

\$~18 and 19

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

Date of Judgment: 30th May, 2017

+ **CRL.A. 567/2012**

SANJEEV KUMAR @ KALIA

..... Appellant

Through: Mr. Pramod Kumar Dubey, Adv.

Versus

STATE

..... Respondent

Through: Ms. Radhika and Ms. Aasha

Tiwari, APP for the State

Inspector Surendra Singh,
ATO/Kotwali with SI Rakesh
(Kotwali)

+ **CRL.A. 568/2012**

RAJESH @ RAJESH RICKSHEWALA

..... Appellant

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

Versus

STATE

..... Respondent

Through: Ms. Radhika and Ms. Aasha

Tiwari, APP for the State

Inspector Surendra Singh,
ATO/Kotwali with SI Rakesh
(Kotwali)

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE REKHA PALLI

G.S.SISTANI, J. (ORAL)

1. The present appeals have been filed under Section 374 (2) of the Code of Criminal Procedure against the judgment dated 08.12.2011 and order on sentence dated 12.12.2011 by which both the

appellants have been convicted for the offence punishable under Section 302/34 of the Indian Penal Code (hereinafter referred to as 'IPC'). Additionally, the appellant Sanjeev Kumar @ Kalia has also been convicted for the offence punishable under Section 27 of the Arms Act. Both the appellants have been sentenced to imprisonment for life with a fine of Rs.10,000/- each and in default of payment of fine, to further undergo simple imprisonment for a period of six months.

2. At this stage, we may note that Vishal Kumar @ Rajesh Totla, co-accused in the present case, expired during the pendency of the appeal. Accordingly, the appeal Crl. A. 566/2012 stands abated in view of the order dated 12.05.2017.
3. At the outset, Mr. Dubey, learned counsel for the appellant Sanjeev @ Kalia submits that he has instructions not to press the appeal on the point of conviction. However, he submits that no case under Section 302 of IPC is made out. At best, the trial Court could have convicted the appellant for the offence punishable under Section 304 Part I of IPC as there was no pre-meditation. The appellant did not act in a cruel or unusual manner. There is no evidence on record to suggest that the appellant had carried a knife with him to stab the deceased. Mr. Dubey has strongly urged before this Court that the appellant has been in incarceration for a period of about 9 years including the remission earned by him and prays that the appellant be released on the period already undergone by him.
4. The brief facts of the case are that on 09.02.2010, at about 11-11:30 PM, PW3 Raju woke up after hearing the noise of abuses and saw that in front of the fountain in Chandni Chowk, there was a hot altercation and exchange of abuses taking place between one person of long height (deceased/identity unknown) and the

appellants and Vishal (co-accused). The appellant Sanjeev told his companions Vishal and Rajesh that the deceased had beaten him alongwith his companion namely Paua @ Bambia. Thereafter, the appellants started beating the deceased, who was abusing the appellants. The appellant Rajesh Thakur and co-accused Vishal @ Totla caught hold of the deceased while the appellant Sanjeev @ Kalia took out a knife from his pocket and gave knife blow on the stomach of the deceased. The intestines of the deceased came out from the abdomen which resulted in his death. Charge under Section 302 read with Section 34 of IPC was framed against the appellant Sanjeev Kumar @ Kalia, Vishal Kumar @ Rajesh Totla and Rajesh @ Rajesh Rickshewala. Additionally, a charge for the offence punishable under Section 25/27 of Arms Act was framed against the appellant Sanjeev Kumar @ Kalia.

5. To bring home the guilt of the appellants, the prosecution examined as many as 20 witnesses. No evidence was produced by the appellants in their defence. Statement of the appellants were recorded under Section 313 of the Code of Criminal Procedure wherein they have stated that they have been falsely implicated in the present case and claimed to be tried.
6. The learned counsels for the appellants have jointly contended that the impugned judgment passed by the trial Court is bad in law and is thus not sustainable. It is also contended that the judgment of the trial Court is based on conjectures and surmises and not supported from the facts and circumstances of the case. The prosecution has not been able to prove his case beyond reasonable doubt. Counsels contend that the deposition made by the material witnesses being PW-3, 7 and 17 are inconsistent, contrary and suffers from glaring discrepancies which would shatter the case made out against the

appellants. Also, the testimonies of the prosecution are not of sterling quality.

