

(2011) 03 DEL CK 0201

In the Delhi High Court

Case No : Criminal A. 386 of 1997 and 30 of 1998

Anil Kumar Sharma @ Bobby

APPELLANT

Vs

Delhi State/NCT Delhi
 Tika Ram Vs The State (Govt.
of NCT of Delhi)

RESPONDENT

Date of Decision : 07-03-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 162
Penal Code, 1860 (IPC) — Section 300(3), 300(4), 302, 304, 307

Citation : (2011) 3 AD 477 : (2011) CriLJ 2394 : (2011) 6 ILR Delhi 82 : (2012) 3 JCC 1604 : (2011) 2 JCC 1480

Hon'ble Judges : S. Ravindra Bhat, J;G.P. Mittal, J

Bench : Division Bench

Advocate : Bhupesh Narula, Amicus, for the Appellant; Lovkesh Sawhney, APP, for the Respondent

Judgement

S. Ravindra Bhat, J.—In these two appeals, the common judgment and order of the Learned Sessions Judge, dated 18.09.1997, in SC No. 45/96 has been impugned. The Appellants were convicted of the offence punishable under Sections 302/34 IPC, and sentenced to life imprisonment, and fined `2,000/-; in default, directed to undergo RI for six months. They were, however acquitted of the charge u/s 364, IPC.

2. The prosecution had alleged that on the night of 14.07.1994, one Chotu, who was driving tempo No. DBL 2712, went near Roshan Tent House (owned by Roshan Lal, PW-3) at around 9:00 PM, and started urinating by the side of a drum, kept near the tent house. Apparently, one Abdul Salam objected to this; taking offence, Chotu slapped him, and left, threatening to "see" him, later. It was alleged that later, around 3:15 AM, Chotu returned to the spot, with two accomplices, i.e. the two Appellants in this case. It was alleged that the trio attacked Mohammed Moin ("the deceased"). Anil Kumar is alleged to have held the deceased by the mouth, and Tika Ram had caught hold of him. Chotu is alleged to have hit the deceased with an iron rod on the head. When others, i.e.P

Ws-13 and 16 woke up due to the noise, they raised an alarm, at which Chotu and the Appellants are alleged to have fled the spot, in the tempo, i.e. DBL 2712. PW-13 and PW-16 allegedly woke up PW-3; he in turn woke up Sanjay, his son PW-4. The latter two witnesses took the deceased to Safdarjung Hospital. It was alleged that as soon as this information was received, a Diary entry was made by the police (Ex. PW2/A) and sent to SI Subhash Chand. The latter moved an application (marked as Ex. PW-20/A during the trial) to examine the deceased. The doctors allegedly refused, stating that he was unfit to make a statement. Mohd. Moin died later, at about 11 AM, the next morning, i.e 15.07.1994.

3. After considering the postmortem report, and recording the statements of various witnesses, as well as making recoveries of material objects, the police submitted its report, pressing charges against the Appellants and Chotu. The Appellant Anil Kumar was arrested shortly after the death of Mohd. Moin; Tika Ram was arrested on 22.12.1994. Chotu could not be arrested, and was declared an absconder. The Trial Court framed charges under Sections 364 and 302/34 IPC. However, it convicted the Appellants of charges only under Sections 302/34. For its conclusions, the impugned judgment relied mainly on the testimonies of P Ws 13 and 16, as well as PW-3 and PW-4.

4. It is argued on behalf of Anil, the Appellant in Cr. Ap. 30/1998, that the impugned judgment is unsustainable since the Trial Court has drawn erroneous conclusions about the alleged incident. It is contended that PW-13, one of the eyewitnesses, did not assign any specific role to Anil, and even stated that he and Tika Ram were beating the deceased, an allegation falsified by the MLC and the Post Mortem report, which nowhere corroborate that the deceased had suffered any injury other than the solitary one on the head, which proved fatal. This clearly conflicts with the deposition of PW-16. Considering that the witness PW-13 was also an eyewitness, the conflict about the alleged role of Anil, in the whole episode results in undermining the credibility of the prosecution story regarding the nature of the alleged incident, and the assault on the deceased.

5. Mr. Madhav Khurana, Learned amicus for one of the Appellants submitted that apart from the lack of clarity regarding the role attributable to the Appellants Anil and Tika Ram, the prosecution did not even recover the weapon of offence, i.e. Sariya, used to inflict the solitary lethal blow. It was argued that the only armed individual, concededly according to the prosecution allegations, was Chotu; he never did stand trial as he absconded. In the absence of recovery of the murder weapon, and the lack of any motive, on the part of Anil, the impugned judgment erroneously concluded that he was guilty of the offence punishable u/s 302/34 IPC.

