* IN THE HIGH COURT OF DELHI AT NEW DELHI

% CRL. APPEAL NO. 974 OF 2001

\+ Date of Decision: 29th August, 2008

\# RAJESH @ HUNNY @ MUNNY ...Appellant
! Through : Mr. Anil Soni, Advocate

Versus

$ STATE ...Respondent
^ Through : Ms. Richa Kapoor, APP

WITH

% CRL. APPEAL NO. 979 OF 2001

\# HARJESH @ SUNNY ...Appellant
! Through : Mr. Anil Soni, Advocate

Versus

$ STATE ...Respondent
^ Through : Ms. Richa Kapoor, APP

CORAM:
* HON'BLE MR. JUSTICE B.N.CHATURVEDI
HON'BLE MR. JUSTICE P.K.BHASIN

1. Whether Reporters of local papers may be allowed to see the judgment?(Yes)
2. To be referred to the Reporter or not?(Yes)
3. Whether the judgment should be reported in the digest?(Yes)

JUDGMENT

P.K.BHASIN, J:

This appeal has been filed by the two appellants, who are real brothers, against the judgment dated 21.11.2001 and order dated 22.11.2001 passed by the learned Additional Sessions Judge, Delhi in Session Case No.90/2000 whereby they were convicted under Sections 302 and 307 read with Section 34 of Indian Penal Code ('IPC' in brief) and sentenced to imprisonment for life and also to a fine of Rs.5000/- each, with a default stipulation, for the murder of one Kapil and rigorous imprisonment for seven years and a fine of Rs.5000/-each, with a default stipulation, for the attempted murder of his mother.

2. The incident leading to the prosecution of the two appellants(hereinafter to be referred to as the accused persons) was narrated by PW-2 Santosh Sharma in her first information statement to the police(Ex.PW- 2/A) on 12th December,1998 when the incident had taken place. She had claimed that that day i.e. 12th December, 1998, her sons Kapil(the deceased) and

Anuj(PW-5) had gone to play cricket in the park near their house. At about 12.30 p.m. when both of them returned to the house Anuj told her and her husband that there was a quarrel over the game of cricket between Kapil and Sunny-Munny(the two appellants herein). Then her husband came out of the house followed by Kapil and Anuj and she also followed them. Sunny and Munny were present in the gali. Sunny(appellant Harjesh) was having a knife in his hand and Munny(appellant Rajesh) caught hold of Kapil and when Sunny was about to assault Kapil she told him(Sunny) not to quarrel. Upon that Sunny stabbed her with the knife and then stabbed Kapil number of times. Her husband and son Anuj tried to save Kapil but Munny kept on holding Kapil and Sunny kept on stabbing him.

3. Injured Santosh Sharma went from the spot and informed the police on phone from a nearby shop. After the incident Kapil was taken to Hindu Rao hospital where he was examined by PW-21 Dr. Mukesh Kumar. On examination, this doctor had found the following injuries on the body of Kapil:-

1. Incised wound 2 cm x 1.25 cm on right side of chest.

2. Incised wound over left side of chest 2 cm x 0.5 cm.

3. Incised wound over back left back dorsal region 1 cm x .25 cm.

4. Incised wound 1 cm x .25 cm on back and left lumber region.

4. The injured-complainant Santosh Sharma was also got medically examined and as per her MLC, Ex. PW-21/B, she had sustained stab injury which was found to be dangerous in nature.

5. Kapil succumbed to the injuries sustained by him on the day of the incident itself. The dead body of the deceased was subjected to post-mortem examination by PW-4 Dr. C.B. Dabas of Hindu Rao Hospital. The following external and internal injuries were noticed by this autopsy surgeon:-

EXTERNAL INJURIES

1. Abrasion 0.5 x 0.5 cm over left forehead.
2. Abrasion 0.7 x 0.2 cm over left side forehead medial to injury no. 1.
3. Scratch abrasion 1.8 x 0.2 cm over right side of chin.

4. Scratch abrasion 4 x 0.2 cm over middle front of right side of neck.

5. One scratch abrasion 1.3 x 0.2 cm over right clavicle.

6. Scratch abrasion 2.5 x 0.5 cm over infra clavicle region on right side.

7. Scratch abrasion 0.8 x 0.3 cm over dorsum of right fore-arm in lower part.

8. Scratch abrasion 1.5 x 0.2 cm over dorsal aspect of right thumb.

9. Scratch abrasion 4 x 0.5 cm over dorsum of right foot.

10. Scratch abrasion 0.5 x 0.3 cm over dorsum of right little toe.

11. One stab wound 3 x 1 cm x 7 depth located on right side front of chest 2 cm outer to mid line, 7.5 cm inner to nipple and 118 cm above right wheel. The room was placed vertically margins were clean cut, lower angle was round, upper angle was acute.

12. One stab wound 3 x 1 cm x ? depth located on left side of chest on lower lateral aspect 17 cm outer to mid line and 15 cm below left nipple and 112 cm above left heel. The wound was placed vertically, the margins were clean cut, upper angle was acute, lower angle was round. There was a lenious scratch in upper angle of the wound measuring 4.5 x 0.2 cm in continuation of the wound.

13. One stab wound 2.5 x 1 cm x ? depth located on left side back of chest 9 cm outer to mid line 117 cm above left heel, margins clean cut, wound was placed horizontally with inner angle of the wound being round and outer angle was acute.

14. One stab wound 2.5 x 1 cm x ? depth located on left side back of chest 12 cm outer to mid line

and 109 cm above left heel. The wound was placed horizontally 8 cm below injury no. 13. The margins of the wound were clean cut, inner angle was round and outer angle was acute, wound was actively bleeding.

INTERNAL INJURIES

CHEST AND ABDOMEN

"Injury no. 11 entered the chest cavity after cutting through fort rib and third inter coastal muscle on right side just near external edge and then entered the pericardial sack, cut through wall of right ventricle and entered the ventricular cavity, depth of the wound was 11 cm. Direction was confront behind and slightly to the left. Plural cavity was full of blood.

Injury No. 12- Travelled subcrutaneously in left side chest wall upto depth of 6 cm.

Injury No. 13 – Entered the chest cavity through 7th intercoast space. Then penetrated through left lung in its lower lobe and then ended in left dome of diaphragm and ended in lower, outer surface of spleen making a deep cut of 2 cm depth in the substance of spleen. Total depth was 9.5 cm.

In the opinion of the autopsy surgeon the cause of death of the deceased Kapil was haemorrhagic shock due to aforesaid injuries and injury nos. 11, 12 13 and 14 were opined to be collectively sufficient to cause death in ordinary course of nature.

The autopsy surgeon gave his detailed post-mortem report Ex. PW-4/A.

