

Praveen and Another Vs. State

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Court : Delhi

Decided On : Apr-30-2012

Judge : S. Ravindra Bhat & S.P.Garg

Appeal No. : CRL.A. 28 & 47 OF 2012

Appellant : Praveen and Another

Respondent : State

Judgement :

S.P.GARG, J.

1. In these appeals by Praveen (A-1) and Deva (A-2), the judgment dated 26.11.2011 and order on sentence dated 29.11.2011 of learned Additional Sessions Judge in SC No. 116/2010 have been impugned. They were convicted for committing the offences punishable under Sections 302/34 IPC and sentenced to undergo imprisonment for life with a fine of `5,000/- each. A-2 was in addition convicted for the offence punishable under Section 27 Arms Act and sentenced to undergo imprisonment for three years with a fine of `5,000/-. Both the sentences were to operate concurrently.

2. The criminal law was set into motion at around 10.29 P.M. on 07.07.2002 when Daily Diary (DD) Entry No.55-B (Ex.PW-12/A) was recorded by Constable Rakesh Kumar at police station Sultan Puri on getting information from Constable Rakesh of PCR that an individual was stabbed at Bus Stand, Sultan Puri. The investigation

was assigned to SI Vinod Kumar who with Constable Jagdish reached the spot. At 10.40 P.M. Daily Diary (DD) Entry No.56-B (Ex.PW-12/B) was recorded on getting information from Dr.Sudeep of Brham Shakti Hospital that an individual was brought 'dead' by his brother Rakesh.

3. Pursuant to DD No.55-B (Ex.PW-12/A), SI Vinod Kumar on reaching the spot i.e. Bus Terminal, Sultan Puri did not find any eye witness. On receipt of DD No.56-B (Ex.PW-12/B), he reached Brham Shakti Hospital, Budh Vihar and collected the MLC of Rajesh in which the doctor had pronounced him 'dead' on arrival. SI Vinod Kumar recorded Baljeet Singh's statement who stated that on 07.07.2002 at about 8.00 P.M., he was sitting in the deceased's house. At about 9.20 P.M., they both went to the Bus Terminal, Sultan Puri where the deceased wanted to settle accounts with his driver. At about 9.30 P.M. he (Rajesh) saw a boy, Sanjay (hereinafter described as A-5) beating a poor man and intervened to rescue him. On that, an altercation ensued between the deceased and A-5 and he (A-5) left the spot threatening to see him (Rajesh). After some time, A-5 brought his two associates (A-1 and A-2) and they started abusing him. They caught hold of Rajesh and A-5 hit him (Rajesh) on his head with a bottle as a result of which blood started oozing out and he (Rajesh) fell down. When he (Rajesh) attempted to flee, A-1 and A-5 caught hold of him and A-2 took out a knife from his trousers and stabbed him in the chest. Thereafter, they fled the spot. Baljeet Singh further stated that when he was taking Rajesh to Brham Shakti Hospital, and had travelled some distance, he (Rajesh) fell down. He informed the family members of the deceased and Rakesh, his brother, reached the spot and they both took him in a van to Brham Shakti Hospital. The victim died on the way to the hospital and the doctor declared him 'dead'. Baljeet Singh further described the features of the assailants and claimed that he could identify them if they were shown to him.

4. SI Vinod Kumar made an endorsement on the statement and sent the rukka through Constable Jagdish for registering the case under Sections 302/34 IPC and 25, 27 Arms Act. The investigation was taken over by Insp.Sukhwinder Singh, SHO, PS Sultan Puri (IO). The police team with the complainant reached the spot; the crime team inspected the place of occurrence and the photographer took the photographs from different angles. The IO prepared the rough site plan at the

instance of the complainant; seized blood, a blood stained sugarcane strip, an envelope and prepared necessary seizure memos. He recorded the statements of Jagdish Chand Sharma and Satpal and set out to apprehend the assailants. On 08.07.2002, the IO prepared the brief facts and sent the dead body for post-mortem. Dr.Komal Singh conducted the post-mortem of the dead body.

5. On 20.07.2002, on the basis of a secret information, A-1 was arrested from outside his house No.2810, Basti Julahan, Sadar Bazar; interrogated and the IO recorded his disclosure statement. On 24.07.2002, A-2 and Rattan (hereinafter described as A-3) were formally arrested. Their disclosure statements were recorded. On 26.07.2002, Kailash (hereinafter described as A-4) was arrested, upon his surrender in Court.