6. It is submitted that the entire role of either Appellant is unclear, and the testimonies of the two so called eye witnesses cannot be relied upon to convict him, under Sections 302/34 IPC. In this context, it was submitted that whereas PW-13 says earlier quarrel was between Tika Ram and Salam, PW-16 deposed that the earlier quarrel was between Chotu and Salam. In any case, there was no

enmity between the deceased and any of the Appellants before the Court. This conflict in the two eyewitness versions, is significant, because mere presence of the Appellants, as alleged accomplices of Chotu in the absence of any motive, and the fact that the main assailant did not trial, is insufficient to convince a criminal court to render a finding of guilt on a charge of murder. Similarly, learned Counsel submitted that PW-13 did not furnish any details about the roles attributed to either Appellant, in the alleged assault on the deceased, but merely stated that all the accused were beating him. However, PW-16 stated that Anil was holding him, while Chotu gave the deceased Sariya blows. It was argued that significantly, the Trial Court did not consider that in the previous, police version of PW-16, there was no mention of PW-13; he however, improved on this aspect, in the testimony in court.

7. Learned Counsel relied on *Godhu and Another Vs. State of Rajasthan*, to say that once in respect of the charge u/s 364 IPC, acquittal is recorded, the other facts have to be proved. The Supreme Court had ruled, in the above decision, as follows:

We have given the matter our consideration and are of the opinion that the effect of the acquittal of the two accused for the offence u/s 364 Indian Penal Code is that in arriving at the conclusion whether the accused are guilty of the offence of murder or not, we should proceed upon the assumption that the prosecution allegation that the accused had forcibly taken Gheru inside Banwari's baithak has not been substantiated. The prosecution would have to bring the charge home to the accused independently of that allegation. If, however, the prosecution establishes the charge against the accused independently of that allegation, there would be no legal impediment or infirmity in the conviction of the accused. It needs also to be emphasised that the fact that an allegation has not been substantiated does not necessarily go to show that the allegation is false. An allegation may be correct and still it may not be substantiated at the trial. The effect of the acquittal of the accused u/s 364 Indian Penal Code would only be, as already mentioned earlier, that for the charge of murder the prosecution cannot rely upon the evidence that the deceased was dragged inside Banwari's baithak by the two accused....

Such being the position in law, argued the learned Counsel, the prosecution could not rely on evidence to say that the accused had dragged or restrained the deceased, and was under an obligation to independently establish the role of each Appellant in the killing of the deceased.

8. It was next argued that the charge of common intention to murder the deceased, by invoking Section 34, was not proved in this case, as far as the Appellants were concerned. Both eyewitnesses clearly testified about Chotu's role as the primary aggressor. In view of the conflicting testimonies of P Ws 13 and 16, who did not state a consistent story as regards such involvement, the prosecution was unable to establish common intention. The mere circumstance that they accompanied Chotu could not be held against them, to conclude that

they too had the intention of participating in a murderous assault on the deceased. Reliance was placed on Ram Prasad and Others Vs. The State of U.P., , where it was held that:

Facts 1, 2 and 3 do not establish the sharing of any common intention by the Appellants of committing the murder of Ram Chandra. The knowledge of the Appellants as recorded in fact 4 that the lat his would be fully and effectively used in the process of forcibly occupying the land is not sufficient to establish the common intention of committing a crime punishable u/s 302. This could be a relevant fact if they would have been 5 in number and would have formed an unlawful assembly the common object of which was to forcibly occupy the land. Fact 7 also does not establish any common intention. Facts 5 and 6 are not accurately recorded. On the doctor's evidence Ram Chandra had only 3 injuries - two injuries on the head caused by lat his and only one at the buttock. In such a situation it is difficult to attribute common intention of causing the death of Ram Chandra to Appellants Harbans and Kalwa. There is nothing to indicate that the Appellants had arrived at the scene with a preplanned common intention of causing the death of Ram Chandra. The manner of assault as deposed to by the prosecution witnesses does not necessarily lead to the conclusion that all the four Appellants had developed a common intention at the time of the occurrence. Giving of two lathi blows by the two Appellants who were armed with lat his did not suffice to show the common intention of the other two Appellants....

9. Reliance was next placed on Dajya Moshya Bhil and Others Vs. State of Maharashtra, , where it was held that:

If the three shared the common intention to commit murder of Gunjarya as is now contended obviously Appellants 2 and 3 would not come unarmed. It is admitted by the prosecution that at that time Appellant 1 was armed with a dharya but Appellants 2 and 3 were unarmed. It would be contrary to common sense to hold that Appellants 2 and 3 accompanied Appellant 1 with the avowed object of committing murder of Gunjarya yet came unarmed. Their intention by this very tell-tale circumstance is contra-indicated. Let it be made clear here that in order to attract Section 34 it is not sufficient to prove that each of the participating culprits had the same intention to commit a certain act. What is the requisite ingredient of Section 34 is that each must share the intention of the other. Appellants 2 and 3 though they were in the company of the Appellant 1 were shown to be unarmed. The High Court has overlooked this most important circumstance.

