

**(2012) 03 DEL CK 0100**

**In the Delhi High Court**

**Case No : Criminal Appeal No. 94 of 2011**

Gomati @ Manoj

APPELLANT

Vs

State (Govt. of NCT) of Delhi

RESPONDENT

**Date of Decision : 20-03-2012**

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 161  
Penal Code, 1860 (IPC) — Section 302, 34, 35, 38, 394

**Citation :** (2012) 3 AD 612 : (2012) 130 DRJ 46

**Hon'ble Judges :** S.P. Garg, J;S. Ravindra Bhat, J

**Bench :** Division Bench

**Advocate :** Anita Abraham in Crl.A. No. 94/2011, Mr. V.P. Singh Charak in Crl.A. No. 783/2011 and Ms. Nandita Rao in Crl.A. 6/2012 and Crl.M.B. 12/2012, for the Appellant; Richa Kapoor, APP for the State in Crl.A. No. 94, 783/2011 and Crl.A. 6/2012 and Crl.M.B. 12/2012, for the Respondent

## Judgement

Mr. Justice S. Ravindra Bhat

1. This judgment will dispose of three appeals, directed against a common judgment and order of the Additional Sessions Judge, Delhi, dated 26.04.2010, in SC No. 135/2007. The appellants were convicted of the offences punishable u/s 394/397/302/34 IPC. For the offence u/s 394 read with Section 397/34 IPC the appellants were sentenced to undergo rigorous imprisonment for 10 years and to pay a fine of Rs. 1000/- in default of which they were to further undergo simple imprisonment for 1 month. For the offence u/s 302/34 IPC the appellants were sentenced to undergo imprisonment for life along with a fine of Rs. 1000/-, in default of which they were to further undergo simple imprisonment for 1 month each.

2. The case of the prosecution in brief is that on the night of 29.01.2005 PW-6 Mahesh Chander Shukla and his brother (the deceased) left their house on a cycle to go to the bus stand as PW-6 had to catch a train to his native place. At about 09:40 PM they were stopped and robbed of about Rs. 4200/- by three

boys near Mahalaxmi Property at Rani Khera, Madanpur Road; all three were armed with knives. Further as per the prosecution story the three boys stabbed PW-6's brother when he tried to run away. The three boys injured the deceased and then escaped. PW-6 went to village Rani Khera to get help for his brother on his bicycle and returned to the spot with Ajay (PW-1) and Ravinder (PW-2); the three of them took the deceased to the hospital where he was declared brought dead. PW-17 Inspector Dharam Pal, IO of the case, who was patrolling the area received a wireless call (D.D. No. 53-B; Ex. PW-10/A) regarding a stabbing incident in Rani Khera area. He and his team reached the spot where he was told that the injured had been removed to SGM hospital. He, along with his staff reached the hospital where he met PW-6, the eye-witness to the incident. PW-17 recorded the eye-witness account and prepared a rukka and sent it for registration of the case through Constable Dalbir. FIR No. 41 of 2005 was registered at PS Kanjhautar on 30.01.2005 at about 12:25 AM.

3. On 04.02.2005 the three accused Gomati, Deepak and Dharambir were arrested by the IO. On 15.02.2005 the TIP of the three accused was conducted at Tihar Jail; PW-6 correctly identified accused Gomati and accused Deepak; however accused Dharambir refused to participate in the TIP. The IO completed the investigation and filed a charge sheet. A charge u/s 394/397/302/34 IPC was framed; the accused pleaded not guilty and claimed a trial.

4. During the course of trial, the prosecution examined 17 witnesses. The testimonies of PW-6 and 17 are material to the case and shall be examined in detail. The testimony of PW-6 Mahesh Chand, elder brother of the deceased, is vital to the prosecution case as he is the only eye-witness to the incident. After considering these, and the other materials on record, the Trial Court concluded that the appellants' guilt had been established beyond reasonable doubt; they were convicted for the offences, and sentenced in the manner, described earlier in this judgment.

5. Counsel for the appellants submitted that it was late in the night and it was dark at the place of the incident. Therefore it was not possible for PW-6 to correctly identify the accused. PW-6 in his cross-examination admitted that as there were fields on both sides of the road there was total darkness. Counsel further submitted that it is highly unlikely that the three accused persons would give stab injuries to his brother and not cause a single injury to PW-6. The appellants stopped PW-6 and the deceased and committed robbery. However the suitcase which was lying on the bicycle was not touched by the appellants; the entire sequence therefore was unlikely.

