

**(2011) 09 DEL CK 0250**

**In the Delhi High Court**

**Case No :** Criminal Appeal No's. 40 and 292 of 1998

Harvinder Pal Saini

APPELLANT

Vs

State <BR> State Vs Sanjay @ Sanju

RESPONDENT

**Date of Decision :** 13-09-2011

**Acts Referred:**

Arms Act, 1959 — Section 25, 27

Criminal Procedure Code, 1973 (CrPC) — Section 161, 162, 313

Evidence Act, 1872 — Section 106, 9

Penal Code, 1860 (IPC) — Section 120B, 302, 304, 326, 34

**Citation :** (2012) 1 JCC 321

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

**Bench :** Division Bench

**Advocate :** Aishwarya Rao in Criminal A. 405/1997, Mr. Sanjay Ghosh, Amicus in Criminal A. 40/1998 and Mr. Rahul Sharma in Criminal A. 424/1999, for the Appellant; Aishwarya Rao in CrI. A. 292/1998, Mr. Sanjay Ghosh, Amicus in CrI. A. 407/1997, Mr. Rahul Sharma, Advocate CrI. A. 407/1997 and Mr. Pawan Sharma, Standing Counsel (CrI.) along with Sh. Harsh Prabhakar, Advocate, on behalf of the State, for the Respondent

**Final Decision :** Dismissed

## Judgement

S. Ravindra Bhat, J.—This judgment will dispose of four appeals, directed against a judgment and order of the learned Additional Sessions Judge, Delhi, dated 23.07.1997 and 31.07.1997, in SC No. 54/96 ("impugned judgment") handing down conviction and sentence for offences punishable u/s 396/34 read with Section 411, IPC. The convicted Appellants, who impugn that judgment, are hereafter referred to by their names, i.e. Amrish, Harvinder and Naseem Ahmed. The State has preferred two appeals, in one questioning the sentence, seeking its enhancement to death penalty; in the other, it has impugned the acquittal of two co-accused Sanjay and Krishan Lal.

2. The prosecution case, briefly is that on 25.12.1987, at about 6.45.PM Sh. Lekh Raj Luthra (P.W.-5), along with his wife Smt. Prem Kumar (PW-.3) and daughter

Bindu Luthra (PW-1) was watching TV in the drawing room of Rat No. 5/610, Lodhi Colony, New Delhi. The door bell of the flat rang. Bindu PW-1 opened the back door and saw four boys standing; she asked them the reason. They told her that they wanted to meet her brother, Sunil Luthra (the deceased), who was an Advocate. PW-1 asked the boys to wait for a minute; she shut the back entrance and went to the drawing room where her parents were sitting, told her father PW-5 that the four boys had come there to see Sunil Luthra. Thereafter, Bindu opened the front door and asked the boys, the purpose for which they were to meet Sunil. One of them replied that they wanted to talk to Sunil in connection with a case. Bindu told them that Sunil was away to the market and that he would be back within 10 minutes and asked them to wait, inviting them to sit on the Sofa lying in the Veranda. They sat on the sofa and immediately got up and told Bindu that they would be back within 10 minutes. While moving towards the main door, they took out their pistols and one of them placed the pistol on her (Hindu's) temple i.e. Kanpati and asked her to keep quiet and commanded her to move towards the drawing room. All the four boys went into the drawing room. One of them pointed the pistol at her father and another towards her mother. She gestured to her father to remain quiet; but her mother could not resist and she asked, addressing them as "betas", as to what they wanted. One of them said that they would not leave Sunil alive. In the meantime, another person, armed with a knife, entered the bed room. He pulled down the attaches lying over the Almirah and started scattering the articles in it. In the meantime, on the sound of Sunil's car PW- 5 ran towards the main entrance and shouted to Sunil Luthra that he should not come upstairs. But Sunil went upstairs, out of curiosity to see what was the matter. As soon as Sunil entered the door all the four persons with pistols surrounded him; the one armed with the knife gave knife blows, some on his chest and some on the abdomen, of Sunil. In the scuffle Lekh Raj Luthra, attempted to save his son Sunil; he succeeded in apprehending one accused. Before he could catch him, that accused hit him on his hand with some object. All these witnesses raised an alarm. The accused attempted to run away. One of them i.e. Naseem Ahmed was caught on the stairs by Lekh Raj P.W.-5. Immediately, after the incident, Bindu telephoned control room No. 100 twice. The police constable reached there. Naseem was handed over to the police by Lekh Raj Luthra. A taxi was immediately called; Lekh Raj Luthra took deceased Sunil to the hospital. Bindu also telephoned her father's friend namely Sh. Ashok Chand Sikka PW-6 and Sh. Govil (PW-.22) Sh. Govil arrived and accompanied Sh. Lekh Raj Luthra to the Hospital. The police alleged that after receiving information, their officials arrived at the spot, recorded the statement of Bindu (Ex. PW-1/A), took seized articles, handkerchief, and other objects. They also took into custody Naseem Ahmed.

3. It was alleged that Naseem Ahmed was arrested on 26.12.1987, and the shirt worn by him was recovered by seizure memo Ex. PW-5/C. It was alleged that in the morning of 26.12.1997 Naseem made the disclosure statement Ex. PW- 4/E in which, claimed the State, Naseem stated about a plan with his associates,

Harvidner Pal alias Vijay Saini alias Pappi, a taxi driver, Sanjay Kumar alias Raja, Amrish Chaudhary, alias Amit, Shrab alias Shaboo to wreck revenge on Sunil Luthra and to kill him. This plan was hatched at Parade Ground Dehradun in a tea shop. Vijay Anand had, assured, payment of Rs. 500/-to each one of them for going to Delhi and returning back. About 8 to 10 days, prior to the date of occurrence, he along with Vijay Anand, Sohrab Alias Shaboo and Shiv had arrived at Delhi at House No. 3506, Arjun Gali, Paharganj. As they could not succeed in this plan they returned. It was also alleged that according to the disclosure, on 23.12.87 in the night he (Naseem) along with Vijay Anand, Amit, Shiv and Sanjay arrived in Delhi as per program and stayed at Avtar Hotel; they were given the site plan of Sunil's house. In accordance with this plan, he along with Sanjay, Vijay Anand, Shiv - all armed with pistols-and Amit armed with knife, reached House No. 610. As soon as Sunil entered the house, Vijay Anand fired but there was no shot. Then Amit attacked Sunil and his father with a knife. In the scuffle and noise, Sunil's father caught hold of him and handed him over to the police. He stated that he was later arrested from Dehradun and Bijnoor. He volunteered to get the pistol which they were armed with, recovered. It was also disclosed that there was enmity between Vijay Anand and Sunil Luthra.

