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

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Date of Judgment: 28th July, 2017

+ CRL.A. 62/2017

RAHUL @ RAJENDER

..... Appellant

Through: Mr. Rakesh Sherawat, Mr. Sheen
Sherawat and Mr. Kamal Chaudhary,
Advocates

versus

THE STATE (GOVT OF NCT OF DELHI)

..... Respondent

Through: Ms. Radhika Kolluru, APP for the
State alongwith Inspector Ram
Sahay and SI Arvind Kumar, P.S.
Jaitpur.

+ CRL.A. 585/2017

VIPIN KUMAR

..... Appellant

Through: Mr. Chetan Lokur and Mr. Nitish
Chaudhary, Advocates

versus

STATE

..... Respondent

Through: Ms. Radhika Kolluru, APP for the
State alongwith Inspector Ram
Sahay and SI Arvind Kumar, P.S.
Jaitpur.

+ CRL.A. 693/2017

RAMAN KUMAR

..... Appellant

Through: Mr. Sumeet Verma, Advocate

versus

STATE

..... Respondent

Through: Ms. Radhika Kolluru, APP for the
State alongwith Inspector Ram
Sahay and SI Arvind Kumar, P.S.
Jaitpur.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MR. JUSTICE CHANDER SHEKHAR

G.S.SISTANI, J. (ORAL)

1. Three appeals (being CrI.A.Nos.62/2017, 585/2017 and 693/2017) have been filed under Section 374 sub-Section (2) of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.P.C. ') against the judgment of the Trial Court dated 02.12.2016 in Sessions Case No.1944/2016, FIR No.405/2012, Police Station Jaitpur by which all the three appellants have been convicted for the offence punishable under Section 302/34 of the Indian Penal Code (hereinafter referred to as 'IPC') and under Section 308/34 IPC and the order on sentence dated 05.12.2016, by virtue of which all the appellants have been sentenced to undergo imprisonment for life with a fine of Rs.5,000/-, in default of payment of fine to further undergo simple imprisonment for six months each for the offence punishable under Section 302 read with Section 34 of IPC. All the three appellants have been further sentenced to undergo rigorous imprisonment for a period of three years with a fine of Rs. 2,500/- each, in default of payment of fine to further undergo simple imprisonment for three months for the offence punishable under Section 308 read with Section 34 of IPC.
2. Since all the three appeals arise out of the common judgment and order on sentence, the same are being disposed of by a common judgment.
3. Before the rival submissions of learned counsel for the parties can be noticed, we deem it appropriate to state the case of the prosecution as noticed by the learned Trial Court, which is reproduced as under:

“1. On 25.11.12 at about 23:37:19 hours, W. Ct. Sarika Kumari (PW-11) received a call in Police Control Room from phone number 9999263672 regarding incident of stabbing at Gali No.A-1, Shakti Vihar, Meethapur, New Delhi. She recorded the said information and thereafter, forwarded the same to concerned authorities. She also filled up prescribed Form Ex. PW-11/A in this regard.

2. In the intervening night of 25-26.11.2012 at about 11:33 hours, Ct. Kuldeep (PW-12) also received a call from phone number 8750872204 about stabbing by 4-5 persons in a barat which was in front of house of Mahesh Awana, Ex-Counselor and one from offenders being over powered. He recorded the said information and forwarded the same to concerned operator. He filled up prescribed Form in this regard which is Ex. PW-12/A.

3. On 25.11.12, information was received at Police Station Jaitpur regarding quarrel vide DD No.40A and 41A. The said DDs were marked to Inspector Dharam Pal Kalra (PW-29) for necessary action. On receipt of said DDs, Inspector Dharam Pal Kalra (PW-29) alongwith SI Rajiv Ranjan, HC Matloob Ali (PW-20) and other staff went to the spot i.e. Gali No.1, Meethapur, New Delhi, where ASI Shailender Kumar (PW-21) and PCR staff were found present. Blood of injured was found scattered at the spot. They came to know that aquarrel had taken place in which two boys had sustained stab injury. They also came to know that injured was shifted to Samvedna Hospital, Om Enclave, Faridabad, Haryana. Thereafter, they went to Samvedna Hospital, where they came to know that Ravi was declared brought dead by the doctor. Body of deceased was shifted to AIIMS Mortuary through ASI Shailender Kumar (PW-21) and got it preserved.

