Explanation.- A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section.

53. The right of an accused to watch the prosecution witnesses deposing before a Court of law indisputably is a valuable right. However, Section 299 of the Code is an exception. Since the law empowers the court to utilize such statements of persons whose statements were recorded in the absence of the accused as an exception to the normal principles embodied in Section 33 of the Evidence Act, inasmuch as, the accused has been denied the opportunity of cross-examining witnesses, it is, therefore, necessary that the pre-conditions for utilizing such statements in evidence during trial must be established and proved like any other fact. There possibly cannot be any dispute with the proposition of law that for

taking the benefit of Section 299 of the Code of Criminal Procedure, the conditions precedent therein must be duly established and the prosecution which proposes to utilize the said statement as evidence in trial must, therefore, prove about the existence of pre-conditions before tendering the evidence.

54. Learned counsel for the appellant relied upon *Jayender Vishnu Thakur* (supra). The facts of this case, however, are quite distinguishable inasmuch as in that case one Suresh N. Dubey was shot dead at Nallasopara Railway Station in the suburbs of Mumbai on 9th October, 1989. The brother of the deceased filed a complaint petition with regard to the incident. The appellant absconded. A proclamation under Section 82 of the Code was thereafter issued on 9th February, 1993 declaring the appellant as a proclaimed offender. Subsequently the said proclamation was also published in different newspapers. After completion of investigation, charge sheet was initially submitted against 12 persons on 27th August, 1993 wherein eight persons including the appellant, were shown to be absconding. The appellant was arrested in Delhi in another case on 23rd July, 1993. The Investigating Officer of the case informed the designated Judge, TADA Court at Mumbai vide

letter dated 1st September, 1993 in regard to the appellants arrest in Delhi case. Appellant was arrested by Maharashtra Police on 23rd October, 1993 in two other cases. The State of Maharashtra filed writ application before the High Court of Delhi for securing the presence of the appellants in the case pending in the State of Maharashtra including the case in question, which was dismissed. On 11th July, 1995 an application under Section 83 of the Code was filed by the IO wherein, it was admitted that the appellant had not been absconding. An application was moved by the State of Maharashtra to the designated Judge, TADA, Delhi for transfer of the appellant to Maharashtra which was declined. The appellant also moved an application for production warrant, which was dismissed on 25th July, 1995. During the period 6th November, 1995 to 22nd January, 1997, ten witnesses were examined who had expired. The appellant was formally arrested on 4th August, 1997. A supplementary charge sheet was filed on 19th August, 1997. Applications were filed by the public prosecutor for exhibiting the deposition of witnesses who had since expired, which was allowed. The appellant challenged the order. It was observed that for the purpose of invoking the provisions to Section 299 of the Code, all the conditions

prescribed therein must be strictly complied with before recording the statement of witnesses produced by the prosecution. The court must be satisfied that the accused has absconded and there is no immediate prospect of arresting him in that case. On facts, it was found that the accused had not absconded. That being so, since, this jurisdictional fact was not proved, therefore, the prosecution could not take the shelter of Section 299 of the Code. However, things are entirely different in the instant case. Charge sheet was submitted on 27.04.2004, wherein this appellant was shown in column No. 2. Thereafter, proceedings under Section 82-83 Cr. P.C. were initiated against him. Learned Metropolitan Magistrate, after recording the statement of process server, and after satisfying himself, declared the appellant (Jaikishan) and Vikram to be proclaimed offenders. Since there were three more accused, trial proceeded. After this accused was arrested, supplementary charge sheet was filed against him. Charge was framed. Most of the witnesses were recalled for further examination. However, as regards PW-3 and PW-7, the judgment records that summons sent to these witnesses were received back un-executed with report that premises were found locked. Prosecution also moved an application under Section 311 Cr.P.C to

summon these witness once again. The process of both these witnesses were ordered to be served through the SHO as well DCP (Central) at both the available addresses of the witnesses in Delhi as well as in Bihar. However, the report was received at Delhi address that 'premises found to remain closed. Search was made in the vicinity but the witnesses could not be located.' At the Bihar address, it was reported that both husband and wife were residing in Delhi but their forwarding address in Delhi was not known to the neighbours in Bihar. That being so, since these witnesses 'could not be found', despite best efforts therefore, evidence recorded under Section 299 Cr. P.C. qua this accused could have been considered and was rightly considered by the learned trial court.

