

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

% *Reserved on : December 22, 2014*
Pronounced on : January 07, 2015

+ **CRL.A. 1519/2014**

MONU KUMAR @ MONU **Appellant**
Represented by: Mr.B.S.Jain, Advocate

Versus

GOVT. OF NCT OF DELHI **Respondent**
Represented by: Ms.Aashaa Tiwari, APP for the
State

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MR. JUSTICE R.K.GAUBA

R.K.GAUBA, J.

1. The appellant stood trial in the Court of Sh.Sanjay Garg, Additional Sessions Judge (East), Karkardooma on the charge for offences punishable under Section 302/34 Indian Penal Code (IPC) and under Section 307/34 IPC allegedly committed in the course of an incident that occurred at 7.10 PM on February 24, 2012 near house No.B-1/25, Rajbir Colony, Gharauli Extension, Delhi within the jurisdiction of Police Station Ghazipur (hereinafter referred to as “the police station”). As per the police case, three other persons had participated in the incident sharing the common intention with the appellant, they being Suraj, Babu and Ravi, each a juvenile in conflict with law (JCL). It is stated that all the said three persons namely Suraj (JCL), Babu (JCL) and Ravi (JCL) have faced separate proceedings before the juvenile justice board. On conclusion of the trial in Court of Sessions the appellant was held guilty and convicted for offences under

Sections 302/323/34 IPC vide judgment dated August 27, 2014. While the finding on the charge under Section 302 IPC was that the appellant had shared common intent with Babu (JCL) who dealt the fatal stab wound, the trial court held that the charge under Section 307 IPC qua the injuries inflicted on two other victims was not proved since the assault was not with “intent to murder”, the injuries suffered being simple in nature. Vide the order on sentence that followed (on September 06, 2014), the learned Additional Sessions Judge awarded imprisonment for life with fine of Rs.2,000/- for offence under Section 302/34 IPC, besides rigorous imprisonment for one year with fine of Rs.1,000/- for offence under Section 323/34 IPC. In default, the appellant has been sentenced to undergo further simple imprisonment for one month on each count. Both the substantive sentences were directed to run concurrently.

2. The appellant, feeling aggrieved with the findings of guilty recorded against him and the sentence imposed, has come up through this appeal to this Court. The appeal is resisted by the State on the basis of trial Court record.

3. It is apposite at this stage to take brief note of the background facts and the evidence adduced during the trial leading to the impugned judgment and the order being passed.

4. The case was registered on the basis of statement (Ex.PW2/A) given by Rahul (PW-2) son of Kanchhid S/o Lekhraj whose homicidal death is the subject matter of the charge for offence under Section 302/34 IPC. The statement Ex.PW2/A was made by PW2-Rahul some time before 9.45 PM

on February 24, 2012 before Inspector Ram Dhan Singh (PW-26), the Investigating Officer (IO).

5. The fact that the Kanchhid suffered homicidal death is not in dispute. There is ample evidence available in this regard including the eye-witness account of PW-2 Rahul and the postmortem report (Ex PW-3/A) duly proved by Dr. Vinay Kumar Singh (PW-3) who had conducted the autopsy on dead body on 25-02-2012, noting mainly the following injuries :-

“1. External injury : Incised stab wound, 5x3.5 cms obliquely present over right side of abdomen, 99 cms above heel and 2 cms from midline, upper end acute; margin sharp and regular, cavity deep.

2. Internal injury : About two liter of blood in abdominal cavity. Hepatic vessels incised. All internal organs were pale.”

6. In the opinion of the autopsy report doctor, cause of death was shock consequent upon the stab injury on the abdomen, all injuries were ante mortem in nature and recent in duration, which were sufficient to cause death in the ordinary course of nature, inflicted by single edged sharp cutting instrument. Clothes of the deceased also had corresponding cut marks.

