

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

% Reserved on: 21<sup>st</sup> September, 2022  
Decided on: 23<sup>rd</sup> December, 2022

+ **CRL.A. 1076/2019**

PANKAJ @ ISHU

.... Appellant

Represented by: Mr. Kanhaiya Singhal, Advocate with  
Ms. Priyal Garg, Mr. Chetan  
Bhardwaj, Mr. Udit Bakshi, Mr.  
Prasanna, Ms. Saumya Sharma and  
Mr. Priyankar Raj Kaushik,  
Advocates.

versus

STATE

.... Respondent

Represented by: Mr. Mukesh Kumar, APP for State  
with Inspector Prabhu Dayal &  
Inspector Nisha Devi, PS Janak Puri.

+ **CRL.A. 1243/2019**

ANKIT AGGARWAL

.... Appellant

Represented by: Mr. Pradeep Gupta, Mr. Parinav  
Gupta, Ms. Mansi Gupta, Mr. Rahul  
Kumar Choudhary and Ms. Mamta  
Sharma, Advocates.

versus

STATE

.... Respondent

Represented by: Mr. Mukesh Kumar, APP for State  
with Inspector Prabhu Dayal and  
Inspector Nisha Devi, PS Janak Puri.

+

**CRL.A. 1259/2019**

AMAN SHARMA

..... Appellant

Represented by: Dr. N. Pradeep Sharma and Mr.  
Susheel Mahajan, Advocates.

versus

STATE OF GNCT OF DELHI

.... Respondent

Represented by: Mr. Mukesh Kumar, APP for State  
with Inspector Prabhu Dayal and  
Inspector Nisha Devi, PS Janak Puri.

**CORAM:**

**HON'BLE MS. JUSTICE MUKTA GUPTA**

**HON'BLE MR. JUSTICE ANISH DAYAL**

**MUKTA GUPTA, J.**

1. By these three appeals, the appellants challenge the common impugned judgment dated 23<sup>rd</sup> August, 2019, convicting all the three appellants for causing hurt to Ajay Kumar and committing the murder of one Bharat (“deceased”) by stabbing him. All the three appellants also challenge the impugned order on sentence dated 28<sup>th</sup> August, 2019 directing them to undergo imprisonment for life alongwith a fine of ₹5,000/- each and in default rigorous imprisonment for 3 months for offence punishable under Section 302 of the Indian Penal Code, 1860 (“IPC”); and to undergo simple imprisonment for 1 month for offence punishable under section 341 IPC; as also simple imprisonment for 1 year for offence punishable under section 323 IPC.

2. Brief facts of the case are that on 2<sup>nd</sup> September, 2011 at about 12:30 pm, the complainant/eye witness Ajay Kumar (PW-1) along with his friend

Bharat (deceased) went to Sarvodaya School, A-2 Block, Janakpuri, as he had to take an amount of ₹500/- from one Deepak. On Deepak's refusal to give the money back, Ajay snatched Deepak's mobile phone of make Sony Ericson and gave the same to his friend, Mohd. Mohsin (PW-14) who was studying in class 11<sup>th</sup> of the said school, and thereafter, Ajay and Bharat returned to their colony. At around 1.30-2 pm on the same day, Ajay and Bharat again went to the school and Ajay called Mohsin from the mobile phone of Bharat, wherein Mohsin informed that Deepak along with his mother and 2-3 boys came to his class and asked for the mobile and he handed over the same to Deepak. Mohsin also informed Ajay that those boys were in search of him and Bharat. Thereafter, while both Ajay and Bharat were returning back to their colony, the three appellants who were on a red Pulsar stopped them in front of Shanti Home Guest house, A-1 Block, Janakpuri. As per Ajay Kumar, appellant Ankit caught Ajay and appellant Aman caught Bharat and started beating them. During quarrel, both Ajay and Bharat tried to escape but were caught by them again. Thereafter, appellant Aman took out a knife from his pant and hit Bharat thrice on his chest, then on his left hand near the wrist and then on his left side rib. Bharat started screaming and in the meanwhile, Ajay managed to rescue himself and ran towards his colony. All the three boys escaped from the spot. On receipt of information DD No. 26A dated 2<sup>nd</sup> September, 2011, IO Insp. Prabhu Dayal (PW-23) at PS Janakpuri along with SI Sikander Roy (PW-26) and HC Rajiv (PW-21) reached DDU Hospital where the injured namely Bharat was declared brought dead, obtained the MLC (Ex.PW-10/A) of the deceased whose body had already been sent to the mortuary. Thereafter, IO met the eye witness/ complainant Ajay Kumar (PW-1) in the hospital and recorded

his statement on which rukka was prepared resulting in registration of FIR No.283/2011 under Section 302/34 IPC dated 2<sup>nd</sup> September, 2011 at PS Janakpuri.

3. The MLC (Ex.PW-10/A) was conducted on 02<sup>nd</sup> September, 2011 at 3.30 pm by Dr. Rita Baruah, DDU Hospital. She reported that the body of deceased Bharat was brought in casualty in an unconscious state, pulse and BP were not recordable, pupils bilateral dilated and fixed, no respiratory and heart sound were heard and ECG showed straight line, hence, the patient was declared brought dead.

4. Postmortem of the deceased was conducted on 3<sup>rd</sup> September, 2011 at about 1:45 PM at DDU Hospital by PW-25, Dr. Komal Singh, Sr. Chief Medical Officer (HAG), DDU Hospital. (Ex.PW-25/A). The following external injuries were found:

- i. *Clean incised wound of size 4cm x 1 cm x muscle deep present over the left side of chest 2cm elbow the left nipple horizontally placed with one angel obtuse another acute.*
- ii. *CIW of size 3.5 cm x 0.8 cm x muscle deep present over the dorsal aspect of lower left forearm 2.5 cm above the left wrist obliquely placed with one angle obtuse another acute.*
- iii. *CIW (Penetrating Injury) of size 4cm x 1.8 cm x deep to abdominal cavity 7 cm above anterior superior iliac spine 16 cm lateral to umbilicus and 20 cm below left nipple and 95 cm above the left heel present on the lateral aspect (in mid auxiliary line) on left side with vertically placed lower angel acute. Intestinal loop is coming out through this wound with sufficient amount of liquid and clotted blood. The penetrating injury traced up to the left kidney after piercing the capsule of the left kidney making a clean laceration of size 5 cm x 1 cm x 3 cm with clean cut margins about 1.4 liter of liquid and clotted blood present in abdominal cavity with large hematoma of dark reddish clotted blood at the capsule of left kidney.*

The cause of death was hemorrhage shock subsequent to stab injury to the kidney. Injury No.3 was opined to be sufficient to cause death in the ordinary course of nature. He further opined that all the cut marks were possible by the knife used by the assailants.

