

**Jisan Alias Bittoo Vs. State**

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**Court :** Delhi

**Decided On :** Jul-21-2015

**Judge :** R. K. Gauba

**Appellant :** Jisan Alias Bittoo

**Respondent :** State

**Judgement :**

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

07. 07.2015 Pronounced on:

21. 07.2015 + CRL.A. 550/2012 JISAN alias BITTOO ..... Appellant versus + STATE ..... Respondent CRL.A. 967/2012 ASLAM ..... Appellant versus STATE + ..... Respondent CRL.A. 968/2012 MOHD. RIAZUDDIN alias DING-DING versus STATE Presence : ..... Appellant ..... Respondent Mr. R.M. Tuffail, Mr. Vishal Raj Sehijpal, Mr. Anwar A. Khan and Mr. Farooq Chaudhry, Advs. for appellant in Crl.A.550/2012. Ms. Sahila Lamba, amicus curiae for the appellant in Crl.A.967/2012. Mr. S.B. Dandapani, Adv. for the appellant in Crl.A. 968/2012. Ms. Asha Tiwari, APP for State. CORAM: HON'BLE MR. JUSTICE SANJIV KHANNA HON'BLE MR. JUSTICE R.K. GAUBA MR. JUSTICE R.K. GAUBA % 1. The three (Crl.A.968/2012), appellants Mohd. Jisan Bittu @ Riazuddin @ (Crl.A.550/2012) Ding and Ding Aslam (Crl.A.967/2012) faced prosecution in sessions case No.34/11 on the charge for the offences of murder of Nazim S/o Salim (hereinafter

referred to as the deceased) and attempted murder of Shahid S/o Abdul Sattar (PW5), in furtherance of their common intention as punishable under Sections 302/34 IPC and Section 307/34 IPC respectively, in the course of an incident which statedly occurred at about 10.35 PM on 20.5.2009 near MCD urinal close to Basti Chain Sukhdas, Lal Mahal within the jurisdiction of PS Chandni Mahal. By the impugned judgment dated 23.03.2012, the learned trial court found the appellants guilty as charged on both counts. By the impugned order-on-sentence dated 26.03.2012 the trial court awarded imprisonment for life as the substantive punishment on each count in addition to fine of `25,000/- for offence under Section 302/34 IPC and `10,000/- for offence under Section 307/34 IPC to each convicted person. In default the appellants were ordered to suffer further simple imprisonment for one year and ten months respectively.

2. The case had arisen out of the report under Section 173 Cr.P.C. filed on conclusion of investigation into FIR No.51/09 under Sections 302, 307 IPC of Police Station Chandni Mahal. In the trial court record, appellants Mohd. Riazuddin @ Ding Ding, Jisan @ Bittu and Aslam have been referred to as accused No.1 (A1), accused No.2 (A2) and accused No.3 (A3) respectively. For the sake of convenience, they would be referred to hereinafter accordingly.

3. It may be added that the findings of guilty have been returned by the learned trial Judge primarily on the basis of eye-witness accounts of PW-5 Shahid (the first informant) and another witness Sarfaraz (PW4), in addition to reliance on the recovery of the weapon of offence (chhuri) shown effected at the instance, and pursuant to disclosure, of appellant Jisan @ Bittu (A2) to whom the act of stabbing with the aid and assistance of other two, is attributed.

4. By these three appeals the appellants seek to assail their conviction and sentence.

5. For a critical overview of the prosecution case, following the chronology in which events occurred would be advantageous.

6. At 10.56 PM on 20.5.2009 Nazim (the deceased), male 22 years, was brought to the casualty of Lok Nayak Hospital, New Delhi (hereinafter referred to as the

hospital) by Imran S/o Suleman (PW1) with history of assault suffered at about 10.40 PM on the same night in an incident that had occurred at a place described as Kala Mahal, Haveli Azam. He was smelling of alcohol, was drowsy but arousable and on examination was found having suffered a clean incised wound of the size of 3-4 cm at right upper side belly from which intestines were coming out. The medico legal record (MLC) (Ex.PW26B) in his case was prepared at 11 PM by Dr. Raj, Junior Resident, who was on duty under the supervision of Dr. Pummy (PW-26), the CMO. After primary treatment, he was admitted to surgery emergency. It may be noted here itself that Nazim succumbed to said injury on the same night, in the course of treatment, death having occurred at 02.40 hours of 21.5.2009, per MLC death summary (Ex.PW8/A) prepared by Dr. Anurag Mishra (medical officer in department of surgery of hospital) (PW8). He remained unfit for statement till death.

