Naresh Kumar Vs. State

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Court : Delhi

Decided On : Sep-04-2013

Judge : Kailash Gambhir

Appellant : Naresh Kumar

Respondent : State

Advocate for Pet/Ap. : Ms. Asha Tiwari

Judgement :

$~ * IN THE HIGH COURT OF DELHI AT NEW DELHI Judgment delivered on:

4. 09.2013 + CRL.A. No.432 /2010 NARESH KUMAR ..... Appellant Through: Ms.AshaTiwari, Advocate versus STATE Through: + CRL.A. No. 321/2010 ARUN KUMAR @ HANNI Through: ..... Respondent Mr. Sunil Sharma, Additional Public Prosecutor for the State ..... Appellant Mr. M.L. Yadav, Advocate versus STATE Through: ..... Respondent Mr. Sunil Sharma, Additional Public Prosecutor for the State AND + CRL.A. No. 717/2010 SANJIV @ SANJAY @ MANJAN ..... Appellant Through: Ms.Sangeeta Chandra, Advocate versus STATE Through: ..... Respondent Mr. Sunil Sharma, Additional Public Prosecutor for the State CORAM: HON'BLE MR. JUSTICE KAILASH GAMBHIR HON'BLE MS. JUSTICE INDERMEET KAUR CRL.A. Nos.432 /321/717 of 2010 Page 1

JUDGMENT

KAILASH GAMBHIR, J.

1. By this order we propose to decide three separate Criminal Appeals preferred by Naresh Kumar, Arun Kumar and Sanjeev, accused in FIR No. 965/07 to challenge the judgment dated 11.02.2009 and order on sentence dated 20.02.2010, whereby all the three appellants were convicted for committing an offence punishable under Section 302 of Indian Penal Code,1806, (hereinafter referred to as IPC) read with Section 34 IPC and sentenced to imprisonment for life with fine of Rs. 4000/- each and in default of payment of fine, to undergo rigorous imprisonment for a period of nine months each. AppellantNaresh has also been convicted for committing an offence punishable under Section 397 of the IPC for which he has been sentenced to undergo rigorous imprisonment for a period of seven years. Appellant Arun and Sanjeev have also been convicted for committing an offence punishable under Section 392 read with Section 34 of IPC, for which they have been sentenced to undergo rigorous imprisonment for a period of five years and to pay fine of Rs.1,000/- each and in default thereof, to further undergo rigorous imprisonment for a period of three months each. CRL.A. Nos.432 /321/717 of 2010 Pag

2. Honesty pays, but it doesn't seem to pay enough to suit some people- F. M. Hubbard. The aforesaid quote rightly reveals what persuades people to indulge into unlawful acts, corrupt and criminal means to acquire riches, it is the quest for money but one cannot ignore that honesty and hard work are the verisimilitude of life that enables oneself to survive even in adverse conditions. Majority of people even today imbibe virtues of hard work and honesty in them, but the only gap that needs to be abridged is the difference in the thought process which varies from one man to another. All life demands struggle. Those who have acquired riches by corrupt means cannot brook the same for lifetime ignoring the clutches of law.

3. Tremendous increase in cases of robbery and dacoity has been noticed especially in the metropolitan cities. Robbery is considered as the easiest way to grab money, jewellery and valuable articles of others. To way lay people on deserted places, on highways and other isolated roads has become a very common practice for these criminals. Usually while committing offence of robbery

or dacoity, these criminals end up committing more serious and horrendous offence of eliminating the victim of his life or attempting to murder such victim or causing grievous hurt. It is also an acknowledged fact that these criminals keep committing these crimes as their normal routine job till they are convicted and appropriately CRL.A. Nos.432 /321/717 of 2010 Page 3 sentenced and even thereafter. A wave of these grisly crimes is sweeping across swathes of urban and small-town India. The continually rising graph makes us queasy. National Crime Records Bureau (NCRB) statistics show that incidents and rates of violent crimesmurder, kidnapping, dacoity, robbery, arson, dowry deaths have gone up dramatically in the past five years. Although 2010-2011 itself witnessed a 5-6 per cent spurt (National Crime Records Bureau). These numbers are also growing because it is one of the easiest ways to satisfy ones lust for money. Cases like chain snatching and pick pocketing have become so prominent in almost all the localities and neighborhoods. Undoubtedly, the State has to share its blame for not being able to provide good education to its citizens and to secure proper job opportunities or to settle the unemployed youth in small time avocations but at the same time the hard reality is that such kind of persons develop the habit of making easy and fast money instead of putting any hard work for their sustenance and livelihood. It is high time that the State should adopt some kind of measures to educate and sensitize the methods in regards to these criminals who keep indulging and repeating these crimes to earn their livelihood and also to start with some employment avenues and schemes for their proper rehabilitation so that they do not indulge or repeat such dreadful acts. CRL.A. Nos.432 /321/717 of 2010 Pag

4. The case in hand relates to one of such horrendous crime of mugging and eventually killing one Mahesh @ pappu on a much celebrated evening of Deepawali. It was the evening of 9th November 2007, when Mahesh @ pappu alongwith his nephew, Ashu went out to celebrate the said festival of lights, especially to enjoy the merriment in their vicinity that the tragic death of Mahesh @ pappu took place. Their lust for easy money through robbery, in quest of achieving their motive provoked one of the accused/ appellant Naresh to kill Mahesh by stabbing him. As per the prosecution case, appellant Naresh had attacked the victim in his chest with the help of a sharp edged knife which proved to be fatal.

5. Instead of celebrating the light of festivity with the relatives, friends, and nears and dear ones, these three appellants committed an intrepid act of robbery where one of the accused /Naresh tried to snatch Maheshs valuables by filchingaway his life. The exact prosecution story as has been unfolded in the charge sheet is as under:6. Prosecution case stanches from the fact that on 09.11.2007, DD No. 26 A was handed over to ASI Bhupinder Singh, which was pertaining to the assault by knife over a scuffle in H. No. 148, Block No. 18, Nand Nangri. When Bhupinder Singh ASI was inquiring the matter in the meanwhile another DD No. 29A was received by him which was pertaining to assault CRL.A. Nos.432 /321/717 of 2010 Page 5 by a knife in B-3 Primary School, Nand Nagri, Delhi. When Bhupinder Singh ASI along with Constable Narender reached at B-4, Primary School, Nand Nagri, they came to know that injured was already removed to the hospital. There was no public witness at the spot. Blood in profuse quantity was seen lying at the spot. When Rakesh, watchman of the school was inquired about the incident, he told that he saw a few boys beating another boy. When he raised alarm, those boys ran away from there. ASI Bhupinder Singh left Constable Narender at the spot and left for GTB Hospital. He obtained MLC No. B- 4522/07 of injured and doctor informed that the patient was brought dead and was sent to mortuary for postmortem. Later on, he came to know that deceased was known as Mahesh @ pappu, which was brought to his knowledge by Mukesh, the brother of the deceased who was bereaving near the dead body. Mukesh told ASI Bhupinder Singh that Mahesh @ pappu went out of his house along with his nephew Ashu. Mukesh came to know that his brother Mahesh @ pappu had an altercation with some boys. Case for offence punishable under section 302/34 IPC was registered. Thereafter, investigation was taken up by Bachu Singh, Inspector. He called the crime team at the spot and got it photographed. Blood, blood stained earth, earth control, blood stained locket having engraved lord Hanumanji, besides a blood stained ring of iron were lifted CRL.A. Nos.432 /321/717 of 2010 Page 6 from the spot. Same were seized and taken into possession. Scaled site plan of the spot was also prepared. Ashu, nephew of deceased Mahesh @ pappu, joined in the investigation. On 10.11.07, postmortem on the dead body was got conducted by Inspector Bachu Singh. Dead body was released in favour of relatives of the deceased. Besides Ashu, Krishan was also made to join the investigation, who

