

Laxmi Devi and ors. Vs. State of Delhi.

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Court : Delhi

Decided On : Apr-19-2011

Judge : Pradeep Nandrajog; Suresh Kait, Jj.

Acts : [Code Of Criminal Procedure \(CrPC\), 1973](#) - Sections 161, 313 ; [Indian Penal Code \(IPC\), 1860](#) - Sections 302, 307, 324, 300, 304A Read with 34 ;

Appeal No. : CRL.A.No.82/1999 And CRL.A.No.104/1999.

Appellant : Laxmi Devi and ors.

Respondent : State of Delhi.

Advocate for Def. : Mr.Pawan Sharma, Adv.

Advocate for Pet/Ap. : Mr.M.L.Yadav, Adv.

Judgement :

1. Criminal law was set into motion, when on 05.03.1995, at about 08.30 PM HC Harinder Singh PW-18, who was on picket duty in Seelampur area was informed by a person that an incident of quarrel and stabbing had taken place near Valmiki Mandir, C-Block, Seelampur, upon which HC Harinder Singh proceeded to the said spot where he saw a person named Hari Shankar (hereinafter referred to as the deceased) lying injured on the road and his father Ram Kumar bleeding from the head. HC Harinder Singh arranged a TSR and one Sansar Singh removed Ram Kumar and his son i.e. the deceased to GTB hospital in the said TSR. At that time, a bystander informed HC Harinder Singh that wife of Ram Kumar namely

Shanti Devi was also injured in the incident in question and had already been removed to GTB hospital in a PCR van. HC Harinder Singh transmitted the aforesaid information through wireless to Police Station Seelam Pur where DD No.52B Ex.PW-21/DA was recorded; noting the aforesaid information.

2. Being handed over a copy of DD entry Ex.PW-21/DA, Const. Raj Kumar PW-14, Inspector Iqbal Mohd. PW-19, ASI Ramesh Chand PW-21 and SI Baldev Singh PW-22, proceeded to the spot where HC Harinder Singh informed them that the injured persons have already been removed to GTB hospital. Leaving HC Harinder Singh at the spot, the remaining police officers proceeded to the hospital where they learnt that the deceased had been declared brought dead as recorded in the MLC Ex.PW-24/B of the deceased. Be it noted here that the MLC Ex.PW-24/B of the deceased records that the deceased was brought to the hospital by one Sansar Singh.

3. Thereafter Inspector Iqbal Mohd. PW-19, collected the MLCs Ex.PW-24/D and Ex.PW-23/A of Ram Kumar, the father of the deceased and Shanti Devi, the mother of the deceased, respectively. The relevant portion of the MLC Ex.PW-23/A of Shanti Devi, the mother of the deceased, notes as under:-

"1. CLW over scalp 5 cm x 0.5 cm

2. Incised wound (illegible) long over Rt arm

3. Incised wound 3 cm long over Rt forearm

4. Abrasion with contusion over Lt shin 5 cm long ..

The kind of weapon used or poison (1 & 4) Blunt suspected in case of poisoning (2 & 3) Sharp

Name of injuries Simple (Simple, Grievous, dangerous)"

4. The relevant portion of the MLC Ex.PW-24/D of Ram Kumar, the father of the deceased, records as under:- "Name of relative or friend B/by Sansar Singh s/o Itwari Lal, C-9, New Seelampur Delhi.

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Injuries:

1. A penetrating injury in the Lt side of chest between Ant & Post axillary line in between 6 th & 7th rib

length 4 5 cm : sucking wound

2. Bruise over forehead

The kind of weapon used or poison 1. Sharp suspected in case of poisoning 2. Blunt"

5. On 05.03.1995 at about 10.00 PM the doctor declared Ram Kumar PW-3, the father of the deceased to be fit to make a statement pursuant to which SI Baldev Singh PW-22, recorded the statement Ex.PW-3/A of Ram Kumar. The statement Ex.PW-3/A of Ram Kumar is in Devnagri script. Translated, it reads as under:- "I reside at the aforesaid address with my family and do my private business. Today, at about 06.00 P.M. my wife had a minor quarrel with Sanjay s/o Shyam Babu who is my neighbor and resides in C PB 20 over the parking of TSRs. My son Hari Shankar parks his TSR on the road in front of his house and his neighbor Anil s/o Shyam Babu also parks his TSR on the said road. Shyam Babu and his sons object to the parking of their TSR on the said road and also quarrel with them over the said issue. Today, my wife alone went to the police station to lodge a report in connection with the quarrel she had with Sanjay earlier in the day however on account of neighborly relations I brought her back from the police station before she could lodge a report. After about one hour i.e. about 08.30 P.M. my wife Shanti Devi was standing in front of his house when Anil s/o Shyam Babu came there and started abusing her and said that they would not let our TSR to be parked on the road in question. On hearing the same my son Hari Shankar also came out and said to Anil @ Pappu that why are you abusing my mother? upon which Anil said that as of now he had only hurled abuses, now he would tell him. At that very time Anil went inside his house and brought a knife from inside and his father Shyam Babu was also accompanying him.

Shyam Babu caught my son Hari Shankar from

behind and Anil inflicted several knife blows on my son Hari Shankar. When my wife Shanti Devi tried to save my son wife of Shyam Babu Laxmi Devi gave a blow on her head with a rod and Anil inflicted a knife blow on the right hand of my wife. When I tried to save my son Rajesh s/o Shyam Babu caught me from behind and Sanjay stabbed me with a knife which hit me on my (illegible). My wife who was in an injured condition ran from there to inform the police. My neighbor Sansar Singh put me and my son Hari

Shankar in a TSR and got us admitted in the hospital. The doctor declared my son Hari Shankar as brought dead. Shyam Babu, his wife Laxmi Devi and his sons Anil @ Pappu, Sanjay and Rajesh launched a

murderous attack on us with a common intention which caused the death of my son Hari Shankar. I and my wife sustained serious injuries. An action be taken against the said persons. I have read my statement and the same is correct."