6. Both the accused were arrested on the day of the incident itself. They made separate disclosure statements after their arrest and allegedly got recovered one knife Ex. P-11 from their house. That knife was produced before the autopsy surgeon who gave his opinion that the injuries no. 11 to 14 (noticed already) could be caused with a sharp edged weapon like the knife Ex. P-11. That knife was later on sent to Forensic Scientific Laboratory (FSL) where on examination human blood was detected on that knife. The sweater and the jeans which appellant-accused Harjesh was wearing at the time of his arrest were found to be blood stained and so the same were taken into police possession. The shirt which appellant-accused Rajesh was wearing at the time of his arrest was also found to be blood stained and so the same was also taken into possession by the Investigating Officer. Those clothes were also sent to FSL where on examination human blood

of 'B' group, which was the blood group of the deceased also, was detected.

7. On the completion of investigation both the accused brothers were charge-sheeted for the murder of Kapil and attempt to murder Kapil's mother. After the commitment of the case to Sessions Court both of them were charged and tried under Sections 302/34 and Sections 307/34 IPC. The prosecution had sought to establish its case mainly upon the evidence of three eye-witnesses of the occurrence, namely PW-1 Ram Niwas, PW-2 Santosh Sharma and PW-5 Anuj Sharma. Other witnesses were also examined who had taken some part or the other during investigation stage. The appellants had claimed that they had been falsely implicated by the police as they were BCs(bad characters) of the area and against them externment orders had also been passed. Accused Harjesh also took the plea that on the day of the incident he was not in Delhi because of his having been externed.

8. The learned trial Court found the evidence of all the three eye-witnesses wholly reliable and corroborating each other and accepting their version convicted both the accused persons for both the offences for which they were tried. Feeling aggrieved by their conviction and the sentences awarded to them both the convicted accused filed separate appeals which were heard together and since both the appeals arose out of the same judgment of the trial Court the same are now being disposed of by this common judgment.

9. Mr. Anil Soni, Advocate, was appointed as an *amicus curiae* at the request of both the appellants to argue their appeals. He did not dispute the fact that the deceased Kapil died a homicidal death. This fact is even otherwise fully established from the evidence of the autopsy surgeon (PW-4). The injuries noticed by him on the dead body of the deceased Kapil have already been noticed by us as well as his opinion about the cause of death. Those injuries leave no manner of doubt that the deceased was murdered. Mr. Soni also did not dispute the fact that the injury

sustained by the mother of the deceased was dangerous in nature, as was opined by PW-22 Dr. Amit Dewan, who had examined her on the day of incident itself. The injury sustained by PW-2 Smt. Santosh Sharma was an 'incised wound of 3.5 cm x .5 cm over her ninth rib in the axillary line on the right side'.

10. Mr. Soni, however, had strongly contended that the prosecution had failed to establish that the deceased Kapil and his mother were stabbed by accused Harjesh @ Sunny and that accused Rajesh @ Hunny @ Munny had facilitated causing of injuries to the deceased by his brother Harjesh by catching hold of the deceased Kapil. He submitted that the evidence of all the three eye witnesses cannot be accepted as they all are family members of the deceased and despite the fact that the incident had allegedly taken place in broad day light in the gali outside the house of the complainant which was in a thickly populated area no independent person had been made a witness by the investigating agency. Mr. Soni had also contended that, in any event, even if it is accepted that the deceased Kapil and his

mother were actually stabbed by accused Harjesh @ Sunny and that his co-accused brother Rajesh had caught hold of the deceased Kapil still accused Rajesh could not be convicted under Sections 302 with the aid of Section 34 IPC since from the evidence of the eye witnesses of the incident it cannot be said that accused Rajesh and Harjesh had shared common intention to kill the deceased. And as far as Rajesh's conviction under Section 307/34 IPC is concerned the same is also not proper since, Mr. Soni submitted, as per the prosecution case Harjesh had suddenly assaulted PW-2 Santosh Sharma when she had tried to ward off the knife attack on her son Kapil and in that process no role had been played by Rajesh at all. Mr. Soni, however, did not dispute that if the incident of stabbing is accepted to have taken place in the manner deposed to by the eye witnesses offence of attempted murder would be made out against accused Harjesh although Mr. Soni continued to maintain his argument that none of the three eye witnesses examined by the prosecution could be relied upon and both the accused deserved to be acquitted. In support of this submission regarding the conviction of appellant–accused Rajesh

under Sections 302 and 307 IPC with the aid of Section 34 IPC Mr. Soni placed reliance on one judgment of Hon'ble Supreme Court which is reported as ***"Ramashish Yadav Vs. State of Bihar", 1999 (8) SCC 53 .***

11. On the other hand, Ms. Richa Kapoor, learned Additional Public Prosecutor for the State while fully supporting the conviction of both the appellants under Sections 302 and 307 IPC contended that there were no infirmities in the evidence of the three eye witnesses of the occurrence and all of them had given truthful version of the incident. She contended that PW-2 Smt. Santosh Sharma had herself sustained dangerous injury in the same incident in which her deceased son Kapil was injured and so her testimony alone was sufficient to convict both the accused persons. It was further contended that although the other two eye-witnesses of the incident were family members of the deceased and the complainant but for that reason alone their evidence cannot be doubted since nothing has been brought on record in their cross-examination from which it could be inferred that they

had any motive to falsely implicate the appellants. They were natural witnesses of the incident which took place outside their house and father and brother of the deceased had ruled out their absence from their house at the time of the incident which fact was sought to be established during their cross-examination. Regarding the conviction of accused Rajesh under Sections 302 and 307 IPC with the aid of Section 34 IPC learned APP had submitted that since just before the main incident in the gali outside the house of the complainant there was already a quarrel between the appellants and the deceased while they were playing cricket during which Kapil was abused by accused brothers and slapped also by accused Harjesh and after that when the deceased and his brother Anuj were leaving that place both the accused had told the deceased and his brother that they were also following them and in fact both of them had thereafter gone towards the house of the deceased and in the gali Harjesh had stabbed Kapil while Rajesh had caught hold of him and so it was a case of planned assault on the deceased Kapil in furtherance of the common intention of both the accused persons. It was also

contended that since the mother of the deceased was also stabbed when she had tried to save him from the assault by accused Harjesh while accused Rajesh was still holding Kapil accused Rajesh had also been rightly convicted under Section 307 IPC with the aid of Section 34 IPC. In support of the submission regarding the applicability of Section 34 IPC in respect of accused Rajesh Ms. Kapoor cited four judgments of the Hon'ble Supreme Court which are reported as ***"Israr v. State of U.P.", 2005 (9) SCC 616, "Ramesh Singh @ Photti v. State of A.P.", (2004) 11 SCC 305, "Sunil Kumar v. The State Govt. of NCT of Delhi", (2003) 11 SCC 367*** and " ***Suresh & Ors. v. State of U.P.", 2001 (3) SCC 673.***