6. It was urged that the story of PW-6 was utterly unbelievable, because the materials on record proved that he was disabled; his brother was riding the bicycle. The prosecution did not recover it; moreover, the witnesses' version was improbable, because had both of them in fact gone to their native place, as originally planned, the question would have been what would then have been done with the cycle. Counsel argued that the entire story was cooked up to

manipulate the role of the accused, and falsely implicate them.

7. It was argued that even the photographs taken at the spot, after the police allegedly reached there, read along with the sketch map, would show that there was no source of light, concededly the witness was in an open area. In these circumstances, the witness had to spell out how he could discern the identities of three individuals whom he could see fleetingly. This improbability cast doubts and suspicions about the veracity of the prosecution story, which the Trial Court lost sight of in the impugned judgment.

8. It was argued that PW-6's evidence is untrustworthy, because in the statement recorded u/s 161, Cr. PC he said that there were three assailants, two of whom were armed with knives, whereas in the deposition, he improved and said that all the assailants attacked his brother with knives. Furthermore, argued counsel the recovery of Rs. 300/- Rs. 400/- and Rs. 500/- from each accused was blatantly improbable. Similarly, the prosecution's story that the purse belonged to the deceased, could not be believed, as there was no Test Identification Parade of that article. Counsel submitted that the improvement made by PW-6 could be further seen by the fact that he was specifically confronted on whether the accused had said "rooko" and asked the witness and the deceased to stop, and then proceeded to attack them.

9. Learned Counsel submitted that the TIP of the accused was conducted after considerable time of their arrest, i.e. about 10 days later. In this connection, it was pointed out that the accused were all arrested on 04.02.2005, whereas the TIP was conducted on 15th February, 2005. The prosecution was unable to explain the delay and on the other hand, the deposition of PW-6 also showed that he had been called to the police station, before the TIP proceeding. In these circumstances, the TIP and so-called identification of some of the accused by the witness was suspect, particularly, when he did not describe any of them in any specific manner.

10. The Learned APP submitted that the prosecution has proved the guilt of the accused persons beyond reasonable doubt. The testimony of PW-6, brother of the deceased, and the only eye-witness to the incident clearly establishes the guilt of the accused persons. PW-6 correctly identified accused Gomati and accused Deepak in the TIP proceedings (Ex. PW-6/E and Ex. PW-14/A) conducted by the Ld.MM at Tihar Jail. PW-14, Ms. Archana Sinha, Ld. MM in her deposition has stated that PW-6 was able to identify accused Gomati and accused Deepak in the TIP proceedings. Therefore there is no doubt as to the identity of the accused persons. Accused Dharambir refused to participate in the TIP and therefore an adverse inference had to be drawn. PW-6 in his deposition has stated that the three accused persons stabbed his brother and ran away. The testimony of PW-6 remained unshaken and there are no material discrepancies in his testimony and therefore there is no reason to disbelieve the eye-witness account.

11. The Learned APP further submitted that PW-6's testimony stood

corroborated by PW-1 Ajay Kumar and PW-2 Ravinder. PW-1 deposed that on 29.01.2005 PW-6 came to him and told him that on the way to Mubarkpur bus stand, some boys robbed him and his brother and caused injuries to his brother. As there was no vehicle available, he requested PW-1 to go to the spot and take him and his brother to the hospital. PW-1 further deposed that he took his car and reached the spot with Ravinder (PW-2) and took PW-6 and the deceased to SGM hospital. PW-2 Ravinder, who had accompanied PW-1 and PW-6 to the hospital also corroborated PW-1's testimony. Therefore, submitted the APP, the presence of PW-6 at the spot at the time of the incident is supported by PW-1 and 2's testimony.

12. It was argued that the submissions made on behalf of the appellant about the inadequacy of light, etc cannot shake the essential fact that PW-6 had witnessed the incident, and was in a position to make out who had participated in the attack. It was submitted that though the fields were dark, the sketch proved during the trial showed that there was sufficient light for the witness to clearly see who did what, and that formed the basis of his deposition. Being the brother of the deceased, who was at the spot, he had formed a vivid impression about the participation of, and role played by each accused. He stuck to his version recorded during the investigation. As far as TIP was concerned, submitted the counsel, what is material is dock identification; during the trial, all the accused were clearly identified by PW-6. In these circumstances, the Trial Court's reasoning was sound, and did not call for any interference.

