

* **THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment Reserved on: 27.08.2009
Judgment delivered on: 22.09.2009

Crl. Appeal No. 92/2000

SUKHCHAIN SINGH & ANR. Appellant

Vs

THE STATE (NCT OF DELHI) Respondent

Advocates who appeared in this case:

For the Appellants : Mr Rajat Wadhwa & Mr Amrik Singh,
Advocates
For the Respondent : Mr Amit Sharma, Addl. Public Prosecutor

**CORAM :-
HON'BLE MR JUSTICE RAJIV SHAKDHER**

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

RAJIV SHAKDHER, J

1. This is an appeal directed against the judgment dated 22.01.2000 and sentence dated 29.01.2000 whereby the appellants stand convicted under Section 307/34 of the Indian Penal Code, 1860 (in short the 'IPC'). The appellants are sentenced to one year rigorous imprisonment and fine of Rs 500/- each. In default, the appellants are required to undergo a simple imprisonment for a further period of three months.

1.1 It is pertinent to note that during the pendency of the appeal, the appellant no. 1 has expired. Therefore, the appeal in so far as appellant no. 1 (i.e., Sukhchain Singh) is concerned, stood abated. The only other appellant whose appeal survives is one Roshan

Singh, who is the son of late Sukhchain Singh, formerly, appellant no. 1.

PROSECUTION'S VERSION AND EVIDENCE:

2. In order to adjudicate the present appeal, it is relevant to first, look at the version set out by the prosecution: On 03.06.1988 one Naresh Kumar (PW4) S/o Raghubir Singh (PW6) R/o M-43/A, Shyam Nagar, New Delhi was admitted to the Deen Dayal Upadhyay Hospital (hereinafter referred to as 'DDU hospital') with a stab wound. An intimation to the same effect was received at the Tilak Nagar police station. On receipt of the information a DD entry, being 32D was made (Ex. PW11/A). A copy of the said communication was handed over to SI Balbir Singh (PW11). SI Balbir Singh. I.O. (PW11) on receipt of the said communication, along with the constable Rohtash went to the DDU hospital. SI Balbir Singh (PW11) collected the MLC (Ex PW2/A) of the injured Naresh (PW4) and proceeded to the spot of the occurrence, which was opposite to factory A-63, Shyam Nagar. At the site of the incidence, SI Balbir Singh (PW11) was met by Smt. Shakuntla (PW1), mother of the injured Naresh (PW4). SI Balbir Singh recorded her statement (Ex PW1/A). The said statement with the endorsement, being Ex. PW11/B was sent through constable Rohtash to police station for registration of a FIR. The rukka was received by ASI Jai Bhagwan (PW3); on the basis of which a FIR bearing no. 201/88 (Ex. PW3/A) was registered.

2.1 In support of its case, the prosecution has cited 11 witnesses. The defence has not cited any witness; only the statement of the appellant/accused under Section 313 of the Code

of Criminal Procedure, 1973 (in short the 'Cr.P.C.') has been recorded.

2.2 The mother of the injured Naresh (PW4), that is, Smt. Shakuntala (PW1) in her examination-in-chief adverted to the fact that on the date of the incident, i.e., 03.06.1988 at about 9.00 a.m., there was a scuffle between the appellant/accused Roshan Singh, his father Sukhchain Singh and her son Naresh (PW4) on account of the fact that her son Naresh (PW4) had intervened when the appellant/accused as well as his father rebuked the children, who were playing outside their house for the reason that the ball, with which the children were playing, went into the house of the appellant/accused. In the process, Naresh (PW4) had received some injuries. However, due to the intervention of the residents the matter got settled. She testified in her examination-in-chief that, when she went to summon her son Naresh (PW4) from the factory, where he worked, to come for lunch, she saw the appellant/accused and his father Sukhchain Singh were once again grappling with her son Naresh (PW4). In the process, the father of the appellant/accused caught hold of her son Naresh (PW4), while the appellant/accused stabbed her son Naresh (PW4) with a knife in the abdomen. She further testified that on being stabbed, the appellant/accused and his father went into their house while Naresh (PW4) fell down on the ground. She further testified, in her examination-in-chief that, her son Naresh (PW4) was taken to the DDU hospital by her husband Raghubir Singh (PW6) and that they were accompanied by one Balwan. She proved her statement (Ex. PW1/A) made to the I.O. She also testified that blood was lifted from the place where her son Naresh (PW4) had fallen. She also