7. Learned counsels also contend that the trial Court has not appropriately appreciated the law laid down in the case of *Virsa Singh vs. State of Punjab*, reported in *AIR 1958 SCR 1495*, to the peculiar facts of the instant case and thus the conclusion drawn by the learned Court that the appellants were liable to be sentenced under Section 302 of IPC is highly erroneous and has resulted in grave miscarriage of justice.
8. Learned counsels for the appellants further contend that the testimony of PW-7 is not reliable as in his examination-in-chief, he has admitted that he is a smack addict and has a disease to forget things. There are serious contradictions in the testimony of this witness. Similar arguments are raised by the learned counsels for the appellants with respect to the testimony of PW-3 Raju who has also admitted in his cross-examination that he is a smack addict. Both counsels have also strongly urged before this Court that PW-3, 7 and 17 are planted witnesses who have deposed under the pressure of the police to save their skin as they were drug addicts. The counsel submits that PW-17 has not supported the case of the prosecution. It has also been contended that upon scrutiny of the testimony of PWs 3 & 7 and also of the FSL report, it is evident that the deceased was under the influence of alcohol and he was abusing appellant Sanjeev which led to sudden and grave provocation and in the heat of the moment, the deceased suffered two stab injuries.
9. Mr. Dubey, learned counsel for the appellant Sanjeev has submitted that a careful analysis of the testimony of the witnesses would show that there was no prior concert between the appellant

Sanjeev or any pre-arranged plan leading to the commission of the alleged offence. The act, if any, was not in furtherance of any common intention.

10. Mr. Dubey further submits that although he has not challenged the order of conviction but the recovery of the weapon at the instance of the appellant Sanjeev is highly doubtful on various counts. *Firstly*, the place from where the weapon was recovered i.e. Metro Station Gate No.1, Chandni Chowk was accessible to public persons and anybody could have thrown the knife there or anybody could have picked up the knife from there in case if it was thrown there. *Secondly*, he submits while relying on the cross-examination of the doctor, that there is a clear cut finding that the injuries could not have been caused by the knife sought to have been recovered at the instance of the appellant Sanjeev which would leave no room for doubt that the knife was planted.
11. Mr. Chetan Lokur, learned counsel for the appellant Rajesh has submitted that the appellant has been falsely implicated in this case as there is no evidence on record by which the trial Court could have passed the order of conviction against him.
12. Mr. Lokur has contended that on the fateful night, the appellant Rajesh was standing at a distance from the spot. There is no evidence on record that he had abused the deceased and his presence being a rikshaw-puller was merely by-chance. Reliance is placed on the testimony of PW-3 to show that according to the testimony of this witness, the appellant Rajesh was standing at a distance. Accordingly, this appellant had no role to play in the alleged incident.
13. Learned counsel for the appellant Rajesh has also submitted that no motive of the crime was established in respect to the alleged

offence, as a material witness, namely, Bomaiyya was not examined by the prosecution and in the absence of any direct evidence, the findings of the learned trial Court on the motive is perverse. Counsel contends that the testimonies of PWs-3 and 7 do not establish any motive behind the alleged offence and have failed to give any particulars i.e. time, date and the persons present at the time of the incident, if any, such incident took place in their presence. Any casual statement made by them cannot be relied upon by the trial Court.

14. Mr. Lokur has further contended that the clothes of the appellant Rajesh was not seized as it did not contain any blood stains which indicates that if he had caught hold of the deceased, in all probabilities drops of blood would have fallen on his clothes.
15. To substantiate his argument that there was no common intention to commit the alleged offence, learned counsel for the appellant Rajesh has relied upon the case of ***Kripal v. State of U.P.*** reported at ***1954 AIR (SC) 706***, wherein the Hon'ble Supreme Court convicted two accused persons under Section 326 of IPC while the third accused was convicted under Section 326/302 of IPC. The relevant para 6 explaining the role played by them read as under:

“6. The question, however, remains as to which of these three appellants are guilty and what offence has been committed by each. The learned Sessions Judge while holding all the three appellants responsible for causing the death of Jiraj was of the opinion that they could be found guilty only under Section 304 IPC taken with Section 34 IPC on the ground that there is no evidence of any pre-concerted or predetermined plan to kill the deceased Jiraj and that the blows were inflicted by the appellants in the course of a sudden fight in the heat of passion without having taken undue advantage or acted in a cruel or unusual manner.

The learned Judges of the High Court quite rightly pointed out that a preconcert in the sense of a distinct

previous plan is not necessary to be proved. The common intention to bring about a particular result may well develop on the spot as between a number of persons, with reference to the fact of the case and circumstances of the situation. Whether in a proved situation all the individuals concerned therein have developed only simultaneous and independent intentions or whether a simultaneous consensus of their minds to bring about a particular result can be said to have been developed and thereby intended by all of them, is a question that has to be determined on the facts.

....

7. On this evidence there can be no doubt that all the three appellants had the common intention of beating Man Singh and Sher Singh and that they did beat them with the several weapons in their hands. But it is specifically in evidence that though two out of them viz. Bhopal and Kripal had spears in their hands, they beat them with the handles thereof and that Sheoraj beat with the lathi in his hands. It is clear, therefore, that the common intention that can be ascribed to the three appellants so far as these two persons, viz. Man Singh and Sher Singh are concerned is a common intention to beat them. The injuries actually received by both of them are, as found from the Medical certificates, only simple.

.....

