

Mukesh Kumar Vs. State

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SooperKanoon Citation : sooperkanoon.com/1098088

Court : Delhi

Decided On : Nov-22-2013

Judge : V.P.Vaish

Appellant : Mukesh Kumar

Respondent : State

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI Reserved on: Date of Decision: % + 29th October, 2013 22nd November, 2013 CRIMINAL APPEAL No.89/2013 RANBIR @ PAPPU & ANR. Appellants Through: Mr.Ajayinder Sangwan, Mr.Dushyant Yadav, Mr.Tarunesh Kumar and Mr.Pradeep Kumar, Advocates. versus STATE Through: + Respondent Mr.Sanjay Lao, APP for the State. CRIMINAL APPEAL No.1430/2012 MUKESH KUMAR Through: Appellant Mr.Rohit Bhardwaj, Mr.Narender Kumar & Ms.Naina, Advocates. versus STATE Through: CRL.A. Nos.89/2013, 1430/2012 & 185/2013 Respondent + CRIMINAL APPEAL No.185/2013 DAULAT RAM Through: Appellant Mr.Sushil Bajaj & Mr.Aditya Sharma, Advocates. versus STATE Through: Respondent Mr.Sanjay Lao, APP for the State. CORAM: HON'BLE MR. JUSTICE P.K. BHASIN HON'BLE MR. JUSTICE VED PRAKASH VAISH VED PRAKASH VAISH, J:

1. The present appeals have been preferred by Ranbir @ Pappu, Ravi @ Ashu, Mukesh Kumar and Daulat Ram against the judgment dated 30th August, 2012 passed by the learned Additional Sessions Judge, North West, Rohini, Delhi in

case FIR No.1081/2006, P.S. Nangloi whereby the appellants have been convicted under Sections 302/34 of the Indian Penal Code (hereinafter referred to as IPC). Vide order on sentence dated 27th November 2012, all the appellants have been sentenced to undergo imprisonment for life and fine of Rs.8,000/- each and in default of payment of fine, they shall further undergo SI for six months. Benefit of Section 428 of Code of Criminal Procedure (hereinafter referred to as Cr.P.C.) was ordered to be given to the appellants.

2. Briefly stated, the facts giving rise to the present appeals are that complainant Suresh used to visit his widow sister Sarla, widow of late Rajbir Singh, r/o House No.97/1, Village Mundka, Delhi in 8-10 days and his younger brother Sudhir @ Dhillu used to stay at her house from the last 7/8 years for the help of their sister. On 12.10.2006 at about 10.00 p.m., complainant Suresh was sitting on cot in the courtyard of his sisters house and Sudhir also reached there. His sister Sarla told that Pappu had come and was talking of returning the money of Rs.2 lakhs borrowed from her two years ago and she asked Sudhir to bring the money from Pappu. Immediately, Sudhir went outside to bring the money from Pappu. After some time, they heard the noise from the gali maro sale ko, jyada paise wala banta hai. They also heard the noise of their brother Sudhir bachao-bachao. The complainant immediately saw in the gali where under the streetlight and near the electric pole adjoining their house, in front of their gate, appellant Ranbir @ Pappu along with the appellants Daulat and Mukesh had caught hold of his brother Sudhir @ Dhillu and giving him leg and fist blows. Appellant Ranbir @ Pappu had caught hold of Sudhir from his neck and his son namely, Ashu (appellant) gave lathi blow on the head of Sudhir. The complainant ran for help of his brother after opening the door. In the meanwhile, appellants gave 2-3 more blows to Sudhir and thereafter Daulat and Mukesh ran on a motor cycle already standing there towards Phirni Road. The appellant Ranbir @ Pappu and Ashu also ran from there in the gali towards the village. Sudhir fell on the ground. In the meanwhile, Sunil and Manish also reached there and shifted Sudhir to Sonia Hospital in the car of one Chand. After examination, the doctors in the hospital declared Sudhir brought dead. Police was informed and DD No.45A was recorded. ASI Om Prakash along with Constable John Patrick reached at the spot and came to know that the victim Sudhir was already shifted to Sonia Hospital. FIR under Sections 302/34 IPC was

registered and the investigation was marked to Insp. R.S. Malik.

