AFR

Court No. - 45 **RESERVED**

Case :- CRIMINAL APPEAL No. - 4134 of 2005

Appellant :- Fasahat
Respondent :- State Of U.P.
Counsel for Appellant :- T.A. Khan,Dileep Kumar,Ghanshyam Joshi,Noor Mohammad,S.M.A.Abdy
Counsel for Respondent :- Govt. Advocate,Ramesh Sinha,Upendra Upadhyay

Connected with

Case :- GOVERNMENT APPEAL No. - 5496 of 2005

Appellant :- State Of U.P.
Respondent :- Jamshed And Others
Counsel for Appellant :- V.S. Mishra,A.G.A.,T.A.Khan
Counsel for Respondent :- Atul Srivastava,Kamal Krishna,Mukhtar Alam,Sanjay Kumar,Tapan Kumar Chandola

Hon'ble B. Amit Sthalekar,J.
Hon'ble Ali Zamin,J.

(Delivered by Hon'ble B. Amit Sthalekar, J)

1. The Criminal appeal no. 4134 of 2005 has been filed against the judgment and order of the trial court dated 30.08.2005 passed by the Special Session Judge, J.P. Nagar in Sessions Trial No. 231 of 2004, Case Crime No. 244 of 2004 (State Vs. Fasahat & others) under Sections 302, 504, 506 IPC, Police Station-Said Nagli, District-J.P. Nagar whereby the appellant Fasahat has been convicted under Section 302 of the Indian Penal Code and sentenced to undergo imprisonment for life with a fine of Rs.10,000/- and in case of default further imprisonment of three years.

2. The Government Appeal no. 5496 of 2005 has been filed by the State against the judgment and order of the trial court dated 30.08.2005 passed by the Sepcial Sessions Judge, J.P. Nagar in Sessions Trial No. 231 of 2004, Case Crime No. 244 of 2004 (State Vs. Fasahat & others)

under Sections 302, 504, 506 IPC, Police Station-Said Nagli, District-J.P. Nagar whereby the accused-respondents Jamshed, Tanveer, Dilshad have been acquitted of the charges.

3. Briefly stated the facts of the case, as per the report of the informant Khaliq Ahmad are that on 01.05.2004 at about 4 o' clock in the evening Fahim Ahmad, brother of the informant was sitting in his shop when the accused Fasahat, Dilshad, Jamshed and Tanveer came to the shop and out of these persons Jamshed, Tanveer and Dilshad caught hold of the deceased Fahim Ahmad while Fasahat with the intention to kill, stabbed Fahim Ahmad with such force that his intestines came out. It is further mentioned in the FIR that the informant then took his brother, in an injured condition, to Hasanpur for treatment under Dr. Shiv Swaroop Tandon. It is also stated that on the cry raised by Fahim Ahmad, he alongwith one Irshad and Munazir came rushing to the shop and managed to extricate his brother from the clutches of the accused. The accused however, made good their escape hurling abuses and threats to kill. The report also mentions that Fahim Ahmad, the injured, was left in the care of other relatives and the informant has come to lodge the FIR (Ex. Ka-1). The report was transcribed by Sri Surendra Singh, Head Moharrir.

4. The injury report is marked as Ex. Ka-4 and reads as under:-

"(1) Incised wound 13cmx2cm cavity deep on LT side margins are clean cut. Intestine Protrude rite and Bleeding from the wound present. Kept under observation.

(2) Incised wound 2cx0.5cmx0.2cm on RT hand Palm in between Rt Index and RT Middle finger 12 cm below to RT wrist joint. Bleeding from the wound Present.

Opinion: Inj. No. (1) and (2) caused by sharp edged object. Inj. No. (1) kept under observation referred to Dist. Hospital Moradabad for further management. Patient is in low condition. Inj. No. (2) simple in nature.

Duration—above injuries fresh."

5. On 4.5.2004 the informant submitted an application (Ex. Ka-2) before the Thana In-Charge mentioning therein that his brother was under

treatment at Hasanpur but on 4.5.2004 he was referred by the Doctor to be taken to Meerut and while he was being taken to Meerut and had travelled just a short distance from Hasanpur that the injured Fahim Ahmad died as a result of injuries caused to him on 01.05.2004 and therefore, the informant came back to the village with the dead body and is reporting the matter to the police.

6. Inquest was held on 4.5.2004 from 22:15 to 23:30 hrs of the same day and marked as Ex. Ka-6. Cause of death is mentioned as due to injuries received on 01.05.2004.

7. The IO sent the body for postmortem and the postmortem was conducted on 5.5.2004 at 11:00 am. In the postmortem report Ex. Ka-3 it is stated that the death had occurred about 3/4th day earlier. The postmortem report mentions cause of death as septicemia due to ante mortem injuries.

8. The crime was investigated by SSI Indu Pal Sharma who visited the spot along with Head Constable Vijay Pal Singh and Constable Narayan Das and reached the Dhakka crossing at about 18:40 hours. On the way they picked up Ali Waris and one Salim Ahmad as witnesses and thereafter, they picked the accused-appellant Fasahat and on the pointing out of Fasahat the knife used in the murder was recovered from the Haryana by-pass crossing after going some distance in the shrubbery and this recovery was made in the presence of witnesses Ali Waris and Salim Ahmad. The accused-appellant Fasahat informed that this was the same knife which was used in the assault on deceased Fahim Ahmad. The recovery memo of the knife Ex. Ka-11 has been proved by the Investigating Officer, SSI Indu Pal Singh (third IO), P.W.-7.

9. Ex. Ka-5 is the Site Plan of the place where the incident occurred. Ex.

Ka-12 is the Site Plan of the recovery of the offending knife. Thereupon, chargesheet was filed against the accused-appellant under Section 302, 504 and 506 IPC on 20.7.2004.

10. Learned counsel for the appellant submitted that P.W.-1 was not an eye witness of the incident and, therefore, the entire story narrated in the FIR as well as the testimony of the P.W.-1 is false.

11. The P.W.-1 in his examination-in-chief has stated that on 01.05.2004 at 4 o'clock in the evening when there was sufficient day light, his brother Fahim Ahmad was sitting in his cement shop in Kasba Dhakka. The accused-appellant Fasahat along with Jamshed, Tanveer and Dilshad, with common intention, came to the shop where the accused Jamshed, Tanveer and Dilshad caught hold of Fahim Ahmad from behind whereas the accused-appellant Fasahat stabbed Fahim Ahmad with a knife with the intention to kill and as a result of stabbing the intestines of Fahim Ahmad came out. The witness along with Irshad and Munazir rushed to the shop and exhorted the accused and extricated Fahim Ahmad from the hands of the accused. Thereafter, they took Fahim Ahmad to the Hasanpur District Hospital and from there they took him to Dr. Shiv Swaroop Tandon for private treatment. On 4.5.2004, Dr. Shiv Swaroop Tandon referred the injured Fahim Ahmad for further treatment to Meerut whereupon the witness took Fahim Ahmad to proceed to Meerut and while on way just after they had left Hasanpur, Fahim Ahmad died as a result of injuries received by him.