4. The prosecution story was that further to this disclosure, on 26.12.1987 Naseem led, the police party to Avtar Hotel, Paharganj and pointed out Room No. 103 which was locked. Police enquiries revealed that Naseem's associates had locked the room at about 3 PM on 25.12.1987 and had not returned. The police party returned, leaving constable Dhanush Kumar to keep a watch on Room No. 103. It was alleged that the police party, on 05.01.1988, went to the Avtar Hotel at about 9 AM. On the pointing of Naseem accused Sanjay and Amrish were arrested while they were standing on the reception counter of the hotel. Their personal search memos Ex. PW- 7/A and B were prepared. Thereafter, search was made of the room in Avtar Hotel where they had stayed. From there some stolen articles of dacoity committed at Tagore Garden and belongings of the accused were recovered. In all 74 items, by Ext. PW-7/C were taken into possession. The hotel register extracts were taken into possession as Memo Ex. PW-9/8. Since accused Sanjay and Amrish had fled from the spot and their identification parade was to be held, their faces were muffled. The accused were then taken to Patiala House Court on 05.01.1988. An application Ex. P.W.-8/ for holding T.I.P. was made in respect of accused Sanjay, Amrish, to Smt. Sangeeta Chopra, Metropolitan Magistrate, which was assigned to Sh. D.S. Punia, Metropolitan Magistrate, for T.I.P on 09.01.1988. Since 09.01.1988 was holiday, the T.I.P. was advanced to 08.01.1988. It was then postponed to 11.01.1988; that day, the T.I.P proceedings were held. Amrish and Sanjay refused to participate in the T.I.P. The statement of Sanjay Ex. PW-8/D and that of Amrish Ex. PW-8/E were recorded by the Metropolitan Magistrate regarding the refusal to join in the T.I.P. As a consequence of their refusal to participate in the TIP application for their police remand was made to the Magistrate, which was granted till 18.01.1988.

5. It was alleged that during police remand, on 13.01.1988, Sanjay and Amrish were taken to the spot of crime where they were identified by Bindu, Prem Luthra and Lekh Raj Luthra. The accused also made disclosure statement Ex. PW-21/A and B. In pursuance to the disclosure statement, Sanjay and Amrish led the police party to the Railway Colony, in Lodhi Colony. Amrish took the police party to the bushes across the Ganda Nala from where, he took out a knife, the sketch of which Ex. P.W21/D was prepared. It is claimed by the State that subsequently information was received that accused Harvinder had surrendered before the D.C.P. head quarters. As a consequence Sh. J.P. Sharma, ASI along with SI Harvinder Dev, constable Vejinder, Dhanush, and accused Sanjay and Amrish, reached the police head quarters. Sh. J.P. Sharma, SI went to the 5th floor of the Police head quarter into Inspector Yadav's room where the accused Harvinder was sitting alone. Harvinder was interrogated by the police. It is claimed that accused pointed out the place where he had kept his belongings viz the brief case. A brief case was lying near the Police HQ towards the Masjid near the bushes. The accused Harvinder was arrested. It is alleged that he also made the disclosure statement Ex. PW-1/3. The brief case was opened. It contained, amongst other articles, a pistol along with 21 live cartridges, the sketch of the Pistol Ext. PW-2/G was prepared. The Pistol was sealed alongwith the cartridges. After the disclosure statement of accused Harvinder, enquiries were made regarding the whereabouts of accused Kishan Lal. On the statement of accused Harvinder, that the accused Kishan Lal would be available at 4 PM outside the casualty ward of LNJP Hospital, the Police party proceeded there. A search was done near the casualty ward of the Hospital. Accused Kishan Lal went there at about 6:40 PM. Kishan Lal was interrogated and arrested. A personal search memo of accused Kishan Lal Ex. PW- 21/C was prepared. Harvinder too was directed, after his arrest, to muffle his face. On 14.01.1988, Harvinder along with Kishan Lal accused were produced in the Court of Ms Sangeeta Chopra, Metropolitan Magistrate. The application was again entrusted to Sh. D.S. Punia, Link Metropolitan Magistrate. Harvinder refused to join the T.I.P. His police remand too was taken by the Police up till 18.01.1988. On 14.01.1988, Harvinder led the police party to the place, where the crime was committed when he was identified by witnesses Bindu Luthra and Lekh Raj Luthra.

6. The accused were all arraigned for the charges of having committed offences punishable under Sections 302/395/396/450 read with Section 120-B IPC. Sanjay, Naseem Amrish and Harvinder were also charged with committing offences under Sections 395/397/398 IPC. All the accused entered the plea of not guilty and claimed trial. The prosecution relied on the testimonies of 28 witnesses, besides the exhibits produced during the trial. The Trial Court, after considering them, convicted all the accused, except Krishan Lal and Sanjay. In the case of Amrish, the court also convicted him additionally under Sections 25/27 Arms Act. It was held that the prosecution conclusively proved the guilt and culpability of Amrish, as the accused who inflicted the stab injuries on Sunil, and was able to establish the involvement of Harvinder and Naseem (the latter

having been nabbed at the spot). So far as Sanjay and Krishan Lal were concerned, it was held that the prosecution could not establish their presence and role, in the incident, as alleged by it.

7. Ms. Aishwarya Rao, learned amicus for the Appellant Amrish, argued that the reasons which persuaded the Trial Court to acquit Sanjay ought to have resulted in the former's acquittal and that the Trial Court fell into error in convicting him. It was submitted that all the ocular witnesses had deposed about the role of the accused, during the trial. Yet, in the case of Sanjay, the Court returned a finding of acquittal, whereas in Amrish's case, the finding was one of conviction. In the case of Sanjay the Court rejected the recovery of a chamber less revolver from the bushes near the nullah abutting Railway Colony, Lodhi Colony; however, in the case of Amrish, a knife was recovered at his instance, which was believed and used as an incriminating circumstance against him. It was submitted that the Court ought not to have returned such varying findings on the basis of the same evidence, in respect of accused, facing charges on identical facts.

