

(2012) 10 DEL CK 0388

In the Delhi High Court

Case No : Criminal Appeal No. 101 of 2011

Hemant @ Pandit

APPELLANT

Vs

State of NCT of Delhi

RESPONDENT

Date of Decision : 17-10-2012

Acts Referred:

Arms Act, 1959 — Section 25
Criminal Procedure Code, 1973 (CrPC) — Section 162, 313
Evidence Act, 1872 — Section 9
Penal Code, 1860 (IPC) — Section 302, 307, 323, 324, 34

Citation : (2012) 10 DEL CK 0388

Hon'ble Judges : Sanjiv Khanna, J; S.P. Garg, J

Bench : Division Bench

Advocate : Ajay Kumar in Criminal Appeal No. 101 and 703/2011, Mr. Deepak Vohra in Criminal Appeal No. 379/2012 and Mr. Aditya Wadhwa in Criminal Appeal No. 1415/2011, for the Appellant; Richa Kapoor, APP., for the Respondent

Final Decision : Dismissed

Judgement

Sanjiv Khanna, J.—Brij Babu @ Nanne, Ishwar, Sonu @ Bihar and Hemant @ Pandit have preferred these four appeals against the common judgment dated 21st October, 2010, passed by the Sessions Court in case No. 149/2009 arising out of FIR No. 584/2008, P.S. Nangloi. The four appellants have been convicted under Sections 302 /34 of the Indian Penal Code, 1860 (IPC, for short) for murder of Bablu on 28th September, 2008. They have been sentenced to life imprisonment and to pay a fine of Rs. 2,000/- each, in default of which they are to undergo simple imprisonment for one month. The appellants have also been convicted u/s 323 read with Section 34 IPC, having caused injury to Noor Mohd. (PW-2), and have been sentenced to rigorous imprisonment for one year under Sections 323 /34 IPC.

2. The prosecution case is that on 28th September, 2008, Noor Mohd. (PW-2), along with deceased Bablu, left on a cycle, after PW-2 had closed his barber shop in Friends Enclave, Rathi Hospital wali Gali, Sultanpuri, Delhi. Bablu was sitting

on the rear seat and PW-2 was paddling the cycle. At about 9.45 P.M., they reached the service road of F-5, when 3-4 boys stopped them. These boys, who were not known to the two victims, asked PW-2 why he had beaten their brother and one of them hit PW-2 with a sharp edged thing. He and the deceased Bablu started running but the boys apprehended Bablu and inflicted 4-5 blows on him, with a sharp article. Then the boys ran away. Blood started oozing out of Bablu's body and he became unconscious. Police was called on No. 100. and Bablu was taken to SGM Hospital, Mangolpuri. FIR was registered by the police, u/s 307 /324/34 IPC. Crime team was called, site plan was prepared, exhibits were lifted from the spot and seizure memos were prepared. On 29th September, 2008, at about 7.30 PM, Bablu expired and, through DD Entry No. 9A, Section 302 IPC was added. On 1st October, 2008, the four accused were arrested and they made separate disclosure statements (Ex. PW-8/K- Ex. PW8/N). On the basis of these disclosure statements, from the Jhuggi of accused Brij Babu, a blood stained shirt and a dagger were recovered, blood stained shirt and the broken cycle were recovered on the pointing out of Hemant @ Pandit, blood stained T-shirt was recovered at the pointing of Sonu and blood stained T-shirt and a blood stained knife was recovered at the pointing out of the Ishwar. PW-2 identified the three accused Brij Babu, Hemant and Ishwar, in the Test Identification Parade (TIP) conducted on 13th October, 2008 and Sonu in the TIP conducted on 17th October, 2008.

3. At the outset, we may notice that Rahul @ Kallu (PW-4) has not supported the prosecution's version that he knew the four appellants and had seen them beating a person mercilessly, on 28th September, 2008, at about 10.00 PM. In the examination-in-chief, PW-4 has stated that he did not know the four appellants but when he had reached the front side of F-5 Service Road, he saw four persons beating a man. He did not know the victim or the four persons. He did not identify the four appellants and has stated that they were not the persons in question. He has stated that on 29th September, 2008, he was taken to the police station and beaten up but he did not identify the four appellants or give any statement to the police. He was declared hostile and then cross-examined by the Addl. Public Prosecutor but nothing substantial has come out. PW-4 also denied the suggestion that he knew the accused or they had committed robbery, at the point of knife, or that he used to consume Ganja at shamshan ghat, in the year 2008. It is apparent that the said witness did not support the prosecution and casts doubt on the investigation. Therefore the evidence and material relied upon by the prosecution requires scrupulous examination.