13. The sole eyewitness in this case, PW-6 deposed that on 29.01.2005 at about 09:30 PM he and his brother (the deceased) left their house on a cycle as he had to catch a train to his native place. At about 09:40 PM when they reached near Mahalaxmi Property at Rani Khera, Madanpur Road, three boys came in front of them (running from the side of the road) and shouted "roko-roko"; all three of them took out a dagger type knife and told them to take out everything they had. He further deposed that due to fear he gave Rs. 4200/- to one boy and the other boy took out his tambakoo puria and Rs. 15/-. The three boys asked his brother to give them whatever he had with him; due to fear his brother (the deceased) ran away from the spot; two boys followed his brother and caught hold of him at some distance in a vacant plot. The third boy was searching him (PW-6) and after that, he too went to where the other two boys were and all the three boys gave stab blows to his brother. PW-6 stated that when he reached the spot, the third boy was taking out some papers and money out of his brother's purse.

14. PW-6 correctly identified the three accused persons as the same persons who robbed them and killed his brother (the deceased). PW-6 pointed towards accused Dharamvir and identified him as the person who had taken money from him while the remaining two boys were standing with dagger type knives in their hands. He then pointed towards accused Dharamvir and Gomti and identified them as the same persons who followed his brother and gave him stab injuries.

He also pointed towards accused Deepak and identified him as the person who searched him and took his jarda puria, Rs. 15/- and who reached the place where his brother was stabbed; he took out some documents and money from his brother's purse as well. PW-6 stated that after the incident all three accused persons escaped from the spot. Blood was oozing out from the injuries inflicted on his brother and as there were no vehicles passing through the road, he left his brother and the public persons who had gathered at the spot and went to village Rani Khera. At the village he told Ajay Kumar (son of his landlord) and one other person from the neighborhood about the incident and they accompanied him to the spot in his landlord's car. He further deposed that they then took his brother to SGM hospital where his brother was declared dead. He further deposed that someone informed the police and the IO reached the hospital and recorded his statement Ex. PW-6/A. He identified the dead body of his brother Ex. PW-6/B. He pointed out the place of occurrence to the IO; the site plan was prepared on his pointing out in the night intervening 29/30.01.2005. The IO lifted the blood stained earth, earth control from the spot and sealed and seized it by Ex. PW-6/C. He further deposed that his blood stained Kurta was also seized by the IO by seizure memo Ex. PW-6/D.

15. He testified that on 15.02.2005 he went to Tihar Jail to participate in the TIP of the accused persons and he correctly identified accused Gomti and accused Deepak and signed the proceedings conducted by the Ld. MM; Ex. PW-6/E and Ex. PW-14/A.

16. In his cross-examination, PW-6 deposed that on the day of the incident, they left their house at about 09:30 PM as he had to catch a train to go to Kanpur; he had his luggage with him. He stated that he had to board the Shram Shakti Express and that he was sitting on the carrier of the bicycle with his luggage; the bag remained on the bicycle at the time of the incident. He admitted that his statement was recorded in the hospital and that he was called by the police on 15.02.2005; he had not gone to the police station prior to 15.02.2005. He admitted that he had not been called by the police to identify the persons at the PS. He was told that the assailants were apprehended and that he had to go to Tihar Jail for identification. He denied that the accused persons had been shown to him at the PS or that the photographs of the accused persons were shown to him before the TIP. He could not remember whether he had given the description of the assailants in his statement to the police. He denied that he had not given the description of the assailants due to darkness. He further stated that his statement was recorded on 15.02.2005 and 03.03.2005. He denied the suggestion that the accused persons were shown to him on 04.02.2005 when the place of incident was pointed out by the accused persons. PW-6 further stated that he had not used his lathi to rescue his brother as it was dark and he (PW-6) had fallen on the ground. He further stated that the distance between the place where his money was taken and the place where his brother was stabbed was about 15 meters. He stated that his lathi had fallen there but he went to save his brother while lingering on one leg. He said it was incorrect to suggest that the

accused persons had escaped before he came to rescue his brother; accused persons had stabbed his brother 3-4 times. He stated that he went to his village on the bicycle. He further stated that it is incorrect to suggest that he was not present at the spot at the time of the incident. He admitted that the accused persons did not inflict any injuries on him. He further stated that there are fields on both sides of the road and at that time there was total darkness. He further stated that his bicycle was not seized by the police. He denied the suggestion that he had been informed by some people that his brother had been stabbed and thereafter he took his brother to the hospital. He further denied the suggestion that the accused persons were shown to him before carrying on TIP of the accused. He admitted that he had not got the berth reserved in the train.