8. It was argued that the entire prosecution version about arrest of the accused, particularly Amrish was unbelievable. In this context, submitted counsel, the prosecution could not substantiate its story about this aspect, i.e. the arrest on 05.01.1988, because unlike in the case of others allegedly arrested at the behest and in the presence of PW-19, the hotel Manager, there was no such witness. Furthermore, argued learned counsel, the Hotel Register produced as an exhibit on the record, did not show Amrish's name, but that of one Amit. The prosecution did not adduce any material to show that Amrish and Amit were the same individual. Therefore, his involvement in the case was highly suspect, and a matter of conjecture, purely based on the disclosure statement of Naseem, which was inadmissible during the trial.

9. It was next submitted on behalf of Amrish that the finger prints alleged to have been lifted from the spot, and sought to be connected with him, were not sufficiently proved. It was argued that the prosecution version about the finger prints on the iron, which was not spoken about by any of the eyewitnesses, none of whom deposed that any of the accused had touched any article such as an electric iron, Therefore, the prosecution story about the so-called finger prints matching with those of Amrish cannot be accepted; the Trial Court, argued counsel, fell into error in holding that this aspect had been proved.

10. Learned counsel submitted that the Trial Court also fell into error in accepting the prosecution submission in regard to Amrish, that his role had been spoken about by co-accused Naseem. It was submitted that the statement relied on was in the course of an inadmissible extra judicial confession which could not have been part of the evidence. It was submitted that significantly the Trial Court overlooked a vital circumstance which belied the prosecution story, i.e. that the rukka recorded at the behest of PW-1 did not mention a knife at all - which the prosecution stated, was used by Amrish.

11. Ms. Rao argued that the prosecution story was disbelieved as regards Sanjay, and the benefit given to him, as well as Krishan Lal, ought to have been extended to the co-accused, who were alleged participants of the same conspiracy. In this regard, counsel relied on the decision reported as State of Maharashtra Vs. Kalu Shivram Jagtap and Others,

12. Mr. Rahul Sharma, learned counsel appearing for the Appellant Naseem, submitted that the Trial Court committed an error in convicting that Appellant. It was submitted by him that the constable, whose name figured prominently in the prosecution story, was not examined. This, according to counsel, was significant, as it could have thrown light on the prosecution version. Counsel also stated that even though the prosecution story was that Naseem was nabbed on 25.12.1987, the day of the incident, yet he was not interrogated or questioned till 27.12.1987, at 04:00 AM. The reason for this delay was not explained which, according to the Appellant's counsel, was fatal to the prosecution story.

13. Mr. Sanjoy Ghosh, learned amicus for Harvinder, submitted that the said Appellant's role in the incident was not proved by the prosecution. It was argued that the statement of PW-3, the mother of the deceased recorded by the police, u/s 161 Cr.P.C. was silent about his participation, which raised serious suspicions about the prosecution's credibility. It was next submitted that the combined testimony of the eyewitnesses showed confusion about the number of attackers who participated in the incident. On this aspect, the variations between the statements made to the police, by PW-1 and PW-5 and their depositions were highlighted. It was submitted on this aspect that whereas some witnesses claimed that four had participated in the attack, one of them said there were five. The prosecution's inability to explain this discrepancy, as well as the timing of Naseem's arrest, put a question mark on its version.

14. Counsel next argued that the alleged hotel register extracts, produced during the trial to prove Harvinder's stay in Avtar Hotel, only showed that someone called "Vijay Anand" had checked in there; the prosecution made no effort to link the said accused with that person. There was no identification. It was submitted, besides, that the attempt to involve PW-18 to say that he knew Harvinder, and that he went to Dehradun is vague and unbelievable. Counsel underlined that the Trial Court did not believe the alleged recovery of the chamber less pistol and the knife, at the behest of the Appellant Harvinder. In these circumstances, his conviction was not based on acceptable evidence.

15. It was urged, that Harvinder's, case was similar to Sanjay's and the reasons which persuaded the Trial Court to acquit the latter, would also be equally applicable in the said Appellant's case. It was also argued that the DD report, Ex. PW-4/A was made at the instance of Mukhtiar Singh, who mentioned about a firing incident. However, the prosecution did not attempt to join him in the investigation or the trial. His omission on the one hand, (as he was an independent individual having no connection with the deceased's family or the police) and the joining of the family members, (PW-1, PW-3 and PW-5) on the

other, pointed to an unfair investigation at the behest of the prosecution, which wanted to suppress facts that were potentially favourable to the Appellant Harvinder.

16. Arguing against the conviction, learned counsel pointed to the fact that Harvinder had been implicated in another case, i.e. dacoity in PS Tagore Garden; however, the accused was acquitted in that case, though it was registered on the basis of disclosures made in this case. Furthermore, the prosecution could not establish involvement of Harvinder in the present case, through the testimony of PW-19. It was submitted that the involvement of Harvinder in the attack was sought to be corroborated by Naseem's disclosure statement, which was inadmissible.

17. Learned Standing Counsel Mr. Pawan Sharma submitted that a combined reading of the depositions of the ocular witnesses PW-1, PW-3 and PW-5 clearly mentions the attack with the knife by one assailant. They had also deposed that others were armed with guns. So far as Amrish's arrest from Avtar Hotel is concerned, the prosecution pointed out that he had stayed there under an assumed name i.e. Amit. This was established by Ex. PW-19/A, which were extracts of the hotel register. The counsel emphasized that Amrish did not cross examine the prosecution witnesses nor even suggests that he did not stay in that hotel. It was further argued that Amrish was arrested on 05.01.1988 along with Sanjay at the instance of Naseem who had named him in the disclosure statement Ex. PW-4/E. After arrest, Amrish was produced in Court with his face muffled - an aspect which was clearly deposed by PW-3, PW-7 & PW-27. This was also corroborated by the testimony of PW-8, the Magistrate D.S. Punia and further established by the application for T.I.P. Ex-PW-8/A as well as the order sheet dated 11.01.1988. Amrish clearly stated that he did not wish to join T.I.P. because the witnesses had seen him at the spot and at the Police Station. Significantly, argued the prosecution counsel, Amrish made no suggestion to the I.O. that he had been shown to the witnesses.

18. The prosecution backed heavily on the evidence of PW-24 - Finger Print Expert and his report Ex. PW-24/A. It was submitted that the chance fingerprints sent for matching were lifted from the electric iron found at the scene of occurrence. The report clearly pointed to the specimen fingerprint of Amrish matching with the chance prints. This report was not challenged by Amrish in any manner. Being a very important incriminating circumstance, Amrish had a duty to explain it. He chooses to remain silent.