3. On 26.10.2006, appellant Ranbir and Ashu were arrested. Appellant Ashu got recovered the lathi with the help of which he hit Sudhir from his house. The appellant Daulat and Mukesh were also arrested who were friends of Ranbir. The appellant Mukesh got recovered the motor cycle bearing registration No.DL4SAY-5392.

4. After completion of investigation, charge-sheet under Sections 302/34 IPC was filed, with the compliance of Section 207 Cr.P.C., the case was committed to Sessions Court. Charges under Section 302/34 IPC were framed against all the appellants to which they pleaded not guilty and claimed trial. The prosecution has examined as many as 22 witnesses and thereafter statements of appellants under Section 313 Cr.P.C. were recorded. Initially, the appellants Ranbir and Ravi opted to lead defence evidence whereas accused Daulat and Mukesh did not opt to lead any defence evidence. However, later on accused Ranbir and Ravi also opted not to lead any defence evidence and defence evidence was closed vide order of the trial Court dated 10.06.2011. The trial was conducted leading finally to passing of the impugned judgment and order on sentence.

5. Learned counsel for the appellants had contended that the prosecution has failed to prove the offence beyond reasonable doubt and the chain of events is not complete. More so the eye-witnesses namely Suresh (PW-1) and Sarla (PW-2) have been planted by the police whereas Sunil Kumar Vats @ Sonu (PW-5) and Manish Lakra (PW-6) are not eye-witnesses of the incident. All the independent witnesses are related witnesses and, therefore, also interested witnesses. The present case is a blind murder and the real culprit is not known to the prosecution and the family members of the deceased, therefore, the appellants have been made scapegoats since there was enmity between the appellants and the family of the deceased.

6. The counsel for the appellants urged that DD No.45A which was recorded by Constable ASI Prem Singh (PW-9) at the instance of wireless operator. DD No.45A was recorded at 10.30 p.m. on 12.10.2006 which finds mention a case of stabbing whereas the entire case of prosecution is based on the injury caused by

danda. Even in the crime team report Ex.PW14/A and the statement of Head Constable John Patrick (PW-13) regarding the application for preservation of dead body submitted after registration of FIR mentions a case of stabbing. It was further contended that the presence of Suresh (PW-1) on the place of incident is highly doubtful. He has neither identified the dead body of his brother nor has he informed the police about the incident. Suresh (PW-1) has also not been named in the MLC and only the names of Sunil and Manish are mentioned in the MLC. If Suresh would have been present in the hospital, his name would have been there in the MLC. There is a dispute between the statements of prosecution witnesses regarding the place of recording of statement of Suresh (PW-1). Suresh while appearing as PW-1 has stated that his statement was recorded in the hospital. On the other hand, ASI Om Prakash (PW-19) has initially stated that the statement of Suresh was recorded in the hospital whereas in his crossexamination, he has stated that the statement was recorded on the spot. There are also improvements in the statements of PW-1 in the Court where he has stated that Sarla (PW-2) followed him to the place of incident and also that all the four appellants had pressed the neck of the deceased by danda. However, these facts were not told by him in his statement before the police and are material improvements. Sarla (PW-2) is not an eye-witness to the incident as the presence of PW-2 is not proved from the FIR. Also even Manish Lakra (PW-6) has stated in his testimony that except Suresh, nobody was present at the spot which is sufficient enough to rule out PW-2s presence on the spot. Further, according to Sarla (PW-2) herself, the distance between her house and the place of incident was 10-15 paces where one can reach within 20 seconds but she took one minute to reach there and the incident of fight continued for 5-7 minutes. Thereafter also, she did nothing to save her brother. Learned counsel for the appellants also submitted that there are no injuries to Suresh (PW-1) and Sarla (PW-2) which further belies their claim. Also PW-2 neither did inform to the police nor did she state any reason as to why she did not accompany her injured brother to the hospital. This conduct is sufficient enough to question the veracity of the testimony of these witnesses.