4. On 26.11.12, HC Mahender Singh (PW-18) received message from Trauma Centre, AIIMS through telephone that Rajinder @ Raju son of Ramji Lal r/o House No.1001, B-Block, Sangam Vihar, Delhi aged 36 years was admitted in injured condition vide MLC No.341805/13 by his relatives, who got injured in quarrel which had taken place at School Road, Meethapur, New Delhi. He recorded the

said DD at serial No.5 in the DD Register vide Ex. PW-18/A. The said DD was sent to Inspector Dharam Pal Kalra (PW-29) through Ct. Rajender Singh.

5. Inspector Dharam Pal Kalra (PW-29) went to AIIMS Hospital, where injured Rajinder (PW-1) was found admitted in the hospital. He was declared fit for statement by the doctors. Inspector Dharam Pal Kalra (PW-29) recorded statement of injured vide Ex. PW- 1/A. Thereafter, they came back to the spot. He prepared rukka Ex. PW-29/B on the statement of Rajinder Kumar Ex. PW-1/A and handed over the same to Ct. Deepak (PW-23) for registration of FIR in the case. Ct. Deepak (PW-23) went to Police Station, got the FIR registered in the case and thereafter, came back to the spot and handed over copy of FIR and asal tehrir to the IO of the case. Inspector Dharam Pal Kalra (PW-29) called crime team for inspection at the spot. The Crime Team came, inspected the spot and thereafter, prepared Crime Report Ex. PW-4/A. He prepared site plan Ex. PW- 29/A at the instance of Gaurav (PW-5), relative of complainant Rajinder. Thereafter, he collected exhibits i.e. earth control with and without blood separately and sealed them in the plastic jar in the pullanda with the seal of DPK and seized the same vide Ex. PW-20/A. He seized marriage card Ex. PW-23/P-1 produced by Suresh Kumar (PW-7) vide Ex. PW-23/F.”

4. After the investigation was completed, charges under Section 302/307/34 of IPC were framed against all the appellants on 11.04.2013 to which they pleaded not guilty and claimed to be tried.
5. To bring home the guilt of the appellants, the prosecution examined as many as 29 witnesses. No evidence was led by the appellants in their defence. The statements of the appellants were recorded under Section 313 of Cr.P.C wherein they claimed to be innocent and alleged false implication.
6. Mr. Chetan Lokur, learned counsel for the appellant Vipin Kumar and Mr. Sumeet Verma, learned counsel for the appellant Raman Kumar submit that even as per the case of the prosecution, the quarrel had

erupted in the marriage pandal where the appellants and deceased had gone to attend the marriage. It is submitted that in this case there was no pre-meditation. A single injury was caused on the deceased and the appellants did not act in an unusual or cruel manner. Even otherwise, there is no evidence on record that the appellants had entered the marriage *pandal* with a knife. Additionally, counsels for the appellants submit that all the parties were in a happy state of affairs and, in fact, were drunk. In such a situation, the fight had erupted in the *pandal* in the spur of the moment and they were advised to leave the *pandal* so that the marriage ceremony would not be disturbed. It is on leaving the *pandal* and on account of a sudden quarrel that the incident had taken place.

7. Mr. Chetan Lokur, learned counsel for the appellant Vipin Kumar and Mr. Sumeet Verma, learned counsel for the appellant Raman Kumar, on instructions, submit that they do not press the appeals on merits and submit that the case of the appellants would fall under Section 304 Part II and only wish to contest the matter with regard to the quantum of sentence so awarded to the appellants.
8. Learned counsels submit that as far as offence under Section 308 IPC is concerned, since they have been addressing their arguments on the quantum of sentence, they would not address any argument on the charge so framed against them. Reliance is placed on the judgments in the case of ***Jagtar Singh. v State of Punjab***, reported at (1983) 2 SCC 342 and ***Ajay Bind v. State NCT of Delhi*** reported at 2017 SCC Online Del 9033.
9. Mr. Rakesh Sherawat, learned counsel for the appellant Rahul @ Rajender, however, submits that no case is made out against Rahul as

there is no evidence on record on the basis of which appellant Rahul could have been convicted.