5. Upon completion of investigation, chargesheet was filed under section 302/323/341/34 IPC and charges were framed for offences punishable under Sections 341/34 IPC, 323/34 IPC and 302/34 IPC against all the three appellants. 27 prosecution witnesses including one eye witness Ajay Kumar (PW-1) were examined. On the other hand, appellants examined one witness namely Mohd. Ali @ Sonu (DW-1).

6. Appellant Pankaj @ Ishu assails the impugned judgment on the ground that as per the prosecution case, the appellant was merely driving the motorcycle, did not utter any word and was not carrying any weapon with him. It is not the case of the prosecution that the appellants shared a common intention or agreed for commission of murder when they reached the spot, or that appellant Pankaj was aware that Aman was carrying a knife. Further, as per the rough and scaled site plan (Ex.PW-23/E and Ex.PW-6/A respectively), Pankaj was on the motorcycle at a substantial distance from the spot where the incident took place. Learned counsel for the appellant Pankaj further submitted that mere presence of appellant at the place of occurrence cannot raise an inference that the appellant shared a common intention with other appellants to commit murder and reliance was placed on the decisions reported as (2013) 12 SCC 294 Raghubir Chand vs. State of Punjab and AIR 1989 SC 1137 Rangaswami vs. State of Tamil Nadu. It was

further submitted that the appellant was at a certain distance from the other two appellants so as to form a common intention at the spur of moment. Reliance was further placed on the decisions in CrI. A. 284-286/2003 Dani Singh & ors. vs. State of Bihar and CrI.A.439/1999 (DHC) Nafees @ Bhurra vs. State (NCT of Delhi). In alternative, it was submitted that even if the case of prosecution is taken at its best, it falls under the ambit of Section 304 IPC, as the deceased was neither known to the appellants, nor was there any enmity between them. Reliance in this regard was placed on (2007) 14 SCC 660 Vineet Kumar Chauhan vs. State of U.P. and CrI.A.1226/2013 (DHC) Jamil @ Jami vs. State (Govt. of Delhi). It was submitted that the appellant has no role whatsoever in the commission of the offence of murder and reliance was placed on (2012) 4 SCC 722 Govindaraju @ Govinda vs. State by Sriramapuram P.S. & Anr. and (2010) 9 SCC 189 Babu vs. State of Kerala. Further, it was contended on behalf of the appellant that the complainant/ eyewitness Ajay (PW-1) is not a trustworthy or reliable witness. His initial version pertaining to snatching of the phone from Deepak was not established and neither Deepak was examined to corroborate the version of the prosecution nor any phone was ever recovered. Further, Ajay stated to have called the family members of the deceased, but no evidence in this regard was brought on record. To establish the presence of Ajay at the spot, the prosecution relies upon the presence of blood of deceased on Ajay's clothes. Merely because Ajay took deceased to the hospital, resulting in the presence of blood on the clothes of Ajay does not lead to the inference that he was an eye witness to the incident. Ajay's presence on the spot continues to remain doubtful.

7. It was further contended on behalf of Pankaj that the testimony of

Ajay is contradictory to the testimony of Gauri (PW-15) in material particulars. Gauri (PW-15) in his testimony stated that on the day of incident at about 1.30 pm – 2 pm, he was with his friends Sonu and Ajay at JJ Colony Chowk and in the meanwhile, some persons came and informed that a boy had received knife injuries. Further, DW-1 in his testimony corroborated this version of PW-15, and hence, Ajay's testimony does not inspire confidence. It was further contended that the prosecution failed to prove the crime scene itself as no investigation was conducted at the crime scene other than preparing a site plan and the prosecution is silent about the inspection by the crime team and its report, photographs of the crime scene and exhibits from the crime scene like earth control, sample earth control and blood stains etc. It was submitted that the importance of the crime scene is much higher to the veracity and truthfulness of the alleged version of an eye witness. Further, the non-production of CCTV footage, non-inclusion of CDRs of the appellants and PW-1 amounts to withholding of best evidence and is not a mere instance of faulty investigation. Reliance was placed on decision reported as (2015) 7 SCC 178 Tomaso Bruno & Anr. vs. State of U.P. It was further contended that the nature of injuries inflicted on the deceased was such that it would have certainly resulted in loss of blood and hence, the same must have been present at the scene of crime. Even otherwise, as per the version of the prosecution, Ajay went upto Gauri (PW-15) and brought him at the spot for taking the deceased to the hospital, which would have taken at least few minutes, which are more than sufficient for blood to ooze out from the wrist and chest of the deceased. It was also contended that the driver of TSR in which Ajay and Gauri took the deceased to the hospital was not examined. No investigation was conducted with respect to the Garg

Nursing Home or any other place where the deceased was first taken to prove the series of events. Learned counsel for the appellant further submitted that the even though Gauri (PW-15) was declared a hostile witness, however, he does not cease to be a reliable witness. The testimony of Gauri need not be considered to be false, and mere fact of him being declared hostile cannot result in automatic rejection of his evidence. Further, his testimony is supported by the defence evidence, which is to be considered at par with the prosecution evidence. Reliance was placed on the decisions reported as (1997) 10 SCC 197, Pandappa Hanumappa Hanamar and Another vs. State of Karnataka, 1977 AIR 170 Rabindra Kumar Dey vs. State of Orissa, (1981) 2 SCC 166 Dudh Nath Pandey vs. State of U.P., (2000) 4 SCC 515 State of U.P. vs. Babu Ram and (2002) 1 SCC 351 Munshi Prasad & Ors. vs State of Bihar.

8. Appellant Ankit Aggarwal assails the impugned judgment on the ground that there is no eyewitness in the present case and that Ajay (PW-1) is a planted witness. Reliance was placed on the testimony of Gauri (PW-15), as per which Ajay was with Gauri at some distance when the incident took place and some person informed them about the incident and hence, Ajay cannot be considered to be an eyewitness. It was contended that the appellant neither had any weapon on him nor committed any overt act nor had any motive nor any enmity with the deceased, and hence he cannot be implicated in the present case with the aid of section 34 IPC. Reliance was placed on (2009) 11 SCC 395 Munni Lal S/o Gokul Teli vs. State of Madhya Pradesh and (2009) 11 SCC 492 Dayashankar vs. State of Madhya Pradesh. It was submitted that the prosecution story was improbable and based on mere suspicion. The investigation in this case was shoddy. No scientific

investigation was done and no CDRs were collected. Learned counsel for the appellant further submitted that it was in fact Ajay who was the main culprit as he had motive to kill the deceased, however he has been made a witness.