7. The fact of the admission of the deceased in the hospital in injured state, against MLC, was brought to the notice of the police station Chandni Mahal (hereinafter referred to as the police station) by Head Constable Kailash (PW-13), on duty in the casualty of the hospital at 11 PM and was reduced into DD entry No.44B (Ex.PW7/A) by Constable Niraj Kumar (PW-7), the DD writer on duty. The matter was entrusted for needful action to ASI Krishan Chander (PW-17) assisted by Constable Siya Ram (PW-11). When PW-17 accompanied by PW-11, reached the hospital, he found Nazim under treatment but unfit for statement, as per the opinion of the doctor attending on him.

8. At 11.50 PM on the same night i.e. 20.5.2009, the police station received information through police control room (PCR) that an incident of firing by one Shahid at a person described as Kala had been reported through telephone No.9212973426 from house No.1867 (or 1267) Gali Chandwali near Jamunwali gali, Kala Mahal. This information, on the basis of PCR call, was also reduced into writing by PW7 vide DD No.45B (Ex.PW7/B) and handed over for needful action to Constable Amit Maurya. It is the case of the prosecution that this DD entry No.45B (Ex.PW7/B) also came to be handed over by Constable Amit Maurya to PW-17, who was attending to the matter arising out of earlier intimation, accompanied by PW-11. It is stated that when the said police officials went for enquiry to the area

of Pataudi House, Kala Mahal, Gali Jamunwali they were met by A1, who was having injury in his hand. Under instructions of PW-17, A-1 was taken by PW-11 to the hospital for medical examination and treatment.

9. In the meantime, Shahid (PW5) is also stated to have reached hospital, in an injured state, on being brought there by Arshad S/o Aslam (PW-22). Going by the medico legal record, the arrival in the hospital of PW-5 and A1 was close on the heels of one another. Both are stated to have been examined by the casualty medical officer, in the case of latter (A1) it being Dr. Pummy (PW-26), the MLCs and accompanying record indicating the time of arrival in the hospital of PW-5 being 0018 hours of 21.5.2009 (document Ex.PW24/A) and that of A-1 at 0012 hours of 21.5.2009 (document Ex.PW26/A) respectively.

10. As per the MLC of PW5, he had suffered a clean lacerated wound of the size of 18 cm x 1.5 cm at lower right back. He was smelling of alcohol, was conscious and oriented. As per opinion (Ex.PW24/A) recorded later, on 8.8.2009, by Dr. Anuj Chawla (PW-24), the injury suffered by PW-5 was simple in nature. As per another opinion (at point X on Ex.PW24/A) recorded on 24.6.2009 by Dr. Pummy (PW-26), PW-5 was referred for orthopaedic opinion since x-ray of the left elbow carried out on 21.5.2009 had shown some mal-united fracture suggestive of old trauma. Clearly, the said old injury has no bearing on the present case.

11. A-1 was found, per MLC (Ex.PW26/A), with clean lacerated wound on outer side of left forearm with complaint of pain in movement of left elbow joint. Though the record is silent as to the further course of treatment, there is an endorsement on the MLC (Ex.26/A) indicating the injury was opined to be simple in nature. Throughout the trial or in the proceedings on the appeal(s) there is no claim by A-1 of the injury being graver in nature.

12. It must be noted that the history of the lacerated wound with which PW-5 was brought to the hospital after midnight at 0018 hours on 21.5.2009, as stated to be narrated by both PW5 and PW-22, to the examining medical officer was, assault near Kala Mahal Haveli Azmi Ka Nala in an incident that had occurred at 11.18 PM (apparently on 20.5.2009). The MLC (Ex.PW26/A) of A-1, on the other hand, recorded just a couple of minutes after that of PW-5, related to DD45 (Ex.PW7B)

would reflect he had been injured in an incident that had occurred at 11.45 PM, this as per information given by PW-11.

13. Noticeably, the defence has not made out, either during trial or in appeal, a case that A-1 had been injured in the occurrence which was subject matter of DD No.45-B (Ex.PW7/B). It is not explained by A-1 as to where or at whose hands he suffered the hurt noted in his MLC. Also, and more crucially, the defence has chosen not to question PW5 or PW11 about the time of incident reported to medical officer at the stage of MLC of PW5 (Ex.PW24/A).