proved the recovery memo (Ex.PW1/B) prepared by the I.O., and testified that the same bore her signature at point 'A'. She also stated that the blood sample and control earth was taken from the place of occurrence which was converted into a parcel, and was duly sealed. She deposed that the accused persons were arrested in her presence, however, nothing was recovered from their personal search being Ex. PW1/C and Ex. PW1/D. She proved her signatures on the said exhibits.

2.3 In her cross-examination, she resiled from her testimony in chief, in so far as, she testified that her son Naresh (PW4) had come to the house, which is when she saw him bleeding, and that the residents of the locality told her that Naresh (PW4) had been stabbed. She specifically denied the fact that Sukhchain, the father of the appellant had held her son Naresh (PW4), and that the appellant/accused had stabbed him.

2.4 Dr. R.K. Gupta (PW2) proved the MLC (Ex. PW2/A), and his signatures on it at point 'A'. He reiterated the opinion given in the MLC.

2.5 ASI Jai Bhagwan (PW3), proved the fact that he had registered the FIR 201/88 (PW3/A).

2.6 Naresh (PW4), i.e., the injured deposed that he was working with one gentleman in the lane, which was next to his house. On the date of the incident, that is, 03.06.1988 between 10-11 a.m., he had an argument with the appellant/accused and his father over their conduct vis-a-vis the children who were playing in front of their house. The fact that an altercation occurred, and that it was called off with the intercession of the residents was also alluded to

by Naresh (PW4). He testified that between 12.00 noon and 12.30 p.m. the same day, he was accosted by Sukhchain Singh along with the appellant/accused, while he was at the workshop near his home; at which point in time, Sukhchain Singh threatened him, and said "*subah to tujhe chhura diya tha*". PW4 further stated that while the appellant/accused and his father, were grappling with him, he saw his mother approaching towards him. This resulted in his attention being diverted towards her, which is when, appellant/accused Roshan Singh stabbed him with a knife in the abdomen, while the father of the accused, Sukhchain Singh had caught hold of him from behind. PW4 testified that, on being stabbed, he attempted to escape, but because there was profuse bleeding, he fell down and became unconscious. He stated that consciousness was regained by him only in the DDU hospital. During his examination-in-chief, he identified the knife (Ex.P-1), which was shown to him, as one with which he was attacked by the appellant/accused Roshan Singh. In his cross-examination, he reiterated the fact that it was Sukhchain Singh who held him from behind, while the appellant/accused Roshan Singh had stabbed him.

2.7 Naresh(PW5), s/o Roopa testified to the effect that he saw Naresh(PW4) running towards his house, and that he had been stabbed in the abdomen with a *kirpan*. He stated that Naresh (PW4) fell down near his house, and that he was moved to the hospital 'probably' by his mother. He deposed that he did not remember whether PW4's father was present at the site. He testified that police had lifted both the blood stained earth and '*kirpan*'; which were sealed and memo was prepared with respect

to them being, Ex. PW1/B, which bore his signatures at point 'B'. He also stated that it was the injured Naresh (PW4) who himself had extricated the *kirpan* from his abdomen, and that the police had lifted the said *kirpan* from the *gali*. He denied the suggestion made to him that the police had recovered anything from the appellant/accused or that appellant/accused was the one who had led the police to his house and got the *kirpan* recovered from there. He, however, proved the pointing out memo (Ex. PW5/X-1) and his signatures at point 'A'. He deposed that he had signed EX. PW5/X-1 after it was read by him. He also deposed that the sketch of the *kirpan* (Ex. PW5/A) was prepared in his presence and that *kirpan* (Ex.P1) is the *kirpan* which was put in a seal cover by the police. He reiterated in his cross-examination that the disclosure statement (Ex.PW5/X) and the sketch of *kirpan* (Ex.PW5/A) were prepared in his presence, and also the pointing out memo (Ex. PW5/X-1).