7. On February 24, 2012 at least two other members of the family of the deceased also suffered injuries which were noted in MLCs contemporaneously prepared, they being Sanjay (PW-4) and Sukhbiri (PW-7), the younger brother and wife respectively of the deceased. The MLCs of PW4-Sanjay and PW7-Sukhbiri were proved during the trial as documents Ex.PW5/A and Ex.PW5/B respectively by Dr.P.C.Sahu (PW-5), the medical officer who had examined each of them in Lal Bahadur Shastri Hospital,

Khichripur, Delhi (“the hospital”) where all the three victims of the incident had been taken.

8. While PW-4 Sanjay was found (Ex.PW5/A) having suffered a lacerated wound of size 6 cm x 0.3 cm x 0.3 cm on the scalp with abrasion measuring 3 cms x 2 cms on right side of cheek below the eye lateral margin, PW-7 Sukhbiri had suffered (per Ex.PW5/B) a lacerated wound on occipital area of the scalp measuring 0.25 cm x 0.5 cm.

9. The crucial part of the incident is alleged to have occurred outside the house of the deceased. PW-4 Sanjay, his younger brother, lives two houses away with his family. The family includes Premwati (PW-11) and Pat Ram (PW-16), the mother and a relative respectively of the deceased.

10. It appears that one Shishpal is a next door neighbor. His wife Smt.Sheela (PW-14) was cited by the prosecution as an eye-witness. Similarly, per the prosecution story, Ramesh Chand (PW-9), another neighbor, also saw the incident happening from the terrace of his house situate across the street.

11. Going by the first version of PW-2 Rahul, as indicated in the FIR, the incident which had occurred at about 7.10 PM had its genesis in an event that had occurred earlier at about 6.30 PM in a cyber café located in the same street where he lives. According to the said version, PW-2 Rahul, a boy aged 16 years, then a student of 11th standard, was working on some project in the cyber café when Suraj (JCL) and Babu (JCL) paid a visit there, one after the other. It is alleged that both the JCLs picked up quarrel with PW-2 Rahul on some frivolous ground and then gave him slaps and fist

blows. According to the PW-2 Rahul, a neighbor named Mahesh (PW-15) had come to his rescue by intervening. PW-2 Rahul in the course of his testimony has narrated that part of the incident to which PW-15 Mahesh provides corroboration.

12. It may, however, be added that PW-15 also adds a role of Ravi (JCL) in the said incident which part of his testimony need not be given any credence for the reason PW-2 Rahul would not make any such allegation against Ravi (JCL) in the context of what had happened in the cyber café. It must also be noted here that PW-15 Mahesh does not know as to what had triggered the incident inside the cyber café. For this, the prosecution has to rest content only with the word of PW-2 Rahul.

13. But the above deficiencies would not have a bearing on the charge against the appellant with regard to the main incident that would occur later.

14. As per the version of PW-2 Rahul, before the police (Ex.PW2/A) as also in the Court, he had suffered the assault only in the cyber café. In the incident that occurred later wherein his father, uncle and mother suffered injuries he was not assaulted. During his cross-examination, he claimed that in the said first incident, in which Suraj (JCL) and Babu (JCL) had taken part, his clothes were torn and the injury suffered on the nose had resulted in bleeding on account of which his clothes had become blood stained. He also claimed that he had handed over the blood stained clothes to the police. This part of the testimony of PW-2 Rahul does not deserve to be believed or acted upon not only because there were no such allegations made by him in the first place but also because he was not taken for medical examination and his blood stained clothes were never seized.

15. It is apparent that the first informant has tried to project the assault on his person in graver light. The exaggerated version in such regard is indicative of embellishments which caution one to subject his testimony with closer scrutiny in order, to use a cliché, to separate grain from the chaff. But, it being normal human frailty to present own suffering at levels heightened than actual (more to evoke sympathy) this trait need not be taken by itself as clinching proof of his incredibility.

16. Be that as it may, according to PW-2 Rahul, after he had been beaten up by Suraj (JCL), and Babu (JCL) in the cyber café, he had returned home and informed his father (deceased Kanchhid) and grandmother PW-11 Premwati, both of whom immediately went to lodge protests at the house of Suraj (JCL) followed by a similar visit to the house of Babu (JCL). There is corroboration available to the word of PW-2 in this regard coming from the deposition of his mother PW-7 Sukhbiri and grandmother PW-11 Premwati. According to the evidence of these three witnesses, the visit to the house of Suraj (JCL) had evoked an assurance from his family that they would suitably counsel Suraj (JCL) while the sisters and mother of Babu (JCL) had turned abusive.