11. The next question is as to what offence Appellants 2 and 3 have committed. Even though they came unarmed when they chased Gunjarya with Appellant 1 who was armed with a dharya a we upon of cutting and pelted stones, an inference of common intention being formed on the spur of the moment can be made. The fact that Appellant 1 was armed with a dharya and Appellants 2 and 3 pelted stones causing injuries may permit an inference that Appellants 2 and 3 could have shared the common intention with Appellant 1 of causing grievous

hurt to deceased Gunjarya. Therefore in the circumstances of this case the minimum common intention that can be attributed to Appellants 2 and 3 is one of causing grievous hurt with a sharp-cutting weapon like a darya. Thus Appellants 2 and 3 are shown to have committed an offence u/s 326 read with Section 34 of the Indian Penal Code and they should be convicted accordingly. In the facts and circumstances of this case each of them must be sentenced to suffer rigorous imprisonment for 3 years.

Similarly, counsel relied on *Ramzan Ali v. King Emperor* 1925 Oudh 322 to say that even if the prosecution is said to establish that in the facts of this case, the Appellants were present, they could not be said to have shared the intention of causing Moin's death, which could have been harboured by Chotu, since he alone was armed with a sariya.

10. It was submitted further, that the prosecution has several infirmities, such as the non examination of Abdul Salam, with whom a quarrel is supposed to have taken place the night previous to the incident, as well as two policemen, i.e. Constables Sunil Kumar (the duty policeman who informed the police station about the admission of deceased to the hospital), Raj Kumar, who is supposed to have delivered a copy of the DD to the IO, and the photographer who allegedly photographed the scene of crime. It was further emphasized that both PW-13 and PW-16 stated that the deceased was wearing a baniyan (vest) at the time of the incident; yet the CFSL report Ex. PW-18/H revealed that a shirt was also sent for blood examination. The prosecution failed to explain how that shirt was recovered, and did not lead any evidence in that regard. Similarly, there were discrepancies in regard to the raid - evident from the testimony of PW-8 who stated that Anil was with the raiding party before the raid, whereas PW-20 stated that he PW-8 joined the raiding party before Anil's arrest. Other discrepancies in the prosecution evidence go to the effect that though PW-14 and PW-20 stated that the rukka was sent to police station to get the case registered, PW-16 stated that no policeman was sent to the Police Station from the hospital. Also, PW-16 stated that no sketch was prepared on the basis of his information, which is contrary to the version of PW-6. The amicus, Mr. Khurana, thus argued that having regard to this state of contradictory evidence, and the absence of the weapon of attack, as well as the assailant, it was unsafe for the Trial Court to have convicted the Appellants Anil Kumar and Tika Ram.

11. Mr. Bhupesh Narula, learned amicus appearing for Anil Kumar, adopted the submissions made on behalf of Tika Ram. He relied on the decision of the Supreme Court reported as *Ramvir and Others Vs. State of U.P.*, to say that in this case, the Appellants could not be fastened with criminal liability for murder, based on their common intention, by application of Section 34, as they were unarmed, and could not be attributed with constructive intention. It was held, by the Supreme Court, in the said decision, that:

18. It was next submitted by the counsel appearing for the Appellants that presence of Appellants 2 and 3 should have been held to be doubtful. It was

submitted by the prosecution that Appellants 2 and 3 caught hold of the deceased Yashpal whereupon Appellant 1 gave a knife-blow to the deceased Yashpal which proved to be fatal. We have analysed the said evidence very carefully and very minutely and also appreciated the contention raised on behalf of the counsel for Appellants 2 and 3.

19. The evidence adduced to establish the guilt of Appellants 2 and 3 are that Appellant 1 had come to the place of occurrence along with a knife in his hand and he came out of nearby bushes whereas the other two accused came from another place. They allegedly came out of the field, caught hold of the deceased and embraced him. If Appellants 2 and 3 were embracing the deceased, a knife-blow could not have been given in that manner by Appellant 1 on the chest of the deceased. It is not stated by the prosecution that the said two Accused 2 and 3 were embracing him from behind. Nature of the evidence adduced and role ascribed to them appear to us to be highly improbable. They are, therefore, entitled to benefit of doubt.

20. The aforesaid attack with the help of the knife pierced through the lung and went through the chest. All the three Appellants are brothers and apparently there was some rivalry between the two groups in the village. Considering the facts and circumstances of the case, we find that the story put up by the prosecution regarding the role of Appellants 2 and 3 is exaggerated and improbable.