10. *Per contra*, Ms. Radhika Kolluru, learned counsel for the State submits that in the present case, as per the testimony of PW1 Rajinder Kumar, three injuries were caused on the deceased, one injury was caused on the neck and the other injuries were on the vital parts of the body. She further submits that having regard to the weapon of offence, the Trial Court has rightly returned the finding and convicted the appellants.
11. Learned counsel for the State submits that the evidence produced on record clearly establishes the guilt of the appellants and the learned Trial Court has rightly convicted the appellants for the offence punishable under Section 302/308/34 of IPC, hence the impugned judgement does not call for any interference.
12. We have heard learned counsel for the parties, who have taken us through the evidence in the matter. We have also given our thoughtful consideration to the submissions, which have been made before us.
13. Prior to dealing with the rival contentions raised at the bar, we deem it appropriate to revisit the law on the evidentiary value of the injured witness.

Evidentiary value of an injured witness:

14. Undoubtedly, the testimony of injured witness cannot be brushed aside lightly. The injuries sustained by the injured witness at the time and place of occurrence, lends support to his testimony that he was present during the occurrence. The Courts have time and again emphasised that the deposition of an injured witness should be relied upon unless there are strong reasons for rejection of his evidence on

the basis of major contradictions and discrepancies therein. It is highly improbable that the injured witness will not want to let his actual assailant go unpunished merely to falsely implicate a third party for the commission of the offence.

15. We may notice a judgment of a co-ordinate bench of this Court, of which one of us (G. S. Sistani, J.) was a member in *Harender Singh vs. State of Delhi* reported at **2016 SCC Online Delhi 1368**, wherein the evidentiary value of testimony of injured witnesses was discussed. It was observed by this Court that the testimony of an injured witness is a highly corroborative piece of evidence. Unless highly compelling circumstances are established by the accused which casts a reasonable doubt over the statement of the injured witness, such statement can be safely relied upon by the Courts to convict the accused persons. (Also see *Vikas @ Lala v State (NCT of Delhi)* reported at **MANU/DE/0968/2016**)
16. PW1 Rajinder in his examination-in-chief deposed that on 25.11.2012 at about 11:00 pm, a fight erupted at a marriage ceremony of his cousin namely Kuldeep (PW-10). He deposed that some boys from the *Baraties* started quarrelling with each other. He along with Ravi (hereinafter referred to as 'deceased') tried to pacify those people who were quarrelling. PW1 identified all the appellants in Court and deposed that when they tried to separate them, the appellants started abusing him and caught hold of the deceased and started stabbing him. He further deposed that the appellant Raman stabbed him on his shoulder with a knife. He and the deceased were taken to Samvedna Hospital by his cousin Gaurav. PW1 was also accompanied to the hospital by his *mausi*, his mother and sister Sunita. The deceased was declared brought dead in Samvedna Hospital while he was shifted to

Trauma Centre, AIIMS. Police came there and recorded his statement which is Ex.PW1/A. He deposed that he was discharged from the hospital and returned to his house. He failed to identify the knife with which he was attacked. At that stage, learned APP wanted to ask a leading question from the witness which reads as under:

“It is true that I had disclosed to IO in my statement that it was accused Vipin who stabbed me with knife. It is true that after hearing commotion, my brother Sunil also reached at spot. It is true that knife shown by me today i.e. Ex.P-1 is same knife which by which I as well as deceased Ravi were stabbed by accused. Vol. that knife was similar as the knife of case property but I cannot say that it is same knife or not.”

17. PW1 Rajinder in his cross-examination stated that he could not see the assailants when the deceased was stabbed. As per the witness, the same assailant first hit him and then the deceased was attacked. He voluntarily stated that he saw the assailants immediately after they assaulted him as well as the deceased. PW1 further stated that he was discharged from the hospital in the morning of the same night.
18. The evidence of the eyewitness PW1 is sought to be corroborated by the evidence of PW5 Gaurav who reached the spot immediately after the appellants killed the deceased and was at a distance of about 10-15 feet. PW5 testified that on 25.11.2012, he had gone to attend the marriage function of his cousin Kuldeep. At about 10-10:30 pm, a boy told him that *baraties* were quarrelling. He along with Rajinder (PW1), deceased Ravi and Sunil (PW6) went there and saw that all the appellants were quarrelling with *gharaties* (persons from the side of bride). They tried to pacify the matter but the appellants had started quarrelling with them. Rajinder and the deceased took the appellants out of the *pandal* to pacify them while he was standing near his car