6. During the investigation, the IO moved an application for holding test identification proceedings but the accused declined to participate in the TIP proceedings. The IO sent the exhibits to the Forensic Laboratory and subsequently, collected the report. The statements of the witnesses conversant with the facts were recorded. Efforts were made to arrest A-5 but in vain. The Trial Court declared him proclaimed offender (PO). After completion of the investigations, a charge-sheet was filed against the Appellants (A-1 and A-2) and A-3 and A-4 (since acquitted) for committing the offences and they were duly charged and brought to trial.

7. To prove the charges, the prosecution examined twenty three witnesses. The statements of the accused were recorded under Section 313 Cr.P.C. to afford them an opportunity to explain the incriminating circumstances. They denied their complicity in the crime and pleaded false implication. They however, did not examine any witness in defence.

8. After appreciating the evidence on record and considering the rival contentions of the parties, the Trial Court convicted A-1 and A-2 for the aforesaid offences. A-3 and A-4 were acquitted of the charges. Aggrieved by the judgment of the Trial Court, the Appellants have filed the present appeal.

9. Learned counsel for the Appellants challenged the findings of the Trial Court and urged that it did not appreciate the evidence in its true and proper perspective and fell into grave error in relying upon the ocular testimony of PW-1 (Baljeet Singh) and PW-4 (Rakesh) who were closely related to the deceased and whose presence at the spot was highly doubtful; their chances of deposing falsely could not be ruled out. Counsel further contended that the prosecution failed to explain, how it took more than an hour to travel a distance of one kilometre to reach the hospital. The inordinate delay in sending the rukka after more than two hours of the incident was not explained. The FIR was recorded after due deliberations and was ante-timed. The area Magistrate received the copy of the FIR the next day at 2.00 P.M. The Trial Court, urged the counsel, omitted to consider the vital inconsistencies and improvements in the prosecution case. The crime team could not ascertain the exact place of occurrence and it is a mystery who summoned the crime team at the spot. The investigation was not carried out in a fair manner and no attempt was made to associate any independent public witness at any stage. Blood stained clothes of the injured were not seized; there was conflict between the ocular and medical evidence and the prosecution failed to prove who was the author of the two other injuries shown in the post-mortem report. He next contended that the prosecution witnesses in their depositions have given a concocted version which casts serious doubts about truthfulness of the prosecution case. Counsel further emphasized that the dossiers of the accused were shown to the complainant in the police station and moving the application for TIP was a mere formality and the accused were justified to decline participation in those. The counsel further argued that even if, the prosecution case is taken at its face value, there was no material to prove that both the Appellants shared common intention to murder the deceased. It was not in the knowledge of A-1 that A-2 had a knife in his pocket and would stab the deceased. PW-11 (Satpal) demolished the prosecution's case and the Trial Court did not appreciate his evidence. PW-8 (Jagdish) is a procured witness and his conduct in the incident is highly unnatural.

10. APP supported the findings of the Trial Court and urged that the testimonies of PW-1 and PW-4 were categorical to prove the guilt of the accused and their evidence cannot be ignored merely because they were interested and partisan

witness. Close relationship is not a factor to discard their otherwise cogent version. PW-11 (Satpal) opted not to support the prosecution and turned hostile. The medical evidence corroborated the ocular testimony in totality without any variation. Despite lengthy cross-examination, the accused failed to elicit any material contradictions in testimonies of the prosecution witnesses to be disbelieved. PW-1 (Baljeet Singh) reported the matter to the police at the earliest and gave a graphic account of the incident. He had no ulterior motive to falsely implicate the accused with whom he had no prior acquaintance.

11. We have considered the submissions of both the parties and have perused the Trial Court records.

12. Before we proceed on merits it is desirable to highlight that the homicidal death of the deceased is not under challenge. A-3 and A-4 were acquitted and the State did not prefer any appeal against their acquittal. Since the case of the prosecution is solely based upon an eye witness testimony, it requires threadbare scrutiny.

13. The Trial Court heavily relied upon the testimonies of PW-1 (Baljeet Singh) and PW-4 (Rakesh) to base its conviction. We find no cogent reasons to deviate from this approach. To dispel the doubt of the accused about the presence of PW-1 at the spot, veracity and authenticity of his evidence requires thorough scrutiny. PW-1 (Baljeet Singh) uncle of the deceased claimed that he was present at the spot when his nephew was stabbed. The crucial document pointing his presence at the spot is his statement (Ex.PW-1/A) made to the police which formed the basis of registering the FIR under Sections 302/34 IPC. His statement (Ex.PW-1/A) was recorded at about 12.45 A.M., soon after the incident (it occurred at 09.30 P.M.) in which he gave a full and vivid description of the sequence of events leading to the commission of the offence by the Appellants and others and attributed specific roles to each assailant. Only an eye witness can narrate such minute details. PW-1 had no ulterior motive to speak falsely of his presence to implicate the accused with whom he had no prior acquaintance. The fact that none of the accused was named in the FIR shows that PW-1 was nurturing no grudge to falsely implicate them subsequently. During the investigation, on refusal to participate in the test identification proceedings, he (PW-1 Baljeet Singh) identified