9. Appellant Aman Sharma assails the impugned judgment on the ground that the investigating Police Station did not have the territorial jurisdiction and no local police, having the said jurisdiction, came at the spot at the time of conducting the proceedings. It was further contended that there was no motive or prior intention on part of the appellant to commit the crime rather Ajay (PW-1) had a motive as he had inflicted injury on the left ear two years back. Md. Ali (DW-1) clearly stated in his testimony that he was standing with Ajay and Gauri when one boy Bharat sustained injuries and was taken to a nearby clinic, hence the presence of Ajay at the spot is doubtful and that he was a planted witness. Further, IO PW-23 stated that he took photographs from his own camera, but neither those nor any other photos of the crime scene were ever brought on record. Security Guard Vir Pal (PW-7) stated that the police had obtained his signatures on the blank papers and therefore, the conduct of police is highly doubtful. Neither any CDRs of PW-1 or deceased were produced nor CCTV footage was collected from either the Garg Nursing Home, or the Guest House nearby or any other nearby area. Reliance was placed on 2014 SCC OnLine SC 1833 Suresh Kumar vs. Union of India. It was further contended that there was a delay in registration of FIR of about 3-4 hours. The FSL report with respect to the blood found on the alleged weapon of offence i.e. the knife shows “no reaction”, which cannot rule out the possibility of another knife being used in the commission of the offence. Further, no chance prints were lifted from the recovered knife and the description of knife is different by different prosecution witnesses.

Ajay stated to have brought the relatives of the deceased from the colony to the place of incident, but none of them was made a witness. Learned counsel for the appellant submitted that even the learned ASJ in the impugned judgment recorded that there are glaring lacunas, investigation is shoddy and that benefit of doubt should be given to the appellants, but still concluded that benefit of the negligence of IO cannot go to the appellants and ruled against the appellants.

10. Ld. APP for the State submitted that the impugned judgment of the Trial Court is well reasoned as it is based on cogent evidence in the form of deposition of PW-1, FSL Reports and post mortem report all of which point towards the guilt of the appellants and hence the present appeals be dismissed. Ld. APP relies upon the following facts:

- i. As per the FSL Report Ex.PW-19/A and Ex.PW19/B, the blood group of the deceased matched with the blood retrieved from the clothes of the appellant Aman.
- ii. The appellant Aman Sharma got the weapon of offence, i.e. the knife, recovered from under the debris of construction material near Talab Wala Park, Main Entry Gate, Village Bindapur (Ex.PW-21/K).
- iii. The PM report Ex.PW-25/A confirmed that the cause of death was hemorrhagic shock subsequent to stab injuries to kidney which was sufficient to cause death. Further, as per the subsequent opinion of the Dr. Komal Singh (Ex.PW-25/D), external injuries 1 to 3 were possible by the knife seized.
- iv. Appellant Ankit was identified by Ajay at the time of

Ankit's arrest on 03<sup>rd</sup> September, 2011 at Uttam Nagar Bus Stand. On 6<sup>th</sup> September, 2011, when appellant Aman was being interrogated by IO at the PS, Ajay walked into the IO room and identified Aman. An application for TIP was moved by the IO for identification of appellant Pankaj, which was refused by Pankaj vide Ex.PW-8/B.

11. It was contended by learned APP that Mohd. Gauri (PW-15) washed the clothes before handing them over, and therefore, no useful purpose could be served by seizing them. Further, the said witness has also been involved in sixteen previous cases of heinous crimes including one case of MCOCA and even after the present incident, he was sent to judicial custody, which was also the time when the appellants were also in judicial custody. Even during his examination as a witness, he was produced from custody. Therefore, the possibility of the witness turning hostile in order to help the appellants, or that he was won over by the appellants in jail cannot be ruled out. It was submitted that merely because Md. Gauri is not supporting the prosecution version, does not weaken the case. Further, it was submitted that no earth control was lifted from the spot as when IO had visited the spot, no blood was found there and the blood started oozing out from the body of the deceased when he was put in the auto for being taken to the hospital.

12. Learned APP further countered the contention put forth on behalf of the appellant Pankaj and submitted that Pankaj shared common intention with the other two appellants on each and every step. It was Pankaj who brought his bike, took them to place of incident and helped them in escaping from the spot. If Pankaj did not have any intention, he would have stopped the other two appellants or taken the deceased to the hospital and would also

have assisted in the investigation. Further, it was countered that chance prints could not be lifted from the recovered knife because of the rainy season at the relevant time. Further, CDRs of the appellants were not obtained because all the appellants were roaming on the same motorcycle and CDR of deceased were not required in the investigation and hence, were not obtained.

13. Having heard learned counsel for the parties at length and perusing the record the following evidence emerges on record.

14. Ajay (PW-1) deposed that on the day of incident he went to a school at Janakpuri with Bharat to take ₹500/- from Deepak, and on Deepak's refusal, he snatched his Sony Ericson phone and handed it over to his friend Mohsin who was studying in the same school. Thereafter, at about 1.30 pm when he and Bharat returned to the school to take the phone from Mohsin. Mohsin told them that Deepak, Deepak's friends and mother took away the phone and were searching for him. Thereafter, he and Bharat started towards their house on foot and around 2 pm when they were outside Shanti Guest House Ankit, Aman and Ishu came on a motorcycle and started quarrelling with them, on which they both started running. Ishu was on motorcycle and chased them and got us at Garg Nursing Home. Aman caught Bharat and Ankit caught him and thereafter, Aman took out a knife and inflicted stab injuries on Bharat. Thereafter all the three appellants ran away and he ran towards his colony, called Gauri and with him took Bharat to DDU hospital in a TSR where Bharat was declared "brought dead". On 06<sup>th</sup> September, 2011, he went to the police station where he identified Aman as the person who stabbed Bharat and on 19<sup>th</sup> September 2011, he identified Pankaj at Tis Hazari Court in custody of a police officer. In his cross examination, he

stated to have known Ankit and Aman from before the incident, and had also seen them around the school. He also stated that after Bharat was stabbed, he first went to the house of Bharat and narrated the incident to Bharat's mother, mama and mami and thereafter he narrated the incident to Gauri who accompanied him to the spot and after that he and Gauri took Bharat to the hospital. The family members of Bharat also reached the spot.

15. Md. Gauri, examined as PW-15, was produced from judicial custody in FIR No.688/2014 PS Delhi Cantt., FIR No. 61/2014 PS Spl. Cell and FIR No.485/2011 PS Uttam Nagar and was declared hostile. In his examination in chief, he stated that on the day of incident he was standing at the Chowk of JJ Colony alongwith his friends Sonu and Ajay and in the meanwhile some persons came and informed that one boy had received knife injuries and that the said boy was at the clinic of the doctor. On reaching the clinic of the doctor, they saw the injured lying there. He knew the injured and his name was Bharat. Thereafter, he along with Ajay took him to DDU hospital where Bharat was declared "brought dead". He stated that his vest got stained with blood and that he tied his shirt on the wound of Bharat. He stated that he was called at PS Janakpuri after about 15-20 days of the incident and that he refused to become a witness in the present case. In his cross examination he stated to have not given his blood stained vest to the police.