14. That the death of Nazim was a case of culpable homicide murder is proved beyond the pale of all doubts. PW-26 noted in the MLC (Ex.PW26/D) that it was a clean incised wound of the size of 3-4 cms at right upper side belly from which intestines were coming out. The autopsy report Ex.PW-15/A prepared on the basis of post-mortem examination on the dead body noted three external injuries; the first of which was a surgical stitched wound; second injury, which corresponds to injury noted in the MLC is described in the post-mortem examination report as under:

Stitched incised stab wound (3 stitches) aprox. (4.5 x 0.5 x 1214) cm, elliptical shape present over right front of abdomen 5.5 cm below costal margin with upper inner angle obtuse and lower outer angle acute with clean margin.

The third injury was a contusion of the size of 3 x 2 cms present on the right side of the chest in anterior auxiliary line, effect of which is noted on the right anterior costal muscle between 9th and 10th ribs.

15. The track of the second injury which proved fatal is noted by the autopsy doctors as under:

Passing through skin, going upward, backward and to the left (midline), piercing subcutaneous tissue muscle of anterior abdominal wall, entering the peritoneal cavity, penetrating the jejunum, then perforating the mesentery and then penetrating inferior vena cave anterior wall, causing a cut measuring (3 x 0.5) cm. Length of track about 12 cm.

16. Clearly, as a result of the piercing of the subcutaneous tissues and muscle of the abdominal wall, peritoneal cavity and jejunum, there was effusion of blood in the muscle layer surrounding the said wound and in the mesenteric layer besides retroperitoneal bleeding. The stab wound inflicted may have been only one but the assailant had intended it to cause deep cuts inside the abdominal area rupturing several organs. The intention behind inflicting such injury can conceivably be none other than causing the death of the person subjected to the assault. We, thus, have no hesitation in confirming the finding of the learned trial judge that the death of Nazim was a case of culpable homicide.

17. The moot question which, however, needs to be addressed is as to who was the author of the fatal injury suffered by Nazim and as to in what circumstances such injury was caused.

18. The case for the prosecution has been that it was A-2 who had stabbed the deceased in an incident that took place at about 10:35 P.M. on 20.05.2009 near MCD urinal close to Basti Chainsukhdas, Lal Mahal, Police Station Jama Masjid and in the said assault he was aided and assisted by A-1 and A-2 who shared the common intention for such purposes. It has also been the case of the prosecution that PW-5 was with the deceased at the time of the said attack brought about collectively by all the three appellants and further that, in the course of the happening, when PW-5 had tried to come to the rescue of the deceased, he was also inflicted stab injury, again by A-2. On the strength of the MLC of PW-5, the prosecution has alleged that the assault on his person was intended to also cause his death and, thus, in the nature of attempted murder. The prosecution relied upon the evidence of PW-4 as an independent eye-witness to the core incident.

19. Before proceeding further, we may take note of the version of PW-5 in the FIR (Ex.PW-6/A) registered on the basis of rukka Ex.PW-5/A (also containing endorsement Ex.PW-27/A).

20. PW-5 told the IO in the FIR that about four/five months prior to the date of incident (20.05.2009), there had been a verbal quarrel between him and Nazim (the deceased) on one side and the appellants on the other. The said quarrel, however, had ended into an amicable settlement with the intervention of elders of

the community. On 20.05.2009 at about 10:30 P.M., he (PW-5) was going near the MCD urinal when A-3 was found urinating in the middle of the street. PW-5 stated in the FIR that the drops of urine of A-3 had fallen on him and Nazim upon which both of them asked the former not to indulge in urination in open street in such manner. This evoked abuses from A-3 who went away extending threats. According to PW-5, he and Nazim had stood around the said place for smoking when after some five-seven minutes, A-3 accompanied by A-1 and A-2 had come on the scene and while uttering Aaj In Dono Ka Kaam Tamaam Kar Dete Hain, he inflicted a fist blow on his (PW-5) right eye. PW-5 alleged in the FIR that when Nazim tried to come to his rescue, he was caught by A-1 and A-3 when A-2 stabbed Nazim in his abdomen with the help of a long knife (Chhuri) bringing out his intestines. PW-5 further stated that when he tried to come to help of Nazim, A-1 and A-3 caught hold of him at which stage, A-2 used the same weapon of offence to inflict an injury on his waist (Qamar). He mentioned in the FIR the arrival of Sarfaraz (PW-4) on hearing the noise of the quarrel. He also stated that the three appellants (the assailants) had fled away from the scene. CrI.A.Nos.550/2012, 967/2012 & 968/2012 hospital by Imran @ Farhan (PW-1), he (PW-5) had gone to inform the family of Nazim and later had reached the hospital accompanied by his friend Arshad (PW-22).

