

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

Judgment delivered on: February 28, 2014

+ CRL.A. 1246/2011

MUKESH SINGH Appellant

Through: Mr. Ajay Verma, Advocate

Versus

STATE (NCT OF DELHI) Respondent

Through Ms. Richa Kapoor, Additional
Public Prosecutor for the State.

+ CRL.A. 1123/ 2012

VIJAY@ Kalia ...Appellant

Through: Ms. Nandita Rao, Advocate

Versus

STATE (NCT OF DELHI) Respondent

Through Ms. Richa Kapoor, Additional
Public Prosecutor for the State.

CORAM:

HON'BLE MR. JUSTICE KAILASH GAMBHIR

HON'BLE MS. JUSTICE SUNITA GUPTA

JUDGMENT

KAILASH GAMBHIR, J

1. By these appeals filed under section 374 of Criminal Procedure Code, 1973 (*hereinafter referred to as 'Cr.P.C.'*), the appellants seek to challenge the impugned judgment dated 08.04.2011 and order on

sentence dated 27th April 2011 whereby the Appellant – Vijay is convicted for committing an offence punishable under Sections 392/394/397/307/ 302 read with section 34 of Indian Penal Code, 1860 (*hereinafter referred to as 'IPC'*) while the appellant – Mukesh was held guilty of committing an offence punishable under Section 392/394/397 read with Section 302/34 of IPC.

2. The exact order on sentence as awarded to the appellants by the Additional Sessions Judge, is reproduced as under:

“The convict Vijay @ Kalia is sentenced to Rigorous Imprisonment for life with the direction that he shall not be considered for grant of remission till he undergoes an actual sentence of 20 years and fine for a sum of Rs.25,000/- for the offence under Section 302 Indian Penal Code. In default of payment of fine the convict shall further undergo Simple Imprisonment for a period of three months. The total fine of Rs.25,000/-, if recovered, shall be given to the family of the deceased Pappu as compensation under Section 357 Cr.P.C. Further the convict is sentenced to Rigorous Imprisonment for a period of Seven Years and fine of Rs.5,000/- for the offence under Section 392/394/397 read with 307 Indian Penal Code. In default of payment of fine the convict shall further undergo Simple Imprisonment for a period of fifteen days.

The convict Mukesh Singh is sentenced to Rigorous Imprisonment for life and fine for a sum of Rs.25,000/- for the offence under Section 397 read with 302 Indian Penal Code. In default of payment of fine the convict shall further undergo Simple Imprisonment for a period of three months. The total fine of Rs.25,000/-, if recovered, shall be given to the family of the deceased Pappu as compensation under Section 357 Cr.P.C. Further the convict is sentenced to Rigorous Imprisonment for a

period of Five years and fine of Rs.2, 000/- for the offence under Section 392 read with Section 394 Indian Penal Code. In default of payment of fine the convict shall further undergo Simple Imprisonment for a period of one week.”

3. Proliferation in heinous crimes is unacceptable. It is quite distressing that at the start of the day, the newspapers alarm us with another act of murder, dacoity, rape etc. It is a societal nag that we all want to eliminate from the society. No doubt poverty is a reason behind several heinous crimes, it persuades people to indulge into unlawful acts, corrupt and criminal means to acquire riches, it is the quest for money but one cannot ignore that honesty and hard work are the bowers of life, that enables oneself to survive even in adverse conditions. Some commit such crimes out of rage, impulse or fear but a few for some psychological satisfaction. The latest National Crime Records Bureau data shows that crime for money is on rise and most of the accused in these cases are from socially and economically backward sections of the society. Usually while committing the offence of robbery or dacoity, these criminals end up committing more serious and dreadful offence of eliminating the life of the victim or attempting to murder such victim or causing them grievous hurt. It is also an acknowledged fact that these criminals keep committing these crimes as their normal routine job till

they are convicted and appropriately sentenced. A wave of these grisly crimes is sweeping across swathes of urban and small-town India. The continually rising graph makes us queasy. Such is the irony of life that a few men think that they would make their living by snatching or committing theft, robbery etc. and to achieve this objective can even stoop to the extent of taking away someone's life. They fail to realise the stern consequences of such acts, which could cause them their entire life in return, the life that could have been made a purposeful one, and worth living. So vicious was the attack in the present case by these four men with an intent to commit robbery, but in commission of the said crime, two of the assailants badly injured one of the victims and caused death of the other.

4. The facts germane to the case of the prosecution is that on 16.8.2008 DD no.29-A was received at Police Station Adarsh Nagar on which SI Arvind Pratap Singh along with ASI Surender Singh and Ct. Prabhu reached at D Block Corner, Azadpur Mandi, Delhi where they came to know that the injured had been taken to BJRM Hospital. Thereafter, SI Arvind Pratap Singh reached the BJRM Hospital where he found one Pappu and Sushil Kumar admitted in an injured state and the

injured Sushil Kumar was declared fit for statement whereas injured Pappu was declared unfit. SI Arvind Pratap Singh recorded the statement of injured Sushil Kumar who informed that he was a vegetable vendor and he along with his friend Pappu had gone to Azadpur Subzi Mandi to purchase vegetables. It was after purchasing the vegetables from D Block that they were going towards the main gate at about 3:30 am when four persons encircled them, out of which two snatched Rs.14,800/- from his pocket and when he protested, the other two boys who were having ice pricks in their hands, attacked them. They inflicted various injuries upon them after which the said persons ran away from the spot. On the basis of the said statement of Sushil Kumar, the FIR got registered. The injured Pappu could not survive and expired after a few hours of the incident. On 17.8.2008, pursuant to some secret information the accused Vijay @ Kalia, Pawan Kumar and Sharwan Kumar were arrested from DDA Park, Subzi Mandi Azadpur, Delhi. Further, on 20.8.2008 the accused Mukesh Singh was also arrested on the basis of secret information, at his instance the blood stained ice prick (sua) was recovered. After completion of investigation, all the accused were charge sheeted.

5. To prove its case the prosecution examined as many as 16 witnesses. After the completion of prosecution evidence, statement of the accused persons were recorded under Section 313 of Cr.P.C. wherein the entire incriminating evidence was put to them and in reply they pleaded innocence and false implication. The Appellant – Vijay in his statement admitted having refused to participate in the judicial Test Identification Parade by giving an explanation that he was already shown to the witnesses in the Police Station. On his arrest, he took a stand that he was lifted from his residence. The same was the stand of Appellant – Mukesh. Both the accused persons however did not lead any evidence in their defense.

6. On behalf of the Appellant – Mukesh, arguments were addressed by Mr. Ajay Verma, Advocate and for the Appellant – Vijay, Ms. Nandita Rao, Advocate had advanced her arguments. The State was led by Ms. Richa Kapoor, Additional Public Prosecutor for the State.