19. The prosecution urged that Amrish's involvement in the crime was also proved by the recovery of Ex. PW-10, a knife, pursuant to the disclosure statement Ex. PW-20/A; and the seizure memo was produced as Ex. PW-21/D. CFSL report PW-27/P established that knife contained blood group "B" - the same blood grouping of the deceased. Ex. P-10, the knife was shown to the Doctor PW-13, in whose opinion, the fatal injuries could have been caused by it.

20. So far as the accused Harvinder was concerned, the prosecution again relied upon the testimony of the ocular witness. It was submitted that his stay in Avtar Hotel on 24.12.1987 with Naseem Ahmed and others was proved by Ex. PW-19/A Harvinder checked in and assumed name as Vijay Anand, testified to by PW-19 Indrajeet. Here the prosecution relied upon the personal search memo Ex. PW-21/1 dated 13.08.1988 in respect of Harvinder and the disclosure statement Ex. PW-21/J where the signature of the accused was shown as Vijay Saini. It was submitted that this corroborated the prosecution story as it amounted to an attempt to camouflage his real identity and the fact that he had checked into Avtar Hotel along with other accused.

21. The learned Standing Counsel argued that Harvinder was produced in Court with his face muffled on 14.01.1988. He, however, refused to participate in the T.I.P. The same evening he was taken to the place of incident and the supplementary statement of PW-1 & 5 were recorded. PW-3 Prem Kumari also saw and recognized Harvinder as the individual who had visited her house along with Kishan Lal on 23.12.1987 when her husband was absent.

22. The prosecution submitted that the Harvinder's conviction was also justified as it was supported by the evidence of PW-18; he claimed to know Harvinder and deposed that in 1984 he had come to Delhi in his taxi from Dehradun. On that occasion, Harvinder had stayed with Kishan Lal at Pahar Ganj. It was submitted that the circumstances surrounding arrest of Harvinder who assumed the name Vijay Anand when he checked into Avtar Hotel cannot also be disbelieved because in the disclosure statement of accused Naseem Ex. PW-4/C, it was recorded that on 23.12.1987 at night he (Naseem) along with Vijay Anand and Amit etc. as per previous program went to Delhi and stayed in Avtar Hotel. This was corroborated by Ex. PW-19/A and the evidence of PW-19. The personal search memo contained the signatures of Vijay Anand whereas the hotel register extract produced as Ex. PW-19/A mentioned V. Anand. Learned counsel emphasized that these aspects were carefully scrutinized by the Trial Court and compared the two entries and signatures found in Ex. PW-19/A and Ex. PW-1/J and found the handwriting to be identical. Having regard to these, the Trial Court was justified in drawing the adverse inference as regards the T.I.P. refusal by Harvinder. Furthermore, he was identified by all the ocular witnesses at the trial.

23. As far as the Appellant Naseem was concerned, the prosecution urged that he was caught red handed; - a fact deposed to by all the eye-witnesses. His bloodstained shirt, seized by memo PW-5/C, contained human blood of "B" grouping, which was that of the deceased. Further, the pistol in the hands of Naseem Ex. P-2 was seized by Memo Ex. PW-6/1. This fact had been deposed to by PW-5 Lekhraj Luthra who stated that Naseem had a gun, which fell down.

24. Learned Standing Counsel argued that Naseem's fingerprints were lifted from the wooden door; they matched the specimen fingerprints given by the CFSL expert through PW-25/A & PW-25/B. Moreover, the prosecution underlined that Naseem himself admitted having gone to meet Sunil Luthra, in reply to

Question No. 147, put to him by the Court while examining him under Section-313 Cr.P.C. He had stated, however, that when he went to meet Sunil, it was in connection with his uncle's case. However, no corroborative material was produced supporting this claim; Naseem did not produce any document or witness to substantiate this defence. Submitting that the State's appeal against acquittal of Sanjay ought to be accepted, it was argued by the prosecution that the reasons which led to his release are untenable. Here, it was submitted that the Trial Court held that the materials and evidence led were of a quality that ought to have resulted in the said accused's conviction. Elaborating on this, the prosecution submitted that the Trial Court erroneously held that the hotel extract register Ex. PW-19/A was of no assistance, since it did not contain Sanjay's name. The learned Standing Counsel submitted that in this case, the accused had not revealed their real names, and had checked into the hotel under assumed names. Therefore, the Trial Court ought to have been conscious of this factor while analyzing the evidence, and ought not to have been unduly swayed. When a crime such as the one in question is committed, it would be futile for its perpetrators to go using their true identities. It was next submitted that the disclosure of Naseem was recorded immediately after the occurrence, on 27th December, 1987; he clearly pointed to the involvement of Sanjay. The most important incriminating circumstance, i.e. the "knife recovered from the bushes near the Railway Colony, Lodhi Colony, was brushed aside, because no public witness was associated. This approach betrayed a flawed understanding of the law, because there is no requirement that members of the public are to be associated with each recovery, made by the prosecution, pursuant to a disclosure statement.

25. The learned Standing Counsel also submitted that Sanjay's involvement was also proved because the personal search memo of Amrish yielded Sanjay's photograph- an aspect which could be looked into, in view of his arrest, and recovery of the photograph itself. The Trial Court, submitted the Standing Counsel, erred in disbelieving the ocular witnesses to the incident, who had occasion to observe who had attacked Sunil.

26. As far as the State's appeal for enhancement of sentence, and conversion of conviction was concerned, the learned Standing Counsel argued that the Trial Court failed erroneously to convict those charged with committing the crime- u/s 302 IPC, though there was sufficient evidence on this aspect.

#### Analysis

27. The discussion in the preceding paragraphs reveals that the prosecution relied heavily on the testimonies of eyewitnesses, i.e. PW-1 (Bindu); P-3 (Prem Kumari) and PW-5 (Lekh Raj Luthra).