21. The record indicates that D.D. No.44-B (Ex.PW-7/A) about admission for treatment of Nazim against MLC was made over for inquiry to PW-17. When PW-17, accompanied by PW-11, had reached the hospital, Nazim was found to be under treatment but unfit for statement. The D.D. entry No.45-B (Ex.PW-7/B) came on the close heels of the arrival of PW17 in the hospital.

22. Thus, the prosecution version and contemporaneous DD, as recorded, indicate that the victim (the deceased) was under treatment and unfit for statement. The second D.D. entry had indicated an incident of firing in the same area. Thereupon PW-17 returned to the place and found A-1 at the spot and returned to the hospital with him sometime after midnight. The record confirms that by that time PW-5 had also come to the hospital with stab injuries which required medical attention. The condition of Nazim deteriorated and he eventually died, while under treatment, at 02:40 hours on 21.05.2009. It is against this backdrop that PW-27, who had also

arrived in the hospital, recorded the statement (Ex.PW-5/A) and got the FIR registered thereupon. During investigation, that followed, statement of Sarfaraz (PW4) was recorded wherein he confirmed the word of PW-4 (the first informant) about the incident in which Nazim had suffered the fatal stab injury followed by stabbing of PW-5 as also the complicity of the three appellants therein. The FIR as per record was registered at 0555 hours, after rukka was recorded and sent by PW-27 at 0540 hours.

23. As per court deposition of PW-4, he was present at the scene from sometime around 10:30 P.M./10:45 P.M. at the stage when both the victims were having a smoke. PW-4 is a resident of nearby Bazar Matia Mahal, Jama Masjid and claims to come to the area to call on his friend Sajid living in the neighbourhood of Kala Mahal. There is no dispute about the fact that all the material witnesses, particularly PW-4 and PW-5 are acquainted with the three appellants and would know each of them by name and face. Concededly, all these persons live and move around in nearby houses or localities.

24. According to the prosecution case, A-1 who was brought to the hospital with injury noted in his MLC (Ex.PW-26/A) on the night of 20.05.2009 was arrested soon after the registration of FIR. Per the evidence of the IO (PW-27), though search was made, A-2 and A-3 could not be found. They are shown eventually arrested on 11.08.2009 by ASI Senser Pal Singh (PW-21), assisted by Head Constable Rakesh Katiyal (PW-20) both of Special Cell from Anand Vihar Bus Station on the basis of secret information. The arrest memos Ex.PW-20/A and Ex.PW-20/B along with personal search memos Ex.PW-20/A-1 and Ex.PW-20/B-1 have been presented for confirmation.

25. It is the case of the prosecution that after their arrests by the officers of Special Cell, the custody of both A-2 and A-3 were handed over to the IO and during police remand, pursuant to the disclosure (Ex.PW-27/H) under interrogation, amongst others, A-2 got recovered the weapon of offence (Ex.PW12/P-1), described as Chhuri in the seizure memo (Ex.PW-12/B), as also in the sketch (Ex.PW-12/A), from under a carrom board kept on the third floor terrace of his house (No.1267, Gali Jamunwali, Kala Mahal, Delhi). It has been further the case

of the prosecution that this weapon of offence had been, thus, kept concealed by A-2 after washing of blood-stains that had come on its blade post its use against the persons of the deceased and PW-5. Per the prosecution case, this weapon of offence, after recovery, was presented before the autopsy doctor (PW-18) who, for purposes of his proceedings, drew up sketch (Ex.PW-18/B) and opined (vide Ex.PW-18/A) that the fatal injury (injury No.2 in the post-mortem examination report) could possibly have been caused by the said instrument.

26. The learned trial judge has believed the testimony of PW-5 as corroborated by PW-4 and primarily on that basis held the three appellants guilty. The appellants question the correctness of the said view by arguing that the witnesses in question were inimically placed, had criminal antecedents and, thus, their word ought not be trusted. The appellants also submit that there has been unexplained delay in the registration of the FIR and, thus, the possibility of fiction having been added cannot be ruled out. Questions were also raised in the course of arguments about the possibility of two separate incidents, one occurring after other, and the injuries suffered by PW-5 having been inflicted in the latter event. Submitting that it cannot be said with certainty that PW-5 had suffered the stab wound around the same time as Nazim was injured, the appellants question the reasoning of the trial court in accepting the presence of PW-5 at the stage of murderous assault on the deceased on account of the fact that A-1 himself had been at similar receiving end. The learned counsel for the appellants further argued that the account of the events narrated by PW-4 and PW-5 does not jell with each other and instead several discrepancies come out adversely affecting their veracity.