outside the said *pandal*. On hearing the noises of quarrel, he reached the spot and found that the appellant Vipin was having a knife in his hand and Rajinder was bleeding from his left shoulder. The deceased was lying in *naali* having lost his senses. The deceased was taken to the Samvedna hospital by Sunil while he took Rajinder to the hospital in his car. The deceased was declared as brought dead by the attending doctors. The deceased sustained injuries on his neck and other parts of the body. PW1 Rajinder was referred to Trauma Centre for further treatment. He further deposed that one of the assailants namely Raman was apprehended from the spot itself. PW5 correctly identified all the three appellants in Court, who were involved in the incident and also correctly identified the knife Ex.P-1 carried by the appellant Vipin at the time of incident.

19. Another witness, PW 6 Sunil @ Sonu was also present at the wedding. He deposed that he had not witnessed the incident of stabbing and on hearing the words '*chaku lag gaya chaku lag gaya*' he went outside the *pandaal* and found his brother Rajinder bleeding and also found the deceased lying in the *naali* and also helped him out. He deposed that the deceased had lost his senses and was bleeding profusely. The deceased was taken to Samvedna Hospital by him in a car while his brother Rajinder was taken to the hospital by Gaurav. As to the identification of the appellants in Court, PW6 turned hostile and did not support the case of prosecution.
20. In view of the evidence discussed in foregoing para 17 to 20, the presence and involvement of the appellants Vipin Kumar and Raman Kumar stands established. Both the appellants in furtherance of their common intention, inflicted injuries upon the deceased Ravi and Rajinder (PW1).

21. Besides above public witnesses, PW2 SI Hira Singh deposed that on 26.11.2012, he was posted as Duty Officer at PS Jaitpur. On that day, at about 9.20 AM he recorded FIR No. 405/12 and has proved the same as Ex.PW2/A. He also proved his endorsement on *rukka* as Ex.PW2/B. PW3 HC Hari Singh recorded DD No. 40A on 25.11.2012 at 11.39 PM and has proved the same as Ex.PW3/A. PW4 SI Krishan Kumar was posted as Incharge Crime Team; South East who reached the spot after the information was received on 26.11.2012 at about 2.00 AM. He inspected the spot and prepared a report which was proved by him as Ex.PW4/A.

Medical Evidence:

22. PW25 Dr. Akhilesh Raj, SR FMT AIIMS Hospital, New Delhi deposed that on 26.11.2012, he conducted post-mortem on the dead body of the deceased. His detailed report is Ex.PW25/A wherein he noted following external ante-mortem injury on the dead body of deceased.

“External Antemortem injuries: A stab wound (puncture) present (horizontal) over right lateral aspect of neck. It is spindle shape. It is 2.5 cm x 1.8 cm (length and width). The track is oblique, towards medial and downwards. It is through skin subcutaneous fascia, deep fascia, fat, muscles and vessels (carotid artery and juglar vein of right side) clotted blood of around 300 CC present. The time since death in this case was about 14-16 hours.”

23. PW25 Dr. Akhilesh Raj opined that the cause of death of deceased was shock due to haemorrhage caused by stab injury on neck which is sufficient to cause death in the ordinary course of nature.

24. We may note that PW1 Rajinder also sustained injuries during the commotion and was examined vide MLC No. 341805, dated

26.11.2012 at 6.58 AM. MLC was proved by PW28 Dr. Sanjeev Bhoi as Ex.PW28/A and reads as under:

*“Incised wound (incised wound 2x1x1 cm over neck)
Incised wound (incised wound 2x2x2 cm below RT
shoulder)
Incised wound (incised wound 2x2x2 cm over RT shoulder)
Stab (Stab wound 3x2x4 cm over LT thigh)
Abrasion (minor abrasion over LT knee)”*

25. As per MLC (Ex.PW28/A), the nature of injuries sustained by PW1 as grievous blunt. PW1 was discharged from the hospital on the same day of the incident. So far as conviction of the appellants Vipin Kumar and Raman Kumar under Section 308 read with Section 34 of IPC is concerned. We concur with the findings of the learned Trial Court and upheld the conviction recorded under Section 308/34 of IPC.