12. In cross examination, the P.W.-1 further stated that only Fasahat had a weapon whereas the other accused did not carry any weapon. He also stated that Jamshed had grabbed the deceased Fahim Ahmad from behind whereas Dilshad had caught hold of his hands and Tanveer had caught hold of his legs. Since he has described the incidence in detail

and his testimony from cross-examination is found intact, therefore, we do not find substance in the contention of learned counsel for the appellant that he is not eye witness and entire story narrated in F.I.R. and his testimony is false.

13. The learned counsel for the appellant submitted that as per the statement of P.W.-1 when he reached the site, the deceased had already fallen from the chair which would suggest that this witness had not seen as to which of the accused had stabbed Fahim Ahmad and, therefore, he was not an eye witness to the incident and had arrived subsequently at the spot.

14. The submission of the learned counsel is without any substance since the P.W.-1 has described the incidence in detail that when he entered the shop the accused Tanveer had caught the deceased by his legs whereas Dilshad had caught his hands and Jamshed was holding him from behind. In his cross examination he has further stated that he was at the spot when the incident occurred and that he, Irshad and Munazir were immediately present there and a crowd gathered later on and when he reached the spot the accused were assaulting his brother Fahim Ahmad. The witness has further repeated that when he reached the shop he found that Dilshad and Jamshed had caught hold of his brother and at the time when stabbing took place his brother was standing. He has described the weapon whose handle was of aluminum and that when he exhorted the accused, they ran away from the spot.

15. Referring to the site plan (Ex. Ka-5), learned counsel for the appellant submitted that Khaliq Ahmad, the informant, whose shop was not in front of the shop of the deceased Fahim Ahmad, could not have seen the incidence and he was not an eye witness. However, from the site plan we find that there is not much distance between the shop of the deceased and that of the P.W.-1 and in any case, the incident was a broad day light

incident in the summer of 01.05.2004 at 4:00 PM and therefore, it cannot be said that P.W.-1 had not witnessed the incident. We find the testimony of P.W.-1 to be consistent with the narration of facts as stated in the FIR. We also find from the postmortem report that Dr. Iqbal Hussain who first examined the deceased has clearly mentioned that injury no.1 was 13cm long with 10 stitches 4cm above the navel. Injury no. 2 was 11 cm with several minor injuries 2 cm under the skin. Injury no. 3 was 2cm x 1 cm and 10 cm above the hip joint. Injury no.4 was an injury caused to the hand and was 1 cm x ½ cm deep. In his testimony P.W.-3 has confirmed that the injury no.1 could have been caused by stabbing with a knife and that injury no.2 which is a tailing wound could have been caused while removing the knife from the body by the tip of knife. Injury no.4 could have been caused by a knife when somebody is trying to prevent the injury with his hands. The learned counsel for the appellant referring to the statement of the Doctor P.W.-3 submitted that if the injury no.2 could have been caused by a harrow it would mean that it was not caused by a knife as alleged in the FIR and in the testimony of P.W.-1. We are not inclined to accept the submission of the learned counsel for the appellant for the reason that this was only a suggestion of the P.W.-3 Dr. Iqbal Hussain, who has also stated that he has not seen the harrow. On the other hand, the P.W.-3 is quite clear and emphatic that the injury no. 1 which was 13 cm long could have been caused by a knife and the injury no. 2 could also have been caused while removing the knife from the body and the injury no.4 to the hand could have been caused by a knife when somebody is trying to hold the knife. Thus, in our opinion, the testimony of P.W.-1 stands corroborated by the postmortem report and the statement of Dr. Iqbal Hussain P.W-3 who has proved the postmortem/injury report.

16. The learned counsel for the appellant next submitted that the statement of P.W.-2 Irshad who is stated to be an eye witness was recorded after four days and, therefore, Irshad was a tutored witness and not an eye witness, therefore, his testimony was wholly unreliable and conviction of the accused could not have been based on such a testimony. Reliance has been placed upon a judgement of the Supreme Court in ***(2016) 4 SCC 96 Shahid Khan Vs State of Rajasthan***. In the said judgement the Supreme Court has held that where the statement of P.W.-24 and 25 (in that case) were recorded after three days of the occurrence and no explanation was forthcoming as to why they were not examined for three days coupled with the fact that the police had not been able to show as to how they came to know that these witnesses saw the occurrence, therefore, the delay in recording the statement casts a serious doubt about their being eye witness to the account. The Supreme Court further held that P.W.-24 and 25 in view of their unexplained silence and delayed statement to the police do not appear to be wholly reliable witnesses. The Supreme Court has further held that there is no corroboration of their evidence from any other independent source either and on these facts the Apex Court found it rather unsafe to rely upon their evidence only to uphold the conviction and sentence of the appellants.

17. At this stage, we may advert to the testimony of P.W.-2 Irsahd. P.w.-2 Irshad is one of the persons named in the FIR alongwith the informant and one other person Munazir who had witnessed the incident. This witness in his testimony has clearly outlined that he and Munazir were sitting in the Sweetmeat shop of one Salim when the accused Fasahat, Jamshed, Tanveer and Dilshad came there from the west with common intention and these persons and the accused entered the shop of the

deceased Fahim Ahmad. Accused Fasahat had a knife in his hand. The accused Jamshed, Tanveer and Dilshad caught hold of Fahim Ahmad whereas Fasahat with the intention to kill Fahim stabbed him in his stomach with the knife with the result that Fahim's intestines came out. He has further described that Fahim tried to hold the knife as a result of which he received injuries in his palm. He has also stated that he has witnessed this incidence in the presence of Khaliq Ahmad (informant) and Munazir. He also stated that they exhorted the accused and extricated Fahim from the clutches of the accused. Thereafter, the witness along with others put Fahim Ahmad in an Ambassador car and took him away. He has also stated that Fahim Ahmad died as a result of injuries received by him. In his cross examination, this witness has further stated that the incident was a broad day light incident which occurred at 4:00 PM on 01.05.2004 and as soon as they heard the shouting, he, Munazir and Khaliq Ahmad (informant) reached the shop, the deceased was in the shop. When he reached the spot Fahim Ahmad was standing when he was stabbed in the stomach. Other than the accused Fasahat none of the other accused carried any weapon. After receiving the injuries, the deceased collapsed and fell down in the shop. He had received injuries in his stomach and his right hand. This witness has further stated that his statement was recorded by the police on the fourth day.

18. We find that P.W.-2 Irshad has been named in the F.I.R as a person who alongwith the informant and one Munazir rushed to the shop as soon as they heard some noise in the shop. We also find from his statement that the witness had also made a statement to that effect and has described the incidence in the same manner as described by the P.W.-1 that accused Dilshad, Tanveer and Jamshed had caught hold of Fahim

Ahmad and it was accused Fasahat who had stabbed Fahim in the stomach. Thus, P.W.-2 is the person who has been named in the FIR at the very first instance and therefore, even if his testimony was recorded four days later it cannot be said that he was a tutored witness nor under the circumstances can it be said that he was not an eye witness of the incident rendering his testimony as unreliable. The testimony of P.W.-2 is consistent and corroborates with the testimony of P.W.-1, the injury report Ex. Ka-4 and the postmortem report Ex. Ka-3. It is not a case of as to how the police came to know that this witness saw the occurrence. The incident of stabbing occured on 01.05.2004 whereas the injured died of his injuries on 4.5.2004. P.W.-2 has been named as a witness in the F.I.R. lodged on the date of stabbing itself. The Supreme Court in **State of U.P. Vs. Satish (2005) 3 SCC 114** in paragraph 18 has held as under:-