The lathi blow said to have been given by Sheoraj has apparently produced no visible injury. Now having regard to the sequence of the assaults, the parts of the body on which the assaults by Kripal and Sheoraj were aimed and the actual result of these assaults as above indicated, it is difficult to attribute to either of them any intention to kill the deceased. Nor is it reasonable to suppose that on the spur of the moment the common intention of the three appellants which was at first merely to beat the two labourers developed suddenly into a common intention to kill Jiraj when he intervened in the altercation. We are, therefore, unable to uphold the view taken by the High Court that any common intention to kill the deceased can be attributed to the three appellants. Therefore, the only common intention that can be attributed to all the three appellants insofar as the assault on Jiraj is concerned is the common intention to beat Jiraj also with the weapons in

their hands, which were likely to produce grievous injuries. In this view, therefore, all the three would be guilty in respect of their assault on Jiraj for an offence under Section 326 IPC while Bhopal alone would be guilty in respect of the offence under Section 302 IPC. It follows from this that the convictions of both Kripal and Sheoraj under Section 302 IPC must be set aside but that of Bhopal has to be maintained.”

(Emphasis Supplied)

16. In the case of **Ramashish Yadav vs. State of Bihar** reported at (1999) 8 SCC 555, the evidence against the two accused persons were to catch hold of the deceased. The Hon'ble Supreme Court while convicting the accused persons under Section 324/34 of IPC held as under:

“3. The distinct feature of Section 34 is the element of participation in action. The common intention implies acting in concert, existence of a pre-arranged plan which is to be proved either from conduct or from circumstances or from any incriminating facts. It requires a pre-arranged plan and it presupposes prior concert. Therefore, there must be prior meeting of minds. The prior concert or meeting of minds may be determined from the conduct of the offenders unfolding itself during the course of action and the declaration made by them just before mounting the attack. It can also be developed at the spur of the moment but there must be pre-arrangement or premeditated concert. This being the requirement of law for applicability of Section 34 IPC, from the mere fact that accused Ram Pravesh Yadav and Ramanand Yadav came and caught hold of Tapeshwar, whereafter Samundar Yadav and SheoLayak Yadav came with gandasa in their hands and gave blows by means of gandasa, it cannot be said that the accused Ram Pravesh Yadav and Ramanand Yadav shared the common intention with accused Samundar Yadav and SheoLayak Yadav. Consequently, accused Ram Pravesh Yadav and Ramanand Yadav cannot be held guilty of the charge under Sections 302/34 IPC but accused Samundar Yadav and Sheo Layak Yadav did commit the offence under Sections 302/34, having assaulted deceased Tapeshwar on his head by means of gandasa on account of which Tapeshwar

died. The accused Ram Pravesh Yadav and Ramanand Yadav are, therefore, acquitted of the charges levelled against them and they be set at liberty forthwith.”

(Emphasis Supplied)

17. In the case of **Narender & Another vs. State** reported at **208 (2014) DLT 790 (DB)**, another division bench of this Court dealt with the similar matter and held as under:

“20. In the present case, as far as Appellant 1 is concerned, there is nothing proved on record by the prosecution that he had any common intention to kill the deceased or that he had any previous knowledge of the fact that the act of the accused Guddu will cause murder of the deceased. Merely because the accused Narender was holding deceased by hands, it cannot be concluded that he was having a common intention with Appellant 2 to cause death of the deceased, although the intention could be to cause the grievous hurt as he was assisting the accused in hitting the deceased with the help of a glass tumbler.

....

23. In Tirthi Lal v. State of Punjab [1998 SCC OnLine P&H 601] wherein in a sudden fight hot words were exchanged between the accused and deceased and without any premeditation, co-accused inflicted single knife blow on the body of the deceased, while appellant caught hold of the hands of the deceased. The Court held that the appellant cannot be said to have shared common intention to cause death of the deceased and accordingly he was convicted under Section 326 read with Section 34 IPC.”

(Emphasis Supplied)

18. The counsel for the appellant Rajesh has further relied upon a recent case of **Sandeep Kumar vs. Govt. Of NCT of Delhi** in **Crl. A. 1751/2014**, decided on 28.04.2016, another Division Bench of this Court, of which one of us (G. S. Sistani, J.) was also a member, acquitted three appellants under Section 34 of IPC for the reason that from the evidence on record, the prosecution had failed

to establish that the appellants were having any prior meeting of mind to kill the deceased or developed such intention on the spur of the moment. The relevant paras 43 and 44 read as under:

“43. While in the case of the appellant, Mohd. Ahad @ Gopal the testimonies of PW-1 and PW-2 would show that this intention to kill developed on the spot when Mohd. Ahad @ Gopal exhorted 'goli maro dekhte kya ho', upon which the accused, Suresh (PO) fired towards the deceased with his katta. Did this common intention developed with the other three appellants? In our view, the answer is in the negative for the reason that despite the fact that they were armed with a knife, gupti and an iron rod, none of the three weapons were used nor did they attack the deceased with the said weapons. If the intention was to kill, being armed they could have used the weapons to attack the deceased but they did not do so. To say that the appellants had reached the spot with a predetermined mind and there was pre-mediation, as argued by learned counsel for the State to kill is not borne out from the evidence. The intention was only with regard to stealing of the pigs. No doubt, there was participation in the action, but that participation in action was in furtherance of the intention to steal the pigs. The meeting of minds was also with the intention of stealing the pigs. But on the spur of the moment at the scene of the crime, the common intention developed between Suresh (PO) and Mohd. Ahad @ Gopal, which is evident from the fact that Mohd. Ahad @Gopal exhorted and Suresh fired.