17. The evidence of PW-2 Rahul and PW-7 Sukhbiri in above regard is more or less similar, but PW-11 Premwati came with a version which is not wholly in *sync* with that of the former two. But then, it has to be borne in mind that PW-11 Premwati is an elderly lady (85 year old) admittedly frail in health, blind in one eye, poor eyesight in the other and hard of hearing. It is not only that her perception would be low but her memory would also be weak and, therefore, some inconsistencies brought out through her version

should not result in PW-2 Rahul or PW-7 Sukhbiri being discredited. The visits of the deceased in the company of his mother PW-11 Premwati to the houses of Suraj (JCL) and Babu (JCL) are material to the narrative only because that is alleged to have triggered a response in the form of the incident in the course of which Kanchhid died due to stab wound.

18. It is pertinent to note at this stage that Babu (JCL) to whom the fatal blow with knife on the person of the deceased is attributed is younger brother of the appellant. Going by the version in the FIR, the appellant came on the scene for the first time when the deceased with his mother PW-11 Premwati and son PW-2 Rahul had visited his house. The FIR would only state that a quarrel took place at that stage. In the course of evidence it has been explained that the mother and sisters of the appellant and Babu (JCL) were standing outside the house and had become abusive. Though PW-2 Rahul would add that the appellant had also come at that stage in drunken state, there is no confirmation to this fact by any other material on record. The only stage wherein active participation on the part of the appellant is shown is the final episode wherein Kanchhid suffered the stab wound and PW-4 Sanjay and PW-7 Sukhbiri suffered injuries.

19. The prosecution case on the basis of which appellant was tried was to the effect that after paying visits to the houses of Suraj (JCL) and Babu (JCL), the deceased Kanchhid with his mother PW-11 Premwati had returned and was standing outside his house talking to each other in the street, in the presence, amongst others, of PW-2 Rahul, PW-4 Sanjay and PW-7 Sukhbiri when the three JCLs accompanied by the appellant appeared on the scene. It was alleged that Babu (juvenile) gave a fist blow on the

face of PW-7 Sukhbiri, Monu the appellant carrying a bat had hit PW-4 Sanjay on his head, Suraj (JCL), had hit PW-4 Sanjay on the right side of his face with a *punch* (iron knuckles) while Ravi (JCL) hit him with a brick piece on his head making him fall unconscious. It was alleged that deceased Kanchhid had tried to intervene but all the four assailants (including the appellant) had turned towards him (Kanchhid) wherein the appellant caught hold of his right hand, Ravi (JCL) caught hold of his left hand while Suraj (JCL) caught hold of his collar and exhorted Babu (JCL) to kill him. It was alleged that Babu (JCL), on such exhortation, took out a knife from the pocket of his jeans trousers and stabbed Kanchhid in his stomach. It is stated that the deceased was taken to the hospital by PW-2 Rahul and his uncle PW-16 Pat Ram but to no avail as he was declared in the hospital to be brought dead. It must be added here that PW-16 Pat Ram, the other person who had assisted PW-2 Rahul in taking the deceased to the hospital apparently had not seen the incident with his own eyes and thus his statement is of no great utility to the prosecution.

20. PW-2 Rahul, PW-4 Sanjay, PW-7 Sukhbiri and PW-11 Premwati have given statements in the Court which are generally similar to the prosecution story on all material counts. As mentioned earlier, there are some variations in the version of PW-11 Premwati which would need to be discounted given her advanced age, fragile health and poor capacity to perceive or recount.

