

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

+ CRL.A. 443/2003

Reserved on: 30.10.2018

Date of decision: 19.11.2018

IN THE MATTER OF:

SALEEM alias GAMA & ANR. Appellants

Through: Ms. Naina Kejriwal and
Ms. Soumava Karmakar, Advocates

versus

THE STATE (NCT OF DELHI) Respondent

Through: Ms. Aasha Tiwari, APP for the State

CORAM:

HON'BLE MS. JUSTICE HIMA KOHLI

HON'BLE MR. JUSTICE YOGESH KHANNA

HIMA KOHLI, J.

1. This appeal has been filed by two appellants assailing the judgment dated 30.05.2003 and order on sentence dated 31.05.2003, passed by the learned Additional Sessions Judge, Delhi convicting them under Section 302/34 IPC and sentencing them to undergo imprisonment for life and to pay a fine of Rs.5,000/- each and in default thereof, to further undergo rigorous imprisonment for one year.

2. The case of the prosecution is that on 08.04.1990, at 7:45 AM, the duty constable of Lok Nayak Jai Prakash Hospital (LNJP) had telephonically informed that one Bilal, son of Sirajuddin aged 24 years had received a knife injury in the slaughter house (Bakra Mandi) situated

near Sadar Thana, Paharganj and was brought by one Mr.Suresh Kumar, an auto driver to the hospital. DD-3A was handed over to SI Phool Singh (PW-17) for investigation. On an application made by SI Phool Singh, the doctor had declared the injured fit for the statement. The statement of the injured was thus recorded and a *rukka* was prepared. The *rukka* was sent to the Police Station through Constable Baldan Singh and based thereon, FIR No. 86/90 was registered under Sections 324/34 IPC.

3. SI Phool Singh (PW-17) then reached the place of the incident and met the two eye witnesses, PW-3 Maju and PW-4 Mukim and prepared a site plan. Constable Baldan Singh also reached the spot and handed over the FIR and *rukka* to SI Phool Singh. SI Phool Singh then reached the hospital at about 8 pm and recorded yet another statement of the injured and converted the offence into one under Sections 307/34 IPC.

4. On 09.04.1990, at 7:45AM, SI Phool Singh (PW-17) received DD-3A regarding the death of Bilal. He alongwith SI Jagbir Singh and two other police officials reached the hospital, got the dead body identified and completed the inquest proceedings. Further investigation was handed over to Inspector Tilak Raj. The dead body was sent for a postmortem and then handed over to the legal heirs of the deceased.

5. On 10.04.1990, at the instance of PW-3 Maju, both the accused persons, namely, appellant No.1, Saleem @ Gama and appellant No.2, Badruddin (brothers) were apprehended and their disclosures were recorded. Accused Saleem got recovered a *chhuri* (knife) used in the offence from the roof top of shop no.44, DDA market, Majnu ka tilla,

Delhi. A sketch of the *chhuri* was prepared and it was seized, then put in a pullanda and sealed. The seal after use, was handed over to PW Maju.

6. The *chhuri* (knife) was identified as *Ex.P1*; the rukka was proved as *Ex.PW17/A*; FIR as *Ex.PW17/B*; DD-3A dated 08.04.1990 as *Ex.PW17/C* and DD-3A dated 09.04.1990, as *Ex.PW17/D*; seizure memo of the *chhuri* as *Ex.PW3/D*, inquest proceedings as *Ex. PW17/E* and *17/F*; statement of Maju (PW-3) as *Ex.PW3/A*; statement of Gyasuddin (PW-7) as *Ex.PW7/A*; statement of Sirajuddin (PW-6) as *Ex.PW6/A*; inquest report as *Ex.PW17/G*; sketch of the *chhuri* as *Ex.PW3/C* and the site plan as *Ex.PW17/H*. The disclosure statement of the accused and their personal search memos were also exhibited. One shirt and baniyan of the deceased were handed over to SI Phool Singh (PW-17) by the Doctor which were seized vide memo *Ex PW10/B*. PW-17 had also sought the opinion of Dr. George Paul in respect of *Ex.PW10/B*.