> ***"18.*** *As regards delayed examination of certain witnesses, this Court in several decisions has held that unless the Investigating officer is categorcially asked as to why there was delay in examination for the witnesses the defence cannot gain any advantage therefrom. It cannot be laid down as a rule of universal application that it there is any delay in examination of a particular witness the prosecution version become suspect. It would depend upon several factors. If the explanation offered for the delayed examination is plausible and acceptable and the court accepts the same as plausible, there is no reason to interfere with the conclusion. (See Ranbir v. State of Punjab,1973) 2 SCC 444, Bodhraj v. State of J&K (2002) 8 SCC 45 and Banti v. State of M.P. (2004) 1 SCC 414)."*

19. The Supreme Court in ***(2013) 7 SCC 278, Ganga Singh Vs State of Madhya Pradesh,*** in paragraph 12 and 12 has held as under:-

> *"12. According to Mr. Mehrotra, however, PW-5 is not a reliable witness as she has made a significant omission in her evidence by not stating anything about the seizure of the blouse, dhoti and broken bangles which were made in her presence. But we find that no question has been put to PW-5 in cross-examination with regard to seizure of the blouse, dhoti and broken bangles in her presence. If the appellant's case was that PW-5 cannot be believed because she made this significant omission in her evidence, a question in this regard should have been put to her during her cross- examination. To quote Lord Herschell, LC in Browne vs. Dunn [(1894) 6 R 67]:*
> *"…..it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross examination showing that the imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such*

questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit."

13. Section 146 of the Indian Evidence Act also provides that when a witness is cross-examined, he may be asked any question which tend to test his veracity. Yet no question was put to PW-5 in cross-examination on the articles seized in her presence. In the absence of any question with regard to the seizure of the blouse, dhoti and broken bangles in presence of PW-5, omission of this fact from her evidence is no ground to doubt the veracity of her evidence."

20. In the instant case with regard to the delayed examination of the witness Irshad no question has been put by the defence to the Investigating Officer, therefore, in view of the finding of the Hon'ble Apex Court in the above case defence cannot gain any advantage on the basis of delayed examination of the witness Irshad.

21. In the circumstances, we find that the judgement of the Supreme Court in the case of Shahid Khan has no application to the facts of the present case.

22. The case was investigated by SI Mahendra Singh P.W.-6 who first investigated the matter on 01.05.2004. The Investigating Officer Mahendra Singh (First IO) has prepared the Case Diary and he recorded the statement of Head Moharrir Surendra Singh as well as the statement of informant Khaliq Ahmad and also prepared the Site Plan (Ex. Ka-5). In his examination-in-chief he has stated that on 03.05.2004 he made entries of the medical report in the Case Diary and after the expiry of the injured victim, Fahim Ahmad, Section 302 was also added in his report and the panchayatnama was prepared Ex. Ka-5 which has been proved by him. He has proved the photo of the dead body (Ex. Ka-7) as well as the recovery. He has proved that the case crime no. was registered in his presence and he recorded the statement of the informant on 2.05.2004. In his cross examination the Investigating Officer has stated that on the date of the incident i.e. 01.05.2004 the informant came to the Thana at 4:45 PM and thereafter he first went to inspect the site on the direction

of the SO and returned after two hours and during this time he also raided a few places and searched for the accused. He also stated that the informant came to the Thana again at 9:30 PM when the report was written down. He also stated that the informant had stated that he was informed by somebody that his brother had been stabbed and thereafter, he reached the crime spot. The Investigating Officer P.W.-6 also stated that the sweetmeat shop is hardly 8-10 steps from the crime spot. This witness has further stated that thereafter, he was transferred from that police station.

23. The investigation was next carried out by P.W.-5 Arun Kumar Verma, IO (second) who in his examination-in-chief has stated that on 04.05.2004 he was posted as SO Thana Saidnagli and on 01.05.2004 Khaliq Ahmad had lodged a report with regard to the incident. Thereafter, during treatment the injured Fahim Ahmad died and therefore, a second report was lodged on 4.05.2004 (Ex. Ka-2) regarding offence under Section 302, 504, 506 IPC. He has also stated that the initial Case Crime no. 244 of 2004 under Section 307, 504, 506 IPC was lodged in his presence in the Thana and the matter at that time was investigated by SI Mahendra Singh and that he had also gone with the SI Mahendra Singh to the crime spot which is about 5 Kms from the Thana. He has also stated that the deceased had two cement shops; in one shop he used to sit and the other shop was being used as a store. In the shop there were chairs. He has also stated that the crime spot was in the village Dhakka in the main bazaar and there were shops adjacent to the crime spot. This witness had also stated that Fahim was first treated in the Primary Health Centre and then taken to Dr. Shiv Swaroop Tandon. In cross examination this witness has stated that at the site there was no blood. He also stated that he was informed by the informant that

the injured Fahim Ahmad was taken from Hasanpur and that one Farman was holding the injured.

24. The Investigation, thereafter, was taken over by SSI Indu Pal Sharma, IO (third) P.W.-7 who has proved the recovery of the offending knife and stated that the knife was recovered on the pointing out of the accused Fasahat in a shrubbery whereupon a recovery memo was made by him Ex. Ka-11 which has been proved by the IO Indu Pal Sharma. He has further stated that he did not send the knife to the Forensic Science Laboratory for testing since the knife had been washed clean. The learned counsel for the appellant assailing the testimony of the Investigating Officer Mahendra Singh stated that when the said IO reached the crime spot he did not find any blood stains, therefore, the incident of stabbing did not occur at all and the appellant has falsely been accused of the crime. The submission of the learned counsel for the appellant cannot be accepted for the reason that the witness P.W.-1 and witness P.-W.-2 who are the eye witnesses of the incident have both clearly stated that soon after the stabbing and after the accused and co-accused ran away from the spot one Haseeb had removed his shirt and tied it to the wound to prevent bleeding. In our opinion, this would account for the fact that there may not have been any blood on the spot.

25. P.W.-4 Dr. J.P. Singh, the incharge Medical Officer, Primary Health Centre, Hasanpur in his examination-in-chief has proved the injury report Ex. Ka-4 which was prepared by him at the time when the deceased Fahim Ahmad had been brought to the Primary Health Centre in an injured condition for medical checkup. He has described the injuries as follows:-

1— कटा हुआ घाव 13 से0मी x 2 से0मी0 x पेट की कैवेटी तक गहरा जो कि पेट के ऊपरी हिस्से से मध्य लाईन के बायी ओर दाहिनी तरफ को नाबी से

3 से0मी0 ऊपर था। चोट के किनारे साफ कटे हुये थे। आँते बाहर निकल आयी थी। घाव से रक्त बह रहा था। चोट को जेरे निगरानी रखा गया था।

2— कटा हुआ घाव 2 से0मी0 X 0.5 से0मी0 X 0.2 से0मी0 दाहिने हाथ पर हथेली की तरफ से तर्जनी उँगली व मध्यम उँगली के बीच तक था। दाहिनी कलाई से 12 से0मी0 नीचे था। घाव से रक्त बह रहा था। किनारे साफ कटे थे।