4. This leaves us with the statement of Noor Mohd (PW-2), the disclosure statements of the appellants and the recoveries made through them.

5. PW-2, in his court statement, has categorically stated that he, with his friend Bablu, was going to Madipur, by the cycle on 28th September, 2008. The cycle belonged to Bablu, who was sitting on the pillion seat. When the two reached the factory area, near Bus Stop Udyog Nagar Service Road, 3-4 boys approached

them. One of the boys caught hold of PW-2's collar and asked why the two had beaten up one of the accused's brother. PW-2 replied that he had not beaten anyone and he did not know them but the boys persisted that the two had beaten their brother and started beating PW-2. PW-2 has stated that one of them had hit him on the left side of his head. At that moment, he started running away and went inside the side lane "gali". PW-2 did not name the accused but had identified them as the assailants. After 3-4 minutes, PW-2 returned but did not find anyone there. He searched for Bablu and found him lying, in the grass, about 15 to 20 paces ahead of the spot where the quarrel had started. Bablu had multiple stab wounds. His shirt was blood stained and he had told PW-2 that he was stabbed with knife. In the court, PW-2 stated that he had not seen Bablu being stabbed because he ran into a gali, to prevent himself from receiving further injuries. On seeing Bablu injured, PW-2 tried to stop vehicles, to take Bablu to a hospital, and dialed no. 100. After 10 minutes the PCR came and Bablu was taken to the hospital. Bablu's cycle was missing. PW-2's statement (Ex. PW2/B), which bears his signatures, was recorded in the hospital. He was treated in the Sanjay Gandhi Memorial Hospital and discharged on the same day. Next day PW-2 came to know that his friend, Bablu, had expired in the hospital.

6. PW-2 confirmed that he was taken to Rohini Jail and Tihar Jail by the police and he identified accused Brij Babu, Ishwar and Hemant at Rohini Jail and accused Sonu in Tihar Jail. He also identified the knife, with which he was attacked, and T-shirt of the deceased Bablu. He identified the appellants in the Court as the persons who had attacked them on 28th Sept 2008. Noor Mohd. (PW-2) proved the document Ex. PW2/A by which the police had taken earth control, blood stained mud and blood stained leaves and plastic bag. The said Exhibits have signatures of PW-2 dated 29th September, 2008.

7. Jawahar Lal (PW-5) has stated that he was running a STD booth, at A-495 Jawala Puri, Sunder Vihar, New Delhi and on 28th September, 2008, at about 9.00/10.00 PM, one man came to the STD booth and made a call at 100 number saying that dead body of a male person, in injured condition, was lying near Shampani Restaurant. In the cross-examination, PW-5 has stated that the call was made by a person who was about 30-35 years old and he had not noticed any injury on the said person. His statement was recorded on 9th September, 2009. We do not think that failure to mention or notice injury, on the head of the PW-2, casts doubt regarding whether PW-2 was present with Bablu or not. The police control room record in Form-I has been produced and proved as PW21/K. The said Exhibit records that a telephone call had been received at 21.59 hours, on 28th September, 2008, by one Jawaharlal who had informed that near Pira Garari, Inder Enclave, in front of Samphani Marriage Home, a boy was lying injured. We have MLC of the deceased (Ex. PW12/A) in which it is recorded that the injured was brought to the hospital, by Head Constable Dilbagh Singh at 10.50 PM, with alleged history of physical assault. The extent and nature of injuries have been delineated in the report. MLC mentions the residential address of the deceased as F-4/333 Sultan Puri, Delhi. We note that this address could

have been given only by a person who knew the deceased Bablu. MLC (Ex. PW8/A) of Noor Mohd. (PW-2), issued by SGM Hospital is dated 28th September, 2008 at about 10.45 PM. It records alleged history of physical assault and states that the patient had suffered a superficial cut over forehead on the LP side. PW-2 states that both he and the deceased were brought to the hospital by a common person, HC Dilbag, 8845 PCR. This is substantiated by the two MLC (Exhibit PW-8/A of PW-2 and Ex. PW-12/A of the deceased).

