

(2009) 11 DEL CK 0124

In the Delhi High Court

Case No : Criminal Appeal No. 576 of 2001

Naushad and Others

APPELLANT

Vs

State (NCT of Delhi)

RESPONDENT

Date of Decision : 05-11-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 309, 313

Evidence Act, 1872 — Section 30

Penal Code, 1860 (IPC) — Section 302, 307, 34

Citation : (2009) 11 DEL CK 0124

Hon'ble Judges : Suresh Kait, J; Pradeep Nandrajog, J

Bench : Division Bench

Advocate : S. Khan, Ajay Sharma and Sunil Goyal, in Criminal Appeal No. 576/2001 and Bahar U. Barqi, in Criminal Appeal No. 590/200, for the Appellant; M.N. Dudeja, Assistant Public Prosecutor, for the Respondent

Judgement

Pradeep Nandrajog, J.—Vide impugned judgment and order dated 06.08.2001, the appellants, Mohd. Irfan, Naushad Ahmad, Shamshad Ahmad and Ibban Ali have been convicted for the offences (two) of having murdered Mohd. Qayyum and Mohd. Furkan, for which offences they have been sentenced to undergo imprisonment for life and pay a fine in sum of Rs. 2,000/-; in default to undergo RI for 3 months. Additionally, the appellants have also been convicted for the offence of having attempted to murder Mohd. Farman, for which offence they have been sentenced to undergo RI for 4 years and pay a fine in sum of Rs. 1,000/-; in default to undergo RI for 1 month.

2. The case of the prosecution is that criminal law was set into motion when at around 6.17 P.M. on 09.10.1988, DD entry No. 14A, Ex.PW-23/B, was recorded by ASI Ram Singh PW- 23, to the effect that an unknown person has informed over the telephone that a man who has been stabbed with knife is lying near Chauhan Bangar Pulia.

3. On receipt of the information contained in the afore- noted DD entry, HC

Balraj Singh PW-16 and HC Swaran Singh PW-24, reached Chauhan Bangar Pulia, where they saw Mohd. Qayyum, lying injured on the road. HC Balraj Singh and HC Swaran Singh removed Mohd. Qayyum in a PCR van to GTB Hospital.

4. In the meantime, Inspector Harshvardhan PW-26, also reached Chauhan Bangar Pulia where he learnt that Mohd. Qayyum has been removed to GTB Hospital and that another incident of stabbing had taken place at the premises bearing Municipal No. A/14/9, Chauhan Bangar. On learning about the same, Inspector Harshvardhan proceeded to the house in question where he learnt that two persons; namely, Mohd. Furkan and Mohd. Farman have been stabbed by the same persons who have injured Mohd. Qayyum and that Furkan and Farman have been removed to Swami Dayanand Hospital.

5. Inspector Harshvardhan proceeded to GTB Hospital, where he learnt that Mohd. Qayyum has been declared brought dead as noted in the MLC Ex.PW-25/A of Mohd. Qayyum. After collecting the MLC Ex.PW-25/A of Mohd. Qayyum, Inspector Harshvardhan went to Swami Dayanand Hospital where he learnt that at around 6.40 P.M. the doctor has declared Mohd. Furkan to be fit to give a statement, as noted in the MLC Ex.PW-1/C of Mohd. Furkan. Accordingly, Inspector Harshvardhan recorded the statement Ex.PW-26/B of Mohd. Furkan. It may be noted here that Inspector Harshvardhan completed recording the statement Ex.PW-26/B of Mohd. Furkan at 07.00 P.M. on 09.10.1988, as evident from the endorsement Ex.PW-1/D made by Dr. Suresh Kumar PW-1, on the said statement. It is the claim of the prosecution that Inspector Harshvardhan recorded the statement Ex.PW-26/B of Mohd. Furkan in the presence of Dr. Suresh Kumar PW-1. It is further the claim of the prosecution that Mohd. Furkan affixed his thumb impressions on his statement Ex.PW-26/B.

6. In his statement, Ex.PW-26/B, Mohd. Furkan stated that today evening he was making tea at his shop when all of a sudden Irfan, Naushad, Shamshad and Ibban came there and caught hold of him. Irfan, Ibban and Shamshad continued to hold him while Naushad gave knife blows on his chest. His brother Mohd. Furkan and his father freed him from the clutches of the said persons. The said persons also inflicted knife injuries on the person of his brother. That yesterday, a quarrel had taken place between them and their neighbour Hanif and that the persons who attacked him are the family members of Hanif.

7. After conducting the medical examination of Mohd. Furkan, the doctor handed over the clothes of Mohd. Qayyum to Inspector Harshvardhan who seized the same vide memo Ex.PW- 26/C.

8. Thereafter Inspector Harshvardhan recorded the statement Ex.PW-4/A of Mohd. Farman and made an endorsement Ex.PW-26/A thereon, and at around 07.45 P.M. forwarded the same through Const. Bhagwati Prasad for registration of an FIR. Const. Bhagwati Prasad took Ex.PW-26/A to the police station and handed over the same to SI Kadam Singh PW-14, who recorded the FIR No. 347/1988, Ex.PW-14/A.

9. In his statement Ex.PW-4/A, Mohd. Farman stated that he along with his family resides in premises bearing Municipal No. A-14/9, Chauhan Bangar, New Delhi as also runs a tea shop in the said premises. Yesterday a quarrel had taken place between them and their neighbour Hanif, and with the intervention of the neighbours the quarrel was quenched. A settlement agreement was entered into between them and Hanif but the appellants who are the sons of Hanif were not happy with the said agreement. Today, at around 5.30 P.M. he along with his brother Furkan and servant Noorudin was present in his shop when all of a sudden the appellants came there. Naushad was having a blood stained knife in his hand and that the clothes of Naushad and Shamshad were stained with blood. The appellants caught hold of Furkan and pulled him out from the shop. Thereafter Irfan said to his brother Furkan that they have killed his friend Qayyum with the said knife and now it is his turn. On hearing the same Furkan got scared and started running towards their house but Naushad inflicted several knife blows on the person of Furkan. Naushad also gave a knife blow on his head when he tried to save Furkan. Thereafter the appellants fled from there. When he and his brother were being removed to hospital he saw that their friend Mohd. Qayyum was smeared with blood and lying at a pulia near their house. Today Qayyum had counselled Naushad and his brothers to not to quarrel with them.