मेरी राय में चोट नम्बर 1 व 2 किसी धारदार हथियार से आनी सम्भव है। चोट नं01 को जेरे निगरानी रखते हुये जिला अस्पताल मुरादाबाद को रैफर किया गया था। मरीज की हालत खराब थी। चोट नं0 2 साधारण किस्म की थी। उपरोक्त चोटे ताजा थी। दोनो चोटे धारदार छुरे से आना सम्भव है चोट नम्बर 02 यदि आदमी के छुरा मारा जाये और आदमी उसे हाथ से पकड़ने पर आनी सम्भव है। चोट नं0 1 मानव जीवन के लिये खतरनाक थी। उपरोक्त चोटे दिनांक 01.05.04 को शाम 4.00 बजे आना सम्भव है।

26. The P.W.-4 has also submitted his expert opinion stating that the injury no.1 and 2 as noted above, was possible to have been caused by a sharp edged weapon. He has further stated that having regard to the seriousness of the injury no.1 he had referred the injured for further treatment in the District Hospital, Moradabad since the medical condition of the injured was bad. The injury no.2 however, was simple. Both the injuries were fresh. He has also opined that it was possible for both the injuries to have been caused by a sharp knife and that injury no.2 could have been caused if the injured tried to hold the knife with his hand. Injury no.1 was stated to be fatal. This witness has further testified that it is not possible for these injuries to have been caused by falling upon a harrow.

27. P.W.-8 Ali Waris who is an independent witness has proved the recovery of the knife from the shrubbery and has also stated that the accused-appellant Fasahat had informed the SO in his presence that he had caused injury to Fahim Ahmad with this knife and while making good

his escape he had washed the knife at a tap near Afzal Tel Depot and thereafter had thrown the knife at the place where it was found in the shrubbery. This corroborates the statement of the Investigating Officer (third) Indu Pal Sharma who has stated that he did not send the knife to the Forensic Science Laboratory for testing since the knife had been washed clean. The Site Plan of the recovery is Ex. Ka-12. Spot marked as 'X' is shown as the spot where the offending weapon i.e. knife was found on the pointing out of the accused. 'XA' is the spot where the accused is stated to have handed over the knife to the police. Point 'B' is the spot where the police jeep was stopped and from where the police and the accused went in search of the knife. The single arrows represent the spot where the police along with accused reached over the bridge. The double arrow thereafter, marks the way led by the accused to the spot where the knife was found. The site plan Ex. Ka-12 has been proved by the Investigating Officer, Indu Pal Sharma P.W.-7.

28. The learned counsel for the appellant also submitted that the witness Abid was never examined. The name of Abid finds mention in the examination-in-chief of P.W.-1 Khaliq Ahmad, the informant who has stated that on the date of the incident i.e. 01.05.2004 in the morning the accused had got into an altercation with the said Abid. Abid in order to save himself ran into the shop of his brother Fahim Ahmad, the deceased. The accused persons followed Abid to the shop of Fahim Ahmad who scolded the accused. The accused then threatened Fahim stating that he would have to face consequences for protecting Abid and it is for this reason that the accused with common intention murdered Fahim Ahmad.

29. Sri Upendra Upadhayay, learned counsel for the complainant as well as learned AGA submitted that motive stood established as being the

incident which occurred on the day of the incident i.e. 01.05.2004 when the accused with the intention to assault Abid chased him and Abid ran into the shop of Fahim to save himself and Fahim saved Abid from the accused persons and the accused had thereupon threatened Fahim with dire consequences for saving Abid. This establishes the motive for the murder of Fahim by the accused persons though we may hasten to add that even if Abid was not produced as a witness to testify to the occurrence of the incidence that occurred with him on the morning of 01.05.2004 but then in the facts and circumstances of the case, the incident being a broad day light incident having occurred at 4 o' clock in the afternoon/evening in the summer month and having witnessed by P.W.-1 and 2 and the facts having been corroborated by the injury report, postmortem report as well as recovery of the murder weapon having been witnessed by independed witness Ali Waris P.W.-8 in the presence of Investigating Officer on the pointing out of the accused and incident being a day light incident, motive becomes irrelevant.

30. In the case of ***Shardul Singh Vs. State of Haryana (2002) 8 SCC 372***, it has been held that :-

> *"motive', which is not always capable of precise proof, if proved, may lead additional support to strengthen the probability of the commission of the offence by the person accused but the absence of motive does not ipso facto warrant an acquittal."*

31. Similarly, in the case of ***Ravindra Kumar Vs. State of Punjab, (2001) 7 SCC 690,*** the Apex Court has held that-

> *"It is generally an impossible task for the prosecution to prove what precisely would have impelled the murderers to kill a particular person. All that prosecution in many cases could point to is the possible mental element which could have been the cause for the murder. It is therefore not possible to change the tide on account of the inability of the prosecution to prove the motive aspect to the hilt.*

32. Similarly in the case of ***State of U.P. Vs. Baburam (2000) 4 SCC 515*** it

has been held that-

> *"It is not possible to accept the view that motive may not be very much material in cases depending on direct evidence whereas motive is material only when the case depends upon circumstantial evidence. There is no legal warrant for making such a hiatus in criminal cases as for the motive for committing the crime. Motive is a relevant factor in all criminal cases whether based on the testimony of eyewitnesses or circumstantial evidence. The question in this regard is whether the prosecution must fail because it failed to prove the motive or even whether inability to prove motive would be weaken the prosecution to any would be well and good for it, particularly in a case depending on circumstantial evidence, for such motive could then be counted as one of the circumstances. However, it is generally in a difficult area for any prosecution to bring on record what was in the mind of the respondent. Even if the investigating officer would have succeeded in knowing it through interrogations that cannot be put in evidence by them due to the ban imposed by law. When the prosecution succeeded in showing the possibility of some ire for the accused towards the victim, the inability to further put on record the manner in which such ire would have swelled up in the mind of offender to such a degree as to impel him to commit the murder cannot be construed as a fatal weakness of the prosecution."*

33. Similarly, in the case ***Thaman Kumar Vs. State of Union Territory of Chandigarh, (2003) 6 SCC 380,*** it has been held that-

> *"There is no such principle or rule of law that where the prosecution fails to prove the motive for commission of the crime, it must necessarily result in acquittal of the accused. Where the ocular evidence is found to be trustworthy and reliable and finds corroboration from the medical evidence, a finding of guilt can safely be recorded even if the motive for the commission of the crime has not been proved. Hence in the facts and circumstances of the case, the absence of any evidence on the point of motive cannot have any such impact so as to discard the other reliable evidence available on record which unerringly establishes the guilt of the accused."*

34. Similarly, in the case of ***Yunis alias Kariya Vs. State of M.P. (2003) 1 SCC 425,*** it has been held that-

> *"Failure to prove motive for crime in our view is of no consequence. The role of the accused persons in the crime stands clearly established. The ocular evidence is very clear and convincing in this case. The illegal acts of the accused persons have resulted in the death of a young boy of 18 years. It is settled law that establishment of motive is not a sine qua non for proving the prosecution case."*

35. In ***(1973) 3 SCC 219 (Shivaji Genu Mohite Vs. The State of Mahrashtra)*** the Supreme Court in paragraph 12 has held as under:

> *"12. As stated earlier, the fact that the prosecution in a given case has been able to discover a sufficient motive or not cannot weigh against the testimony of any eye-witness. Evidence as to motive would, no doubt, go a long way in cases wholly dependent on circumstantial evidence. Such evidence would form one of the links in the chain of circumstantial evidence in such a case. But that would not be so in cases where there are eye-witnesses of credibility, though even in such case if a motive is properly proved such proof would strengthen the prosecution case and fortify the court in its ultimate conclusion. But that does not mean that if a motive is not established the evidence of any eye-witness is rendered untrustworthy."*

36. In ***(2017) 11 SCC 120 (Rajagopal Vs. Muthupandi alias Thavakkalai and Others)*** the Supreme Court in paragraph 14 has held as under:

> *"14. Equally, it is well established that motive does not have to be established where there is direct evidence. Given the brutal assault made on PW-1 by criminals, the fact that witnesses have turned hostile can also cut both ways, as is well known in criminal jurisprudence."*

37. It was further submitted by the learned counsel for the respondents that statement of P.W.-1 should be read as a whole and it cannot be read piecemeal by picking up statements made here and there. He submitted that even if P.W.-1 has in his cross examination stated that he was at the crossing on the road marked by X inside a circle in the Site Plan Ex. Ka-5 but in the same context he has also stated that at the time of the incidence he was standing about 4-5 meters to the east of the shop where the incident occurred, therefore, it cannot be said that P.W.-1 could not have witnessed the murder of Fahim Ahmad. The learned counsel for the respondents have further submitted that the statement of P.W.-1 in cross examination that Tanveer had held the legs of deceased Fahim, Jamshed had held him from behind and Dilshad had held him by his hands is consistent and intact with the narration of facts in the FIR**.**

38. With regard to the lodging of the FIR at 22:00 hours on 01.05.2004,

learned counsel for the respondents submitted that the incident happened at 4:00 PM thereafter, the informant rushed with the injured Fahim to the Primary Health Centre where Dr. J.P. Singh (P.W.-4) examined him and prepared the injury report. Dr. J. P. Singh, thereafter referred him to the District Hospital, Moradabad. The informant then took the injured Fahim for further treatment to Dr. Shiv Swaroop Tandon where he was treated privately and remained there till 04.05.2004 as per the statement of the informant. On 04.05.2004 Dr. Shiv Swaroop Tandon referred the injured for further treatment at Meerut and while the informant was taking the injured from Hasanpur to Meerut the injured Fahim Ahmad died on the way. Therefore, considering the time lapse which has occurred from the time the injury was caused to the deceased Fahim Ahmad till he was taken to Dr. Shiv Swaroop Tandon and left there in the care of other relatives and only thereafter, that the informant rushed to the police station to lodge the FIR on the same day at 10:00 P.M, in our opinion, such time lapse has reasonably been explained and therefore, the submission of the learned counsel for the appellant that there was inordinate delay in lodging the FIR is totally misconceived.

39. The accused in their defence under Section 313 Cr.P.C. have denied the incident altogether and claimed that they have been falsely implicated in the murder of the deceased Fahim Ahmad due to enmity. However, the defence has not been able to show what was the enmity between the prosecution and the accused.

40. In this view of the matter, it is amply clear that the prosecution has proved its case against the appellant Fasahat.

41. In view of the facts of the case and the case laws referred to above, we do not find any illegality or infirmity in the finding recorded by the trial

court with regard to the appellant Fasahat and appeal is liable to be dismissed. Hence, the **Criminal appeal no. 4134 of 2005 is dismissed.** The conviction and sentence awarded by the trial court is affirmed. The appellant Fasahat is already in jail. He shall be kept there to serve out the sentence as awarded by the trial court and affirmed by us in the above case.

42. In **Government Appeal no. 5496 of 2005,** the learned AGA for the State-appellant submitted that as per the site plan, the deceased Fahim Ahmad was attacked in his shop and the site is marked by point “A” whereas Khaliq Ahmad the informant is stated to be standing 4-5 metres from the spot “A”, therefore, spot “A” would be clearly visible. He further submitted that statement of P.W.-1 that Jamshed had caught hold of Fahim from behind, Dilshad had caught hold of him by the hands and Jamshed was holding him by the legs is consistent with the narrative in the FIR that the three accused-respondents Jamshed, Tanveer and Dilshad were holding Fahim whereas Fasahat, the other accused had stabbed him with a knife. Learned AGA has further submitted that respondents Jamshed, Tanveer and Dilshad had gone with Fasahat with a common intention to avenge the incident which had happened in the morning of 01.05.2004 regarding Fahim giving protection to Abid in his shop and even though Fasahat alone was carrying a weapon and inflicted the fatal stab wound on Fahim, the deceased, the respondents Jamshed, Tanveer and Dilshad were equally guilty.

43. Sri Mukhtar Alam further submitted that Dr. Shiv Swaroop Tandon was never examined as a witness and, therefore, the entire story that the injured was taken for treatment to Dr. Shiv Swaroop Tandon was a concocted story and could not have been relied upon. In our opinion, even if Dr. Shiv Swaroop Tandon was not produced as a witness by the

prosecution but Dr. J.P. Singh P.W.-4 has proved the Ex. Ka-4 which is the injury report prepared by him on the very first instance when the injured Fahim Ahmad was brought to the Primary Health Centre for treatment immediately after being stabbed and the injury report corroborates the incident of stabbing. The injury report of Dr. J. P. Singh further finds support from the injury report prepared by Dr. Iqbal Hussain, P.W.-3, in-charge Medical Officer. The doctor in the District Hospital conducted the postmortem of the deceased and the injuries mentioned in the postmortem report corroborate the statements of P.W.-1 and 2 that the deceased Fahim Ahmad was stabbed.

44. Sri Mukhtar Alam further submitted that the Medical Officer/doctor who declared the injured Fahim Ahmad having been brought dead did not communicate the said information to the police and there was violation of Section 39 of the Cr.P.C. Section 39 of the Code provides that every person, aware of the commission of, or of the intention of any other person to commit, any offence punishable under any of the sections of the Indian Penal Code mentioned in Section 39 to be duty bound to communicate such information to the nearest Magistrate or the police officer of such commission or intention. However, as submitted by the learned AGA, we find that Section 307 and 323 IPC are not mentioned in Section 39 Cr.P.C. We may, however, note that at the time when injured Fahim Ahmad was admitted for treatment to Dr. Shiv Swaroop Tandon he was still alive and a case under Section 307, 504, 506 IPC had been registered which Sections do not find mention in Section 39 of Cr.P.C., therefore, there was no obligation on the part of Dr. Shiv Swaroop Tandon to communicate such information to the nearest Magistrate or the police officer. However, we may hasten to add that the FIR was lodged in the Thana Hasanpur on 1.5.2004 and bears

the endorsement of the S.I of the same date. Just below it is the endorsement of the in-charge CJM District J.P. Nagar, though no date has been mentioned but we have no reason to believe that the same was sent to the Magistrate at a later date and not on 1.5.2004 itself. The FIR also bears the seal of the Circle Officer, Hasanpur referring to the concerned court. We may also note that report of the death of injured Fahim Ahmad was made to the Thana concerned on 4.05.2004 itself which is the date of death of the injured by the informant Khaliq Ahmad (Ex. Ka-2). We therefore reject the contention of the learned counsel for the respondents that there was violation of provisions of section 157 Cr.P.C. The judgment of the Supreme Court in the case of Jagdish Murav (supra) therefore, has no application to the facts of the present case.