21. There is no allegation that these two persons i.e. Appellants 2 and 3 were carrying any weapon in their hands. It is also proved that they were coming to the place of occurrence from another direction. Therefore, the role ascribed to Appellants 2 and 3 is found to be unbelievable. Their presence at the place of occurrence is also doubtful and therefore we extend benefit of doubt so far as Appellants 2 and 3 are concerned.

12. Counsel also relied on the decision reported as Mohd. Sagir v. The State (Cr. A. No. 14/1997, decided on 27/10/2009 by a Division Bench of this Court), to the following effect:

In Ramashish Yadav and Ors. v. State of Bihar 2000 SCC 9 it was observed that the principle of joint liability in doing of a criminal act u/s 34 of IPC is essentially based in the existence of common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. The distinct feature was stated to be the element of participation in action and a pre-arranged plan, which is proved either from conduct or from circumstances or from any incriminating facts. The Supreme Court went on to observe that:

It requires a pre-arranged plan and it presupposes prior concert. Therefore, there must be prior meeting of minds. The prior concert of meeting of minds may be determined from the conduct of the offenders unfolding itself during the course of action and the declaration made by them just before mounting the attack. It can also be developed at the spur of the moment but there must be pre-

arrangement or pre-mediated concert.

14. In the given facts of the case, the accused persons came and caught hold of the deceased where after the other accused came with a gandasa and gave blows with it and the same was held not to form a common intention of all the four accused to cause death of the deceased.

15. We find substance in the plea of the learned Counsel for the Appellant though we have no doubt that there was a common intention formed on the part of the Appellant and Kamruddin when they visited the deceased at 4 A.M. in the morning and the Appellant caught hold of the feet of the deceased while Kamruddin hit him with a hard object like a wooden paya of a cot. The question however remains what was this common intention?

16. In our considered view, from the testimony of the witnesses, we cannot come to the conclusion that the Appellant and Kamruddin shared a common intention to cause death of the deceased.

17. The role assigned to the Appellant is that he held the feet of the deceased while his co-accused Kamruddin hit the deceased with a rod or a "paya". In the absence of user of a dangerous weapon like knife, pistol or a katta etc., which would normally be used in such a situation where there is an intention to cause death of a person, at best what can be inferred from the evidence is that the Appellant shared a common intention with his co-accused Kamruddin to cause grievous injury to the deceased.

13. Mr. Narula also relied on the judgment of the Supreme Court, reported as Balbir Singh, etc. Vs. State of Punjab, etc., , and Badruddin Vs. State of Uttar Pradesh, to the same effect. In Balbir Singh, it was observed that:

8. Coming to the nature of the offence committed by the Appellants, there is evidence to the effect that the Appellants only wanted to teach a lesson to Tara Singh. They were aggrieved by the fact that deceased Tara Singh had purchased the agricultural land which they expected to get from Gurdial Kaur. Two of the assailants were armed with axes, but they did not use the sharp edge of those weapons and the injuries sustained by deceased Tara Singh would show that there were no deep penetrating injuries.... Appellants Gora Singh and Balbir Singh are not alleged to have caused any fatal injury to the deceased Tara Singh. Gora Singh, though armed with a "kulhari" (axe), used the blunt portion of that axe. Sikandar Singh was armed with a "sotti" (wooden stick). He caught hold of deceased Tara Singh to enable the other assailants to cause injury to him and Sikandar Singh himself gave sotti-blows on the back of the deceased which resulted in causing fracture of the ribs and, in turn, piercing of the lung tissues of the deceased Tara Singh. There is no dispute that these injuries were caused on Tara Singh. It is clear that Sikandar Singh dealt the fatal blows which ultimately resulted in the death of the deceased. If the entire prosecution evidence is considered in the background of the so-called motive alleged, it is very difficult to discern that these Appellants had any common intention to cause the death of

the deceased. The sotti-blows dealt on the back of deceased Tara Singh proved fatal causing fracture of ribs which pierced his lung tissues.

9. On careful analysis of the prosecution evidence and the role played by each one of the Appellants, we are of the view that the evidence does not show that these Appellants shared a common intention to cause the death of the deceased. However, Appellant Sikandar Singh caused injuries on deceased Tara Singh which proved to be fatal at the end. The act committed by Sikandar Singh would come within the offence punishable u/s 304 Part I IPC as he could be attributed with the knowledge that the injury caused by him is likely to cause death. The grievous injuries caused by other Appellants, namely, Gora Singh and Balbir Singh, would fall within the mischief of Section 326 IPC.