10. After collecting the MLCs of Mohd. Furkan and Mohd. Farman, Inspector Harshvardhan PW-26, proceeded to Chauhan Bangar pulia i.e. the place of the murder of Mohd. Furkan where he prepared the site plan Ex.PW-26/A. Thereafter Inspector Harshvardhan went to the premises bearing Municipal No. A- 14/9, Chauhan Bangar i.e. the place where Mohd. Furkan and Mohd. Farman were attacked and prepared the site plan Ex.26/E. Since the ground at the said spots appeared to be stained with blood, Inspector Harshvardhan lifted a portion of the grounds in question and seized the same vide memos Ex.PW-2/A and Ex.PW-3/A. It is the claim of the prosecution that Mohd. Zaleel PW-2 and Mohd. Israr PW-3, witnessed the preparation of the seizure memos Ex.PW-2/A and Ex.PW-3/A respectively.

11. In the meantime, Mohd. Furkan was shifted to Jai Prakash Narayan Hospital where he succumbed to his injuries at 12.30 A.M. on 10.10.1988. The body of Mohd. Furkan was sent to the mortuary at Maulana Azad Medical College where Dr. P.C. Dixit PW-18, conducted the post-mortem at about 2.30 P.M. on 10.10.1988 and gave his report Ex.PW-18/A, which records following 16 external ante-mortem injuries on the person of Mohd. Furkan:

1. Abrasion 1.5 x 1 cm over deep of right shoulder.
2. Two multiple abrasion upper 3 cms and lower one 2.5 cms semi circular bite mark by teeth over middle and outer aspect of right arm.
3. Incised wound 3.5 x 1.1 x bone deep on inner back aspect of rt forearm, 2 cms above the wrist joint.
4. Abrasion 2.5 x 1 cms over medial aspect of rt forearm near the wrist joint.

5. Abrasion 0.8 x 0.5 cm over medial aspect of rt elbow joint.
6. Incised wound 2 x 0.4 cm x bone deep over inferior lateral aspect of rt knee joint.
7. Stitched incised wound 5.5 cms over inner aspect of left wrist joint and upper part of palm.
8. Incised wound 2 x 0.8 cm x 0.3 cm between lt thumb and fore finger.
9. Incised wound 1 x 0.8 x 0.3 cm over the inner aspect of middle phalanx of left little finger.
10. Incised stitched wound 9 cm over outer aspect of left forearm and elbow.
11. Stitched incised wound 6 cm vertically placed in front of left shoulder joint region and 3 cm below the tip of acromion process.
12. Stitched incised stab wound 2 cm over the left lower chest obliquely placed, 7 cm below and lateral to left nipple and 9 cms below anterior axillary fold. On removing the stitches the margins were regular, both angles were acute. The wound was going upwards, backwards and medially entering the chest cavity. The lower angle was 112 cms above the left heel.
13. Stitched incised stab wound 4.5 cm over left side lower chest, obliquely placed, 6 cms below and lateral to left nipple, 8 cm left to mid line and 2 cms medial to injury No. 12. On removing the stitches the margins were regular. Both angles were acute. The wound was going downwards, medially and backward to enter into chest cavity and then abdomen cavity. The lower angle was 108 cms above the left heel.
14. Stitched incised stab wound 2.5 cm over left iliac fossa, obliquely placed 2 cms and left to mid line and 6.5 cms lateral and below to the umbilical. On removing the stitches the margins were regular. Both angles were acute. The wound was going upward, backwards and medially to enter the abdominal cavity. The lower angle was 87 cms above the left heel.
15. Incised stitched wound (Operative wound) 42 cms L shaped starting from symphysis pubis upto xyphisternum and then towards left below the nipple upto anterior axillary fold.
16. Incised stab wound 2.5 x 1 cm over middle back near the midline. The lower angle was on the midline and the upper angle 1.5 cm right to midline. The upper angle is 16 cms below and medial to inferior angle of left scapula. The wound was spindle shaped. Both the angles were acute and margins were regular. The inferior angle was 109 cm above the right heel.
12. He opined that the cause of the death of Mohd. Furkan was haemorrhage and shock consequent upon stab injuries to lung, diaphragm, stomach and intestine. Injuries Nos. 1, 4 and 5 found on the person of Mohd. Furkan could have been caused by a blunt force whereas injury No. 2 was caused by teeth bite. Injuries

Nos. 3, 6, 7, 8, 9 10 and 11 could have been caused by single or doubled edged sharp weapon whereas injuries 12, 13, 14 and 16 were most probably caused by doubled edged weapon. Injury No. 15 was caused by operative procedure. Injuries Nos. 12, 13 and 14 found on person of Mohd Furkan were sufficient to cause his death in the ordinary course of nature.

13. Since Mohd. Qayyum was brought dead at the hospital, his body was sent to the mortuary of DDU Hospital where Dr. L.K. Barua PW-19, conducted the post-mortem at about 4.00 P.M. on 10.10.1988 and gave his report Ex.PW-19/A, which records following 28 external ante-mortem injuries on the person of Mohd. Qayyum:

1. Abrasion size 3 cm x 1 cm on left forehead 1 cm above the left eyebrow.
2. Abrasion size 3 cm x 0.5 cm on bridge of nose placed vertically.
3. Abrasion on tip of nose size 1 cm x 0.5 cm.
4. Incised and lacerated wound on medial aspect of rt thumb & avulsion (illegible) 3.5 cm x 1 cm extending to the middle phalynx.
5. Abrasion on post aspect of rt elbow of size 2 cm x 1 cm.
6. Incised wound on rt upper chest placed vertically 2 cm above and medial to the rt nipple. The size of wound is 3 cm x 2 cm x ?. The lower end is 9 cm lateral to mid line. The lower end of the wound is acute.
7. Incised wound on rt side of chest placed obliquely vertical. The lower inner end is 2.5 cm rt to the mid line. Size of wound is 3 cm x 1.5 cm x ? Both the ends are acute and the upper and outer end is tailing. The upper end of wound is 10 cm below the mid cleavicular line (illegible)
8. Incised wound placed almost transversely on the lower part of chest of size 10.5 cm x 5 cm x ? A part ofillegible is seen coming out of the wound. The medial end is touching the mid line on 16.5 cm below the stereo cleavicular joint.
9. Incised wound placed oblique/vertically on left epigastric area of size 5 cm x 3 cm x abdominal cavity deep. It has not cut any of the abdominal tissues. This wound is separated from injury No. 8 ...illegible
10. Incised wound on rt lower chest placed transversely placed 2.5 cm above the injury No. 9 of size 2.5 cm x 1 cm xillegible
11. Incised wound on left upper chest placed obliquely, the lower inner end is 4 cm lateral to mid line. Size of wound is 6 cm x 1 cm x ? The wound is 22 cm below lt mid cleavicular line.
12. Incised wound placed obliquely on left upper part of chest. The upper end is 2 cm below the mid cleavicular line and 6 cm lateral to mid line, size of wound is 2 cm x 1.3 cm x ?