7. Learned counsel for the appellants further contended that the prosecution has failed to prove the motive. The exact amount of loan as given by Sarla (PW-2) to the appellant Ranbir @ Pappu is not proved. In the FIR, it is mentioned that Rs.2

lakhs was given to the appellant Ranbir by Sarla. The same fact was stated by Suresh (PW-1) in his testimony. However, Sarla (PW-2) has stated in her testimony before the trial Court that she had given few money (thode se) and again stated Rs.2 lakhs were given and again stated that she paid a cash amount of Rs.1,40,000/- in the presence of Sachin Kumar and Rs.20,000/- were also paid. During her cross-examination, she stated that the money was given in two instalments by way of Rs.1 lakh on one occasion and Rs.40,000/- on another. These contradictions are enough to show that the story of PW-2 has been cooked up. She has also not disclosed that with her income, how was she able to manage the alleged loan amount.

8. It was lastly contended by learned counsel for the appellants that the recovery of danda at the instance of appellant Ashu is highly unbelievable. Also, the ingredients of Section 300 are not established. There was no intention to kill. As per the prosecution, appellants Ranbir @ Pappu, Daulat and Mukesh were not armed and only when the appellant Ravi @ Ashu came at the spot with danda and gave danda blow, it resulted in the death of deceased Sudhir. To substantiate charge under Section 302 read with Section 34, it must be shown that the criminal act complained of was done by one of the accused person in furtherance of a common intention of both or all of the accused which in the present case is not made out. Reliance is placed on Mithu Singh vs. State of Punjab, (2001) SCC (Crl.) 668, Arun vs. State by Inspector of Police, Tamil Nadu, (2008) 15 SCC501 and Naresh Kumar vs. State, Crl. A. No.432/2010 delivered by this Court on 04.09.2013. Otherwise also, the appellants are entitled to benefit of the Exception IV to Section 300 IPC.

9. Per contra, learned APP for the State contended that murder was committed by the appellants and stands proved from the testimonies of Suresh (PW-1) and Sarla (PW-2) who were both eye-witnesses to the incident. There is no reason to disbelieve their testimony merely because the said witnesses were related to the deceased. He contended that the conviction can be based on the testimony of a single witness if it proves to be reliable.

10. The appellant-Ranbir @ Pappu was holding the deceased from the neck and the appellant Mukesh and Daulat were giving him leg and fist blows. Appellant Ravi @ Ashu gave danda blow on the head of the deceased Sudhir which proves that they had intention to cause death of the Sudhir and, therefore, charge under Section 302/34 IPC is proved. The contradictions pointed out in the testimonies of prosecution witnesses are minor and do not go to the root and core of this case.

11. It was further contended by learned APP that the public persons generally do not become the witnesses to the criminal proceedings and hence the testimonies of prosecution witnesses cannot be ruled out in their absence. It was also contended that the appellants are not entitled to the benefit of faulty investigation.

12. We have given our thoughtful consideration to the submissions made by learned counsel for the appellants and learned APP for the State.

13. At this juncture, it would be pertinent to reproduce the testimony of Suresh (PW-1) and Sarla (PW-2) who were the eye-witnesses to the incident.

14. Suresh (PW-1) has stated that his sister was married with Rajbir Singh who had expired about 10/11 years prior to this incident. His sister was residing at her in-laws house and after death of his brother-in-law Rajbir, he started living with his sister Sarla at her in-laws house at Mundka. After 2/3 years, his brother Sudhir @ Dhillu (deceased) had started living with his sister at her in-laws house and he also used to visit at the house of Sarla usually after a gap of 10/12 days. On 12.10.2006, he was present at the house of his sister Sarla at Village Mundka at about 10.00 p.m. He along with his sister were present at her house and in the meantime his brother Sudhir @ Dhillu entered into the house and his sister told Sudhir that Pappu @ Ranbir had come to her house and told her that he was asking to return money that is Rs.2 lakhs which was given to the appellant by his sister prior to the incident. His brother Sudhir @ Dhillu immediately left the house of her sister Sarla to receive money from Pappu and after some time, they heard noise towards pond in a gali as they were sitting in the courtyard of the house of Sarla. He heard the noise of his brother Sudhir bachao-bachao and then he left the house and was followed by his sister Sarla and reached at the gate of their house. They saw that appellant Ranbir @ Pappu was holding his brother from