7. Mr. Ajay Verma, learned counsel for the Appellant – Mukesh sturdily contended that the case of the prosecution is primarily based on eye witness account of two witnesses i.e. PW-1 and PW-4, however their testimonies are totally unreliable and full of discrepancies and

contradictions and therefore, to convict the Appellant on these two testimonies would be unsafe and fatal. Learned counsel further argued that it looks quite apparent that PW-4 was introduced by the prosecution only with a view to give strength to the testimony of PW-1, as otherwise the testimony of PW-4 on the very face of it lacks any credibility and trustworthiness. PW-1 in his deposition did not mention about the presence of PW-4 at the time of the incident nor did he state that PW-4 had also accompanied him alongwith the deceased – Pappu to Azadpur Subzi Mandi for purchasing vegetables. The other glaring conduct of PW-4 which falsifies his presence at the site was his deposition in his cross-examination that he went to his house immediately after the incident occurred and did not rush to the hospital even after having seen his injured brother – Pappu having received serious injuries. Learned counsel for the appellant further suspected that Azadpur Mandi being a busy place during the night hours, if such kind of incident had taken place then certainly it could have attracted the attention of many other passersby's and truck drivers etc. and since as per the case of the prosecution, no public person came forward to depose about the said incident, that by itself demolishes the entire case of the prosecution.

Further on the testimony of PW-1 who was an injured witness, the contention raised by the learned counsel was that his testimony is quite rickety and full of contradictions and discrepancies. In support of this contention, counsel pointed out that PW-1 deposed that he and the deceased Pappu had consumed tea and counted money at the tea shop but later on denied that the STD/PCO or any tea shops were open at the time of occurrence of the incident. Learned counsel for the Appellant further pointed out that PW-1 in his court deposition for the first time stated that he had gone to Mandi on Truck bearing No.2737 alongwith other vendors and an identity card was issued for entering the Mandi, while no such statement was made by him to the police. Similarly, for the first time he has stated in his court statement that from home he carried a sum of Rs.70,000/- and he maintained the record of vegetable purchases by way of slips (parchies). Learned counsel for the appellant also raised a contention that PW-1 had admitted the fact that he had not seen the actual occurrence which took place with the deceased Pappu and also that he had clearly seen the face of only one of the assailants who had inserted his hand in the pocket of PW-1 and had stabbed him with the help of an ice prick. Learned counsel for the appellant on the recovery of ice pricks

from the possession of the Appellant – Mukesh, further urged that Mukesh was arrested on 20th August 2008 and the ice prick being an easily available source in the market, therefore, the possibility of planting of same with the Appellant–Mukesh by the police may not be discarded.

8. Based on the aforesaid submissions, learned counsel for the appellant – Mukesh strongly urged that the prosecution has absolutely failed to prove any incriminating evidence as against this Appellant and therefore, he is entitled for an acquittal right away.

9. Ms. Nandita Rao, Advocate appearing for the Appellant – Vijay also raised strong doubts on the presence of PW-4 at the time of the incident. Learned counsel for the appellant – Vijay also submitted that the testimony of PW-1 is full of discrepancies and improvements. Learned counsel for the appellant also strongly disputed if PW-1 could have seen the assailants, as the incident had taken place at 3.30 a.m. in the night and as per the site plan there were no lights and therefore, his testimony in his cross-examination that he had clearly seen the face of only one assailant and that was the person who stabbed him is totally misleading and stropky. Learned counsel for the appellant further pointed out that the testimony of the PW-1 also cannot inspire any confidence as his stand of

being taken to the private nursing home by Pappu does not coincide with the testimony of PW-14, HC Kanwarpal Singh PCR Official, deposing that PW-1 and Pappu in an injured state, were taken to the BJRM Hospital by the PCR Van from the spot itself. Learned counsel for the appellant further urged that if they were taken from the spot itself by the PCR Van then it would mean that PW-1 and the deceased pappu had never gone to the private nursing home for the purpose of their medical treatment and therefore, it creates a serious doubt on the testimony of PW-1. Learned counsel for the appellant further submitted that no genuine witness would distort or create facts and even though primacy is attached to the testimony of an injured eye witness but in the facts of the present case, PW-1 has not deposed in a natural and truthful manner and therefore, it will be hazardous to base the conviction of the Appellant – Vijay on such doubtful and fabricated testimony of PW-1.

10. Learned counsel for the appellant – Vijay also urged that the deposition of PW-1 lacks credibility on account of the fact that if two persons had forcibly taken away the money from his pocket then, at least his pocket would have been torn or at least had a glimpse of rip but no such scuttle was found, therefore, it cannot be believed that robbery has

been committed in the manner as alleged by PW-1 or there was any involvement of the Appellant and other assailants in commission of the said crime. Learned counsel for the appellant – Vijay also argued that in such circumstances the defence raised by the Appellant that the scuffle had taken place between PW-1 and the deceased but the same has been given a shade of robbery and murder at the hands of the assailants, sounds more logical and natural.

11. Learned counsel for the appellant – Vijay also argued that no public witnesses were joined at the time of the arrest of the Appellant – Vijay despite the fact that he was arrested from a public park. Counsel also argued that even no public witness had joined in the alleged recovery of the wallet of the deceased although it is not the case of the prosecution that the wallet of the deceased was snatched by the assailants.

12. On the identification of the Appellant – Vijay, the contention raised by the learned counsel was that the Appellant has rightly not participated in the judicial Test Identification Parade held on 02.09.2008 as the Appellant and other assailants were already shown to PW-1 outside the Rohini Courts and therefore, refusal of the Appellant in the judicial test identification parade cannot be taken adverse against him. Learned

counsel for the appellant also argued that no description of the assailant was given to the appellant at the time of recording of his first statement by the police and it is only later in the court deposition that the Appellant has wrongly stated that he had given the description of the assailants to the Investigating Officer or that the person who stabbed him was dark in complexion and has cut mark on his face. Learned counsel for the appellant also argued that it is not the case of the prosecution that there was a common intention of the assailants to have committed murder and even there is no allegation as such that the Appellant – Vijay had attacked the deceased or had committed robbery and therefore, the conviction of the Appellant – Vijay under Sections 392/ 397 read with section 307/ 34 of IPC is arbitrary and illegal. In support of the arguments, learned counsel for the appellant placed reliance on the following judgments:-

1. **Suresh & Anr V. State of U.P. AIR 2001 SC 1344**
2. **Sandeep @ Dhillu V. State , 201(2013) DLT 539 (DB)**

13. Refuting the said submissions made by the learned counsel for the appellants, Ms. Richa Kapoor, Additional Public Prosecutor for the State vigorously contended that as per the prosecution, the present case is an open and shut case and there is no escape root for the Appellants to save

themselves. Learned APP further submitted that learned trial court has critically analysed each and every aspect of the case set up by the prosecution and it is only after studying the entire fundamentals minutely, the learned ASJ has reached to a final conclusion of holding these appellants guilty for committing the offence and thus, there is no scope for this court to interfere with the well reasoned findings given by the learned trial court.