8. In view of the aforesaid, we reject the contention, of the appellants, that PW-2 was not present at the spot and was not paddling the cycle or was not with the deceased, at about 9.45 - 10 PM on 28th September, 2008.

9. The homicidal death of Bablu has been proved beyond doubt by Dr. Brijesh Singh (PW-12), CMO, Sanjay Gandhi Memorial Hospital. He has stated that, as per the MLC, Bablu had suffered six wounds. MLC was prepared by Dr. Anuj Kumar Gupta, whose writing was identified by PW-12. He also confirmed the MLC of Noor Mohd. Ex. PW8/A, which bears his signatures and was written by Dr. Vipin Dabas, whose signatures and writing he could identify. Dr. Vipin Dabas had left service of the said hospital and they did not know his present where about. Death report of Bablu has been marked as Ex. PW21/B. Body of Bablu was recognized by Ashok Kumar (PW-1), father of Bablu. Post Mortem Report of Bablu (Ex. PW9/A) mentions six injuries inflicted on the deceased Bablu. Manoj Dhingra (PW-9) had conducted the said Post Mortem and had concluded the cause of death as hemorrhagic shock, resulting from multiple stab injuries. While dealing with the contention of the appellants on the question of common intention, we shall refer back to the details of the injuries.

10. The main question raised, in the appeal, is about the identity of the assailants and their involvement. The counsel for the appellants have put forward plethora of arguments regarding this. Appellants" contend that it was dark and night time; the appellants were not known to PW-2; and suspected involvement of the appellants cannot be justified, by the police, as PW-4 has turned hostile. Since Raju @ Kallu (PW-4) has not supported the prosecution case, therefore, the chain of events is incomplete. They propel that the contention regarding PW-4 being a planted witness has been established and, therefore, the case must fail. PW-2, in the cross-examination, admitted that the appellants were shown to him, in the police station, before the TIP was conducted and hence the TIP proceedings were vitiated. The recoveries made pursuant to the said disclosure statements were sham and the statements of police witnesses, regarding recoveries, were contradictory. Cycle parts were not shown to PW-2, therefore, could not be identified by him. Lastly, it was stated that the date of arrest of the accused, as per the police, was night intervening 1st & 2nd October, 2008, but there is no evidence or witness who has stated how and when they were arrested. It was pointed out that if the date of arrest was debatable then the prosecution version and story should fail. Reliance was placed on Suraj Mal Vs. State (Delhi Administration), and Kashmira Singh Vs. State of Punjab, .

11. PW-2, in the Court, had identified the four appellants, as the assailants who had injured him and had also given stabs wounds to the deceased Bablu. As noted above, he had also identified them in the TIPs on 13th October, 2008 and 17th October, 2008. The accused, as per the police version, were arrested on intervening night of 1st and 2nd October, 2008. On 2nd October, 2008 itself, they were produced in the court, with their faces covered, for judicial custody, and thus they were not in the police custody. On 8th October, 2008, the prosecution had filed an application (marked Ex. PW10/F) for conduction of TIP. On this application, the TIP proceedings were directed to be conducted on 13th and 17th October, 2008. As recorded above, the PW-2 had identified the four accused in the TIP proceedings. Learned Counsel for the appellant - Ishwar had submitted that in the TIP proceedings, marked PW22/G - J, names of accused is mentioned. It was, therefore, argued that PW-2 had identified the accused by their names, whereas it was clear that PW-2 could not, even in the court, identify the accused by their names. We do not find any merit in the said contention. TIP proceedings have been recorded by the Metropolitan Magistrate Rakesh Kumar (PW-22). He is the author of the said document. Name of the accused is mentioned in the TIP report to specify the person who was identified. This does not mean that PW-2, in the TIP, identified the four appellants by their names. Neither has this been recorded or stated anywhere. No questions were put, to either PW-22 or PW-2, to establish that the TIP reports are incorrect or wrongly recorded because PW-2 had identified the appellants with their names.

12. Learned Counsel for the appellant has drawn our attention to the following statement made by PW-2 in his cross-examination:-

Babloo was known to me for the last three years. I used to go with Babloo to Madipur around twice or thrice a week. At the time when accused persons started beating us, I ran towards the factory side and Babloo started running towards the road. The spot of the incident is about 1.5 km away from my shop. The service road was not crowded since it was a Sunday. I was called to PS Nangloi for 2/3 days after the incident and was shown some boys for the purpose of identification. The accused Brij Babu was brought at Nangloi Police station on the same night and I identified him. The remaining accused persons were also brought to the PS Nangloi within two three days and I identified all of them at the PS. I was shown some other boys also but I told the police that they were not the assailants. It is wrong to suggest that I was told by the police officials that the accused persons were the actual assailants and that I identified them at the PS as well as in the jail on that basis.