27. Per contra, the learned counsel for the respondent State argued that PW-4 and PW-5 have withstood the cross-examination well and there is no reason why their evidence should not be disbelieved. It was submitted that some of the inconsistencies pointed out in the testimony of these witnesses and the other material is the end result of natural wear and tear of memory on which account no doubts as to the complicity of the three convicted appellants should arise.

28. Before we take up the other arguments of the appellants for examination, it is necessary to mention here that in the course of trial three of the witnesses for

prosecution tried to take upon themselves a role larger than what was initially indicated. Imran @ Farhan (PW-1) who had taken the deceased to the hospital on a scooter assisted by PW-4, Wasim (PW-2) a cousin brother of the deceased who had reached the hospital upon learning about stabbing incident, and Nadeem (PW-3), the brother of the deceased who had also similarly rushed to the hospital after news reached him deposed before the trial court that the victim (Nazim) before death had disclosed to each of them the involvement of the appellants in the crime. PW-1 testified that when he had found Nazim sitting in injured condition on asking he was told by the latter that he had been stabbed by A-1 and A-3. PW-1 and PW-3 deposed having met Nazim in the hospital and engaged him in conversation at which stage he told each of them about the complicity of the three appellants.

29. All the above-mentioned witnesses viz. PW-1, PW-2 and PW-3 had not given any such account in their respective statements under Section 161 Cr.P.C. For this reason, their deposition about the information given by Nazim, which is in the nature of dying declaration, has not been acted upon by the learned trial judge and, in our opinion, rightly so. We would, therefore, exclude from consideration this part of their testimony.

30. There is material on record to indicate that both the deceased and PW- 5 did not have clean antecedents. PW-5 admittedly was involved in certain criminal cases including possibly one case of hurt (referred to as a case of quarrel) and dealing in counterfeit currency. He conceded that the deceased was also facing trial in some criminal case, though he would explain it away as a matrimonial dispute. The prosecution, on the other hand, points out involvement of A-1 and A-2 in FIR No.335/2006 under Sections 308/323/452/505/34 IPC of Police Station Jama Masjid, and of A-2 in FIR No.391/2002 under Section 307/34 IPC of Police Station Jama Masjid.

31. The evidence for the prosecution in the case at hand, for several reasons noticed above, will have to be subjected to in-depth scrutiny and careful examination of the individuals involved. At the most, involvement of the deceased and PW-5 in crime in the past may show that PW-5 and the deceased might have

other persons inimically placed lurking in the background. The case at hand instead rests on eye-witness account given by PW-4 and PW-5.

32. It is the argument of the defence that injuries suffered by PW-5 with which he had come to the hospital past midnight were possibly inflicted not in the course of incident where the deceased was stabbed but much later. Reference is made in this context to the history of assault noted in the MLC Ex.PW-24/A of PW-5.

33. We have carefully examined the above-noted argument, also bearing in mind the history of assault with which A-1 had come to the hospital around the same time so as to be examined against MLC Ex.PW-26/A We are of the opinion that this material does not impeach the testimony of PW-5 about his own injuries. Noticeably, when PW-5 came to the hospital past midnight, he was accompanied by PW-22. There is ample evidence available including the testimony of PW-22 which we are inclined to accept as truthful, to indicate that PW-5 had suffered injuries in the course of incident that had occurred at or about 10:35 P.M. wherein the deceased was stabbed. The injury of PW-5, as noted in the MLC, though technically simple, was also not ignorable. It was a slash of a size of 18 cms given by a cutting instrument. Since the depth of the injury was seemingly not much, it did not cause serious harm to the insides. The injury matches with the narration of the manner in which PW-5 describes it to have been inflicted in the wake of stabbing of the deceased at a stage when PW-5 was grappling with the assailants to rescue his friend.

34. It appears that there was some confusion in the casualty section of the hospital when PW-5 arrived in injured state. The name of the patient came to be recorded in the emergency card by the clerk at the reception as Farhan son of Aslam, resident of Kala Mahal, Chandni Mahal. The person named Farhan son of Aslam would be an individual other than Imran @ Farhan son of Suleman (PW-1) who was already present in the hospital he having earlier at 10:56 P.M. on 20.05.2009 accompanied PW-4 to bring the deceased in the injured state. It appears that friends, kith and kin had gathered in the hospital in large number. In the melee, the reception clerk in the emergency ward seems to have understood the description of the person wrongly. Apparently, the information was given not by PW-5 himself

but by some other person with him at that time. The examining medical officer later corrected the error in the description not only in the MLC but also in the emergency card (available at page 263 of trial court record).