them as the assailants whose description he had given while registering first information report. Since the rukka (Ex.PW-1/A) was recorded promptly without inordinate delay, his presence at the spot could not be doubted. PW-1 had taken the deceased to the Brham Shakti Hospital from the spot prior to the arrival of the police. In the MLC (Ex.PW-7/A), his name finds mention. It corroborates his presence at the spot. DD No.56-B (Ex.PW-12/B) was recorded at PS Sultan Puri on the information given by Dr.Sudeep who informed that Rajesh had admitted by his brother Rakesh at the hospital.

14. PW-4 (Rakesh) corroborated PW-1 and testified that on 07.07.2002 at about 10.00 P.M., after he received a phone call from his uncle (PW-1) about the incident, he reached the spot and they both took Rajesh in a Maruti van to the Brham Shakti Hospital where the doctor declared him 'dead' on arrival. In the cross-examination, he asserted that he reached the spot within 15 minutes. The police reached the hospital at about 10.30 P.M. The testimony of PW-4 that he received telephone call from his uncle (Baljeet Singh); that Rajesh was beaten by two or three boys; that Baljeet Singh was present at the spot on his reaching there and they removed the injured Rajesh to Brham Shakti Hospital in a maruti van remained unrebutted in the cross-examination. No suggestion was put to him that Baljeet Singh and the deceased had not gone together at the Bus Stand and that Baljeet Singh was not present at the time of occurrence on the spot.

15. While appearing as PW-1, Baljeet Singh proved the version narrated by him to the police without variation. He deposed that on 07.07.2002 at about 08.00 P.M. he was sitting in his portion of the house with Rajesh. At about 09.15. P.M. they both reached Bus Terminal, Sultan Puri because Rajesh was to reconcile accounts from his driver. At the Bus Terminal, his nephew intervened to rescue a poor man to whom A-5 was beating and his intervention enraged him (A-5) and he left the spot threatening to 'see' him. PW-1 further deposed that after some time, A-5 brought two associates (A-1 and A-2) and they started abusing Rajesh and caught hold of him. A-5 hit him on his head with a bottle as a result, of which he fell down and attempted to flee but he (Rajesh) was caught hold of by A-1 and A-5 and A-2 took out a knife from his pocket and stabbed him on the left side of his chest. Thereafter, all the three assailants fled the spot and he informed the family

member of deceased at his residence and took him to hospital in a maruti van. In the cross-examination, he elaborated that they reached the Bus Terminal after 09.00 P.M. but before 09.30 P.M. The poor man was being beaten by A-5 at a distance of 5/10 paces from the gate of the Terminal. Rajesh was successful to save the old man aged 40/50 years. He was at a distance of 10/15 paces from the place of occurrence when Rajesh was hit with the bottle. PW-4 Rakesh reached the spot within 10 minutes; the police arrived at the hospital at about 11.00 P.M. The daggar was a long one. He fairly admitted that he did not know the accused prior to the occurrence and had not given the names of the assailants.

16. PW-1 withstood extensive cross-examination. The accused could not elicit any material discrepancy to impeach his credibility. Admittedly, PW-1 and the deceased were residing in House No. 540, Poothkalan in their respective portions. Their presence there was natural and probable. It was nothing unusual to go together to Bus Terminal for their work. The incident took place at about 09.15/09.30 P.M. The witness took the deceased to the Brham Shakti Hospital at 10.25 P.M. PW-22 (SI Vinod Kumar) reached the spot after 10.30 P.M. but did not find any eye witness or the injured there. Apparently, the injured was not taken to the hospital either by PCR officials or by the local police. The fact that soon after the occurrence, the injured/deceased was taken to the hospital before arrival of the police, shows that PW-1 (Baljeet Singh) was present at the place of occurrence and had witnessed the incident. He identified all the accused by face in the Court and narrated their role minutely. There is no contradiction with regard to the identification of the assailants. On reappraisal and scrutiny of the evidence discussed, we find no particular reason, as to why the two witnesses PW-1 and PW-4 would falsely depose against the Appellants.

17. Counsel underlined the need to draw an adverse inference because PW-1 did not inform the police about the incident, thus making his presence doubtful. In our view, mere omission in not informing the police is not sufficient to disbelieve his presence. The natural instinct of the witness would have been to see that medical aid was given at the earliest time to save the injured's life. He was not expected to waste precious time in lodging the report with the police. The witness exhibited natural conduct and immediately called PW-4 (Rakesh) who brought the Maruti

van and they both shifted the victim to the hospital. PW-1 (Baljeet Singh) disclosed in the cross-examination that there were police officials present at the police post at Brham Shakti Hospital and they were informed about the incident.