44. As far as the other appellants are concerned, it cannot be said that the intention to kill was pre-arranged or developed on the spur of the moment. It cannot be said that barring Suresh and Mohd. Ahad @ Gopal, the other appellants had any common intention, which would make them liable to be punished under Section 34 of the Indian Penal Code.”

19. Additionally, the counsel for the appellant Rajesh has relied upon the case of ***Veeran and Ors. vs. State of M.P.*** reported at (2011) 11 SCC 367 (paragraphs 7, 10, 11, 12, 15 and 18); ***Raghubir chand vs. State of Punjab*** reported at (2013) 12 SCC 294, (paragraphs 10-

13).

20. Per contra, Ms. Radhika and Ms. Aashaa Tiwari, learned counsel appearing on behalf of the State submit that the State has been able to prove its case beyond any shadow of doubt. The contradictions, if any, do not go to the root of the matter. Having regard to the social status of the three witnesses who were rickshaw pullers and drug addicts, it cannot be expected that their evidence would be meticulous. The counsels submit that the presence of the appellants stand established. PWs 3 & 7 have categorically identified both the appellants. They have also identified appellant Sanjeev as the person who had stabbed the deceased. PWs 3 & 7 in their examination-in-chief have categorically stated that the appellant Rajesh had caught hold of the deceased while appellant Sanjeev had stabbed him. Merely because their testimonies are shifting in nature that by itself cannot wipe out the truth with regard to the presence of the appellant and the fact that the appellant Sanjeev had caused two stab injuries on the deceased which resulted in his death.
21. Ms. Tiwari and Ms. Radhika also submit that the doctor in his cross-examination has also opined that death could have been caused by the use of a weapon similar to the weapon which was recovered. It is submitted that in view of the ocular evidence on record of PWs 3 & 7, there is no room for doubt that the deceased was stabbed by the appellant Sanjeev. There was meeting of minds on the spot after he was caught hold by the appellant Rajesh. Learned counsels for the State submit that in case the clothes were not seized, this by itself cannot be a ground to acquit the appellants. To say that PWs 3 & 7 who were present but did not try and save the deceased or they ran away from the spot is not an

unusual conduct. Since three persons were together and one person was armed with a knife, both PWs 3 & 7 fled from the spot and PW 3 had himself gone to the police station and informed about the incident.

22. Learned counsel further submit that there was no reason for these witnesses to falsely implicate the appellants as no enmity has been pointed out in the matter. To substantiate their arguments, learned counsels for the State have relied upon the judgments in the case of ***Bhabha Nanda Sarma and Others. vs. State of Assam*** reported at (1977) 4 SCC 396 (paragraphs 4 and 6) and also ***Suresh and Another vs. State of U.P.*** reported at (2001) 3 SCC 673 (paragraphs 37 - 41)
23. We have heard learned counsels for the parties and considered their rival submissions, carefully examined the testimonies of the witnesses on record and the impugned judgment rendered by the trial Court. Before the submissions of learned counsel for the parties are considered, we deem it appropriate to discuss the testimonies of some of the material witnesses including PWs 3, 7 and 17.
24. PW3 Raju @ Kacchua deposed in his examination-in-chief that on 09.02.10 at about 11.00/11.30 PM he heard the noise of abuses. He woke up and saw that in front of the fountain, hot words and abusing was taking place between one person of long height (deceased/whose identity was unknown) and the appellants. He knew the appellants very well as they also used to live in Chandni Chowk. The appellant Sanjeev told his companions Vishal and Rajesh that the deceased had beaten him alongwith his companion namely Paua @ Bambia. Then, the appellants started beating the deceased, who, in turn, was abusing the appellants. Vishal @ Totla

and the appellant Rajesh Thakur caught hold of the deceased. Appellant Sanjeev @ Kalia took out a knife from his pocket and gave a knife blow on the stomach of the deceased. The intestines of the deceased came out from the abdomen which resulted in his death. All the persons fled from the spot. One Sarvesh @ Time Pass (PW7) was also with him and he had also seen the incident. Sarvesh also fled away from the spot. On 10.02.10 at about 11.00 / 12.00 noon he went to the Police Station where the police recorded his statement and he also identified the dead body of the deceased when the photographs were shown to him. He deposed that the two knife blows were given on the stomach of the deceased by the appellants.