2.8 Raghubir Singh (PW6), the father of the injured Naresh (PW4), deposed to the effect that on hearing a commotion outside his house he stepped out, which is when he saw his son Naresh (PW4) shouting that he had been stabbed. He stated that it is only then that, he saw that his son Naresh (PW4) had received a stab wound in his abdomen. He testified that the injured Naresh (PW4) was taken by him, to the DDU hospital.

2.9 ASI Om Prakash (PW7), proved the fact that on 03.06.1988 he received three sealed packets with one seal of 'BS' from SI Baldev Singh, I.O. (PW11). He proved the relevant entry in the register of the store room (*malkhana*). He also deposed that on

11.08.1988, the said sealed packets were sent to Central Science Forensic Laboratory (in short the 'CSFL') through Constable Sudarshan lal (PW10) vide RC No. 80/21. The receipt to the effect that the sealed packets were received back on 17.10.1988 was received by him untampered; was also proved by him.

2.10 Dr. Satish Kumar Bindal (PW8), Chief Medical Officer, DDU hospital, as indicated above, proved the MLC (Ex. PW2/A). He testified that the opinion recorded in the MLC was rendered by him in which he had classified the injury as 'dangerous' at point (Ex. PW8/A) in the MLC. He also testified to the effect that the MLC (EX. PW2/A) was prepared by Dr. R.K. Gupta (PW2) but the opinion as to the nature of injury was given by him. In his cross-examination, he deposed that the injury could have been caused by a *kirpan* or any other sharp edged weapon, and that injury could have also been caused if a person fell on a sharp edged weapon.

2.11 Dr. P.P. Srivastava (PW9) deposed to the effect that blood examination of the exhibits sent to the CFSL was carried out by him. He proved his report (Ex. PW9/A). In his deposition, he stated that after examination, the parcels were sealed, and sent to the concerned division for serological analysis.

2.12 Constable Sudershan (PW10) testified to the effect that he had carried the three sealed parcels along with the seal 'BS' from the CFSL back to the store room, and that while they were in his custody, the seals were not tampered.

2.13 SI Balbir Singh, I.O. (PW11) reiterated the fact that he had received information with regard to the incident on 03.06.1988, which is, when he rushed to the DDU hospital with constable

Rohtash. On reaching the hospital, he collected the MLC (Ex.PW2/A) of the injured, who at that point in time was declared unfit for statement. He also testified to the effect that on reaching the spot of occurrence he was met by Shakuntla (PW1), the mother of the injured. At the site, he recorded the statement of Shakuntla (PW1). The statement, along with his own endorsement (PW11/B), was sent through a constable Rohtash to the police station. He testified that he had prepared a site plan (Ex. PW4/DA) at the pointing out of Shakuntla (PW1). PW11 also testified to the effect that he lifted the blood stained earth and control earth, and sealed the same (Ex. PW1/B) separately with the seal 'BS'. He also stated that he had recorded the statement of the witnesses. He testified to the effect that appellant/accused had made a disclosure statement (Ex. PW5/X), and that on the pointing out of the appellant/ accused a *kirpan* was recovered, which was lying under the pieces of wood and other articles in the house of the appellant/accused. He deposed to the effect that he had prepared a sketch (Ex. PW5/A) of the *kirpan* which was blood stained and sealed the same in a packet (Ex.PW5/X-1) which was deposited by him in the police station record room (*malkhana*). PW11 also stated that he had recorded the statement of Naresh (PW4), after he was declared fit. He also testified that on 11.08.1988 the sealed packet was sent to CFSL. He identified the *kirpan* (Ex.P1) which he had recovered from the appellant/accused. In his cross-examination, PW11 deposed that at the spot of occurrence, he was met by Shakuntla (PW1) as well as Naresh (PW5). He testified that since there were shops in the vicinity he had made inquiries from the shop keepers. He also deposed, in the cross-examination, that