21. There are some contradictions and inconsistencies appearing in the evidence of PW-4 Rahul and PW-7 Sukhbiri. To illustrate, PW-2 refers to various stages of incident with such specific timing (6.25 PM, 6.27 PM,

6.43 PM and so on) as if he were logging each stage by the clock which, given the background and status of the families involved, is rather unnatural and unpalatable. He also claimed that he had accompanied his father and grandmother to the house of Suraj (JCL) and Babu (JCL). Surely, he had not said so specifically in the FIR. Noticeably, his mother PW-7 Sukhbiri would not confirm he to have been in the company of his father and grandmother at such stage. PW-2 Rahul refers to a full brick being used in the attack by Ravi (JCL) while his mother PW-7 Sukhbiri referred to such weapon of offence as half brick. In our considered opinion, however, these contradictions or inconsistencies are not material and do not go to the root of the case and, therefore, need not be given any importance.

22. Before we consider the effect of the evidence of PW-4 Sanjay Kumar, whose presence at the scene around the time of the incident cannot be doubted on account of he having suffered the injuries noted earlier (as evidenced by MLC Ex.PW5/A), it would be useful to look into the testimony of the two neighbors namely PW-9 Ramesh Chand and PW-14 Sheela.

23. The presence of PW-9 Ramesh Chand and PW-14 Sheela at the scene at the time of incident is not in dispute. The prosecution relied on the testimony of these witnesses seeking corroboration to the version of PW-2 Rahul and members of his family. The defence relies on the testimony of these two neighbors submitting that this part of the evidence is to be preferred since it provides independent account of the sequence of events that had actually occurred. Even the defence concedes that PW-9 Ramesh Chand saw the incident happening from the terrace of his house which

overlooks the street where the assault took place while PW-14 Sheela, the next door neighbor was at the gate of her house and had actually been talking to the deceased when the assault began.

24. According to PW-9 Ramesh Chand, the deceased was standing alone at the main door of his house when the three JCLs came on the scene. According to him, Babu (JCL) had stabbed Kanchhid in his abdomen while the other two JCLs had just stood by and that after such assault all three of them had run away. He would state that it was PW-14 Sheela who had raised the alarm on hearing which PW-4 Sanjay and PW-16 Pat Ram came out with other neighbors also gathering in the street. According to him, Ramesh Kumar (PW-20) another neighbor had informed the police on phone No.100 by making a call with the help of his mobile phone.

25. PW-20 Ramesh Kumar was also projected by the prosecution to be yet another eye-witness. He did not support the prosecution case to this effect. He would only confirm the word of PW-9 Ramesh Chand about he having informed the police about the incident using his mobile phone claiming that he had learnt about the incident from PW-4 Sanjay.

26. According to the FIR, the IO had set out for inquiry on the basis of information recorded vide DD No.27A. Copy of the said *Roznamacha* entry has not been shown light of the day. Three DD entries were proved, they being DD no.23A (Ex.PW6/A), DD No.24A (Ex.PW6/B) and DD No.26A (Ex.PW22/A). None of these DD entries contain any material as could incriminate the appellant.

27. PW-9 Ramesh Chand, in his testimony, stated that the appellant “was not involved in the incident” thereby seeking to absolve him totally from any culpability. PW-14 Sheela also would not incriminate the appellant but her version is at variance from that of PW-9 Ramesh Chand to an extent. According to her testimony, the sole assailant was Babu (JCL) who had come all alone and had stabbed Kanchhid with a knife and while going away had thrown the weapon thus used in the area of *bijli ghar*. She however added that “at the time of stabbing Kanchhid” by Babu the appellant had also come on the scene and “some quarrel” took place between PW-4 Sanjay and Babu (JCL). During cross-examination, she sought to clarify that the appellant had come to the scene after the stabbing.

28. The evidence of PW-4 Sanjay, as indeed part of testimony of PW-2 Rahul, need to be now noted and scrutinized against the above backdrop.