neck and the appellant Mukesh, Daulat were giving legs and fist blows to his brother in the gali by the side of the gate. Immediately appellant Ashu also reached there and he was having danda in his hand and the appellant Ashu gave 2-3 danda blows on the head of his brother. Due to this scuffle and injuries, his brother fell down on the ground and after that all the four appellants pressed the neck of his brother Sudhir with danda using force. They reached there to intervene but the appellants Daulat and Mukesh ran away from the spot after the incident on the motor cycle towards Phirni Road and remaining two appellants i.e. Ranbir @ Pappu and Ashu ran towards their houses. After some period, Sunil and Manish who were the residents of same locality reached at the spot and took his injured brother to Sonia Hospital and he also accompanied them to the hospital. After examining his brother Sudhir, doctor declared him as brought dead. Police also reached in the hospital from Police Station Nangloi and his statement was recorded. The post mortem of the dead body of his brother was got conducted and after post mortem, dead body was handed over to them. IO lifted blood, one hawai chappal from the spot. He also handed over his blood stained shirt which he was wearing at the time of the incident and lifted his brother from the spot. In his cross-examination, he reiterated his above stand and denied the suggestion that there were many complaints against his brother in the locality and also denied that his brother was a habitual drunkard and a gambler or used to gamble.

15. Sarla (PW-2) has stated that her husband Rajbir Singh had expired about 10/11 years. After death of her husband, her brother Suresh started residing with her to help her at her house. After that, Suresh left her house and 7-8 years prior to the incident, her another brother Sudhir started residing with her at their house. On 12.10.2006, her brother Suresh had come to their house and she along with her brother Suresh were sitting in the courtyard of their house. At about 10.00 p.m. appellant Pappu to whom she had given few money (thode se) again stated that she had given Rs.2 lakhs to the appellant Pappu two and half years prior to the incident came to her house and asked her to receive from him the said amount after visiting his house and after that he left her house. After 2-3 minutes when Pappu left her house, her brother Sudhir came to her house from outside and she told the fact of collecting money from the appellant Pappu to her brother Sudhir and asked him to collect by visiting the house of appellant Pappu. Her brother

Sudhir left the house to collect money. After about 4-5 minutes, she heard the noise maro sale ko, jada paise wala banta hai in the gali near her house. She again heard the cries of her brother Sudhir bachao-bachao. After that, she along with her brother Suresh left their house towards the gali from which they heard the noise. Her brother was ahead of her. There was a light in the gali as the light of their house was towards gali. She saw appellant Ranbir, Daulat and Mukesh were beating her brother Sudhir with legs and fists blows. Pappu had caught hold the neck of her brother Sudhir at that time and was exhorting maro sale ko. After that appellant Ashu @ Ravi son of appellant Pappu also reached there and he gave a lathi blow on the head, by the side of right ear, shoulder and other part of the body of her brother Sudhir. All the appellants/accused persons were also giving legs and fists blows to her brother. After that, they opened the gate of their house and in the mean time appellant Ashu gave 4-5 lathi blows to her brother Sudhir and the appellant Pappu again caught hold the neck of her brother. When they reached there, all the four appellants pressed the neck of her brother Sudhir with the help of danda jointly. After that, they intervened but all the appellants escaped from the spot leaving danda at the spot. Her brother Sudhir became unconscious at the spot. In the mean time, Manish and Sunil arrived there and brought one Maruti car of Chand Ram at the spot. Sudhir was taken to the Sonia Hospital in the said car. Her brother Suresh took the deceased to the hospital. She came to know about the death of the deceased Sudhir next day as she remained at her house. In her cross-examination, she reiterated her stand and stated that she is not engaged in the business of money lending but had given money to the appellant Pappu. She denied the suggestion that the deceased was in a drunk state at that time and also denied that he received injuries in the scuffle that took place at the time when he was gambling with other persons. She also denied the suggestion that her brother molested wife of Vijay and that appellant Ranbir and his son and the other members of the locality had objected to this behaviour.