16. Mohsin (PW-14), deposed that on the day of incident he was in his school when at around 1-1.15 pm, Ajay came to him and handed over one Sony Ericson black colored phone to him and told him that he would take that back in sometime. After 15-20 minutes, one Deepak who was also studying in the same school came to him along with his mother and brother

and asked for the phone. He gave the phone to Deepak. Thereafter, he received a call from Ajay and Ajay told him that he was coming to take the phone, to which he replied that he had already given the phone to Deepak. After sometime, Ajay still came to him to make enquiry and in between this time, Ankit came outside his class and called for him and on his refusal Ankit went away after 5-10 minutes. Thereafter, he informed Ajay that Ankit was searching and asking for him. In his cross examination he stated that on both the occasions of giving and taking away the phone, Ajay came alone to him. In cross-examination he stated that he deposed falsely regarding coming of Ankit in his school and asking about Ajay.

17. IO Insp. Prabhu Dayal (PW-23), deposed that on receipt of DD No.26A, he along with SI Sikander Roy and HC Rajiv reached the DDU Hospital, where Bharat was reported to have been brought dead. He recorded the statement of the eye witness Ajay, prepared rukka (Ex.PW-23/A) and got the FIR registered. He went to the scene of crime and prepared the site plan Ex.PW-23/B. He seized the clothes of Ajay (Ex.PW-1/B) and deposited the same in malkhana. The dead body was identified by father of the deceased Bittoo Singh and mama. Thereafter, on 03<sup>rd</sup> September 2011, Ankit was arrested (Ex.PW1/D) from Uttam Nagar Bus Terminal and was identified by the complainant at the entry gate of the bus terminal. On 4<sup>th</sup> September 2011, on a secret information (DD No.9A) he reached Dhaula Kuan with a raiding team and Pankaj was arrested (Ex.PW-21/B) after being identified by the appellant Ankit. Pankaj then got recovered the motorcycle bearing no. DL-9SU-3504 used in the commission of offence from H.No 114, Village Bindapur, Uttam Nagar, and Pankaj disclosed that the bike belongs to Manoj and that Pankaj had borrowed the same from Manoj. On 5<sup>th</sup> September 2011,

vide a secret information (DD No.41B), he alongwith the raiding team arrested Aman from Dabri Chowk (Ex.PW-21/F). Aman disclosed and got recovered the knife (Ex.PW-21/K) from Talab Vala Park, Bindapur, and his blood stained clothes alongwith the knife cover (Ex.PW-21/L) from a room in Sai Nath Clinic, Property No. A-24, Anup Nagar, Bindapur. In his cross examination he stated that he did not seize the clothes of Md. Gauri as he had already washed his clothes.

18. Naresh Kumar (PW-19), Sr. Scientific Officer (Biology), prepared the FSL Report Ex.PW-19/A and Ex.PW-19/B. As per the serology report, human blood was found on the weapon of offence recovered, however the blood group could not be ascertained. Further, human blood with same blood group as that of the deceased was found on the jeans pant (Ex.2a), banian (Ex.2b) and shirt (Ex.2c) of eye witness Ajay as also the T-Shirt (Ex.6a), banian (Ex.6b) and underwear (Ex.6c) of appellant Aman. Human blood was also found on the Jeans Pant (Ex.6d) and weapon/knife cover (Ex.6e) but the blood group could not be ascertained for these two recovered articles.

19. In their respective statements under section 313 CrPC, appellants Pankaj, Ankit and Aman stated that they were falsely implicated in the case. They led one defence witness Mohd. Ali DW-1 who deposed that at the time of incident, he was standing at the Pankha road along with one Gauri and Ajay and some boys came running and informed that one Bharat sustained injuries and was taken to the clinic in the colony. He alongwith Gauri and Ajay went to the clinic, where the doctor advised to take the injured to the hospital, upon which, Ajay and Gauri took the injured to the hospital and he went back to his house. In his cross examination, he stated that he did not know Ajay but Gauri introduced Ajay to him.

20. It was the case of the prosecution that at about 2.30 pm, when deceased Bharat and Ajay were returning to their colony, in front of Shanti Guest House, A-1 Block, Janakpuri, the appellants Pankaj, Aman and Ankit came on red colored Pulsor, and Ankit caught Ajay and Aman caught Bharat. Both Bharat and Ajay tried to rescue themselves but they were held by Ankit and Aman near Garg Nursing Home and thereafter, Aman took out a knife from his pocket of his pant and stabbed Bharat, on which Bharat screamed loudly and all the three appellants ran away on the bike which was being driven by Pankaj @ Ishu. To seek help, Ajay rushed to nearby jhuggi where he met Md. Gauri, and both of them took Bharat to hospital in an Auto, where he was declared “brought dead”. Clothes of Md. Gauri and Ajay got soaked in blood which came out from the wound only after Bharat was put in auto and not at the spot.

21. The main challenge of the appellants to the prosecution case is that Ajay (PW-1) is not a reliable witness. He was not present at the spot and has been planted as an eye witness. The first challenge to Ajay’s presence at the spot is on the basis of statement of Mohd. Gauri (PW-15). As noted above PW-15 in his deposition stated that on the day of incident, he was standing at the chowk of J J Colony along with his friend Sonu and Ajay, when some persons came and informed that one boy had received knife injuries. Thus, they went to the spot. Both Ajay and Mohd. Gauri took the deceased to DDU hospital. Clothes of Ajay and Mohd. Gauri were bloodstained, however Mohd. Gauri’s clothes were not seized as he had washed the same. Thus, though Mohd. Gauri supported the case of the prosecution to the extent that he and Ajay had taken the deceased to DDU hospital, however, discredited the version of Ajay as an eyewitness, by claiming the presence of

Ajay (PW-1) with him at the time of alleged incident and that it was someone else who informed them that deceased had been stabbed. It may be noted that when Mohd. Gauri was examined as a witness, he was produced from judicial custody in FIR No. 668/2014 PS Delhi Cantt, FIR No. 61/2014 PS Special Cell and FIR No. 485/2011 PS Uttam Nagar. Mohd. Gauri was involved in as many as 16 cases including one of MCOCA and was thus running in judicial custody, when the appellants were also in judicial custody. Hence the same appears to be the probable reason due to which Mohd. Gauri turned partly hostile and has supported the appellants by stating that Ajay was not an eyewitness.

