

Salim @ Naju Vs. State

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Court : Delhi

Decided On : Sep-20-2013

Judge : G.P. Mittal

Appellant : Salim @ Naju

Respondent : State

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI Reserved on:

31. t July, 2013 Pronounced on:

20. h September, 2013 + CRL.A.976/2012 SALIM @ NAJU Through :
Appellant Ms.Saahila Lamba, Advocate versus STATE Through : +
Respondent Ms.Richa Kapoor, Additional Public Prosecutor CRL.A.802/2013 RAJ
KUMAR @ KHUJJAR Through : Appellant Ms.Rakhi Dubey, Advocate versus
STATE (NCT OF DELHI) Through : Respondent Ms.Richa Kapoor, Additional
Public Prosecutor CORAM: HON'BLE MR. JUSTICE G.S.SISTANI HON'BLE MR.
JUSTICE G.P. MITTAL

JUDGMENT

G. P. MITTAL, J.

1. These two appeals arise out of judgment dated 27.02.2012 and order on sentence dated 14.03.2012 passed in Sessions Case No.206/2009 whereby the appellants were convicted for the offence punishable under Section 302 read with Section 34 Indian Penal Code(IPC) and under Section 307 read with Section 34 IPC and were sentenced to undergo imprisonment for life and a fine of `5,000/- each for the offence punishable under Section 302/34 IPC and were further sentenced to undergo RI for seven years and a fine of `5,000/- each for the offence punishable under Section 307/34 IPC. In default of payment of fine, the appellants were sentenced to undergo SI for six months on each count.

2. Another appeal (being Crl.A.977/2012) was preferred by one Jitender @ Billoo against this very judgment. Said Jitender raised a plea that on the date of commission of the offence, he was a juvenile. By an order dated 12.03.2013, a Division Bench of this court upheld the contention raised by Jitender @ Billoo and set aside the order of conviction and sentence imposed on Jitender. The case was remitted to the Juvenile Justice Board to hold an inquiry in accordance with law.

3. The instant case was registered on the basis of the statement to the police made by PW8, Sanjay who was injured in the incident which took place on the night intervening 28/29.05.2009. In the incident, one Sandeep @ Sanjeev was inflicted stab wounds on his person which proved fatal. He was declared dead when brought to All India Institute of Medical Sciences (AIIMS). PW8 was also inflicted an injury with a knife on his face. He, however, survived and made statement Ex.PW2/B to the police. ASI Shambhu Sah made endorsement Ex.PW17/C whereupon the FIR Ex.PW17/B was recorded in Police Station New Friends Colony. The substance of statement of PW8, Sanjay which is the fulcrum of the prosecution case has been given in para 20 of the impugned judgment, which is extracted hereunder:

20. PW8 is the injured Sanjay who deposed that deceased Sandeep @ Sanjeev was his friend and the deceased used to work in a kothi, New Friends Colony, B Block. He further stated that on the intervening night of 28/29.05.2009, he went to meet Sandeep @ Sanjeev at New Friends Colony where Sandeep told him that he has to recharge his mobile phone and at about 10.30 PM they both left New

Friends Colony to Taimur Nagar to recharge the mobile phone of Sandeep. At about 11.30 PM/12 night they were returning from Taimur Nagar. When they reached near a Kudadan(Dustbin) near C Block, New Friends Colony, three boys met them. He stated that all the three boys demanded the mobile phone of Sandeep to make a call but Sandeep refused to hand over his mobile phone to those boys. Thereafter, one of the boy attacked Sandeep with a knife. He further stated that he tried to intervene but the other boy took the knife from accused Jitender @ Biloo and attacked him with knife on his face. He further stated that accused Raj Kumar @ Khijjar caught hold of him while the other two accused were attacking him and his friend. He further deposed that he sustained injuries on his face and blood was oozing out from his face, he fell down and his friend Sandeep @ Sanjeev had already fell down after sustaining injuries. Thereafter, public persons gathered there and accused persons fled away from the spot. He stated that one of the public person lifted the phone of Sandeep and made a call to police. PCR reached at the spot and took them to AIIMS hospital where his friend Sandeep was declared dead by doctors. Thereafter, police officials recorded his statement Ex.PW2/B.