14. Learned APP also submitted that the case of the prosecution primarily rests on the eye witness version of PW-1, who himself is the victim of the offence having sustained multiple injuries and his testimony was not only cogent and consistent but duly corroborated with the medical evidence. Learned APP further submitted that both the accused persons refused to participate in the Test Identification Parade conducted by the learned Magistrate on 02.09.2008, for the purpose of their identification by the said injured eye witness – PW-1 and therefore, such refusal on the part of the appellants was rightly held as adverse by the learned trial court. Learned APP further argued that both these appellants had inflicted serious stab injuries with the help of two separate ice pricks due to which one of the victim Pappu had succumbed to

multiple injuries on his thigh, chest and left arm etc. while the other victim – PW-1 had sustained injuries on his chest and left palm. Learned APP further submitted that FSL report proved on record as Ex.PX clearly shows that blood was found on both the ice pricks and the said ice pricks were recovered from the said accused persons during their disclosure statements. Learned APP further stated that there was sufficient light at the spot and therefore, PW-1 Sushil Kumar could easily identify all the four assailants. Learned APP also submitted that even if in the site plan proved on record the source of light has not been shown, still the testimony of PW-1 testifying that there was sufficient light at the spot of the incident cannot be ignored. Learned APP also argued that even in the absence of sufficient light, the accused persons could be identified by their respective voices, or by their broad features, their gait and manner of walking etc. Learned APP also invited attention of this court to the testimony of PW-12 – Dr. R.P. Singh, who in his deposition clearly stated that injuries as were inflicted on the victims could be caused with the help of ice pricks or such similar type of weapons. Learned APP also argued that as per the settled legal position minor discrepancies or improvements made by the PW-1 deserves to be ignored when on vital facts his

testimony remained unshattered and unchallenged. Based on these submissions, Learned APP strongly urged for the dismissal of the present appeals. In support of her arguments, reliance was placed by Learned APP on the following judgments:-

1. **State of U.P. V. Manohar lal & others, AIR 1981 SC 2073**
2. **Kedar Singh & others V. State of Bihar AIR 1999 SC1481**
3. **Parveen Kumar V. State of Delhi 2013VAD(Delhi)325**

15. We have heard learned counsel for the parties at considerable length and given our thoughtful consideration to the arguments advanced by them. We have also perused the records of the learned Trial Court.

16. In order to prove commission of a crime, it is not always necessary that the same has to been seen by a person who can be termed as an eye witness and therefore, in the absence of any direct evidence, the prosecution engages itself into obtaining every incriminating piece evidence, which is commonly referred to as the circumstantial evidence to prove its case against the perpetrators of the crime. For proving any case on the basis of circumstantial evidence, the settled legal position is that all the links must form a complete chain without leaving any gaps, which unerringly points out the guilt of the accused to the exclusion of

the plea of his innocence. It is also a settled legal position that the conviction of the appellant can be based on the testimony of a sole witness where the testimony of the sole witness is of sterling quality and the court finds his testimony to be most reliable and truthful.

17. The testimony of an injured eye witness must be placed at a higher pedestal, as such witness is not only an eye witness of the crime but he himself is a victim of crime and therefore, he is expected to give a truthful version of the entire scene of crime and also with regard to the description of the persons who are the perpetrators of the crime. The witness who himself receives injuries of serious nature during assault would not normally let go the real culprits until and unless the defence succeeds to establish that there was a strong motive on the part of such a witness to save the real culprits and falsely implicate the innocent persons. It is also a settled legal position that minor omissions, discrepancies or improvements in the testimony of an eye witness cannot discredit his testimony unless the same militates against the core or heart of the prosecution case.

18. In the present case, there were two eye witnesses, who had allegedly seen the incident, wherein one of them suffered serious injuries

on his person. PW-1 Sushil Kumar was an injured eye witness while PW-4 Pradeep was merely an eye witness. The testimony of PW-4 was not believed by the learned Trial Court and in fact, the learned Trial Court went to the extent of observing that the possibility of PW-4 Pradeep being a planted witness by the prosecution cannot be ruled out. Although the counsel appearing for the appellants also voiced strong suspicion on the testimony of PW-4, but considering the fact that the Trial Court itself has not placed reliance on his testimony, therefore, we deem it fit to ignore his testimony for analysing the evidence adduced by the prosecution and the reasoning given by the learned Trial Court in convicting the accused persons.

19. The most formidable evidence of the prosecution in the present case is the evidence of PW-1 Sushil Kumar, who is not merely an eye witness but an injured eye witness. Sushil Kumar and the deceased Pappu were both vegetable vendors and on the date of the incident i.e. 16.8.2008 they went to the D Block Azadpur Subzi Mandi for purchasing vegetables for their respective shops and when they were proceeding towards in gate/main gate and reached near STD/PCO booth on the corner of the D Block at about 3.30 a.m. they were encircled by four persons. These four

persons were Sharwan Kumar, Pawan, Vijay @ Kalia and Mukesh. PW-1 while deposing in Court had pointed out towards the accused Sharwan and Pawan being the assailants who had snatched Rs. 14,800/- from his pocket and two other persons Vijay and Mukesh being the assailants who were armed with ice pricks and attacked both of them. PW-1 in his deposition categorically named Vijay @ Kalia to be the person who stabbed him and at the same time he also pointed out towards Mukesh being armed with ice prick and caused injuries along with Vijay on the person of the deceased Pappu and even to him on the left side of his chest and abdomen besides on his right hand. He further deposed that after filching money from him the accused persons ran away. He further deposed that he was gheroad by the accused persons and also got entrapped in the traffic of trucks and when he moved out of the traffic, he saw that his companion Pappu was lying in an injured condition on the road. He immediately called up the PCR from his mobile number and was taken to BJRM Hospital in a PCR van along with the deceased. PW-1 also disclosed his mobile number as 9210415252. He also stated that he had seen the accused persons on 15.9.2008 while they were to appear in the Rohini Court complex.

20. Minor contradictions/improvements cannot render an injured witness's deposition untrustworthy. The law on this aspect has been detailed in the judgment '*State of Uttar Pradesh vs. Naresh and ors.*', : (2011) 4 SCC 324 as under:

27. The evidence of an injured witness must be given due weightage being a stamped witness, thus, his presence cannot be doubted. His statement is generally considered to be very reliable and it is unlikely that he has spared the actual assailant in order to falsely implicate someone else. The testimony of an injured witness has its own relevancy and efficacy as he has sustained injuries at the time and place of occurrence and this lends support to his testimony that he was present during the occurrence. Thus, the testimony of an injured witness is accorded a special status in law. The witness would not like or want to let his actual assailant go unpunished merely to implicate a third person falsely for the commission of the offence. Thus, the evidence of the injured witness should be relied upon unless there are grounds for the rejection of his evidence on the basis of major contradictions and discrepancies therein. (Vide Jarnail Singh v. State of Punjab, Balraje v. State of Maharashtra and Abdul Sayeed v. State of M.P.)

21. Similarly in another case '*Abdul Sayed vs. State of Madhya Pradesh*', (2010) 10 SCC 259, Hon'ble Supreme Court observed that:

The question of the weight to be attached to the evidence of a witness that was himself injured in the course of the occurrence has been extensively discussed by this Court. Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone. "Convincing evidence is required to discredit an injured witness." [Vide Ramlagan Singh v. State of Bihar, Malkhan Singh v. State of U.P., Machhi Singh v. State of Punjab, Appabhai v. State of Gujarat, Bonkya v. State of Maharashtra, Bhag Singh, Mohar v. State of U.P. (SCC p. 606b-c), Dinesh Kumar v. State of Rajasthan,

Vishnu v. State of Rajasthan, Annareddy Sambasiva Reddy v. State of A.P. and Balraje v. State of Maharashtra.]