16. Insofar as the question of credit worthiness of the evidence of relative of victim is concerned, it is well settled that though the Court has to scrutinize such evidence with great care and caution but such evidence cannot be discarded on the sole ground of their interest in the prosecution. The relationship per se does not affect the credibility of a witness. Merely because the witness happens to be a

relative of the victim of the crime, he/she cannot be characterized as an interested witness. It is trite that the term interested postulates that the person concerned have some direct or indirect interest in seeing that the appellant/accused is somehow or the other connected either because he had some animosity with the accused or for some other motive. It is more often than not a relation would not conceal the actual culprit and make allegations against an innocent person. The Supreme Court in *Namdeo vs. State of Maharashtra*, (2007) 14 SCC150 observed as follows :

37. Recently, in *Harbans Kaur v. State of Haryana* [(2005) 9 SCC195:

2005. SCC (Cri) 1213]. the conviction of the accused was challenged in this Court, inter alia, on the ground that the prosecution version was based on testimony of relatives and hence it did not inspire confidence. Negating the contention this Court said: (SCC p. 198, para 7)

7. There is no proposition in law that relatives are to be treated as untruthful witnesses. On the contrary, reason has to be shown when a plea of partiality is raised to show that the witnesses had reason to shield the actual culprit and falsely implicate the accused.

38. From the above case law, it is clear that a close relative cannot be characterised as an interested witness. He is a natural witness. His evidence, however, must be scrutinised carefully. If on such scrutiny, his evidence is found to be intrinsically reliable, inherently probable and wholly trustworthy, conviction can be based on the sole testimony of such witness. Close relationship of witness with the deceased or victim is no ground to reject his evidence. On the contrary, close relative of the deceased would normally be most reluctant to spare the real culprit and falsely implicate an innocent one.

17. Also in *Dalip Singh & Ors. Vs. The State of Punjab*, AIR 1953 SC364 it was held by the Honble Supreme Court as :

26. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the

witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalisation. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts.

18. In the present case, no reasons are brought forth by the appellants to question the veracity of these witnesses. CRL.A. Nos.89/2013, 1430/2012 & 185/2013 Nothing Page 16 of 30 material has been put forth by the appellants to show that these witnesses are trying to falsely implicate them out of some personal grudge or animosity. Further the allegations with regard to the fight due to pigs and the conduct of the deceased with women, these too are not proved by means of evidences or witnesses.

19. No infirmity, otherwise also can be imputed on the testimonies of PW-1 and PW-2 for the mere fact that they did not make all the efforts to stop the appellants from hitting their brother when they could have done so by reaching the place of incident within one minute when the entire incident lasted for about 5-7 minutes or PW-2 not accompanying the deceased to the hospital. The Court does not expect a standard code of conduct from all the witnesses, i.e., to act and behave in a particular manner. Human being react differently to different situation. To a same incident, different degree of emotion such as surprise, excitement, fear, annoyance etc. is exhibited by the various witnesses and no particular degree or standard can be laid down by any Court in which form and manner it expects the witnesses to behave and react to a particular situation. This Court cannot further penalise or discard what is stated by a witness for a fact that he has failed to act and behave to a situation in a manner what the general public expects out of him. In the present case, simply a failure of PW-1 and PW-2 to conduct in a manner as

aforementioned would not be sufficient to belie their otherwise cogent testimonies. We observe that both these witnesses had stated in their testimonies that when they reached at the spot and tried to intervene all the accused/appellants had run away. Further Sunil Kumar Vats (PW-5) has stated that Sarla (PW-2) had not gone to the hospital as she was not feeling well after the incident.

20. It was held by the Supreme Court in *Rana Pratap vs. State of Haryana*, (1983) 3 SCC3276. Yet another reason given by the learned Sessions Judge to doubt the presence of the witnesses was that their conduct in not going to the rescue of the deceased when he was in the clutches of the assailants was unnatural. We must say that the comment is most unreal. Every person who witnesses a murder reacts in his own way. Some are stunned, become speechless and stand rooted to the spot. Some become hysteric and start wailing. Some start shouting for help. Others run away to keep themselves as far removed from the spot as possible. Yet others rush to the rescue of the victim, even going to the extent of counter-attacking the assailants. Every one reacts in his own special way. There is no set rule of natural reaction. To discard the evidence of a witness on the ground that he did not react in any particular manner is to appreciate evidence in a wholly unrealistic and unimaginative way.