17. Now, what can be seen from the testimony of PW-6 is that while he is consistent with the basic framework of the version he recorded about the attack-which is the first intimation to the police and also the FIR (Ex. PW-6/A and Ex. PW-3/A) there are important variations. One is that in the earlier statement, he mentioned that two accused were armed with shiny sharp weapons; however, in the deposition recorded during trial, he seemed to suggest that all accused were armed. Similarly, he did not attribute an identical role to all the accused. He stated, after mentioning about the chase given to his brother, and the latter being stabbed that:

the remaining third boy was taking my search and after taking my search, the third boy also followed the other two and reached there and he also accompanied the other two and all the three boys gave stab blows on the person of my brother....At this stage, witness has pointed out towards accused Dharamvir, who took out the money from him and remaining two boys were standing along with their respective weapons ie dagger typed knife in their hands...The witness has also correctly identified accused Deepak who had taken my personal search and he took out my jarda puriya and Rs. 15/- and after that he also reached at the place where my brother was stabbed. Later on he also took out the purse of my brother Ram Chander containing some papers and money...

18. It is clear that PW-6 initially said that amongst the three accused, two were aggressors, who attacked the deceased, whereas the other was an accomplice, who had first divested the witness of his belongings, and then proceeded to where the deceased lay, before taking away his purse. This third accused was Deepak.

19. The other testimony which is important to the prosecution case is that of PW-17 Inspector Dharam Pal, IO of the case. PW-17 deposed that on 29.01.2005 at about 10:00 PM, while patrolling he received a call on his wireless set regarding a stabbing incident near Maha Laxmi Property on Madan Pur Rani Kheda road. On receipt of the call he and his staff reached there; ASI Ashiq Ali and Const. Dalbir of PS Kanjhawala were also present at the spot. PW-17 further deposed that he did not meet any eye witness there but was informed that the injured was removed to SGM Hospital, Mangol Puri. He along with his staff

reached SGM hospital and collected the MLC of injured Ram Chander (Ex. PW-8/A) who was brought dead. He met Mahesh Chand Shukla, brother of the deceased, who was an eye witness to the incident and recorded his statement Ex. PW-6/A. PW-17 prepared the rukka and sent it to the police station through Constable Dalbir for registration of the case. He further deposed that thereafter he along with his staff and the complainant reached the place of incident; he called the crime team and got the spot photographed. He prepared the site plan of the spot (Ex. PW-17/B) at the instance of the complainant. Constable Dalbir reached the spot and handed over the original rukka and copy of the FIR to him. PW-17 deposed that he lifted the blood, blood stained earth and earth control and sealed it by memo Ex. PW-6/C. The kurta which the complainant was wearing at the time of the incident and at the time of taking the deceased to the hospital was also taken into possession by Ex. PW-6/D.

20. He recorded the statement of Ajay Kumar (PW-1) and Ravinder (PW-2) and then returned to the police station. On 30.01.2005 PW-17 along with his staff reached the hospital and prepared the inquest proceedings, brief facts and sent the body for post mortem. He thereafter interrogated the young boys of the area and came to know that three boys residing in A Block Prem Nagar, PS Sultan Puri, Gali No. 2 were missing since the date of incident; PW-17 searched for them and deployed an informer to find out their whereabouts.

21. On 04.02.2005, PW-17, along with his staff reached A Block, Gali No. 2 Prem Nagar to look for those three boys and found two boys Gomati @ Manoj and Dharambir; he correctly identified accused Gomati and Dharambir in court. He further deposed that both the accused confessed to their involvement in the crime and he recorded their disclosure statements; Ex. PW-16/E and Ex. PW-16/F. Accused Gomati got recovered one blood stained chhura, Rs. 300/- cash, and one blood stained jeans (which he was wearing at the time of the incident) from his house i.e. the place of arrest. Accused Gomati further disclosed that he could get his co-accused Deepak arrested. Accused Dharambir assisted in recovery of one blood stained chhura from underneath the bed, a purse along with some visiting cards, one blood stained T-Shirt (which he was wearing at the time of the incident) and Rs. 400/- cash from the place of arrest. PW-17 took into possession all the recovered items and prepared seizure memos.