6. Thereafter SI Baldev Singh PW-22, made an endorsement Ex.PW-22/A on the statement Ex.PW-3/A of Ram Kumar, and at about 10.50 PM on 05.03.1995 handed over the same to Const. Raj Kumar PW-14, for the purposes of registration of an FIR. Const. Raj Kumar took the endorsement Ex.PW-22/A to the police station where HC Abdul Hamid PW-12, registered the FIR No.149/1995 Ex.PW-12/A.

7. Soon after the registration of the FIR, Shanti Devi PW-4, the mother of the deceased, made a statement Ex.PW-4/DA under Section 161 Cr.P.C. to SI Baldev Singh PW-22, which statement was in complete sync with the statement Ex.PW-3/A of Ram Kumar and also implicated the appellants and one Rajesh as the assailants of the deceased.

8. Thereafter Const. Raj Kumar PW-14, Inspector Iqbal Mohd. PW- 19, ASI Ramesh Chand PW-21 and SI Baldev Singh PW-22, returned to the place of occurrence where they saw that the earth in front of the house of the deceased was stained with blood at two different spots. SI Baldev Singh PW-22, lifted the

earth stained with blood as also the earth control and seized the same vide memo Ex.PW-18/A.

9. Since the deceased was declared brought dead at the hospital, his body was sent to the mortuary, where at about 11.15 A.M. on 06.03.1995 Dr.A.K. Tyagi PW-11, conducted the post- mortem of the deceased and gave his report Ex.PW-11/A, which records that following external injuries were found on the person of the deceased:-

"1. Incised stab wound of 3.2 x 1.1. cms present obliquely over right side of chin.

2. Incised stab wound of 2.5 x 1.5 x cavity deep slightly obliquely over middle front of left side of chest. The upper angle is 2.5 cms obliquely down wards and inwards to the nipple. Both the angles are acute. Entering the left side chest cavity through 3rd intercostal space then entered the upper lobe of left lung in its middle near the inner margin by making a cut of 2.5 x 0.5 cms and then came out through the inner surface and further going obliquely upwards inwards and backward and ended by making a cut of 1.0 cms into 0.1 cms in the wall of ascending arch of aorta. Total depth of the injury was 10.5 cms.

3. Incised wound of stab of 2.2 x 0.8 cms present obliquely over middle centre of left side abdomen. Both the angles were acute and injury was going backward and slightly inwards from left to right into the muscle of abdomen, upto a depth of 2.0 cms.

4. Three small abrasions in an area of 3.0 x 0.5 cms present over middle front of right leg.

5. Abrasion of 2.8 x 0.8 cms present over lower outer front of right knee.

6. Abrasion of 1.0 x 0.8 cms present over lower inner front of right knee.

7. Incised stab wound of 2.5 x 1.0 cms x 6.5 cms present over upper outer and middle outer of right buttock, 7 cms outer to ant. Sup. Iliac spine going inwards and forwards and right to left and into the muscle of buttock pierce the iliac bone entered and pelvic cavity. Both the angles were acute with plenty of effusion of

blood in the pelvic structures.

8. Incised stab wound of 3.8 x 1.8 cms x cavity deep present obliquely, over lower outer of right side abdomen, 2 cms above the injury no.7. Both the angles were acute going obliquely upwards inward and forward into the tetro peritoneal upto a depth of 10.8 cms with plenty of effusion in the area.

9. Incised stab wound of 3.8 x 0.8 cms was present obliquely over middle back of left side abdomen. Both the angles were acute. The injury went obliquely upwards slightly inwards and forward into the abdominal muscle upto the depth of 10 cms."

10. The post-mortem report Ex.PW-11/A of the deceased further records that the death of the deceased was caused due to shock as a result of hemorrhage caused by multiple injuries found on the person of the deceased; that the injuries Nos.1, 2, 3, 7, 8 and 9 found on the person of the deceased were caused by sharp double edged stabbing cutting weapon; that injuries Nos.4, 5 and 6 found on the person of the deceased were caused by blunt force impact and that the injuries Nos.1, 2, 3, 7, 8 and 9 found on the person of the deceased were sufficient to cause death in ordinary course of nature.

11. On the same day i.e. 06.03.1995 the police recorded the statement of Sansar Singh PW-2, under Section 161 Cr.P.C. wherein he claimed to have witnessed the incident in question and impliaced the appellants and accused Rajesh as the assailants of the deceased.

12. Since the parents of the deceased had implicated the appellants and accused Rajesh as the assailants of the deceased, the police set out to apprehend them. Appellants Shyam Babu and Laxmi Devi were arrested by the police in the intervening night of 05.03.1995 and 06.03.1995 while the remaining appellants i.e. Anil and Sanjay and accused Rajesh were arrested on 08.03.1995.

13. Upon being interrogated by SI Baldev Singh PW-22 in the presence of Const. Jagpal PW-1, appellant Anil made a disclosure statement Ex.PW-1/B and stated that he can get recovered the dagger used by him in murdering the deceased. Pursuant thereto, appellant Anil led SI Baldev Singh and Const. Jagpal to a drain

and got recovered a dagger from the said drain, which dagger was seized by SI Baldev Singh vide memo Ex.PW-1/C. Since no recoveries were made pursuant to the disclosure statements of the other accused, we need not note what they stated.

14. On 24.03.1995 the dagger recovered at the instance of appellant Anil was sent to Dr.A.K.Tyagi PW-11, for his opinion regarding weapon of offence. Vide his opinion Ex.PW-11/B, Dr.A.K. Tyagi opined that the injuries Nos.1, 2, 3, 7, 8 and 9 found on the person of the deceased are possible to have been caused by the dagger recovered at the instance of appellant Anil.