29. As mentioned earlier, PW-4 Sanjay, younger brother of the deceased, lives two houses away. He deposed that around 6.30 PM he was present inside the house and had asked his sister-in-law to prepare a cup of tea for him. His brother Kanchhid (the deceased) was also present inside the house and had gone out into the street as the tea was being served. He deposed that he heard cries (*chaku mar dia, chaku mar dia*) coming from outside attributing it to a neighbour named Sushila (both the prosecution and the defence) agree that the witness was referring to PW-14 Sheela. PW-4 testified that upon hearing such cries, he had immediately run out into the street whereupon he saw Babu (JCL) running away towards his house holding a knife in his hand while his brother Kanchhid was lying on the road. He also added, confirming the word of PW-14 Sheela, that Babu

(JCL) had thrown the knife near the power house in the street. He further added that 3 to 4 boys were standing in the street. From what follows in his testimony it appears that he was referring to the two other JCLs and the appellant.

30. According to PW-4 Sanjay, Babu (JCL) had used iron knuckles which he had taken from others and come near him. He also deposed that Suraj (JCL) had given a bat blow on his head while the appellant had taken over the iron knuckles from Babu (JCL) and hit him on his face below the right eye. He further stated that Babu (JCL) had hit him with a brick piece on his head and also used a blade to cause injuries on his left ear and back side of the neck. He claimed that he had suffered giddiness and had fallen down in the street to regain consciousness after he had been taken inside the house. It is the version of both PW-2 Rahul and PW-7 Sukhbiri that PW-4 Sanjay had become unconscious after the assault.

31. Since the roles attributed to the three JCLs, and the appellant, by PW-4 Sanjay in his examination-in-chief were not in accord with the prosecution case he was declared hostile and subjected to cross-examination by the public prosecutor. At that stage, the witness sought to confirm the word of PW-2 Rahul and PW-7 Sukhbiri explaining that he is an illiterate person and had forgotten the detailed facts due to lapse of time.

32. During cross-examination PW-4 Sanjay claimed that he had regained consciousness around 9.30 PM at his house. But, this cannot be correct since, per MLC (Ex.PW5/A), he had been taken to hospital by 7.55 PM at which stage he was conscious and oriented. It must, however, be added that there can be no doubt as to the fact that PW-4 Sanjay had suffered injuries

in the assault which injuries would later be found to be simple in nature (Ex.PW17/A).

33. The learned Additional Sessions Judge has found the evidence of PW-2 Rahul, PW-4 Sanjay, PW-7 Sukhbiri and PW-11 Premwati to be worthy of reliance so on return findings of guilty on the charge that the appellant had shared common intention with the three JCLs in general, and Babu (JCL) in particular, in the course of assault wherein Babu (JCL) stabbed Kanchhid to death. For the injuries suffered by PW-4 Sanjay and PW-7 Sukhbiri, the appellant had been charged with the offences punishable under Section 307/34 IPC. The learned Additional Sessions Judge, however, concluded that the injuries suffered by the said two witnesses were simple in nature and having regard to the facts and circumstances would constitute only the offence punishable under section 323/34 IPC for which the appellant was convicted. It may be noted here that the State has not questioned the correctness of conviction on lesser charge on this score.

34. It has been argued on behalf of the appellant that, given the depositions of PW-9 Ramesh Chand and PW-14 Sheela, the evidence of the above mentioned other witnesses with regard to the role attributed to the appellant, particularly in the context of stabbing of Kanchhid by Babu (JCL), ought not be believed or acted upon. The counsel submitted that the testimony of PW-4 Sanjay confirms the version of PW-9 Ramesh Chand and PW-14 Sheela about the appellant not having participated at the crucial stage when the murder took place, his role being restricted to the assault on the persons of others viz. PW-4 Sanjay and PW-7 Sukhbiri, that occurred

immediately thereafter. It is his argument that the version of PW-2 Rahul also shows this to be probable sequence of events.

35. The appellant further argued that the learned trial court was not justified in trashing as “an afterthought” the version of Gudia (DW-1), sister of the appellant which indicated the presence of the appellant at place other than that of the incident. It was submitted that a defence witness is to be treated at par with witness produced by the prosecution unless there is material showing his testimony to be not trustworthy. The defence further submitted that the discrepancies and inconsistencies in the depositions of PW-2 Rahul, PW-4 Sanjay, PW-7 Sukhbiri and PW-11 Premwati could not have been sidelined given the narration of the true facts by DW-1 Gudia.