FSL Results:

26. PW24 Imrana, SSO (Biology), FSL Rohini, examined the exhibits of the case. Her detailed report is Ex. PW-24/A and Serological report is Ex. PW-24/B. As per the report, blood was found on the clothes of the deceased and injured Rajinder (PW1) and the blood sample taken in gauze of deceased and injured Rajinder has matched with the blood found on the knife which was recovered at the instance of the appellant Vipin.
27. This brings us to the moot question whether the present case is one of deliberate or intentional killing resulting in the injuries, which would be a case of murder under Section 302 of IPC; or, unintentional. Further, if it is a case of unintentional and not a premeditated act and had arisen out of sudden quarrel, on the spur of the moment whether it

falls under one of the special exceptions carved out under Section 300 of IPC?

28. In the case of ***Jagtar Singh v. State of Punjab*** reported at **1983 (2) SCC 342**, in a trivial quarrel the appellant wielded a weapon like a knife and landed a blow on the chest of the deceased. The Hon'ble Supreme Court observed that the quarrel had taken place in the spur of the moment. There was exchange of abuses. At that time, the appellant gave a blow with a knife which landed on the chest of the deceased and therefore, it was permissible to draw an inference that the appellant could be imputed with a knowledge that he was likely to cause an injury which was likely to cause death but since there was no premeditation, no intention could be imputed to him to cause death. The Apex Court, therefore, convicted the appellant under Section 304 Part II of the Indian Penal Code instead of Section 302 of the Indian Penal Code and sentenced him to suffer rigorous imprisonment for a period of five years.
29. We may usefully refer to a judgment rendered by the Hon'ble Supreme Court in the case of ***Suresh Kumar v. The State of Himachal Pradesh***, reported at **(2008) 13 SCC 459**, wherein a fight erupted at a marriage ceremony and the appellants took out a knife and stabbed the deceased. The Hon'ble Supreme Court discussed the application of Exception IV of Section 300 of IPC and modified the conviction of the appellant from Section 300 to Section 304 Part I of IPC and sentenced to 10 years imprisonment. Relevant para 16 and 17 read as under:

“16.....Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon an

equal footing. A 'sudden fight' implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor could in such cases the whole blame be placed on one side. For if it were so, the exception more appropriately applicable would be Exception 1. There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. The help of Exception 4 can be invoked if death is caused (a) without premeditation, (b) in a sudden fight, (c) without the offenders having taken undue advantage or acted in a cruel or unusual manner, and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the 'fight' occurring in Exception 4 to Section 300 IPC is not defined in IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties had worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in a cruel or unusual manner. The expression 'undue advantage' as used in the provision means 'unfair advantage'." [Ed.: As observed in Dhirajbhai Gorakhbhai Nayak v. State of Gujarat, (2003) 9 SCC 322 at pp. 327-28, paras 10-11.]

17. Where the offender takes undue advantage or has acted in a cruel or unusual manner, the benefit of Exception 4 cannot be given to him. If the weapon used or the manner of

attack by the assailant is out of all proportion, that circumstance must be taken into consideration to decide whether undue advantage has been taken. In **Kikar Singh v. State of Rajasthan** (1993) 4 SCC 238, it was held that if the accused used deadly weapons against the unarmed man and struck a blow on the head it must be held that giving the blows with the knowledge that they were likely to cause death, he had taken undue advantage.

(Emphasis Supplied)

30. In a recent case of *Ajay bind v. State NCT of Delhi*, reported at **2017 SCC Online Del 9033**, while dealing with a matter wherein a sudden quarrel ensued between the appellants and the deceased's family which resulted in the death of the deceased by fatal blow to his head and injuries were also sustained by his wife. This Court modified the conviction of appellants from Section 302 to Section 304 part II by giving them the benefit of Exception IV of Section 300 IPC and sentenced them to rigorous imprisonment for a period of five years. Relevant para 59 and 63 read as under:

"59. The evidence extracted above shows that the weapons were not carried by the appellants but were picked up from the spot. The acts were in the course of a sudden quarrel and the incident occurred by chance without any pre-meditation. There is no evidence at all of previous enmity. On the contrary, the deceased was a stranger to the appellants who was visiting the matrimonial home of his daughter in the vicinity where the quarrel took place. The incident was a result of the appellants getting provoked and in a heat of passion.