15. Armed with the aforesaid materials, the police filed a charge sheet against the appellants. Needless to state, the appellants were sent for trial. Be it noted here that the trial of co-accused Rajesh was conducted before a Juvenile Court as he i.e. Rajesh was a juvenile when the crime was committed. We are not concerned with Rajesh inasmuch as the decision impugned before us pertains to the appellants who are husband and wife and their 2 sons. Charges were framed against the appellants for having committed offences punishable under Sections 302 and 307 IPC read with Section 34 IPC.

16. At the trial, the prosecution examined 25 witnesses. The various police officers whose names we have noted herein above while setting out the registration of the FIR, the investigation conducted deposed facts pertaining to the seizures made, arrest of the appellants and the recovery of a dagger at the instance of appellant Anil and learned counsel for the appellant conceded that he had no worthwhile points to argue qua the same. Thus, we need not note in detail the testimony of the said police officers.

17. Sansar Singh PW-2, turned hostile and denied having made a statement to the police to the effect that he had witnessed the incident in question. He deposed that he had removed the deceased and his father Ram Kumar to the hospital on the day of the incident.

18. Ram Kumar PW-3, the father of the deceased, deposed in complete harmony with his statement Ex.PW-3/A. Be it noted here that suggestions were given on

behalf of the appellants to the witness in his cross-examination that a quarrel had taken place on 05.03.1995 few hours prior to the incident in question when an objection was raised by appellant Sanjay over parking of a TSR; that the police had come to the spot in connection with the said quarrel and that son of Ram Swaroop i.e. Swaraj Singh had intervened in the said quarrel.

19. Laxmi Devi PW-4, the mother of the deceased, deposed on same lines as her statement recorded by the police under Section 161 Cr.P.C. and which we note is in sync with the statement of her husband on basis whereof the FIR has been registered and thus we do not note the same in detail, but we note that as against her statement to the police in which she said that accused Sanjay caught hold of Ram Kumar and accused Rajesh inflicted knife blows on his person, in her deposition in Court she stated that Rajesh caught hold of Ram Kumar and Sanjay inflicted knife blows on his person. When confronted with the said discrepancy during cross- examination she stated:- (Quote) I do not remember now whether I had told in my statement before police Sanjay accused got hold of my husband and Rajesh hit him with a knife. Confronted with portion A to A of statement Ex.4/DA where it is recorded that Sanjay got hold of my husband and Rajesh stabbed him. (Vol. I had told the police as already stated by me in chief).

20. Dr.A.K.Tyagi PW-11, deposed that he had conducted the post- mortem of the deceased and that the post-mortem report Ex.PW- 11/A of the deceased and the opinion Ex.PW-11/B regarding weapon of offence were prepared by him. Dr.Sandeep Arora PW-24, deposed that the MLCs Ex.PW-24/A and Ex.PW-24/B of Shanti Devi and the deceased respectively were prepared by him and that the MLC Ex.PW-24/D of Ram Kumar was prepared by Dr.S.S.Tripathi and that he can identify the handwriting and signatures of the said doctor.

21. In their statements under Section 313 Cr.P.C. the appellants denied everything and stated that the parents of the deceased have falsely implicated them in the present case as they were inimically disposed towards them. Appellants Shyam Babu and Laxmi Devi stated that on 05.03.1995 the deceased had a quarrel with some unknown persons in the market of Seelampur and that the said unknown persons murdered the deceased and inflicted injuries on the person of parents of

the deceased when they tried to save the deceased. Appellants Anil and Sanjay stated that they were not present in their house on 05.03.1995 i.e. the day of the incident as they had gone to the house of their maternal uncle on that day and stayed there till 07.03.1995.

22. Relevant would it be to note that in their statements under Section 313 Cr.P.C. Shyam Babu and Laxmi Devi have admitted the parents of the deceased i.e. Ram Kumar and Laxmi Devi being present with the deceased evidenced by their statement that the 2 received injuries when they tried to save their son, whom these 2 persons claim was attacked by strangers.

23. The appellants examined 5 witnesses in defence.

24. Ram Swaroop DW-1, deposed that on 05.03.1995 at about 06.00 P.M. the mother of the deceased Shanti Devi quarreled with his son Swaraj Singh over the parking of a TSR and that she had got his son arrested by the police in connection with the said quarrel. On the same day i.e. 05.03.1995 at about 08.30 P.M. he and Virender Jhan were standing in front of his house and talking to each other when he saw that the deceased who was standing near his house had started running in the direction of Balmiki temple after seeing some unknown 6-7 boys and that he also saw the father of the deceased going in that direction. The deceased had a quarrel with said unknown 6-7 boys. He further saw that some jostling took place between mother of the deceased Shanti Devi and the said 6-7 boys upon which Shanti Devi fell on the ground. He claimed to have narrated the entire incident to the police.

25. Amrit Lal DW-2, the maternal uncle of appellants Anil and Sanjay, deposed that appellants Anil and Sanjay were present in his house the entire day on 05.03.1995 and that he and Anil and Sanjay had watched a movie between 06.00 P.M. to 09.00 P.M. on that day.

26. Virender Jha DW-3, deposed that on 05.03.1995 at about 08.30 P.M. he and Ram Swaroop were standing in front of the house of Ram Swaroop and talking to each other when he saw that the deceased who was standing in front of his house had started running in the direction of Balmiki temple after seeing some unknown

6-7 boys. He also saw mother of the deceased Shanti Devi running in the direction of Balmiki temple but said 6-7 boys pushed her in the direction of her house.