28. PW-1 Bindu, in her statement, mentioned that Sunil, the deceased was an Advocate. While she was sitting on 25.12.1987 in the drawing room with her parents, at about 06:45 PM, the door bell rang and she opened the back

entrance. The witness saw four boys, one of whom told her that they wanted to meet Sunil. She asked him to wait for a minute, closed the back entrance and went to the drawing room and told her father that four boys wanted to meet Sunil. The four of them were standing in the middle of back entrance. She opened the front door and enquired from them about the work they had with Sunil to which one of them replied that he had come in connection with a case. The witness told them that Sunil was away to the market and would be back in 10 minutes and asked them to sit on the sofa in the verandah. The witness stated that the moment they sat on the sofa, they got-up and said they would be back in 10 minutes. While moving towards the main door, they took out pistol's and one of them placed it on her temple, asking her to keep quiet and ordering her to move towards the drawing room. All the four boys went inside the drawing room. One pointed a pistol towards her father and another towards her mother. She asked her father to keep quiet but her mother could not restrain herself and asked them what they wanted by addressing them as Beta. To this one of them stated that they would not leave Sunil alive. In the meantime, according to PW-1, one more person entered the bedroom, armed with a knife. He pulled down an Attache case kept over an almirah and started ruffling through the articles in it. By then, the sound of Sunil's car was heard; her father ran to the main entrance and shouted to him to keep away. Sunil, however, went upstairs to see what had happened. At the entrance, all four, armed with pistols surrounded her brother and the fifth armed man gave 5-6 knife blows on Sunil's chest and abdomen. Her father tried to save Sunil and in the process apprehended one of the assailants. Before her father could apprehend him, he hit him on the head with some object. Sunil started bleeding profusely and fell-down in the bedroom. Many people came there on hearing the cries of the witness and her father. By then her father had apprehended Naseem and the others fled. The witness telephoned number 100 twice. After some time, the police reached there, took into custody Naseem and her father took Sunil to the hospital in a taxi. He was also accompanied by PW-22 Govil. Her statement was recorded by the IO (Ex. PW-1/A). She deposed that she could identify all the accused and did so. She subsequently pointed to Amrish as the attacker who entered later, armed with a knife and as the one who had stabbed Sunil repeatedly. She further deposed that the police had brought Amrish to her house on 30.09.1988 and that she was able to identify him. She was confronted with three inconsistencies in regard to the statement recorded during the investigation. Her deposition regarding the accused pointing a pistol to her father and the other to her mother, was not mentioned in the previous statement to the police. The second mention was with regard to the number of blows given to Sunil. The previous statement did not give the number of blows. The third was the testimony that her father tried to save his son - again did not find mention in the previous statement. Another omission, which she was confronted with (vis-a-vis her previous police statement) was in regard to her statement that one of the attackers had placed a gun at her temple. It was elicited in her cross-examination that the entire incident took 10 minutes from the time the door bell rang. She clarified in the

cross-examination about not going to the Safdarjung Hospital when her brother was taken there. She also mentioned that her second statement was recorded on 14.01.1988 though she did not appear in Court. She clarified not having seen the accused Amrish prior to the incident.

29. The second eyewitness, PW-3 Prem Kumari, said much the same thing about the events preceding the attack on Sunil, as narrated by PW-1. However, she added that one of the boys pointed a pistol at her, and another pointed a pistol at her husband, and that Hindu, at pistol point, was made to stand near the other drawing room door. She corroborated PW-1 in other particulars about all the boys being armed with pistols, a fifth one reaching there, through the verandah and going into the bedroom, taking down the suitcase, and rummaging through it, when Sunil's car was heard, the warning given to Sunil, his going upstairs, and being given 5-6 knife blows by the fifth boys, one attacker being caught by her husband, who was given a blow, in the process, etc. She also added that Kishan Lal was her sister-in-law's dewar (husband's brother,), whom she was able to identify (though she was not on visiting terms with him). According to her, Kishan Lal had visited their house two days before the incident, with Harvinder, at noon time, to meet her husband, PW-5. She told him why he had visited at that time, when he knew that PW-5 would not be home at that time; the two boys had asked for a glass of water, and then left. She had not been asked to identify the accused, in Court prior to the trial. The most significant portion of her cross examination was that she was confronted with her previous Section 161 Cr.P.C. statement, where she had mentioned that four boys had come home armed with pistols and when Sunil came back home, had attacked him - three of them holding him, and one, inflicting knife injuries on him.

30. PW-5 Lekh Raj Luthra corroborated the deposition of PW-1 in all material particulars about the attack. He too mentioned about four accused initially entering home joined, later by a fifth. He identified Sanjay, Naseem, Amarish and Harvinder as those present at the time of the attack, and that Amrish was the accused who inflicted knife injuries. He also mentioned having nabbed Naseem during the attack. He mentioned that Kishan Lal had called him up on 22.12.1987 asking for some money, which he refused, and that he had informed his wife PW-3 about this. In cross examination, he admitted that the information regarding Kishan Lal's request for money was given to the police in the second week of January, and later recorded by them. He also stated (as did PW-3) that Kishan Lal had visited their house when his sister had visited them earlier during the year. He deposed that Kishan Lal used to live in Pahar Ganj.

31. In this case, PW-4/B is DD entry No. 10 containing the earliest record of the incident, by which Bindu had informed the police, at No. 100. It mentions that a murder had taken place in her house. Ex. PW-13/A is the MLC issued by Safdarjung Hospital; it records that the deceased was taken there at 7:12 PM. All the eyewitnesses mention about the attack having taken place at 6:45 PM, and PW-1 as well as PW-3 said that the whole incident lasted for about 10 odd

minutes. The earliest account of facts was narrated by PW-1, and formed the basis of the FIR; it was exhibited as Ex. PW-1/A. Her narration of facts, except to the extent recorded in her cross examination, was almost identical with the earliest version, which had stated all the elements, and also that Naseem had been handed to the police, upon their arrival at the scene. The prosecution thus was able to prove how the attack took place, and that four individuals were involved, of whom one (Naseem) was nabbed at the spot, and handed over to the police. The prosecution case was that Naseem's disclosure statement led the investigation from then onwards; he mentioned about the involvement of other accused.

32. So far as the role of Naseem is concerned, the statements of all the eye witnesses i.e. PW-1, 3 & 5 are consistent. The earliest statement recorded at the instance of PW-1 i.e. PW-1/A clearly mentions that one boy who was amongst the four at the spot of occurrence was nabbed by her father PW-5; they also mentioned that it was Naseem, whose name was ascertained later, the same night. This was corroborated by the other eye witnesses; the record also discloses that Naseem was arrested after he was handed over to the police the same night or in the wee hours of next morning i.e. 26.12.1987. The argument by Naseem's counsel about the non-examination of a constable who was named by the prosecution being serious and fatal to its case, is insubstantial. We also notice that PW-10 Mahender Singh carried the D.D. Entry-10A Ex. PW-4/B, corroborated the eye witness stating that he saw Naseem at the spot. The I.O. PW-27 Shri J.P. Sharma also mentioned having taken Naseem into custody at that time. Naseem's case before the Trial Court was that he went to meet Sunil at 08:30 PM in connection with his uncle's customs case and that after reaching there, the police took him into custody. Apart from stating this and advancing submissions on similar lines, he made no effort to explain his presence at the spot where he concededly was present. By virtue of Section-106 of the Evidence Act - having regard to the testimonies of PW-1, 3, 5 & 27, he ought to have explained the incriminating circumstances. No effort was made by him to substantiate the plea taken by him either by giving particulars in regard to the customs case mentioned by him or by examining his uncle as a defence witness.