Similarly, in Badruddin it was held that:

4. The High Court noted that the relations between the deceased and the others were strained on account of a dispute with regard to "sahan" (open yard) of the Mosque of Shah Bhukhari and that after Friday's prayer, there was some altercation between the two groups; the one consisting of the said four persons and the other consisting of the deceased and PW 1. Thereafter, the Appellant and the said three persons came armed with a knife and lat his, as noted above, surrounded the deceased near his door while Nizamuddin dealt blows to him with a knife, Siddiqui beat him with lathi. P Ws 3 and 5 stated that the Appellant, Hafiz and Siddiqui inflicted blows on the said three eyewitnesses with lat his. From the above facts, it is difficult to sustain the conclusion that there was common intention between the Appellant and other persons to kill the deceased. Though establishing common intention is a difficult task for the prosecution, yet, however difficult it may be, the prosecution has to establish by evidence, whether direct or circumstantial, that there was a plan or meeting of mind of all the assailants to commit the offence, be it prearranged or on the spur of the moment but it must necessarily be before the commission of the crime. Where direct evidence is not available, it has to be inferred from the circumstantial evidence. In the instant case, it is stated that the deceased alone was assaulted by Nizamuddin with a knife and Siddiqui with a lathi. The Appellant dealt blows with a lathi not to the deceased but to other witnesses. There is no direct evidence of common intention. There is no case nor evidence of exhortation by him or of the fact that with a view to keep the said witnesses away from interfering and to facilitate Nizamuddin to kill the deceased, the Appellant assaulted the said witnesses. Having regard to the facts and circumstances of the case, it is not possible to arrive at the conclusion that the Appellant and others shared common intention to kill the deceased Shaukat Ali. Consequently, we are unable to sustain the conviction of the Appellant for the offence under Sections 302/34 IPC. However, on the facts, we confirm the conviction and sentence under Sections 323/34 IPC awarded by the courts below. As the Appellant has already served out the sentence for the offence convicted, therefore, he is directed to be released forthwith unless he is required to be detained in any other case. The appeal is

accordingly allowed....

It is submitted that the prosecution has not proved that Anil had gone to the spot, at the relevant time, along with the other accused and the prosecution has also not proved the recovery of tempo and Anil Kumar's arrest. In the circumstances, his conviction is unsustainable, and has to be set aside.

14. Mr. Lovkesh Sawnheny, the learned APP, submitted that the testimonies of the two eyewitnesses showed that the deceased was sleeping when he was attacked by the accused; and at that time three persons came to the site. One was armed with a Sariya. That indicated preparedness. Though the two eyewitnesses did not attribute any overt attack to the two Appellants before the court, yet their action in restraining the victim and gagging him, shows intention to fatally injure a helpless target. Here, stressed the APP, premeditation implied the element of surprise, due to night attack, to eliminate resistance. The Appellants were aware that their co-accused was armed with a Sariya, with the necessary intention to launch a murderous assault. Further, there was a single blow, which was lethal, and was inflicted on a vital part of the victim's body. All these disclosed a planned and calculated attack. The Appellants Anil Kumar and Tika Ram went together with this intention, with Chotu; in the dead of the night. They had seen the Sariya; therefore, submitted the APP, it was idle for them to argue or fall back on ignorance about the true intent of the assaulter, who inflicted the lethal blow.

15. It was argued next that the definition of "Murder" in Section 300 (3) and (4) aptly describe the facts of the present case, and the mental status of the Appellants. The said provisions read as follows:

300 MURDER.

(1) Except in the cases hereinafter excepted, culpable homicide is murder...

(3) If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or (4) If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid...:

The APP argued that when the Appellants accompanied Chotu, they had seen the Sariya. This showed their awareness. The deadly nature of the weapon, eliminates any intention other than the one to kill. It was further contended that the circumstances in this case disclose the common intention of all the accused, who went armed to the deceased. The time, 3:15 AM was crucial, as it was the time to catch someone sleeping and defenseless. In these circumstances, knowledge and intention to kill Moin had to be imputed to the accused Appellants.

16. It was urged that PW13 and PW16 were natural witnesses; they informed the owner of the tent shop, PW-3 and his son, PW-4. The removal of the injured to hospital, and recording of statement by police, indicate an integrally connected chain of events. The timing of the rukka indicated that there was no scope of maneuvering, or cooking up a story. The assault took place at about 3:15 AM or so, and the injured was rushed immediately to the hospital. There, the rukka was prepared, and sent at 4:40 AM. In the circumstances, the testimonies of PW-13 and PW-16 about Chotu carrying the we apon as well as presence of the two Appellants, is credible. The nature of we apon used, is corroborated by medical evidence. In addition to the fatal blow, there are bruises in the eye of the deceased. It was lastly urged that the court cannot be swayed by minor discrepancies in the testimonies of witnesses, particularly if they had seen the incident, and that motive (or the lack of it) in such cases, assumes a secondary position. The APP argued that the shirt recovered and sent to CFSL, was not used as a circumstance by the trial judge, to convict the Appellants.

17. In this case, the post-mortem report (PW-9/A) discloses the following injuries, on the deceased's person, and their cause:

The following external injuries were found on the dead body:

1. Right eye was black 2. lacerated wound of size 4x 0.2 x 1 cm present on the interior part in the midline on top of head. It is anteroposteriorly placed. Its interior end was 10 cm above the bridge of nose.