22. Version of Mohd. Gauri was that he was standing with Sonu and Ajay when the information was received that one boy had received knife injuries and thus they went to the injured who was found to be Bharat. In case the version of Mohd. Gauri is to be accepted to the extent that Sonu and Ajay were standing with him, it is unexplained as to why Sonu did not accompany them to the spot, then with the deceased to the hospital. It is unexplained by Mohd. Gauri as to where Sonu went away. Be that as it may, it is well settled even part testimony of a hostile witness can be looked into to the extent it is corroborated in material particulars.

23. The fact that Ajay took the deceased to the hospital is corroborated by the MLC Ex.PW-10/A which notes his name "Ajay, friend and mobile No. 9810331421". Further, clothes of Ajay were bloodstained and were sent to FSL. As per the FSL report, clothes of Ajay were stained with blood of Group A which was the same as that of the deceased. The deceased reached the hospital at 3.30 PM. Ajay (PW-1) in his testimony has clarified that after they had gone to the school again at 1.30 PM and when Mohsin stated that

Deepak, his friend and mother were searching him, they proceeded towards the school and at about 2.00 PM he along with Bharat reached Shanti Home, Janak Puri. It is at that point that the three accused, namely, Ankit, Aman and Ishu came on a Red Pulsar motorcycle and started quarrelling. When Ajay and Bharat ran, Ishu was on the motorcycle with the engine on, the two other accused Aman caught hold of Bharat and Ankit caught hold of Ajay, knife injuries were given on the side of Garg Nursing Home as is evident from the site plan. Undoubtedly, nobody has been examined from Garg Nursing Home by the prosecution as no treatment was given to Bharat at the said Nursing Home and he was referred to the hospital in view of the nature of injuries caused to him. The entire process would have consumed some time and by 3.30 PM the deceased was admitted in DDU hospital where he was declared brought dead. Based on the statement of Ajay for the incident which took place between 2.00 PM to 3.00 PM on the 2<sup>nd</sup> September, 2011 rukka was sent at 6.25 PM wherein Ajay had clearly stated that three boys on a red Pulsar motorcycle came, of which one was Ankit and the other was Aman and the third boy was driving the motorcycle whom he could identify on seeing. He assigned specific roles to Aman and Ankit and that after Ankit caught hold of him, Aman took out a knife from his pocket and gave three stab injuries to Bharat. It is at that stage that Ajay got himself rescued from Ankit and ran towards the colony and called other people including Mohd. Gauri and took Bharat to the hospital. There is nothing unnatural or improbable in the testimony of Ajay that would ascribe him as a planted witness. Rather his version is corroborated in material particulars by the testimony of hostile witness Mohd. Gauri and the documentary evidence in the form of MLC and rukka.

24. Learned counsels for the appellants vehemently argued that the crime scene has not been proved as neither the earth control samples were lifted nor photographs were taken. It may be noted that Bharat received incised injuries, the two main injuries being on the left side of chest and the abdominal cavity which would have resulted in the blood majorly collecting in the cavity inside the body except for the left forearm injury which was above the left wrist and since the blood started oozing out later on when even as per Mohd. Gauri he put his shirt to control the blood and the blood was found on the clothes of Aman, the blood not falling on the place of incident cannot be ruled out. In the absence of blood at the spot, there was no useful purpose to collect the earth control or take the photographs. Even as per the post-mortem report, death was due to hemorrhagic shock consequent to the stab injury to the kidney and the said injury No.3 was sufficient to cause death in the ordinary course of nature.

25. In the decision reported as (2012) SCCOnlineDel 4272 Karamvir Vs. State a Coordinate Bench of this Court held that where the bloodstained clothes of the witness were seized at the spot and as per the FSL examination the blood so found on the clothes tallied with that of the deceased, it was sufficient to establish the presence of such witness and the factum of his taking the deceased to the hospital.

*“16. The overall testimony of this witness, in the absence of any infirmities, inspires confidence. Being the son of the victim, he was interested to bring the real culprit to book. He was not expected to let the real culprit go scot free and to falsely implicate the innocent for the murder of his father. His presence at the spot has been established beyond doubt. He had taken the victim to the hospital soon after the incident in the van No. DID-2063 driven by PW-31 (Kuldeep Singh Ahuja). His name finds*

*mention in the MLC (Ex.PW-9/A). The investigating officer met him at the hospital and recorded his statement (Ex.PW-11/A) then and there. His blood stained clothes were seized at the spot and as per Forensic Science examination, the deceased's blood group was found on his clothes. That established his presence and proved the factum of his taking the injured/victim to the hospital. The accused did not claim that PW-11 was present at any other specific place at the time of occurrence. They did not examine any witness in their defence from the locality to rule out his presence at the time of occurrence. In the cross-examination he explained the sequences of events i.e. how his father had gone to make payment to PW-32 (Harpal) for the building material purchased from him and how he was stabbed near his house.”*

26. Learned counsels for the appellants have also contended that TSR driver has not been made a witness. However, as regards TSR driver is concerned, there is no contradiction in the testimonies of Ajay and Mohd. Gauri to the extent that the two of them took Bharat in an auto to DDU hospital and at that stage he was bleeding. Thus, prosecution was not required to multiply the witness for the deceased being taken in an auto to the hospital.

27. Thus, from the cogent and convincing evidence of Ajay (PW-1) it can be safely held that he was an eye-witness to the incident and during the scuffle he was caught hold by Ankit when Aman stabbed Bharat and he got himself freed, thereafter ran to the colony, called other people and then took the deceased to the hospital where he was declared brought dead and on the same day within 3 hours of his reaching the hospital and Bharat being declared dead, FIR was registered on the statement of Ajay Kumar wherein the two appellants Ankit and Aman were clearly named and as regards Pankaj specific role was ascribed to him. Ajay also stated that he could

identify the third boy on being shown.

28. As regards TIP of Pankaj is concerned, the same was carried out vide Ex.PW-8/B wherein Pankaj took the plea that he was not participating in the TIP as he has been already shown to the witnesses at the Police Station. The only eye-witness to the incident was Ajay. In cross-examination of Ajay on behalf of Pankaj no suggestion has been given that the accused was shown to him at the Police Station. Appellant Pankaj was apprehended on the pointing out of accused Ankit Aggarwal who was already in custody and at the spot his arrest memo, personal search memo and disclosure statement was recorded. Pankaj stated that he could get recovered the motorcycle used in the commission and thereafter he took the Police party to a place near rice shop and printing press, where Bajaj Pulsar bearing registration No. DL-9SU-3504 of red colour was pointed, which was seized. Nothing has been elicited in the cross examination of the eye witness Ajay that he was present in the police station or at the time of arrest, hence the plea cannot be accepted.