12. In order to appreciate the rival submissions regarding the truthfulness of the testimony of the three eye witnesses examined by the prosecution as well as the applicability of Section 34 IPC in respect of appellant–accused Rajesh for the offences of murder and attempt to murder the evidence of the three eye witnesses needs to be noticed. PW-5 Anuj Sharma is the brother of the deceased and an eye witness of the main incident of stabbing as

well as of the incident which had taken place just before that incident when he alongwith his brother Kapil and others were playing cricket. The relevant part of his testimony is reproduced below:-

> "The deceased Kapil Sharma was my elder brother. On 12.12.98 I along with Kapil had gone to play cricket in the park in front of our house. We were playing cricket with our friends at about 12.00 noon both the accused present in the court also came there. I knew them as they resided in my locality. Their names are Sunny and Munny. Both the accused told us that they would also play cricket with us. My brother allowed them to play 4-5 balls. Both the accused insisted to play more. Kapil told them to play after the match is over. We were playing match with other boys. On this both the accused started abusing my brother and accused Sunny gave one or two slaps to him. We left the match and returned to our house. Both the accused told us that they were also coming behind us. We had come back at about 12.30 p.m. My parents were at home. I told them about the quarrel between Kapil and accused. On this my father went out of the house. I remained in my house. Kapil had also followed my father. When Kapil also went out behind my father my mother also went behind him. I followed my mother. By the time I reached out of the house, I saw both the accused present in the gali. Accused Sunny was having knife in his hand. Accused Munny caught hold of my brother and when Sunny wanted to give knife blow to my brother, my mother came in between but accused Sunny told her 'HAT BURRIYA'. Immediately after saying this Sunny gave knife blow to my mother which fell on her left side of rib cage. My mother fell down. Accused Sunny thereafter gave blow 4-5 blows of

knife to my brother while Munny have been keeping him caught hold of. My brother fell down. When I tried to catch the accused persons with my father they threatened us and ran away. My mother called the police on telephone from the shop of Subhash. PCR van came there and took my mother, brother and my father to the hospital. Subsequently I came to know that my brother had succumbed to the injuries. My mother remained in the hospital for about 8-9 days for treatment....."

13. PW-2 Santosh Sharma is the injured–complainant herself. The relevant part of her testimony in respect of the incident of stabbing is reproduced below:

"I have three sons namely Kapil, Vikas and Anuj. Kapil was my eldest son.

It was on 12.12.98 when I was present in my house. My husband and my son Anuj were also present. My son Vikas had left the house in the morning to attend the duty. In the morning at about 11 a.m. my sons Kapil and Anuj had gone to play cricket in the park adjoining our house. They came back at about 12 or 12.30 in the noon. On arrival my younger son Anuj told me that a quarrel had taken place between Kapil, my elder son, and Sunny and Munny. Sunny and Munny both are resident of A-79, Shastri Nagar and I knew them as I have been seeing them in the area. My husband was at home at that time. On hearing this, my husband went out of the house to see Sunny and Munny. I followed my husband. My both sons also came behind us. We came down from our house on to the street, both the accused Sunny and Munny present in the court whom I identify also reached there. Accused Sunny was having a knife in his hand.

> Accused Munny caught hold of my son Kapil by both his hands. I stepped forward to separate them. At this Sunny gave a blow of knife on my right side rib and I started bleeding. Accused Sunny thereafter started giving blow of knife to my son Kapil. I went to General Store which is nearby and telephoned the police. My husband and my son had also tried to rescue Kapil but the accused persons continued in their acts. Both the accused had ran away from the spot. Police came there after some time and took Kapil to the hospital. I was also taken to the hospital. My husband had also accompanied with us.....
>
> Later on I came to know that my son Kapil has succumbed to the injuries. Police had met me in the hospital and took/recorded my statement. I have seen my statement which is Ex. PW-2/A which bears my signature at point 'A'. I remained in the hospital for about 8 days for my treatment. When accused Sunny gave a knife blow to my son Kapil he threatened me 'HAT JA BURIYA NAHI TO TERA KO BHI JAN SA MAR DOONGA' and thereafter they continued beating my son....."

In cross-examination on behalf of the accused this witness clarified that when she had intervened to save her son Kapil he had already been given some knife blows.

14. PW-1 Ram Niwas is the father of the deceased Kapil. This is what he deposed about the actual incident:-

> "After accident I am residing at home because of health problem. I have three sons eldest son Kapil Sharma, then Vikas and Anuj.

Youngest is in 10th class, Vikas is not employed anywhere. Only my son Kapil was earning member in my family.

There is a park near my house. On 12.12.98 my eldest son Kapil and younger son Anuj had gone to adjoining park to play cricket. They returned at about 12.30 p.m. My son Anuj told me that a quarrel taken place between Kapil and one of the accused whose name was not mentioned by him. He told the names of Sunny and Manny was the accused present in the court. I know both the accused as they reside in A-79, Main Road, Shastri Nagar. My son Anuj also told me that both the accused had given threat to Kapil – 'EAB EAKAR TERI BEHAN CHODTA HAI'. I told both my sons to remain at home and I will sort out the matter. While the time I had come out of my house I saw both the accused coming in the street to my house. My sons were also following me. Accused Manni(Rajesh) pointed out to my son Kapil and asked that he should be caught hold of. Thereafter accused Manni caught hold of Kapil with both his hands and accused Sunny gave two blows of knife which was in his hand to Kapil. One blow was given by him to the right back and on the right side of chest. My wife in the meanwhile came down and stretched herself over Kapil who had fallen and asked the accused persons not to kill him. I folded my hands and requested both the accused persons to spare my sons but Sunny abused me by telling 'HAT JAI BUDDA NAHI TO TERA KO BHI CHACKU MAR DUGA'. Accused Sunny gave me push and gave knife blow on the right back of my wife. My wife stood up and went to call the police thereafter accused Sunny(Harjesh) gave two more knife blows to my son Kapil which fell on his left back and left upper back.....

.....Accused Sunny at the time of incident was wearing white colour sweater, blue jeans. Accused Manni was wearing red colour shirt and blue jeans. Kapil was wearing blue pant, white banian and yellowish shirt. I was wearing cream

colour pant and full sleeve banian and shirt. My clothes were blood stained with the blood of Kapil. Police met me in the hospital. They took my clothes and sealed in a parcel.....

Thereafter I along with the police party went in search of the accused persons. On the same day both the accused persons present in the curt were found sitting outside H.No. 7817, Ram Gali, Roshnara Road. Both were arrested and their personal search was taken.....

At the time of arrest of both the accused, they were wearing the same clothes which they were wearing at the time of incident. Clothes of both the accused were having blood stains which appeared to have been tried to be washed. Police took clothes of both the accused in possession after separately sealing them with the seal of JSS. Memo Ex. PW-1/F in this respect bears my signature at point A. .....

On 15.12.98 accused persons were again interrogated and their statements were recorded. I have seen documents Ex. PW-1/J and Ex. PW-1/K which are signed by me. Both the accused disclosed that the knife was lying concealed outside the house in the courtyard in the heap of stones. Accused were also with us. One policeman recovered the knife from the heap of the stone ....."