18. The counsel emphasized that the conduct of PW-1 in not intervening to save his nephew demonstrates that he was not present at the spot. We find nothing unusual in the post-event conduct of the witness to discard his presence. The conduct of the witness can be termed as 'unnatural' only when the reaction demonstrated by him is so improbable or so inconceivable, that it cannot be expected from a human being placed in a similar situation. Post-incident conduct varies from person to person and different persons react differently in similar situations. In the present case, PW-1 explained that the incident happened so fast that he became scared. In the cross-examination, he elaborated that the person who stabbed Rajesh pointed a knife at him and he did not intervene due to fear. Since the assailants were armed with deadly weapon and outnumbered the witnesses, no adverse inference can be drawn against PW-1 for not intervening to save his nephew.

19. Regarding the delay in registering the FIR, what can be seen it transpires that the police machinery came into motion at 10.29 P.M. on getting information from the police control room. SI Vinod Kumar to whom the investigation was assigned reached the Brham Shakti Hospital from the spot (on getting DD No. 56-B (Ex.PW-12/B)) recorded at 10.40 P.M. Thereafter, on reaching the hospital, he recorded PW-1's statement and sent the rukka at 12.45 A.M. There was thus no inordinate delay in sending the rukka to doubt the version given by PW-1 in his statement. Indisputably, the FIR was delivered to the Metropolitan Magistrate on 08.07.2002 at 02.00 P.M. However, the IO was not cross-examined for delay in delivering the report to the area Magistrate.

20. No doubt, the police have to take steps at the earliest to apprise the concerned Magistrate about any incident concerning the death of an individual, by virtue of Section 157. However, this single fact cannot vitiate the entire trial. In 'Pandurang Chandrakant Mhatre v. State of Maharashtra', (2009) 10 SCC 773, it was held that:

"As regards delayed receipt of the copy of FIR by the Court of Magistrate on 12-4-1988, in the first place Ext. 84, FIR register indicates that copy of FIR was sent to the Magistrate concerned on 3-4-1988 itself. Secondly, and more importantly, if the evidence of eyewitnesses is found cogent, convincing and credible, the delay in receipt of the copy of FIR by the court concerned would not be of much significance."

21. Similarly in 'Pala Singh v. State of Punjab', (1972) 2 SCC 640, the Supreme Court observed that:

"No doubt, the report reached the Magistrate at about 6 p.m. Section 157 Cr PC requires such report to be sent forthwith by the police officer concerned to a Magistrate empowered to take cognizance of such offence. This is really designed to keep the Magistrate informed of the investigation of such cognizable offence so as to be able to control the investigation and if necessary to give appropriate direction under Section 159. But when we find in this case that the FIR was actually recorded without delay and the investigation started on the basis of that FIR and there is no other infirmity brought to our notice, then, however improper or objectionable the delayed receipt of the report by the Magistrate concerned it cannot by itself justify the conclusion that the investigation was tainted and the prosecution insupportable. It is not the appellant's case that they have been prejudiced by this delay."

22. In our view delay in sending the special report to the area Magistrate in the absence of any prejudice should not adversely affect the prosecution case.

23. PW-11 (Satpal) did not support the prosecution and turned hostile. He was cross-examined by APP after seeking permission from the Court and was confronted with the statement (Ex.PW-11/A) made to the police. Nevertheless, he admitted that on 07.07.2002 at about 09.30/10.00 P.M. he was present at Sultan Puri, Bus Terminal and a quarrel took place there. He further admitted that he had put his signatures on the statement (Ex.PW-11/A). The testimony of this witness corroborates the police version to the extent that at the relevant time a quarrel took place at the Bus Terminal, Sultan Puri. It is a settled position of law that the evidence of a hostile witness need not be rejected in its entirety but may be relied

on for corroboration. It does not efface the testimony of other prosecution witnesses.