22. While deciding this issue, a similar view was taken in ***Jarnail Singh v. State of Punjab, (2009) 9 SCC 719***, where the Hon'ble Supreme Court reiterated the special evidentiary status accorded to the testimony of an injured witness and held as under:

Darshan Singh (PW 4) was an injured witness. He had been examined by the doctor. His testimony could not be brushed aside lightly. He had given full details of the incident as he was present at the time when the assailants reached the tubewell. In Shivalingappa Kallayanappa v. State of Karnataka this Court has held that the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies, for the reason that his presence on the scene stands established in case it is proved that he suffered the injury during the said incident.

22. In *State of U.P. v. Kishan Chand* a similar view has been reiterated observing that the testimony of a stamped witness has its own relevance and efficacy. The fact that the witness sustained injuries at the time and place of occurrence, lends support to his testimony that he was present during the occurrence. In case the injured witness is subjected to lengthy cross-examination and nothing can be elicited to discard his testimony, it should be relied upon (vide *Krishan v. State of Haryana*). Thus, we are of the considered opinion that evidence of *Darshan Singh (PW 4)* has rightly been relied upon by the courts below.

23. In ***State of Madhya Pradesh v. Man Singh (2003) 10 SCC 414***, it was held that “*The evidence of injured witnesses have greater evidentiary value and unless compelling reasons exist, their statements are not to be*

discarded lightly. Merely because there was no mention of a knife in the first information report. That does not wash away the effect of evidence tendered by the injured witnesses PWs 4 and 7. Minor discrepancies do not corrode credibility of otherwise acceptable evidence. The circumstances highlighted by the High Court to attach vulnerability to evidence of the injured witnesses are clearly inconsequential. Though, it is fairly conceded by learned counsel for the accused that though mere non-mention of the assailants' names in the requisition memo of injury is not sufficient to discard the prosecution version in entirety, according to him it is a doubtful circumstance and forms a vital link to determine whether prosecution version is credible. It is a settled position in law that omission to mention the name of the assailants in the requisition memo perforce does not render prosecution version brittle.”

24. The law on the point can be summarised to the effect that the testimony of the injured witness is accorded a special status in law. In law, testimony of an injured witness is given due importance and weightage. When the eyewitness is stated to be a victim himself and has been unswerving in his deposition, it has to be noted that being a victim at the hands of accused persons it would not be proper to conclude that

they would shield the real culprits and rope in the innocent persons. The injury to the witness is an inbuilt guarantee of his presence at the scene of the crime and unless there are strong grounds for rejection of his evidence, his testimony should not be easily disbelieved or discarded. Thus, the deposition of the injured witness should be relied upon unless there are compelling reasons for rejection of his evidence on the basis of some major contradictions and discrepancies therein (***Refer : Balraje @ Trimbak v. State of Maharashtra (2010) 6 SCC 673: Jarnail Singh (supra)***)

25. So far as adjudging the evidentiary value of the eye witness is concerned, the Hon'ble Apex Court in ***State of U.P. vs. Smt.Noorie alias Noor Jahan and others, AIR 1996 SC 3073***, held that "*While assessing and evaluating the evidence of eye witnesses the court must adhere to two principles, namely whether in the circumstances of the case it was possible for the eye witness to be present at the scene and whether there is anything inherently improbable or unreliable.*"

26. In the case at hand, the testimony of PW-1 is also found consistent from his very first statement made to the police and proved on record as Exhibit PW1/A. In this statement PW-1 was very categorical in stating

that when at about 3.30 a.m. he along with Pappu had reached the D block corner Azadpur Subzi Mandi, they were surrounded by four boys and out of those two boys had snatched Rs. 14,800/- from his pocket and when he along with Pappu had protested then all four of them started fighting with them and two boys amongst the four had brought out some pointed object and hit Pappu on his chest and simultaneously attacked him on his left hand. He further stated that all the four persons ran away after they started shouting. Sushil Kumar PW-1 further stated that he could very well identify all the four persons if brought before him. It is thus seen that the first statement made by PW-1 to the police and the information given by him to the PCR van and further report recorded in the PCR form is quite unswerving and consistent with each other, leaving no space for any doubt or suspicion on the testimony of PW-1, so far the material facts are concerned. Learned counsel appearing for both the appellants have questioned the reliability and truthfulness of the testimony of PW-1, which in our view is totally incorrect as the minor blots in the statement of the eye witness cannot whittle down the import of the evidence as a whole. As per counsel for the appellants PW-1 for the first time deposed that he along with the deceased had consumed tea

and had counted money at the tea shop; PW-1 had gone to mundi on a truck bearing No. 2737 along with other vendors and an entry pass was issued for entering the Mandi; for the first time he has stated he had started from his house carrying Rs.70,000/- and he had prepared parchies regarding the vegetables he had purchased; his stand of being taken to private nursing home by the public, which does not coincide with the testimony of PW-14 deposing that PW-1 and injured Pappu were taken to the hospital by the PCR van from the spot itself are certain inconsequential discrepancies and improvements as were pointed out by the counsel for the appellants and are not of substantial character. As a matter of fact they do not touch the heart of the prosecution case, which revolves around the incident which had taken place around 3.30 a.m. on the intervening night of 15.06.2008 when both the victims were gheroad by the four assailants and the way the money was snatched from PW-1 and the manner in which they were stabbed by the other two assailants.

27. It is a settled legal position that the Courts are not to get skewed by minor contradictions or insignificant discrepancies when otherwise testimony of a witness is cogent, credible and trustworthy on the material aspects of the case. No witness even the most genuine one would be in a

position to give the exact account of the scène of crime minutely or to describe what preceded the incident and what exactly happened post incident. Some minor discrepancies, variations and improvements are bound to occur due to multiple factors governing the human behaviour and the background of a particular witness under examination and, therefore, unless such discrepancies and improvements affect the core of the prosecution case, no undue importance should be given to such minor discrepancies, variations and improvements which usually creep in the testimony of any witness, due to multiple factors.

28. The Hon'ble Supreme Court in various authorities has time and again held that unless there are vital improvements, they cannot by itself affect the credibility of a witness and unless contradictions are on material dimension they should not be used to jettison the evidence in its entirety and trivial discrepancies ought not to obliterate the otherwise acceptable testimony of a witness. It was observed in *Dhanvir and Others vs. The State, 85 (2000) DLT 711*, that human memory is not mere a computer where memory can be fed or restored for all times to come and later on when retrieved it would be verbatim the same. A human being, when he describes some incident in a natural course, some

variation is bound to take place and so long as the variations are natural and minor they ought to be ignored.