also had the knowledge of incident. Krishan @ Gola informed that two boys, who are wanted in connection with the murder of Mahesh @ pappu, are available at B-5 Park. Attaining this information, Inspector Bachchu Singh along with other staff reached at B-5 Park and arrested accused Arun @ Hanni and Sanjeev @ Sanjay @ Manjan at the instance of Ashu and Krishan. During the course of investigation, Arun was found in possession of purse, Rs. 100/- and identity card of deceased Mahesh @ pappu. On interrogation, Arun divulged that Naresh showed knife to Mahesh @ pappu, while, he himself and Sanjeev dragged Mahesh @ pappu towards the gate of the Primary School. At the instance of the accused Sanjeev and Arun, their associate Naresh was also arrested from his house at B-4/353, who got recovered the knife from the roof of primary school. On 20.11.07, Inspector Bachu Singh got recorded the statement of Krishan under sector 164 Cr.P.C, and the statement of Ashu u/s 164 Cr.P.C on 21.11.07. Exhibits of the case were sent to FSL. Charge for CRL.A. Nos.432 /321/717 of 2010 Page 7 offences punishable under sections 302 and 392 read with section 34 IPC was framed against the accused persons, besides a separate charge for offence u/s 397 IPC against the accused Naresh was framed, to which charges they pleaded not guilty and claimed trial. To substantiate the charge, prosecution examined 20 witnesses.

7. In order to afford an opportunity to explain circumstances appearing in evidence against the accused persons, they were examined under section 313 Cr.P.C. Their case has been of denial simplicitor. They claimed their implication in the instant case to be false and fabricated at the hands of investigating agency. However, they have examined Sumer Chand (DW1) in support of their defence.

8. Ashu (PW1) is the nephew of deceased Mukesh and is an eyewitness of incident and is also a witness to the recovery of purse and knife. Krishan@ Gola (PW2) is an independent witness, who witnessed the occurrence and is also a witness to the recovery of purse and knife. Rakesh (PW3) was on duty as watchman in MCD Primary School, B-4 Nand Nagri, Delhi, on 09.11.07., when incident took place. Mukesh (PW4) identified dead body of his brother Mahesh @ pappu at Mortuary, GTB Hospital, vide identification memo Ex.PW4/A. After postmortem, dead body was handed over to him vide handing over memo

Ex.PW4/B. Rajpal (PW5) had also CRL.A. Nos.432 /321/717 of 2010 Page 8 deposed that dead body of Mahesh @ pappu was handed over to them vide handing over memo Ex.PW4/B. Govind Ram (PW6), brother-in-law (sala) of deceased Mahesh @ pappu had also identified dead body of Mahesh @ pappu. His statement Ex.PW6/A was recorded to this effect.

9. Ms. Asha Tiwari, Advocate addressed arguments on behalf of appellant Naresh in Criminal Appeal No. 432/2010; Mr. M.L. Yadav, Advocate addressed arguments on behalf of appellant Arun Kumar in Criminal Appeal No. 32/2010 while Ms.Sangeeta Chandra, Advocate pleaded the case of appellant Sanjeev in Criminal Appeal No.717/2010.

10. Ms. Asha Tiwari, Counsel for the appellant- Naresh while addressing arguments, mainly questioned the conduct of PW-1 Ashu, nephew of the deceased in leaving the injured at the spot without getting any medical aid whatsoever and thereafter, not informing anybody including the parents of the injured, his own parents or relatives or the police and then ultimately going off to sleep at his aunts house as most unnatural and improbable act on his part creating serious doubt about his presence at the spot of incident. Learned counsel for the appellant Naresh also argued that PW-1 in his deposition before the court did not talk about the presence of PW-2 Krishan @ Gola at the time of incident except casually mentioning that he saw Krishan @ Gola on the following day at around 6 P.M. Learned counsel CRL.A. Nos.432 /321/717 of 2010 Page 9 for the appellant also argued that the statements recorded under Section 161 and 164 of Cr.P.C. are used only to corroborate and confront the witness and the same are not a substantive piece of evidence. Learned counsel for the appellant further argued that PW-2 Krishan @ Gola was not an eyewitness and the truth clearly emerged from his cross-examination to disbelieve his presence at the spot. As per the counsel for the appellant this witness also admitted that his signatures were taken by the police on blank papers. Learned counsel for the appellant further argued that the place of incident was a populated residential cum commercial area and the time of incident was Diwali night but the prosecution has failed to advance any reason as to why they could not join any independent witnesses to support the said incident of crime. Learned counsel for the appellant further argued that there