21. It was then contended that there are certain discrepancies and contradictions in the statements of prosecution witnesses in regard to the recording of statement of Suresh (PW-1) and also that it was not possible for Sarla (PW-2) to see the incident from behind the close door of her house. However, in this regard, we observe that these variations are not material in nature. Further, PW-2 has stated in her cross-examination that at the time when accused persons/appellants were pressing danda on the throat of the deceased, she was opening her grill gate. Thus, it could be possible for her to see the incident from there. Undoubtedly, some minor discrepancies or variations are traceable in the statement of these witnesses. But what the Court has to see is whether these variations are material and affect the case of the prosecution substantially. However, variation may not be enough to adversely affect the case of prosecution. It is a settled principle of law that the Court should examine the statement of the witness in its entirety and read the said statement along with the statement of other witnesses in order to arrive at

a rational conclusion. No statement of a witness can be read in part and/or in isolation. We are unable to see any material or serious contradiction in the statements of these witnesses which may give any advantage to the appellants.

22. The prosecution case not only stands proved from the testimonies of the aforesaid witnesses who saw all the appellants involved in the incident rather also from the statement of Sunil Kumar Vats (PW-5) who has stated in his testimony that on 12.10.2006 at about 10.00 p.m., he was present at his house. He heard the noise of quarrel in the gali near his house and he came outside from his house and when he was present in the gali, he found one Manish who was residing in his neighbourhood. He also found Sudhir present in the gali opposite to the house of the neighbour in injured condition and later on stated, opposite to the shop of Sudhir which is situated in the house of his sister Sarla. When he went near Sudhir, he found two accused/appellants Daulat and Mukesh running towards Phirni Road from the gali on a motor cycle and saw the appellant Ashu running towards village with his father Pappu. Then he went to fetch the Maruti van of his friend and removed Sudhir to Sonia Hospital in the van and Suresh was with him in the van and Manish followed them on the motor cycle. Thus, as per Sunil Kumar Vats (PW-5) also, he saw all the appellants fleeing away from the spot, though, he had not witnessed the incident. It is also clear from his testimony that Suresh accompanied Sunil Kumar and Manish along with the injured to the hospital and in such a case, the factum of mere absence of the name of Suresh (PW-1) from the MLC report Ex.PW3/A cannot be taken adverse to the prosecution case.

23. So far as non mention of name of the appellants in MLC is concerned, it may be mentioned that there is no rule of law that MLC must contain the name of the accused. The primary duty of the doctor is to treat the patient and not to find out who had caused the injuries.

24. As regards, the absence of motive in the present case, we observe that it is a settled legal proposition that even if the absence of motive as alleged is accepted that is of no consequence and pales into insignificance when direct evidence establishes the crime. Therefore, in case there is direct trustworthy evidence of witnesses as to commission of an alleged offence, the motive part loses its

significance. Therefore, if the genesis of the motive of the occurrence is not proved, the ocular testimony of the witnesses as to the occurrence could not be discarded only by the reason of the absence of motive, if otherwise the evidence is worthy of reliance. In this regard, reliance can be placed upon judgments in Hari Shankar vs. State of U.P., (1996) 9 SCC40 Bikau Pandey & Ors. vs. State of Bihar, (2003) 12 SCC616 and Abu Thakir & Ors. vs. State of Tamil Nadu, (2010) 5 SCC91 25. In the instant case, as we have already observed that the testimonies of PW-1 and PW-2 are corroborated with each other and nothing material has emerged from their cross-examination. Presence of the appellants on the spot is proved from the testimony of Sunil Kumar Vats (PW-5). Hence in the light of the above observations, mere absence of motive is not sufficient to discard the testimony of these witnesses.