7. Insp. Tilak Raj (PW-18), the SHO to whom further investigation was handed over, had obtained the blood sample of the deceased and seized it vide seizure Memo *Ex.PW18/A*. He arrested the accused persons and got the *chhuri* recovered from them.

8. The MLC was proved by PW-19, Dr. V.J. Anand as *Mark-A* and the postmortem report was proved by PW-15, Dr. R.K. Bansal as *PW15/A*. As per the said witness, two injuries viz. injury-1 and 5 were inflicted by the accused and whereas three injuries viz. injuries number

2,3,4 were surgical injuries. The relevant portion of the report reads as under:-

“Chest valve shows under injury no.1 and obliquely placed and downwards cut wound of 4.1 cm. in the sixth inter coastal space extending in its lower in a part cutting the upper border of sixth coastal cartilage of .8 cm. Both margins clean cut and both angles acute. The lower inner angle been 7.4 cm. from middle line. Injury no. shows underneath the third right rib cut at the costal condal junction with stitched incisions in right, third and fourth inter coastal space, upwards. The fourth inter coastal space extending outwards upto the anterior axillary lines with its outer and incorporating the surgical drainage mallecot tube coming out of injury no.4. Injury no.3 shows a corresponding cut underneath in the seventh inter coastal space. Right plural cavity is adherent and contains 1.2 litres of blood. It is adherent on the outer part of right upper lobe. Right lungs shows clots of blood on its surface. Right upper lobe shows a superficial cut of 2x.8 cm. going .5 cm. slightly collapsed. Right upper lobe and its lower outer front surface contains blood in the cut with little froth coming out. Both lungs are extensively adematuous and are bulky.”

9. The Doctor (PW-15) opined that injury No.1 cut the sixth inter coastal space as described as well as upper border of seventh rib in its inner part, entered the right plural cavity in its lower outer front part finished after cutting the lower outer front part of right upper lobe of lung as described earlier. The direction of the injury was before backwards slightly downwards and slightly outwards, caused by either a single edged thin blade sharp cutting weapon; the distal portion of

second edge of the weapon also slightly sharpened or a thin bladed double edged sharp cutting weapon.

10. PW-15 further stated that the opinion of Dr. George Paul, who was working in the hospital and had conducted the post mortem but had since left, revealed that *“death in this case was due to haemorrhage and shock from stab injuries to the right lung and right chest wall vide injury no.1. All the injuries are antemortem and recent in duration. Injury no.1 was caused by either a single edged sharp cutting stabbing weapon upto the distal edge of the wound near tip also could be caused by double edged thin bladed weapon struck in a before backward slightly downward and outward direction and was sufficient to cause death in the ordinary course of nature by causing injuries to structures within as described. Injury no.5 was caused by a pointed or a sharp object or could have been caused by the same above mentioned weapon. The injuries No. 2, 3 and 4 were surgical.”*

11. Further, PW-16, Dr. P.C. Dixit proved the report PW16/A, qua the knife, Ex.P1 and deposed that as per the opinion of Dr.George Paul, injury No. 1 on the body of the deceased and cuts in his clothing could be caused by the weapon diagrammed in Ex PW16/A.

12. The entire case of the prosecution rests on the dying declaration of the deceased, corroborated by four witnesses, PW-3 Maju, PW-4 Mukim, PW-5 Raffiquddin and PW-2 Suresh Kumar, a scooter driver who had allegedly removed the injured to LNJP hospital on 08.04.1990, at 7:35AM.