22. PW-17 deposed that thereafter both the accused led the police party to accused Deepak's house at C-54, Bhagya Vihar, Sultan Puri and accused Deepak was arrested; he correctly identified accused Deepak in court. Deepak too made a disclosure statement Ex. PW-16/R and got recovered one blood stained knife, Rs. 500/- cash and one blood stained shirt (which he was wearing at the time of incident); all the recovered items were seized. PW-17 further deposed that during the course of investigation, he made an application for TIP of the accused persons and accused Gomati and Deepak were correctly identified by PW-6 in judicial TIP. However accused Dharambir refused to join the TIP.

23. PW-17 in his cross-examination stated that he reached the spot on

29.01.2005 at about 10:15 PM and remained there for about 20 minutes and then reached SGM hospital. The complainant remained at the spot with them till 04:00 AM. He further stated that he sent the rukka through Constable Dalbir at about 11:55 PM and he along with his staff and the complainant reached the spot at about 01:00 AM. Constable Dalbir went to the spot with a copy of the FIR at about 02:15 AM. He further stated that the statements of PW-1 and 2 (Ajay and Ravinder) were recorded at their house in village Rani Khera. He further stated that on 04.02.2005 he along with his staff left the police station at about 01:30 PM and reached house no. 2-A, Prem Nagar, Sultan Puri. He admitted that the house was in a residential area and that he tried to join members of the public in the investigation but they refused to join. All the documents were prepared while sitting on a cot in the house and no site-plan of the place of recovery was prepared. PW-17 further stated that they reached the house of accused Deepak at Bhagya Vihar at about 07:00 PM; accused Deepak's father was present in the house. They remained at accused Deepak's house till 8:30 PM and then reached the police station at about 10:30 PM. He denied the suggestion that the three accused persons were lifted from their houses on 03.02.2005. He also denied the suggestion that the accused persons were shown to the witnesses before the TIP. PW-16 SI Ram Kanwar corroborated PW-17's testimony.

24. The appellants had argued that PW-6's testimony is untrustworthy, for several reasons. The foremost submission was insufficiency of light to enable an accurate description, let alone identification of anyone who participated in the crime, as an attacker. At the first instance, the argument seems attractive. The rough site map (Ex. PW-17/A), however, shows that the incident occurred in an open area, and the spot was at some distance from an Electric Pole marked No. 47. Now, the next electric pole is marked 46, down the road. Although PW-6 said there was darkness in the fields, no suggestion of any kind was made to him that it was impossible for seeing what happened, or the conditions were so dark that no identification was possible. Even the IO, PW-17 was not cross examined about the adequacy or inadequacy of light. In this context, the Court recollects the decisions of the Supreme Court in *State of U.P. Vs. Bhoora and Others*, , and *Krishnan and another Vs. State of Kerala*, , where this aspect was not given much importance. In the latter decision, it was said that identification cannot be ruled out or said to be impossible, in the absence of light, if the incident occurs on a cloudless starry night. In this case, Ex. PW-11/A, the scaled site map indicates that the spot of occurrence was about 40 metres" distance from the electric pole. Having regard to the overall circumstances, particularly the fact that PW-6's presence as a witness cannot be doubted, the question of inadequate light is not a sufficiently determinative fact to discredit his testimony. this Court also notices that PW-17 was not cross examined at all about adequacy of light.

25. So far as delay in holding TIP is concerned, the testimony of PW-14 Ms. Archana Sinha, the Magistrate, reveals that after the arrest of the accused, an application (Ex. PW12/A) for holding their TIP was moved. She deposed that the



application was listed before her on 07.02.2005 and she confirmed to holding the TIP proceedings dated 15.02.2005 (Ex. PW 6E, PW-6/F and PW-14/B) Those documents reveal that an application for conducting TIP had initially been filed on 05.02.2005 itself when it was marked to PW-12. She deposed that on 07.02.2005, the Court had scheduled the TIP for 15.02.2005. All the accused were produced from judicial custody; they had been remanded there since the earlier date i.e. 05.02.2005. Having regard to these facts, the appellants' argument about delay in TIP has no merit.