in the site plan (Ex PW4/DA) the position of Shakuntla (PW1) was not shown by him. He testified that the accused persons were arrested from their house where they were found present and that it is at that point in time the appellant/accused had produced the *kirpan*. He accepted the fact that he had not sent the *kirpan* to the doctor for his opinion. He specifically denied the fact that the appellant/ accused had not made a disclosure statement and that there has been no recovery of *kirpan* from him. He testified that one Balwan Singh had been cited as a prosecution witness. However, he denied the suggestion that eventhough in the list of witnesses the addresses of Balwan Singh and Shakuntla (PW1) were the same, that he was responsible for supplying the addresses.

SUBMISSIONS OF THE COUNSELS

3. Based on the aforesaid evidence, produced by the prosecution, the learned counsel for the appellant/accused has submitted that the prosecution has not been able to prove its case beyond a reasonable doubt. In order to buttress his submission, he has referred to the following inadequacies and/or discrepancies, which, according to him, create sufficient doubt as regards the prosecution's case and, therefore, the benefit of which should go to the appellant/accused Roshan Singh:

(i) Firstly, it is submitted that even though SI Balbir Singh (PW11) recorded the statement of injured Naresh (PW4) under Section 161 of the Cr.P.C., a copy of the same was not given to the appellant/accused. It is his submission that the prosecution has

deliberately kept back the statement of the injured Naresh (PW4) and, therefore, compromised the defence of the appellant/ accused.

(ii) Secondly, it is submitted that there is no eye witness to the incident. The mother of the injured Naresh (PW4), Shakuntla (PW1) in her cross-examination, has resiled from her deposition made in the examination-in-chief, which was to the effect that while, Sukhchain Singh held her son Naresh (PW4) from behind, the appellant/accused attacked him with a knife.

(iii) Though the examination-in-chief of Shakuntla (PW1) commenced on 04.11.1992, her cross-examination got concluded on 07.07.1999. Apart from the fact that there is a gap of 7 years between examination-in-chief of Shakuntla (PW1) and her cross-examination, other witnesses were examined in between, namely, Naresh S/o Roopa (PW5) and injured Naresh (PW4) on 05.10.1998, Raghubir Singh (PW6) on 05.10.1998, ASI Om Prakash (PW7) on 06.10.1998, and Dr. Satish Kumar Bindal (PW8) on 17.02.1999. It is his submission that their evidence was recorded prior to the cross-examination of Shakuntla (PW1) on 07.07.1999, thus prejudicing the defence of the appellant/accused.

(iv) The testimony of the injured Naresh (PW4) cannot be relied upon, for the reason that even though in the MLC (Ex.PW2/A) it is recorded that he was fully conscious, his statement was not recorded. In these circumstances, the learned counsel for the appellant/accused submitted that the testimony of the SI Balbir Singh (PW11) also cannot be relied upon because in his testimony he has said that since Naresh (PW4) was not fit, his statement could not be recorded. He submitted that this contradiction is

nailed by the fact that the MLC (Ex.PW2/A) clearly states that Naresh (PW4) at the relevant time was conscious.

(v) In his cross-examination, SI Balbir Singh (PW11) has referred to the fact that at the site of occurrence, he met the mother of the injured, Shakuntla (PW1) as well as one Balwan Singh, despite which even though Balwan Singh was included in the list of witnesses, he was not examined by the prosecution for some curious reason.