45. The next submission of the learned counsel for the respondents, Sri Mukhtar Alam is that the F.I.R. itself was delayed. However, we may note in this context that the incident occurred at 4:00 P.M./16:00 hours on the afternoon/evening of 01.05.2004. The P.W.-1 in his testimony has stated that he had taken the injured first to the Primary Health Centre where he was examined by Dr. J.P. Singh who referred him to the District Hospital, Moradabad. Thereafter, he took the injured to Dr. Shiv Swaroop Tandon where he was left in the care of other relatives and thereafter the P.W.-1 rushed to lodge the F.I.R. The first Investigating Officer P.W.-6 Mahendra Singh has in his testimony stated that he had reached the site of the incident at 6:00 PM in the evening which means that the information had been given to the police by that time. He also states in his cross-examination that the informant Khaliq Ahmad had come to the Thana for lodging the FIR at 4:45 PM in the evening, though the time may not be correct since from the original record it is

seen that the Medical Officer, Incharge (PHC) Hasanpur has examined the injured Fahim Ahmad on 1.5.2004 at 5.35 p.m. and submitted the injury report Ex. Ka-4. . The IO did not register the F.I.R. at that time but as per his statement he went to the spot for inspection and only, thereafter the F.I.R. was registered at 22:00 hours same day i.e. on 1.5.2004. The time of the FIR is mentioned in the chik F.I.R. as 22:00 hours on 01.05.2004. The chik FIR has been proved by the SSI Indu Pal Singh P.W.-7. Therefore, it is not correct to state that there was delay in lodging the F.I.R. It is also to be noted that the chik FIR was sent to the Magistrate by Dak as per the noting of the Circle Officer and also endorsed by the CJM, J.P. Nagar as "seen". We may also noted that if it is the allegation of the defence that the FIR was delayed no question in this regard was put to the IO either and therefore, the defence cannot gain any advantage through such submission.

46. The Supreme Court in ***Balveer Singh Vs State of Madhya Pradesh 2019 (108)ACC 317*** in para 20 has held as under:-

> "***20***. *Delay in FIR – For the occurrence on 11.03.1998 at 05.30 PM, FIR No.114/98 was registered on the same day at 06.00 PM. As per the evidence of Constable Radhey Shyam (PW-10), FIR was handed over before the Court of JMFC, Bina on 12.03.1998. So far as the contention regarding delay in receipt of the FIR in the court, the trial court held that not sending the FIR immediately to the Court after its registration, cannot be put against the prosecution case since after 05.30 PM, the court timing gets over and in these circumstances, production of FIR before the Court on the next day during the court timings does not indicate that the FIR is ante dated. The case of prosecution, in our view, cannot be doubted on the ground of delay in receipt of the FIR in the court."*

47. Sri Mukhtar Alam, learned counsel has placed reliance upon the judgement of the Supreme Court in ***Jagdish Murav Vs State of U.P. and Ors, (2006) 12 SCC 626 and Meharaj Singh Vs State of U.P., (1994) SCC (Crl) 1390*** and submits that there was a delay in lodging the F.I.R. which has led to a coloured version and an exaggerated story in the FIR. However, in view of the facts of the case, explaining the delay in lodging the FIR which we have discussed at length and rejected

hereinabove, and in view of the judgment of the Supreme Court in the case of Balveer Singh and Ganga Singh (supra), in our opinion, the judgement of Jagdish Murav and Meharaj (supra) have no application to the facts of the present case.

48. Sri Mukhtar Alam, learned counsel for the respondent next submitted that respondents role was only one of holding the injured/deceased whereas the actual incident of stabbing was carried out by accused Fasahat and, therefore, they had rightly been acquitted by the trial court and the acquittal should not be reversed on the evidence as it stands. He has relied upon the judgment of the Supreme Court in ***(2009) 11 SCC 334 Mahendra Pratap Singh Vs State of Uttar Pradesh*** as well as ***(2009) 11 SCC 660, Shripathi and others Vs State of Karnataka*** and submitted that in Sripathi (supra) the accused A-1 and A-3 had on the instructions of A-4 held the deceased whereas it was A-4 who was carrying a knife in his pocket, suddenly brought it out and stabbed the deceased.

49. In our, opinion, the judgement in the case of Mahendra Pratap Singh (supra) and Sripathi (supra) have no application to the facts of the present case for the reason that in the case of Sripathi (supra) it could not be established that the accused A-1 to A-3 had a common intention and object in perpetrating the crime and had caught hold of the deceased with that intention. On the other hand in the present case, it has been successfully proved by the prosecution through the testimony of the witnesses that on the morning of the incident the accused had chased one Abid into the shop of Fahim, the deceased who had scolded the accused and sent them away and while leaving the accused had threatened Fahim Ahmad with dire consequences for having saved Abid. The prosecution has also succeeded in proving that all the accused on

the same day in the afternoon at 4:00 pm i.e. 1.05.2004 with common intention came to the shop of Fahim and while Jamshed, Tanveer and Dilshad caught hold of Fahim, the accused Fasahat stabbed Fahim with such force that the intestines of the deceased came out. It is not the case of the defence that the accused were not aware of the intention of Fasahat to stab Fahim or that after the accused had held the deceased Fahim Ahmad the accused Fasahat took out a knife from his pocket and stabbed Fahim and that the accused could not have known of the intention of Fasahat to stab Fahim to death.

50. In this view of the matter, the judgement cited by Sri Mukhtar Alam namely, Sripathi (supra) and Mahendra Pratap Singh (supra) with reference to common intention under Section 34 have no application to the facts of the present case.

51. Otherwise also the manner in which the crime was committed, we find that Jamshed, Tanveer and Dilshad along with the accused Fasahat had with a common intention reached the shop of the deceased to teach him a lesson and to kill him in relation to a previous incident which occurred the same morning in which the deceased had saved one Abid from the clutches of the accused persons. It has specifically come on record that Jamshed had grabbed the deceased Fahim Ahmad from behind whereas Dilshad had caught hold of his hands and Tanveer had caught hold of his legs, meaning thereby that they had rendered the deceased immobile and ineffective to save himself from knife blow dealt by accused Fasahat. If the three accused-respondents had not caught hold of the deceased so firmly, there would have been a chance for the deceased to have run away and save himself. Thus, it is clear that they had reached the spot alongwith the accused Fasahat with the common intention to avenge the incident of the same morning and to assault the deceased and to kill

him. Therefore, in our opinion, all the three accused-respondents having reached the spot in furtherance of their common intention to commit murder of the deceased and also actively participated in the crime, therefore, they are liable to be held guilty of the offence under section 302/34 I.P.C.

52. It is to be noted for convicting a person with the aid of Section 34 IPC apart from the fact that there should be two or more accused, two factors must be established (i) common intention and (ii) participation of the accused in the commission of the offence. If common intention is proved but no overt act is attributed to the individual accused, Section 34 IPC will still be attracted as essentially it involves vicarious liability.

53. In the present case it has been specifically proved by the prosecution that the respondents were present on the spot and were catching hold of the deceased and thereby they actively participated in the commission of the crime with common intention to kill the deceased. It is also the case of the prosecution that an incident had taken place in the morning in which the deceased had scolded the accused persons and saved one Abid who was being chased by the accused persons and, thereafter the accused persons had left threatening the deceased Fahim of dire consequences and on the same day they reached the shop of Faheem and committed his murder with common intention. The prosecution has also proved its case beyond reasonable doubt.