13. Two contentions are raised with reference to the said paragraph. Firstly, it was submitted that the accused Brij Babu was arrested in the intervening night of 28-29th September, 2008 and, secondly, the appellants were shown to PW-2, before the TIP was conducted, and this vitiates the entire proceedings. We do not agree that confirmation/identification at the police station has any material bearing on the TIP proceedings or identification of the four appellants in the

court. The aforesaid paragraph has to be read with the examination in chief of PW-2. In the examination in chief, PW-2 has categorically stated that four persons, present in the Court, were the ones who had beaten him and caused injuries to the deceased but he could not give their individual names. He has further stated that he was taken to Rohini and Tihar Jails where he identified the accused. In the cross-examination he has stated that he was called to police station, Nangloi, after 2-3 days of the incident and shown boys for identification. On the same night i.e. after 2-3 days, the appellant Brij Babu was shown to him and he identified him as one of the assailants. Remaining accused were shown to him within 2-3 days and he identified them. The statement quoted above shows that PW-2 is a truthful, reliable and credible witness. He did not hide or conceal true facts or go by the dictates of any person or police officers. He has narrated what in actuality had transpired and happened. He did not wrongly or falsely implicate any person. The Supreme Court in *Munna Kumar Upadhyaya @ Munna Upadhyaya Vs. The State of Andhra Pradesh Through Public Prosecutor, Hyderabad, Andhra Pradesh*, , has made reference to the case of *Sidhartha Vashisht @ Manu Sharma Vs. State (NCT of Delhi)*, , wherein the court has discussed case laws relating to identification and it is held:

68. We may refer to the judgment of this Court in a more recent case, in *Sidhartha Vashisht @ Manu Sharma Vs. State (NCT of Delhi)*, , where the law in relation to purpose of holding an identification parade, the effect of delay and its evidentiary value were discussed. The Court held as under: (SCC pp. 96-99, paras 256 & 259)

256. The law as it stands today is set out in the following decisions of this Court which are reproduced as herein under:

Munshi Singh Gautam (D) and Others Vs. State of M.P.,

16. As was observed by this Court in *Matru alias Girish Chandra Vs. The State of Uttar Pradesh*, 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 (sic made) in court. (See *Santokh Singh Vs. Izhar Hussain and Another*, .) 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 Vs. Delhi Administration*, , *Vaikuntam Chandrappa and Others Vs. State of Andhra Pradesh*, , *Budhsen and Another Vs. State of U.P.*, and *Rameshwar Singh Vs. State of Jammu and Kashmir*, .)

19. In *Harbajan Singh Vs. State of Jammu and Kashmir*, , though a test identification parade was not held, this Court upheld the conviction on the basis of the identification in court corroborated by other circumstantial evidence. In that case it was found that the appellant and one Gurmukh Singh were absent at the time of roll call and when they were arrested on the night of 16-12-1971 their rifles smelt of fresh gunpowder and that the empty cartridge case which was found at the scene of offence bore distinctive markings showing that the bullet which killed the deceased was fired from the rifle of the appellant. Noticing these circumstances this Court held: (SCC p. 481, para 4)

4. In view of this corroborative evidence we find no substance in the argument urged on behalf of the appellant that the investigating officer ought to have held an identification parade and that the failure of Munshi Ram to mention the names of the two accused to the neighbours who came to the scene immediately after the occurrence shows that his story cannot be true. As observed by this Court in *Jadunath Singh and Another Vs. The State of U.P.*, absence of test identification is not necessarily fatal. The fact that Munshi Ram did not disclose the names of the two accused to the villagers only shows that the accused were not previously known to him and the story that the accused referred to each other by their respective names during the course of the incident contains an element of exaggeration. The case does not rest on the evidence of Munshi Ram alone and the corroborative circumstances to which we have referred to above lend enough assurance to the implication of the appellant.

Malkhansingh and Others Vs. State of Madhya Pradesh,

7. 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 of Criminal Procedure 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 of Criminal Procedure. 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.