27. Swaraj Singh DW-4, deposed that on 05.03.1995 at about 5.30/6.00 P.M. the mother of the deceased quarreled with him over the parking of a TSR and that she had got him arrested by the police in connection with the said quarrel.

28. Rakesh Kumar DW-5, deposed that he resides in the house bearing Municipal No.C-18, New Seelampur, Delhi. On 05.03.1995 at about 08.30 P.M. he saw that the deceased was lying injured on the ground in front of his house.

29. Holding that the evidence of the parents of the deceased Ram Kumar PW-3 and Shanti Devi PW-4, inspires confidence and that the defence set up by the appellants is completely demolished inasmuch as suggestions contrary to the defence set up by the appellants were given on behalf of the appellants to Ram Kumar PW-3, the father of the deceased, in his cross-examination, vide impugned judgment dated 22.01.1999 the learned Trial Judge has convicted the appellants for the offence of committing the murder of the deceased. As regards the charge under Section 307 IPC read with Section 34 IPC framed against the appellants for having attempted to murder Ram Kumar and Shanti Devi, the learned Trial Judge has held that in view of the facts that the injuries found on the person of Ram Kumar and Shanti Devi were simple in nature and that there is no evidence to show that the appellants intended to murder Ram Kumar and Shanti Devi the appellants cannot be convicted for the offence punishable under Section 307 IPC and has convicted them for the offence of having caused simple injuries on the person of Ram Kumar and Shanti Devi by sharp-edged weapons i.e. an offence punishable under Sections 323 and 324 IPC. For the offence punishable under Section 302 IPC read with Section 34 IPC, the appellants have been sentenced to undergo imprisonment for life and pay a fine in sum of Rs.5,000/- each; in default to undergo rigorous imprisonment for a period of six months. For the offence punishable under Section 324 IPC read with Section 34 IPC, the appellants have sentenced to undergo rigorous imprisonment for a period of two months and pay a fine in sum of Rs.1,000/- each; in default to undergo rigorous imprisonment for a period of two months.

30. In support of the appeals, learned counsel for the appellant advanced following four submissions:-

A The first submission advanced by the learned counsel for the appellants was predicated upon the testimony of Ram Kumar PW-3 and Shanti Devi PW-4. Counsel argued that the testimonies of Ram Kumar PW-3 and Shanti Devi PW-4, forms the plank of the case of the prosecution against the appellants and that the learned Trial Judge has committed an illegality in accepting the testimonies of the said witnesses at its face value. Counsel argued that the learned Trial Judge ought to have appreciated the testimonies of Ram Kumar PW-3 and Shanti Devi PW-4, with great caution for the reason said witnesses were inimically disposed towards the appellants inasmuch as there was a dispute between them over the parking of TSRs.

B The second submission advanced by the learned counsel for the appellants was that there are discrepancies in the evidence of Ram Kumar PW-3 and Shanti Devi PW-4. The first discrepancy pointed out by the learned counsel was predicated upon the post- mortem report Ex.PW-11/A of the deceased. Counsel pointed out that both Ram Kumar and Shanti Devi have deposed that appellant Shyam Babu had caught the deceased from behind and that appellant Anil inflicted upon the person of the deceased and the post-mortem report Ex.PW-11/A of the deceased records that one stab wound was found on the back side of the body of the deceased. According to the counsel, had appellant Shyam Babu caught the deceased from behind as claimed by Ram Kumar and Shanti Devi it would not have been possible for appellant Anil to inflict a knife blow on the back side of the body of the deceased. The second discrepancy pointed out by the learned counsel pertained to the statement Ex.PW-4/DA of Shanti Devi. The counsel pointed out that Shanti Devi stated in her statement Ex.PW-4/DA that appellant Sanjay caught hold of Ram Kumar and accused Rajesh inflicted knife blow on his person while she deposed in her testimony that accused Rajesh caught hold of Ram Kumar and appellant Sanjay inflicted knife blow on his person. Counsel argued that various judicial decisions have recognized that there is an incurable tendency in the complainant group to rope in innocent members of the opposite group along with the guilty and manipulate and twist the facts with regard to the mode and manner

of the occurrence so as to make their case appear true with the innocent members of opposite faction also as participants in the occurrence. Counsel argued that in such circumstances, the discrepancies pointed out by him in the evidence of Ram Kumar and Shanti Devi assume significance and strongly probablize that the said witnesses have twisted facts with regard to the mode and manner of the occurrence in order to rope in the entire family of the appellants in the present case.

C The third submission advanced by the learned counsel for the appellants was that only overt acts attributed to appellants Laxmi Devi and Sanjay were that they prevented the parents of the deceased Ram Kumar and Shanti Devi from saving the deceased. As per the counsel, in such circumstances, it cannot be said that appellants Laxmi and Sanjay were sharing any common intention with the other appellants to murder the deceased, therefore, they ought not to have been convicted under Section 302 IPC read with Section 34 IPC for committing the murder of the deceased.

D Lastly, a feeble attempt was made by the learned counsel for the appellants to show that the present case does not warrant conviction for offence of murder punishable under Section 302 IPC. Counsel argued that evidence of Ram Kumar PW-3 and Shanti Devi PW-4, if accepted as true, establishes that the occurrence took place without any pre-meditation in a sudden quarrel and thus the present case is squarely covered under the fourth exception to Section 300 IPC vis-a-vis appellant Anil, and as such appellant Anil, could only be held guilty for offence of culpable homicide not amounting to murder, punishable under Section 304 Part-I IPC.

31. Since the first few submissions advanced by the learned counsel for the appellants pertain to the alleged discrepancies in the ocular evidence of Ram Kumar PW-3 and Shanti Devi PW-4, we first proceed to consider the veracity of the evidence of said witnesses.