35. In the above facts and circumstances, it appears that the history of the assault at 11:18 P.M. had been given not by PW-5 but by the person accompanying him. We conclude thus also, rather more so, for the reason that throughout the trial it was never the case of the defence that two different incidents had occurred, one at 10:30 P.M. or so and another around 11:18 P.M./11:45 P.M. or so. Crl.A.Nos.550/2012, 967/2012 & 968/2012 examination against MLC Ex.PW-26/A referred to assault at 11:45 P.M., no evidence has been led on his behalf to substantiate the said claim. Noticeably, the injuries with which he had come to the hospital were trivial (small lacerated wound of insignificant size) as compared to the injuries of PW-5.

36. It was argued on behalf of the appellants that the conduct of PW-5 has been unnatural. His close friend (deceased) had suffered a serious stab injury. Yet, he would not opt to come with him to the hospital and went somewhere else only to re-surface, past midnight, in the hospital. The counsel submitted that PW-5 has tried to exaggerate by talking of injury also suffered on his abdomen which claim is not corroborated by the medical record. It was argued that PW-1, who took the deceased to the hospital, does not even talk of the presence of PW-5 at the spot where the former had found the deceased sitting in injured state. Similarly, it was pointed out, PW-22 speaks about he finding only PW-5 in injured condition, this, as per argument, being suggestive of both the deceased and PW-5 having suffered assaults at two different places and points of time. Further, the counsel argued that though PW-5 claimed that his clothes had been blood-stained, the same were not seized.

37. On careful scrutiny, we find the above-noted criticism of PW-5 to be unacceptable and stretched. The witness has given sufficient reasons as to why he did not go with the deceased to the hospital. He explained even in the FIR that he opted to first go to the house of Nazim to inform the family about the occurrence, inasmuch as Nazim had suffered a life-threatening assault for the

reason the stab wound had cut into and brought out his intestines. The word of PW-5 about the detour to the house of PW-3 for giving the information is corroborated in material particulars by PW-22. Indeed, there is some discrepancy, in that PW-3 contradicts the other two by denying that he had received the information about stabbing of Nazim directly from PW-3 and would rather attribute it to telephonic information from his wife at his shop. This small discrepancy cannot, however, disturb the larger picture that the information was actually conveyed to the family at the house of Nazim.

38. As regard the exaggeration as to the injuries, it was pointed out by the learned prosecutor that in the emergency card (Page 263 of the trial court record), it is noted by the examining medical officer that there were two lacerated wounds inflicted on the person of PW-5, first as noted earlier and the second on right flank of the size of 6 cms. Clearly, this injury was insignificant as compared to the main injury suffered on the back. Be that as it may, there is no reason why the word of PW-5 should be doubted only because the casualty medical officer did not note down the second injury in the MLC.

39. The seizure of clothes of PW-5, if blood-stained, would undoubtedly have provided some further corroboration to his word. There is no explanation given by the IO as to why this exercise was not carried out. It is not proper to doubt the word of PW-5 about the injuries suffered by him for such omission on the part of the IO. The factum of injury stands duly proved even in absence of the blood-stained clothes of PW-5 from his MLC.

40. While on the subject, we may also mention and reject the argument of the defence based on non-seizure of the clothes of PW-1 and PW-4 which also would have received some blood-stains inasmuch as they had carried the fatally injured Nazim as a pillion rider sitting between the two of them on a scooter to the hospital. Firstly, it is not necessary that blood would have necessarily come on to the clothes of these two witnesses on the journey to the hospital. Secondly, the fact that Nazim was stabbed seriously in his abdominal region does not need any further corroboration since it is proved beyond doubt by his MLC and the post-mortem report. Thirdly, the fact that he was taken to the hospital at least in the

company of PW-1 is duly mentioned in the MLC with no dispute raised in such regard. And fourthly, the omission of the IO on this score as well cannot detract one from the conclusive finding as to the stabbing of the deceased on the date, time and place mentioned by the prosecution witnesses.

41. It is the argument of the appellants that PW-4 cannot be trusted as a truthful witness. The submission is that PW-4 admittedly is a close friend of the two victims, though he lived elsewhere. The MLC of the deceased does not name PW-4 as the person accompanying the victim to the hospital. If his word is to be believed, he was present in the hospital from 11:00 P.M. onwards and since he claims to be an eye-witness, the IO could have recorded his statement and registered the FIR. The FIR was intentionally delayed till early hours of the next morning for reasons not explained.