15. From the aforesaid evidence of the three eye-witnesses it is clear that all of them have fully supported the prosecution case. They reiterated whatever they had claimed before the police during investigation. No material contradictions with reference to their statements under Section 161 Cr.P.C. could be brought on

record during their cross-examination on behalf of the accused persons. Their presence at the time of the incident was quite natural since the incident of stabbing took place outside their house in the gali. As far as the father and brother(PW-5 Anuj) of the deceased are concerned the accused had attempted to introduce some element of doubt in their being present in the house at that time while cross-examining them but could not succeed. PW-1 Ram Niwas had stated that those days he used to stay at home only because of health problems and further that on the day of the incident his younger son Anuj had not gone to school as it was a holiday for him. All this was stated by him in his cross-examination when it was put to him that on that day he and his son Anuj were not at home at the time of the incident. Anuj also maintained that he was present at the time both the incidents.

16. The main ground of challenge to the evidence of the three eye witnesses taken by the learned counsel for the appellants was that their evidence should not be accepted since they are all

family members and so interested witnesses. There is no doubt that all these three witnesses are family members but it is well settled that witnesses being close relatives of each other as well as the victim of the incident is no ground to disbelieve them. Relationship of the witnesses with the victim of an incident is not a factor to affect their credibility. Relatives of a victim of an incident are normally not expected to leave the actual culprit and implicate an innocent person falsely. Before the evidence of relative witnesses is rejected on the ground of their being interested witnesses an accused is required to lay a foundation either in their cross-examination or by adducing some independent evidence to show that those witnesses had any motive to falsely implicate the accused. In fact, the Hon'ble Supreme Court in *"Lehna vs State of Haryana",(2002) 3 SCC 76* while rejecting similar contention raised on behalf of the convicted accused in respect of the testimony of relatives of the murdered person had even gone to the extent of laying down that even if there was some hostility between the accused and the family members of the deceased who had deposed against the accused

during the trial that would not be a ground to reject their testimony since it would be unbelievable that they would shield the actual culprit and falsely implicate an innocent person. In the present case, in any case, the appellants-accused have not even taken a plea that there was some enmity between them and the complainant side. On the contrary their plea was that they have been falsely implicated by the police since they were BCs of the area against whom even externment orders had been passed. The appellants, however made no attempt to substantiate their plea that externment orders had been passed against them by the police because of their being BCs of the area where both of them and the deceased and his family members were residing. We have, in any case, examined and analyzed the evidence of all the three eye-witnesses with great care and caution because of their being family members and the result of that analysis is that all of them have been found to be wholly trustworthy witnesses and their evidence formidable. They have corroborated each other on all material aspects of the prosecution case. The evidence of all the three eye-witnesses in respect of the main incident of stabbing

is consistent with the prosecution case. None of them could be discredited in cross-examination on behalf of the accused.

17. Learned counsel for the appellants had submitted that there were material contradictions in the statements of the three eye-witnesses. However, we have not found any material contradiction in their evidence as far as the substratum of the prosecution case is concerned. Learned counsel for the appellants had submitted that the three eye-witnesses were not consistent in their statements regarding the actual number of stab injuries inflicted on the body of the deceased by accused Harjesh @ Sunny inasmuch as PW-1 Ram Niwas had claimed that four stab injuries were inflicted on the body of the deceased, PW-2 Santosh Sharma did not state as to how many stab injuries were inflicted by Harjesh and PW-5 Anuj Sharma deposed that 4-5 blows of knife were given to the deceased. In our view, for this reason put forth by the learned counsel for the appellants the evidence of these three witnesses to the occurrence cannot be doubted. At the time of the incident they were not expected to count the exact number

of injuries being inflicted by the accused with the knife and to have remembered the exact number of knife blows inflicted on the body of the deceased upto the time of giving evidence in Court. These kinds of variations in the version of a murderous assault, in fact, show the absence of tutoring by the police. We may here refer to a judgment reported as ***"Shivaji Sahabrao Bobade vs State of Maharashtra",(1973) 2 SCC 793*** wherein while dealing with similar contention raised on behalf of the convicted accused the Hon'ble Supreme Court had observed as under:

> "18. Some attempt was made to show that many injuries found on the person of the deceased and the manner of their infliction as deposed to by the eye-witnesses do not tally. There is no doubt that substantially the wounds and the weapons and the manner of causation run congruous. Photographic picturisation of blows and kicks and hits and strikes in an attack cannot be expected from witnesses who are not fabricated and little turns on indifferent incompatibilities. Efforts to harmonise humdrum details betray police tutoring, not rugged truthfulness."

So, the evidence of the eye witnesses of the instant case cannot be rejected for this reason put forth by Mr. Soni.

18. Another reason urged before us by the learned counsel for the appellants for not accepting the evidence given by the father and brother of the deceased in particular was that their conduct and behavior at the time of the incident was so abnormal and unnatural that their very presence at the place of occurrence becomes highly doubtful. Mr. Soni submitted that if actually both these witnesses had been present at the time of the incident they would not have allowed PW-2 Santosh Sharma, who had been seriously injured, to go away from there for giving the information of the incident to the police on phone from a nearby shop and anyone of them in normal course would have gone to inform the police if at all they had thought that police should be informed first. We are not impressed with this argument also since it is now well settled that evidence of a witness of some crime which he claims to have been committed in his presence cannot be viewed with suspicion because of his behavior at the time of incident which the accused considers to be abnormal or unnatural. Witnesses of a heinous crime like murder may not all react at the time of the occurrence in any particular way. There is no set rule of

natural reaction. In any case, it is also now well settled that nothing can be presumed against a witness for any reason unless his explanation is sought during cross-examination. In this regard we may make a useful reference to a decision of the Hon'ble Supreme Court in ***"State of U.P. v. Anil Singh", 1988 (Supp) SCC 686*** wherein the veracity of the prosecution case was sought to be attacked on behalf of the accused on the ground that the FIR of the incident was so exhaustive that it could not have possibly been lodged by its maker within the short period it was shown to have been lodged with the police. Hon'ble Supreme Court while rejecting that argument observed that the informant of the incident had not been specifically cross-examined on the possibility of an exhaustive report being lodged by him within The incident of murder in that case had taken place sometime between 7.00 p.m. and 8.00 p.m. and the FIR was lodged at 9.15 p.m. Hon'ble Supreme Court observed that the Court cannot presume something adverse to a witness unless his attention is specifically drawn to the fact on the basis of which his testimony is challenged and sought to be discredited. In the present case,

nothing was elicited from the father and the brother of the deceased as to why none of them had gone to inform the police and had allowed the injured lady to go for that purpose. Therefore, for this reason also urged on behalf of the appellants the evidence of PWs 1 and 5 cannot be discarded.