32. In dealing with the submissions pertaining to the credibility of the witnesses; Ram Kumar PW-3 and Shanti Devi PW-4, we first proceed to note the following judicially evolved principles regarding the appreciation of ocular evidence in a

given case:-

I While appreciating the evidence of a witness, the approach must be whether the evidence of a witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the Court to scrutinize the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witnesses and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief.

II If the Court before whom the witness gives evidence had the opportunity to form an opinion about the general tenor of the evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of the evidence by the trial court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on ground of minor variations or infirmities in the matter of trivial details.

III A former statement though seemingly inconsistent with the evidence need not necessarily be sufficient to amount to contradiction. Unless the former statement has the potency to discredit the later statement, even if the later statement is at variance with the former to some extent it would not be helpful to discredit said witness.

IV Animosity is a doubled-edged weapon. It cuts both sides. It could be a ground for false implication and could also be a motive for committing the crime.

V The presence of an injured witness at the place and time of the occurrence cannot be doubted unless there are material contradictions in his deposition.

VI Unless, it is otherwise established by the evidence, it must be believed that an injured witness would not allow the real culprits to escape and falsely implicate the accused.

VII The evidence of an injured witness has a greater evidentiary value and unless compelling reasons exist, their statements are not to be discarded lightly.

VIII The evidence of injured witness cannot be doubted on some embellishment in natural conduct or minor contradictions.

IX If there be any contradiction, exaggeration and immaterial embellishments in the evidence of an injured witness, then such contradiction, exaggeration or embellishment should be discarded from the evidence of injured, but not the whole evidence.

X In a situation of a kind where the entire members of a family are roped in as accused, it is the duty of the Judge to carefully see whether the complainant group is using an opportunity where the folly of a few of the opposite group is used; nay misused, as a golden opportunity to ensnare in the clutches of criminal law the entire family of the ones who have committed the folly. How is this task to be performed? No straight jacket formula can be prescribed, but the quintessence and signature tune of whatever formula is applied will have a common denominator i.e. use of commonsense as a prudent person and have a 360 degree microscopic look at the evidence.

33. From the afore-noted judicial principles, it is clear that the first step in appreciating the evidence of a witness is to examine his evidence de-hors the discrepancies appearing therein and to see whether the evidence appears to be a truthful account.

34. It is most significant to note that Ram Kumar PW-3 and Shanti Devi PW-4, are injured witnesses. Conscious of the fact that the presence of an injured witness at the place and time of the incident cannot be easily doubted, a defence was taken by the appellants that the injuries found on the person of witnesses Ram Kumar and Shanti Devi as also the deceased were inflicted upon them by some unknown 6-7 boys and not the appellants. To make good the said defence, evidence was led and arguments were advanced by the appellants before the learned Trial Court to show that the incident in question did not take place in front of the house of the family of the deceased as claimed by Ram Kumar and Shanti Devi but had taken place near Valmiki temple which is situated 400-500 yards away from the house of the family of the deceased. The aforesaid defence and arguments advanced by the appellants did not cut any ice with the learned Trial Court, which view taken by

the learned Trial Court has not been challenged by the counsel for the appellants before us.

35. In the instant case, the incident occurred around 08.30 P.M. on 05.03.1995. The statement of Ram Kumar Ex.PW-3/A, which formed the basis of the FIR Ex.PW-12/A, was recorded at about 10.50 P.M. on 05.03.1995. The statement Ex.PW-3/A of Ram Kumar was recorded at GTB hospital as evident from the deposition of SI Baldev Singh PW-22, the scribe of the statement Ex.PW-3/A, that he recorded the said statement at hospital. SI Baldev Singh was cross-examined at length, but his testimony on the point of the recording of the statement Ex.PW-3/A could not be shaken by the defence. It can reasonably be taken that it must have taken at least 30 minutes for Ram Kumar in reaching GTB hospital from the place of occurrence. In these circumstances, the possibility of Ram Kumar contriving facts and spinning a false story in such less time is remote.

36. SI Baldev Singh PW-22, deposed that he had recorded the statement Ex.PW-4/DA of Shanti Devi under Section 161 Cr.P.C. soon after recording the statement Ex.PW-3/A of Ram Kumar, meaning thereby, that the statement Ex.PW-4/DA of Shanti Devi was recorded by SI Baldev Singh soon after the occurrence. Be it noted here that the said deposition of SI Baldev Singh has not been controverted by the defence. Except for one discrepancy which shall be dealt by us shortly hereinafter, the version of the incident given by Shanti Devi in her testimony is almost similar to the one given by her in her statement Ex.PW-4/DA. In the decision reported as *Machhi Singh v State of Punjab* (1983) 3 SCC 470 it was held by the Supreme Court that the fact that the version of an incident given by a witness in her testimony is substantially similar to the one given by her in his statement recorded under Section 161 Cr.P.C. soon after the occurrence attaches a ring of truth to the evidence of the said witness.

37. In the decision reported as *Malkiat Singh v State of Punjab* (1991) 4 SCC 391 the Supreme Court has held that it is settled law that the First Information Report is not substantive evidence. It can only be used to contradict the maker thereof or for corroborating his evidence and also to show that the implication of the accused was not an after-thought. In the instant case, the recordings contained in the FIR

Ex.PW-12/A that Ram Kumar has stated that he had sustained injuries at the time of the incident and that his wife had sustained injuries on her head and right hand at the time of the incident stand corroborated by the MLC Ex.PW-24/D of Ram Kumar which records presence of injuries on the person of Ram Kumar and the MLC Ex.PW-24/A of Shanti Devi which records presence of injuries on head and right arm of Shanti Devi. Furthermore, the recording contained in the MLCs Ex.PW-24/D and Ex.PW-24/B of Ram Kumar and the deceased respectively that Sansar Singh had brought the deceased and Ram Kumar to the hospital and the unshaken deposition of SI Baldev Singh PW-22, that he recorded the statement Ex.PW-3/A of Ram Kumar at GTB hospital corroborate the recording contained in the statement Ex.PW-3/A of Ram Kumar and Sansar Singh had removed the deceased and Ram Kumar to GTB hospital, which in turn, establishes the presence of Ram Kumar at the place of occurrence at the time of the incident.