29. Learned counsel for Pankaj claimed that since he was on the motorcycle, did not take part in the offence and was not aware that Aman was carrying a knife, he cannot be convicted for the offence punishable under Section 302 IPC with the aid of Section 34 IPC.

30. Hon'ble Supreme Court in the recent decision reported as (2022) 7 SCC 521 Krishnamurthy @ Gunodu & Ors. Vs. State of Karnataka following the law laid down by the Hon'ble Supreme Court in (2001) 3 SCC 673 Suresh & Anr. Vs. State of Uttar Pradesh succinctly noted the law applicable for liability under Section 34 of the IPC as under:

*“12. The underlying basic assumption or foundation in criminal law is the principle of personal culpability. A person is criminally responsible for act or transactions in which he is personally engaged or in some other way had participated. However, there are various modes and capacities in which a person can participate in a crime. He can instigate, be a facilitator or otherwise aid execution of a crime. Section 34 IPC incorporates the principle of shared intent, that is, common design between the two perpetrators, which makes the second or other participants also an equal or joint perpetrator as the main or principal perpetrator [ We have used the said terms for want of a better phrase. Section 34 IPC does not postulate such distinction.] . The question which arises is whether Thimmappa and Gopala can be attributed common intention under Section 34 IPC to commit murder under Section 300 or even offence under Section 304 IPC.*

*13. In Suresh v. State of U.P. [Suresh v. State of U.P., (2001) 3 SCC 673 : 2001 SCC (Cri) 601] , R.P. Sethi, J. in his concurring judgment (for himself and B.N. Agarwal, J.) on the question of common intention has observed : (SCC pp. 686-87, paras 38-40)*

*“38. Section 34 of the Penal Code, 1860 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 Penal Code, 1860 (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* [Satrughan Patar v. Emperor, 1919 SCC OnLine Pat 4] 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.”*

14. Appropriate at this stage would be reference to an earlier decision of this Court in *Afrahim Sheikh v. State of W.B.* [*Afrahim Sheikh v. State of W.B.*, AIR 1964 SC 1263] , which referred to with approval the following quote on the expression “act” explained by the Judicial Commissioner in *Barendra Kumar Ghosh v. King Emperor* [*Barendra Kumar Ghosh v. King Emperor*, 1924 SCC OnLine PC 49 : ILR (1925) 52 Cal 197] : (*Barendra Kumar Ghosh case* [*Barendra Kumar Ghosh v. King Emperor*, 1924 SCC OnLine PC 49 : ILR (1925) 52 Cal 197] , SCC OnLine PC)

*“... criminal act means that unity of criminal behaviour, which results in something, for which an individual would be punishable, if it were all done by himself alone, that is, in a criminal offence.”*

This “criminal act” under Section 34 IPC, it was held, applies where a criminal act is done by several persons in furtherance of common intention of all. The criminal offence is the final result or outcome but it may be through achievement of individual or several criminal acts. Each individual act may not constitute or result in the final offence. When a person is assaulted by a number of accused, the “ultimate criminal act” normally will constitute the offence which finally results or which may result in death, simple hurt, grievous hurt, etc. This is the final result, outcome or consequence of the criminal act, that is, action or act of several persons. Each person will be responsible for his own act as stipulated in Section 38 IPC. However, Sections 34 and 35 expand the scope and stipulate that if the criminal act is a result of common intention, every person, who has committed a part of the criminal act with the common intention, will be responsible for the offence.

15. It was accordingly held in *Afrahim Sheikh* [*Afrahim Sheikh v. State of W.B.*, AIR 1964 SC 1263] as under : (AIR pp. 1267-268, paras 9-10)

*“9. Provided there is common intention, the whole of the result perpetrated by several offenders, is attributable to each offender, notwithstanding that individually they may have done separate acts, diverse or similar. Applying this test to the present case, if all the appellants shared the common intention of severely beating Abdul Sheikh and some held him down and others beat him with their weapons, provided the common intention is accepted, they would all of them be responsible for the whole of the criminal act, that is to say, the criminal offence of culpable homicide not amounting to murder which was committed, irrespective of the part played by them. The common intention which is required by the section is not the intention which Section 299 mentions in its first part. That intention is individual to the offender unless it is shared with others by a prior concert in which case Sections 34 or 35 again come into play. Here, the common intention was to beat Abdul Sheikh, and that common intention was, as we have held above, shared by all of them. That they did diverse acts would ordinarily make their responsibility individual for their own acts, but because of the common intention, they would be responsible for the total effect that they produced if any of the three conditions in Section 299 IPC applied to their case. If it were a case of the first two conditions, the matter is simple. They speak of intention and Section 34 also speaks of intention.*

*10. The question is whether the second part of Section 304 can be made applicable. The second part no doubt speaks of knowledge and does not refer to intention which has been segregated in the first part. But knowledge is the knowledge of the likelihood of death. Can it be said that when three or four persons start beating a man with heavy lathis, each hitting his blow with the common intention of severely beating him and each possessing the knowledge that death was the likely result of the beating, the requirements of Section 304, Part II are not satisfied in the case of each of them? If it could be said that*

*knowledge of this type was possible in the case of each one of the appellants, there is no reason why Section 304, Part II cannot be read with Section 34. The common intention is with regard to the criminal act i.e. the act of beating. If the result of the beating is the death of the victim, and if each of the assailants possesses the knowledge that death is the likely consequence of the criminal act i.e. beating, there is no reason why Section 34 or Section 35 should not be read with the second part of Section 304 to make each liable individually.”*

16. *Accordingly, to attract applicability of Section 34 IPC, the prosecution is under an obligation to establish that there existed a common intention before a person can be vicariously convicted for the criminal act of another. The ultimate act should be done in furtherance of common intention. Common intention requires a prearranged plan, which can be even formed at the spur of the moment or simultaneously just before or even during the attack. For proving common intention, the prosecution can rely upon direct proof of prior concert or circumstances which necessarily lead to that inference. However, incriminating facts must be incompatible with the innocence of the accused and incapable of explanation by any other reasonable hypothesis.*

17. *By Section 33 IPC, a criminal act in Section 34 IPC includes omission to act. Thus, a co-perpetrator who has done nothing but has stood outside the door, while the offence was committed, may be liable for the offence since in crimes as in other things “they also serve who only stand and wait”. Thus, common intention or crime sharing may be by an overt or covert act, by active presence or at distant location but there should be a measure of jointness in the commission of the act. Even a person not doing a particular act but only standing as a guard to prevent any prospective aid to the victim may be guilty of common intention. [ See Tukaram Ganpat Pandare v. State of Maharashtra, (1974) 4 SCC 544 : 1974 SCC (Cri) 580]*