19. As far as PW-2 Smt. Santosh Sharma is concerned she herself had sustained dangerous injury in the same incident in which her son Kapil was fatally stabbed. Her presence at the scene of occurrence is more than confirmed because of the injury sustained by her. Evidence of an injured witness has greater evidentiary value and evidence of such a witness is not to be discarded lightly and we have not found any flaw in her evidence which would make it unreliable. And so, even if we were to exclude the evidence of the father and the brother of the deceased from consideration for any of the reasons urged by the counsel for the appellants the involvement of the two accused in the incident of stabbing stands established beyond any shadow of doubt from

the testimony of this injured eye-witness alone, relevant parts of whose testimony we have already noticed.

20. It was also the submission of the learned counsel for the appellants that the evidence of the three eye witnesses in any case is not corroborated by any other direct reliable evidence and so should not be accepted. We are, however, of the view that evidence of none of the three eye-witnesses required any corroboration, they being wholly reliable witnesses but, in any case, there is sufficient corroborative evidence also brought on record by the prosecution and we do not agree that corroboration, if it is required, can be only by some direct evidence. It can be in the form of circumstantial evidence also. As per the prosecution case, at the time of the arrest of the accused persons which was on the day of the incident itself, the clothes which they were wearing were found to be blood stained and so the same were taken to police possession by the investigating officer. This has been deposed to by PW-1 Ram Niwas, father of the deceased as well as PW-19 SI Ram Avtar. When those clothes were sent to FSL

human blood of 'B' group was detected and the report to that effect is Ex. PW-24/D. The blood group of the deceased was also found to be of 'B' group when his blood stained clothes removed from his body at the time of post mortem examination were examined at the FSL. The plea of the appellants on this piece of evidence was that the police had stained their clothes with blood of the deceased which was lifted from the place of occurrence. However, we have no reason to reject the evidence of the police officials and the father of the deceased who were present at the time of arrest of the appellants and had noticed blood on their clothes. The appellants did not offer any explanation for the presence of blood on their clothes which they were wearing at the time of their arrest. So, this circumstance corroborates the evidence of the three eye-witnesses to the effect that both the appellants were involved in the occurrence.

21. Another corroborative piece of evidence adduced by the prosecution is the recovery of a knife, Ex. P-11, at the instance of accused brothers pursuant to their disclosure statements made

after their arrest. Both the accused are brothers and so both could be expected to have concealed the knife in their house. As per the prosecution case, human blood was detected on this knife also when examined at the FSL and the accused had not explained the find of blood on that knife. The autopsy surgeon had on seeing the same opined that the stab injuries found by him on the body of the deceased at the time of post mortem examination could be caused by this knife. That makes the recovery of knife as a recovery of an incriminating piece of evidence. Although half-hearted attempt was made by the learned counsel for the appellants to convince us that recovery of the knife allegedly being made pursuant to the disclosure statements of both the accused was not an admissible piece of evidence against any one of them but then did not pursue this argument in view of the decision of the Supreme Court in Parliament attack case *("**State vs Navjot Sandhu @ Afsan Guru", AIR 2005 SC 3820***) wherein evidence about recovery of incriminating material pursuant to disclosure statements made by different accused separately was held to be not inadmissible. Witnesses to the recovery of knife in the present

case are the father of the deceased, PW-19 SI Ram Avtar and PW-24 Inspector Jagjit Singh. These witnesses have deposed about the recovery of the knife from the backyard of the house of the accused. The accused had also challenged the evidence about the recovery of knife on the ground that there was no independent witness of that recovery and the evidence of the police official and the father of the deceased should not be accepted as they were all interested witnesses. We, however, do not find any force in this ground of challenge also. The investigating officer had stated in cross-examination he had tried to join public persons at the time of the recovery of the knife but none had agreed to become a witness. We find no reason to disbelieve the investigating officer since it is now quite well known that public is by and large reluctant to associate themselves in criminal investigation and particularly in cases of heinous crimes like murder. So, we are of the view that the evidence of the two police officials and the father of the deceased about the recovery of knife Ex. P-11 cannot be rejected for this reason put forth on behalf of the accused persons. Therefore, recovery of the said knife at the instance of accused

also corroborates the version of the occurrence given by the father, mother and the brother of the deceased.

22. The evidence of these eye witnesses gets corroborated from the prompt registration of the FIR also. In the FIR the incident was narrated by the injured Santosh Sharma in the manner in which she narrated during her evidence. Both the appellants were named therein and their roles in the incident were also described and the father and the brother of the deceased were also named therein as the eye witnesses of the occurrence. With reference to the description of the incident and the roles of the appellants given in the FIR no contradictions could be brought on record during the cross-examination of the complainant. The injuries sustained by the deceased and her mother have already been noticed by us. The injury report and post-mortem report of the deceased have been proved by the concerned doctors and the MLC of the injured complainant has also been proved by the concerned doctor who had examined her. In our view, medical

evidence also lends support to the version of incident narrated by the three eye witnesses.

23. Learned counsel for the appellants had submitted that there was no motive whatsoever for the accused persons to have caused the death of the deceased Kapil and, in fact, as per the prosecution itself there was no enmity between the complainant side and the accused and on the contrary PW-1 Ram Niwas had claimed in his cross-examination that there used to be exchange of pleasant talks between him and the accused persons and that shows that the police only had falsely implicated the two accused to solve a blind murder case since the accused persons were the BCs of the area. We, however, do not find any merit in this submission of the counsel for the appellants. It emerges from their evidence that on the day of incident i.e. 12.12.98 the deceased Kapil, his brother Anuj Sharma (PW-5) and some other boys were playing cricket in a park in Shastri Nagar where the deceased was residing with his family members. Both the appellants were also the residents of Shastri Nagar. PW-5 Anuj

Sharma had deposed that when they were playing cricket the two accused brothers came there and wanted to play cricket with them and they were allowed to play 4-5 balls. They wanted to play more and when Kapil told them to play after their on-going was match was over both of them abused and slapped Kapil. Thereafter he alongwith Kapil came back to their house but both the accused had told them that they were also coming behind them. This part of the statement of PW-5 Anuj Sharma remained totally unchallenged in his cross-examination and, therefore, stood admitted by the accused. This statement of PW-5 got corroboration from the evidence of his father and mother both of whom had deposed that when Anuj and Kapil had come back home after playing they were informed by Anuj about the said incident in the park. It is thus clear that both the appellants were not happy with the deceased Kapil for not allowing them to play cricket for more time in the park and they were also not satisfied with the beatings given by them to the deceased Kapil in the park. The appellants themselves had claimed that they were the BCs of the area and that also appears to be the reason for their not being

satisfied with the simple beatings given by them to the deceased Kapil for the humiliation suffered by them because of Kapil not allowing them to play more cricket in the on-going game. They had also threatened Kapil when he along with his brother Anuj was leaving the park after that incident for going back to their house that they would be following them. So, it's not that the incident of stabbing took place just like that. It was a sequel to the preceding incident.