24. PW-8 (Jagdish Chand) claimed to have seen the occurrence on 07.07.2002 at about 09.30 P.M. He deposed that he was present at the Bus Stand, Sultan Puri on 07.07.2002 at about 09.30 P.M. and a quarrel took place in which Rajesh was stabbed. He identified the accused and attributed specific role to each of them. Analysing the testimony of this witness and taking into consideration his post-event conduct, we do not consider him a reliable witness to place reliance on his testimony. The conduct of an eye witness in (a) not raising alarm, (b) not making any attempt to take the injured to the doctor, (c) not reporting the matter to the police or close relatives (d) not intervening to rescue the victim is a strong indicator that he had not witnessed the incident as claimed by him. Conveniently, he left the spot and went to his house to have his meal leaving the injured in a critical condition on the spot. His conduct to return to the place of incident after some time to find out what happened to the injured is contrary to the course in which a similarly situated person would normally behave. PW-1 or PW-4 did not depose about his presence at the spot. PW-22 (SI Vinod Kumar) on reaching the spot did not find him at there. It seems that this witness was introduced to bolster the prosecution case. His conduct and behaviour during the whole process renders his evidence shaky and untrustworthy and deserves outright rejection.

25. PW-4 (Rakesh) is not a witness to the incident. He reached the spot on getting information from PW-1 about the incident and shifted Rajesh in his maruti van to the Brham Shakti Hospital. Exclusion of testimonies of PW-8 (Jagdish Chand) and PW-11 (Satpal) would not dilute the prosecution case. PW-1 is uncle of the deceased and is not expected to falsely implicate the accused to let the real culprits go scot free. Ordinarily a close relative would not intend to screen the culprit as he would be interested to see that the offender is brought to book. In this context, it was held, by the Supreme Court, in 'Anvaruddin v V. Shakur' 1990 (3) SCC 266, that:

“It is well settled law that evidence of witnesses to the occurrence cannot be thrown overboard merely because they are interested and partisan witnesses. All

that the law demands is that their evidence should be scrutinised with great care and caution to safeguard against the normal temptation to falsely implicate others.”

26. In a similar vein, the Supreme Court had ruled, in Dilip Singh and others v. The State of Punjab AIR 1953 SC 364 that:

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

Vivien Bose, J, put the matter even more clearly, as follows:

"We are unable to agree with the learned Judges of the High Court that the testimony of the two eye-witnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rule. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this Court endeavoured to dispel in - 'Rameshwar v. State of Rajasthan' (AIR 1952 SC 54 at p. 59) (1952 Cri LJ 547). We find, however, that it unfortunately still persists, if not in the judgments of the Courts, at any rate in the arguments of counsel."

27. It has been consistently held that as a general rule the Court can and may act on the testimony of a single witness provided he is wholly reliable. There is no

legal impediment in convicting a person on the sole testimony of a single witness.

28. In the case of 'Chittar Lal vs. State of Rajasthan'(2003)6SCC397 Supreme Court has observed that :

“...The legislative recognition of the fact that no particular number of witnesses can be insisted upon is amply reflected in Section 134 of the Indian Evidence Act, 1872 (in short “the Evidence Act”). Administration of justice can be affected and hampered if number of witnesses were to be insisted upon. It is not seldom that a crime has been committed in the presence of one witness, leaving aside those cases which are not of unknown occurrence where determination of guilt depends entirely on circumstantial evidence. If plurality of witnesses would have been the legislative intent, cases where the testimony of a single witness only could be available, in number of crimes the offender would have gone unpunished. It is the quality of evidence of the single witness whose testimony has to be tested on the touchstone of credibility and reliability. If the testimony is found to be reliable, there is no legal impediment to convict the accused on such proof. It is the quality and not the quantity of evidence which is necessary for proving or disproving a fact. This position has been settled by a series of decisions. The first decision which has become locus classicus is Mohd. Sugal Esa Mamasan Rer Alalah v. R.² The Privy Council focused on the difference between English law where a number of statutes make conviction impermissible for certain categories of offences on the testimony of a single witness and Section 134 of the Evidence Act....”

29. PW-1 had sufficient time to observe the features of the assailants as the occurrence took place during summer days at a busy place i.e. a Bus Terminal. In his statement (Ex.PW-1/A) he gave broad features of the assailants and claimed to identify them if they were shown to him. After the arrest, A-2's face was in muffled. PW-21 Ms.Nisha Saxena conducted the TIP proceedings but A-2 refused to participate in the proceedings alleging that he was shown to witnesses in the police station. A-1, too, on the same plea declined the offer to participate in TIP. The accused however did not elaborate when they were shown to the witnesses and if so to whom. No suggestion was put to PW-1 (Baljeet Singh) in the cross-examination that the accused were shown to him in the police station any time.

PW-23 (Insp.Sukhwinder Singh) admitted in the cross-examination that PW-1 had seen the dossier of the accused Praveen (A-1) in the police station. In our considered view, mere identification on the strength of the dossier is not sufficient to decline test identification proceedings. It is well settled that identification parades are not primarily meant for the Court. They are meant for investigation purposes. The object of conducting a test identification parade is two fold. Firstly it is to enable the witnesses to satisfy themselves that the prisoner whom they suspect is in fact the one who was seen by them in connection with the commission of the crime. Second is to satisfy the investigating authorities that the suspect is the person involved whom eye witnesses had seen in connection with the occurrence. It is also settled that the substantive evidence of the witness is his evidence in the Court.