18. *Normally, however, in a case of offence involving physical violence, physical presence at the place of actual*

*commission is considered to be safe for conviction but it may not be mandatory when prearranged plan is proved and established beyond doubt. Facilitation in execution of the common design may be possible from a distance and can tantamount to actual participation in the criminal act. The essence and proof that there was simultaneous consensus of mind of co-participants in the criminal action is however, mandatory and essential. [ See Ramaswami Ayyangar v. State of T.N., (1976) 3 SCC 779 : 1976 SCC (Cri) 518] In Krishnan v. State of Kerala [Krishnan v. State of Kerala, (1996) 10 SCC 508 : 1996 SCC (Cri) 1375] it has been observed that an overt act is not a requirement of law for Section 34 IPC to operate but prosecution must establish that the persons concerned shared the common intention, which can be also gathered from the proved facts.*

19. *In Suresh case [Suresh v. State of U.P., (2001) 3 SCC 673 : 2001 SCC (Cri) 601] , this Court also examined whether a passive co-perpetrator can be liable under Section 34 IPC. This case quotes with approval the following passage from the judgment of Richardson, J. in King Emperor v. Barendra Kumar Ghose [King Emperor v. Barendra Kumar Ghose, 1923 SCC OnLine Cal 119 : AIR 1924 Cal 257] : (King Emperor case [King Emperor v. Barendra Kumar Ghose, 1923 SCC OnLine Cal 119 : AIR 1924 Cal 257] , SCC OnLine Cal)*

*“It appears to me that Section 34 regards the act done as the united act of the immediate perpetrator and his confederates present at the time and that the language used is susceptible of that meaning. The language follows a common mode of speech. In R. v. Salmon [R. v. Salmon, (1880) LR 6 QBD 79] [R. v. Salmon was followed in R. v. Morgan, 1909 SCC OnLine Cal 150 : (1908-09) 13 CWN 362. Curiously enough, however, the learned Judges expressly disclaimed the aid of Section 34, I do not know what section other than Section 34 made both the accused soldiers liable. With respect, the Court would seem to have been unnecessarily puzzled over the question of their “common intention”.] three men had been negligently firing at a mark. One of them—it was*

*not known which—had unfortunately killed a boy in the rear of the mark. They were all held guilty of manslaughter. Lord Coleridge, C.J., said: ‘The death resulted from the action of the three and they are all liable.’ Stephen, J., said: ‘Firing a rifle’ under such circumstances ‘is a highly dangerous act, and all are responsible for they unite to fire at the spot in question and they all omit to take any precautions whatever to prevent danger’.*

*Moreover, Sections 34, 35 and 37 must be read together, and the use in Section 35 of the phrase ‘each of such persons who joins in the act’ and in Section 37 of the phrase, ‘doing any one of those acts, either singly or jointly with any other person’ indicates the true meaning of Section 34. So Section 38 speaks of ‘several persons engaged or concerned in a criminal act’. The different modes of expression may be puzzling but the sections must, I think, be construed as enunciating a consistent principle of liability. Otherwise the result would be chaotic.*

*To put it differently, an act is done by several persons when all are principals in the doing of it, and it is immaterial whether they are principals in the first degree or principals in the second degree, no distinction between the two categories being recognised.*

*This view of Section 34 gives it an intelligible content in conformity with general legal notions. The opposing view involves a distinction dependent on identity or similarity of act which, if admissible at all, is wholly foreign to the law, both civil and criminal, and leads nowhere.”*

20. *At this stage, we would like to refer to an old judgment of a Division Bench of the Allahabad High Court in Bashir v. State [Bashir v. State, 1953 SCC OnLine All 74 : AIR 1953 All 668] , which by giving examples explains the scope and significance of the words “in furtherance” used in Section 34 IPC in the following manner : (SCC OnLine All)*

*“18. The use of the words “in furtherance” suggests that Section 34 is applicable also where the act actually done is not exactly the act jointly intended by the conspirators to be done, otherwise, the words would not be needed at all. The common intention can be to do one act and another act can be done in furtherance of the common intention. It may be a preliminary act necessary to be done before achieving the common intention; or it may become necessary to do it after achieving the common intention or it may be done while achieving the common intention. Going to the spot in a motor car is an act in furtherance of the common intention to commit a crime there; but if while going there the driver runs over and kills a pedestrian, the collision is merely incidental and the running over of the pedestrian is not in furtherance of the common intention. If, however, a conspirator who wishes to commit a crime involving violence against X is impeded by Y and throws Y aside in order to get at X, the attack upon Y is made in furtherance of the common intention; see Russell on Crime, pp. 557 and 558.”*

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*26. Section 34 IPC makes a co-perpetrator, who had participated in the offence, equally liable on the principle of joint liability. For Section 34 to apply there should be common intention between the co-perpetrators, which means that there should be community of purpose and common design or prearranged plan. However, this does not mean that co-perpetrators should have engaged in any discussion, agreement or valuation. For Section 34 to apply, it is not necessary that the plan should be prearranged or hatched for a considerable time before the criminal act is performed. Common intention can be formed just a minute before the actual act happens. Common intention is necessarily a psychological fact as it requires prior meeting of minds. In such cases, direct evidence normally will not be available and in most cases, whether or not*

*there exists a common intention has to be determined by drawing inference from the facts proved. This requires an inquiry into the antecedents, conduct of the co-participants or perpetrators at the time and after the occurrence. The manner in which the accused arrived, mounted the attack, nature and type of injuries inflicted, the weapon used, conduct or acts of the co-assailants/perpetrators, object and purpose behind the occurrence or the attack, etc. are all relevant facts from which inference has to be drawn to arrive at a conclusion whether or not the ingredients of Section 34 IPC are satisfied. We must remember that Section 34 IPC comes into operation against the co-perpetrators because they have not committed the principal or main act, which is undertaken/performed or is attributed to the main culprit or perpetrator. Where an accused is the main or final perpetrator, resort to Section 34 IPC is not necessary as the said perpetrator is himself individually liable for having caused the injury/offence. A person is liable for his own acts. Section 34 or the principle of common intention is invoked to implicate and fasten joint liability on other co-participants.*

*27. Further, the expression/term “criminal act” in Section 34 IPC refers to the physical act, which has been done by the co-perpetrators/participants as distinct from the effect, result or consequence. In other words, the expression “criminal act” referred to in Section 34 IPC is different from “offence”. For example, if A and B strike lathi at X, the criminal act is of striking lathis, whereas the offence committed may be of murder, culpable homicide or simple or grievous injuries.*