54. The Apex Court in ***Suresh Vs. State of UP, AIR 2001 SC 1344,*** opined in para 36 and 37 as under:

"***36.*** *However, in view of the importance of the matter, in so far as the interpretation of Section 34 of the Indian Penal Code is concerned, we have chosen to express our view in the light of consistent legal approach on the subject throughout the period of judical pronouncements. For the applicability of Section 34 to a co-accused, who is proved to have common intention, it is not the requirement of law that he should have actually done something to incur the criminal liability with the aid of this section. It is now well settled that no overt act is necessary to attract the applicability of Section 34 for a co-accused who is otherwise proved to be sharing common intention with the ultimate act done by*

any one of the accused sharing such intention.

37. *Section 34 of the Indian Penal Code recognises the principle of vicarious liability in the criminal jurisprudence. It makes a person liable for action of an offence not committed by him but by another person with whom he shared the common intention. It is a rule of evidence and does not create a substantive offence. The section gives statutory recognition to the commonsense principle that if more than two persons intentionally do a thing jointly, it is just the same as if each of them had done it individually. There is no gainsaying that a common intention pre-supposes prior concert, which requires a prearranged plan of the accused participating in an offence. Such a preconcert or preplanning may develop on the spot or during the course of commission of the offence but the crucial test is that such plan must precede the act constituting an offence. Common intention can be formed previously or in the course of occurrence and on a spur of moment. The existence of a common intention is a question of fact in each case to be proved mainly as a matter of inference from the circumstances of the case.*

38. *Dominant feature for attracting Section 34 of the Indian Penal Code (hereinafter referred to as "the Code") is the element of participation in absence resulting in the ultimate "criminal act". The "act" referred to in latter part of Section 34 means the ultimate criminal act with which the accused is charged of sharing the common intention. The accused is, therefore, made responsible for the ultimate criminal act done by several persons in furtherance of the common intention of all. The section does not envisage the separate act by all the accused persons for becoming responsible for the ultimate criminal act. If such an interpretation is accepted, the purpose of Section 34 shall be rendered infructuous. Participation in the crime in furtherance of the common intention cannot conceive of some independent criminal act by all accused persons, besides the ultimate criminal act because for that individual act law takes care of making such accused responsible under the other provisions of the Code. The word "act" used in Section 34 denotes a series of acts as a single act. What is required under law is that the accused persons sharing the common intention must be physically present at the scene of occurrence and be shown to not have dissauded themselves from the intended criminal act for which they shared the common intention. Culpability under Section 34 cannot be excluded by mere distance from the scene of occurrence. The presumption of constructive intention, however, has to be arrived at only when the court can, with judicial servitude, hold that the accused must have pre-conceived result that ensued in furtherance of the common intention. A Division Bench of the Patna High Court in Shatrughan Patar & Ors. v. Emperor [AIR 1919 Patna 111] held that it is only when a court with some certainty hold that a particular accused must have pre-conceived or pre-meditated the result which ensued or acted in concert with others in order to bring about that result, that Section 34 may be applied.*

40. *In Barendra Kumar Ghosh vs. King Emperor [AIR 1925 PC 1] the Judicial Committee dealt with the scope of Section 34 dealing with the acts done in furtherance of the common intention, making all equally liable for the results of all the acts of others. It was observed:*

> *".....the words of Section 34 are not to be eviscerated by reading them in this exceedingly limited sense. By Section 33 a criminal act in Section 34 includes a series of acts and, further, "act" includes omissions to act, for example, an omission to interfere in order to prevent a murder being done before one's very eyes. By Section 37, when any offence is committed by means of several acts whoever intentionally co-operates in the commission of that offence by doing any one of those acts, either singly or jointly with any other person, commits that offence. Even if the appellant did nothing as he stood outside the door, it is to be remembered that in crimes as in other things 'they also serve who only stand and wait'. By Section 38, when several persons are engaged or concerned in the commission of a criminal act, they may be guilty of different offences by means of that act. Read together, these sections are reasonably plain. Section 34 deals with the doing of separate acts, similar of diverse, by several persons; if all are done in furtherance of a common intention, each person is liable for the result of*

them all, as if he had done them himself, for 'that act' and 'the act' in the latter part of the section must include the whole action covered by 'a criminal act' in the first part, because they refer to it. Section 37 provides that, when several acts are done so as to result together in the commission of an offence, the doing of any one of them, with an intention to co-operate in the offence (which may not be the same as an intention common to all), makes the actor liable to be punished for the commission of the offence. Section 38 provides for different punishments for different offences as an alternative to one punishment for one offence, whether the persons engaged or concerned in the commission of a criminal act are set in motion by the one intention or by the other."

(Emphasis supplied)

Referring to the presumption arising out of Section 114 of the Evidence Act, the Privy Council further held:

"As to Section 114, it is a provision which is only brought into operation when circumstances amounting to abetment of a particular crime have first been proved, and then the presence of the accused at the commission of that crime is proved in addition; Abhi Misser v. Lachmi Narain [1900 (27) Cal. 566]. Abetment does not in itself involve the actual commission of the crime abetted. It is a crime apart. Section 114 deals with the case where there has been the crime of abetment, but where also there has been actual commission of the crime abetted and the abettor has been present thereat, and the way in which it deals with such a case is this. Instead of the crime being still abetment with circumstances of aggravation, the crime becomes the very crime abetted. The section is evidentiary not punitory. Because participation de facto(as this case shows) may sometimes be obscure in detail, it is established by the presumption juris et de jure that actual presence plus prior abetment can mean nothing else but participation. The presumption raised by Section 114 brings the case within the ambit of Section 34.

(Emphasis supplied)

41. *The classic case on the subject is the judgment of the Privy Council in Mahboob Shah vs. Emperor [AIR 1945 PC 118]. Referring to Section 34 prior to its amendment in 1870 wherein it was provided:*

"When a criminal act is done by several persons, each of such persons is liable for that act in the same manner as if the act was done by him alone."
it was noticed that by amendment, the words "in furtherance of common intention of all" were inserted after the word "persons" and before the word "each" so as to make the object of Section clear. Dealing with the scope of Section, as it exists today, it was held:

"*Section 34 lays down a principle of joint liability in the doing of a criminal act. The section does not say 'the common intention of all' nor does it say 'an intention common to all'. Under the section, the essence of that liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. To provide the aid of Section 34 successfully, it must be shown that the criminal act complained against was done by one of the accused persons in the furtherance of the common intention of all; if this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone. This being the principle, it is clear to their Lordships that common intention within the meaning of the section implies a pre- arranged plan, and to convict the accused of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan. As has been often observed, it is difficult if not impossible to procure direct evidence to prove the intention of an individual; in most cases it has to be inferred from this act or conduct or other relevant circumstances of the case.*"

(Emphasis supplied)

55. In ***Goudappa and others Vs. State of*** **Karnataka, (2013) 3 SCC 675**, Hon'ble Supreme Court opined that Section 34 IPC lays down a principle of joint liability in doing a criminal act and the essence of that liability is to be found in the existence of common intention.