29. In the recent case of *Gangabhavani Vs. Rayapati Venkat Reddy and Ors 2013(11)SCALE132*, the Hon'ble Supreme Court while giving the judgment categorically observed that :

"CONTRADICTIONS IN EVIDENCE:

9. In ***State of U.P. v. Naresh*** : (2011) 4 SCC 324, this Court after considering a large number of its earlier judgments held:

In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about the truthfulness of the witness and other witnesses also make material improvement while deposing in the court, such evidence cannot be safe to rely upon. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety. The court has to form its opinion about the credibility of the witness and record a finding as to whether his deposition inspires confidence.

Exaggerations per se do not render the evidence brittle. But it can be one of the factors to test credibility of the prosecution version, when the entire evidence is put in a crucible for being tested on the touchstone of credibility.

Therefore, mere marginal variations in the statements of a witness cannot be dubbed as improvements as the same may be elaborations of the statement made by the witness earlier. The omissions which amount to contradictions in material particulars i.e. go to the root of the case/materially affect the trial or core of

the prosecution's case, render the testimony of the witness liable to be discredited.

*A similar view has been reiterated by this Court in **Tehsildar Singh and Anr. v. State of U.P.** : AIR 1959 SC 1012; **Pudhu Raja and Anr. v. State**, Rep. by Inspector of Police : JT 2012 (9) SC 252; and **Lal Bahadur v. State (NCT of Delhi)** : (2013) 4 SCC 557).*

10. Thus, it is evident that in case there are minor contradictions in the depositions of the witnesses the same are bound to be ignored as the same cannot be dubbed as improvements and it is likely to be so as the statement in the court is recorded after an inordinate delay. In case the contradictions are so material that the same go to the root of the case, materially affect the trial or core of the prosecution case, the court has to form its opinion about the credibility of the witnesses and find out as to whether their depositions inspire confidence”.

30. Moreover, the minor discrepancies as pointed out by counsel for appellant - Mukesh are concerned, the learned trial court has extensively dealt with this aspect after placing reliance on the judgment of the Apex Court in State of **H.P. V. Lekhraj and Anr** , **JT 1999 (9) SC 43** taking a view that discrepancies which do not go to the root of the matter and shake the absolute version of the witnesses cannot be attached any undue importance. Such discrepancies are due to normal errors of observation,

normal errors of memory due to lapse of time, due to mental disposition such as shock or horror at the time of occurrence and the like.

31. Applying the aforesaid dicta in the circumstances of the present case, it cannot be discarded that PW-1 was present at the site of crime and moreover, after scrutinizing the cross examination of PW-1 and the medical evidence, we do not find any such inherently unreliable or improbable aspect which can shatter the intrinsic evidence when read in entirety.

32. Learned Trial Court in its judgment has also given reference to the PCR form which refers to the same telephone number from which the call was made by PW-1 and as per the PCR form the information was received about the said incident at 3.48 a.m. This PCR form also reflects that, as per the report received from the PCR, two injured persons were found at the spot and were taken to the BJRM hospital. It also records that the act of snatching the money had been committed on the victims by four boys aged between 18-20 years and they had been injured with the pointed object like *sua*. In the PCR form, it was also mentioned that Sushil had received three injuries on the chest and one on the finger and the deceased Pappu had received one injury on his chest. This PCR form

was not proved on record as an exhibited document. Learned Trial Court has made reference to the contents of the said PCR form so as to test the truthfulness of the testimony of PW-1. Learned Trial Court observed that it is a document maintained in the regular investigation process and there is a valid presumption of its correctness and can always be read into evidence for the purposes of corroboration. Although the PCR Form does not fall in the category of document as prescribed under Section 293 of the Code of Criminal Procedure, 1973 that it can be read in evidence without exhibiting the same. However, in the facts of the present case PW-14, HC Kanwarpal Singh had deposed that in the intervening night of 15/16.8.2008 he was posted as Incharge PCR van and he was on duty from 8.00 p.m. to 8.00 a.m. He had received information that two persons had been stabbed at gate No. 2 Azadpur Mandi and thereafter, he along with the staff reached at gate No. 2 Azadpur Mandi. The evidence of this witness is based on what was recorded in the PCR form but due to the lapse of the prosecution, the said form was not exhibited in evidence. The deposition of the said witness has not been rebutted by the defence and his testimony remained unassailable, therefore, we are of the view that there is nothing wrong if the contents of the PCR form, as a supportive

piece of evidence, is taken into consideration once the witness who had received the information being Incharge of the PCR van has entered into the witness box and deposed in terms of the information recorded in the PCR form. We do not find any infirmity or perversity in the said reasoning given by the learned Trial Court.

33. As per the MLC report of Sushil and Pappu, proved on record as Ex.PW3/A and Ex.PW3/C respectively, both the victims i.e . Sushil Kumar (PW-1) and the deceased were brought to the BJRM Hospital. Dr. Nadeem under the supervision of Dr. Gopal, Medical Officer, PW-3 examined Sushil Kumar and as per his MLC, on local examination one punctured wound over middle of chest and abrasion over left palm of the injured was found and the patient was referred to surgery for further opinion where the patient was examined by Dr. Kamlesh, Sr. Surgeon and had also observed the same injuries.

34. The deceased Pappu S/o Sobran Singh, was also examined by Dr. Nadeem and on local examination it was opined by the doctor that there was punctured wound over sternum area of the patient . Thereafter, the patient was referred to a senior surgeon, Dr. Kamlesh who had second the aforesaid opinion.

35. The postmortem on the dead body of deceased Pappu on 16.8.2008 was conducted by Dr. R.P. Singh, PW-12, which report is marked as Ex.PW12/A. Dr. R.P. Singh opined that the deceased pappu was brought to the trauma centre on 16.8.2008 at 3.30 a.m. and had expired at about 6.00a.m. the same morning. According to him, on External Examination the following injures were found present:

1. A Reddish abrasion of size 4 cm x 0.3 cm was present on left thigh on medial aspect 25 cm below anterior superior iliac spine.

2. A penetrating wound with lacerated margins of size 0.3 cm x 0.4 cm was present on anterior aspect of right side of chest, 1cm from mid line and 5.5 cm below supra sternal notch. Further it is cutting sternum opposite second inter costal space, cutting pericardium and then cutting aorta through and through and then making a nick in pulmonary artery in the pericardium itself. Pericardial cavity contains about 500 ml clotted blood. Depth of the wound is 10 cm and direction of the wound was horizontal, backward and slightly to the right side.

3. Penetrating lacerated wound of size 0.2 cm x 0.2 cm x 1 cm was present at lateral aspect left lower forearm. 6 cm above wrist joint.

4. Penetrating lacerated wound of size 0.2 cm x 0.2 cm x 1cm was present on lateral aspect of left thigh, 20 cm below anterior superior iliac spine.