4. It may be noted that in the statement Ex.PW2/B, PW8 had also informed ASI Shambhu Sah that two of the culprits were referring to the tall attacker (who inflicted injury on the person of the deceased) by the name of Billoo. During the course of investigation, HC Vinesh Kumar(PW19) had also shown photographs of some miscreants of the area to PW8. He had identified photograph of one of the persons being involved in the incident, that is, Jitender @ Billoo. Co-accused Jitender(juvenile) was arrested by the police on the basis of a secret information received in the Police Station on the night of 30.05.2009. On the information being provided by Jitender (juvenile), the appellants were arrested. Both the appellants were arrested from the house of Raj Kumar. On personal search of appellant Salim, one chura was recovered from his right dub. Appellant Raj Kumar Khujjar, in pursuance of the disclosure statement made by him got recovered a blood-stained T-shirt worn by him at the time of the incident from a bush near Yamuna. (The same is, however, not of much relevance as the blood group thereon could not be deciphered so as to connect the same with the incident).

5. On the appellants pleading not guilty to the charge for the offence under Sections 302/307 read with Section 34 IPC, the prosecution examined 22 witnesses. Sanjay(PW8), complainant is the star and the most crucial witness produced by the prosecution. PW3, Dr. R.P. Singh, PW4, SI Mahesh Kumar, PW16, ASI Shambhu Sah, PW19, HC Vinesh Kumar, PW20, Dr. Vijay Singh, PW21, Inspector Sunil Kumar Sharma and PW22, Inspector Brijender Singh are other important witnesses examined by the prosecution. Rest of the witnesses have provided various links in the case of prosecution.

6. PW3, Dr. R.P. Singh had conducted postmortem examination on the dead body of the deceased Sandeep @ Sanjeev. He found three injuries on the person of the deceased. He opined that the death of deceased Sandeep was on account of hemorrhagic shock due to injury to the heart (injury No.3) produced by a sharp cutting/stabbing object. He stated that injury No.3 was sufficient to cause death in the ordinary course of nature.

7. Dr. Vijay Singh (PW20) had examined the deceased and injured Sanjay(PW8) on their removal to the casualty(AIIMS). He deposed that when deceased Sandeep @ Sanjeev was brought to the hospital at 12:35 am on 29.05.2009, the patient was very serious. His pulse and BP were not recordable. They provided him Cardiopulmonary Resuscitation and other treatment, but he could not be revived and was declared as brought dead.

8. PW4, SI Mahesh Kumar had prepared the scaled site plan of the spot of the incident at the instance of PW8. He proved the same as Ex.PW4/A. The important aspect of the scaled site plan and his testimony is that he had shown one electric pole containing six halogen lamps at a distance of about ten meters from the place of incident. The position of the electric pole was not disputed in cross-examination of this witness.

9. PW6, Vikram Singh and PW7, Shiv Raj had informed the PCR on noticing two boys lying at the spot with injuries.

10. PW16, ASI Shambhu Sah was on night duty in Police Station New Friends Colony on the night intervening 28/29.05.2009. He deposed that on receipt of DD

No.37A, Ex.PW5/A regarding stabbing, he along with Constable Surender reached the spot. On getting information that the injured have been removed to AIIMS by the PCR, he proceeded to the hospital. On reaching the hospital, he was informed that Sandeep @ Sanjeev had been declared brought dead at the hospital, whereas PW8, Sanjay was declared fit to make the statement. He recorded the statement of the injured and made his endorsement for getting the case registered.

11. PW19, HC Vinesh Kumar, PW21, Inspector Sunil Kumar Sharma and PW22, Inspector Brijender Singh deposed about the part played by them in the investigation of the case, arrest of the two appellants and the juvenile and various recoveries.

12. In their examination under Section 313 Cr.P.C., the appellants denied the prosecutions allegation and pleaded false implication. Appellant Raj Kumar examined three defence witnesses to prove that he was present with DW1, Padam Lal at the time of the alleged incident.

13. By the impugned judgment, while relying on the testimony of PW8 who was the star witness of the prosecution, the Trial Court rejected the contention raised on behalf of the appellants that PW-8 was unworthy of reliance or that his testimony contained improvements or contradictions. The Trial Court observed that if the testimony of a witness is recorded after one year of the incident, small contradictions with regard to the date of taking photographs at the spot or not disclosing the name of the shop wherefrom the mobile was got recharged or the exact time when he reached the spot with the police officer were not very material. The Trial Court observed that if anything is stated in answer to a question in crossexamination and not stated in the statement before the police, it will not be treated as an improvement. Crl.A.Nos.976/2012 & 802/2013 testimony of the witness was consistent and convincing. Rather, the minor contradictions showed that the witness was not a tutored one and deposed in a natural way. Thus, relying on the testimony of PW-8 which was supported by the other evidence produced by the prosecution, the Trial Court convicted and sentenced the appellants as stated earlier.