13. PW-3 Maju (elder brother of the deceased) and PW-4 Mukim deposed in consonance with each other, stating *interalia* that on 08.04.1990, they were present near Bilal when he was hanging *raas* (slaughtered animals) while the accused brothers wanted to hang *raas* at the same very place and had objected to what Bilal was doing. Though the PWs tried to intervene, both the accused, Saleem and Baddu started quarreling with Bilal. Baddu asked Salim to teach them a lesson for hanging the *raas* there and immediately, Baddu caught hold of Bilal and Saleem gave a *chhuri* blow to Bilal on the right side of the abdomen. Though accused No. 1, Saleem gave a second blow with the *chhuri*, but the people around had intervened and dragged Bilal away. PW-5 Mohd. Raffiquddin also supported this version of PW-3 and PW-4. PW-5 had put the injured in the auto of PW-2 Suresh Kumar who took Bilal to the hospital whereas PW-5 went to inform the parents of Bilal.

14. On the basis of the above evidence, the trial court convicted both the accused persons under Sections 302/34 IPC, primarily on the ground of there exist eye witnesses namely, PW-3, PW-4 and PW-5. The contradictions as pointed out by the defence were held not to be material enough to upset the prosecution case. Further, the plea of the defence that the conduct of PW-5 Raffiquddin in accompanying the injured to the hospital but not getting him admitted was not natural, was turned down and the trial court observed that there was nothing unnatural in it because PW-2 had remained there with Bilal. The argument advanced by the defence counsel that the absence of the SDM/Magistrate at the time of the recording of the statement of the injured, would adversely affect the case set up by the prosecution was also rejected and the trial court

expressed a view that there were no improvements in the statement of witnesses qua the accused leaving the place of the incident and returning after sometime to the spot and mere non-mentioning of the name of the appellant No.2, Baddrudin in the MLC, would not be of any material consideration.

15. The points that were urged before the learned trial court, have again been raised before us. Ms. Kejriwal, learned counsel for the appellants argued that appellant No.2, Baddrudin has wrongly been roped in as his name had not been included in the MLC. We may note here that the alleged history of the incident was given by the injured himself and when probably asked as to who had stabbed him, he had named the appellant No.1, Saleem @ Gama. At the same time, we cannot overlook the fact that at the time of conducting the MLC, the injured would have been in acute pain and had probably limited his answer to a query posed by the doctor. Therefore, non-inclusion of the name of Badruddin in the MLC would not go to the root of the matter as his presence on the spot and his role in the sequence of events as they had unfolded, has been corroborated by the evidence of two eye witnesses, PW-3, Maju and PW-4, Mukim.

16. As for the absence of the SDM at the time of recording the statement of the injured, sought to be highlighted by learned counsel for the appellants, we may note that when the injured was brought to the hospital, he was conscious and oriented, though in acute pain and at that point in time, there was no apprehension of his death. For this reason, the SDM/Magistrate may not have been called while recording

rukka/statement of the injured. We are inclined to concur with the view of the trial court that the statement of the deceased recorded by the Investigating Officer cannot be ignored and ought to be treated as a dying declaration.

17. Further, the minor contradictions/improvements in the statement of the witnesses, PW-3 and PW-4, highlighted by learned counsel for the appellants are in our opinion, not so material as to dilute the entire prosecution case. It is trite that contradictions in matters of detail cannot be a ground to disbelieve the witness once his testimony stands corroborated in material particulars. In the case of State (Delhi Administration) and Ors. vs. Laxman Kumar and Ors. reported as **AIR 1986 SC 250**, on the aspect of contradictions in the deposition of witnesses, the Supreme Court observed as below:-

“43.It is common human experience that different persons admittedly seeing an event, give varying accounts of the same. That is because the perceptiveness varies and a recount of the same incident is usually at variance to a considerable extent. Ordinarily, if several persons give the same account of an event, even with reference to minor details, the evidence is branded as parrot like and is considered to be the outcome of tutoring. Having read the evidence of these witnesses with great care, we are of the view that the same has the touch of intrinsic truth and the variations are within reasonable limits and the variations instead of providing the ground for rejection, add to the quality of being near to truth.” (emphasis added)