42. We do not agree with the above submissions. PW-4 has explained in his testimony, and there was no effort made to discredit him on such count, as to why he had come to the area in question. He was a chance witness who appeared on the scene just before the assault after the initial verbal exchange involving A-3 over the manner of his urination in public street. PW-4 himself had no means of taking the fatally wounded Nazim to hospital. The scooter was driven by PW-1. Thus, the two persons assisted Nazim to the hospital. The examining medical officer would not be interested in keeping a record of the names and particulars of all who had come with the injured patient. The mention of the name of PW-1 in the MLC was sufficient. The presence of PW-4 at that time is confirmed by PW-1. PW-4 was not privy to the entire background facts as he had come on the scene moments before the assault took place.

43. Given the information about the firing in the area received vide D.D. entry No.45-B (Ex.PW-17/B), apparently a false and misleading communication since even the defence does not refer to it, the police officers engaged in the preliminary inquiry had remained pre-occupied. By the time formal steps could be taken, PW-5 had also arrived in the hospital in injured state. Thus, the investigating police had available to it a better and more informed witness than PW-4. By the time PW-5 was medically examined and given the necessary medical aid, Nazim had

succumbed to his injuries giving to the case a far serious turn.

44. In the above set of circumstances, we find no reasons to doubt the veracity of PW-4 or to conclude that the FIR is delayed. The events and happening were taking place at a fast pace.

45. As noted earlier, the prosecution case also rests, for corroboration to the word of PW-5 and PW-4, on recovery of Chhuri (Ex.PW-12/P-1) from the possession and at the instance of A-2. At the time of seizure, its sketch was prepared vide Ex.PW-12/A. When it was taken to autopsy doctor (PW18) for his opinion, he prepared another sketch (Ex.PW-18/B). In this sketch, the autopsy doctor described weapon as double-edged sharp. The total length of weapon is noted in the said document as 29.5 cms. The length of the blade on one side is indicated to be 20 cms while the sharp edged portion on the other side had the length of 15.3 cms. In the autopsy report prepared earlier on 21.05.2009, PW-15 and PW-18 had opined that the second injury, which proved fatal, had been caused by single sharp edged weapon. The learned counsel for the appellants argued that this opinion is suggestive of the fact that the Chhuri recovered from the possession of A-3 may not have been the weapon used in the crime.

46. Having carefully examined the material on record, we find that the above discrepancy is not sufficient to create doubts as to the complicity of the appellants in the stabbing of Nazim and PW-5. PW-18 has given sufficient explanation about the tentative opinion in the autopsy report about the injury having been possibly caused by a single sharp-edged weapon. He stated under cross-examination that the opinion recorded in the autopsy report was based on assessment of the angles of the wound and was not a final conclusion, since that would require scrutiny of the co-relation of the weapon with the wounds. He further stated that under typical conditions, the sharp edge of a stabbing weapon would cause a wound with acute angle while the blunt edge would produce wound with obtuse angle. He pointed out that the weapon shown in the case at hand is a double-edged sharp weapon but at the bottom end, roughly lower one-third portion of the blade, the edges are blunt. Having regard to the nature and dimensions of the second injury, as appearing from the external examination, and the damage caused to the insides,

noted at length earlier, we uphold the justification offered by PW-18 in his opinion as to the possible use of weapon (Ex.PW12/P-1) in the fatal stabbing of Nazim and, thus, reject the contention of the defence.

47. Small contradictions by themselves are no reason to throw the case out. It has been held time and again that discrepancies do not necessarily demolish the testimony. Proof of guilt can be sustained despite little infirmities [Narotam Singh Vs. State 1978 Cr. L. J.

1612 (SC)]. No undue importance can be attached to such discrepancies as do not go to the root of the matter or do not shake the basic version of witnesses. [Lallan Vs. State 1990 Cr. L. J.

463]. It was ruled in Ramni Vs. State, [JT19996) SC247 that all discrepancies are not capable of affecting the credibility of witnesses. Similarly, all inconsistent statements are not sufficient to impair the credit of a witness.

48. On evaluation of the evidence on record in entirety, we find no reason to disbelieve the oral testimony of PW-5, duly supported and corroborated in all material particulars by the eye-witness account of PW-4, as indeed the other material on record including the medical evidence. The learned trial court, in our judgment, has correctly appreciated the evidence and accepted the version of PW-5 as to the manner and background, in which the assault took place. There is no reason for us to disturb the findings of fact as to the role and involvement of the three appellants in the incident resulting in stab injuries suffered by Nazim (deceased) and PW-5 Shahid.