36. Per contra, the prosecution would rely on 2011(6) SCC 279 A Shankar Vs. State of Karnataka to argue that minor discrepancies cannot be given undue importance and that small variations in the statements of the aforementioned witnesses only re-affirm that they had not been tutored and were rather deposing on the basis of facts actually perceived by them in the course of the occurrence. It is the submission of the State that, in the course of the assault, PW-4 Sanjay and PW-7 Sukhbiri suffered injuries which fact is corroborated by their respective MLCs duly proved. This, according to the learned prosecutor, lends re-assurance to their veracity proving not only their presence at the spot but also, and more importantly, their version as eye-witnesses to the incident in which Kanchhid suffered fatal stab wound at the hands of Babu (JCL). Prosecution relies heavily on the version of these witnesses with regard to the assault on the person of Kanchhid, almost by way of concert, by the three JCLs and the appellant, demonstrating it to

be in furtherance of their common intention [AIR 2004 SC 1808 Girija Shankar Vs. State of UP]. Reference is also made to the recovery of bat, the weapon of offence, at the instance of the appellant.

37. On close scrutiny of the evidence led by the prosecution, we find that the material on record throws up two divergent versions to be the possible sequence of events leading to the homicidal death of Kanchhid and injuries on the persons of PW-4 Sanjay and PW-7 Sukhbiri. By one account, based on the testimony of PW-2 Rahul, PW-7 Sukhbiri and PW-11 Premwati (in which PW-4 Sanjay also joins through that part of his testimony which came on record during cross-examination by the public prosecutor), all the four persons alleged to be assailants (the three JCLs and the appellant) had come together, first accosted PW-7 Sukhbiri and PW-4 Sanjay causing injuries on their respective persons and then diverted their attention towards Kanchhid (who had tried to intervene), overpowering him and ending up leaving him stabbed by Babu (JCL) upon exhortation by Suraj (JCL). In contrast, the version of PW-9 Ramesh Chand and PW-14 Sheela reflects that when Kanchhid was stabbed by Babu (JCL), he was standing in the street outside his house almost all alone, albeit with the two said witnesses being around, his other family members, particularly PW-2 Rahul, PW-4 Sanjay, PW-7 Sukhbiri and PW-11 Premwati having come out only when alarm was raised by PW-14 Sheela.

38. The prosecution had relied on the word of PW-9 Ramesh Chand and PW-14 Sheela projecting them as independent witnesses who had no personal stake involved. The said witnesses did not support the prosecution story particularly with regard to the participation of the appellant in the fatal

assault on the person of Kanchhid. Given this nature of their respective testimony, prosecution seeks to disown the said witnesses arguing that they had been won over and further that the involvement of the appellant has been otherwise proved through the consistent statements of PW-4 Sanjay and PW-7 Sukhbiri who had suffered injuries in the same incident.

39. In our view, the State cannot wish away the evidence of PW-9 Ramesh Chand and PW-14 Sheela, not only because they were presented by the prosecution itself as independent witnesses but also for the reason their word (exculpating the appellant) finds support, to a great extent, from the initial part of the testimony of PW-4 Sanjay and to which PW-2 Rahul also lends credence.

40. As already noted at length, PW-4 Sanjay in his examination-in-chief himself spoke about his presence inside the house in the company, *inter alia*, of his brother Kanchhid. From that part of his narration, it is clear that Kanchhid had gone out into the street alone even while PW-4 Sanjay was being served with a tea. PW-4 Sanjay would come out after the stabbing of Kanchhid inasmuch as his attention was drawn impelling him to rush out only when he heard the shrieks of PW-14 Sheela announcing to the world at large that somebody had been knived. In our view, the statement of PW-4 Sanjay during his examination-in-chief is the truthful version and the explanation (illiteracy) to come with a different story (on the lines of the prosecution case) under cross-examination by the public prosecutor is specious.