18. It has also been held by courts that identical testimonies without any contradictions, can in fact be suspect. In Shivaji Sahabrao Bobade vs. State of Maharashtra reported as **AIR 1973 SC 2622**, speaking for the

Bench, Justice V.R. Krishna Iyer made the following observations when it comes to evaluation of evidence of a witness, which may not be found to be completely credible:-

“19. We must observe that even if a witness is not reliable, he need not be false and even if the Police have trumped up one witness or two or has embroidered the story to give a credible look to their case that cannot defeat justice if there is clear and unimpeachable evidence making out the guilt of the accused. Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between ‘may be’ and ‘must be’ is long and divides vague conjectures from sure conclusions.” (emphasis added)

19. We are of the opinion that in the instant case, the defence has not been able to shake the testimony of the witnesses in their cross-examination and the said testimony stands duly corroborated in all material particulars. Nor are we persuaded to disbelieve the deposition of some of the eye witnesses only because they were close relatives of the deceased. In the present case, merely because PW-3 Maju is the elder brother of the deceased and PW-5 Raffiquddin is the brother-in-law of the deceased (husband of Bilal’s sister), would not be a ground to discard or discount their evidence. It is noteworthy that PW-5 also happens to be the maternal cousin of both the accused persons (sons of his maternal uncle). In this context, we may usefully refer to the following observations made by the Supreme Court in the case of Dalip Singh vs. State of Punjab reported as **AIR 1953 SC 364**:-

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

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

20. In Masalti vs. State of U.P. reported as **AIR 1965 SC 202**, a Constitution Bench of the Supreme Court had approved the decision in the case of Dalip Singh (supra) and observed that:-

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

21. Besides attacking the testimony of the witnesses, learned counsel for the appellants argued that the trial court failed to appreciate that there was insufficient evidence on record to ascribe the role of a murderer to the accused No.2, Baddrudin since his role was limited to catching hold of the deceased, Bilal and therefore, at best he could be convicted under

Sections 323 IPC whereas an offence under Section 304 (II) IPC only is made out against the accused No.1, Saleem and not Section 302 IPC. It was contended that the accused, Badruddin had never shared any common intention with the accused, Saleem to kill Bilal, as the incident had occurred at the spur of the moment and therefore, the provision of Section 34 IPC could not have been invoked to convict him.

22. To support her submission that the appellant No.2, Badruddin could not have been convicted under Section 302/34 IPC, learned counsel for the appellants has cited the decisions of the Supreme Court in the case of Suresh Sakharam Nangare vs. The State of Maharashtra reported as **2012 (9) SCALE 245**. In support of her plea that the appellant No.1, Saleem could have been convicted under Section 304(II) IPC and not under Section 302 IPC, learned counsel relied on the cases of Kulwant Rai vs. State of Punjab reported as **AIR 1982 SC 126**, Jagtar Singh vs. State of Punjab reported as **AIR 1983 SC 463** and Hem Raj vs. The State (Delhi Administration) reported as **AIR 1990 SC 2252**.

23. Per contra, learned APP supported the impugned judgment and the order on sentence in respect of both the accused and argued that merely because the appellant No.1 had inflicted one blow on the deceased, would not bring the case under Section 304(II) IPC particularly when the evidence brought on record by the prosecution has clearly established that the injury could have been caused by the weapon used namely, *chhuri* in the hands of Saleem at the relevant point in time. It was contended that it could not be stated that a single injury inflicted, was insufficient to cause death and therefore appellant No.1 had been rightly