26. Otherwise also, it is observed that the deceased had gone to take the money from appellant Ranbir @ Pappu which he owed to Sarla (PW-2) in the process of which he was caught by the appellants and given various injuries as a result of which he died. At this juncture, it is also pertinent to observe that although the exact loan amount has not been stated by Sarla and various discrepancies exist regarding it. Also, Sarla (PW-2) has not been able to prove the source of the said loan amount. However, in this regard we observe that it was not required to be so done as the case before us is a criminal prosecution and not a civil suit for recovery in which the exact amount of loan is required to be proved. Sarla (PW-2) has stated that she had lend money to the appellant Pappu and so also Suresh (PW-1) has stated that on the day of incident, the said appellant had come to the house of Sarla (PW-2) asking her to take the said amount back from him. Further, Sachin Lakra (PW-18) has also stated in his testimony that he took his aunt Sarla to SBI Mundka for withdrawal of cash amount. His said aunt withdrew Rupees One lakh from the bank. In the evening, his aunt had handed over Rs.1,40,000/- to Ranbir @ Pappu. The said amount was given in the year 2004. The appellant Pappu had borrowed the said amount from his aunt but he does not know for what purpose the said amount was given to him.

27. We cannot forget that it is generally a difficult area for prosecution to bring on record as to what was in the mind of the accused/appellant and why he chose to

act in a particular manner because it is not easy to read the human nature being what it is. The mans passion may arouse at any time on some very trifling issue. The motive of a man is often so deep seated as to be almost unfathomable. Only he is having the knowledge of the feelings which he may be having against a particular person. On the other hand there are persons who are so indolent and tolerant that they do not react even on much more serious incidents. Man's behaviour and reaction differ from person to person and by no scale is measurable. In todays time when patience run low and anger is aroused over a very trifling matter, it cannot be said with utmost certainty that a simple act such as asking for the money could not have been sufficient enough to form a motive for commission of an offence. However, as we have already observed that motive rests deep within the mind of the accused and is unfathomable and cannot be determined with utmost certainty. The fact of the matter still remains to be that motive loses its significance when direct evidence of the incident exists.

28. Lastly, it is observed from the testimonies of the eye-witnesses that all the appellants were involved in giving various injuries to the deceased as a result of which he died. Suresh (PW-1) has stated that he saw the appellant Ranbir @ Pappu holding his brother from neck and appellant Mukesh and Daulat were giving leg and fist blows to him. Immediately appellant Ashu also ran there and he has a danda in his hand using which he gave 2-3 blows on the head of his brother Sudhir. After that all the four appellants/accused persons pressed the neck of his brother with danda using force. To similar effect, it was stated by PW-2 in her testimony that Ranbir, Daulat and Mukesh were beating her brother with leg and fist blows. Pappu had caught hold the neck of her brother Sudhir and was exhorting maro sale ko. After that appellant Ashu @ Ravi, son of appellant Ranbir @ Pappu also reached there and gave a lathi blow on the head, by the side of right ear, shoulder and other part of body of Sudhir. All the appellants were also giving leg and fist blows to Sudhir. Appellant Ashu gave 4-5 lathi blows to her brother and Pappu again caught hold of Sudhirs neck. When they reached there, all the four appellants pressed the neck of her brother with the help of danda jointly.

29. In the post mortem report of the deceased Sudhir which is Ex.PW20/A, the following injuries were shown to be found on the person of the deceased:

1.

2.

3.

4.

5. Bruising on left shoulder on its outer aspect of size 3 cms x 2 cms. Bruising of lower lip Lacerated wound just below chin 3 cms x .5 cm x muscle deep Multiple bruises on front of neck of size varying from 3 cms x 2 cms to 2 cms x 2 cms. Lacerated wound on right temporal region 3 cms x 2 cms x Scalp deep On internal examination, there was sub-scalp haematoma on right temporo-parietal region. There was generalized subdural haematoma and subarachnoid haemorrhage on tempo-parietal region; on internal examination of neck, there was bruising of neck tissue on front.

30. Further, as per Dr.V.K. Jha (PW-20), the cause of death was opined as comma as a result of head injury consequent to blunt force diverted upon head by other party and the head injury was sufficient to cause death in ordinary course of nature. He has also deposed that on 17.11.2006, an application seeking opinion regarding weapon of offence was moved. On opening the sealed parcel, he found a bamboo stick, the length of the stick was 3 feet 2 inch, one inch thicker and taper in other end and contained vide thick stain on its surface. After examination, he opined that injury over head and neck mentioned in Ex.PW20/A could have been produced by the said weapon or similar such weapon. He has proved his subsequent opinion as Ex.PW20/B.