38. The evidence of witnesses; Ram Kumar PW-3 and Shanti Devi PW-4, receives corroboration from a most unexpected source. Both Ram Kumar and Shanti Devi have deposed that a quarrel had taken place between Shanti Devi and appellant Sanjay over the parking of a TSR on 05.03.1995 few hours prior to the happening of the incident in question. In his cross-examination, a suggestion was given to Ram Kumar on behalf of the appellants that that a quarrel had taken place on 05.03.1995 few hours prior to happening of the incident in question when an objection was raised by appellant Sanjay over parking of TSRs. The aforesaid suggestion corroborates the evidence of Ram Kumar and Shanti Devi that a quarrel had taken place between Shanti Devi and appellant Sanjay over the parking of a TSR on 05.03.1995 sometime prior to the happening of the incident in question. Not only that, the aforesaid suggestion completely demolishes the defence taken by appellant Sanjay that he was not present in his house on the entire day of 05.03.1995 as he along with appellants Anil and accused Rajesh had gone to the house of his maternal uncle on the said day.

39. The two eye-witnesses; Ram Kumar PW-3 and Shanti Devi PW- 4, have corroborated each other on material aspects relating to the incident.

40. Therefore, the conclusion which emerges from the first reading of the evidence of the witnesses in question is that they are prima facie truthful witnesses.

41. Next, it needs to be considered, whether the so-called discrepancies pointed out by the learned counsel for the appellants in the evidence of Ram Kumar PW-3 and Shanti Devi PW-4, are in fact discrepancies? If yes, the effect thereof?

42. Is there a discrepancy between the evidence of Ram Kumar PW-3 and Shanti Devi PW-4, and the post-mortem report Ex.PW-11/A of the deceased as contended by the learned counsel for the appellants?

43. In order to find an answer to the aforesaid question, let us visualize as to what happened on the date of the incident. On 05.03.1995 at about 08.30 P.M. appellant Anil started abusing Shanti Devi in front of the house of the family of the deceased upon which the deceased came out of his house and told appellant Anil to behave himself. This enraged appellant Anil who went inside his house and came back with a knife in his hand. Appellant Anil was accompanied by Shyam Babu at that time. Appellant Shyam Babu caught the deceased from behind and appellant Anil started inflicted knife blows on his person. In the meantime, appellant Laxmi Devi and Sanjay and accused Rajesh also came there. On seeing the life of the deceased in danger, the parents of the deceased Shanti Devi and Ram Kumar rushed towards the deceased to save him from the clutches of appellants Anil and Sanjay Babu. Shanti Devi was prevented from saving the deceased by appellant Laxmi Devi who gave a blow on her head with a rod and appellant Anil who inflicted knife blows on her hand. Ram Kumar was also prevented from saving the deceased by appellant Rajesh who caught him and appellant Sanjay who inflicted knife blows on his person. It was like a melee there at that time. It is not the case of the prosecution that appellant Shyam Babu had caught the deceased from behind by hugging him. It is possible that the deceased was not held very tightly by appellant Shyam Babu and appellant Anil ended up inflicted knife blows on the back side of the body of the deceased due to all the commotion happening at the time of the occurrence. It is also possible that when Ram Kumar and Shanti Devi tried to save the deceased appellant Shyam Babu lost his grip on the deceased for few seconds and at that time appellant Anil

inflicted knife blows on the back side of the deceased.

44. We may note that even the learned Trial Judge has concluded as aforesaid while explaining the injuries on the person of the deceased and the argument that if the deceased was caught by appellant Shyam Babu from behind the said injuries were not explained has been repelled by the reasoning that Shyam Babu having caught the deceased from the behind would not mean that Shyam Babu was stuck to the deceased from the behind, a view with which we concur. We shall be discussing this aspect a little more in detail in a few paragraphs away.

45. As contended by the learned counsel for the appellants, there is a discrepancy between the statement of Shanti Devi as made to the police and her testimony regarding the manner of attack on Ram Kumar by appellants Sanjay and accused Rajesh. The recording contained in the statement of Shanti Devi before the police regarding the manner of attack on Ram Kumar by appellants Sanjay and accused Rajesh is not in sync with the evidence led by the prosecution on the said point. But the question would be whether the said discrepancy in the testimony of Shanti Devi is material and destroys the case of the prosecution. In our opinion the answer is No.

46. We have already noted herein above that Shanti Devi's statement under Section 161 Cr.P.C. was recorded soon after the occurrence. The deceased had died by said time. The husband of Shanti Devi Ram Kumar had sustained injuries on his person. Shanti Devi herself had sustained injuries on her person. Undoubtedly, Shanti Devi must have been under great stress and trauma at the time she made the statement to the police. In such circumstances, the possibility that Shanti Devi was not able to think straight and mixed up the roles of Sanjay and Rajesh is a natural variation.

47. Have Ram Kumar and Shanti Devi taken advantage of the incident in question and roped in innocent members of the family i.e. husband, wife and their 3 sons.

48. The entire members of one family, being five in number, have been implicated as accused in the present case. Thus, we have to be careful in evaluating the testimony of Ram Kumar and Shanti Devi and must at the outset record that

except for the afore-noted discrepancy in the testimony of Shanti Devi, which we have already explained herein above, nothing was brought out to discredit the two witnesses. In spite thereof, we find substantial evidence to corroborate the two witnesses with respect to the number of persons involved in the crime.