13. Incised wound on left upper part of chest placed obliquely. The lower end is placed medially and 13 cm lateral to mid line, size of wound 4 cm x 1.5 cm x middle deep.

14. Incised wound placed vertically on left mid axillary line 13 cm below the anterior axillary fold. Size of wound is 3 cm x 1 cm x muscle deep. This wound is 2 cm lateral to injury No. 13.

15. Incised wound placed vertically on left ant axillary fold. Size 3 cm x 1 cm x muscle deep.

16. Incised wound placed slightly obliquely on cut port axillary fold 8 cm below in left arm of size 2 cm x 1 cm x ? 17. Incised wound placed almost transversely 4.5 cm below the left arm of size 5 cm x 2 cm x ?

18. Incised wound on left side middle of abdomen placed transversely, the medial end is 5 cm left to midline.....Illegible

19. Incised wound placed vertically on lateral aspect of left arm size 9 cm x 1 cm x ?. The lower end of 2.5 cm....Illegible

20. Incised wound on vertical aspect of left arm placed vertically of size 2.5 cm x 1 cm x ?.Illegible

21. Incised wound lateral aspect of left knee placed vertically on lateral aspect of rt knee of size 8 cm x 0.5 cm x muscle deep

22. Incised wound placed vertically on lateral aspect of rt knee of size 8 cm x 0.5 cm x muscle deep

23. Incised wound on rt side of back of chest 21 cm below the rap of neck and 3 cm lateral to midline of size 1.5 cm x 1 cm x muscle deep. The medial end is tailed and transversely placed.

24. Incised wound on rt side of back of abdomen placed transversely 17 cm below the injury No. 23. Size of wound is 4 cm x 1 cm x muscle deep

25. One linear scratch on back of lower abdomen placed transversely 4 cm below the injury No. 24. Size is 8 cm x 0.2 cm

26. Incised wound on rt side of abdominal wall placed transversely size 5 cm x 2.5 cm x muscle deep

27. Incised wound placed transversely on rt side abdominal wall placed almost horizontal to injury No. 26. This injury is 3 cm below the injury No. 26. Size of wound 4.5 cm x 1.5 cm x muscle deep

28. Incised wound on rt buttock 3 cm above the rt... illegible fold of size 2.5 cm x 1 cm x muscle deep

14. The doctor opined that the cause of death of Mohd. Qayyum was shock and haemorrhage resulting from the ante- mortem injuries found on his person.

Injuries Nos. 8, 11, 16 and 17 found on the person of Mohd. Qayyum were individually sufficient to cause his death in the ordinary course of nature.

15. After the post-mortem, the doctor handed over the clothes and blood sample of Mohd. Qayyum on a gauze to Const. Balraj Singh PW-16, who in turn handed over the same to Inspector Harshvardhan PW-26, as recorded in the memo Ex.PW- 16/A.

16. Since Mohd. Furkan and Mohd. Farman had indicted the appellants as the assailants, the police set out to apprehend them. On the basis of a secret information, a police party consisting of Inspector Harshvardhan PW-26, HC Iqbal Ahmad PW-17 and HC Bhagwati Prasad PW-22, apprehended appellant Irfan at his residence on 13.10.1988. On being interrogated by Inspector Harshvardhan PW-26, in the presence of HC Iqbal Ahmad PW-17 and HC Bhagwati Prasad PW-22, appellant Irfan made a disclosure statement Ex.PW-22/A (Ex.PW-26/A) wherein he stated that he can get recover the clothes worn by him at the time of the occurrence. Pursuant thereto, he led the aforesaid police officers to the bushes near a fish pond and got recovered a safari suit from a gunny bag lying hidden in the said bushes. The said safari suit was seized vide memo Ex.PW-17/A.

17. Thereafter appellant Irfan led the aforesaid officers to a slum dwelling wherefrom the other appellants were arrested. On being interrogated by Inspector Harshvardhan PW-26, in the presence of HC Iqbal Ahmad PW-17 and HC Bhagwati Prasad PW-22, appellant Naushad made a disclosure statement Ex.PW- 22/B wherein he stated that he can get recover the clothes worn by him at the time of the occurrence as also the knife used by him for stabbing Mohd. Qayyum and Mohd. Furkan. Pursuant thereto, he led the aforesaid police officers to the bushes near Yamuna bridge and pointed out a newspaper lying hidden in the said bushes. On checking the newspaper, a knife and shirt were found wrapped therein. The said knife and shirt were seized vide memo Ex.PW-17/F. Inspector Harshvardhan PW-26, prepared the sketch of the said knife; being Ex.PW-17/H.

18. On the same day i.e. 13.10.1988 HC Iqbal Ahmad PW- 17, took appellants Mohd. Irfan and Naushad to Swami Dayanand Hospital for their medical examination. It be noted here that the MLC Ex.PW-1/A of Naushad records that 4 injuries were found on his person and that the MLC Ex.PW-1/B of appellant Mohd. Irfan records that 6 injuries were found on his person. After conducting the medical examination of appellants Mohd. Irfan and Naushad, the doctor handed over their blood samples to HC Iqbal Ahmad PW-17, who in turn handed over the same to Inspector Harshvardhan PW-26, as recorded in the memo Ex.PW-17/G.

19. On 04.01.1989 Inspector Dalvinder Singh PW-12, draftsman, prepared the site plans to scale of the place of the murder of Mohd. Qayyum and the place where Mohd. Furkan and Mohd. Farman were attacked; being Ex.PW-12/A and Ex.PW- 12/B.

20. The seized materials; earth lifted from the place of the murder of Mohd. Qayyum and the place where Mohd. Furkan and Mohd. Farman were attacked; the clothes of Mohd. Furkan; the clothes and the blood sample of Mohd. Qayyum; the knife and shirt recovered at the instance of appellant Naushad; the clothes and gunny bag recovered at the instance of appellant Mohd. Irfan and the blood samples of Mohd. Qayyum and Mohd. Irfan were sent to CFSL for serological examination.