14. We have heard Ms. Saahila Lamba and Ms. Rakhi Dubey, Advocates, the learned counsel for the appellants and Ms. Richa Kapoor, the learned APP for the State and have perused the record.

15. The learned counsel for the appellants have urged that according to the prosecution version, the incident took place on the night intervening 28/29.05.2009 at about 11:30/12:00 at night; the assailants were previously not known to PW8; their description, except that one of the boy was tall, the other was short and the third one was medium in height, was not given; still the prosecution did not prefer to hold any Test Identification Parade(TIP) to pinpoint the assailant during the course of investigation. Relying on Dana Yadav alias Dahu and Others v. State of Bihar, AIR 200.SC 332.and a Division Bench of this court in Om Prakash v. State, (Crl.A.467/2001) decided on 03.09.2009, it is argued that appellants identification for the first time in the court without its corroboration from a previous TIP is valueless. Thus, it is argued that the appellants are entitled to be acquitted.

16. The learned counsel for the appellant Raj Kumar @ Khujjar has stated that in the disclosure statement of the juvenile, name of one Raju Nepali, as being involved in the incident also surfaced. There is every possibility that the appellant Raj Kumar @ Khujjar was mistaken in place of Raju Nepali and was implicated in the case falsely.

17. In the alternative, the learned counsel for the appellants have urged that even if the case of the prosecution is accepted on its face value, it cannot be stated that the two appellants shared the common intention of inflicting the stab injury by the juvenile and thus they cannot be held guilty for the offence under Section 302 IPC with the aid of Section 34 IPC. In support of their contention, the learned counsel have placed reliance on a three Judge Bench decision of the Supreme Court in Kripal and Others, v. State of Uttar Pradesh, AIR 195.SC 706.The learned counsel have further canvassed that the injury on the person of PW8 was found to be simple with a sharp object. PW8 was discharged from the hospital after giving first aid. Thus, the appellants could not have been convicted for the offence punishable under Section 307/34 IPC. At the most, they could have been convicted under Section 324 IPC read with Section 34 IPC.

18. On the other hand, learned APP for the State has contended that the juvenile was arrested on the basis of an identification on the basis of photographs which was permissible as held by a Division Bench of this court in Ranjeet Singh Gill v. State, ILR(2009) 4 Del 210. The learned APP has argued that the incident started with an altercation between the deceased and PW8 on the one hand and, the appellants and the juvenile on the other followed by taking out of a knife by the juvenile inflicting injuries on the person of the deceased. The knife was taken by the appellant Salim, PW8 was held by appellant Raj Kumar Khujjar and an injury was inflicted on PW8s face by appellant Salim. Although, the incident took place in the dead of the night, but there was sufficient light at the spot as stated by PW8 and as proved from the scaled site plan Ex.PW4/A which shows presence of an electric pole containing six halogen lamps. Relying on a recent judgment of the Supreme Court in Kunjumon @ Unni v. State of Kerala, 2012 (11) SCALE 212 the learned APP has submitted that the appellants and PW8 came face to face with each other during the time of the altercation between the deceased and PW8 on the one hand and, the appellants and the juvenile on the other. There was sufficient time to notice the facial features of the culprits and thus non-holding of the TIP in the instant case will be of no import. The learned APP supports the appellants conviction for the offence punishable under Section 302 IPC with the aid of Section 34 IPC urging that the appellants and the juvenile were present in the street and one of them was in possession of a knife, a deadly weapon. They were present there with the intention to commit robbery and to use knife in case of any need. Since the knife was used by one of the accused, that is, the juvenile, it has to be deemed to be in furtherance of the common intention of the appellants and the juvenile. With regard to the injury on the person of PW8 being simple, the learned APP urges that the fact that PW8 was held by appellant Raj Kumar while appellant Salim inflicted injury with a dangerous weapon on a vital part of the body would be sufficient to ascribe intention to cause murder of PW8. It was PW8s good luck that somehow the injury was not so deep so as to become dangerous. The appellants, it is urged, have been rightly convicted under Section 307 IPC read with Section 34 IPC. NON-HOLDING OF TIP 19. Since the judgment in Kanta Prashad v. Delhi Admn. AIR 195.SC 350. it is well settled that the purpose of holding Test Identification Parade is to test the statement of a witness made in the