26. As far as identification by PW-6 of all the accused is concerned, there is no doubt that one refused to participate in the TIP and the other two were clearly identified during TIP. In any event all the accused were identified in the Court. It is a well established proposition that in a criminal trial dock identification of the accused is counted as evidence; the holding of the TIP which is part of the investigative process, and its outcome only lends assurance and rules out the false implication. There is, consequently no merit in the submission that identification of the accused was suspect due to delay in TIP.

27. In this case having regard to the testimony of PW-17 about how and under what circumstances he became aware that the appellants were assailants responsible for the crime, the facts leading up to their arrest, the disclosure statements made by them and their identification by PW-6, the findings with regard to identity of assailants, are well reasoned and sound. this Court notices that there is not much controversy about the reporting of the crime which took place within a few minutes of its aftermath; the FIR was recorded at 12.25 AM (Ex. PW-3/B). The statement of PW-6 was recorded by the police at 11.55 PM on 28.01.2005. The un-scaled site map Ex. PW-17/B was prepared on 30.01.2005. PW-6 specifically mentioned this in his deposition and was not cross-examined on the score. Though the prosecution relied on the recoveries made pursuant to the disclosure statements, some of them are neutral circumstances. For instance the seizure of currency notes without distinctive marks or the recoveries of other articles commonly available, cannot by themselves implicate any of the accused. However, the recovery of daggers at the instance of the accused, particularly Gomti and Dharambir (seizure memos being Ex. PW-16/K and 16/O) are significant. The report of CFSL dated 18.11.2005 Ex. PW-17/G reveals that even though three knives or daggers were sent (Ex. 6, 7, and 8) blood could be detected only in one of them i.e. steel knife (Ex. 6).

28. A feature which was noticed by the Court earlier was that PW-6 in his deposition clearly diverted from the statement recorded by the Police at the earliest opportunity and also noted in the FIR i.e. that only two of the three assailants were armed with shining and sharp objects. PW-6 had further stated in the course of investigation that two armed assailants had caused knife injuries to his brother and that the third robbed him and then went back to his brother; after his accomplice stabbed the latter the third accused took away the deceased's belongings. To a great extent this finds corroboration in the court

testimony of the witness. Even though he improved by stating that all three were armed as has mentioned in the previous part of this judgment the role attributed to the third assailant i.e. Deepak was of searching the witness and after that reaching the place where his brother had been stabbed; and leaving after taking out the deceased's purse. Therefore, all the accused had not attacked the deceased Ram Chander with knives.

29. The nature of injuries on the deceased - which was spoken about by PW-7 Dr. Samir Pandit leaves no doubt that the intention of the attackers was to kill their victim. There were seven knife injuries in all - sufficient to cause death, three chest injuries and one on the right epigastrium, i.e the upper middle part of the abdomen, above the navel. The doctor's opinion was that three injuries individually and collectively were sufficient to cause death in the ordinary course of nature. The severity of blows and the motive for the crime, i.e. robbing, rules out the possibility of the attackers, i.e Gomti and Dharambir having any intention other than to kill and rob their victim. Consequently the findings by the trial court on this aspect, as regards those two, are justified.

30. The evidence discloses that Deepak was not armed. The testimony of PW-6 reveals that he was an accomplice to the other two who had clear intentions of robbing and if necessary killing their victim. His conduct in this regard requires closer scrutiny. The possibility of his being aware about the fact that Gomti and Dharambir were armed or at least did not have any intention to kill their victim has to be seen from the light of what he did. No doubt, he was at the same place as PW-6 when the attack went on. He did not disassociate himself as soon as the others started wielding their knives. He continued to divest PW-6 of the articles he possessed and went on to rob the deceased after he had been stabbed. It is equally possible, that - having regard to the rapidity of the crime (it happened in a flash), and the fact that he was not armed, as per PW-6's account (who also does not say that Deepak indulged in any kind of aggression), this accused's motive was merely to rob, which he continued to do. The question which arises for consideration therefore, is, what was the common intention which this accused shared, with the others.