21. Vide CFSL report Ex.PW-21/J it was opined that blood was detected on the clothes of Mohd. Qayyum and Mohd. Furkan; the earth lifted from the place of the murder of Mohd. Qayyum and the place where Mohd. Furkan and Mohd. Farman were attacked; knife and shirt recovered at the instance of appellant Naushad and the clothes recovered at the instance of appellant Mohd. Irfan. Vide CFSL report Ex.PW-21/K it was opined that the blood detected on the earth lifted from the place of the murder of Mohd. Qayyum and the place where Mohd. Furkan and Mohd. Farman were attacked; the clothes of Mohd Qayyum and Mohd Furkan; the knife and shirt recovered at the instance of appellant Naushad and the shirt recovered at the instance of appellant Mohd. Irfan was having O group. The report further opined that the blood group of Mohd Qayyum was O and that no opinion could be given about the group of blood sample of appellants Mohd. Irfan and Naushad as the same had putrefied.

22. During the course of the investigation, the police officers recorded the statements of Mohd Zaleel PW-2, Layeeq Ahmad PW-7 and Mohd. Chand PW-8, u/s 161 Cr.P.C. It be noted here that Mohd. Zaleel and Layeeq Ahmad stated in their respective statements u/s 161 Cr.P.C. that they had witnessed appellants Naushad and Irfan murdering the deceased whereas Mohd Chand, the father of Mohd Furkan and Mohd Farman, stated that he had witnessed the appellants attacking his sons Mohd Furkan and Mohd Farman.

23. Armed with the aforesaid materials, a charge sheet was filed against the appellants. Following charges were framed against the appellants:

S. Charge Offence No. 1. Section 302 read with Causing death of Mohd. Section 34 IPC Qayyum

2. Section 302 read with Causing death of Mohd. Section 34 IPC Furkan

3. Section 307 read with Attempting to murder Section 34 IPC Mohd. Farman

24. At the trial, the prosecution examined 26 witnesses. We need not note the testimony of various police officers for the reason they have narrated the facts noted herein above by us pertaining to the seizures effected, the arrest of the appellants, the disclosure statements made by the appellants and the recoveries effected pursuant to the said disclosure statements. 25. Dr. Suresh Kumar PW-1, deposed that he had prepared the MLCs Ex.PW-1/A, Ex.PW-1/B and Ex.PW-1/C of appellants Naushad, Mohd. Irfan and Mohd. Furkan; that the statement Ex.PW-26/B of Mohd. Furkan was recorded in his presence and that the

endorsement Ex.PW-1/D on the statement Ex.PW-26/B of Mohd. Furkan was made by him. Dr. R.K. Nagar PW-25, deposed that he had prepared the MLC Ex.PW-25/A of Mohd. Qayyum. (It may be noted here that the prosecution did not prove the MLC of Mohd Farman)

26. Mohd Zaleel PW-2 and Layeeq Ahmad PW-7, turned hostile and did not support the case of the prosecution that they had witnessed appellants Naushad and Irfam murdering the deceased. They denied having made any statement to the police in said regard. Mohd Chand PW-8, the father of Mohd. Furkan and Mohd. Farman also turned hostile and did not support the case of the prosecution that he had witnessed the appellants attacking his sons Mohd. Furkan and Mohd. Farman. He further deposed that Mohd. Furkan used to sign in Urdu language and never used to put his thumb impressions on any document. Mohd. Jeeshan PW-11, the brother of Mohd. Furkan and Mohd. Farman, deposed that there was no dispute between his family and the appellants and that no settlement agreement was entered into between him and the family members of the appellants.

27. On 14.09.1993 Mohd Farman PW-4, the star witness of the prosecution was examined. He deposed that on 08.10.1988 a quarrel had taken place between them and their neighbour Hanif and with the intervention of the neighbours the quarrel was quenched. A settlement agreement was entered into between them and Hanif. On 09.10.1988 at about 05.30 P.M. he along with his brother Furkan and servant Noorudin was present in his shop when all of a sudden the appellants came there and pulled Mohd. Furkan out of the shop. Their servant Noorudin got scared and ran away from there. Appellants Shamshad and Irfan caught hold of Furkan. Naushad was having a blood stained knife in his hand and the clothes of Naushad and Shamshad were stained with blood. Thereafter Irfan said to his brother Furkan that they have killed his friend Qayyum with the said knife and now it is his turn. Furkan tried to release himself from the clutches of the appellants but Naushad inflicted several knife blows on the person of Furkan. Naushad also gave a knife blow on his head when he tried to save Furkan. Thereafter the appellants fled from there. When he and his brother were being removed to hospital he saw that their friend Mohd. Qayyum was smeared with blood and was lying at a pulia near their house. In the evening of 09.10.1988, he had counselled the appellants to not to quarrel with them. The statement Ex.PW-4/A was made by him to the police.

28. On the same day i.e. 14.09.1993 the witness was partly cross-examined by the counsel for appellant Irfan. However, the cross-examination of the witness could not be completed on the said day. Thereafter the witness was cross-examined on 24.07.1997 i.e. after a period of four years from the date of his examination-in-chief, on which day he took a somersault by stating that the appellants had no role to play in the murder of Mohd. Furkan. Additionally, he stated that on 09.10.1988 somebody hit on his head from behind and he became unconscious because of the said blow. That the police had obtained his

signatures on a blank paper and that he did not make the statement Ex.PW-4/A to the police. That the police obtained thumb impressions of Furkan on a blank paper after his death and that Furkan used to sign in Urdu language.

29. On being re-examined by the prosecutor, the witness stated that he had earlier deposed in the court at the instance of the police.

30. In their statements u/s 313 Cr.P.C. the appellants denied everything and pleaded false implication.

31. In defence, the appellants examined Salauddin, the brother of appellant Mohd. Irfan. Salauddin DW-1, deposed that 10-12 years prior to the year 2000 Inspector Harshvardhan called him to the police station where he told him to send his brother Mohd. Irfan to the police station for the purposes of interrogation pursuant to which Irfan went to the police station. The police arrested Mohd. Irfan and falsely implicated him in the present case.

32. Holding that the statement made by Mohd. Farman PW-4, in his examination-in-chief is creditworthy and that the recovery of the blood stained clothes and knife at the instance of appellants Mohd Irfan and Naushad corroborates the case set up by the prosecution against the appellants, the learned Trial Judge has convicted the appellants.

33. At the hearing, the learned Counsel for the appellants advanced following three broad submissions:

A. The first submission advanced by the learned Counsel was that all the material witnesses of the prosecution having turned hostile, the prosecution has, proverbially speaking, no legs to stand. It was further argued by the learned Counsel that the learned Trial Judge committed an illegality in placing reliance on the examination-in-chief of Mohd. Furkan PW-4, and ignoring that he had not supported the case of the prosecution in his cross-examination. It was submitted by the counsel that Mohd Furkan PW-4, was not worthy of reliance as he was shifting stands and there was no scale to find which of his two statements was truthful. It was further submitted that the evidence of such a vacillating witness should be best ignored and discarded.