25. PW-3 has further deposed that on 13.02.10 police brought Vishal and the appellant Sanjeev @ Kalia at Phawara Chowk, Chandni Chowk, where he identified them and stated to the police that those are the same persons, who alongwith one Rajesh had committed the said crime. Thereafter, on 22.02.10, the police brought appellant Rajesh on the spot, at Phawara Chowk, Chandni Chowk. PW-3 identified him as the same person who alongwith his two companions had beaten one person, who died at the spot on 09.02.10. The police recorded his statement in this regard. He could not identify the knife, which was used by the appellants, as he could not see the knife properly, but he stated that it was a buttondar knife.
26. In his cross-examination, PW-3 stated that he is a drug addict and cannot remember things sometime. He further stated that on the fateful night he was sleeping at his usual place. He denied that he did not see anything. He woke up when he heard the cry but did not hear the words spoken by the appellants and the deceased as he

was not very near to them. The shop of Ghantewala is situated at the distance of about 15 ft. from the place, where he was sleeping. He did not know the deceased prior to the occurrence. The appellants were calling the deceased by the name of Lambu but he was looking like a Khan (Muslim). He denied that the distance between the place of his sleeping and place of occurrence is very far and noise cannot be heard from such a distance; further denied that he does have any kind of enmity with the appellants. He stated that the appellants did not indulge in the job of collection of garbage. He also denied that the co-accused Vishal did not catch hold of the deceased. The deceased was under the influence of liquor and was in standing position, when he was caught by the appellants. When the knife blows were given to the deceased, appellant Rajesh Thakur was standing near to him. He has perfect vision and saw the appellant clearly. The incident took place under the mercury light. He witnessed the incident from the distance of 10/15 ft. PW3 reached the spot within 2/3 minutes. He denied that PW7 Sarvesh was not sleeping with him on that day; also denied that police tutored him to depose in the Court; further denied that police pressurised and had beaten him for deposing in the Court; denied that there is no mercury light on the spot. PW3 stated that apart from him, Sarvesh and one another person had also witnessed the incident. PW3 stated that the deceased was caught hold by the co-accused Vishal and the appellant Rajesh was standing at a distance. He further reiterated that the appellant Rajesh Thakur was standing at a distance of 2/3 ft from the deceased. The latter part of the cross-examination was contrary to the earlier statement made by PW3 wherein it was stated that that his statement got recorded by the police wherein he admitted that the co-accused Vishal @

- Totla and the appellant Rajesh Thakur caught hold of the deceased.
27. PW7 Sarvesh, another eye witness to the incident, deposed in his examination-in-chief that on 09.10.10, he was sleeping near Phuwara Chowk. At about 11.00 PM he heard some noise. He woke up and saw that one person (since deceased) was abusing the appellants namely, Sanjeev @ Kalia, Rajesh Thakur @ Rickshewala and one Vishal @ Rajesh Totla, to whom he knew already, as they also used to live on the footpath. The appellant Sanjeev was telling to Vishal @ Totla and the appellant Rajesh Thakur that the person, who was abusing, had beaten him alongwith his friend Bambaiya and also said '*Aaj Moka Hai Isse Maja Chakhana Hai*'. Thereafter, the appellants and Vishal started beating the deceased and as a result he fell on the ground in front of the shop. Vishal @ Rajesh Totla and the appellant Rajesh Thakur caught hold of the deceased and the appellant Sanjeev took out one knife from his pocket and gave knife blows on his stomach. Thereafter, the appellants along with Vishal fled away from the spot. After receiving the injury, the intestines came out from the stomach of the deceased. PW-7 also fled away from there. On the next morning he went to PS, where his statement was recorded by the police. On 13.02.10, the police took the appellant Sanjeev at Phawara Chowk Chandni Chowk where he and one Raju (PW3) identified him and told the police that he along with his companion Rajesh Thakur had committed the murder of the deceased on the night of 09.02.2010 with the knife. PW7, along with Raju (PW3), identified the appellant Rajesh on 22.02.2010.
28. In his cross-examination, PW7 stated that he had a disease of forgetting things. PW7 further stated that he had seen the knife blow been given to the deceased by the appellants. He stated that

the co-accused Vishal was standing and holding the deceased. He also stated that the appellant Rajesh was drunk and again stated that the deceased was drunk. He again stated that neither of them was holding the deceased. PW7 stated that the appellant Rajesh only kicked the deceased and left from the spot. The Police Chowki was across the road and was near to the spot.