63. Thus tempers of the appellants were already running high. The evidence of Rampal (PW-6) is that the appellants were quarrelling under the influence of alcohol. The intervention by the deceased to loudly command the appellants to keep quiet resulted in the attention and ill temper becoming directed towards the deceased. It was in this atmosphere of heightened temper that Ajay Bind picked

up the hammer lying at the spot. The other two picked up the danda and the saria lying there itself. None of these are dangerous weapons but ordinary tools lying on the spot which came to be used as weapons. Clearly, the evidence establishes that there was no pre-meditation and that the violence was a result of sudden provocation in an ongoing fight between the appellants from a stranger (the deceased). ”

(Emphasis Supplied)

31. In another recent case of **Anil @ Hunny vs. State of NCT of Delhi**, reported at **2017 SCC Online Del 8582**, another Division Bench of this Court, of which one of us (G. S. Sistani, J.) was also a member, modified the order of conviction of the appellant Anil from Section 302 of IPC to under Section 304 Part I of IPC wherein there were two stab injuries sustained by the deceased and out of the two, only one injury was sufficient to cause death. Similarly in the case of **Sanjiv Kumar @ Kalia vs. State** reported at **2017 SCC Online Del 8893**, this Court modified the conviction of the appellants from Section 302 of IPC to under Section 304 Part I of IPC wherein there were two fatal blows given to the deceased on the abdomen of the deceased with a knife.
32. The present appeals are to be decided on the touchstone of the law laid down by the Hon'ble Supreme Court and reiterated by this Court in the foregoing paras 30 to 33. Admittedly, the fact that the appellants gave a single fatal blow with a knife to the deceased Ravi Kumar which landed on his neck and this injury resulted in death of Ravi Kumar is not open to dispute and not questioned before us. After analysing the evidence on record, it is evidently clear that the occurrence has the features of an incident in which the injuries are inflicted in a sudden fight without pre-meditation in the heat of passion upon a sudden

quarrel within the contemplation of Exception 4 to Section 300 of IPC, which takes the case out of the purview of murder.

33. As defined in the Exception 4, there was no premeditation on the part of the appellants; the appellants were not armed prior to the incident and only picked a knife from the spot. There is no evidence that the appellants made special preparation for assaulting the deceased with the intent to kill him. There is no dispute that the appellants assaulted deceased in such a manner that the deceased suffered grievous injuries, but considering the fact that the appellants did not act in a cruel or unusual manner, did not take undue advantage. The medical evidence further establishes there was only single injury sustained by the deceased on the neck of the deceased which was opined as sufficient to cause death in the ordinary course of nature.
34. Applying the law to the facts and circumstances of the present case, we are persuaded to accept the alternative limb of submission advanced by the learned counsel for the appellants Vipin Kumar and Raman Kumar that the present case would fall within the ambit of Section 304 Part I of IPC. We find force in the argument made by the counsels for the appellants that the present incident was resulted due to a quarrel which had erupted in the marriage *pandal* on the spur of the moment where the appellants Vipin Kumar and Raman Kumar alongwith the deceased had gone to attend the marriage. There was no premeditation on the part of the appellants Vipin Kumar and Raman Kumar and only single injury was caused to the deceased. There was no evidence that the appellants had entered the marriage *pandal* with a knife. All the parties were in a happy state of affairs and, in fact, were drunk. This shows that the appellants Vipin Kumar and Raman Kumar did not have the requisite intention to kill the deceased and the

incident had happened on the spur of moment which was ensued in a scuffle during which there was hot exchange of words between the appellants Vipin Kumar, Raman Kumar and the deceased. The ends of justice would be met if we modify the sentence awarded to the appellants Vipin Kumar and Raman Kumar and sentence them to undergo rigorous imprisonment for a period of 6 years.

35. So far as the conviction of the appellant Rahul @ Rajender is concerned. There is no evidence against the appellant Rahul @ Rajender. The testimonies of the prosecution witnesses available on record have not ascribed any role to him in the commission of the charged offence. Moreover, the Trial Court did not discuss the role of the appellant Rahul in the impugned judgment which is challenged before us. Therefore, the prosecution has not been able to prove its case against the appellant Rahul @ Rajender for the offence punishable under Section 302/308 read with Section 34 of IPC. No cogent evidence was produced by the prosecution to prove his involvement in commission of the crime. We are of the opinion that his conviction under Section 302/308 read with Section 34 of IPC is not sustainable in the eyes of law and the benefit of doubt is to be given to the appellant Rahul. Accordingly, the appellant Rahul is hereby acquitted of the charges levelled against him under Section 302/308/34 of IPC. Our view is further fortified by the following judgment passed by this Court.