B. The second submission advanced by the learned Counsel for the appellants that the evidence on record and other circumstances of the case strongly suggest that documents allegedly prepared by the police during the investigation of the present case were fabricated documents which in turn shows that the police had falsely implicated the appellants in the present case. The first document assailed by the learned Counsel was the statement Ex.PW-26/B allegedly made by Mohd. Furkan soon before his death. Counsel urged that Mohd Farman PW-4 and Mohd Chand PW-8, deposed that Furkan used to sign in Urdu language yet strangely enough the document Ex.PW- 26/B does not contain the signatures of Furkan but his thumb impressions. Counsel urged that the said discrepancy when viewed in the light of the deposition of Farman PW-4, that the police had obtained the

signatures of Furkan on a blank paper after his death strongly suggests that the document Ex.PW-26/B is a fabricated document. The second document assailed by the counsel is the seizure memo Ex.PW-26/C of the clothes worn by Mohd. Qayyum at the time of the occurrence. Counsel urged that Inspector Harshvardhan PW-26, deposed that he had seized the clothes of Qayyum before the registration of the FIR in the present case yet strangely enough the number of FIR registered in the present case finds a mention in the seizure memo Ex.PW-26/C of the clothes of Qayyum. Counsel urged that the fact that the number of FIR registered in the present case finds mention in the seizure memo Ex.PW-26/C makes it apparent that the FIR was registered first and that seizure memo Ex.PW-26/C was prepared subsequent to the registration of the FIR which shows that the seizure memo Ex.PW-26/C is a fabricated document. The third document assailed by the learned Counsel is the statement Ex.PW-4/A of Mohd. Farman. Counsel first drew attention of the court to a recording contained in the MLC of Farman that Farman was declared fit to give a statement at 8.00 P.M. Counsel then drew attention of the court to the fact that the endorsement Ex.PW-26/A which was recorded on the basis of the statement Ex.PW-4/A of Farman was prepared at 07.45 P.M., meaning thereby that the statement Ex.PW-4/A was recorded prior to 07.45 P.M. Counsel urged that the fact that the statement Ex.PW-4/A of Farman was recorded before the time when he was declared fit to give a statement shows that the statement Ex.PW-4/A of Farman is a fabricated document.

C. The third submission advanced by the learned Counsel for the appellants is that Mohd. Farman PW-4, had attributed no overt act to appellant Ibban Ali in the commission of the murder of Mohd. Furkan. Counsel urged that only act attributed by Farman to appellant Ibban Ali was that he was present at the time of occurrence. As per counsel, "participation" in the crime in furtherance of common intention is sine qua non for application of Section 34 IPC and therefore, appellant Ibban Ali ought not to have been convicted for the offence of committing the murder of Furkan with the aid of Section 34 IPC.

34. It is true that none of the alleged eye-witnesses, namely, Mohd. Zaleel PW-2, Layeeq Ahmad PW-7 and Mohd. Chand PW-8, deposed that the appellants were the assailants of Qayyum and Furkan but then there is Mohd. Farman PW-4, who, as noticed above, deposed in his examination-in-chief that Furkan was murdered by the appellants and that appellant Irfan made an extra-judicial confession to Furkan in his presence pertaining to the murder of Qayyum. It is no doubt true that Farman having firmly supported the prosecution version and having clearly implicated the appellants as the persons involved in the crime and having also assigned roles to each one of them wavered when cross-examined and made an effort to provide an escape route to the appellants by alleging that in his examination-in-chief, he had implicated the appellants at the instance of the police.

35. Should we, in view of the somersault committed by Farman in his cross-

examination, take the evidence given by him in his cross-examination as unworthy of reliance? Should we say that in view of what he has stated in his cross-examination, the involvement of the appellants in the crime stands not established? Is it that this witness has to be ignored as someone unworthy of reliance?

36. Let it be emphasized that the examination-in-chief of Mohd. Farman PW-4, was recorded on 14.09.1993. Unfortunately, the cross-examination of the witness could not be completed on the said day and he was ultimately cross-examined on 24.07.1997 i.e. after a long gap of 4 years from the date of recording of his examination-in-chief. This, we feel, provided scope for manoeuvring. The only explanation that the witness gave for making a somersault was that he had implicated the appellants in his examination-in-chief on the tutoring of the police. We find no truth in the explanation provided by the witness particularly when it was not his case that he was pressurised by the police to depose as tutored by it. However, let us for a moment, assume that he was under some kind of pressure from the police but in that event, he ought to have complained Additional Sessions Judge about the same. He could also make a complaint to the superior officers of the police. We say so for the reason that if he could muster courage to tell the court during the course of his cross-examination that he implicated the appellants at the time of his examination-in-chief on the asking of the police, he could also gather the same strength during his examination-in-chief. It was not his case that in the intervening period of 4 years, the police officers who were pressurising him got transferred from the police station and he therefore was relieved of the pressure on him. All said and done, after having gone through his deposition as a whole, we strongly feel inclined to accord with the learned Trial Judge that when Farman implicated the appellants in his examination-in-chief, he was stating the truth and that when he resiled in his cross-examination it was not for his newly found respect for truth. We feel it was the fear of the appellants. He along with others was a witness to a nerve-wrecking experience. Qayyum and Furkan were brutally murdered evident from the fact that 16 and 23 injuries respectively were found on their person as recorded in the post-mortem reports Ex.PW-18/A and Ex.PW-19/A. This was enough to instil fear in the witnesses. It is therefore no surprise to us if the other eye-witnesses declined to implicate the appellants as the assailants of Qayyum and Furkan. And let us also not be oblivious to the present day scenario. There being virtually no protection to the witnesses, criminals facing trial or apprehending prosecution loses no opportunity to either intimidate or otherwise win them over. Fearful of reprisal the witnesses to an incident are too scared to come to the forefront. Hence, we feel that if Mohd. Farman PW-4, did initially muster courage to implicate the appellants as the culprits, it was no small a feat. He cannot, in our view, be branded as unworthy of reliance. It is true that the courage which he exhibited did not last long. We feel the long gap of four years did the trick. Truth, so boldly proclaimed, became casualty in cross-examination. We propose to uphold his statement in his examination-in-chief. Truth has to

prevail.