convicted under Section 302 IPC. To fortify the said submission, reliance has been placed on Anil @ Rajesh vs. State reported as **2017(4) JCC 2858** and Chandrakant Somnath Kudale and Anr. vs. State of Maharashtra reported as **1989 Supp (2) SCC 107**. Similarly, learned APP cited Suresh and Anr. vs. State of UP reported as **(2001) 3 SCC 673** and Munnuswamy and Ors. vs. State of T.N. **(2002) 6 SCC 700** to urge that meeting of minds or a common intention of the accused herein, could have developed on the spot without any premeditated plan of action and therefore it cannot be argued that simply because the incident took place at the spur of the moment, the appellant No. 2 did not share a common intention with appellant No.1, Saleem to kill Bilal. She particularly referred to the exhortation on the part of both the accused that they would teach the deceased a lesson (*mazza chhakha denge*) for placing the slaughtered goats at a particular place in the slaughter house. It was thus submitted that the learned trial court has rightly relied upon the nature of the evidence placed on record viz. the deposition of the eye witnesses; the medical evidence viz. MLC/Postmortem Report as also the opinion of the doctor *qua* the injury caused to the deceased by the *chhuri* (knife) Ex.P1 to convict both the appellants under Section 302/34 IPC.

24. The first question that is required to be answered is as to whether on examining the facts and circumstances of the instant case, both the accused could be said to have committed the murder of the deceased, Bilal punishable under Section 302 of the IPC.

25. It transpires from the evidence on the record that on the fateful day a quarrel had taken place between the accused and Bilal at the slaughter

house at the spur of the moment when the accused had objected to Bilal placing the slaughtered goats at a particular spot. It has also come out in the evidence that there was a heated exchange of words and the accused had left the place with a threat that they would teach Bilal a lesson and after some time, they had returned. Appellant No.2 had then caught hold of Bilal while appellant No.1 gave him a blow with a knife that landed on the chest of the deceased. PW-15 Dr. R.K. Bansal has opined on the basis of the post mortem report that injury No.1 caused by a single edged sharp cutting stabbing weapon on the chest, was sufficient to cause death in the ordinary course of nature.

26. The point here is as to whether it could be stated that in the given facts and circumstances, which had resulted in the appellant No.1 giving a blow with a knife on the chest, his intention was to cause the death of Bilal. In our opinion, looking at the sequence of events as they unfolded over a very short span of time, there was no scope of any pre-mediation. The quarrel that took place between the accused and the deceased was very sudden. The provocation was placing of the slaughtered goats by Bilal at a particular spot in the slaughter house, where the accused were also working. The nature of work being executed by the accused and the deceased was such that knives were readily available at the spot so it is not as if the accused had made prior arrangements to procure the weapon or had to look far to reach out for a knife. There is a clear absence of pre-mediation. The quarrel took place at the spur of the moment, over a minor dispute. It could not be said that the accused intended to inflict a fatal blow on the deceased. We are therefore of the opinion that the appellant No.1 could not have been convicted under Section 302, IPC for

having murdered the deceased, Bilal and awarded a sentence of imprisonment for life. As a result, the said order cannot be sustained and is liable to be set aside.

27. The next question that needs to be examined is the nature of offence that the appellant No.1 had committed, if not under Section 302 IPC. Even though the quarrel was insignificant in nature, the appellant No.1 had used a weapon like a knife (*Chhuri*) and given a blow on the chest of the deceased, which had ultimately proved to be fatal as Bilal had ultimately succumbed to the injury sustained by him on 08.4.1990. In view of the fact that the said occurrence was without any pre-mediation and a solitary injury had been caused by the appellant No.1, which proved to be fatal, an inference can be drawn that he had the knowledge that he was likely to cause an injury, which was likely to cause Bilal's death. Thus, the offence committed by the appellant No.1 would be punishable under Section 304 Part II of the IPC. The view taken by us above, finds support from the decisions of the Supreme Court in Kulwant Rai (supra), Jagtar Singh (supra) and Hem Raj (supra). In all the said cases, there was a single knife blow inflicted on the chest of the deceased as a result of a sudden fight, without any pre-mediation. Despite the injuries being sufficient in the ordinary course of nature, causing death, the accused therein were convicted under Section 304 Part II of the IPC and not under Section 302 IPC.