41. As already observed, PW-4 Sanjay has spoken about his presence with other members of his family including deceased brother Kanchhid

inside the house. This appears to indicate that the deceased accompanied by his mother PW-11 Premwati having returned after visits to the houses of Suraj (JCL) and Babu (JCL) had not stayed back in the street and instead had come inside the house to be with other members of the family. That this was the correct version (rather than what is deposed by PW-7 Sanjay and PW-11 Premwati) is confirmed by none other than the first informant PW-2 Rahul himself during his cross-examination, when he also spoke about coming out (in the midst of the incident).

42. It is well-settled that if the evidence on record in a criminal trial shows the possibility of two different versions, the one favourable to the defence must be preferred. In the case at hand, the version narrated by PW-9 Ramesh Chand and PW-14 Sheela finds re-assurance from the initial part of the testimony of PW-4 Sanjay which is wholly exculpatory for the appellant with regard to his participation in the assault on the person of Kanchhid. Since the evidence of PW-9 Ramesh Chand and PW-14 Sheela rules out any participation whatsoever on the part of the appellant in the stabbing of Kanchhid by Babu (JCL), it cannot be held that the appellant had shared common intention in that part of the incident.

43. In order to invoke the principle of vicarious liability recognized by Section 34 IPC, it is essential that the criminal act (which may consists of a series of acts) is done by more than one person. The set of evidence, which deserves to be given preference in the case at hand, indicates the act of stabbing to be the handiwork only of Babu (JCL) and no act of commission or omission on the part of the appellant. On the contrary, it shows he to be a mere bystander at the time with Kanchhid received the stab wound.

44. The recovery of bat, used as a weapon of offence, at the instance of the appellant is of no consequence since it has nothing to do with the fatal assault on the person of Kanchhid. It, however, remains a significant piece of evidence corroborative of the prosecution story with regard to the injuries suffered by PW-4 Sanjay.

45. For the foregoing reasons, the conclusions reached by the learned trial judge with regard to the involvement of the appellant in the murder of Kanchhid cannot be sustained. The finding of guilty, conviction and the sentence awarded for offence under Section 302 IPC, thus, deserve to be set aside.

46. It is clear from the evidence, however, that the assault on the persons of PW-4 Sanjay and PW-7 Sukhbiri occurred in the wake of stabbing of Kanchhid by Babu (JCL). The evidence unmistakably shows that as soon as Kanchhid had been stabbed, PW-14 Sheela raised cries which evoked a response from members of his family including at least PW-2 Rahul, PW-4 Sanjay and PW-7 Sukhbiri. It reveals that when PW-4 Sanjay rushed towards his brother Kanchhid who was lying in the street with the stab wound, he was attacked by the three JCLs with active assistance of the appellant. In the melee that followed PW-4 Sanjay and PW-7 Sukhbiri suffered injuries at their hands. In this view, in a skirmish of such nature, some contradiction in the version of different witnesses is only natural and, therefore, no benefit on that account would deserve to be given. The evidence of PW-4 Sanjay and PW-7 Sukhbiri, corroborated by that of PW-2 Rahul, clearly suggests that the appellant had actively participated in this

assault using the bat as a weapon. This, thus, would attract the inference of common intention on his part.

47. For the foregoing reasons, the finding recorded by the learned trial judge about culpability of the appellant in causing hurt to PW-4 Sanjay is found to be properly reached. Though given the situs (head) of the lacerated wound suffered by PW-4 Sanjay at the hands of the appellant using bat as a weapon arguably could be treated as a hurt which would endanger life within the mischief of 8th clause of Section 320 IPC so as to be treated as “grievous hurt”, the State having not challenged the conviction simpliciter for the offence under Section 323/34 IPC, that part of the result of the trial may not be tinkered with by us in this appeal.

48. In the result, the appeal is partly allowed. The conviction and order on sentence for the offence under Section 302/34 IPC against the appellant is set aside. The conviction and order on sentence for the offence under Section 323/34 IPC for the injuries caused to PW-4 Sanjay and PW-7 Sukhbiri is maintained.

49. The appellant be informed of the result of the appeal and furnished with a copy of this judgment through Superintendent, Central Jail, Tihar.

(R.K.GAUBA)
JUDGE

(PRADEEP NANDRAJOG)
JUDGE

JANUARY 07, 2015
vld/mr/ik