31. In the case of Section 34 IPC, it is well established that the common intention pre-supposes prior concert. It requires a prearranged plan because before a man can be vicariously convicted for the criminal act of another, the act must have been done in furtherance of the common intention of them all. However, the plan may not be elaborate, nor is a long interval of the time required. It could arise in a

spur of moment. But as it is difficult to prove the intention of an individual, it has to be inferred from his act or conduct and other related circumstances. Also, as it was observed by the Supreme Court in *State of U.P. vs. Iftikhar Khan*, (1973) 1 SCC 512 that it is not necessary to attract the section that any overt act must be done by the particular accused. It is enough if it is established that the criminal act has been done by anyone of the accused in furtherance of the common intention. The Supreme Court in *Suresh and Anr. Vs. State of U.P.*,

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

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

40. Participation in the crime in furtherance of the common intention cannot conceive of some independent criminal act by all accused persons, besides the ultimate criminal act because for that individual act law takes care of making such accused responsible under the other provisions of the Code. The word act used in Section 34 denotes a series of acts as a single act. What is required under law is that the accused persons sharing the common intention must be physically present at the scene of occurrence and be shown not to have dissuaded themselves from the intended criminal act for which they shared the common intention. Culpability under Section 34 cannot be excluded by mere distance from the scene of occurrence. The presumption of constructive intention, however, has to be arrived at only when the court can, with judicial servitude, hold that the accused must have preconceived the result that ensued in furtherance of the common intention. A Division Bench of the Patna High Court in *Satrughan Patar v. Emperor* [AIR1919 Pat 111 :

20. Cri LJ289 held that it is only when a court with some certainty holds that a particular accused must have preconceived or premeditated the result which ensued or acted in concert with others in order to bring about that result, that Section 34 may be applied.

32. In the present case, the factum of all the appellants sharing a common intention to cause death of the deceased is clearly established from the testimonies of Suresh (PW-1) and Sarla (PW-2) who have stated that all the appellants have participated equally in giving leg and fist blows and pressing the neck of the deceased with danda, the number and type of injuries and the sufficiency of the injury inflicted on the head with a blunt object to cause death in ordinary course of nature, too, stands established from the post mortem report Ex.PW20/A. Further, as per judgment in *Suresh and Anr.* (supra), the appellants are constructively made liable for the criminal act even though they may not have actually committed that act. The judgments relied by the appellants do not aid their case. Even the reliance on *Naresh Kumars* case (supra) by the appellant is misconceived as that was a case where the appellants had caught hold the hands of the deceased and pushed him against the wall and the main accused had stabbed the deceased on the chest and in the light of the same, this Court had

held that the fatal injury could not have been caused within the comprehension of the appellants. Whereas in the present case, we have already observed that all the appellants have equally participated and the common intention to cause death by all was clearly manifest from their conduct of holding the deceased, giving him leg and fist blows and appellant Ravi @ Ashu hitting him with danda on his head and later on all of them pressing his neck with the said danda.

33. Placing reliance on Ankush Shivaji Gaikwad vs. State of Maharashtra, (2013) 6 SCC770 Pal Singh & Ors. Vs. State, Crl. Appeal No.195/2001 and Chenda vs. State of Chattisgarh, Crl. Appeal No.1285/2013, learned counsel for the appellants sought the benefit of Exception IV to Section 300 IPC. However, it is settled law that to claim the benefit of the said Exception, the onus is on the person who claims the benefit to prove that the occurrence had happened in a sudden quarrel and without any pre-meditation. In the present case, the appellants have failed to discharge this onus to claim the benefit under the said Exception and hence they are not entitled to any such benefit.

34. In the light of the aforesaid discussion, the appeals are devoid of any merit and are hereby dismissed. The judgment dated 30 th August, 2012 is upheld. We also affirm the order on sentence dated 27 th November, 2012.

35. The appellants are in judicial custody, a copy of this judgment be delivered to the appellants through concerned Superintendent Jail. (VED PRAKASH VAISH)
JUDGE (P.K. BHASIN) JUDGE November 22, 2013 gm

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