28. In our view, the judgments cited by the prosecution viz. Chandrakant Somnath Kudale and Another vs. State of Maharashtra (1990 SCC (Cri) 29) and Anil@ Rajesh vs. State (2017 (4) JCC 2858)

are not applicable on facts as the facts therein do show the intention of the accused therein was to cause such bodily injuries which were sufficient in the ordinary course of nature, to cause death and hence, they were convicted under Section 302 IPC.

29. As a result, the conviction of the appellant No.1 under Section 302 IPC is altered to Section 304 Part II, IPC wherein the maximum sentence of imprisonment provided is ten years. As on 14.05.2007, he had undergone sentence for a period of 4 years, 6 months and 15 days. Vide order dated 13.09.2007, his sentence stood suspended. Appellant No.1 is sentenced to undergo rigorous imprisonment for a period of seven years and fine of Rs.5,000/- and in default, simple imprisonment for six months. He is directed to surrender before the trial court forthwith for undergoing the remaining unserved portion of his sentence, per Section 428 Cr.PC.

30. Coming next to the appellant No.2, Baddrudin, the role attributed to him was of catching hold of the deceased Bilal when the appellant No.1 had landed a blow on his chest. The other role attributed to the appellant No.2 is of exhorting the appellant No.1 of teaching a lesson to Bilal and his brother, Maju (PW-3) for not removing the slaughtered animals from a particular place in the slaughter house. In his dying declaration, Bilal had mentioned the name of both the appellants and held them responsible for causing him injuries. Bilal had also specifically stated that the appellant No.2, Baddu had caught hold of his hands, whereas appellant No.1, Saleem had given him a knife blow. Thus, in our opinion, by no stretch of imagination, could the appellant No.2 have been convicted under Section 302 IPC.

31. To our mind, even Section 34 IPC is not attracted to the facts of the present case. The ambit of Section 34 IPC has been dwelled upon at length by the Supreme Court in Suresh and Anr. (supra), wherein it was held as follows:-

“23. Thus to attract Section 34 IPC two postulates are indispensable: (1) The criminal act (consisting of a series of acts) should have been done, not by one person, but more than one person. (2) Doing of every such individual act cumulatively resulting in the commission of criminal offence should have been in furtherance of the common intention of all such persons.

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37. 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 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 presupposes prior concert, which requires a prearranged plan of the accused participating in an offence. Such preconcert or preplanning 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 the spur of the 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 the later 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 not to 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 preconceived the result that ensued in furtherance of the common intention.** A Division Bench of the Patna High Court in *Satrughan Patar v. Emperor* [AIR

1919 Pat 111 : 20 Cri LJ 289] held that it is only when a court with some certainty holds that a particular accused must have preconceived or premeditated the result which ensued or acted in concert with others in order to bring about that result, that Section 34 may be applied.” (emphasis added)

32. In other words, to successfully invoke the provisions of Section 34 IPC, the prosecution must be able to demonstrate that the criminal act complained of against the accused persons was done by one of the accused in furtherance of a common intention of all the accused persons and the common intention implies a pre-arranged plan that has to be inferred from the act or conduct of other relevant circumstances of the case. From the material placed on record by the prosecution in the present case, we are not convinced that the appellant No.2 had any common intention with the appellant No.1 to eliminate the deceased as no prior concert/meeting of minds has come to light. In the absence of a pre-arranged plan, we are of the view that the appellant No.2 could not be convicted under Section 302 read with Section 34 IPC.

33. Though the learned APP has referred to the decisions in the case of Suresh and another vs. State of UP [(2001) 3 SCC 673] and also Munnuswamy and others vs. State of Tamilnadu (AIR 2002 SC 2994) to state that once an accused is shown to have aided the crime, he is vicariously liable and ought be convicted with the aid of Section 34 IPC for the main offence, we may note that the facts of the cases referred to above are not similar to the case in hand. In Suresh and others (supra) a distinction has been drawn between “*common intention*” and “*similar intention*” and the Supreme Court held that this distinction should not be

overlooked by the Courts lest it may lead to miscarriage of justice. Similarly, in Munnuswamy (supra), the prosecution had proved that all the accused had come to the place of occurrence in a *planned manner* and hence, the said decision is not relevant to the issue raised in the instant appeal.