(vi) The testimony of various prosecution witnesses including Shakuntla (PW1), Raghubir Singh (PW6) and SI Balbir Singh (PW11) bear out the fact that the children were around at the point in time when a scuffle between the injured Naresh (PW4) and the accused broke out in the morning of the day of the incident; yet none of the children were examined. To buttress his submission, he relied upon the provisions of Section 118 of the Evidence Act, 1872 (In short the 'Evidence Act') to submit that the testimony of children is both admissible and valid. He further submitted that prosecution has not examined any public witnesses even though the spot, where the incident occurred, was very near to several shops; a fact which emerged in the testimony of the prosecution witnesses.

(vii) The testimony of Naresh (PW5) is a clear pointer that no recovery of weapon of offence was made from the appellant/accused, since in his examination-in-chief he has stated that the injured Naresh (PW4) had himself extricated the *kirpan* from his abdomen and the police has lifted the *kirpan* from the *gali*.

Also a suggestion to the contrary in the cross-examination has been denied by PW5.

(viii) The scientific evidence was of no material value as in the present case the blood found on the knife and the stained earth, even though analysed as being human in origin, was not matched with the blood sample of the injured Naresh (PW4).

4. As against this, Mr Amit Sharma, learned APP submitted that, based on the evidence it could not be doubted that the injured Naresh (PW4) had been stabbed. The weapon of offence, i.e., a knife was also recovered. The injured Naresh (PW4) in his testimony, has elaborately given the details of the incident, and how the appellant/accused and his father Sukhchain Singh had attacked him. The learned APP submitted that there was nothing that the appellant/accused brought on record to suggest that there was an enmity or any other motivation, which could have impelled the injured Naresh (PW4) to name the appellant/accused and his father Sukhchain Singh, as the assailants. He submitted that the testimony of the injured Naresh (PW4) is unshaken, and could be relied upon for convicting the accused. The learned APP submitted that there was nothing on record to suggest that statement of the injured Naresh (PW4) under Section 161 of the Cr.P.C. was recorded. It was his contention that the entire record, which was in possession of the prosecution, was supplied to the appellant/accused. For this purpose, he relied upon the order dated 11.05.1989 passed by the trial court. He submitted that in any event no suggestion was given to SI Balbir Singh (PW11) that a

statement under Section 161 of the Cr.P.C. of the injured Naresh (PW4) was recorded by him in the instant case.

4.1 The learned APP also submitted that even though the mother of the injured, Shakuntla (PW1) resiled in her cross-examination from what she had stated in her examination-in-chief, it is not as if the entire testimony of the mother, Shakuntla (PW1), should be disbelieved. The circumstances obtaining in the case, suggest that because of the time gap between the date of her examination-in-chief and the day when her cross-examination took place, she was under some kind of pressure to resile from her testimony. The learned APP submitted that in the examination-in-chief, the mother Shakuntla (PW1) clearly said that she did see the father of the appellant/accused holding her son Naresh (PW4) from behind, while the appellant/accused stabbed him with a knife in the abdomen.

4.2 As regards the submission that the name of the assailant was not given in the first instance when the MLC (Ex PW2/A) was being recorded, the learned APP submitted that perhaps on account of shock the injured did not give the name of the assailants in the first instance, which, however, in his opinion, was not material in view of the otherwise unshakable testimony of the injured Naresh (PW4) in court, as also the statement of Shakuntla (PW1) made to the police, in the very first instance, based on which the FIR was registered.

4.3 As regards the aspect that it is recorded in the MLC (Ex.PW2/A) that the injured Naresh (PW4) was 'conscious' when he was brought to the hospital, despite which his statement was not

recorded, the learned APP submitted that being 'conscious' could not be equated with being 'fit' for making a statement. In any event, he submitted that no such suggestion was made to Dr. R.K. Gupta (PW2), who proved the MLC (Ex.PW2/A).