49. We have already held in earlier part of this judgment that the death of Nazim is a case of culpable homicide. The stab wound inflicted on the abdominal region of PW-5, given the manner in which caused soon after fatally wounding Nazim, also cannot be but with the intent of bringing about similar result and so, a case of attempted murder. The narration as to occurrence by the eye-witnesses PW-1, PW-4 and PW-5 affirms that this is a case of murder. The injury inflicted in the abdomen was intentional and deliberate.

50. It was, however, also argued that the stabbing of Nazim (deceased) and PW-5 were acts committed by A-2 Jisan only and that it is unfair to attribute common intention in such assault to A-1 Mohd. Riyazuddin and A3 Aslam. Reliance was placed on Ramesh Singh v. State of MP2004(110) Cr. L.J.

3354 to argue that the evidence is deficient to bring in the constructive liability under Section 34 IPC or to hold A-1 and A-2 accountable for the consequences of the acts indulged in by A-3. It was submitted that inferences that A-1 and A-2 may have harboured similar intentions as A-3 cannot lead necessarily to the conclusion that they shared the intention of A-3 to cause death by inflicting the stab injuries, this in absence of evidence to show mutual agreement to commit the offence conjointly or about meeting of minds.

51. In Ramesh Singh (supra), the Supreme Court held as under:

As a general principle in a case of criminal liability it is the primary responsibility of the person who actually commits the offence and only that person who has committed the crime can be held to be guilty. By introducing Section 34 in the penal code the Legislature laid down the principle of joint liability in doing a criminal act. The essence of that liability is to be found in the existence of a common intention connecting the accused leading to the doing of a criminal act in furtherance of such intention. Thus, if the act is the result of a common intention then every person who did the criminal act with that common intention would be responsible for the offence committed irrespective of the share which he had in its perpetration. Section 34 IPC embodies the principles of joint liability in doing the criminal act based on a common intention. Common intention essentially being a state of mind it is very difficult to produce direct evidence to prove such intention. Therefore, in most cases it has to be inferred from the act like, the conduct of the accused or other relevant circumstances of the case. The inference can be gathered by the manner in which the accused arrived at the scene, mounted the attack, determination and concert with which the attack was made, from the nature of injury caused by one or some of them. The contributory acts of the persons who are not responsible for the injury can further be inferred from the subsequent conduct after the attack. In this regard even an illegal omission on the part of such

accused can indicate the sharing of common intention. In other words, the totality of circumstances must be taken into consideration in arriving at the conclusion whether the accused had the common intention to commit an offence of which they could be convicted. (Noor Mohammad Yusuf Momim, AIR 1971 SC855 (1971 Cri LJ793: AIR 1971 SC885

52. There can be no quarrel with the proposition that for bringing home the charge with the aid of common intention, it is essential that proof is adduced as to the meeting of minds. The onus in this regard is squarely on the prosecution. It is, however, also to be borne in mind that state of mind (*mens rea*) needs to be gathered from the facts and circumstances, in general, and acts of commission or omission, in particular. The fatal injury may be inflicted by one assailant but it is the conduct of the others present at the scene in providing aid or assistance which may show as to whether they shared the intention of the actual assailants, and if they did so share, the extent thereof.

53. The sequence of events has to be kept in mind in entirety. The unsavory exchange over the manner of urination by A-3 had occurred a few minutes prior to the incident. The prosecution has proved that A-3 went away extending threats and came back to the scene thereafter accompanied by A-1 and A-2 only to immediately start physical assault. It began with the fist blow on the face of PW-5 by A-3. The evidence has proved that A-2 had come with knife openly held in his hand. When Nazim (the deceased) tried to help PW-5, the three appellants shifted focus on him. With A-1 and A-3 assisting by holding on to Nazim, A-2 gave the stab injury in his abdominal region. These physical acts collectively seen against the backdrop, *inter alia*, of the exhortation by A-3 only lead to the irresistible conclusion that A-1 and A-3 shared the meeting of mind with A-2 for committing the murder of Nazim. Since A-1 and A-3 were assisting A-2 even when he stabbed PW-5 Shahid, in the course of same transaction, the common intention on their part for attempted murder of the latter is also bound to be inferred. Thus, we conclude that the learned trial court rightly invoked the principle of collective liability under Section 34 IPC to hold all the three appellants accountable.

54. The appeals are, thus, found devoid of substance. They are dismissed.

55. The appellants be informed of the result of their respective appeals by the Registry making over a copy of this judgment to be delivered to each of them through Superintendent, Jail. R.K.GAUBA (JUDGE) SANJIV KHANNA (JUDGE)  
JULY21 2015 ik

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