Court. The TIP which belongs to the investigation stage is conducted to assure the investigating agency that the investigation is proceeding in the right direction. A three Judge Bench of the Supreme Court in *Sheikh Hasib v. State of Bihar* (1972) 4 SCC 77.reiterated that it is only the identification of the accused in the Court which is a substantive evidence and the TIP is held during investigation to minimize the chances of memory to identifying witnesses fading away due to long lapse of time. In *Dana Yadav v. State of Bihar* AIR 200.SC 3325.the Supreme Court culled out certain exceptions to the ordinary rule that identification of an accused for the first time in the Court is a weak type of evidence. Relying on *State of Maharashtra v. Sukhdev Singh & Anr.* (1992) 3 SCC 70.and *Ronny @ Ronald James Alwaris v. State of Maharashtra* (1998) 3 SCC 625.the Supreme Court noticed that where the witness had a chance to interact with the accused or where the witness had an opportunity to notice the distinctive features of the accused which lends assurance to his testimony in the Court, the evidence of identification in the court for the first time by such witnesses cannot be thrown away merely because any identification parade was not held. In the latest judgment of the Supreme Court in *Kunjumon @ Unni v. State of Kerala* 2012 (11) SCALE 21 relied upon by the learned APP while referring to its earlier judgments in *Malkhan Singh v. State of Madhya Pradesh* (2003) 5 SCC 746.*Vijay @ Chinev v. State of Madhya Pradesh* (2010) 8 SCC 19.and *State of Himachal Pradesh v. Lekh Raj & Anr.* (2000) 1 SCC 247.the Honble Supreme Court observed that mere failure to hold a TIP is not fatal to the prosecution case but the Trial Judge will need to be circumspect in accepting the identification of an accused by a witness in the Court if the accused is a stranger to the witness. The Supreme Court, therefore, relied upon the identification of the accused by the witness for the first time in the Court where the witness and the culprit were face to face. Paras 22 to 26 of the report are extracted hereunder:22. A more useful and elaborate discussion on the subject is to be found in *Malkhansingh v. State of Madhya Pradesh*, (2003) 5 SCC 74.where the TIP is linked to the requirement of Section 9 of the Evidence Act, 1872 and coupled with the caution that in the absence of a TIP, the weight to be attached to the identification of the accused in Court is a matter for the courts of fact to decide.

23. Similarly, in *Vijay @ Chinee v. State of Madhya Pradesh*, (2010) 8 SCC 191 after a discussion on the subject, it was concluded that, the test identification is a part of the investigation and is very useful in a case where the accused are not known beforehand to the witnesses. It is used only to corroborate the evidence recorded in the court. Therefore, it is not substantive evidence. The actual evidence is what is given by the witnesses in the court.

It was noted in *Vijay* with reference to *State of Himachal Pradesh v. Lekh Raj*, (2000) 1 SCC 24, that the holding of a TIP is a rule of prudence which is required to be followed in cases where the accused is not known to the witness or complainant.

24. We have gone into some detail on this issue because of the unfortunately cursory manner in which the matter has been dealt with by the Trial Judge and the High Court.

25. The sum and substance of the various decisions referred to above and others on the same lines is that the failure to hold a TIP is not fatal to the case of the prosecution, but the Trial Judge will need to be circumspect in accepting the identification of an accused by a witness in Court if the accused is a stranger to the witness.

26. In the present case, we are not dealing with the evidence of any ordinary witness - we are dealing with a victim of a crime, someone who was directly at the receiving end of the actions of the appellant and who came face to face with the threat and intimidation by the appellant. The evidence of such a victim of a crime must be placed, in our opinion, on a somewhat higher pedestal, in terms of the credibility attached to it, than the evidence of any other witness. We need to seriously consider a partial shift in focus in the proper administration of justice by including not only the life and liberty of an accused but issues of victimology and the treatment of victims. Theories concerning criminal law and the administration of criminal justice are fast developing and we need to keep up with these developments.