29. PW17 Subhash Chand Sharma, another eye witness to the incident deposed on similar lines as deposed by PW3 and PW7. He deposed in his examination-in-chief that the appellant Rajesh and co-accused Vishal caught hold of the deceased and the appellant Sanjeev Kalia took out a knife from his pocket and gave knife blows on the stomach of the deceased which resulted in his death. Thereafter, all the persons fled from the spot. PW17 identified the appellant Sanjeev. However, in his cross-examination, he turned hostile and did not support the case of the prosecution and stated that upon being informed by a boy, whose identity was not known to him, he reached the spot and saw some *hathapai* taking place between the appellants and the deceased. He further stated that he did not see anything else except the *hathapai*. He also stated that none of the appellants had given knife blows to the deceased in his presence.
30. Besides the above public witnesses, PW20 Insp. P. S. Chahal was the Investigating Officer in the present case and has proved the FSL results which are Ex.PW20/X and Ex.PW20/X-1 as per which human blood was detected on the knife and also on the clothes of the co-accused Vishal.
31. Before deciding the appeal in hand, we deem it appropriate to analyse the medical evidence in detail. In this regard testimony of PW12 Dr. S.Lal assumes importance. PW12 Dr. S.Lal conducted

postmortem of the deceased on 19.02.2010. His detailed report is Ex. PW12/A. PW12 had found the following injuries on the body of the deceased:

“i) Stab incised wound 2.6 x 2 cm x abdominal cavity deep over middle upper abdominal on epigastric region, vertical place, upper angle of the wound is acute and the other angle is blunt. The wound is placed 4 cm above the umbilicus in midline. The wound enter the abdominal cavity in backward and slightly upward direction to cut the large intestine and peritoneum. Total depth of the wound was above 8 cm.

ii) Stab incised wound 1.8 x 0.2 cm x cavity deep over left side upper abdominal, obliquely placed, upper inner angle is acute and the other angle is blunt. The wound is placed 3.2 cm left to mid line and 4 cm below the sub costal margin. The wound enter abdominal cavity is backward and upward direction to cut the mesentry of intestine peritoneum. Total depth of the wound is about 6 cm and about one and half ltr. of blood present in cavity.”

32. After post-mortem examination, Dr. S. Lal has opined the cause of death as haemorrhagic shock due to the stab injuries in the abdomen. All the injures were ante-mortem in nature, recent in duration and could be caused by pointed single sharp edged weapon. Injury No. 1 and 2 were sufficient to cause death in the ordinary course of nature individually and collectively both. Time since death was about 9 to 10 days.
33. As to the weapon of offence, PW12 opined that the injury No. 1 and 2 were possible to be caused by the Buttondar knife shown to him for examination and the cut marks in the clothes of deceased could also have been caused by the said knife. His subsequent opinion is Ex.PW12/B. However, in his cross-examination he stated that the wound caused on the body of the deceased was more in length than the weapon of offence. He also stated that any other

weapon similar to that of the said weapon could produce similar injury as caused to the deceased. Therefore, he was not sure whether the injuries caused to the deceased were caused by the Buttondar knife. Further, PW12 also stated that he was unsure whether the deceased received the injuries while he was standing or lying on the road as it depends upon the case and circumstances.

34. The question which arises for consideration is as to 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?
35. As noticed in the paragraphs aforegoing, Mr. Dubey has not contested the order on conviction except that no case under Section 302 of IPC is made out. Mr. Dubey reiterates that no motive is proved. The deceased was highly drunk which is evident upon reading of the FSL report. He had 300 mg of alcohol per 100 ml blood which is of extremely high content of alcohol and in that state of mind; it is not unusual for the fight to have erupted. There is no evidence that the appellant Sanjeev had carried a knife with him. The injuries as per the post-mortem report suggest that the appellants did not act in a cruel or in unusual manner. There was no pre-meditation and thus a case, at best, under Section 304 Part I of IPC could be made out.
36. Learned counsel for the appellant has also urged that having regard to the genesis of the occurrence and there was no evidence on record to suggest that the appellant Sanjeev had carried a knife with him to stab the deceased. Also, there was only two fatal blows

with a knife which landed on the abdomen of the deceased, it cannot be said with reasonable certainty that the appellant committed murder of the deceased or the appellants intended to cause the particular injury and the injury intended to be inflicted was sufficient in the ordinary course of nature to cause death.

37. In a recent case of *Anil @ Hunny vs. State of NCT of Delhi*, in *Crl. A. No. 423/2016*, decided on 28.04.2017, another Division Bench of this Court, of which one of us (G. S. Sistani, J.) was also a member, modified the order of conviction under 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.
38. Having regard to the testimonies of PW3 and PW7 that both the witnesses have identified the appellants and attributed a specific role to them. The appellants were previously known to the witnesses PW3 and 7 as the appellants used to stay at footpath. Their presence at the spot stands established. We find the testimonies of PW3 and 7 reliable and trustworthy.
39. As the recovery of weapon of offence i.e. knife is concerned, the same was recovered at the instance of the appellant Sanjeev from an open place near Metro Station Gate No.1, Chandni Chowk. No reliance can be placed on such a recovery which was being made from such open public place. In view of 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 appellant Sanjeev that the present case would fall within the ambit of Section 304 Part I of IPC. The ends of justice would be met if we modify the sentence of the appellant Sanjeev to the rigorous imprisonment for a period of 9 years.