was a material inconsistency in the deposition of PW-1, Ashu when he stated that the knife was recovered from the roof of the school and at that time police officials were with him and then in his cross-examination, stated that he did not remember as to which of the accused were with him besides stating that the knife was not sealed in his presence. Learned counsel for the appellant further submitted that the alleged disclosure statement of the accused / Naresh and alleged recovery of knife is false and enthused when even PW-2, Krishan @ Gola in his statement clearly CRL.A. Nos.432 /321/717 of 2010 Page 10 mentioned that the police had taken his signatures on blank papers. Pointing out at the contradiction between the statement of PW-8 and PW-18, learned counsel for the appellant emphasized that PW-8 in his deposition stated that he alongwith Naresh went to the roof of the school where a button actuated knife was lying and he handed over the same to the Investigating Officer Bachu Singh. However, PW-18, Sub Inspector Bachu Singh deposed that the knife was recovered from the roof of the school and he alongwith Ashu, Krishan @ Gola, Head Constable Mahavir Singh and Naresh had gone to recover the same. Learned counsel for the appellant further submitted that when evidence of these witnesses if considered as a whole, it creates a doubt about the credibility of the prosecution case and the contradictions on the part of this witness are substantial in nature. Learned counsel for the appellant also submitted that at best, the prosecution case falls under exception 4 to Section 300 of IPC, as the alleged act was committed by the accused with pre-meditated mind, in a sudden fight in a head of passion, upon a sudden quarrel. In support of his arguments, learned counsel for the appellant Naresh relied upon the following judgments: a) b) c) d) State of U.P. Vs. Bhagwant & Ors., JT 200.(4) SC 13.Toran Singh vs. State of M.P., 2002 SCC (Cri) 1377 Din Dayal vs. Raj Kumar @ Raju& Ors, 1998 III AD (SC) 378 Kalu vs. State of U.P. & Ors., JT 199.(3) SC 44.CRL.A. Nos.432 /321/717 of 2010 Page 11 e) 11. Shivaji Dayanu Patil vs. State of Maharashtra, JT 198.(3) SC 16.Addressing arguments on behalf of the appellant Arun Kumar, Mr. M.L. Yadav, Advocate submitted that there is no legal evidence on record to justify the conviction of Arun Kumar as none of the eye witnesses have supported the prosecution version in a clear and unambiguous manner. Learned counsel for the appellant further submitted that PW-3 Rakesh (Chowkidar) has pleaded ignorance about any such incident and thus failed to

support the prosecution version and while PW-2 Krishan @ Gola in his cross-examination has categorically stated that he was not an eye witness of the occurrence and whatever he had stated in his examination-in-chief was deposed by him at the instance of the police. Pointing out the discrepancy of PW-1 Ashu, learned counsel for the appellant argued that this witness in his statement under Section 164 of Cr. P.C. does not name Arun, one of the appellants herein as perpetrator of the crime and therefore, no weightage can be given to his court deposition making improvement in his earlier statement. Learned counsel for the appellant also reiterated the argument taken by the counsel for the appellant Naresh that the conduct of PW-1 Ashu was totally unnatural and unrealistic having made no efforts to save the deceased or to report the matter to his relatives and police etc. Learned CRL.A. Nos.432 /321/717 of 2010 Page 12 counsel for the appellant further argued that the learned trial court has erred in law and has completely ignored the defence evidence adduced through DW-1 Sulekh Chand Jain, who in his deposition stated that the school building where the alleged incident took place initially was L shaped and, thereafter, four rooms were constructed and it took a U shape whereas the Investigating Officer/ Bachu Singh said that the building was straight in shape. Learned counsel for the appellant further argued that neither PW-1 nor PW-2, who claimed themselves to be the eye witnesses, reported the matter to the police after having witnessed the incident of crime themselves and this fact by itself completely wobbles the case of the prosecution. Learned counsel for the appellant without prejudice laid main stress on his argument that, PW-1 attributed to the appellant only the role of catching hold of the deceased and with this limited role assigned to the appellant, he cannot be held liable as perpetrator of the crime of murder with the aid of Section 34 of IPC. Learned counsel for the appellant further argued that the post mortem report also falsifies the stand of the eye witness as the post mortem report discloses infliction of five injuries on the body of the deceased while the eye witnesses have deposed only about two injuries inflicted by the appellant Naresh. On the alleged recovery of the purse from the possession of the appellant Arun, learned counsel for the CRL.A. Nos.432 /321/717 of 2010 Page 13 appellant argued that the same is highly improbable and the same is planted one as nobody will procure the looted purse alongwith ID proof of any other person with him till the next day. Learned

counsel for the appellant further argued that without prejudice to the defence raised by the appellant, the intention of the appellant was only to robe the deceased and not to kill him at any point of time. Learned counsel for the appellant pleaded for showing leniency to accused/ Arun as at the time of incident, the appellant Arun Kumar was aged about 18 and half years and presently he is a married person with zilch criminal records. In support of his arguments, learned counsel for the appellant placed reliance on the following judgments: a) b) c) 12. Din Dayal vs. Raj Kumar @ Raju & Ors, 1998 SCC (Cri) 892 Malempati Pattabinarendra vs. Ghattamaneni Maruthi Prasad and others, 2000 (2) JCC (SC) 702 RamashishYadav and others vs. State of Vihar, 1999 (2) JCC (SC) 471 Pleading the case of appellant Sanjeev, Ms. Sangeeta Chandra, Advocate and amicus curiae, argued that it is an admitted case of the prosecution that this appellant neither inflicted any injury on the body of the deceased nor any weapon of offence or any other article was recovered from him on personal search and seizure being conducted and the only role attributed to him is that he was the one amongst the two who caught hold of the deceased and with such a limited role, as assigned to him, it cannot be CRL.A. Nos.432 /321/717 of 2010 Page 14 held that this appellant had shared any common intention with the accused Naresh to commit the crime of murder. Learned counsel for the appellant further submitted that the learned trial court has gravely erred in taking a view that the appellant had shared a common intention of killing the deceased with the Accused Naresh and Arun. Explaining the parameters, as envisaged under Section 34 of the IPC, learned amicus curiae for the appellant argued that for the applicability of Section 34 of the IPC, it is necessary that the accused has participated in the commission of the crimeand such intention was known to each one of them before the commission of such a crime. Learned amicus curiae also submitted that in drawing such an inference the principle of law which is to be applied is the principle which requires that guilt is not to be inferred unless that is the only inference which follows in the specific circumstances of the case. Learned amicus curiae also argued that at best, the intention of the appellant could be as that of accused Naresh of committing robbery and not the murder of the deceased. Learned amicus curiae further argued that the case of the appellant does not fall under the purviewof any of the four clauses of Section 300 of the IPC as there being no