20. The importance of holding TIP was highlighted by the Supreme Court in Dana Yadav relied upon by the learned counsel for the appellants. In para 6 to 8, the Supreme Court held as under:

6. It is also well settled that failure to hold test identification parade, which should be held with reasonable dispatch, does not make the evidence of identification in court inadmissible, rather the same is very much admissible in law. Question is, what is its probative value?. Ordinarily, identification of an accused for the first time in court by a witness should not be relied upon, the same being from its very nature, inherently of a weak character, unless it is corroborated by his previous identification in the test identification parade or any other evidence. The purpose of test identification parade is to test the observation, grasp, memory, capacity to recapitulate what a witness has seen earlier, strength or trustworthiness of the evidence of identification of an accused and to ascertain if it can be used as reliable corroborative evidence of the witness identifying the accused at his trial in court. If a witness identifies the accused in court for the first time, the probative value of such uncorroborated evidence becomes minimal so much so that it becomes, as a rule of prudence and not law, unsafe to rely on such a piece of evidence. We are fortified in our view by a catena of decisions of this Court in the cases of Kanta Prashad v. Delhi Admn. AIR 195.SC 350.

7. Apart from the ordinary rule laid down in the aforesaid decisions, certain exceptions to the same have been carved out where identification of an accused for the first time in court without there being any corroboration whatsoever can form the sole basis for his conviction. In the case of Budhsen [(1970) 2 SCC 12.:

1970. SCC (Cri) 343]. it was observed:

There may, however, be exceptions to this general rule, when for example, the court is impressed by a particular witness, on whose testimony it can safely rely, without such or other corroboration.

8. In the case of State of Maharashtra v. Sukhdev Singh [(1992) 3 SCC 70.:

1992. SCC (Cri) 705]. it was laid down that if a witness had any particular reason to remember about the identity of an accused, in that event, the case can be brought under the exception and upon solitary evidence of identification of an accused in court for the first time, conviction can be based. In the case of Ronny [(1998) 3 SCC 62.:

1998. SCC (Cri) 859]. it has been laid down that where the witness had a chance to interact with the accused or that in a case where the witness had an opportunity to notice the distinctive features of the accused which lends assurance to his testimony in court, the evidence of identification in court for the first time by such a witness cannot be thrown away merely because no test identification parade was held. In that case, the accused concerned had a talk with the identifying witnesses for about 7/8 minutes. In these circumstances, the conviction of the accused, on the basis of sworn testimony of witnesses identifying for the first time in court without the same being corroborated either by previous identification in the test identification parade or any other evidence, was upheld by this Court. In the case of Rajesh Govind Jagesha[(1999) 8 SCC 42.:

1999. SCC (Cri) 1452]. it was laid down that the absence of test identification parade may not be fatal if the accused is sufficiently described in the complaint leaving no doubt in the mind of the court regarding his involvement or is arrested on the spot immediately after the occurrence and in either eventuality, the evidence of witnesses identifying the accused for the first time in court can form the basis for conviction without the same being corroborated by any other evidence and, accordingly, conviction of the accused was upheld by this Court. In the case of State of H.P. v. Lekh Raj [(2000) 1 SCC 24.:

2000. SCC (Cri) 147]. it was observed that ..test identification is considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them. There may, however, be exceptions to this general rule, when, for example, the court is impressed by a particular witness on whose testimony it can safely rely without such or other corroboration. In that case, laying down the aforesaid law, acquittal of one of the accused by the High Court was converted into conviction by

this Court on the basis of identification by a witness for the first time in court without the same being corroborated by any other evidence. In the case of Ramanbhai Naranbhai Patel [(2000) 1 SCC 35.:

2000. SCC (Cri) 113]. it was observed:

It, therefore, cannot be held, as tried to be submitted by learned counsel for the appellants, that in the absence of a test identification parade, the evidence of an eyewitness identifying the accused would become inadmissible or totally useless; whether the evidence deserves any credence or not would always depend on the facts and circumstances of each case.

The Court further observed .the fact remains that these eyewitnesses were seriously injured and they could have easily seen the faces of the persons assaulting them and their appearance and identity would well remain imprinted in their minds especially when they were assaulted in broad daylight. In these circumstances, conviction of the accused was upheld on the basis of solitary evidence of identification by a witness for the first time in court.