40. So far as the conviction of the appellant Rajesh is concerned. It was contended by the counsel for the appellant that he was standing at a distance and there is no evidence on record to show that he had abused the deceased and his presence being a rikshaw-puller was merely by-chance. There was no common intention 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 thereof, the appellant Rajesh deserves acquittal.
41. To rebut these arguments, learned counsel for the State has relied upon the case of ***Bhabha Nanda Sarma and Others. vs. State of Assam*** reported at (1977) 4 SCC 396, wherein the conviction of all the three appellants under Section 302 with the aid of Section 34 of the IPC was considered by the Apex Court. The relevant para 4 and 6 read as under:

“4. To attract the application of Section 34 it must be established beyond any shadow of doubt that the criminal act was done by several persons in furtherance of the common intention of all. In other words, the prosecution must prove facts to justify an inference that all the participants of the act had shared a common intention to commit the criminal act which was finally committed by one or more of the participants. Section 38 of the Penal Code says:

Where several persons are engaged or concerned in the commission of a criminal act, they may be guilty of different offences by means of that Act.

In ***Afrhim Sheikh and others v. State of West Bengal*** 1964 Cri LJ 350 Hidayatullah J, as he then was, has pointed out that it was possible to apply the ingredients of Section 34 in relation to the commission of an offence under Section 304 Part II, even though death is caused with the knowledge of the persons participating in the occurrence that by their act death was likely to be caused. The sharing of the common intention, as pointed out in that case, is the commission of the act or acts by which death was occasioned. With reference to Section 38, the learned Judge observed at page 178:

That is to say, even though several persons may do a single criminal act, the responsibility may vary according to the degree of their participation. The illustration which is given clearly brings out that point.

6. On the evidence of Gopi Nath himself the result aforesaid follows. Shashi Mohan had reached near him and when he tried to obstruct the accused and prevent them from committing the assault on Shashi Mohan Harendra said "we have met enemy today, need not be freed". There upon Bhaba Nanda caught hold of the hands of Shashi Mohan from behind. Phanidhar then gave him the blow on the head, as already stated, with the dolibari. Harendra gave further blows on his head and other parts of his body after Shashi fell down. On these facts it is difficult to conclude that Bhaba Nanda caught hold of the hands of Shashi sharing the common intention of Phanidhar and Harendra of causing the death of Shashi. He did not utter a word which would justify such a conclusion. He must be aware that his two elder brothers Phanidhar and Harendra were going to assault Shashi with their respective weapons in their hands. Bhaba Nanda did not use his lathi for causing any injuries on Shashi. The first blow was given by Phanidhar. Thereupon Shashi fell down. Bhaba Nanda's intention, therefore, was to join in the commission of the acts by the other two with the intention of getting Shashi assaulted severely with the knowledge that such an assault in all probability and likelihood might result in the death of Shashi. His participation in the crime, therefore, did not take him to the extent of the sharing of the common intention to cause his murder. As we have said above, Phanidhar and Harendra undoubtedly shared such an intention as is apparent from the manner of assault by them on Shashi and the severity and force with which the blows were given on his head by both of them with the respective weapons in their hands. Applying the principle of law under Section 38 of the Penal Code, therefore, the case of Bhaba Nanda can be separated from that of the other two. He can be held guilty only under Section 304 Part II as he had intentionally joined in the commission of an act with the knowledge that the assault on Shashi was likely to result in his death. The facts of this case indicate that Bhaba Nanda shared the common intention of his other two brothers for the commission of a

lesser offence than murder. But while committing the act in furtherance of that common intention, Phanidhar and Harendra developed and shared the common intention of causing his murder.”

(Emphasis Supplied)

42. In the case of **Suresh and Another vs. State of U.P.** reported at (2001) 3 SCC 673, the Hon’ble Supreme Court discussed the scope of Section 34 of IPC and its applicability in paras 37- 41, which read as under:

“37. However, in view of the importance of the matter, in so far as the interpretation of Section 34 of the Indian Penal Code is concerned, we have chosen to express our views in the light of consistent legal approach on the subject throughout the period of judicial pronouncements. For the applicability of Section 34 to a co-accused, who is proved to have common intention, it is not the requirement of law that he should have actually done something to incur the criminal liability with the aid of this section. It is now well settled that no overt act is necessary to attract the applicability of Section 34 for a co-accused who is otherwise proved to be sharing common intention with the ultimate act done by any one of the accused sharing such intention.