35. The cause of death of one of the victims pappu as opined by the Doctor in this case was shock due to cardiac tamponade as a result of

injuries to great vessels produced by pointed stabbing object and the Injury no.2 is ante-mortem and sufficient to cause death in ordinary course of nature and time since death is about eight hours. PW-11 has further deposed that after postmortem examination, blood in gauze pieces and clothes were sealed and handed over to the police. He had further deposed that on 22.10.2008 an application was moved before him by Inspector Ram Chander for taking the subsequent opinion whether the injury on the body of deceased could be caused with the recovered Sua or anyone of them and the investigating officer produced two separate pullandas marked 3831/08 and 3833/08 respectively with the seal of RCS. According to PW-12, on opening pullanda mark 3831/08 it was found to contain an ice prick with wooden handle marked LAZER whose sketch is drawn separately and on opening pullanda mark 3833/08, it was found to contain an ice prick with wooden handle marked TRISHUL whose sketch is drawn separately. The witness has testified that both the pricks had reddish brown stains on the lower aspect (near the tip). The doctor has further opined that the injuries mentioned in the postmortem report no. 822/08 dated 16.8.2008 on the body of Pappu S/o Shobha Ram were possible by the weapons produced before him or by similar such

type of weapons, which opinion is marked as Ex.PW12/B. The medical evidence thus fully supports the ocular evidence adduced by the injured eyewitness PW-1.

36. We also do not subscribe to the contention raised by Ms. Nandita Rao, learned counsel for the appellant -Vijay that as per the testimony of PW-1, he was taken by the public to a private hospital along with victim Pappu did not coincide with the testimony of PW-14 deposing that both of them were taken to BJRM Hospital from the spot. We fail to comprehend as to how the credibility of the said witness can be doubted on this premise when in any case, PW-1 had mentioned in his statement that he himself had contacted the police control room from his own mobile number which also finds mentioned in the PCR form and it is to this information that the PCR van had reached the spot to take them to BJRM Hospital. The spot was the exact spot or a nearby spot is hardly of any consequence.

37. One of the contentions raised by counsel for the appellant Vijay was that there were no sufficient lights at the place of incident and this is apparent from the fact that in the site plan proved on record as Ex. PW-8/A, existence of any such lights have not been shown. Contention of

learned counsel for the appellant was that in the absence of any light being there PW-1 could not have seen any of the assailants, and later recognised them as being the actual perpetrators of the crime. This contention raised by counsel for the appellant Vijay Kumar is devoid of any merit as PW-1 in his testimony categorically stated that there was sufficient street light with yellow colour lamps being lit around to see the faces of the assailants. PW-1 also deposed that the accused persons had not covered their faces at the time of occurrence. In his cross-examination he denied the suggestion that it was pitch dark at the spot of occurrence or that he could not have seen any of the assailants. With such clear stand taken by PW-1 that there was sufficient street light to see the faces of the assailants, we find no merit in the said contention raised by counsel for the appellant Vijay. Even otherwise in the scaled site plan proved on record as Exhibit PW-8/ A at point C, D and E the position of lights as were existing at the site have been duly shown.

38. To deal with the next contention raised by counsel for the appellant that no credence can be attached to the testimony of PW-1 where he stated that two persons forcibly took away the money from his pocket as forcibly snatching should have resulted in tearing of the pocket of a pant

worn by PW-1. This argument of learned counsel for the appellant does not cut much ice as we find no reason to disbelieve the testimony of an injured eye witness solely because of the fact that forcibly snatching away of money from one's pocket can result in tearing of the trouser. Conversely also tearing of the pocket, if not supported by some credible evidence cannot lead to an inference that such tearing has taken place as a result of snatching away of the money. The contention raised by counsel for the appellant thus deserves outright rejection as it raises no such vile doubts or questions against the testimony of PW-1 when he had clearly identified and even gave a clear distinction between the accused who tried to rob them or who tried to injure them at that point in time.

39. The next contention raised by learned counsel for the appellant was that no public person came forward to give evidence although alleged incident had taken place at a busy place like Azadpur Mandi. Undoubtedly, there must have been a flutter of activity during the night hours of Azadpur Mandi as the same being wholesale vegetable market and someone from the public could have come forward to join the investigation. However, in the present days' time, hard reality is that no public person comes forward to join in any police investigation under the

fear of getting harassed at the hands of the police and thereafter, at the time of attending court hearings, therefore, non joining of any public witness who might have been present at the time of incidence cannot be taken as adverse to the case of the prosecution. Even otherwise, it is for the prosecution to collect the best available evidence to prove its case before the court and in a case where the Investigating Officer finds there is an eye witness available to prove the incidence, it may or may not look for other public witnesses to join the investigation. It is also a settled legal position that it is not the quantity but the quality of the evidence, which ultimately matters. The legal system has laid emphasis on the value of the evidence provided by each witness, as opposed to the multiplicity or plurality of witnesses. It is thus, the quality and not quantity, which determines the adequacy of evidence, The contention raised by counsel for the appellant thus has no force.

40. In *Namdeo v. State of Maharashtra: (2007) 14 SCC 150*, The Hon'ble Apex Court categorically observed that it is the quality and not the quantity of evidence which is necessary for proving or disproving a fact. The legal system has laid emphasis on value, weight and quality of evidence rather than on quantity, multiplicity or plurality of witnesses. It

is, therefore, open to a competent court to fully and completely rely on a solitary witness and record conviction. Conversely, it may acquit the accused in spite of testimony of several witnesses if it is not satisfied about the quality of evidence.

41. Learned counsel for the appellant laid much emphasis on the contention that the prosecution has utterly failed to prove the involvement of these appellants in the commission of the said crime through any cogent and clinching evidence. As per the counsel for appellant, PW-1 failed to give description of these assailants to the police in his first statement and he could recognise the assailants only at the time of his deposition in court after these assailants were shown to him by the police. Counsel also justified the refusal of the appellants to participate in the Test Identification Parade conducted on 02.09.08 because of they being already shown to PW-1 by the police. This contention raised by counsel for the appellant lacks any merit. There can be no dispute that one of the important task of the investigation is to apprehend the real and actual culprit of the crime. The Investigation which is carried out by the Investigating Officer and his team should be judicious, fair, independent, transparent, totally uninfluenced by any extraneous factors. There should

not be undue and undesirable delay in the investigation of any crime as any slackness in the investigation can always prove fatal. The entire pursuit of any criminal trial is to see that no innocent man is punished and no guilty man goes scot free. PW-1, in his very first statement categorically stated that he can recognise all the four assailants if brought before him. While giving his statement in court, he could easily identify all these four assailants who were present in the court. He specifically pointed out to the two accused persons who had snatched money from his pocket and the other two who were armed with ice pricks and started attacking him and the deceased Pappu. In his cross-examination, he also stated that the person who stabbed him was dark in complexion and had a cut mark on his face. It would be therefore seen that right from the first statement, the stand of PW-1 had been that he can identify the assailants and in fact he had identified them when they were also present at the time of his deposition in court. The refusal of these assailants to participate in the test identification parade proceedings thus goes against them. The trial court is correct in taking a view that the onus shifted on the accused persons to prove on record that their photographs were shown to PW-1 prior to the holding of the said test identification parade. PW-1 is quite

candid in stating in his court deposition that he had seen these assailants on 15th September 2008 when they were produced in a court at Rohini Courts Complex. In this background, it is difficult to accept the argument of counsel for the appellant that the prosecution had failed to establish the identity of these assailants who committed the said crime.