259. In *Mullagiri Vajram and others Vs. State of Andhra Pradesh*, it was held that though the accused was seen by the witness in custody, any infirmity in TIP will not affect the outcome of the case, since the depositions of the witnesses in court were reliable and could sustain a conviction. The photo identification and

TIP are only aides in the investigation and does not form substantive evidence. The substantive evidence is the evidence in the court on oath.

Regarding his statement, the expression "same night", used in the sentence in the cross-examination quoted above, refers to the night i.e. 2-3 days after the incident when accused Brij Babu was brought to the police station and PW-2 identified him. It is not possible to accept the contention that the appellant Brij Babu was arrested on the same night as the incident i.e. intervening night of 28th/29th September, 2008. Had this been the case, the prosecution version would have been entirely different and palpably simpler and easier to prove.

14. It is relevant to state here that appellants had participated in the TIP proceedings without any protest or demur and did not make any allegation that their identities had been disclosed and they were shown to PW-2 before the TIP. PW-2 identified them as assailants in the said parade and subsequently in the court. The appellants have, therefore, belatedly altered their stand, after taking a chance and participating in the TIP.

15. The seizure memo of the cycle (Ex. PW8/W) clearly mentions that the bicycle was recovered in broken parts. PW-8, PW-11 and PW-21 have been cross-examined regarding this and they have stated that complete cycle was not recovered and hence it was not possible to tell the brand or identify the cycle. It is possible that the other parts might have been sold off in the market, after stealing the cycle, and these parts would have been difficult to recover. Failure to conduct TIP of the remaining cycle parts or identification by PW-2 was immaterial as the cycle itself was not recovered.

16. Statement of PW-2, in the cross examination, shows that the police has not relied upon identification of the appellants/accused by PW-4. Several persons were shown to PW-2 and only after he identified the culprits/assailants, the appellants were prosecuted. Presence of PW-4, at the time of occurrence, is not indicated by witness PW-2 or PW-5. Therefore, even though PW-4 has turned hostile, it does not perforate the prosecution case with regards to identity of the assailants or their involvement in the said offence. PW-4's statement would have been relevant with regards to the arrest of the accused, which has been dealt with above.

17. As noticed, PW-2 is an injured witness, who was present at the time of the occurrence and reliance can be placed on his statement. His statement is entitled to substantial weight. It has been held in *Abdul Sayeed Vs. State of Madhya Pradesh*, :-

28. The question of the weight to be attached to the evidence of a witness that was himself injured in the course of the occurrence has been extensively discussed by this Court. Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s)

in order to falsely implicate someone. "Convincing evidence is required to discredit an injured witness."

30. The law on the point can be summarized to the effect that the testimony of the injured witness is accorded a special status in law. This is as a consequence of the fact that the injury to the witness is an inbuilt guarantee of his presence at the scene of the crime and because the witness will not want to let his actual assailant go unpunished merely to falsely implicate a third party for the commission of the offence. Thus, the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies therein.

In State of U.P. Vs. Kishan Chand and Others, a similar view has been reiterated observing that the testimony of an injured witness has its own relevance and efficacy. It held:

10.... The testimony of an injured witness has its own relevance and efficacy. The fact that the witnesses sustained injuries at the time and place of occurrence lends support to their testimony that the witnesses were present during the occurrence.

18. Brij Babu in his statement, u/s 313 of Cr.P.C., has stated that he was lifted from his house, in the intervening night of 28th/29th September, 2008. Hemant and Ishwar have stated that they were arrested on 30th September, 2008 at 6.00 P.M. and Sonu has stated that he was arrested from his factory on 1st October, 2008 at 8:30 A.M. Thus, as far as arrest of Sonu is concerned, there is no controversy or dispute. Hemant in his statement, u/s 313, had referred to FIR No. 1184/2006, registered in PS Nangloi under Sections 25, 54 and 59 of the Arms Act but no details and particulars have been put forth and none of the police witnesses were cross-examined on this aspect.