common intention to commit the murder and admittedly, there is no motive to commit the murder even as per the prosecution case. Learned amicus curiae also espoused the argument CRL.A. Nos.432 /321/717 of 2010 Page 15 canvassed by the other counsel with regard to the alleged unnatural and improbable conduct of PW-1 Ashu having gone to sleep without reporting the incident of crime to anyone or to arrange for providing the medical help to the victim. In supportof her arguments, learned amicus curiae placed reliance on the following authorities:a) b) Harbans Nonia and another vs. State of Bihar, 1992 Cri.LJ 10.c) Din Dayal vs. Raj Kumar @ Raju& Ors, 1998 SCC (Cri) 892 d) 13. RamashishYadav and others vs. State of Vihar, 1999 (2) JCC (SC) 471 Malempati Pattabinarendra vs. Ghattamaneni Maruthi Prasad and others, 2000 (2) JCC (SC) 702 Refuting the arguments of counsel appearing for the appellants, Mr. Sunil Sharma, learned Additional Public Prosecutor for the State submitted that the learned trial court has passed a well-reasoned judgment and order on sentence after fully evaluating the evidence on record. Learned APP further submitted that PW-1 Ashu gave graphical description of the full incident and his testimony remained unrebutted and uncontroverted leaving no scope to disbelieve him. Learned APP further submits that besides the eye witness PW-1, PW-2, Krishan @ Gola also supported the prosecution case in his examination-in-chief although he deviated from his stand in his cross-examination. Placing reliance on the judgment of Apex Court in CRL.A. Nos.432 /321/717 of 2010 Page 16 Khujji @ Surender Tiwari vs. State of M.P., reported in 1991 Cri.LJ 2653(1), learned APP submitted that in this judgment the Apex Court took a clear view that in a case where the cross-examination of the witness takes place after some gap and the witness takes an undue advantage of the time gap and turns hostile in his cross-examination, then the statement given by such witness in his examination-in- chief will be believed and not the one given in his cross-examination. Learned Additional Public Prosecutor further submitted that so far as the contradictions in the evidence of PW-2 in his cross-examination and examination-in-chief under Section 164 of Cr. P.C. are concerned, the same can be ignored as the stand taken by the said witness in the cross-examination cannot efface or wash off the truthful stand taken by him in his court deposition and under Section 164 of Cr. P.C. Learned APP further submitted that the statement of PW-1 and PW-2 is further corroborated by the medical evidence and

this fact also fortifies the statements made by PW-1 and PW-2. Learned APP further argued that all these appellants in well designed and premeditated manner had not only committed the offence of robbery but had also brutally and valiantly murdered Mukesh, only because he has resisted to part away with the money and mobile, so demanded by them. Based on these submissions, learned APP for the State urged that this Court may upheld the judgment CRL.A. Nos.432 /321/717 of 2010 Page 17 passed by the learned trial court whereby these appellants have been convicted under the offences charged and also upheld the order on sentence.

14. We have heard learned counsel for the appellants as well as learned Additional Public Prosecutor for the State at a considerable length. We have also perused the trial court record and the judgments cited by both the sides at bar.

15. As per the case of the prosecution, the incident in question was witnessed by PW-1 Ashu, nephew of the deceased Mahesh @ pappu and by PW-2Krishan @ Gola, an independent witness who was present at the scene of crime. PW-3 Rakesh, chowkidar in MCD Primary School was not exactly a witness of the crime but had noticed one man lying in the pool of blood in an injured condition and three appellants out of which one had blood stained knife in his hand standing there. As per initial statement recorded under Section 161 of Cr. P.C., this witness was threatened by the accused to immediately budge from the place and thereafter, he entered in school premises out of fear. This witness had turned hostile, when entered into the witness box. The common ground raised by the counsel representing these appellants is that the conduct of PW-1 Ashu was extremely unnatural and improbable as he left his maternal uncle after his maternal uncle was grievously injured without either reporting the matter to the police or his CRL.A. Nos.432 /321/717 of 2010 Page 18 relatives but peacefully went to his aunts (bua) house and slept. Counsel appearing for the appellants argued that the said witness was an adult and as per the case of the prosecution he had consumed liquor along with his maternal uncle prior to the said incident and thus, was capable enough of taking a decision to report the crime to the police or to at least the family members of his maternal uncle.

16. It is prudent to say that in normal circumstances, it is quite grotesque of any person who is a witness of a crime to not inform the police or the relatives of the victim of the crime reporting the incident and such a behavior on the part of such eye witness normally would be considered unnatural, abnormal and ludicrous. Nevertheless, no straight-jacket formulae or principle can be laid down as to how a particular witness will react at such a situation. It may depend upon couple of circumstances depending upon the facts of each case. It is not always necessary that at a given situation similarly placed person will react in a same fashion. Much will depend on the fact situation of each incident and also the individual behavior of the person including his psyche. One may be timid or may be very bold and it is also possible that a person otherwise timid in his life may turn out to be bold at a particular moment or vice versa. The prompt reaction or the immediate outcry whether being bold or timid of the person is an CRL.A. Nos.432 /321/717 of 2010 Page 19 important aspect which has to be taken care of while dealing with such terrifying crimes. In the facts of the present case, PW-1 Ashu was about 17 years of age on the date of the said crime and it has come in his evidence that accused Naresh had threatened him while pointing out blood stained knife at him by stating that in case he dare inform about the incident to anyone, then he would kill him. It is also an admitted fact that the accused Naresh is a brother of Parvesh, who was a known bad character of the area and both these facts were good enough to instill enough fear in the mind of boy of 17 years to save his life and this is what PW-1 Ashu in fact did, when he went to his aunts house to sleep there without reporting the matter of crime to the police or any other relatives of his maternal uncle.

17. The Honble Apex Court in the case of Vemireddy Satyanarayan Reddy and Three Ors. Vs. The State of Hyderabad, AIR 1956SC379, has clearly mentioned that it requires a very courageous man, foreseeing and ignoring all the consequences in order to reveal the truth. What law requires is that there should be such corroboration of the material part of the story connecting the accused with the crime as will satisfy the reasonable minds that the man can be regarded as a truthful witness. The germane portion is quoted below: CRL.A. Nos.432 /321/717 of 2010 Pag

6. .It is true he did not divulge the secret of the murder to anyone else except to his own father. But who would, in view of the atrocities and terrorism that prevailed in that region during the relevant time? It required a very courageous man to have proclaimed the truth, needless of consequences to himself, and we cannot credit the dhobi boy with so much of fearlessness. The learned counsel urged that if a man sees the perpetration of a crime and does not give information of it to anyone else, he might well be regarded in law as an accomplice and that he could be put in the dock with the actual criminals. There is, however, no warrant for such an extreme proposition. On the other hand, the following short passage from Russell on Crime, 10th Edition, page 1846, will show its untenability :"But a person may be present, and, if not aiding and abetting, be neither principal nor accessory; as, if A, happens to be present at a murder and takes no part in it, nor endeavours to prevent it, or to apprehend the murderer, this course of conduct will not of itself render him either principal or accessory". Indeed, there can be no doubt that the evidence of a man like P. W. 14 should be scanned with much caution and we must be fully satisfied that he is a witness of truth, especially when no other person was present at the time to see the murder. Though he was not an accomplice, we would still want corroboration on material particulars in this particular case, as he is the only witness to the crime and as it would be unsafe to hang four people on his sole testimony unless we feel convinced that he is speaking the truth. Such corroboration need not, however, be on the question of the actual commission of the offence; if this was the requirement, then we would have independent testimony on which to act and there would be no need to rely on the evidence of one whose position may, in this particular case, be said to be somewhat analogous to that of an accomplice, though not exactly the same. What the law requires is that there should be such corroboration of the material part of the story connecting the accused with the crime as will satisfy reasonable minds that the man can be regarded as a truthful witness. In the leading case of Rex v. Baskerville [1916] 2 K. B. D. 658 it was pointed by Lord Reading C. J.

that CRL.A. Nos.432 /321/717 of 2010 Page 21 "the corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime. The nature of the corroboration will depend on and vary according to the particular circumstances of

each case. What is required is some additional evidence rendering it probable that the story of the accomplice is true and that it is reasonably safe to act upon it". Judged by this test, we can say that the evidence given by P. W. 14 has been amply corroborated. It was not disputed for the appellants that there is abundant evidence consisting of the testimony of several witnesses in support of the truth of the narrative given by P. W. 14 regarding the abduction of the deceased. This evidence was given not by mere onlookers but by mean like P. Ws. 3, 4, 5, 6 and 9, who were with the deceased when the communist group came upon them and who were themselves badly beaten up by the gang before being released from impending death at the merciful intervention of some one of them. They say that at the time of the release the accused retained the deceased with them and took him away in the direction of Mulgupad.