The following internal injuries were found on the dead body:

1. Effusiol on blood was found in the interior half of the scalp. Suture separation fracture was present in the coronal suture. It is present throughout its length. Thick subdural, haematoma was present all over cerebral hemisphere.

2. Contusion haemotoma was present on the outer surface of right temporal lobe. Brain stem haemorrhage was present. Weight was 1450 gm, oedematus.

Time since death was about 22 hours. The cause of death was head injury following blunt force impact. Injury No. 2 was sufficient to cause death in the ordinary course of nature. Blood/blood gauze/ clothes were sealed and handed over to the police.

18. In the present case, the main witnesses relied on by the prosecution and the Trial Court are PW-13 and PW-16. PW-13, Mohd. Manzoor deposed that at about 3.50 he was woken up by some noise and he saw that Tika Ram, Anil Kumar and Chotu were beating the deceased (Mohd. Moin). He raised an alarm and these three fled in tempo No. 2712. Tarbaz (PW-16) went and woke up Sanjay (son of the owner) and he, alongwith Tarbaz and Roshan Lal (owner of tent house) took deceased to the hospital. He went to the hospital later on and then came back to the spot with the police. He says that earlier Tika Ram had quarrelled with another tent house worker, i.e Salam. On cross examination he said that there were 10-20 other tent house employees, sleeping on the road. He claimed to be

employed in Roshan Tent House since 1984, and also deposed that PW16 and Salam were working in that tent house for about 7-8 years prior to the day of the incident. He claimed to know accused Anil Kumar, since he had worked in Roshan Tent House for 2 years but did not know about Tika Ram and Chotu's employment. According to him the distance between where he was sleeping and the place of occurrence was 30 meters. He did not know, from which portion of the body Moin was bleeding but knew there was swelling in his eye. . He reached the hospital at about 4 AM. The Police had recorded his statement at Roshan Tent House at about 7 AM on the day of the incident. The Police met him in the hospital at about 3.15 AM and he was there for about one hour and then from there went to the house of accused Anil Kumar with two police officials.

19. PW-16 Tabrez deposed that on 14.07.94 at about 9 PM Chotu Ram came in Tempo No. DBL 2712 and started urinating in front of the Tent house, which was objected to, by Salam. Chotu slapped Salam and threatened him that he would "see" him later on. Then at around 3.15 AM he heard some noise and woke up and saw that Anil Kumar had pressed the mouth of deceased and Tika Ram had caught hold of Moin (the deceased) and Chotu gave a blow on the head of deceased (with an iron rod) and hit him other parts of the body as well. He raised an alarm at which the accused fled from the spot in Tempo No. DBL 2712. As per his statement Manzoor too (PW13) woke up. He then went and woke up the owner and his son and they took the deceased to Safdarjung Hospital. Police officials came to the hospital and recorded his statement and later he, along with the police went to the spot. The police seized a blood stained road metal, sample road metal and shirt. At about 2:45PM two police officials came and informed, that accused Anil Kumar was in his house and therefore they went there. Anil Kumar was arrested and his personal search memo was drawn in his presence. PW-16 says that he had been working at the Tent House for the past one year and that Manzoor was working prior to that. The deceased had joined work about two months prior to him. On cross-examination he said that Manzoor was sleeping in a Tempo and that the place of incidence was about 10 paces from where he was sleeping. He deposes that police officials had come along with him to the spot at about 7 AM and stated that no police official was sent to the police station from the hospital. He went on to say that he had mentioned to the police about the shirt that was found at the spot was the one that Anil Kumar had pressed the mouth of the deceased with. However in the cross-examination, he admitted that in the previous statement at Ex.PW16/A, there was no mention of such detail. He said that the deceased was unconscious and bleeding a lot from his head. He states that when the shirt was seized from the spot there were some members of the public present, none of whom were joined at the time of seizure of the shirt or at the time of arrest of the accused Anil Kumar.

20. PW 20 Subhash Chander, deposed to, on receiving DD No. 20 A, going, along with Const. Ram Dutt, to Safdarjung Hospital. He was not permitted to record statement of Moin as doctors said he was not fit to give statement. He recorded the statements of PW 3, PW 4, PW 13, and PW 16 at the Hospital. He then sent

the rukka through a constable to get the case registered. Then later, he, along with Constable Ram Dutt and PW 4 and PW 16 came to the spot and got the scene photographed. He prepared the site plan at the pointing out of PW 16. He also seized from the spot, blood stained road metal, sample road metal and one shirt found lying at the spot Ex. P-1 through Memo Ex. PW4/C. He then formed a raiding party in which Rajeev (PW8) also joined, and went to accused Anil's house and arrested him. Thereafter, on the pointing out of Anil, Tempo No. 2712 was seized from behind the NDSE-I petrol pump. Further, in cross-examination he stated that accused Anil was arrested at the pointing out of PW-16. He further deposed that PW-16 had not disclosed that Anil had thrown a shirt at the spot and neither had he disclosed the colour or the description of the shirt seized from the spot. He said that no witness had mentioned to him about Tika Ram wearing a shirt. He agreed that no public person was asked to join, (even though some were present) when the shirt was seized.