38. Section 34 of the Indian Penal Code recognises the principle of vicarious liability in the criminal jurisprudence. It makes a person liable for action of an offence not committed by him but by another person with whom he shared the common intention. It is a rule of evidence and does not create a substantive offence. The Section gives statutory recognition to the commonsense principle that if more than two persons intentionally do a thing jointly, it is just the same as if each of them had done it individually. There is no gainsaying that a common intention pre-supposes prior concert, which requires a pre-arranged plan of the accused participating in an offence. Such a pre-concert or pre-planning may develop on the spot or during the course of commission of the offence but the crucial test is that such plan must precede the act constituting an offence. Common intention can be formed previously or in the course of occurrence and on a spur of

moment. The existence of a common intention is a question of fact in each case to be proved mainly as a matter of inference from the circumstances of the case.

39. The dominant feature for attracting Section 34 of the Indian Penal Code (hereinafter referred to as "the Code") is the element of participation in absence resulting in the ultimate "criminal act". The "act" referred to in latter part of Section 34 means the ultimate criminal act with which the accused is charged of sharing the common intention. The accused is, therefore, made responsible for the ultimate criminal act done by several persons in furtherance of the common intention of all. The Section does not envisage the separate act by all the accused persons for becoming responsible for the ultimate criminal act. If such an interpretation is accepted, the purpose of Section 34 shall be rendered infructuous.

40. Participation in the crime in furtherance of the common intention cannot conceive of some independent criminal act by all accused persons, besides the ultimate criminal act because for that individual act law takes care of making such accused responsible under the other provisions of the Code. The word "act" used in Section 34 denotes a series of acts as a single act. What is required under law is that the accused persons sharing the common intention must be physically present at the scene of occurrence and be shown to not have dissuaded themselves from the intended criminal act for which they shared the common intention. Culpability under Section 34 cannot be excluded by mere distance from the scene of occurrence. The presumption of constructive intention, however, has to be arrived at only when the court can, with judicial servitude, hold that the accused must have pre-conceived result that ensued in furtherance of the common intention. A Division Bench of the Patna High Court in **Shatrughan Patar & Ors. v. Emperor: AIR 1914 Cal 901 (2)** held that it is only when a court with some certainty hold that a particular accused must have pre-conceived or pre-meditated the result which ensued or acted in concert with others in order to bring about that result, that Section 34 may be applied.

41. In **Barendra Kumar Ghosh vs. King Emperor: AIR 1914**

Cal 901(2) the Judicial Committee dealt with the scope of Section 34 dealing with the acts done in furtherance of the common intention, making all equally liable for the results of all the acts of others. It was observed:

".... [T]he words of S. 34 are not to be eviscerated by reading them in this exceedingly limited sense. By S. 33 a criminal act in S. 34 includes a series of acts and, further, "act" includes omissions to act, for example, an omission to interfere in order to prevent a murder being done before one's very eyes. By S. 37, when any offence is committed by means of several acts whoever intentionally co-operates in the commission of that offence by doing any one of those acts, either singly or jointly with any other person, commits that offence. Even if the appellant did nothing as he stood outside the door, it is to be remembered that in crimes as in other things 'they also serve who only stand and wait'. By S. 38, when several persons are engaged or concerned in the commission of a criminal act, they may be guilty of different offences by means of that act. Read together, these sections are reasonably plain. S. 34 deals with the doing of separate acts, similar of diverse, by several persons; if all are done in furtherance of a common intention, each person is liable for the result of them all, as if he had done them himself, for 'that act' and 'the act' in the latter part of the section must include the whole action covered by 'a criminal act' in the first part, because they refer to it. S. 37 provides that, when several acts are done so as to result together in the commission of an offence, the doing of any one of them, with an intention to co-operate in the offence (which may not be the same as an intention common to all), makes the actor liable to be punished for the commission of the offence. S. 38 provides for different punishments for different offences as an alternative to one punishment for one offence, whether the persons engaged or concerned in the commission of a criminal act are set in motion by the one intention or by the other."

(Emphasis Supplied)

43. Applying the law as laid down in ***Bhabha Nanda Sarma's*** case and ***Suresh's*** case (*supra*) to the facts of the present case, we find that the appellant Rajesh shared common intention with the appellant Sanjeev to commit the charged offence and thus his role being limited to catch hold of the deceased does not absolve him from the committed offence. Therefore, the culpability of both the appellants would be the same. The judgments relied upon by the counsel for the appellant Rajesh do not apply to the facts and circumstances of the present case. Hence, we are of the considered view that the present case would fall within the ambit of Section 304 Part I of IPC. Accordingly, we modify the sentence awarded to the appellant Rajesh and sentence him to the period already undergone by him which is more than 9 years.
44. Consequently, the appeals are allowed in part, the conviction and order on sentence recorded by the trial Court is modified to the extent indicated hereinabove. The appeals stand disposed of. The fine imposed upon the appellants and the default sentence awarded to him shall remain unaltered.
45. The trial Court record be sent back along with a copy of this judgment.
46. Copy of this judgment also be sent to the Superintendent-Central Jail, Tihar for updating the jail record.

G.S.SISTANI, J.

REKHA PALLI, J.

MAY 30, 2017//-