42. Learned counsel for the appellant – Mukesh was quite emphatic in his contention that PW-1 in his cross examination admitted the fact that he had clearly seen the face of one assailant, who stabbed him and this deposition of PW-1 clearly meant that he was stabbed by the assailant to whom he described as person with dark complexion having a cut mark on his face and therefore, Mukesh had no role in the commission of the said crime. The court has to take an overall view of the entire testimony of a witness, which includes his examination in chief as well as his cross examination. PW-1 while giving his evidence in examination in chief, had clearly identified all the four accused persons being the assailants who were involved in the said incident and in cross examination he merely said that he had clearly seen the face of only one assailant who stabbed him. The said statement of PW-1 in his cross examination can lead to only one inference that so far as the face of one assailant was

concerned, he could see him with more clarity, but that would not mean that he did not see the faces of the other assailants or he was not in a position to identify the other assailants, may be with the help of their other descriptions including their height, gait and manner of walking, etc. We also cannot subscribe to the said contention raised by counsel for these appellants as we find no reason for PW-1 to implicate these persons to save the actual culprits of the said crime. We thus find no force in the above contention raised by counsel for the appellant.

43. Dealing with the next contention raised by the counsel for the appellant- Vijay, i.e. challenging the recovery of the black purse at the instance of appellant Vijay and pocket diary of deceased Pappu and Rs. 7,000/- at the instance of the appellant Mukesh Singh, the learned Trial Court has already disbelieved the said recoveries taking a view that the prosecution has not been able to prove and substantiate the recovery of purse belonging to the deceased and robbed amount from the accused Vijay. So far as the challenge of the counsel for the appellants in relation to the recovery of the black purse during disclosure statement of the appellant Vijay, which contained the voter ID card and pocket diary of deceased Pappu and also the recovery of Rs. 7,000/- at the instance of the

appellant Mukesh Singh, the learned Trial Court has already disbelieved the said recoveries taking a view that the prosecution has blatantly failed to prove the recovery of the black purse at the instance of appellant, Vijay as well as the recovery of sum of Rs.7000/- at the instance of appellant, Mukesh. We second the reasoning given by the learned Trial Court in disbelieving the said recoveries. Therefore, attack of the counsel for the appellants on the said recoveries, which was disbelieved even by the Learned Trial Court, will not be of any help to dislodge the case of prosecution.

44. This brings us to the last contention raised by the counsel for the appellant that there was no common intention of the appellants to commit the murder of the deceased. Counsel for the appellant- Vijay also argued that at best Vijay can be held liable under Section 307 IPC and not under Section 302 IPC, in the light of the deposition of PW1 testifying that he had clearly seen the face of only one assailant that was the person who stabbed him. Counsel also argued that PW1 had already given the description of the person who stabbed him being dark in complexion and having a cut mark on his face. Counsel also invited attention of the Court to the deposition of PW1, in his cross-examination, where he said that it

is correct that he had seen the occurrence taking place between his companion Pappu and the two assailants. As already discussed above, PW1 in his examination-in-chief has clearly spelled out the exact role of the four assailants, as against Sharwan Kumar and Pawan the only role ascribed to them by PW1 was that they had snatched money from him and so far as the remaining two assailants are concerned, they were allegedly armed with ice pricks. PW1 was also categorical in stating in his examination-in-chief that accused persons, namely Vijay and Mukesh Kumar caused injuries with the help of ice pricks on the person of Pappu and also to him. From the said testimony of PW1, it becomes abundantly clear that these two appellants were only carrying ice pricks with them and not the other assailants. The learned Trial Court is correct in saying that the common intention of all the accused persons was to commit robbery but so far as accused Vijay @ Kalia and Mukesh Kumar were concerned, they had come armed with ice pricks and their intention was clearly to scuttle the resistance offered by the victims, which was ultimately used by both of these assailants in causing serious injuries to PW1 and fatal injuries to the other victim Pappu who ultimately died. So far the offences under Sections 307 and 302 IPC are concerned, the

common intention to scuttle the resistance with the use of the said deadly weapon, was shared by these two appellants and not by the other two assailants and so far the offence under Section 392 Cr.P.C. read with section 34 Cr.P.C. is concerned, the same was shared by all the four assailants.

45. It is a settled legal principle that there may not be any direct evidence of common intention of the accused persons and sharing of the common intention can take place even at the spur of the moment i.e. at the time of commission of the crime. There exists no straight jacket formula for applying the principle of common intention. Inferences with regard to the existence of common intention and committing a particular act must be drawn from the totality of the facts and circumstances of the each case. In the facts of the present case, only these two appellants were armed with ice pricks and they were involved in causing stab injuries to PW-1, Sushil Kumar and deceased Pappu and therefore, there can arise no difficulty in attributing the common intention to these two assailants who went to the extent of using the said deadly weapon(ice prick) in causing the death of one of the accused and causing severe injuries to the other when they resisted to give them money as per their demand.

46. Section 34 of the Indian Penal Code very clearly signifies that once it is found that a criminal act was done in furtherance of the common intention of all, each of such persons is liable for the criminal act as it were done by him alone. The existence of a common intention amongst the participants of crime is the essential ingredient. It embodies the commonsense principle that if two or more persons intentionally do a thing jointly it is just the same as if each of them had done it individually (*Refer: Bharwad Mepa Dana AIR 1960 SC 289*)

47. Common Intention which is the essence of the principle of vicarious liability manifested under section 34 of the Indian Penal Code can be the result of a premeditated decision between several co-accused or in a given case such common intention can very well develop on the spur of moment or at the scene of the crime as well. The Hon'ble Supreme Court in the recent judgment **Raghubir Chand and Ors. Vs. State of Punjab** 2013(10)SCALE20 has held as under :

"8 Common Intention which is the gist of the principle of vicarious liability enshrined by Section 34 of the Indian Penal Code can be the result of a premeditated decision between several co-accused or in a given case such common intention can very well develop on the spur of the moment or at the scene of the crime. What is of importance and, therefore, must be ascertained is the meeting of minds of the co-accused that the particular criminal act should be committed. Once the court can consider it safe to come to such a

conclusion only then apportionment of liability amongst the co-accused would be permissible with the aid of Section 34 of the Indian Penal Code. Liability of an accused under Section 34, therefore, is a matter of inference to be drawn from the facts and circumstances of each case. The above are the principles that have been laid down in a long line of decisions of this Court, few of which can be illustratively referred to herein below.

This Court in the case of **Sripathi v. State of Karnataka:** (2009) 11 SCC 660 observed as under:

9. 5. Section 34 has been enacted on the principle of joint liability in the [commission] 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 a 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 a plan or meeting of minds of all the accused persons to commit the offence for which they are charged with the aid of Section 34, be it prearranged or on the spur of the moment ; but it must necessarily be before the commission of the crime. The true contents of the section are that if two or more persons intentionally do an act jointly, the position in law is just the same as if each of them has done it individually by himself. As observed in *Ashok Kumar v. State of Punjab*: 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.