21. PW-3 Roshan, the tent owner where PW-13 and PW-16 worked, corroborated their versions, to the extent of being woken up after the assault on the deceased; he deposed to having been informed about the attack, and having taken the deceased, in an injured condition, to the Safdarjung hospital, in the early hours of the morning, along with his son, Sanjay (PW-4). PW-4 Sanjay supported the deposition of his father about the details of the attack, learnt by both of them, from their employees, and having taken the injured to the hospital. He also supported the prosecution story about recoveries made. Both PW-3 and PW-4 mentioned that Anil Kumar had worked with them for some time earlier; they were able to identify him.

22. From the above discussion, it is apparent that the deceased was attacked at about 3-15 AM in the night intervening 14/15.07.1994. The prosecution had urged that there was some petty quarrel, the cause of which was Chotu, (who was driving tempo No. DBL 2712) going near Roshan Tent House (owned by Roshan Lal, PW-3) at around 9:00 PM, and urinating nearby. It was alleged that one Abdul Salam objected to this. Chotu took offence, slapped him, and left the place threatening to "see" him (cause Salam harm), later. According to PW-13, the deceased was beaten by Chotu, Anil Kumar and Tika Ram. PW-16 stated that Anil Kumar held the deceased by the mouth, whereas Tika Ram restrained his hand, and Chotu attacked him with a Sariya. PW-13 witnessed the incident from a Tempo, in which he had been sleeping, and woke up at the commotion, and from a distance of about 30 meters from the spot. PW-16 claims to have witnessed the incident about 20 paces from the place of occurrence. No doubt, PW-16 did not mention about the presence of PW-13 in the statement u/s 161 Code of Criminal Procedure recorded by the police. However, what is common in the depositions of the two witnesses is that they identified both the Appellants, whom they knew. No suggestion was put to them about adequacy or otherwise of light or conditions of visibility, which means that there is no dispute that they could have seen and identified the attackers at that hour. Furthermore, a reading of the rukka, which records the earliest version, discloses that it was dispatched

at 4:40 AM. It corroborates the time of attack, by showing it to be 3:15 AM. Initially, the police had registered a case u/s 307 IPC; Moin's statement was sought to be recorded. However, the doctor attending him at the time, declined permission, as he was medically unfit to make a statement. The statement of PW-16 was recorded then. In material particulars, what was recorded then was deposed to by him. No doubt, in that statement, PW-16 did not mention about the rukka being sent to the police station. However, in the circumstances, that is an inconsequential detail, since such witnesses may not be expected, normally to notice or discern such minute facts.

23. PW-16 does not mention, in his deposition, about the presence of PW-13. Now, although a sketch PW-20/D was sought to be placed on record, and deposed as having been prepared by PW-20 after consultation with PW-16 (according to the document, on 15.07.1994), PW-16 contradicted that version and stated that a sketch was prepared with his assistance by a draftsman about 2-3 months after the incident. If that is correct, PW-20/D has no evidentiary value, as it is hit by Section 162, Cr. PC. Such a plan or site map drawn to the scale is admissible only if the witnesses corroborate the draftsman's statement that they showed him the places. (Ref. *Tori Singh v. State of UP* 1962 (1) Cri LJ 469; *State of Himachal Pradesh Vs. Prem Chand*, ; and *Jagdish Narain and another Vs. State of U.P.*,). Therefore, it is unclear where PW-13 was sleeping, and whether PW-16 could spot him at the time when he saw the deceased being attacked.

24. As regards the contradictions sought to be made out by the Appellants counsel regarding the recoveries, or the place and time of Anil's arrest the identity of the shirt, and so on, are concerned, they cannot be termed major discrepancies which can amount to reasonable doubts about the prosecution version regarding the presence and identity of the Appellants. Therefore, there cannot be any doubt about the presence and due identification of the Appellants in the assault upon the deceased Moin, by Chotu.