30. A-3 and A-4 were acquitted by the impugned judgment as there were no allegations of participation in the crime against them. PW-1 did not attribute any role to them in the incident. Moreover, from the inception, the case of the prosecution was that three assailants had participated in the crime. It is well settled that although a man may be present when a crime is committed, if he takes no part in it and does not act in concert with those who commit it, he will not be held liable merely because he did not endeavour to prevent it, or to apprehend the offender. All those present do not necessarily assist or participate by their presence in every act which is done in their presence, nor are they consequently liable to be punished as offenders. There must be community of design to render the person present liable. The fact that the accused were together at the time of the incident and fled together is not conclusive evidence of common intention in the absence of any other positive evidence. The mere circumstance of a person being present during an unlawful occasion does not, therefore, raise a presumption of that person's complicity in an offence then committed. The Supreme Court in the case of 'Ram Udgar Singh vs. State of Bihar'(2004) 10 SCC 443 held as under :

“That even if a major portion of evidence of a witness is found to be deficient, in case the residual is sufficient to prove the guilt of an accused, notwithstanding acquittal of a number of other co-accused persons, conviction can be maintained.

It is a duty of the Court to separate grain from chaff and appreciate in each case, as to what extent, the evidence is worthy of acceptance.”

31. Minor discrepancies on trivial matters not touching the core of the case, hypertechnical approach by taking sentences turn out of context here and there from the evidence, attaching importance to some technical error committed by the investigating officer would not ordinarily permit rejection of the evidence as a whole. It is not unoften that the improvement in earlier version are made at the trial in order to give a boost to the prosecution case. Coming the grievance of the Appellants that no explanation was sought from them regarding the common intention in their statements recorded under Section 313 Cr.P.C., it is relevant to note that substantive law is not required to be put to the accused under Section 313 Cr.P.C.

32. In the case of ‘Suresh Chandra Bahri vs. State of Bihar’ 1995 Supp.(1) SCC 80 the Supreme Court underlying the object behind Section 313 Cr.P.C. observed :

“It is no doubt true the underlying object behind Section 313 Cr.P.C. is to enable the accused to explain any circumstance appearing against him in the evidence and this object is based on the maxim audi alteram partem which is one of the principles of natural justice. It has always been regarded unfair to rely upon any incriminating circumstance without affording the accused an opportunity of explaining the said incriminating circumstance. The provisions in Section 313, therefore, make it obligatory on the court to question the accused on the evidence and circumstance appearing against him so as to apprise him of the exact case which he is required to meet. But it would not be enough for the accused to show that he has not been questioned or examined on a particular circumstance but he must also show that such non-examination has actually and materially prejudiced him and has resulted in failure of justice. In other words in the event of any inadvertent omission on the part of the court to question the accused on any incriminating circumstance appearing against him the same cannot ipso facto vitiate the trial unless it is shown that some prejudice was caused to him. In the present case no such objection was advanced either before the trial court or the High Court. Secondly, no material was placed before the court to show as to what

and in what manner the prejudice, if any, was caused to the accused persons or any of them. Apart from that it cannot be said that the accused was totally unaware of the substance of the accusation and charge against him or that he was not examined on the question of motive at all. In the facts and circumstances of the case it cannot be said that any prejudice was caused to the appellant.”

(A) Common intention :

33. The primary stand of the Appellants was that Section 34 has no application to the facts of the case. Contention of the learned counsel for the Appellants is that the only overt act attributed to A-1 was that he caught hold of the deceased and A-2 stabbed him. It cannot be said that A-1 had known that A-2 was carrying a knife. From the facts on record it cannot be said that there was prior meeting of mind, pre-concert and pre determination to attract Section 34 IPC.