19. Insp. Joginder Singh (PW-20) was Incharge of Crime Team and he has stated that he had remained at the spot from 1.00 AM to 1.40 AM. Photographs were taken and necessary directions were given to the Investigating Officer. He was never questioned regarding how the appellant Brij Babu had been arrested, by the appellants counsel. Retd. Inspector Prakash Chand (PW-21) has stated that on 1st October, 2008, he along with Constable Mahender Singh, HC Hattu Ram and other police staff were patrolling the area P.S. Nangloi when they met a secret informer who revealed that the criminals, involved in the incident of 28th September, 2008, were present at Rohtak Road near Rail Neer Plant. Raid was conducted and the appellants were arrested. In the cross-examination, he accepted that Rahul (PW-4) was one who had identified the accused. As noticed above, Rahul (PW-4) was declared hostile and did not support the prosecution's case. However, while cross-examining PW-21, it was put to him that Brij Babu was arrested on 29th September, 2008 and Ishwar and Hemant were arrested on 30th September, 2008 at 6.00 AM. Huttu Ram (PW-11) has made a similar statement about arrest of the appellant, on 1st October, 2008, from the said

location. It was put to him that accused Brij Babu was arrested on 29th September, 2008 in this case and in 2-3 other cases which were pending before him. The details of those cases were not indicated. With regard to other accused, namely Hemant and Ishwar, no such question was put to them. Inspector Mahender Singh (PW-8) has stated that crime team remained at the spot and had lifted three samples. Thereafter they proceeded to the police station and, on the way, he met eye-witness Kallu i.e. Rahul PW-4. On 1st October, 2008, he again joined investigation with SHO Insp. Prakash Chand and at 10.30 P.M., the four appellants were arrested at the instance of Kallu @ Rahul.

20. After the arrest, on the basis of disclosure statements made by the accused, as noticed above, recoveries have been made. Articles recovered were sent to CFSL for tests. The CFSL report (Ex. PW14/A) indicates that the blood group of the deceased was Group A. Same blood group was found on the knife Ex. 9 and T-shirt recovered at the instance of Ishwar and on the T-shirt recovered at the instance of Hemant. The blood on the shirt of one of the accused (Ex. 8) was found to be of human origin but the blood group test remained inconclusive.

21. Learned Counsel for the appellant submitted that there is discrepancy, in the statement made by PW-11, PW-8 and PW-21, in respect of recoveries made at the instance of Ishwar and Hemant. It was highlighted that PW-8 has stated that T-shirt recovered at the instance of Sonu had the words "LEJ" printed on it. It is pointed out that PW-11 has stated that T-shirt recovered from Sonu had the word "LEJ" written on it and on the T-shirt recovered from Ishwar "Why Not" was written on it in yellow. However, PW-8 did not mention about polythene in respect of recovery made from Ishwar and also had not mentioned the words "Why Not" on Ishwar's T-shirt. PW-21, on the other hand, had stated that on the T-shirt recovered from Ishwar words "Why Not" were written and the T-shirt was in polythene. It was also stated that there is some confusion regarding whether Sonu and Brij Babu were staying together. We note that PW-8, PW-11 and PW-21 are the relevant police officers who were there at the time of recovery, following to disclosure statement. None of the description given by any of these officers is mismatching from the disclosure statements of the accused. The fact that PW-8 remembered Ishwar's red- shirt but not the words "Why Not" written on it or the polythene, though the other two police officers have recollected these details, or the fact that PW-21 could not state if Sonu @ Bihari's T-shirt had "LEJ" written on it, while at the same time PW-8 and PW-11 have, is a reflection that observation, retention and memory of human are different and does not reflect upon the recoveries made and documented. Providing minutest details in oral statement when undertaken without reference to records, after so many years, is not always possible and is a valid and correct explanation why the police officers had provided slightly incomplete or different descriptions.

22. The last contention raised by the counsel for the appellants was with reference to common intention u/s 34. As noticed above, reliance was placed upon Kashmir Singh (supra). It was pointed out that, as per PW-2, the appellants

had attacked him and Bablu because they suspected that the two had attacked their brother. It is submitted that common intention to cause injury is not established. In this regard, it will be appropriate to record nature of injuries which were sustained by the deceased. Common intention is always inferred and gathered from facts, keeping in mind the circumstances in which the occurrence/ crime has taken place. In the present case, the crime had taken place in night between 9.45 PM to 10 PM. The obvious intention was to stop and pick up a quarrel with PW-2 and the deceased, at one pretext or the other. Six wounds were caused by sharp edged weapon i.e. knife. The nature and extent of injuries, the conduct of appellants in stopping the cycle and picking up the quarrel and then hitting PW-2 and causing six knife wound reflect the common intention of the appellants. The common intention is, therefore, clearly established. In light of these observations, relying on PW-2's statement and recoveries made in this case, these appeals are dismissed and the conviction and sentence u/s 302/ 34 IPC and Section 323/34 IPC are maintained.