18. The trial court has also taken sustenance from the judgment of the Honble Apex Court in Criminal Appeal No.52/1980 in the case of Rana Pratap Vs. State of Haryana, wherein the Apex Court observed that every witness who witnesses a murder reacts in his own way. Some are stunned, became speechless and stand rooted to the spot. Some became hysteric and start wailing. Some start shouting for help. Others run away to keep themselves as far removed from spot as possible. Yet others rush to the rescue of the victim, even going to the extent of counter attaching the assailants. Everyone reacts in his own special way. There is no set rule of natural reaction. To discard the evidence of witnesses on the ground that he CRL.A. Nos.432 /321/717 of 2010 Page 22 did not react in any particular manner is to appreciate evidence in a wholly unrealistic and unimaginative way.

19. In the light of the aforesaid dicta, considering the facts of the case at hand based upon the conduct of the witness Ashu in not reporting the crime to anybody in our view is not unnatural or improbable and therefore, evidence of PW-1 merely on this count cannot be discarded or disbelieved. Rather taking such a view /would be totally unrealistic and incomprehensible in the factual situation of the present case. The judgments cited by counsel for the appellants are clearly distinguishable due to the peculiar facts of the present case.

20. The other contention raised by counsel for the appellant Naresh Kumar was PW-1 in his deposition before the court did not talk about the presence of PW-2 Krishan @ Gola at the time of incident and therefore, there is complete contradiction between the deposition of PW-1 and PW-2 to disbelieve their court depositions. Here again we areimpelled to reject this contention as PW-1 in his statement made under Section 164 of Cr. P.C. clearly stated that PW-2 Krishan @ Gola was also present at the site and even in his court deposition, he unequivocally stated that after the incident, he saw Krishan @ Gola, on the following day around 6 PM; meaning thereby he saw Krishan @ Gola for the second time. CRL.A. Nos.432 /321/717 of 2010 Pag

21. We also do not find any force in the contention raised by counsel for the appellant Naresh that PW-2 Krishan @ Gola was not an eye witness if the statement made by the said witness in the cross-examination is taken into consideration. Undoubtedly, PW-2 Krishan @ Gola took a somersault in his cross-examination by stating that the statement made by him under Section 164 of Cr. P.C. before the learned Metropolitan Magistrate and before the Court were at the instance of the police. He also in his crossexamination deposed that his signatures on document Ex.PW-1/G were obtained by the police officials when the said document was blank. This argument of learned counsel for the appellant has been elaborately discussed by the learned trial court and it would be appropriate to refer to the relevant part dealing with this aspect of the case as under:16. Examination-in-chief of his witness was recorded on 21.08.08 and 10.12.08. However, his crossexamination was deferred on request of counsel for accused and thereafter he appeared on 06.03.09. On that date, when he was cross-examined by the learned defence counsel, he took a complete somersault and stated that on 20.11.07 police officials brought him to the court and he made a statement before the court and that statement was stated to him by the police officials. He went on stating that document Ex.PW1/G was blank, when he signed the same. Police officials did not record his statement and his signatures were obtained on certain papers, which were blank. He further went on stating that whatever statement was given on 21.08.08, same was tutored to him by police out of the Court and that same was deposed CRL.A. Nos.432 /321/717 of 2010 Page 24 at the instance of police. He further deposed that accused Sanjeev was not apprehended by the

police in his presence. As regards accused Arun is concerned, he deposed that he was playing a match in the park, when he was taken by police officials. Since this witness had taken somersault, he was re-examined by the ld. Prosecutor and at that time, he admitted that he did not state before ld. MM, who recorded his statement u/s 164 Cr.P.C, that he has been tutored by police officials.

17. Firstly it may be mentioned that immediately after the incident, the investigation officer of the case had moved an application before Sh. Shailender Malik, ld. MM, for recording statement of this witness u/s 164 Cr.P.C., vide his application Ex.PW19/A. Sh. Vikas Dhall, who was working as MM has testified that after ascertaining the voluntary nature of witness Krishan @ Gola @ Gola, he recorded his statement Ex.PW2/A, which bear his signatures at point X. The statement contained true and correct account of the incident given by Krishan @ Gola before him. A perusal of this statement goes to show that witness has given an eyewitness account of entire incident and all the accused persons were arrested on his identification as well as on identification of Ashu. He has further detailed the manner in which accused Naresh was apprehended at the instance of remaining two accused persons and at his instance knife was recovered from roof of the school. There is no suggestion to the ld. MM that witness did not make any statement voluntarily or that it was under pressure of police officials that he had made statement before him. Furthermore, submissions of the ld. Prosecutor that this witness was cross-examined, after a lapse of about three months of his cross-examination, and by that time he was won over by the accused persons cannot be lost sight of as the record reveals that examination-in-chief of this witness was recorded on 21.08.08. Further examination was deferred as the case property was not received from FSL by that date, therefore he was again examined on 10.12.08, when he CRL.A. Nos.432 /321/717 of 2010 Page 25 identified the case property. Thereafter, his crossexamination was deferred. When this witness appeared on 06.03.09, that is, after a lapse of three months, then he completely took changed version by deposing that statement made before ld. MM or before the Court was at the instance of police officials.

18. 1991 Cr.L.J.