34. To appreciate the points raised by counsel for the Appellants, the facts peculiar to the case require a quick glance. The initial quarrel took place between A-5 and a poor man at the Bus Stand. The deceased as a goodwill gesture to rescue the poor man intervened. The intervention was resented by A-5 and he left the spot threatening the deceased to ‘see’ him. Soon thereafter, A-5 brought his associates (A-1 and A-2) at the spot and they started abusing the deceased. They (A-1 and A-2) caught hold of the deceased and A-5 hit with a glass bottle on his (Rajesh) head. The deceased had not provoked them to come in support of A-5. The deceased was unarmed at that time. They (A-1 and A-2) without enquiring from the deceased the cause of quarrel facilitated A-5 in causing the injuries on his head. The deceased started bleeding from the injuries on his head. When he tried to get up and flee, to save his life A-5 and A-1 caught hold of him to prevent his escape and A-2 took out the knife from his pocket and stabbed on the left side of his chest. All the three assailants fled the spot with the knife. The facts reveal that there was no provocation whatsoever from the deceased. He had no enmity with the assailants. His only fault was that he intervened to rescue a stranger whom A-5 was beating and that prompted A-5 to seek assistance of his associates (A-1 and A-2). They actively participated in the crime at two stages, first when A-5 hit him (Rajesh) on his head with a bottle and the role assigned to them (A-1 and A-2)

was that they caught hold of him (Rajesh). Despite the deceased suffering head injuries and bleeding, again when he made a futile attempt to flee from the spot, he was caught hold by A-1 and A-5 and this time, A-2 took out the knife and stabbed him on the vital parts of the body. A-2 was armed with a deadly weapon. The accused (A-1 and A-2) were A-5's close associates and assisted him in causing injuries at both the stages. They came together at the spot and fled after the crime together. The fact that they joined hands with A-5 and accompanied him to execute the threat extended by him showed that they all shared common intention to cause such bodily injuries which were sufficient to cause death in the ordinary course of nature. There is no variance between the medical evidence and the ocular evidence. PW-20 (Dr.Komal Singh) who conducted the post-mortem on the dead body of the deceased vide (Ex.PW-20/A) noted the injuries and its impact :

“On external examination there were clean incised wound at the 5th intercoastal space and wound size was 2.7 X 1 cm. There were other three clean incised wound. On internal examination on tracing the no.1 injury which was penetrated the right ventricle of the heart. There was collection of 1.5 ltr. Of clotted and the liquid blood. Over the head there was subarchnaoid and subdural haemorrhage. In my opinion, cause of death was haemorrhagic shock and coma subsequently to the stab injury to the heart and blunt impact over the head. Both the injuries were sufficient to cause death in ordinary course of nature.

All the injuries were ante mortem and were of same duration. Time since death was approximately 15 hours."

35. The post-mortem report reveals that the injury No.1 penetrated the right ventricle of the heart. The cause of death was haemorrhagic shock and coma consequent to the stab injuries to the heart and blunt impact over the head. PW-1 (Baljeet Singh) in his deposition before the Court clearly spoke of these injuries inflicted on the head and chest with the bottle and the knife, respectively.

36. The assailants were known to each other. A-5 at the first instance, of his own, was unable to cause any harm to the deceased and left the spot threatening to 'see' him. Only when the accused joined him and participated in the crime, they in

furtherance of their common intention could inflict bottle blows on the head and stab blow on chest of the deceased. But for the active support of A-1 and A-2, A-5 could not have been able to cause any injury to the deceased. All these facts and circumstances establish beyond doubt that the accused shared common intention to cause the intended injuries sufficient to cause death in the ordinary course of nature. The materials placed by the prosecution, particularly, from the eye witness, the common intention can be inferred among the accused.

37. In the case of 'Mrinal Das and Ors. vs. The State of Tripura'(2011) 9 SCC 479 the Supreme Court held :

XXXX XXXX XXXX

“72. Section 34 IPC reads as under:

“**34. Acts done by several persons in furtherance of common intention.**-When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.”

The reading of the above provision makes it clear that the burden lies on the prosecution to prove that the actual participation of more than one person for commission of criminal act was done in furtherance of common intention at a prior concept. Further, where the evidence did not establish that particular accused has dealt blow the liability would devolve on others also who were involved with common intention and such conviction in those cases are not sustainable.

XXXX XXXX XXXX

74. There is no bar in convicting the accused under substantive section read with Section 34 if the evidence discloses commission of an offence in furtherance of the common intention of them all. It is also settled position that in order to convict a person vicariously liable under Section 34 or Section 149 IPC, it is not necessary to prove that each and every one of them had indulged in overt acts in order to apply Section 34, apart from the fact that there should be two or more accused. Two facts must be established, namely, (a) common intention, (b) participation of

accused in the commission of an offence. It requires a prearranged plan and presupposes prior concept. Therefore, there must be prior meeting of minds. It can also be developed on the spur of the moment but there must be prearrangement or premeditated concept.