49. The post-mortem report Ex.PW-11/A of the deceased records that six stab wounds were found on his person. None of the stab wounds found on the person of the deceased is a defence wound, which highly probablizes that the deceased was caught by someone during the entire occurrence due to which he was completely immobilized and could not defend himself. Thus, at least two persons were involved in the assault on the deceased; one person was stabbing the deceased and the other person had caught him. The MLC Ex.PW-24/A of Shanti Devi records that three wounds were found on her person, one of which was caused by a blunt object and other two were caused by a sharp object. The MLC Ex.PW-24/D of Ram Kumar records that one injury was found on his person, which injury was caused by a sharp weapon. It would be difficult and in any case highly improbable for one person to be stabbing the deceased and simultaneously injure Ram Kumar and Shanti Devi. The person who caused stab injuries on the two had to be other than the one who caused injuries to the deceased on the probabilities emerging from the injuries on the deceased and the two witnesses. Thus, at least one more person was involved. The person who was holding the deceased could not have been involved in the attack on Ram Kumar and Shanti Devi for the reason he was busy holding the deceased during the occurrence. Therefore, what emerges is that other than two persons who had participated in the assault on the deceased at least one more person was involved in assaulting Ram Kumar and Shanti Devi. Now, there is an injury caused by a blunt object on Shanti Devi and this highly probablizes the participation by a fourth person.

50. Thus, we find substantial corroboration to the testimony of the two injured eye-witnesses that the participants in the assault were quite a few. The injuries on the deceased and the injured eye- witnesses probablizes to the extent of virtual proof that at least four persons were involved in the assault and thus we see no reason to doubt the two that five persons participated in the assault.

51. At this juncture, we proceed to deal with the third submission advanced by the learned Counsel for the appellants.

52. Section 34 IPC does not create a substantive offence. The section fastens constructive liability if two or more persons sharing the common intention act in furtherance thereof. The constructive liability under this section would arise if following two conditions are fulfilled:- (a) there must be a common intention to commit a criminal act; and (b) there must be participation of all in doing of such act in furtherance of that intention. Common intention need not be anterior in point of time when the crime was committed and may develop at the spur of the moment when the crime was committed.

53. It is difficult, if not impossible, to procure direct evidence of common intention. In most cases it has to be inferred from the act or conduct of the accused and other relevant circumstances of the case. This inference can be gathered by the manner in which the accused arrived on the scene and mounted the attack, the determination with which the injury was inflicted, the concerted act of the accused persons and the attendant relevant circumstances enwombing the act. The totality of the circumstances must be taken into consideration in arriving at the conclusion whether the accused had a common intention to commit an offence with which he could be convicted.

54. In the decision reported as *Suresh v State of UP* (2001) 3 SCC 673 the Supreme Court observed as under:-

"23. Thus to attract Section 34 IPC two postulates are indispensable: (1) The criminal act (consisting of a series of acts) should have been done, not by one person, but more than one person. (2) Doing of every such individual act cumulatively resulting in the commission of criminal offence should have been in furtherance of the common intention of all such persons.

24. Looking at the first postulate pointed out above, the accused who is to be fastened with liability on the strength of Section 34 IPC should have done some act which has nexus with the offence. Such an act need not be very substantial, it is enough that the act is only for guarding the scene for facilitating the crime. The

act need not necessarily be overt, even if it is only a covert act it is enough, provided such a covert act is proved to have been done by the co-accused in furtherance of the common intention. Even an omission can, in certain circumstances, amount to an act. This is the purport of Section 32 IPC. So the act mentioned in Section 34 IPC need not be an overt act, even an illegal omission to do a certain act in a certain situation can amount to an act, e.g. a co-accused, standing near the victim face to face saw an armed assailant nearing the victim from behind with a weapon to inflict a blow. The co-accused, who could have alerted the victim to move away to escape from the onslaught deliberately refrained from doing so with the idea that the blow should fall on the victim. Such omission can also be termed as an act in a given situation. Hence an act, whether overt or covert, is indispensable to be done by a co-accused to be fastened with the liability under the section. But if no such act is done by a person, even if he has common intention with the for the accomplishment of the crime, Section 34 IPC cannot be invoked for convicting that person. In other words, the accused who only keeps the common intention in his mind, but does not do any act at the scene, cannot be convicted with the aid of Section 34 IPC.

25. There may be other provisions in the IPC like Section 120-B or Section 109 which could then be invoked to catch such non-participating accused. Thus participation in the crime in furtherance of the common intention is a sine qua non for Section 34 IPC. Exhortation to other accused, even guarding the scene etc. would amount to participation. Of course, when the allegation against an accused is that he participated in the crime by oral exhortation or by guarding the scene the court has to evaluate the evidence very carefully for deciding whether that person had really done any such act."

55. Qua Shyam Babu and Anil, we find that the prosecution has proved Anil inflicting knife blows on the deceased and Shyam Babu having caught the deceased. It is not that Shyam Babu retracted when his son Anil started the assault. The stab injuries are 6 in number and then there are abrasions. Thus, by the act of catching hold of the deceased and facilitating Anil to repeatedly stab the deceased, Shyam Babu is clearly vicariously liable for the act of Anil. As regards Anil we find that it was he who started the quarrel and after initial abuses went

inside the house and came armed with a knife when the deceased had objected to his i.e. Anil abusing the mother of the deceased. It is not that he picked up a knife which was lying nearby. Thus, qua the death of the deceased, the two are clearly liable to be convicted for the offence punishable under Section 302/34 IPC.

56. The question which needs consideration is whether appellants Laxmi Devi and Sanjay can be attributed with sharing the common intention of causing death of the deceased.