25. It would now be necessary to consider whether the prosecution, which has successfully proved the presence and identity of the Appellants before the court, was able to prove that they had the common intention with the aggressor, so as to be criminally responsible for murder. Here, the contradictions between the versions of PW-13 and PW-16 become important. It is clear enough from PW-16's evidence that none of the Appellants before the court were armed. They were accomplices, alleges the prosecution, which also points out at Section 300(4) IPC, stressing that they had accompanied one armed with a deadly weapon, which could have been used only for one purpose, in the dead of the night. While that contention sounds attractive, the court is also mindful that in order to attract criminal responsibility, mere presence of the co-accused is not always sufficient. Section 34 IPC, in cases involving single blow by an accused, to fasten guilt for murder on co-accused, has engaged the attention of courts on several occasions. While there is no universally acceptable formula that in such

instances, the intention to cause death cannot be attributed to such non-participating co-accused, at the same time, courts have to recognize the need to exercise caution.

26. The rationale for fixing joint responsibility on a co-accused who does not participate in the actual attack, but might play a covert role, or might even be a mere by stander, was explained by the Supreme Court, in the following words, in *Ramesh Singh v. State of MP* 2004 (110) Cri. LJ. 3354:

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

27. In this case, the Appellants have relied on several judgments of the Supreme Court, and of this Court, to contend that even if they were present, their common intention to kill the deceased could not be proved beyond reasonable doubt. The authorities cited by them undoubtedly support such a proposition. Similarly, in *Smt. Tripta Vs. State of Haryana*,] the deceased died after some time of the attack. A lacerated wound on the left side of scalp was found. The Appellant went to him (the deceased) to question as to why he had transferred his lands. It was held that the deceased's response must have irked her, and the main accused started assaulting him (the deceased). Having regard to the role played by the Appellant, it was held that no case u/s 302/34 was made out as she had no role to play in causing injuries to other persons present there, although the main accused had assaulted them. In *Kishori Lal Vs. Sales Officer*,

District Land Development Bank and Others, , where the accused, one of the four assailants of the deceased, had hit him on the leg, and one of the others had inflicted a single fatal blow on the head, as in the present case, the Supreme Court held that common intention to cause injury of the kind punishable u/s 304 Part I had been proved. Likewise, in *Raju Trambak Magare and Others and Laxman Kautik Soyanke Vs. State of Maharashtra*, two important facts which weighed with the court in concluding that the two Appellants before the Supreme Court did not share the common intention of the assailants, to kill the deceased, was that though their role in dragging him (deceased) was established, it was unclear from the evidence how they beat him, and further that they were unarmed, and could not have known that the other two accused would have inflicted fatal injuries which caused death. In *Dajya Moshya Bhil (supra)* the Supreme Court refused to uphold a conviction u/s 302, by attributing common intention, and found that their presence in the scene of crime was established, but their being unarmed, and no proof having been led about the injuries inflicted upon the deceased, and lastly, the absence of motive or common intention, (because of their absence at the time, in relation to an insult, which was allegedly given to the principal accused) resulted in their diminished criminal liability. The conviction was therefore, altered from Section 302 to 326, IPC.

28. In the present case, the Appellants presence has been proved. Equally, the fact that PW-13 and PW-16 knew them has been established. However, none of these witnesses deposed that either of the Appellants were armed. The quarrel alluded to by the prosecution witnesses was a trivial one, and crucially, the Appellants were not present when it took place. Puzzlingly, Salam, with whom the main assailant (Chotu) quarrelled, was not examined. He was not at the spot of occurrence; his connection or relationship with the deceased, has not been proved. All that has come on record is that Tika Ram was known to Chotu. Now, if the prosecution version's is to be accepted that the two Appellants had known that Chotu was armed with a deadly we apon, i.e a Sariya, one could have understood the intention if the we apon had been described, since concededly it has not been produced. PW-16's description about the role played by each Appellant is not too clear. Anil, he says, held the deceased by the mouth; and Tika Ram held his hands. The deposition suggests that one held him from the front, while the other held him from the back, and further that Chotu inflicted the injuries on the face and head. If this is an accurate description, either the assailant must have faced the deceased directly, or inflicted the blows, sideways. In either case, he would have taken care to land the blows with some precision, since one of the accomplices was holding the lower part of the deceased's face. That would, in turn imply, that the accused was either accurate or that the we apon was a small and compact one, or both. Now in the state of all these uncertainties as to the role played by each of the Appellant, it would not be possible to discern a common intention to cause death of the deceased Moin. Their presence is undeniable; under the circumstance, it can be inferred that they shared the intention with the co-accused, to cause injury enough to subdue

or "take care" of Moin. Under the circumstances, they can be attributed with the intention of causing bodily injury as was likely to cause death, amounting to an offence punishable u/s 304 Part I.

29. In view of the above findings, the two appeals, CrI. A. No. 386/1997 and CrI.A. No. 30/1998 are partly allowed; the Appellants' conviction u/s 302/34 is altered to one u/s 304 Part I, read with Section 34. The Appellants shall undergo rigorous imprisonment for 7 years; the sentence of fine, is, however not disturbed.

30. The Appellants shall appear before the trial Court after two weeks on 22.03.2011 and continue remainder of sentence, if any.