2653 (1), Khujji alias Surendra Tiwari V. State of M.P is a direct authority on the point in hand. In that case also, examination-in-chief of the witness was recorded on 16.11.76, when he identified all the assailants by name. His cross-examination commenced on 15.12.76. In that cross-examination, he stated that since the accused had their backs towards him, therefore, he count not see their faces. On the basis of that statement, it was submitted that evidence regarding identity of the accused was rendered highly doubtful and it would be hazardous to convict the appellant solely on the basis of identification of such a wavering witness. Honble High Court came to the conclusion, which was up held by Honble Apex Court that during one month period that elapsed since the recording of his examination-in-chief, something transpired which made him shift his evidence on the question of identity to help the appellant. His statement in cross-examination on the question of identification of the appellant and his companion is a clear attempt to wriggle out of what he had stated earlier in his examination-in-chief. As such, it was observed that there was no material contradiction to doubt his testimony. It was further observed that evidence of declared hostile is not wholly effaced from record and that part of evidence, which is otherwise acceptable, can be acted upon. Reliance was placed on well settled decisions of Honble Supreme Court-Bhagwan Singh v. State of Haryans, (1976) 2 SCR 92.: Air 1976 SC 202.Rabinder Kumar Dev v. State of Orissa, (1976) 4 SCC 233.AIR 197.SC 17.and Sayed Akbar v. State of Karnataka, (1980) 1 SCR 95.AIR 197.SC 184.Where it was held that the evidence of a prosecution witness cannot be rejected in CRL.A. Nos.432 /321/717 of 2010 Page 26 toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witness cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent their version is found to be dependable on a careful scrutiny thereof.

19. Substantially, similar view was taken in 2009 (XI) AD SC 12.Alagarsamy& Ors. Vs. State by Deputy Superintendent of Police. In that case also, the witness was declared hostile at the fag end of his crossexamination. The examination-in-chief of witness was recorded on 02.04.01 and on the same day he was crossexamined by three defence counsels. Then only later on, on 26.06.01, when he was recalled, he was treated as hostile witness. Honble High Court commented that witness was tried to be won over, after his crossexamination and this comment was approved

by Honble Apex Court and it was observed that law is not well settled that merely because witness is declared as hostile witness, whole of his evidence is not liable to be thrown away. Reference was made to Syed Akbar Vs. State of Karnatka, 1980 (1) SCC 30.Rabindera Kumar Dey vs. State of Orissa, 1976 (4) SCC 23.and Bhagwan Singh Vs. State of Haryana, 1976 (1) SCC 389.

20. In view of these authoritative pronouncements, keeping in view the fact at the earliest juncture, statement of Krishan @ Gola @ Gola was recorded u/s 164 Cr.P.C by ld. MM, wherein he narrated entire incident coupled with the fact that he even supported the case of prosecution in his examination-in-chief and was only later on that in his cross-examination he took a completely changed stand by stating that his statement made earlier was at the instance of the police, as such possibility of his winning over cannot be ruled out.

21. At this juncture, it will not be out of place to reproduce the observations made by Honble Apex Court CRL.A. Nos.432 /321/717 of 2010 Page 27 in Krishan @ Gola Mochi vs. State of Bihar, 2002 (6) SCC 81.which are as under:It is a matter of common experience that in recent times there has been a sharp decline of ethical values in public life even in developed countries much less a developing one, like ours, where the ratio of decline is higher. Even in ordinary cases, witnesses are not inclined to depose or their evidence is not found to be credible by courts for manifold reasons. One of the reasons may be that they do not have courage to depose against an accused because of threats to their life, more so when the offenders are habitual criminals or high-ups in the Government or close to powers, which may be political, economic or other powers including muscle power. A witness may not stand the test of cross-examination, which may be sometimes, because he is a bucolic person and is not able to understand the question put to him by the skillful cross-examiner and at the times under the stress of cross-examination, certain answers are snatched from him. When a rustic or illiterate witness faces an astute lawyer, there is bound to be imbalance and, therefore, minor discrepancies have to be ignored. These days, it is not difficult to gain over a witness by money power or giving him any other allurance or giving out threats to his life and/or property at the instance of persons, in/or close to powers and muscle men or their associates. Such instances are also not

uncommon where a witness is not inclined to depose because in the prevailing social structure he wants to remain indifferent. In view of this observation, possibility of wining over of this witness by the time he came for his crossexamination in the Court and PW3 Rakesh cannot be ruled out CRL.A. Nos.432 /321/717 of 2010 Pag

22. We fully concur with the said finding of the learned trial court giving due credence to the deposition made by PW-2 in his examination-in-chief and his statement made before the learned Metropolitan Magistrate under Section 164 of Cr. P.C. fully supporting and corroborating the testimony of the other eye witness PW-1 and the medical evidence proved on record. We also cannot be oblivious of the fact that as per the prosecution case the appellant Naresh Kumar happened to be the brother of Pravesh, who is a known criminal and bad character of the area and it is because of the fear and threats extended by Naresh, that PW-1 could not muster the courage to report the matter to the police and how much courage could PW-2 had gathered that he explicitly in his examination in chief recorded on 21.08.08 deposed about the said incident and even identified the accused persons but could not relentlessly support the prosecution case in his cross examination which took place after a gap of time. One cannot obviate the fact of threats or pressure being extended in that span of time, resultantly turning the said witness hostile. The part of the evidence of PW-2wherein he has proclaimed to be the eye witness of the incident in his examination-in-chief and the statement made by him under Section 164 of Cr. P.C. fully corroborates the line of prosecution. CRL.A. Nos.432 /321/717 of 2010 Pag

23. So far as adjudging the evidentiary value of the eye witness is concerned, the Honble Apex Court in State of U.P. vs. Smt.Noorie alias Noor Jahan and others, AIR 199.SC 3073.has held that While assessing and evaluating the evidence of eye witnesses the court must adhere to two principles, namely whether in the circumstances of the case it was possible for the eye witness to be present at the scene and whether there is anything inherently improbable or unreliable.

24. Applying the aforesaid dicta in the circumstances of the present case, we have no hesitation to believe the presence of PW-1 and PW-2 at the site of crime and

moreover, after scrutinizing the depositions of PW-1 , Ashu and PW-2, Krishan, we do not find any such inherently unreliable or improbable aspect that barges and cults the entire evidence as useless when read in entirety.

25. We also do not find much force in the argument raised by counsel for the appellant Naresh that the place of incident was residential-cumcommercial area therefore, there could have been other independent witnesses who had witnessed the said incident but the prosecution has failed to give reason as to why other independent witness did not join as a witness. It was the evening of Deepawali festival and everybody being in a festive mood could not have withdrawn from the festival fervourand CRL.A. Nos.432 /321/717 of 2010 Page 30 therefore, non-joining of any public witness by the police cannot create any suspicion in our mind to disbelieve the incident which stands fully corroborated by the testimony of PW-1 and PW-2 and other medical evidence produced on record.