56. In ***Jai Bhagwan and others Vs. State of Haryana, (1999) 3 SCC 102,*** para 11 reads as under:-

> ***"10.*** *To apply Section 34 IPC apart from the fact that there should be two or more accused, two factors must be established : (i) common intention and (ii) participation of the accused in the commission of an offence. If common intention is proved but no overt act is attributed to the individual accused, Section 34 will be attracted as essentially it involves vicarious liability but if participation of the accused in the crime is proved and common intention is absent, Section 34 cannot be invoked. In every case, it is not possible to have direct evidence of common intention. It has to be inferred from the facts and circumstances of each case."*

57. In ***Ramesh Singh Alias Photti Vs State of A.P., (2004) 11 SCC 305,*** the Supreme Court in para 12 has held as under:-

> ***"12.*** *To appreciate the arguments advanced on behalf of the appellants it is necessary to understand the object of incorporating Section 34 in the Indian Penal Code. As a general principle in a case of criminal liability it is the primary responsibility of the person who actually commits the offence and only that person who has committed the crime can be held to guilty. By introducing Section 34 in the penal code the Legislature laid down the principle of joint liability in doing a criminal act. The essence of that liability is to be found in the existence of a common intention connecting the accused leading to the doing of a criminal act in furtherance of such intention. Thus, if the act is the result of a common intention then every person who did the criminal act with that common intention would be responsible for the offence committed irrespective of the share which he had in its perpetration. Section 34 IPC embodies the principles of joint liability in doing the criminal act based on a common intention. Common intention essentially being a state of mind it is very difficult to procure direct evidence to prove such intention. Therefore, in most cases it has to be inferred from the act like, the conduct of the accused or other relevant circumstances of the case. The inference can be gathered by the manner in which the accused arrived at the scene, mounted the attack, determination and concert with which the attack was made, from the nature of injury caused by one or some of them. The contributory acts of the persons who are not responsible for the injury can further be inferred from the subsequent conduct after the attack. In this regard even an illegal omission on the part of such accused can indicate the sharing of common intention. In other words, the totality of circumstances must be taken into consideration in arriving at the conclusion whether the accused had the common intention to commit an offence of which they could be convicted. (See Noor Mohammad Yusuf Momin v. State of Maharashtra, (1970) 1 SCC 696 : AIR 1971 SC 855)."*

58. In ***Murari Thakur and Another Vs State of Bihar, (2009) 16 SCC 256,***

the Supreme Court in para 7 has held as under:-

> "***7****. We agree with the view taken by the High Court and the trial court that the accused had committed murder of deceased Bal Krishna Mishra after overpowering him in furtherance of their common intention on 26-8-1998 at 4 p.m. No doubt it was Sunil Kumar, who is not before us, who cut the neck of the deceased but the appellants before us (Murari Thakur and Sudhir Thakur) also participated in the murder. Murari Thakur had caught the legs of the deceased and Sudhir Thakur sat on the back of the deceased at the time of commission of this murder. Hence, Section 34 IPC is clearly applicable in this case."*

59. In ***Asif Khan Vs State of Maharashtra and Another, (2019) 5 SCC 210***,

the Supreme Court in paragraphs 23, 24 and 25 has held as under:-

> ***"23.*** *The principles as noticed above have been reiterated time and again. We may refer to the judgment of this Court in Narinder Singh and Another Vs. State of Punjab, (2000) 4 SCC 603, the facts in the above case has been noticed in Paragraph No.5 of the judgment, which are to the following effect:-*
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> > *"5. On 6-11-1989 Gurdev Singh with his son Hardip Singh (PW 2) was going on a bicycle to Village Jagatpur in order to withdraw the money from his account in the Cooperative Bank there. Hardip Singh was pedalling the cycle while Gurdev Singh was sitting on its carrier. Around 12 o'clock when they reached the metalled road near the field of one Gurmej Singh, resident of Jagatpur, they saw the appellants sitting near a tree. They got up and intercepted Gurdev Singh and Hardip Singh. Both got down from their cycle. Appellant Narinder Singh proclaimed that they would teach Gurdev Singh a lesson as he had not vacated the office of Granthi of the Gurudwara as per their demand. He grabbed Gurdev Singh by his arms while the second appellant Ravinder Singh alias Khanna took out a gatra kirpan, which he was wearing and stabbed Gurdev Singh with the gatra kirpan on the left side of his neck. Gurdev Singh after receiving the kirpan-blow fell down....."*
>
> ***24.*** *The role assigned was that he grabbed Gurdev Singh by his arms while the second appellant stabbed 24 Gurdev Singh with kirpan. In Paragraph No.5, following has been stated:-*
>
> > *"5. .....He grabbed Gurdev Singh by his arms while the second appellant Ravinder Singh alias Khanna took out a gatra kirpan, which he was wearing and stabbed Gurdev Singh with the gatra kirpan on the left side of his neck. Gurdev Singh after receiving the kirpan-blow fell down....."*
>
> ***25****. This Court in Paragraph No.16 of the judgment held that both the appellants had committed the murder of Gurdev Singh. It was held that it is not material to bring the case under Section 34, as to who inflicted the fatal blow, following was laid down in Paragraph No.16:-*
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> > *"16. .....Both the appellants committed the murder of Gurdev Singh, Granthi in furtherance of their common intention. It was submitted by Mr Gupta that Narinder Singh could not have been convicted with the aid of Section 34 as this section is nowhere mentioned in the impugned judgment. Mention of the section in the judgment is not the requirement of law to convict a person. If the ingredients of the offence are present, conviction can be made. It is not material to bring the case under Section 34 IPC as to who, in fact,*

inflicted the fatal blow. The High Court has rightly interfered in the matter and sentenced the appellants accordingly."

60. Learned trial court considering that P.W. 1 and P.W. 2, namely, Khalik Ahmad and Irshad have stated that deceased was caught hold by the accused Tanvir, Dilshad and Jamshed and both have stated that they reached the spot after hearing the noise and after the injury was caused, has held that their witnessing of catching hold of the deceased by accused Tanvir, Dilshad and Jamshed is doubtful. In view of the facts already discussed above and the settled legal position the finding of the trial court is wholly perverse.

61. In view of the aforesaid, we are of the view that the accused respondents had wrongly been acquitted by the trial court for the ultimate criminal act done by all the respondents in furtherance of the common intention of all.

62. For the reasons stated above, the ***Government Appeal no. 5496 of 2005 is allowed*** and the judgement and order of the trial court dated 30.8.2005 in so far as it relates to the acquittal of the accused-respondents Jamshed, Tanveer and Dilshad is set aside. We hold the respondents 1, 2 and 3, namely, Jamshed, Tanveer and Dilshad guilty of the offences punishable under section 302/34 I.P.C. and sentence each of them to imprisonment for life with fine of Rs. 5000/- and in case of default of payment of fine, they shall undergo further simple imprisonment for a period of six months.

63. The CJM, Jyotiba Phule Nagar is directed to take the accused-respondents, namely, **Jamshed, Tanveer** and **Dilshad** in custody forthwith and send them to jail to serve out the sentences awarded by us as above.

64. Office is directed to send a copy of this order to the court concerned

within a week for compliance. The CJM concerned shall send his report with regard to the accused-respondents within one month thereafter, which shall be kept on record of this case.

65. The lower court record shall be returned to the court concerned.

Order Date :- 18/12/2019
o.k./Kirti