21. Turning to the facts of the instant case, although the incident took place in the dead of the night, but as stated earlier there was sufficient light as there was an electric pole containing six halogen lamps very close to the place of incident. The incident started with an altercation between deceased and PW-8 on the one hand and the two appellants and the juvenile on the other on the matter of lending of a mobile by the deceased and PW-8. In spite of the appellants insistence, the deceased and PW-8 declined to part with the mobile to enable the appellants to allegedly make a call. It was thereafter that the juvenile took out a knife and caused injuries on the person of the deceased. Thereafter the knife was taken by Salim. The appellant Raj Kumar @ Khujjar held PW-8 and appellant Salim inflicted knife blow on PW-8s face. Thus, it is not a case where PW-8 had only a glimpse of a fleeing assailant. Thus, in our opinion, not holding of TIP was not material in the instant case.

22. PW-8 was an injured witness. His testimony was found to be credible and worthy of reliance by the Trial Court. The Trial Court observed that discrepancy on

non-material points would show that the witness was truthful and was not a tutored one. In *State of U.P. v. Naresh & Ors.* (2011) 4 SCC 324, the Supreme Court observed that the testimony of an injured witness has to be accorded a special status in law and should be relied on unless there are strong grounds for its rejection. In *Abdul Sayed v. State of Madhya Pradesh* (2010) 10 SCC 25, echoing similar sentiments, the Supreme Court observed that an injured witness is unlikely to spare his actual assailant (S) and to falsely implicate someone else. Para 28 of the judgment reads thus: 28. The question of the weight to be attached to the evidence of a witness that was himself injured in the course of the occurrence has been extensively discussed by this Court. Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone. Convincing evidence is required to discredit an injured witness.

23. The contention raised on behalf of the appellant Raj Kumar that he was falsely implicated in place of one Raju Nepali whose name also appeared in the disclosure statement made by the juvenile is also devoid of any merit for more than one reason. The disclosure statement which is in the form of a confessional statement is inadmissible in evidence. It is relevant so far as it relates to discovery of any fact. Raju Nepali was never arrested. PW-8 in his cross-examination categorically stated that there were just three persons involved in the incident. His testimony, as stated above, is credible and worthy of reliance. Such statements are sometime made by an accused to mislead the investigating agency. In view of the specific role ascribed to appellant Raj Kumar @ Khujjar, we reject the contention raised on his behalf that he has been implicated falsely in place of one Raju Nepali.

24. Thus, relying on the testimony of PW-8 the factum and manner of the incident is fully established and we are inclined to support the Trial Court judgment in this regard. COMMON INTENTION 25 It is well settled that common intention implies a pre-arranged plan and acting in concert pursuant to the plan. Common intention comes into being prior to the commission of the act in point of time. At the same

time, it has to be borne in mind that for common intention neither any written nor any oral agreement is necessary. The common intention may well develop at the spot. The common intention has to be distinguished from a similar intention. In *Suresh and Anr. v. State of U.P.* (2001) 3 SCC 673, the Supreme Court observed that merely because a person is present at or near the scene of the crime without doing anything or without sharing the common intention he could also be convicted with the aid of Section 34 of the IPC for the offence committed by the other accused. To answer whether the appellants shared common intention with the juvenile in causing injuries on the person of the deceased, we will again refer to the testimony of PW-8. PW-8 deposed that at about 11:30 P.M./12 at night, they were returning from Taimur Nagar, when they (the deceased and he) reached near the dustbin near C block, New Friends Colony, three boys met them. All the three boys demanded the mobile phone of Sandeep to make a call but Sandeep refused to hand over his mobile phone to those boys. Thereafter, one of the boy (the juvenile) attacked Sandeep with a knife.

26. Thus, what can be gathered from PW-8's testimony is that the juvenile and the two accused asked for the mobile phone from the deceased and that the deceased refused to hand over the same to the accused persons. Immediately thereafter, the co-accused, that is, the juvenile attacked the deceased with a knife. What provoked the juvenile to attack the deceased with a knife cannot be deciphered. It is difficult to accept the contention raised on behalf of the State that the three accused persons wanted to rob the deceased of the mobile phone. Even if it is assumed that the three boys wanted to commit the robbery where is the common intention to cause injury and that too on a vital part of the body of the deceased?

27. It is evident that the knife was taken out suddenly by the juvenile and the injury was caused on the person of the deceased. At the moment, we are not concerned with the injury caused on the person of PW-8 to which we will advert a little later.