55. Now coming to the applicability of Section 34 IPC, it is a settled principle of law that to show common intention to commit a crime it is not necessary for the prosecution to establish, as a matter of fact, that there was a pre-meeting of the minds and planning before the crime was committed. In the case of *Surendra Chauhan vs State of Madhya Pradesh*, AIR 2000 SC 1436, Hon'ble Supreme Court held that common intention can be

developed even on the spur of the moment. Also, under Section 34, a person must be physically present at the place of actual commission of the crime. The essence is the simultaneous consensus of the minds of persons participating in the criminal act and such consensus can be developed on the spot. It is not mandatory for the prosecution to bring direct evidence of common intention on record and this depends on the facts and circumstances of the case. The intention could develop even during the course of occurrence. In this regard reference can be made to ***Ramaswami Ayyangar vs State of Tamil Nadu***, (1976) 3 SCC 779 and ***Rajesh Govind Jagesha vs State of Maharashtra***, (1999) 8 SCC 428. In other words, to apply Section 34, two or more accused should be present and two factors must be established, i.e., common intention and participation of the accused in the crime. Section 34 moreover, involves vicarious liability and therefore, if intention is proved but no overt act is committed, the section can still be invoked.

56. Section 34 has been enacted on the principle of joint liability in the doing of a criminal act. The section is only a rule of evidence and

does not create a substantive offence. The distinctive feature of the section is the element of participation in action. The liability of one person for an offence committed by another in the course of criminal act perpetrated by several persons arises under Section 34 if such criminal act is done in furtherance of common intention of the persons who join in committing the crime. Direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the circumstances appearing from the proved facts of the case and the proved circumstances. In order to bring home the charge of common intention, the prosecution has to establish by evidence, whether direct or circumstantial, that there was 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 pre-arranged or on the spur of the moment but it must necessarily be before the commission of the crime. The true concept of the section is 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 Vs. State of Punjab*, AIR 1977 (1) SCC 746 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.

57. 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 played by each of them. As was observed in

Chinta Pulla Reddy Vs. State of AP, 1993 Supp (3) 134, 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.

58. In the instant case, the role attributable to each of the accused clearly demonstrates common intention and common perspective to achieve the object of killing the deceased.

59. In, ***Satbir @ Lakha Vs. State of Haryana***, 2013 (1) SCC (Cri) 129, a quarrel ensued. Appellant and other accused A-3 and A-4 caught hold of PWs while A-1 inflicted knife injuries on them. It was held that but for the overt act of appellant and other accused in having held the victims, there would have been no scope for A-1 to have inflicted injuries. Conviction u/s 34 read with Sections 307 and 324 IPC was affirmed by High Court and Apex Court dismissed the appeal.

60. In ***Raj Pal Singh & Another Vs. State***, (2013) 1 SCC (Cri) 7, in that case A-1 in fully drunken condition started abusing complainant

in filthy language. Complainant's husband warned appellant not to abuse complainant. A-1 did not pay heed and asked his wife to get a knife. A-1's wife A-2 brought knife and gave it to A-1 who then stabbed the complainant. As a result whereof he fell down with bleeding injury and was taken to hospital where he died subsequently. A1 was arrested and at his instance knife was recovered. It was held that deceased was unarmed and there was absolutely no physical threat from deceased to the appellants, and A1 after being provided with knife by A2 stabbed deceased on left side of chest on instigation of A2, resulting in the death of the deceased. This was, thus a case where the appellants took undue advantage and acted in a cruel or unusual manner. Appellants were rightly held guilty of committing murder under Section 302 read with S.34 IPC.

61. In the instant case also, the fact that deceased was unarmed and there was absolutely no physical threat from his side to the appellants and accused together came to the spot, armed with knife, and accused Prakash @ Pakka asked Jaikishan @ Jacky and Suraj to hold the hands of Ram Chander and thereupon on the asking of Prakash Kumar @ Pakka, Suraj handed over knife to him and then Prakash @ Pakka

inflicted knife blow on the chest of the deceased Ram Chander makes it quite clear that all the three accused shared common intention. In other words, criminal act was done with the common intention to kill the deceased Ram Chander. Learned trial court has rightly noticed in its judgment that the act of all the accused persons coming together and giving serious knife blow with active participation shows a common intention to murder the deceased. Under these circumstances, the conclusion arrived at by the learned trial court does not call for any interference. The judgment of the court below does not suffer from any illegality or infirmity.

62. While finding no merit in the appeals, we dismiss the same.

SUNITA GUPTA, J

REVA KHETRAPAL, J

May 16, 2013

rs