37. Supreme Court was also faced with a similar situation in a decision reported as *Khujji v. State of M.P.* AIR 1991 SC 1859. The facts of the said case are quite akin to the case in hand. In the said case, there were three eye witnesses to the incident of murder, two of them including the complainant on the basis of whose statement the FIR was registered, expressed their inability to identify the accused persons while the third supported the prosecution version in his examination-in-chief and also identified the accused persons. However, in cross-examination he wavered on the question of identity of the accused. The trial Court refused to place reliance on any of the eye-witnesses but found the other evidence on record sufficient enough to convict the accused persons. The High Court in appeal while maintaining the conviction relied upon the evidence of the witness, who had identified the accused in his examination-in-chief. The High Court held that the examination- in-chief of this witness was recorded on 16th November, 1976, whereas, his cross-examination commenced on 15th December, 1976 i.e. after a month and in between, he seemed to have been won over or had succumbed to threat. The High Court therefore took a view that the subsequent attempt of the witness to create a doubt regarding the identity of the appellant was of no consequence. The Apex Court in appeal not only relied upon the evidence of the witness who had turned hostile in cross-examination as was done by the High Court, but also relied upon the evidence of that witness who had lodged the FIR and who too had turned hostile. In said regards, Supreme Court observed as under:

...On the basis of this statement Mr Lalit submitted that the evidence regarding the identity of the appellant is rendered highly doubtful and it would be hazardous to convict the appellant solely on the basis of identification by such a wavering witness. The High Court came to the conclusion and, in our opinion rightly, that during the one month period that elapsed since the recording of his examination-in-chief something transpired which made him shift his evidence on the question of identity to help the appellant. We are satisfied on a reading of his entire evidence that his statement in cross-examination on the question of identity of the appellant and his companion is a clear attempt to wriggle out of what he had stated earlier in his examination-in-chief. Since the incident occurred at a public place, it is reasonable to infer that the street lights illuminated the place sufficiently to enable this witness to identify the assailants. We have, therefore, no hesitation in concluding that he had ample opportunity to identify the assailants of Gulab, his presence at the scene of occurrence is not unnatural nor is his statement that he had come to purchase vegetables unacceptable. We do not find any material contradictions in his evidence to doubt his testimony. He is a totally independent witness who had no cause to give false evidence against the appellant and his companions. We are, therefore, not impressed by the reasons which weighed with the trial court for rejecting his evidence. We agree with the High Court that his evidence is acceptable regarding the time, place and manner of the incident as well as the identity of the

assailants.

38. A comparable situation also arose before a Division Bench of this Court in the decision reported as Abdul Murasalin Vs. State, In the said case, three accused trespassed into the house of one Shama Parveen. Two accused were armed with revolvers and the third accused was having a knife. After having robbed Shama Parveen and her colleague Salvinder, the accused started outraging the modesty of Shama Parveen which evoked protest from Salvinder who questioned them as to why they were molesting her when they had even taken away all her valuables. On that, one of the accused asked him to keep shut and at the same time fired a shot at his forehead consequent to which he fell on the bed and died. Shama Parveen and the other alleged eye-witnesses though lending their full support to the prosecution version that there was robbery and murder, turned hostile on the crucial question of identification of the accused. However, one eye-witness Mohd Jamail PW-20, in his examination-in-chief fully supported the prosecution version and identified the accused as those involved in the commission of robbery and murder in the house of Shama Parveen but turned hostile in his cross-examination which was conducted two months after the recording of his examination-in- chief. After holding that no worthwhile explanation was given by the witness for resiling from the statement given by him in his examination-in-chief, the Division Bench placed reliance upon the deposition of the witness in his examination-in-chief and convicted the accused. It was further held by the Division Bench that the facts that the accused refused to participate in the Test Identification Parade without any justifiable reason, a country made pistol along with live cartridges was recovered from the possession of the two accused and that a gold chain and wrist watch belonging to Shama Parveen was recovered from the third accused lend due corroboration to the deposition of Mohd Jamail in his examination-in-chief that the accused were involved in the commission of robbery and murder in the house of Shama Parveen.

39. In view of the above discussion, to say, as a proposition of law, that in a situation like this, the witness who when cross-examined resiles from what he said in his examination-in-chief becomes unworthy of reliance and that his testimony needs to be ignored, cannot be accepted.

40. Before concluding the discussion on the first submission, we would like to quote following observations of Supreme Court in the decision reported as Ambika Prasad v. State (Delhi Administration) (2002) 2 SCC 646:

It is also to be pointed out that PW 4 Vikram Singh (informant) who had lodged FIR immediately was under constant threat and was compelled not to speak the truth despite the fact that he was the brother of the deceased. Other witnesses also turned hostile including PW 6 Prem Singh, son of Pratap Singh and PW 8 Rattan Singh, which indicates, as observed by the High Court, that the accused party was stronger in terms of money power and muscle power. At this stage, we would observe that the Sessions Judge ought to have followed the mandate of

Section 309 CrPC of completing the trial by examining the witnesses from day to day and not giving a chance to the accused to threaten or win over the witnesses so that they may not support the prosecution. It appears from the record that the examination-in-chief of PW 4 Vikram Singh was over on 6-2-1984. The counsel representing Ambika Prasad requested the Court that because of his uncle's demise, he would not be in a position to cross-examine the witness and, therefore, recording of further cross-examination might be adjourned. Thereafter, the witness was cross-examined in the month of July 1985. In our view, this is highly improper. Even if the request for adjournment of the learned Counsel for the accused was accepted, the cross-examination ought not to have been deferred beyond two or three days.

41. We expect that in future the learned Trial Courts would honour the dictum laid down by Supreme Court in Ambika Prasad's case (supra) and would make an endeavour to examine the material witnesses of the prosecution on a day to day basis.

42. Is the document Ex.PW-26/B i.e. the statement allegedly made by Mohd. Furkan soon before his death a tainted document?

43. At the outset, it may be noted that the learned Trial Court has not used the statement Ex.PW-26/B as a dying declaration of Mohd. Furkan. No reasons are forthcoming from the impugned judgment as to why learned Trial Judge has not used the statement Ex.PW-26/B as a dying declaration of Furkan.

44. As already noted herein above, the MLC Ex.PW-1/C of Furkan records that the doctor had declared Furkan to be fit to give a statement at 06.40 P.M. on 09.10.1988. The endorsement Ex.PW-1/D made by Dr. Suresh Kumar PW-1, on the statement Ex.PW-26/B of Furkan records that the statement in question was recorded at 07.00 P.M. on 09.10.1988. A perusal of the endorsement Ex.PW-26/A which was recorded on the basis of the statement Ex.PW-4/A of Farman was prepared at 07.45 P.M. on 09.10.1988. Yet strangely enough, the statement Ex.PW-26/B of Furkan does not find mention in the endorsement Ex.PW-26/A even though it was recorded prior to the preparation of the endorsement Ex.PW-26/A.