57. Evidence establishes that Laxmi Devi and Sanjay prevented the parents of the deceased i.e. Ram Kumar and Shanti Devi from rescuing the deceased from the clutches of appellants Anil and Shyam Babu by inflicting injuries on their person.

58. In the decision reported as *Kishore Eknath Nikam v State of Maharashtra* (2006) 10 SCC 666 the appellant therein prevented a witness from saving the deceased from the clutches of the co-accused and inflicted a knife injury on the person of the said witness during said process. Holding that the appellant was rightly convicted under Section 302 IPC read with Section 34 IPC, the Supreme Court observed as under:-

"10. A perusal of the statements of all PWs 1, 2 and 3 shows that there is no manner of doubt that the accused-appellant in furtherance of the common intention of A-1 Jagdish tried to prevent PWs 2 and 3 from intervening in the matter. So much so that PW 3 who wanted to intervene, effectively was prevented by causing knife injury by the accused-appellant. Therefore, this conduct of the accused-appellant is sufficient to attract Section 34 IPC because he acted in furtherance of common intention of accused A-1. Looking to the facts of the present case there remains no manner of doubt that the accused-

appellant was acting in furtherance of the common intention and prevented PWs 2 and 3 to save the deceased. He facilitated the commission of the offence in furtherance of common intention of A-1 Jagdish in commission of the murder of the deceased Parshant. Therefore, Section 34 is attracted in the present case and the accused-appellant was rightly convicted under Section 302 read with Section 34 IPC."

59. We thus hold that Laxmi Devi and Sanjay, by preventing the parents of the deceased i.e. Ram Kumar and Shanti Devi from rescuing the deceased from the clutches of Anil and Shyam Babu have evidenced their common intention with that of Anil and Shyam Babu and hence are vicariously liable for the action of Anil and Shyam Babu. Had the two not assaulted Ram Kumar and Shanti Devi when the two ran to rescue their son, the deceased could possibly have been saved. The obvious intention of Laxmi Devi and Sanjay was to prevent the deceased being rescued when Anil was stabbing the deceased.

60. This takes us to the last submission advanced by the learned counsel for the appellants.

61. From the testimony of witnesses Ram Kumar and Shanti Devi it is apparent that the appellant Anil abused the mother of the deceased i.e. Shanti Devi, i.e. appellant Anil triggered the cause which resulted in the unfortunate death of the deceased. The theory of a sudden quarrel is premised on the fact that the origin of the fight is shrouded in uncertainty and it cannot be pointed out as to whether the accused or the victim was the trigger. In the decision reported as JT 2008 (1) SC 640 Shaikh Majid & Anr. v. State of Maharashtra & Ors., it was observed as under:

"11. The residual question is the applicability of Section 302 IPC. As noted above it was submitted that only one blow was given and that too in the course of a sudden quarrel.

12. In essence, the stand of learned Counsel for the appellant is that Exception IV to Section 300 IPC would apply to the facts of the case.

13. For bringing in operation of Exception 4 to Section 300 IPC, it has to be established that the act was committed without premeditation, in a sudden fight in the heat of passion upon a sudden quarrel without the offender having taken undue advantage and not having acted in a cruel or unusual manner.

14. The Fourth Exception to Section 300 IPC covers acts done in a sudden fight. The said Exception deals with a case of prosecution not covered by the First Exception, after which its place would have been more appropriate. The Exception

is founded upon the same principle, for in both there is absence of premeditation. But, while in the case of Exception 1 there is total deprivation of self-control, in case of Exception 4, there is only that heat of passion which clouds men's sober reason and urges them to deeds which they would not otherwise do. There is

provocation in Exception 4 as in Exception 1; but the injury done is not the direct consequence of that provocation. In fact Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon equal footing. A "sudden fight" implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor in such cases could the whole blame be placed on one side. For if it were so, the Exception more appropriately applicable would be Exception 1. There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. The help of Exception 4 can be invoked if death is caused (a) without premeditation; (b) in a sudden fight; (c) without the offender having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the "fight" occurring in Exception 4 to Section 300 IPC is not defined in IPC. It takes two to make a fight. Heat of passion requires that there must be a no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two or more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner. The expression "undue

advantage" as used in the provision means "unfair advantage".

62. The testimony of witnesses Ram Kumar and Shanti Devi does not show that the deceased participated in any quarrel. The testimony shows that appellant Anil foul mouthed Shanti Devi. Whereas Shanti Devi swallowed the insult, the deceased, being a man of self-respect, could not tolerate his mother being abused and told the accused to behave himself and unfortunately invited a fatal assault. It is not the case of the accused that the deceased attacked any of the appellants. No suggestion has been given to witnesses Ram Kumar and Shanti Devi that the deceased assaulted any accused.

63. The matter can also be looked from another angle.

64. The premise of Fourth Exception to Section 302 IPC is that heat of passion clouds mens sober reason and urges them to deeds which they otherwise would not do. In the instant case, appellant Anil was abusing the mother of the deceased Shanti Devi in front of the house of the deceased. At that time, the deceased came out of his house and told appellant Anil to behave himself upon which appellant Anil went inside his house and came back within few minutes with a knife in his hand and started attacking the deceased. It is not a case where appellant Anil acted in a heat of passion for there was time gap between the deceased telling appellant Anil to behave himself and appellant Anil attacking the deceased. Furthermore, the act of appellant Anil of bringing a knife from his house is indicative of the fact that appellant Anil deliberated upon the matter in his house and brought a knife from his house with a definite intention to murder the deceased.

65. Looked at from any angle, the Fourth Exception to Section 300 IPC is not attracted in the present case.

66. In view of above discussion, we do not find any merit in the present appeals. The same are hereby dismissed. The bail bonds and surety bonds of the appellants are cancelled. The appellant shall surrender forthwith to serve the remaining sentence.