6. The section does not say 'the Common Intention 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 [commission] of a criminal act in furtherance of such. As a result of the application of principles enunciated in Section 34, when an accused is convicted under Section 302 read with Section 34, in law it means that the accused is liable for the act which caused death of the deceased in the same manner as if it was done by him alone. The provision is intended to meet a case in which it may be difficult to distinguish between acts of individual members of a party who act in furtherance of the Common intention of all or to prove exactly what part was taken by each of them. As was observed in *Chinta Pulla Reddy v. State of A.P.* : 1993 (Supp 3) SCC 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." As observed in *State of M.P. v. Deshraj*: (2004) 13 SCC 199

In **Abdul Mannan v. State of Assam** : (2010) 3 SCC 381 in paragraphs 19 and 20 this Court made the following observations:

19. The High Court placed reliance on **Sheoram Singh v. State of U.P.** : (1973) 3 SCC 110 in which this Court observed as under: (SCC p. 114, para 6)

6....It is undeniable that Common intention can develop during the course of an occurrence, but there has to be cogent material on the basis of which the court can arrive at that finding and hold an accused vicariously liable for the act of the other accused by invoking Section 34 of the Penal Code.

20. Reliance was also placed on **Joginder Singh v. State of Haryana** : AIR 1994 SC 461 in which this Court has observed:

7. It is one of the settled principles of law that the Common intention must be anterior in time to the commission of the crime. It is also equally settled law that the intention of the individual has to be inferred from the overt act or conduct or from other relevant circumstances. Therefore, the totality of the circumstances must be taken into consideration in order

to arrive at a conclusion whether the accused had a Common intention to commit the offence under which they could be convicted. The prearranged plan may develop on the spot. In other words, during the course of commission of the offence, all that is necessary in law is, the said plan must proceed to act constituting the offence."

48. It is undeniable that common intention can develop during the course of an occurrence, but there has to be convincing material on the basis of which the court can arrive at such a conclusion and hold an accused vicariously liable for the act of the other accused by invoking Section 34 of the Penal Code.

49. In ***Rajesh Kumar v. State of H.P., : (2008) 15 SCC 705***, the Supreme Court elucidated and laid down the following principles as applicable to Section 34 IPC:

13. 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 a 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 mind 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 moment; but it must necessarily be before the commission of the crime. The true contents of the Section are that if two or more

persons intentionally do an act jointly, the position in law is just the same as if each of them has done it individually by himself. As observed in Ashok Kumar v. State of Punjab : (AIR 1977 SC 109), 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.

49. In **Gopi Nath v. State of U.P. : 2001 (6) SCC 620** this Court

observed as under:

8. ...Even the doing of separate, similar or diverse acts by several persons, so long as they are done in furtherance of a common intention, render each of such persons liable for the result of them all, as if he had done them himself, for the whole of the criminal action-be it that it was not overt or was only a covert act or merely an omission constituting an illegal omission. The section, therefore, has been held to be attracted even where the acts committed by the different confederates are different when it is established in one way or the other that all of them participated and engaged themselves in furtherance of the common intention which might be of a preconcerted or prearranged plan or one manifested or developed on the spur of the moment in the course of the commission of the offence. The common intention or the intention of the individual concerned in furtherance of the common intention could be proved either from direct evidence or by inference from the acts or attending circumstances of the case and conduct of the parties. The ultimate decision, at any rate, would invariably depend upon the inferences deducible from the circumstances of each case.

50. In the facts of the present case, critically analysing the record, the deposition of PW-1, it is quite apparent that these appellants shared common intention in committing the aforesaid crime. This leaves no iota of

doubt that Sushil and pappu were injured by these two assailants, and were carrying the deadly weapon. No matter it has not come out clearly that whether PW-1 Sushil saw Mukesh- the accused inflicting more blows in causing the death of the deceased-pappu, but from the entire material placed before this court and the submissions made by the parties, it cannot be disputed that Mukesh was armed with an ice prick and had attacked pappu the deceased in consonance with Vijay @ Kalia with an intention to snatch money . The intention of both the assailants is quite apparent, that to succeed in their mission to commit robbery, they could have even gone to the extent of murdering them if the victims resisted to surrender, which ultimately happened and life of one of the victims- pappu was eliminated by one of the assailants. There is no gain saying that the deceased died in consequence of the resistance shown by the victims, therefore with the rush of traffic even if the deceased momentarily went out of sight of the victim Sushil, this can not negate the prior chain of evidence that subsequently led to the killing of the deceased pappu. It is just a matter of chance that while saving themselves from Vijay and Mukesh respectively , the injured victim and the deceased could not keep a watch on each other very closely which is quite adaptable in that event of circumstances. Therefore the

submission that there lies a contradiction in the deposition of PW-1 that if he actually saw Mukesh killing the deceased does not cut much, as in the entire event of circumstances, it is quite evident that these two men attacked the injured victim and pappu- the deceased herein to rob them of their money and in that course with common intention they indulged into a scuffle with pointed weapons to kill them.

51. Seeing the facts of the present case in the light of the legal principles discussed above, undoubtedly, the two assailants in furtherance of a common intention committed the said criminal acts, killed pappu and caused multiple injuries on the vital parts on the person of Sushil.

52. The loopholes in the investigation and the minor discrepancies in the evidence pointed out by the defence counsel are too inconsequential to persuade us to hold the accused persons innocent of the offence for which they have been charged. The sequence of events as unfolded by the evidence of the prosecution witnesses and the documentary evidence on record, in our considered opinion, cogently and conclusively establishes the guilt of the accused persons.

53. It has been held by the Hon'ble Apex Court in the case of ***Allarakhia K. Mansuri vs. State of Gujarat***, reported in AIR 2002 SC 1051, while

dealing with the cases of omissions and commissions by the investigating officer, and duty of the Court in such cases held as under:

33. even if the investigation is defective and faulty the accused person cannot be acquitted solely on account of defective and faulty investigation. With the passage of time, the law also developed and the dictum of the Court emphasized that in a criminal case, the fate of proceedings cannot always be left entirely in the hands of the parties. Crime is a public wrong, in breach and violation of public rights and duties, which affects the community as a whole and is harmful to the society in general.'

54. In another case of ***Ram Bali vs. State of Uttar Pradesh reported in AIR 2004 SC 2329***, the Apex Court took a view that acquitting an accused person solely because of faulty or defective investigation would amount to playing into the hands of Investigating Officer. The relevant paragraph of the said judgment is reproduced as under:-

“34. In the case of a defective investigation the Court has to be circumspect in evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective.’

55. Thus, in light of the above discussion, we do not find any illegality, perversity or infirmity in the finding of the learned Trial Court so far as the conviction and sentence of appellant Mukesh and Vijay are

concerned. Therefore, the same is left undisturbed and the aforesaid appeals filed by the accused persons challenging the order of conviction dated 08.04.2011 and order on sentence dated 27.04.2011 respectively are dismissed and the order of the learned Trial Court is upheld.

56. A Copy of this order be sent to jail Superintendent for information.

57. Accordingly, the appeals stand dismissed.

KAILASH GAMBHIR, J.

SUNITA GUPTA, J.

FEBRUARY 28, 2014

v/pkb