XXXX XXXX XXXX

76. We have already pointed out that in order to seek the aid of Section 34 IPC, it is not necessary that individual act of the accused persons has to be proved by the prosecution by direct evidence. Again, as mentioned above, common intention has to be inferred from proved facts and circumstances and once there exists common intention, mere presence of the accused persons among the assailants would be sufficient proof of their participation in the offence. We agree with the conclusion of the High Court that the trial court failed to explain or adduce sufficient reasons as to why the other part of the evidence that the accused persons named by the approver were found present in the place of occurrence could not be believed for the purpose of invoking Section 34 when two or more eyewitnesses corroborated the testimony of the approver (PW 6) specifically naming six accused persons including the two convicted appellants.

77. The existence of common intention amongst the participants in the crime is the essential element for application of Section 34 and it is not necessary that the acts of several persons charged with the commission of an offence jointly must be the same or identically similar. We have already pointed out from the evidence of eyewitnesses as well as the approver (PW 6) that one Uttam Shil (A-8) was deployed at the place of meeting at Santinagar for the purpose of giving intimation to other accused persons about the movement of the deceased. It is also seen from the evidence that one more accused was stationed on the shore of the river near Bagan Bazar. It is also seen from the evidence that after the meeting, when the boat carrying Tapan Chakraborty and other eyewitnesses was about to reach Bagan Bazar shore, accused Anil Das (A-1) who was deployed there suddenly left towards Bagan Bazar and within few minutes 10 accused persons rushed to the boat from Bagan Bazar. Thereafter, the occurrence took place. From the materials placed by the prosecution, particularly, from the eyewitnesses, the common

intention can be inferred among the accused persons including the six persons identified by the eyewitnesses”.

(B) Section 304 part-I or Section 302 :

38. This takes us to the alternative plea taken by the counsel that even assuming the case to be true, the matter would still not within the definition of murder but can be culpable homicide not amounting to murder punishable under Section 304 part-I IPC. On scrutinizing the evidence and considering the circumstances in which the occurrence took place, we find no merit in the plea. A-5 had deliberately brought his two associates at the spot to execute the threat extended to the deceased. All of them, on reaching the spot participated in the crime and facilitated A-5 to cause head injuries with a bottle. The accused did not stop there and when the deceased tried to flee the spot to save his life, A-1 and A-5 caught hold of him, and A-2 stabbed him on his vital organs. The injuries inflicted were so serious that despite being taken to the hospital immediately, he could not survive. The act of goodness of the deceased to rescue a stranger resulted in his death. The repeated injuries at two stages on the vital parts of the body i.e. head and chest ruled out that the accused had no intention to cause such body injuries as were sufficient to cause death in the ordinary course of nature.

39. The law on this aspect has been detailed by the Supreme Court in the judgment ‘Bhagwan Bahadure vs. State of Maharashtra’(2007) 14 SCC 728 where single blow was considered to prove intention to commit murder as under :

“XXXX XXXX XXXX

Keeping the aforesaid legal principles in view, the factual position is to be examined. It cannot be said as a rule of universal application that whenever one blow is given Section 302 IPC is ruled out. It would depend upon the facts of each case. The weapon used, size of weapon, place where the assault took place, background facts leading to the assault, part of the body where the blow was given are some of the factors to be considered.”

40. In another case 'State of Rajasthan vs. Dhool Singh'(2004) 12 SCC 546, Supreme Court observed:

“XXXX XXXX XXXX

13. In regard to the finding of the High Court that the prosecution has not even established that the respondent herein had acted with an intention of causing death of the deceased, we must note that the same is based on the fact that the respondent had dealt a single blow which according to the High Court took the act of the respondent totally outside the scope of Exception I to Section 300 IPC. Here again we cannot agree with the finding of the High Court. The number of injuries is irrelevant. It is not always the determining factor in ascertaining the intention. It is the nature of injury, the part of body where it is caused, the weapon used in causing such injury which are the indicators of the fact whether the respondent caused the death of the deceased with an intention of causing death or not. In the instant case it is true that the respondent had dealt one single blow with a sword which is a sharp-edged weapon measuring about 3 ft in length on a vital part of the body, namely, the neck. This act of the respondent though solitary in number had severed sternocleidal muscle, external jugular vein, internal jugular vein and common carotid artery completely leading to almost instantaneous death. Any reasonable person with any stretch of imagination can come to the conclusion that such injury on such a vital part of the body with a sharp-edged weapon would cause death. Such an injury in our opinion not only exhibits the intention of the attacker in causing the death of the victim but also the knowledge of the attacker as to the likely consequence of such attack which could be none other than causing the death of the victim. The reasoning of the High Court as to the intention and knowledge of the respondent in attacking and causing death of the victim, therefore, is wholly erroneous and cannot be sustained.”

(C) Conclusion :

41. In the light of above discussion, we find no illegality or irregularity in the impugned judgment. The Appeals lack merit and are therefore, dismissed. All the pending applications in the appeals are accordingly disposed of as infructuous.