28. In *Rajendra Singh & Ors. v. The State of Bihar* (2000) 4 SCC 298, the Supreme Court quoted with approval observations in *Dukhmochan Pandey v. State of Bihar* (1997) 8 SCC 405, where it was held as under: In the case of *Dukhmochan Pandey*

v. State of Bihar (1997) 8 SCC 40. this Court has held that there lies a distinction between the common intention and similar intention and the question whether there exists a common intention in all the persons who did some overt act resulting in the death of some of the persons of the other party is a question of fact and can be inferred only from the circumstances. This Court had held that the distinction between a common intention and a similar intention may be fine, but is nonetheless a real one and if overlooked, may lead to a miscarriage of justice. Following the ratio in the aforesaid case and applying to the facts and circumstances of the present case, as unfolded through the eyewitnesses, it is not possible for us to hold that Triloki also shared the common intention with accused Rajender and his conviction under Sections 302/34 cannot be sustained.

29. In State v. Sunil @ Akash @ Sagar 2012 (2) JCC 827. while hearing leave petition a Division Bench of this Court in similar circumstances held that Sunil could not have shared a common intention with Vipin for the murder or the homicidal attack on the deceased since the knife by all accounts was whipped out all of a sudden. In that case, the respondent Sunil had even held the deceased but in the absence of any evidence that Sunil had the knowledge that Vipin was armed with a knife and was bound to use it, Sunil's acquittal for the offence under Section 302/34 IPC was upheld by the Division Bench.

30. Adverting to the facts of the instant case, keeping in view PW-8's testimony that the juvenile (Jitender) suddenly took out a knife and attacked the deceased, the appellants cannot be fastened with the liability for the deceaseds Sandeep @ Sanjeev murder with the aid of Section 34 of the IPC.

31. The Trial Courts judgment so far as it relates to the appellants conviction under Section 302 read with Section 34 of the IPC, therefore, cannot be sustained; the same is accordingly set aside. CONVICTION UNDER SECTION 302 34 IPC 32. It is urged by the learned counsel for the appellants that the injured Sanjay PW-8 was admitted in Jai Prakash Narayan Apex Trauma Centre of AIIMS on the night of 29.05.2009. The injury on the right side of temporal region was found to be simple but caused with a sharp weapon. The injured (PW-8) was discharged from the hospital after first aid. As per the prosecution version, PW-8 was even taken to

the spot by the IO. In view of the circumstances, it cannot be said that the injury was caused by appellant Salim with the intention of causing his death and, therefore, the appellants conviction under Section 307/34 IPC cannot be sustained. It is argued that at the most, the appellants could be convicted under Section 324/34 IPC. On the other hand, learned APP urges that it is not the nature of injury but the intention and knowledge and the circumstances in which the injury is caused that would govern the applicability or otherwise of Section 307 IPC. To appreciate the contention raised on behalf of the appellants, we would extract Section 307 IPC hereunder:Section 307. Attempt to murder Whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and if hurt is caused to any person by such act, the offender shall be liable either to [imprisonment for life]., or to such punishment as is hereinbefore mentioned.

33. There is no dispute that the injury on the person of PW-8 was found to be simple caused with a sharp object. A perusal of Section 307 IPC reveals that the injury caused need neither be grievous nor dangerous. What is important to see is the requisite intention or knowledge or the circumstances in which the injury is caused coupled with the fact that if the victim had died because of the overt act, the accused would be guilty of murder.

34. In *Sarju Prasad v. State of Bihar* AIR 196.SC 843.the Supreme Court observed that the mere fact that the injury actually inflicted by the appellant did not cut any vital organ of the injured is not by itself sufficient to take the act out of the purview of Section 307 IPC.

35. In *State of Maharashtra v. Balram Bama Patil & Ors.* (1983) 2 SCC 28.the Honble Supreme Court while holding that for the purpose of Section 307 IPC, the Court has to see whether the act irrespective of its result was done with the intention or knowledge and under the circumstances mentioned in this Section held as under:9.. To justify a conviction under this section it is not essential that bodily injury capable of causing death should have been inflicted. Although the

nature of injury actually caused may often give considerable assistance in coming to a finding as to the intention of the accused, such intention may also be deduced from other circumstances, and may even, in some cases, be ascertained without any reference at all to actual wounds. The section makes a distinction between an act of the accused and its result, if any. Such an act may not be attended by any result so far as the person assaulted is concerned, but still there may be cases in which the culprit would be liable under this section. It is not necessary that the injury actually caused to the victim of the assault should be sufficient under ordinary circumstances to cause the death of the person assaulted. What the Court has to see is whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in this section. An attempt in order to be criminal need not be the penultimate act. It is sufficient in law, if there is present an intent coupled with some overt act in execution thereof.