34. Reliance placed by learned counsel for the appellants upon Suresh Skharam Nangare vs. The State of Maharashtra (2012(9) SCALE 245) is well taken. The Supreme Court took note of the role attributable to the appellant therein which was of only holding the legs of the deceased, as was directed by the accused No.1 while the latter was sitting on the abdomen and holding the neck of the deceased. It was only when the deceased had stopped his movement, that the accused No.1 had got down from his abdomen, lifted a kerosene can, poured it on the person of the deceased who was lying on the floor and on seeing this, the appellant ran away from the spot. In this background, the Supreme Court held that the common intention of the appellant with the accused No.1 was absent since there was no prior meeting of minds or prior concert.

35. The exhortation attributed to the appellant No.2 at the time of the incident, wherein he had asked appellant No.1 to teach Bilal and his brother a lesson, cannot be treated as an intention to cause death or to kill. Teaching of a lesson could even be confined to causing of simple hurt. There was no pre-arranged plan on the part of the accused to confront the deceased or his brother on the fateful day. It could not even be said that the appellant No.2 had knowledge that the appellant No.1 would give a knife blow to the deceased on his chest. Moreover, it was

only one blow that proved fatal in this case. It is not as if several blows by knife had been inflicted on the deceased for the prosecution to argue that even though the appellant No.2 did not have a meeting of mind with the appellant No.1 for causing injury by knife, yet meeting of mind between the two took place on the spot for deducing the existence of a common intention. It has therefore to be inferred that the exhortation by the appellant No.2 was only to teach the deceased a lesson and not to kill him and for this reason too, his conviction under Section 302/34 IPC cannot be sustained.

36. To sum up, the following facts cannot be ignored **(a)** though knives were readily availability at the spot, it being a slaughter house, but the appellant no.2 did not pick up any knife or cause any injury to the deceased with a knife; **(b)** the incident had happened at the spur of the moment; **(c)** the appellant No.2 had only intended of teach a lesson to the deceased and not to kill/ stab him and **(d)** only the appellant No.1, Saleem had used the knife.

37. Hence we find merit in the submission of the learned counsel for the appellants that the prosecution has failed to prove a pre-arranged plan or a pre-meeting of minds, between both the appellants even though the incident had occurred at the spur of the moment. The facts of the instant case reveal that the incident had occurred due to a sudden quarrel. There being no time to prepare a strategy, it cannot be said that the appellant no.2 had shared a common intention with the appellant No.1 to murder the deceased. In the absence of common intention being proved, the provision of Section 34 IPC would not be attracted. We accordingly set

aside the conviction of the appellant No.2 under Section 302 read with 34 IPC.

38. The only remaining question would be as to which provision would apply to the appellant No.2 in the given facts of the case. Having examined the appending facts and circumstances, we are of the opinion that the appellant No.2 ought to have been convicted under Section 323 IPC, that entails punishment for voluntarily causing hurt, for which offence, the sentence can extend to one year or fine upto Rs.1,000/- or with both. Accordingly, the conviction of the appellant No.2 is altered from 302/34 to 323 IPC. Since the appellant No.2 had already undergone a sentence of three years, 11 months as on 20.11.2006 and vide order dated 01.12.2006, his sentence was suspended during the pendency of the present appeal, no further order of sentence is required to be passed *qua* him. Bail bond of appellant No.2 stands cancelled and his surety is discharged.

39. The appeal is disposed of on the above terms.

(HIMA KOHLI)
JUDGE

(YOGESH KHANNA)
JUDGE

NOVEMBER 19, 2018
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