33. The prosecution also relied on the depositions of PW-24, the finger print expert; he deposed having visited the crime scene on 25.12.1987 and lifted six finger prints from the side wall and two finger prints on the electric iron kept on top of the table in a room. These were developed by him. He deposed that the fingerprints, sent to him by the SHO (PW-27) on 04.02.1988, on comparison showed that two prints belonged to Naseem. The report was marked as Ex. PW-24/A. PW-27, the I.O. deposed having taken the fingerprints of Naseem and forwarded them to the Finger Prints Bureau, the Seizure Memo was exhibited as PW-27/J. This too constitutes a strong incriminating as well as corroborative circumstance against Naseem which went unexplained during the trial. In these circumstances, we do not see any reason to disturb the findings as regards the involvement of Naseem in the crime.

34. So far as the involvement of Amrish was concerned, the prosecution again relied on the testimonies of the eye witnesses PW-1, 3 & 5. The prosecution had alleged that Amrish had checked into Avtar Hotel under the assumed name Amit and sought to substantiate it by relying on the hotel register extract Ex. PW-19/A. Amrish's arrest was proved by PW-23 and PW-27. The prosecution apparently applied for a T.I.P. on the same day itself i.e. 05.01.1988 (Ex. PW-8/A). The Trial Court recorded the proceedings on 11.01.1988 in its order sheet. Amrish refused to join the T.I.P. because the witnesses had seen him at the spot and at the Police Station. This aspect is of some importance because the prosecution's case was that Naseem's disclosure eventually led to the police going to Avtar Hotel and discovering that the room was locked. The prosecution claimed that a Police Constable was deployed to keep watch and subsequently the police party returned after a tip off and at the pointing out of Naseem, arrested Amrish and Sanjay on 05.01.1988. As noticed earlier, the application for T.I.P. was made on the same day. PW-5's evidence establishes that Amrish and Sanjay were taken to the spot of occurrence on 13.01.1988. He clarified during cross examination that he had taken leave that day and was at home. Having regard to these facts, the refusal to participate in the T.I.P. (recorded by Ex. PW-8/E) assumed some importance. Whether the Court can accept the explanation given by Amrish about his having been shown to the witnesses prior to the date he was produced in the Court for T.I.P. would, therefore, have to be seen in the light of the entire circumstances. PW-5 categorically deposed that witnesses were taken at the spot on 13.01.1988 i.e. two days after the T.I.P. refusal. In the circumstances, Amrish's explanation for not participating in the T.I.P. is unworthy of credence. The Court would, therefore, be justified in drawing adverse inference on this aspect against him.

35. The prosecution had relied upon the knife, Ex. PW-10, recovered pursuant to the disclosure statement allegedly made by Amrish; the recovery memo was marked as Ex. PW-21/D. The knife, according to the CFSL report, Ex. PW-27/P contained human blood group "B" -the blood grouping of the deceased. Whilst, we agree with the submissions on behalf of Amrish that implication by co-accused in the disclosure statement is per se not incriminating, the recovery of the knife at his instance, however, stands on a different footing. Added to this, is the report of the Finger Print Expert PW-24 who after photographic enlargement of the two chance prints lifted and developed from the spot i.e. from the electric iron tagged as Q7 and Q8 which matched with the specimen finger print of Amrish. The matching points were described in Ex. PW-24/E and the reasons for the opinion in Ex. PW-24/F. We have earlier noticed while discussing the case against Naseem that these chance prints were lifted by the Finger Print Expert immediately after the scene of occurrence. The Trial Court held that apart from the circumstances that he was an expert witness, there was no reason for him to display bias against the accused. Furthermore, we notice that PW-27 clearly deposed having taken the specimen finger prints from Amrish too; the seizure memo in that case was Ex. PW-27/K. Amrish's identification by the eye witness

and the chance prints lifted from the spot were sufficiently damaging and implicated him in this case. The submissions made on his behalf that none of the eye witnesses mention that Amrish had touched the iron is of no consequence. At least two eye witnesses had deposed that the entire occurrence took place within 10-12 minutes. Having regard to the varying degrees of power of observation and the relative points at which the eye witnesses were placed in the crime scene, seen in the context of the fact that a family member was attacked, as a consequence of which he died, the omission of this detail is insignificant. On the other hand, the eye witnesses are categorical as regards the role played by Amrish i.e. that he pulled out the knife and stabbed the deceased repeatedly.

36. We are conscious of the fact that the prosecution was unable to establish the motive which it claimed led the Appellants to commit the crime. In the charge-sheet, it was mentioned that Kishan Lal bore a grudge of some malice because PW-5 refused to lend him some money, however, his role could not be established. At the same time, the motive which is a key element in a case involving circumstantial evidence plays at best a secondary role if there is clear ocular evidence implicating the accused. This was mentioned in the judgment reported as *Rajesh Govind Jagesha Vs. State of Maharashtra*, as follows:

We are not impressed with the arguments that as the earlier occurrence in which Sarita @ Rita was teased has not been established by the prosecution, the appellants were entitled to acquittal as, according to them, there did not exist any motive for the commission of the crime. "Motive" in a criminal case based upon ocular testimony of witnesses is not at all relevant. This Court in *Gurcharan Singh v. State of Punjab*<sup>3</sup>, held that:

But it has repeatedly been pointed out by this Court that where the positive evidence against the accused is clear, cogent and reliable, the question of motive is of no importance.

Again in *Datar Singh v. State of Punjab*<sup>4</sup> this Court reiterated that mere absence of a strong motive for committing the crime cannot be of any assistance to the accused if the offence could be proved by evidence. Where the direct evidence regarding the commission of offence is worthy of credence and can be believed, the question of motive becomes, more or less, academic. "Motive" may be relevant in a case based upon circumstantial evidence only, being one of the circumstances.

In view of the above discussion, we see no reasons to differ with the Trial Court's findings regarding involvement of Amrish, in the crime, and the role played by him.