45. At this juncture, it is most relevant to note the following statements made by Inspector Harshvardhan PW-26, the scribe of the statement Ex.PW-26/B, in his cross- examination:

I registered the FIR on the basis of the statement of the brother of other deceased Furkhan Ali. I recorded the statement in the hospital between 7-7.30 p.m. I sent the rukka at about 07.45 P.M. through Ct. Bhagwati Prasad.In General Hospital firstly I recorded the statement of Farman Ali in the casualty and the second injured Furkan Ali was also in the casualty. ...I took ten minutes in recording the statement of Farman Ali. On his statement I prepared the ruqqa. I sent ruqqa at about 7.30 PM. It is correct that after seeing Ex.PW26/A the time mentioned as 7.45 PM under my signature on the ruqqa. Thereafter I recorded

the statement of Furkan Ali. I did not mention the time when I started recording the statement of Furkan Ali at the top of his statement. Again said I recorded the statement of Furkan Ali before recording the ruqqa or after recording the statement of Farman Ali. ...When I recorded the statement of Farman Ali the time 7.10 PM was already over. I do not remember at what time doctor gave certificate of fitness to Furkan Ali on his MLC..... In completing the statement of Furkan Ali it might have taken 8/10 minutes. After fifteen minutes of recording of the statement of Furkan Ali I sent ruqqa. I made my endorsement below the statement of Farman Ali after recording the statement of Furkan Ali. The same is Ex.PW-26/A. I have not mentioned in my endorsement regarding presence of Furkan Ali being injured in the hospital or that his statement has also been recorded. I have seen the MLC of Mohd. Farman and doctor had mentioned him as fit for statement at 7 PM and time is given below his signature with date.....After seeing the MLC Ex.PW1/C1 on Ex.PW1/C there is time mentioned by the doctor for fit for statement Mohd Furkan as 6.40 PM. It is correct that the statement ExPW26/B the time is given by the doctor which is Ex.PW1/D at 7 PM. It is correct that as per the record the patient Furkan was declared fit for statement at 6.40 PM and his statement had been completed at 7 PM. It is correct that doctor declared another injured Mohd. Farman as fit for statement at about 7 PM as per record. As per record it is revealed that the statement of Furkan Ali was recorded first and thereafter the statement of Farman Ali was recorded. According to my memory I recorded the statement of Farman Ali first. If I recorded the statement of Furkal Ali first it was sure that I sent ruqqa on his statement.

46. In the light of the facts that Inspector Harshvardhan PW-26, did not prepare the endorsement (rukka) on the basis of the alleged statement Ex.PW-26/B of Furkan even though it was recorded prior to the recording of the statement Ex.PW-4/A of Farman; that the alleged statement of Ex.PW-26/B of Furkan does not even find mention in the endorsement Ex.PW-26/A and that Inspector Harshvardhan is most ipse dixit on the timings of preparation of the statements Ex.PW-26/B and Ex.PW-4/A, we have no hesitation in holding that the alleged statement Ex.PW- 26/B of Furkan is a highly suspicious document.

47. As regards the submission that the number of FIR registered in the present case is mentioned in the seizure memo Ex.PW-26/C, suffice would it be to state that the investigating officer Inspector Harshvardhan PW-26, has not been cross-examined with respect to said aspect of the matter. No suggestion was given to the investigating officer that seizure memo Ex.PW-26/C was prepared only after the registration of the FIR and for that reason, the number of the FIR came to be mentioned on the top of the seizure memo. Possibility cannot be ruled out that the investigating officer mentioned the number of the FIR on the seizure memo, after the receipt of the formal FIR from the police station. Having given no opportunity to the investigating officer to explain the circumstance pertaining to mentioning of the number of the FIR in the seizure memo Ex.PW- 26/C no adverse inference can be taken against the prosecution. In taking the said view,

we are supported by the decisions of Supreme Court reported as Rahim Khan Vs. Khurshid Ahmed and Others, , State of U.P. Vs. Anil Singh, and Sunil Kumar v. State of Rajasthan (2005) 9 SCC 298.

48. In said regards, it is also relevant to note the decision of Supreme Court reported as Radhey Sham Vs. State of Haryana, wherein it was observed as under:

Learned Counsel for the appellant further submitted that FIR number is mentioned on the recovery memo and therefore it is apparent that FIR was first registered and thereafter the recovery memo was prepared. He has also submitted that sealing of the article seized was also not proper. No independent witness was examined nor was the accused having any injury even though the van turned turtle. In our view, the aforesaid submissions deserve no consideration because with regard to the FIR, FIR number is mentioned on the recovery memo but that would not vitiate the recording of FIR....

49. Therefore, in view of the above discussion, it cannot be held that the seizure memo Ex.PW-26/C is a manipulated or fabricated document and that the prosecution case is false.

50. The third submission predicated upon the MLC of Farman need not detain us and can be rejected out rightly for following two reasons namely, (i) the MLC of Farman records that Farman was declared fit to give a statement at 7.00 P.M. on 09.10.1988 and not 8.00 P.M. as claimed by the counsel for the appellants and (ii) the MLC of Farman was not got proved by the prosecution.

51. We now proceed to adjudicate upon the question that whether the prosecution has been able to establish the guilt of the appellants. (We shall deal with the third submission advanced by the learned Counsel for the appellants a little later)

52. Offence of murder of Mohd. Qayyum: - The only piece of evidence to connect the appellants with the murder of Mohd. Qayyum is the extra-judicial confession made by appellant Irfan to Mohd. Furkan in the presence of Mohd. Farman.

53. As already stated in the foregoing paras, Mohd. Farman PW-4, deposed in his examination-in-chief that he heard appellant Irfan telling Mohd Furkan that the appellants have murdered Mohd. Qayyum. Can the appellants be convicted for the offence of murder of Mohd Qayyum on the basis of the said extra-judicial confession made by appellant Irfan?

54. It is settled legal position that an extra-judicial confession can form the basis of conviction, but as a matter of caution the courts must seek corroboration for such extra- judicial confession. (See the decisions of Supreme Court reported as Mundlapadi Krishnaiah Vs. State of A.P., , Gagan Kanojia and Another Vs. State of Punjab, Ratan Gond Vs. The State of Bihar, and Balbir Singh Vs. State of Punjab,

55. There is yet another aspect of the matter. u/s 30 of the Evidence Act, the extra-judicial confession made by a co-accused could be admitted only as a corroborative piece of evidence against the other accused. In the absence of any substantive evidence against an accused, no judgment of conviction can be recorded against an accused only on the basis of confession of a co-accused, be it extra-judicial confession or a judicial confession. (See the decisions of Supreme Court reported as State of Madhya Pradesh and Others Vs. Paltan Mallah and Others etc., and Bishnu Prasad Sinha and Another Vs. State of Assam,

56. In the instant case, the extra-judicial confession made by appellant Irfan is not corroborated by any piece of evidence and therefore, in absence of corroboration, it is unsafe to convict the appellants for the murder of Qayyum only on the basis of said extra-judicial confession.