26. The other discrepancies pointed out by the learned counsel for the appellant Naresh on the recovery of the knife and the signatures of the witnesses on the seizurememosare only a feeble attempt to create suspicion in the mind of the court. We find ourselves to be fully unconvinced with the pleas raised by the counsel for the appellants as the recovery memo of the knife proved on record as Ex.PW-1/L was duly witnessed by PW-1 and PW-2 and PW-3 and recovery of black purse was made from the appellant Arun @ Hanni during his disclosure statement and this recovery memo was proved on record as Ex.PW1/F, which was duly witnessed by PW-1 and PW-2. Turning hostile of Rakesh and contradictory statement made by PW-2 Krishan @ Gola also cannot discredit the testimony of PW-1 Ashu, who remained firm and undaunted in his stand throughout and therefore, not much weightage can be given to the stand taken by PW-2 in his cross- examination stating that he had signed the blank documents at the instance of police or PW-3 turning hostile. Moreover, the minor discrepancies as pointed out by counsel for CRL.A. Nos.432 /321/717 of 2010 Page 31 appellant Naresh are concerned, the learned trial court has extensively dealt with this aspect after placing reliance on the judgment of the Apex Court inDeep Chand vs. State of Haryana, 1996 (3) SCC 890.taking a view that discrepancies which do not go to the root of the matter and shake the absolute version of the witnesses cannot be

attached any undue importance.

27. In Vidhya Rani and Madan Lal Vs. State (Delhi Admn.), Criminal Appeal Nos. 186 and 385/1997, this Honble Court taking support from the judgment of Hon'ble Supreme Court in the matter of Bharwada Bhoginbhai Hirjibhai v. State of Gujarat (1983) 3 SCC 217in paragraph 22 has held as under:

5. Overmuch importance cannot be attached to minor discrepancies. The reasons are obvious:

(1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.

(2) Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprised. The mental faculties therefore cannot be expected to be attuned to absorb the details.

(3) The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind, whereas it might go unnoticed on the part of another.

(4) By and large people cannot accurately recall a conversation and reproduce the very words used by them or CRL.A. Nos.432 /321/717 of 2010 Page 32 heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape-recorder.

(5) In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess-work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person.

(6) Ordinarily a witness cannot be expected to recall accurately the sequence of events which takes place in rapid succession or in a short time span. A witness is

liable to get confused, or mixed up when interrogated later on.

(7) A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross-examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him Perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment.

6. Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all important "probabilities factor" echoes in favour of the version narrated by the witnesses.

28. It is also a settled legal position that the corroborative evidence of an eye witness cannot be discarded merely because of some contradictions in his deposition. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly CRL.A. Nos.432 /321/717 of 2010 Page 33 necessary for the court to scrutinize the evidence more particularly keeping in view the deficiencies, draw-backs and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical errors committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole.(Ref.State of U.P. v. M.K. Anthony, AIR 198.SC 48).

29. Mere understatements or hyperboles per se do not render the evidence brittle. Trivial contradictions, inconsistencies, embellishments or improvements on trivial matter without diluting the core of the prosecution case cannot be made a ground

to reject the evidence in its entirety.The trial Court, after going through the entire evidence, must form an opinion about the reliability of the witnesses, and the appellate court in the normal course of action, would not be justified in reviewing the same, without providing justifiable reasons for doing so. CRL.A. Nos.432 /321/717 of 2010 Pag

30. Therefore, the minor contradictions and discrepancies as pointed out by the learned counsel for the appellant are concerned, the case of the prosecution cannot be discredited on the basis of such minor inconsistencies. Finding support from the various judgments as cited above, we second the reasoning of the learned trial court in this regard. We do not find any merit in the submissions made by the counsel for the appellants as one cannot raise any doubt about the commission of the offence, or the presence of PW-1 or PW-2 at the scene of crime on perusal of the entire factual matrix.

31. The victim Mahesh @ pappu had received following anti mortem injuries on his person, as per the post mortem report proved on record as Ex.PW14/A: a. Reddish grazed abrasion, 4cm x 3.5 cm present over the right shoulder tip. b. Incised wound measuring 2.4 cm x 0.2 cm x 0.2 cm present vertically over the dorsal aspect of left wrist joint. c. Incised wound measuring 2.5 cm x 0.2cma x 0.2 cms present on anterolateral, aspect of right lower thigh, 3cm above the right knee joint. d. Incised stab wound measuring 2cm x 0.3cm on surface present slightly obliquely over the left chest its upper medical angle is blunt and is 3cm from the midline and it slower lateral angle is acute and is 6.6 cms above and CRL.A. Nos.432 /321/717 of 2010 Page 35 vertical to above nipple. The wound goes forward, downwards and medially cutting the skin and the tissues enters the left chest cavity by cutting through the 1 st intercostal space and 2nd costal cartilage , then piercing through the upper lobe of the left lung it cuts the arch of aorta making a total depth of 7.6 cms. e. Incised stab wound measuring 1.6 x 0.2cm on surface present slightly obliquely over the ventral aspect of right forearm, its upper medial angle is acute and lies 2cm below the mid of the right cubitalfossk, its lower lateral angle is blunt and 4.5 cm below and lateral to medial epicondyle of ulcerous. The wound goes inwards and upwards cutting the soft tissue only to a depth of 2.3 cms. The injury on the chest was opined to be sufficient to cause death in ordinary

course of nature.

32. The blood stained clothes, blood of the deceased, blood stained material and knife were sent to FSL and as per the FSL report the blood group detected on these exhibits was opined to be of the same group i.e. of the deceased i.e. Blood Group A.

33. Taking into consideration the unrebutted, reliable and trustworthy deposition of PW-1, the statement of PW-2 Krishan @ Gola in his examination-in-chief and his statement recorded under Section 164 of Cr. P.C., the medical evidence produced on record and the FSL report, Ex.PW20/B, we are of the view that the learned trial court has rightly come to the conclusion that all the appellants are guilty of committing an offence CRL.A. Nos.432 /321/717 of 2010 Page 36 punishable under Section 392/34 of the IPC. We also concur with the finding of the learned trial court holding the appellant Naresh guilty for committing an offence punishable under Section 397 of IPC. We also find ourselves in complete agreement with the reasoning given by the learned trial court to hold the appellant Naresh guilty for the offence punishable under Section 302 of IPC. However, we differ only to the limited extent of holding the appellants Arun @ Hanni and Sanjiv @ Sanjay, guilty for committing an offence punishable under Section 302/34 of IPC.

34. Now to examine the aspect and adjudge whether the criminal act was done in furtherance of a common intention, regard must be given not solely to a particular fact, but to all the facts and circumstances in a given case. There exists no straight-jacket formula for applying the principles of common intention. Inference with regard to existence of common intention in committing a particular act must be drawn from the totality of the facts and circumstances of each case. For enjoining a constructive liability under Section 34 IPC on an accused for the criminal act done by the other, it is necessary to establish that such criminal act was done pursuant to a prearranged design. Undoubtedly, it is not possible to procure direct evidence to prove the intention of the accused sought to be convicted with the aid of Section 34, therefore, in most of the cases the intention of such a person is CRL.A. Nos.432 /321/717 of 2010 Page 37 gathered from the relevant facts and circumstances surrounding a particular case.