36. In the case of ***Haider Ali vs. State*** reported at ***2015 SCC Online Del 12234***, another co-ordinate bench of this Court discussed the principle of joint liability enshrined under Section 34 of IPC and set aside the conviction of the appellant Haider Ali as there was no evidence with regard to sharing of common intention with the main accused who

gave the knife blows to the deceased. It was observed by the Court that mere presence of the appellant Haider Ali at the earlier grapple in which no sharp weapon was used or even displayed would not result in drawing the inference that he had shared common intention or that the act of stabbing was in furtherance of common intention. Relevant para 8, 12 and 15 read as under:

“8.....Use of knife and inflicting of blows was all of a sudden and out of the blue in which the perpetrator who had given the blows had taken out and used the knife. The other person i.e. the appellant Haider Ali, in spite of the earlier quarrel or grapple had distanced himself and was not a participant, though present at the spot. Shanti-the deceased, we also record, was not involved in the grapple with the appellant, Dinesh and Lal Chand (PW-8).

12. Reference on the said aspect can be made to Lal Chand v. Emperor; AIR 1931 Lah 523, wherein, it has been observed:

“Section 34 laying down the constructive and joint liability for acts done in furtherance of common intention has no application to acts committed in the course of sudden quarrel without any common intention amongst the accused.”

15. Section 34 IPC has been enacted on the principal of joint liability in the doing of a criminal act. The section is only a rule of evidence and does not create a substantive offence. The distinctive feature of the section is the element of participation in action. The liability of one person for an offence committed by another in the course of criminal act perpetrated by several persons arises under Section 34 if such criminal act is done in “furtherance of common intention” of the persons who joins in committing the crime. Direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the circumstances appearing from the proved facts of the case and the proved circumstances. In order to bring home the charge of common intention, the prosecution has to

establish by evidence, whether direct or circumstantial, that there was plan or meeting of minds of all the accused persons to commit the offence for which they are charged with the aid of Section 34, be if pre-arranged or on the spur of the moment, but it must necessarily be before the commission of the crime. The true precept of the Section is that if two or more persons intentionally do an act jointly, the position in law is just the same as if each of them has done it individually by himself. As observed in **Ashok Kumar v. State of Punjab** reported in (1977) 1 SCC 746 the existence of a common intention amongst the participants in a crime is the essential elements for application of this section. It is not necessary that the acts of the several persons charged with commission of an offence jointly must be the same or identically similar. The acts may be different in character, but must have been actuated by one and the same common intention in order to attract the provision. The Section does not say “the common intentions of all” nor does it say “an intention common to all”. Under the provisions of Section 34 the essence of the liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal “act” in furtherance of such intention.”

(Emphasis Supplied)

37. Applying the aforesaid dictum in the facts and circumstances of the present case, there was no common intention on the part of the appellant Rahul to commit the alleged offence or the common intention shared at the spot during the course of commission of the said offence. In the absence of evidence against the appellant Rahul, we are of the considered view that he should be released forthwith if not involved in any other case. Accordingly, there is no evidence which inspires confidence of this Court to convict him under Section 302/308 read with Section 34 of IPC.
38. Consequently, CrI.A.No.62/2017 is allowed and the appellant Rahul @ Rajender is acquitted of all charges and be released, if not wanted

in any other case. Crl.A.Nos. 585/2017 and 693/2017 are allowed in part, the conviction and order on sentence recorded by the Trial Court against the appellants Vipin Kumar and Raman Kumar is modified from Section 302 to Section 304 Part I of IPC and the appellants Vipin Kumar and Raman Kumar are sentenced to undergo rigorous imprisonment for a period of 6 years.

39. The appeals stand disposed of.
40. The fine imposed upon the appellants and the default sentence awarded to them shall remain unaltered.
41. The copy of this judgment also be sent to the Superintendent-Central Jail, Tihar for updating the jail records.
42. Trial Court record be sent back along with a copy of this judgment.

CRL.M.(B).996/2017 in CRL.A.585/2017
CRL.M.(B).1266/2017 in CRL.A.693/2017

43. In view of the above, the applications are dismissed as not pressed.

G. S. SISTANI, J.

CHANDER SHEKHAR, J.

JULY 28, 2017

//pst