24. It was also the submission of the learned counsel for the appellants that PW-5 Anuj Sharma had in his cross-examination given the names of the boys with whom they were playing cricket in the park but none of them had been examined by the prosecution and so for this reason also the prosecution case based on the evidence of relatives of the deceased only should be viewed with suspicion. We, however, are not inclined to accept this argument since the investigating officer PW- 24 Inspector Jagjit Singh had stated in his cross-examination that none of the boys who were playing cricket was prepared to become a witness. PW-5

Anuj Sharma had also stated in his cross-examination that all the boys had fled away from the park after the quarrel. The disinclination of those boys to become witnesses of that incident in the park cannot be said to be unjustified for the reason that the appellants were the BCs of the area as had been claimed by themselves during the trial and the other boys may not have gathered the courage to stand against the BCs. In any case, the version given by PW-5 Anuj Sharma regarding the incident in the park having not been challenged in his cross-examination on behalf of the accused the non-examination of other boys who might have seen that incident of beating of the deceased has no adverse effect on the prosecution case in respect of that incident.

25. We are also of the view that the entire prosecution case gets further strengthened from the false plea of alibi taken by the two appellants. This plea was introduced for the first time during the cross-examination of PW-19 Sub-Inspector Ram Avtar and the investigating officer PW-24 Insp. Jagjit Singh. It was put to them that the accused were externees. To PW-19 it was put that

accused Harjesh was not in Delhi on the day of the incident because of his having been externed from Delhi. The witnesses denied that suggestion. The accused had made no effort to establish that they could not have been present at the scene of occurrence since externment orders had been passed against them. Not only that, to none of the eye witnesses all of who were examined before these two police witnesses, this was put in their cross-examination. It may be noticed here that the two accused had examined their third brother as a defence witness to show that at the time of the incident the two accused were in house at Roshanara Road because their father was not keeping well those days. This much was, of course, deposed by this defence witness but in our view, the evidence of the brother of the appellants does not establish that the accused could not be present at the scene of occurrence as claimed by the eye witnesses, even if his utterly vague statement that on that day they were in his house at Roshanara Road is accepted to be correct. He did not say as to at what time the accused were there. His evidence, in fact, falsifies the plea of alibi taken by the accused and particularly of Harjesh

that he was not in Delhi that day. We have, therefore, no hesitation in rejecting this plea as being false and that instead of being of any help to the accused it is helpful for the prosecution.

26. So, in our view the evidence of the three eye witnesses has been rightly accepted by the learned trial Judge and his conclusion about the involvement of both the accused in the incident is unassailable. We have no hesitation in accepting the conclusion of the learned trial Court that the accused-appellant Harjesh @ Sunny fatally stabbed the deceased Kapil with a knife and also inflicted dangerous injury on the person of the complainant PW-2 Santosh Sharma, the mother of the deceased. He has been rightly convicted for the offences of murder of Kapil and attempted murder of his mother Santosh Sharma.

27. We now come to the conviction of the appellant Rajesh @ Hunny. We have already accepted the prosecution version that it was this accused who had caught hold of the deceased Kapil when his brother Harjesh @ Sunny stabbed Kapil. We have also accepted

the prosecution case that the said incident of stabbing was preceded by another incident on the same day between the two accused persons and the deceased Kapil while playing cricket. At that time the deceased Kapil had not permitted the two accused to play with them for more time which they wanted and because of that refusal of Kapil he was beaten by accused Harjesh @ Sunny and when the deceased Kapil and his brother Anuj were leaving the playground for home the two accused had told them that they would be following them and after sometime both of them were actually seen coming towards the house of the deceased by his father PW-1 Ram Niwas when the incident of stabbing took place. All this shows that both the accused brothers had followed the deceased with a pre-determined mind to assault him. Both, thus, shared some common intention. It was the submission of learned counsel for the appellants that the only intention which accused Rajesh could be said to have shared with his brother Harjesh was to cause only grievous injury to Kapil and nothing beyond that and in view of the judgment of the Hon'ble Supreme Court cited by him Rajesh could be convicted under Section 324/34 IPC at the most

as far as the injuries sustained by the deceased Kapil are concerned. Mr. Soni submitted that there is no evidence to show that accused Rajesh knew that his brother Harjesh was carrying a knife with him with which he would stab Kapil. In this regard our attention was drawn to the statement of PW-1 Ram Niwas in his cross-examination to the effect that accused Harjesh @ Sunny had taken out the knife from his pocket and then had stabbed Kapil. Mr. Soni submitted that this statement of the father of the deceased supports his argument that no knowledge could be attributed to accused Rajesh regarding the possession of a knife by his brother Harjesh at the time of the incident.

28. We have read the judgments cited from both the sides on the applicability of Section 34 IPC in respect of the role played by the accused Rajesh in the incident of stabbing is concerned. In the case cited by Mr. Soni, (***1999 (8) SCC 53***), the facts were that two accused persons had caught hold of the murdered person when other two co-accused came to the scene of crime with '*gandasa*' in their hands and gave blows with the '*gandasa*' to the deceased.

The two accused who had caught hold of the deceased were convicted by the trial Court under Section 302 IPC with the aid of Section 149 IPC as there were some other accused also who had killed another person in the same incident. In appeal the conviction of the two accused who had simply caught hold of the deceased was converted into one under Section 302 read with Section 34 IPC by the High Court. They were, however, acquitted by the Hon'ble Supreme Court by observing that they could not be said to have shared the common intention with their other two co-accused persons to cause the death of the deceased. It was, however, not laid down as a proposition of law by the Hon'ble Supreme Court that whenever the allegations against an accused involved in some incident of stabbing are of only catching hold of the victim of an assault by a co-accused he would always be acquitted on the ground that simply by catching hold of the victim he could not be said to have shared the common intention with the co-accused who actually assaults the victim to kill him. In criminal cases applicability of Section 34 IPC depends upon facts of each case and the question as to for which particular offence

different accused persons involved in some incident could be said to have shared the common intention has to be decided in the light of various circumstances brought on record by the prosecution during the trial. In this regard reference can be made to a decision of the Hon'ble Supreme Court reported as ***(2004) 11 SCC 305 , "Ramesh Singh @ Photti v. State of Andhra Pradesh"*** wherein the convicted accused had sought to secure acquittal for the offence of murder for which they had been convicted with the aid of Section 34 IPC on the ground that in some earlier decisions accused persons similarly placed had been acquitted by the Supreme Court of the charge of murder with the aid of Section 34 IPC and were convicted for offence of lesser gravity, like, under Sections 326 and 324 IPC. In that regard the Hon'ble Supreme Court observed in para nos. 11, 13 and 14 of its judgment as under:

> 11. A reading of the above judgments relied upon by the learned counsel for the appellants does indicate that this Court in the said cases held that certain acts as found in those cases did not indicate the sharing of common intention. But we have to bear in mind that the facts appreciated in the above judgments and inference drawn have been so done by the courts not in isolation but on the totality of the circumstances found in those

cases. The totality of circumstances could hardly be ever similar in all cases. Therefore, unless and until the facts and circumstances in a cited case is in pari materia in all respects with the facts and circumstances of the case in hand, it will not be proper to treat an earlier case as a precedent to arrive at a definite conclusion. This is clear from some judgments of this Court where this Court has taken a different view from the earlier cases, though basic facts look similar in the latter case. For example, if we notice the judgment relied upon by the learned counsel for the respondent i.e. the case of Hamlet alias Sasi v. State of Kerala (supra), this Court held that the fact that one accused held the deceased by his waist and toppled him down while the other accused attacked him with iron rods and oars was held to be sufficient to base a conviction with the aid of Section 34 IPC. The fact of holding the victim is similar in the cases of Vencil Pushpraj and Hamlet alias Sasi (supra) but the conclusions reached by this Court differ because the circumstances of the two cases were different. In Nandu Rastogi alias Nandji Rustogi and Anr. v. State of Bihar (supra) this Court held that to attract Section 34 IPC it is not necessary that each one of the accused must assault the deceased. It was held in that case that it was sufficient if it is shown that they had shared the common intention to commit the offence and in furtherance thereof each one of them played his assigned role. On that principle, this Court held that the role played by one of the accused in preventing the witnesses from going to the rescue of the deceased indicated that they also shared the common intention of the other accused who actually caused the fatal injury.

12.....

13. Since common intention essentially being a state of mind and can only be gathered by inference drawn from facts and circumstances established in a given case, the earlier decisions involving almost similar facts cannot be used as

> a precedent to determine the conclusions on facts in the case in hand.....
>
> .....As we have said, each case must rest on its own facts and the mere similarity of the facts in one case cannot be used to determine a conclusion of fact in another.....
>
> 14. It is clear from the law laid down in the said case of Pandurang (supra) that however similar the facts may seem to be in a cited precedent the case in hand should be determined on facts and circumstances of that case in hand only and facts arising in the cases cited should not be blindly treated as a precedent to determine the conclusions in case in hand." (emphasis laid).

29. As far as the legal position regarding the applicability of Section 34 IPC is concerned, the Hon'ble Supreme Court in the aforesaid judgment also observed in para no. 12 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 ....."
>
> (underlining is ours)

30. In ***"Israr v. State of U.P.", AIR 2005 SC 249,*** also the question of applicability of Section 34 IPC came to be considered in respect of one of the two convicted accused against whom the allegations were that he had caught hold of the deceased while his co-accused had given knife blows to the deceased. An argument was raised on behalf of the appellant that Section 34 IPC could not be invoked against the appellant as far as the offence of murder was concerned. Dealing with that argument and

rejecting the same the Hon'ble Supreme Court observed in para no. 21 of the judgment as under:

> "21. Section 34 has been enacted on the principle of joint liability in the doing of a criminal act. The section is only a rule of evidence and does not create a substantive offence. The distinctive feature of the section is the element of participation in action. The liability of one person for an offence committed by another in the course of criminal act perpetrated by several persons arises under Section 34 if such criminal act is done in furtherance of a common intention of the persons who join in committing the crime. Direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the circumstances appearing from the proved facts of the case and the proved circumstances. In order to bring home the charge of common intention, the prosecution has to establish by evidence, whether direct or circumstantial, that there was plan or meeting of mind of all the accused persons to commit the offence for which they are charged with the aid of section 34 be it pre-arranged or on the spur of the moment; but it must necessarily be before the commission of the crime. The true concept of Section is that if two or more persons intentionally do an act jointly, the position in law is just the same as if each of them has done it individually by himself....."

31. Similarly in ***"Suresh v. State of U.P." , 2001 (3) SCC 673***, also the Hon'ble Supreme Court had dealt with the scope and ambit of

Section 34 IPC in paras no. 22 and 24 of the judgment and observed as under:

> "22. Even the concept of presence of the co-accused at the scene is not a necessary requirement to attract Section 34, e.g. the co-accused can remain a little away and supply weapons to the participating accused either by throwing or by catapulting them so that the participating accused can inflict injuries on the targeted person. Another illustration, with advancement of electronic equipment can be etched like this: One of such persons in furtherance of the common intention, overseeing the actions from a distance through binoculars can give instructions to the other accused through mobile phones as to how effectively the common intention can be implemented. We do not find any reason why Section 34 cannot apply in the case of those two persons indicated in the illustrations.
>
> 23. .....
>
> 24. Looking at the first postulate pointed out above, the accused who is to be fastened with liability on the strength of Section 34 IPC should have done some act which has nexus with the offence. Such act need not be very substantial, it is enough that the act is only for guarding the scene for facilitating the crime. The act need not necessarily be overt, even if it is only a covert act it is enough, provided such a covert act is proved to have been done by the co-accused in furtherance of the common intention. Even an omission can, in certain circumstances, amount to an act. This is the purport of Section 32 IPC. So the act mentioned in Section 34 IPC need not be an overt act, even an illegal omission to do a certain act in a certain situation can amount to an act, e.g. a co-accused, standing near the victim face to face saw an armed assailant

> nearing the victim from behind with a weapon to inflict a blow. The co-accused, who could have alerted the victim to move away to escape from the onslaught deliberately refrained from doing so with the idea that the blow should fall on the victim. Such omission can also be termed as an act in a given situation. Hence an act, whether overt or covert, is indispensable to be done by a co-accused to be fastened with the liability under the section. But if no such act is done by a person, even if he has common intention with the others for the accomplishment of the crime, Section 34 IPC cannot be invoked for convicting that person. In other words, the accused who keeps the common intention in his mind, but does not do any act at the scene, cannot be convicted with the aid of Section 34 IPC."