37. Coming to Harvinder, the prosecution relied on the eyewitness testimony of PW-1, PW-3 and PW-5. He was arrested after surrendering to the police on 13.01.1988. The prosecution alleged that his stay in Avtar Hotel on 24.12.1987 with Naseem Ahmed and others was proved by Ex. PW-19/A. Harvinder checked in and assumed name as Vijay Anand, testified to by PW-19 Indrajeet.

Harvinder's counsel argued, on the other hand, that PW-19 could not have identified him, and that in any case, the hotel register extracts produced during the trial nowhere reflected his name. Here the prosecution relied upon the personal search memo Ex. PW-21/I dated 13.01.1988 in respect of Harvinder and the disclosure statement Ex. PW-21/J where the signature of the accused was shown as Vijay Saini. While these two circumstances on their own would not implicate Harvinder, they find corroboration in the testimony of PW-19, the hotel manager, who identified him, and also proved Ex. PW-19/A, entry No. 2724, in the name of V. Anand. These certainly implicated him. The Trial Court also compared the signatures on the hotel register extract, and the personal search memo of Harvinder Ex. PW-21/I (on which he signed as Vijay Anand) and found the handwriting to be identical. Interestingly, we notice that in reply to queries put to Harvinder u/s 313 Cr. PC, he mentioned having been arrested after he surrendered to the DCP, Headquarters. When specifically queried about Ex. PW-21/I, he denied it, but stated that the police had taken his signatures on blank papers. Ex. PW-21/I was signed as "Vijay Saini". Furthermore, the prosecution sought his TIP the very next day; he refused it. Concededly he surrendered and was arrested in the police headquarters. In these circumstances, the Trial Court held that the onus shifted on him to at least explain why he refused to participate in the TIP; however, he offered no explanation or evidence.

38. In *Munshi Singh Gautam (D) and Others Vs. State of M.P.*, it was held by the Supreme Court that:

16. As was observed by this Court in *Matru v. State of U.P.*<sup>22</sup> identification tests do not constitute substantive evidence. They are primarily meant for the purpose of helping the investigating agency with an assurance that their progress with the investigation into the offence is proceeding on the right lines. The identification can only be used as corroborative of the statement in court (See *Santokh Singh v. Izhar Hussain*<sup>54</sup>) The necessity for holding an identification parade can arise only when the accused are not previously known to the witnesses. The whole idea of a test identification parade is that witnesses who claim to have seen the culprits at the time of occurrence are to identify them from the midst of other persons without any aid or any other source. The test is done to check upon their veracity. In other words, the main object of holding an identification parade, during the investigation stage, is to test the memory of the witnesses based upon first impression and also to enable the prosecution to decide whether all or any of them could be cited as eyewitnesses of the crime. The identification proceedings are in the nature of tests and significantly, therefore, there is no provision for it in the Code and the Evidence Act. It is desirable that a test identification parade should be conducted as soon as after the arrest of the accused. This becomes necessary to eliminate the possibility of the accused being shown to the witnesses prior to the test identification parade. This is a very common plea of the accused and, therefore, the prosecution has to be cautious to ensure that there is no scope for making such an allegation. If,

however, circumstances are beyond control and there is some delay, it cannot be said to be fatal to the prosecution.

17. It is trite to say that the substantive evidence is the evidence of identification in court. Apart from the clear provisions of Section 9 of the Evidence Act, the position in law is well settled by a catena of decisions of this Court. The facts, which establish the identity of the accused persons, are relevant u/s 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is, accordingly, considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. The identification -parades belong to the stage of investigation, and there is no provision in the Code which obliges the investigating agency to hold or confers a right upon the accused to claim a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code. Failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification should be a matter for the courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration, (See *Kanta Prashad v. Delhi Admn.*<sup>55</sup> *Vaikuntam Chandrappa v. State of A.P.* 56, *Budhsen v. State of U.P.*<sup>51</sup> and *Rameshwar Singh v. State of J&K* 57.

The above views were approved after the Supreme Court revisited the issue, and considered several other judgments in *Sidhartha Vashisht @ Manu Sharma Vs. State (NCT of Delhi)*, It is thus clear that a TIP is not per se substantive evidence, in a criminal trial; the identification of an accused during trial constitutes substantive evidence. However, a TIP is an investigative tool, and courts look for it, wherever available to lend assurance that at the earliest opportunity, the prosecution sought recourse to it, to ensure that the real culprits are brought to book. Having regard to these, particularly the fact that Harvinder surrendered on 13.01.1988, and the prosecution offered his TIP the next day, his refusal had to be explained by him, in the light of the positive identification by the eyewitnesses.

39. In the light of the preceding discussion, we see no infirmity in the Trial Court's judgment, finding that Harvinder was one of the four boys present at the time of the crime, as it was deposed to by the eyewitnesses, and his arrest, corroborated in material particulars by independent evidence.

40. The Trial Court disbelieved that Sanjay was using an alias, i.e. Shiv, as

alleged by the prosecution. Unlike in the case of other accused, there was no corroboration that Sanjay had checked into the hotel under an assumed name; this fact was not established by any prosecution evidence. The other reason which persuaded the Trial Court to conclude that the prosecution could not prove its case against Sanjay beyond reasonable doubt, was that the disclosure statement of a co-accused, made during investigation could not be used against him. The Court also felt that the arrest had not been proved, since the signature of Sanjay was not obtained on the personal search memo. While the Standing Counsel is right in contending that there is no hard and fast rule on this aspect, in law, and that the document, or arrest cannot be doubted on that score, what needs to be emphasized here is that in the present case, the arrest memos and the personal search memos in respect of the accused were signed by them. Furthermore, unlike in the case of other accused, there was no positive identification by any witness other than the ocular witness. Having regard to the overall conspectus of facts, we are unpersuaded that these reasons call for interference, in the State's appeal.

41. As regards Krishan Lal's acquittal, the Trial Court was unconvinced about the prosecution's evidence regarding his involvement in the crime. He did admit having sought for some amount from PW-5. Yet, the prosecution was unable to establish that as a strong motive and link his involvement with the other accused; the allegations of his being acquainted with Harvinder, and having hatched a plot and conspired to kill Sunil was disbelieved; the Trial Court felt that there was simply not sufficient material to support a criminal conspiracy. So far as confessional statements were concerned, the Court held -and in our view, unexceptionally, that such species of evidence was impermissible, even if it was inculpatory, unless it led to any discovery of fact or article. Having regard to the standard which High Courts have to adhere to while assessing evidence in criminal cases, and weighing whether to interfere with the Trial Court's findings, i.e. after seeing if there are substantial or compelling reasons, we are not satisfied that the prosecution has fulfilled that threshold. We are conscious that as an Appellate Court, the entire evidence and materials can be re-appreciated, which is why we did look into the entire record. However, we cannot substitute our findings merely because we can take a view different from that of the Trial Court.