35. It is a trite law that commission of a criminal act by several persons in furtherance of a common intention of all pre-supposes a prior meeting of mind. Section 34 IPC which is nothing but a rule of evidence provides that when a criminal act is done by several persons in furtherance of a common intention, each of that person is liable for that act in the same manner as if it were done by him alone.

36. In Brijlal Pd. Sinha v. State of Bihar

5. SCC 699.the Apex Court in the following Para held as under:11. ...The liability of one person for an offence committed by another in the course of a criminal act perpetrated by several persons will arise Under Section 34 of the Indian Penal Code only where such criminal act is done in furtherance of a common intention of the persons who join in committing the crime. Direct proof of common intention will, of course be difficult to get and such intention can only be inferred from the circumstances. But the existence of a common intention must be a necessary inference from the circumstances established in a given case. A common intention can only be inferred from the acts of the parties. Unless a common intention is established as a matter of necessary inference from the proved circumstances the accused persons will be liable for their individual act and not for the act done by any other person. For an inference of common intention to be drawn for the purposes of Section 34, the evidence and the circumstances of the case should establish, without any room for doubt that a meeting of minds and a fusion of ideas had taken place amongst difference accused and in prosecution of it the overt acts of the accused persons CRL.A. Nos.432 /321/717 of 2010 Page 38 flowed out as if in obedience to the command of a single mind. If on the evidence there is doubt as to the involvement of a particular accused in the common intention, the benefit of the doubt should be given to the said accused person.

37. In Dharam Pal & Ors. v. State of Haryana, AIR 197.SC 1492.this court laid down the following tests for Section 34 IPC to be applicable against the co-accused and held as under:It may be that when some persons start with a prearranged plan to commit a minor offence, they may in the course of their committing the minor offence come to an understanding to commit the major

offence as well. Such an understanding may appear from the conduct of the persons sought to be made vicariously liable for the act of the principal culprit or from some other incriminatory evidence but the conduct or other evidence must be such as not to leave any room for doubt in that behalf. A criminal Court fastening vicarious liability must satisfy itself as to the prior meeting of the minds of the principal culprit and his companions who are sought to be constrictively made liable in respect of every act committed by the former. There is no law to our knowledge which lays down that a person accompanying the principal culprit shares his intention in respect of every act which the latter might eventually commit. The existence or otherwise of the common intention depends upon the facts and circumstances of each case. The intention of the principal offender and his companions to deal with any person who might intervene to stop the quarrel must be apparent from the conduct of the persons accompanying the principal culprit or some other clear and cogent incriminating piece of evidence. In the absence of such material, the companion or companions cannot justifiably be held guilty for every offence committed by the principal offender. CRL.A. Nos.432 /321/717 of 2010 Pag

38. Seeing the facts of the present case in the light of the legal principles discussed above, undoubtedly, appellants had the common intention to commit robbery and it was the co accused Naresh who was carrying a knife in his pocket at the time of commission of the offence. It is also an admitted fact that it was Naresh alone who had used the knife and stabbed the deceased twice, once on his right hand and second on the right side of the chest. Having said this, the role attributed to appellant Arun @ Hanni and Sanjiv @ Sanjay, is that they were asked by Naresh to catch hold of the deceased and thereafter, these accused persons caught hold the hands of the deceased and pushed him against the wall and then appellant Naresh stabbed him on his chest. The said fatal injury on the chest of the deceased conceivably could not be within the comprehension of Arun and Sanjiv as Naresh had caused the first injury on his hand with the view to extract money and mobile phone from him 39. At this stage, it would be well to recall the observations made by this Court relating to appreciation of evidence and the duties expected of a Judge presiding over a criminal trial.In State of U.P. V. Anil Singh, 1988 Supp SCC 68.:

1989. SCC (Cri) 48 : AIR 198.SC 1998.it is observed as under: ... in the great majority of cases, the prosecution version is rejected either for want of corroboration by independent CRL.A. Nos.432 /321/717 of 2010 Page 40 witnesses, or for some falsehood stated or embroidery added by witnesses. In some cases, the entire prosecution case is doubted for not examining all the witnesses to the occurrence. The indifferent attitude of the public in the investigation of crimes could also be pointed. The public is generally reluctant to come forward to depose before the court. It is, therefore, not correct to reject the prosecution version only on ground that all witnesses to occurrence have not been examined. It is also not proper to reject the case for want of corroboration by independent witnesses if the case made out is otherwise true and acceptable. With regard to falsehood stated or embellishments added by the prosecution witnesses, it is well to remember that there is a tendency amongst witnesses in our country to back up a good case by false or exaggerated version. It is also experienced that invariably the witnesses add embroidery to prosecution story, perhaps for the fear of being disbelieved. But that is no ground to throw the case overboard, if true, in the main. If there is a ring of truth in the main, the case should not be rejected. It is the duty of the court to cull out the nuggets of truth from the evidence unless there is reason to believe that the inconsistencies or falsehood are so glaring as utterly to destroy confidence in the witnesses. It is necessary to remember that a Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. One is as important as the other. Both are public duties which the Judge has to perform.

40. Thus, in the present case, appellant Arun @ Hanni and Sanjiv @ Sanjay cannot be enjoined with constructive liability for the criminal act of committing murder of the deceased by the accused Naresh under section 34 IPC.

41. Thus, in light of the above discussion, we do not find any illegality, perversity or infirmity in the finding of the learned Trial Court as far as the conviction and sentence u/s 302, 397 IPC awarded to appellant Naresh is concerned. Therefore, the same is left undisturbed and the appeal filed by CRL.A. Nos.432 /321/717 of 2010 Page 41 the accused Naresh challenging the order of conviction and

sentence dated 11.02.2009 and 20.02.2010 respectively is dismissed and the order of the learned Trial Court is upheld. So far as the appeal filed by the accused Arun @ Hanni and Sanjiv @ Sanjay is concerned, the same is allowed limited to the extent that they stand acquitted under Section 302 IPC, and accordingly the order of conviction and sentence dated 11.02.2009 and 20.02.2010 respectively are set aside with regard to the offence under Section 302 IPC, however, the conviction under Section 392 read with Section 34 of IPC, for which they have been sentenced to undergo rigorous imprisonment for a period of five years and to pay fine of Rs.1,000/- each and in default thereof, to further undergo rigorous imprisonment for a period of three months each is left undisturbed. These appellants are directed to surrender and serve the remainder of their sentence. For this purpose, they shall appear before the trial court on 27th September 2013. The registry shall transmit the trial court records forthwith to ensure compliance of the judgment.

42. The appeals stands disposed of in the above terms. KAILASH GAMBHIR, J.

INDERMEET KAUR, J.