57. The conclusion which results from the above discussion is that the appellants are acquitted of the charge framed against them u/s 302/34 IPC for committing the murder of Mohd. Qayyum.

58. Offence of murder of Mohd Furkan: - To bring home the guilt of the appellants with respect to the murder of Furkan, we have the evidence of Mohd Farman PW-4, who is an eye-witness to the incident of murder of Furkan. We have already stated in foregoing paras that the evidence given by Farman in his examination-in-chief is worthy of reliance. Farman clearly stated in his examination-in-chief that the appellants came to their shop and pulled Furkan out of the shop. Appellants Irfan and Shamshad caught hold of Furkan while Naushad inflicted several knife blows on the person of Furkan. The aforesaid evidence of Farman is corroborated from the facts that the clothes which were worn by Furkan at the time of the occurrence were found to be stained with blood of O group and that blood of O group was detected on the knife and shirt recovered at the instance of appellant Naushad as also on the clothes recovered at the instance of appellant Irfan.

59. At this juncture, we proceed to deal with the third submission advanced by the learned Counsel for the appellants.

60. Section 34 IPC does not create a substantive offence. Section 34 means that if two or more persons intentionally do a common thing jointly, it is just the same as if each of them had done it individually. It is a well-recognised canon of criminal jurisprudence that the courts cannot distinguish between co-conspirators, nor can they inquire, even if it were possible as to the part taken by each in the crime. Where parties go with a common purpose to execute a common object, each and every person becomes responsible for the act of each and every other in execution and furtherance of their common purpose; as the purpose is common, so must be the responsibility. All are guilty of the principal offence, not of abetment only. In a combination of this kind a mortal stroke, though given by one of the parties, is deemed in the eye of law to have been given by every individual present and abetting. But a party not cognizant of the

intention of his companion to commit murder is not liable, though he has joined his companion to do an unlawful act. The leading feature of this section is the element of participation in action. The essence of liability under this section is the existence of a common intention animating the offenders and the participation in a criminal act in furtherance of the common intention. The essence is simultaneous consensus of the minds of persons participating in the criminal action to bring about a particular result. Therefore, before a man can be held liable for acts done by another, under the provisions of this section, it must be established that: (i) there was common intention in the sense of a prearranged plan between the two, and (ii) the person sought to be so held liable had participated in some manner in the act Constituting the offence. Unless common intention and participation are both present, this section cannot apply.

61. What is the meaning of the word "participation" in the context of Section 34 IPC?

62. The answer to the aforesaid question lies in the decisions of Supreme Court reported as Surendra Chauhan Vs. State of M.P., and Prakash v. State of MP (2006) 13 SCC 508.

63. In Surendra Chauhan's case (supra) Supreme Court observed as under::

Under Section 34 a person must be physically present at the actual commission of the crime for the purpose of facilitating or promoting the offence, the commission of which is the aim of the joint criminal venture. Such presence of those who in one way or the other facilitate the execution of the common design is itself tantamount to actual participation in the criminal act. The essence of Section 34 is simultaneous consensus of the minds of persons participating in the criminal action to bring about a particular result. Such consensus can be developed at the spot and thereby intended by all of them. (Ramaswami Ayyangar v. State of T.N.)....

64. In Prakash's case (supra) Supreme Court observed as under:

The reason why the persons having common intention are deemed to be guilty is that the presence of accomplices gives encouragement, support and protection to the person actually committing an act. For attracting the provisions of Section 34 IPC, the physical presence of the accused at the place of occurrence need not be proved. He may not be present on the actual scene of occurrence. He may, however, stand guard outside the room, or ready to warn his companions. His presence at the place of occurrence in a given situation may be found to be sufficient. He must participate in the commission of the crime, but the same does not mean that some overt act must be attributed on his part. His participation may be in one way or the other at the time crime is actually committed. (See Shiv Prasad Chuni Lal Jain v. State of Maharashtra.)

65. Tested on the aforesaid anvil of law, can it be said that appellant Ibban Ali has not participated in the crime of the murder of Furkan?

66. The submission of the learned Counsel that the only role attributed by Farman to appellant Ibban Ali in the crime of murder of Furkan is that he was present at the time of the occurrence is factually incorrect. Farman has categorically deposed in his examination-in-chief that he along with the other appellants pulled Furkan out of his shop. Appellant Ibban Ali by pulling Furkan out of his shop facilitated the appellants to cause injuries on the person of Furkan and thus participated in the crime of murder of Furkan.

67. The necessary conclusion which results from the above discussion is that the appellants are guilty of committing the murder of Mohd. Furkan.

68. Offence of attempt to murder Mohd Farman: - As already stated in preceding paras, Farman stated that Naushad inflicted a knife blow on his head when he tried to save Mohd Furkan.

69. In the instant case, there is not an iota of evidence which could even remotely suggest that appellant Naushad inflicted a knife blow on the person of Farman in furtherance of the common intention of the appellants.

70. In that view of the matter, since "common intention" is the essence of Section 34 IPC, Section 34 IPC cannot be invoked in the present case to hold that appellants Irfan, Shamshad and Ibban Ali are guilty of the commission of the offence of attempting to murder Mohd. Farman.

71. Conclusion: - The result of the above discussion can be summarized as under:

I. The appellants are acquitted of the charge framed against them u/s 302/34 IPC for committing the murder of Mohd. Qayyum.

II. The appellants are convicted of the charge framed against them u/s 302/34 IPC for committing the murder of Mohd. Furkan. We maintain the punishment awarded by the learned Trial Judge to the appellants in respect of the said offence.

III. Appellant Naushad is convicted of the charge framed against him u/s 307 IPC for attempting to commit the murder of Mohd. Farman. We maintain the punishment awarded by the learned Trial Judge to the appellant in respect of the said offence.

IV. Appellants Irfan, Shamshad and Ibban Ali are acquitted of the charge framed against them u/s 307/34 IPC for attempting to commit the murder of Mohd. Farman.

72. The appellants are on bail. The bail bonds and surety bonds furnished by them are cancelled. The appellants shall surrender and suffer the remaining sentence in terms of the present decision.