36. While referring to *R. Prakash v. State of Karnataka* (2004) 9 SCC 27, the Supreme Court observed that though nature of injury actually caused may often give considerable assistance in coming to a finding as to the intention of the accused, such intention may also be deduced from other circumstances and without any reference to the actual injury caused. In Para 9, the Supreme Court held as under:⁹ It is sufficient to justify a conviction under Section 307 if there is present an intent coupled with some overt act in execution thereof. It is not essential that bodily injury capable of causing death should have been inflicted. Although the nature of injury actually caused may often give considerable assistance in coming to a finding as to the intention of the accused, such intention may also be deduced from other circumstances, and may even, in some cases, be ascertained without any reference at all to actual wounds. The section makes a distinction between the act of the accused and its result, if any. The court has to see whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in the section. Therefore, it is not correct to acquit an accused of the charge under Section 307 IPC merely because the injuries inflicted on the victim were in the nature of a simple hurt.

37. Similarly, this Court in *Vinot Tyagi v. The State* 2013 (2) JCC 105, held that to justify conviction under Section 307 IPC, it is not essential that bodily injury

capable of causing death should have been inflicted. Relevant para of the report is as under:9..Admittedly, injuries were not dangerous to the life of the victim. No repeated blows with deadly weapon were caused in attempt to commit murder, I am conscious that to justify conviction under Section 307 I.P.C., it is not essential that bodily injury capable of causing death should have been inflicted. An attempt in order to be criminal need not be the penultimate act fore-boding death. It is sufficient in law if there is present an intent coupled with some overt act in execution thereof

38. The quarrel started when the juvenile and the two appellants demanded a mobile phone from the deceased and on refusal by the deceased he (the deceased) was attacked with a knife by the juvenile. The injury on the person of Sandeep @ Sanjeev proved fatal and he was declared brought dead in the hospital. When PW-8 tried to intervene to save his friend (the deceased) the appellant Raj Kumar @ Khujjar held him whereas appellant Salim gave him a knife blow on the right side of the temporal region. Thus, keeping in view that the juvenile (co-accused) caused two injuries on the face and one injury on the chest of the deceased which proved fatal. From the circumstances in which the injury was caused on PW-8s face it can be gathered that it was just PW-8s good luck that he escaped with simple injury. The intention and knowledge of appellant Raj Kumar @ Khujjar in holding PW-8 and appellant Salim in giving a knife blow on his face could only be that with the intention and knowledge and in the circumstances if PW-8 had died, the appellants would have been guilty of murder. Thus, the appellants conviction under Section 307 read with Section 34 of the IPC cannot be interfered with.

39. For the offence punishable under Section 307/34 IPC, the appellants were sentenced to undergo rigorous imprisonment for seven years and to pay a fine of `5,000/- each. In default of payment of fine, the appellants were sentenced to undergo simple imprisonment for six months.

40. A perusal of the nominal roll of appellant Salim @ Naju as on 25.06.2013 reveals that he has already undergone a sentence of four years and 22 days. In addition, he has earned remission of four months and 03 days. Similarly, a perusal

of nominal roll of appellant Raj Kumar @ Khujjar as on 21.05.2013 reveals that he has already undergone a sentence of three years, eleven months and 20 days. In addition he has earned remission of four months and 05 days.

41. Thus, as of now, the appellants have undergone actual sentence of about four years and four months and would have earned remission of a little less than five months.

42. In the circumstances of the case, the interest of justice would be met if the appellants are sentenced to undergo rigorous imprisonment for the period already undergone (which is a little less than five years). The sentence of fine and the imprisonment of six months in default thereof is, however, maintained. Thus, while upholding the order of conviction under Section 307/34 of the IPC, the sentence is altered as stated above.

43. Both the appeals are allowed in above terms.

44. Both the appellants are directed to be released forthwith, if not required in any other case.

45. Pending applications also stand disposed of. (G.P. MITTAL) JUDGE (G.S. SISTANI) JUDGE SEPTEMBER 20 2013 pst/vk

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