42. That leaves us with the question of conviction. The record shows that the prosecution was unable to establish the motive. We are conscious that motive acquires a secondary position, where the prosecution case is based on direct ocular evidence. Yet, when the prosecution alleges, as in this case-assault on an individual by one person, with others around him, armed, who had accompanied him to the scene of crime, it becomes important for the court to assign the precise criminal responsibility of each one of them. Speaking of the offence u/s 34 IPC, which attributes joint responsibility in such cases, the Supreme Court, in *Ramashish Yadav and Ors. v. State of Bihar*; 2000 SCC (Crl.) 9 held 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 intent impelling the accused to commit a criminal act. The distinct feature is the element of participation, in action and a pre-arranged plan proved either from conduct or from circumstances or from any incriminating facts. The Supreme Court held that common intention:

...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.

In AIR 1945 118 (Privy Council) the Privy Council stated the law as to joint liability, u/s 34, IPC, as follows:

the inference of common intention should never be reached unless it is a necessary inference deducible from the circumstances of the case.

In Pandurang, Tukia and Bhillia Vs. The State of Hyderabad, the Supreme Court, discussed the applicability and scope of Section 34 IPC and the nature of evidence of prior concert, which had to be adduced, in the following terms:

Now in the case of Section 34 we think it is well established that a common intention presupposes prior concert. It requires a pre-arranged plan because before a man can be vicariously convicted for the criminal act of another, the act must have been done in furtherance of the common intention of them all: Mahbub Shah v. King Emperor MR 1945 PC 118. Accordingly there must have been a prior meeting of minds. Several persons can simultaneously attack a man and each can have the same intention, namely the intention to kill, and each can individually inflict a separate fatal blow and yet none would have the common intention required by the section because there was no prior meeting of minds to form a pre-arranged plan. In a case like that, each would be individually liable for whatever injury he caused but none could be vicariously convicted for the act of any of the others; and if the prosecution cannot prove that his separate blow was a fatal one he cannot be convicted of the murder however clearly an intention to kill could be proved in his case: Barendra Kumar Ghosh v. King-Emperor 72 LA 148 and Mahbub Shah v. King-Emperor. As Their Lordships say in the latter case, "the partition which divides their bounds is often very thin: nevertheless, the distinction is real and substantial, and if overlooked will result in miscarriage of justice".

34. The plan need not be elaborate, nor is a long interval of time required. It could arise and be formed suddenly, as for example when one man calls on bystanders to help him kill a given individual and they, either by their words or their acts, indicate their assent to him and join him in the assault. There is then the necessary meeting of the minds. There is a prearranged plan however hastily formed and rudely conceived. But pre-arrangement there must be and premeditated concert. It is not enough, as in the latter Privy Council case, to

have the same intention independently of each other, e.g., the intention to rescue another and, if necessary, to kill those who oppose.

35. In the present case, there is no evidence of any prior meeting. We know nothing of what they said or did before the attack, not even immediately before. Pandurang is not even of the same caste as the others Bhilia, Tukia and Nilia are Lambadas, Pandurang is a Hatkar and Tukaram a Maratha. It is true prior concert and-arrangement can, and indeed often must, be determined from subsequent conduct as, for example, by a systematic plan of campaign unfolding itself during the course of the action which could only be referable to prior concert and pre-arrangement, or a running away together in a body or a meeting together subsequently. But, to quote the Privy Council again, "the inference of common intention should never be reached unless it is a necessary inference deducible from the circumstances of the case.

The decision in *A. Mohnam v. State of Kerala*, 1990 Supp SCC 66 has held that common intention has to be gathered from their overt acts and not from what one of the accused did subsequently. The need for the court to sift the role of each accused, to see whether the common intention or object extended to cause or inflict the same kind of injury, would have to be seen, was emphasized by the Supreme Court, in *Rajagopalswamy Konar v. State of T.N.*, 1995 SCC (Cri) 184.

43. The judgment of the Supreme Court, reported as *Balbir Singh, etc. Vs. State of Punjab, etc.*, contain observations in a similar vein. 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 1 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.

44. The discussion in the preceding paragraphs of this judgment would reveal that Amrish had inflicted the two fatal injuries, which according to medical evidence, were the cause of death. Having regard to the location of those injuries, and the doctor's opinion, there is no room for any doubt that they were aimed at a vital part of the body; equally, they were intended to kill the victim, and did achieve that purpose. The Court therefore upholds Amrish's conviction u/s 302 IPC. However, as far as the others, i.e. Naseem and Harvinder are concerned, the ocular evidence shows that they did not participate in the attack; they were armed with kattas. None of them did any overt act in the attack. Here, the lack of proof of motive - becomes somewhat important. The absence of any overt role leaves the Court clueless as to their intention. Being armed with dangerous weapons, and having accompanied Amrish, they cannot be said to have no criminal motive; it is equally unclear that they came prepared to kill the deceased. Quite possibly they did, or on the other hand, they were at the scene, with the intention of intimidating, or causing some serious injury to Sunil, they can also be attributed knowledge that the weapon if used may result in death. Having regard to the nature of evidence on the record, and the overall circumstances of the case, the court is of opinion that the said two accused cannot be convicted for the offence punishable u/s 302 IPC; at best their case would be u/s 304 Part II IPC read with Section 34.

45. In view of the above discussion the appeals of the State and Amrish (Crl. Appeal Nos. 405/1997, 407/1997 and 292/1998) have to fail. Amrish is directed to surrender and serve the remainder of his sentence u/s 302 IPC, before the Trial Court on 30th September, 2011. The Appeals of Harvinder and Naseem Ahmed have to succeed in part. Their conviction is substituted to the offence punishable u/s 304 Part II IPC; the sentence too is substituted to 10 years rigorous imprisonment. We notice that both of them have undergone imprisonment for over 10 years, and were enlarged on bail for the duration of their appeals. Their bail and surety bonds are hereby discharged; their appeals succeed in these terms. In the result, Criminal Appeals 405/1997, 407/1997 and 292/1998 are dismissed; and Criminal Appeals Nos. 40/1998 and 424/1999 are partly allowed in terms of the above directions.