*28. The expression “common intention” should also not be confused with “intention” or “mens rea” as an essential ingredient of several offences under the IPC. Intention may be an ingredient of an offence and this is a personal matter. For some offences, mental intention is not a requirement but knowledge is sufficient and constitutes necessary mens rea. Section 34 IPC can be invoked for the said offence also [refer Afrahim Sheikh [Afrahim Sheikh v. State of W.B., AIR 1964 SC 1263] ]. Common intention is common design or common intent, which is akin to motive or object. It is the reason or purpose behind doing of all acts by the individual*

*participant forming the criminal act. In some cases, intention, which is ingredient of the offence, may be identical with the common intention of the co-perpetrators, but this is not mandatory.*

*29. Section 34 IPC also uses the expression “act in furtherance of common intention”. Therefore, in each case when Section 34 is invoked, it is necessary to examine whether the criminal offence charged was done in furtherance of the common intention of the participator. If the criminal offence is distinctly remote and unconnected with the common intention, Section 34 would not be applicable. However, if the criminal offence done or performed was attributable or was primarily connected or was a known or reasonably possible outcome of the preconcert/contemporaneous engagement or a manifestation of the mutual consent for carrying out common purpose, it will fall within the scope and ambit of the act done in furtherance of common intention. Thus, the word “furtherance” propounds a wide scope but should not be expanded beyond the intent and purpose of the statute. Russell on Crime, (10th Edn. p. 557), while examining the word “furtherance” had stated that it refers to “the action of helping forward” and “it indicates some kind of aid or assistance producing an effect in the future” and that “any act may be regarded as done in furtherance of the ultimate felony if it is a step intentionally taken for the purpose of effecting that felony”. An act which is extraneous to the common intention or is done in opposition to it and is not required to be done at all for carrying out the common intention, cannot be said to be in furtherance of common intention [refer judgment of R.P. Sethi, J. in Suresh [Suresh v. State of U.P., (2001) 3 SCC 673 : 2001 SCC (Cri) 601] ].*

*30. When we apply the aforesaid principles relating to applicability of Section 34 IPC to the facts of the present case, we feel that Thimmappa and Gopala are entitled to the benefit of doubt on the ground that it cannot be with certainty held that they had common intention viz. the injuries inflicted by Krishnamurthy on Venkatarama after he had fallen down. They did not participate thereafter by physically assaulting or*

*causing any injury to Venkatarama. They did not facilitate and help Krishnamurthy in the assault he perpetuated. We have no grounds to accept that they could have preconceived the brutal assault by Krishnamurthy who had put his knees on the neck and jumped on the chest of the deceased to cause the injuries resulting in his death. We cannot hold that these two accused could have premeditated the result which ensued when Krishnamurthy behaved and acted in the manner he did. Clearly, they had not joined Krishnamurthy when he had acted and have stood by. There is nothing to indicate that their acts, that is, holding the hands and pulling the legs of the deceased making him fall down, were done in furtherance of the common intention that Krishnamurthy would thereupon put his leg on the neck of the deceased, crush his chest and fracture the ribs. We would, in favour of the appellants Thimmappa and Gopala, hold that their acts cannot be primarily connected with the violence perpetuated by Krishnamurthy.*

*31. Given the acts attributed to Thimmappa and Gopala, the assault by Krishnamurthy and the resultant outcome were unexpected. We are also not prepared to hold that these two accused should have known the final outcome, or it was known to them, or it was a reasonably possible outcome of the preconcert/contemporaneous engagement or a manifestation of mutual consent for carrying out a common purpose. We, therefore, would not hold them guilty for the offence under Section 300 or even Section 299 IPC on the ground that they shared common intention as understood on application of Section 34 IPC.”*

31. To determine the role of appellant Pankaj @ Ishu, in terms of the decision of the Hon’ble Supreme Court, reiterated in Suresh & Anr.(supra) and Krishnamurthy @ Gunodu & Ors. (supra), it would be relevant to note the relevant portion of the deposition of Ajay Kumar, PW-1 as under:-

*“....Thereafter, I along with Bharat proceeded from the school towards our residence. At about 002:00 PM, when I along with Bharat reached at Shanti Home, Janak Puri. Three*

*persons namely Ankit, Amand and Ishu came on a red coloured Pulsar motorcycle and they all started quarreling with us. We both started running. At that time Ishu was on motorcycle in engine on position. One of the accused uttered to apprehend us and on this third accused chased us on his motorcycle and got us at Girl Nursing Home. Aman caught hold of Bharat and Ankit caught hold of me. Accused Aman had taken out a knife and gave three stab injuries on the person of Bharat. First knife hit on the chest, other on the hand and third near ribs. Thereafter, all the three accused persons run away from there on the same motorcycle. I went from three towards my colony and I called Gauri. I along with Gauri had taken injured Bharat in a TSR to DDU Hospital... ”*

32. It may be noted that Pankaj was driving the red Pulsar motorcycle on which Aman and Ankit had come. Further, when Ajay and Bharat ran, Pankaj followed them on the motorcycle with Aman and Ankit. Further, while Ankit caught hold of Ajay, Aman caught hold of Bharat and gave stab injuries, Pankaj kept his motorcycle on and immediately after the incident took away Ankit and Aman from the spot and hence it cannot be said that the intention was formed on the spur of the moment and Pankaj cannot be held to be a non-participant in the commission of offence with the aid of Section 34 IPC. It may be noted that it was not a case of single injury inflicted by Aman but 3 stab injuries were inflicted, two of which were on vital parts, when Pankaj also continued standing there with his motorcycle on and ran away only after taking the two accused after completion of the offence.

33. Thus from the cogent and convincing evidence of eye-witness Ajay Kumar who immediately after the incident took the deceased to the hospital and his name is reflected in the MLC Ex.PW-10/A and further corroborated by the fact that the clothes of Ajay Kumar were stained with blood of the

deceased and at whose instance Ankit was apprehended and besides the version of this eye-witness, at the instance of appellant Pankaj @ Ishu the red Pulsar motorcycle was recovered, knife which was used in the commission of offence was recovered at the instance of Aman Sharma concealed under the debris of construction material at near inside the Talab Vala park, main entry gate, village Bindapur and the post-mortem Doctor opined that the injury to the deceased was possible by the said weapon of offence; also as per the FSL report blood group of the deceased was found to match with the blood on the clothes of appellant Aman Sharma vide the FSL report Ex.PW-19/A and PW-19/B, this Court finds no error in the impugned judgment of conviction and order on sentence qua the appellants.

34. Appeals are accordingly dismissed.

35. Copy of the judgment be uploaded on the website and be sent to the Superintendent Jail for updation of record and intimation to the appellants.

**(MUKTA GUPTA)**  
**JUDGE**

**(ANISH DAYAL)**  
**JUDGE**

**DECEMBER 23, 2022/akb**