31. In *Ramashish Yadav and Others Vs. State of Bihar*, , it was observed that the principle of joint liability in the doing of the criminal act u/s 34 IPC is based on existence of common intention of an accused leading to the doing of such an act further to the intention. The distinctive and important feature is the element of participation in the action and a pre-arranged plan which can be proved either from conduct or from circumstances or from any incriminating fact.

32. Joint criminal responsibility by association, requires proof of prior common intention. It is often quite difficult to give such proof because at times intention can be forged at the spur of the moment having regard to the principle presented for the crime. The Privy Council in *Mehbub Shah Vs. King Emperor* 1945 LR 72 IA 148 observed that

the partition which divides their bounds is often very thin; nevertheless, the distinction is real and substantial, and if over looked will result in miscarriage of justice.....the inference of common intention should never be reached unless it is necessary inference deducible from the circumstances of the case.

33. The above views were quoted with approval in *Pandurang, Tukia and Bhillia Vs. The State of Hyderabad*, . In *Joginder Ahir and Others Vs. The State of Bihar*, , the Supreme Court highlighted the need to focus on the specific acts of each accused to discern whether he shared common intention for the particular crime. The absence of an overt act was held to be determinative in that case and the accused were held not guilty by association for the intention to murder. Similarly the decision in *Krishna Govind Patil Vs. State of Maharashtra*, , highlighted that different acts of individuals who are said to have common intention may not lead to different consequences. Earlier in *Anda and Others Vs. The State of Rajasthan*, , a four Judge decision of the Supreme Court while reiterating that Section 34 applies where there is common intention for a crime act done in furtherance to the common intention of all, noticed that Section 35 IPC requires the existence of knowledge or intent in each accused before he can be held liable if knowledge or intent is necessary to make the act criminal. The Supreme Court's observations are illuminating:

Thus if two persons beat a third and one intends to cause his death and the other to cause only grievous injury and there is no common intention, their offences will be different. This would not be the case if the offence is committed with a common intention or each accused possessed the necessary intention or knowledge. Section 38 provides for different degrees of responsibility arising from the same criminal act. The illustration brings out the point quite clearly:

A attacks Z under such circumstances of grave provocation that his killing of Z would be only culpable homicide not amounting to murder. B having ill-will towards Z and intending to kill him, and not having been subject to the provocation assists A in killing Z. Here, though A and B are both engaged in causing Z's death, B is guilty of murder, and A is guilty only of culpable homicide.

34. In this case the testimony of PW-6 clearly shows that Deepak did not participate in the attack. No doubt his conduct in continuing to rob the witness and thereafter proceeding to take away the belongings of the deceased while he was lying helplessly on the ground are reprehensible. The question is whether this points to sharing of common intention with the other accused, to cause death. In the previous section of the judgment the Court has held that the findings with regard to guilt for the offences the other two accused were charged with are sound and justified. The conduct of accused Deepak would reveal that he was aware that Gomti and Dharambir were armed and that there was likelihood of knives being used. The common motive initially was undoubtedly to take advantage of the opportunity which arose to rob. The evidence of PW-6 is categorical, in that Deepak was very much a part of the group that set upon the witness and the deceased. Whereas the other two attacked the deceased,

Deepak went about divesting the brothers of their valuables. Although the articles recovered cannot be identified specifically, the fact that PW-6 and his brother were robbed, forcibly and under threat, has been clearly established. In that sense there is no doubt that Deepak's acts prove elements of the offence under Sections 394 and 397 IPC. However, in view of the fact that there was no overt role attributed to him and that the stabbing was resorted to in an opportunistic manner when the other two Gomti and Dharambir perhaps felt that deceased would resist their attempt to rob, the ingredients of the offence u/s 302 have not been made out as far as Deepak is concerned.

35. In view of the above discussion, the appeals of Gomti and Dharambir have to fail. The appeal of Deepak consequently succeeds in part. His conviction u/s 302 IPC is hereby set aside. His sentence under Sections 394, 397 is hereby modified to the extent, instead of 10 years imprisonment, he shall undergo RI for 8 years. The sentence of fine so far as Deepak is concerned is left undisturbed as is the case with the sentences of the unsuccessful appellants. The Criminal Appeal Nos. 94/2011, 783/2011, are accordingly dismissed and Criminal Appeal No. 6/2012 is allowed partly, to the above extent. The application being CrI.M.B. No. 12/2012 also stands disposed of.