32. Having noticed the legal position on the scope of Section 34 IPC we conclude that in the present case accused Rajesh cannot be acquitted of the charge of murder with the aid of Section 34 IPC just because in ***Ramashish Yadav's*** case (*supra*) cited by the counsel for the appellants the accused who had simply caught hold of the murdered person at the time of the incident when he was stabbed by two others had been acquitted. The applicability of Section 34 IPC against Rajesh for the offence of murder of Kapil shall have to be seen after examining the facts and circumstances of the present case and bearing in mind the afore-said legal position laid down by the Hon'ble Supreme Court in its various

decisions on the applicability of Section 34 IPC. We now proceed to examine if on the basis of evidence of the father, mother and the brother of the deceased, all of whom are the eye witnesses of the main incident of stabbing, it can be said that accused Rajesh had shared the intention with his brother accused Harjesh for causing the death of the deceased Kapil, as has been found to be so by the learned trial Judge. Harjesh certainly, as concluded by us already, had stabbed the deceased Kapil mercilessly with the only intention of killing him. We have also held that prior to the incident of stabbing there was a quarrel between the accused and the deceased while playing cricket and testimony of PW-5 Anuj Sharma in that regard had remained unchallenged. We have further accepted the testimony of PW-5 Anuj that at the time of the incident in the park the accused had told Kapil and Anuj when they were leaving that place that they would be following them and we find from the evidence that only a few minutes thereafter they were seen coming towards the house of the deceased. It so happened that while they were coming towards the house of the deceased PWs 1, 2 and 5 alongwith the deceased came out of

their house and saw the accused persons in the gali outside their house. Since both the accused persons were known to the deceased and his family members the father of the deceased must have thought to talk to the accused persons to pacify them and not to fight with his sons over a trivial issue of their not been allowed by Kapil to play cricket in the park where Kapil and his friends were already playing a match. However, from the evidence of the three eye-witnesses it is clear that on seeing the deceased Kapil in the gali accused Rajesh had said that Kapil should be caught hold of and then Rajesh himself caught hold of Kapil and accused Harjesh stabbed him. That shows that both the accused persons had gone there after having decided to assault the deceased. The incident of stabbing was thus pre-concerted and pre-planned by the two accused brothers.

33. There is no doubt that PW-1 Ram Niwas had stated in his cross-examination that accused Harjesh had taken out the knife from his pocket, but from that statement of PW-1 it cannot be inferred that accused Rajesh might not be knowing that his

brother Harjesh was carrying a knife with him, as was the contention of the learned counsel for the appellants. From the act of accused Rajesh in catching hold of the deceased it becomes more than clear that he knew that Kapil was to be stabbed by his brother with a knife and to prevent Kapil saving himself from the assault Rajesh had caught hold of him. That was his act of facilitating the stabbing of Kapil by his brother Harjesh. Here, we may once again make a reference to the judgment of the Hon'ble Supreme Court in ***Ramesh Singh @ Photti's*** case (supra) wherein the Hon'ble Supreme Court observed while dealing with the case of the convicted accused who was found to have caught hold of the murdered person while his co-accused had stabbed him that if that accused had no intention of facilitating the murder of the victim he should have offered some explanation at the time of recoding of his statement under Section 313 Cr.P.C. as to why he had caught hold of the hands of the deceased and in the absence of any explanation it could be said that he had the knowledge that his co-accused was to assault the deceased with a weapon. In the present case also accused Rajesh has not offered any explanation

as to why he had caught hold of the deceased Kapil on seeing him in the gali outside his house. That reinforces our conclusion that Rajesh caught hold of the deceased knowing that his brother Harjesh was to stab him with a knife carried by him.

34. In any case, we are also of the view that even if Rajesh did not know that Harjesh was having a knife with him that would not absolve him of the consequences for his participation in the incident as well as the acts of his co-accused brother. After Harjesh had taken out the knife from his pocket and had given one stab injury to Kapil, Rajesh did nothing thereafter to prevent him from giving further knife blows to Kapil or to Kapil's mother when she had tried to save him from the assault. Even when Harjesh gave knife blows to Kapil after stabbing his mother accused Rajesh did not stop Harjesh from continuing his assault on Kapil which he would have done if actually he had not shared the intention with his brother Harjesh for causing the death of Kapil and instead continued to hold the deceased so that he could not escape. Here, a useful reference can be made to another

decision of the Hon'ble Supreme Court in ***"Major Singh v. State of Punjab", AIR 2003 SC 342***. In that case also an argument was advanced on behalf of the convicted accused against whom the allegation was of catching hold of the deceased that he could not be convicted for the offence of murder with the aid of Section 34 IPC. The Hon'ble Supreme Court rejected that argument for the reason that the evidence of the eye-witnesses showed that after his co-accused had started the assault on the deceased he had not released the hand of the deceased which he was holding before the commencement of the assault nor had he even tried to dissuade the co-accused assailants from attacking the deceased and in that situation it was reasonable to conclude that the accused on whose behalf such an argument was raised had shared the common intention with the assailants which had been accepted to be one to commit the murder of the deceased.

35. PW-5 Anuj Sharma had also claimed that when he had tried to apprehend the accused persons alongwith his father the accused persons had threatened them. All the eye-witnesses have

also claimed that after the incident both the accused brothers had fled away together with the weapon of offence. So, in the present case it can be safely concluded that the death of Kapil was caused in furtherance of the common intention of both the accused brothers and, in our view, accused Rajesh cannot escape from the consequences of the stab injuries inflicted on the body of the deceased by his brother which had proved fatal. We, therefore, have no hesitation in affirming the decision of the learned trial Court holding that the deceased Kapil was stabbed fatally by accused Harjesh in furtherance of the common intention which he and his brother Rajesh had shared before reaching the place of occurrence. The challenge of accused Rajesh to his conviction under Section 302 IPC with the aid of Section 34 IPC is without any force and is rejected.

36. As far as the conviction of accused Rajesh under Section 307 IPC with the aid of Section 34 IPC is concerned we are of the view that the same cannot be sustained. We have already held that the accused brothers had assaulted the deceased Kapil in the

gali outside his house because of his having not allowed them to play cricket for more time in the park. It so happened that when Harjesh had started stabbing Kapil his mother Santosh Sharma intervened to save Kapil from further assault. At that time Harjesh stabbed her also. In our view, that act of Harjesh was his individual act and in the facts and circumstances of the case it is clear that accused Rajesh did not share any common intention with his brother Harjesh for stabbing her. The stabbing of PW-2 Santosh Sharma by accused Harjesh cannot be said to have been done in furtherance of the common intention of the two accused persons. Therefore, accused Rajesh is entitled to be acquitted of the charge under Section 307 read with Section 34 IPC.

37. As a result of our foregoing conclusions, Criminal Appeal no. 979/2001 filed by accused Harjesh @ Sunny is dismissed and consequently his conviction under Sections 302 and 307 IPC and the sentences awarded to him by the trial Court stand affirmed. Criminal Appeal no. 974/2001 filed by accused Rajesh @ Hunny, however, is partly allowed. His conviction under Section 307/34

IPC and the sentence awarded to him for this conviction are set aside while his conviction under Section 302/34 IPC is maintained. The sentences of imprisonment awarded to accused Rajesh were suspended during the pendency of his appeal but now that his conviction for the offence of murder as well as the sentence of life imprisonment awarded to him have been affirmed he shall be taken into custody forthwith and lodged in jail to serve out the remaining part of the sentence of life imprisonment.

We record our appreciation for the able and effective assistance rendered to us by Mr. Anil Soni, learned *amicus curiae.* He shall be paid a sum of Rs. 20,000/- by the Delhi High Court Legal Services Committee for the assistance rendered by him to this Court on behalf of the two convicted accused persons.

(P.K.BHASIN)
JUDGE

(B.N. CHATURVEDI)
JUDGE

August 29, 2008