4.4 The learned APP conceded that the blood sample of the injured Naresh (PW4) was not taken, and hence could not be sent to the CFSL.

4.5 As regards the submission of the learned counsel for the appellant/accused that neither the children nor any adult member of the public were examined, the learned APP submitted that apart from the fact that no such suggestion was made to the prosecution witnesses as to why they were not produced, it would not impact the present case since the veracity of the testimony of the witnesses produced by the prosecution could not be doubted. He submitted that there is sufficient evidence on record to establish the culpability of the appellant/accused.

4.6 He further submitted that the appellant/accused in his statement under Section 313 of the Cr.P.C. apart from stating that he has been falsely implicated, has given no other explanation.

Reasons

5. I have heard the learned counsel for the appellant/accused, as well as Mr Amit Sharma, the learned APP. It is beyond doubt that the injured Naresh (PW4) had suffered injury in his abdomen with a sharp edged weapon. The testimony of Dr. R.K. Gupta (PW2) read with the opinion given by him on the MLC (Ex.PW2/A) of the injured Naresh (PW4) clearly adverts to this aspect. The

MLC (PW2/A) not only refers to the fact that the weapon used was 'sharp' but also that the injury was 'dangerous'. The question then arises is whether the appellant/accused was the one who inflicted the injury on the injured Naresh (PW4) with the knife (Ex.P1), which has been produced by the prosecution.

5.1. The testimony of the injured Naresh (PW4) clearly establishes how, the day, on which the incident occurred, unfolded for him: it transpires that on 03.06.1988 between 10.00 to 11.00 a.m. PW4 got into an altercation with the appellant/accused and his father Sukhchain Singh on account of the fact that they had rebuked the children playing outside the house as a ball, with which the children were playing, had rolled into the house of the appellant/accused. The matter got defused due to intercession of local residents. However, later in the day between 12.00 noon and 12.30 p.m., the father of the appellant/accused came out of his house, while the injured Naresh (PW4) was outside the factory where he was working and started abusing him by saying "*subah to tujhe chhura diya tha*". The appellant/accused joined his father *Sukhchain Singh* at that point in time. At this very point it seems that Shakuntla (PW1), mother of the injured Naresh (PW4), was approaching the factory as she had to summon her son Naresh (PW4) to the house for lunch; a fact which is consistent with her deposition made in examination-in-chief. It seems that the morning episode had weighed heavily with both the appellant/accused and his father Sukhchain Singh. Resultantly, Sukhchain Singh once again accosted PW4. A scuffle broke out between them. At which point the father of the appellant/accused i.e., Sukhchain Singh

caught hold of Naresh (PW4), while the appellant/accused who emerged from inside his house stabbed PW4 with a knife.

5.2 The submission of the learned counsel for the appellant/accused that the mother Shakuntla (PW1) resiled from her testimony in the cross-examination to the extent that she said that, she had not seen the appellant/accused and his father precisely at the point in time when Naresh (PW4) was stabbed, to my mind cannot enure to the benefit of the defence for the following reasons:

5.3 In the present case, I have no reason to doubt the testimony of the injured Naresh (PW4). The injured Naresh (PW4) in his testimony has given vivid details with regard to how the appellant/accused attacked him while the father Sukhchain Singh held him from behind. As a matter of fact he also referred to the fact that he saw his mother, coming towards the spot of occurrence, which is when his attention got diverted, and perhaps the reason why he could not save himself from being knifed in the abdomen area, apart from the fact that he was also held from behind by the father, Sukhchain Singh. The important aspect is, that the examination-in-chief of Shakuntla (PW1) took place on 04.11.1992, in between on 05.10.1998 the testimony of the injured Naresh (PW4) had been recorded. The cross-examination of the Shakuntala (PW1) on 07.07.1999 tells its own tale. Therefore, I am not inclined to give much credence to the deposition of Shakuntla (PW1) made in her cross-examination after a gap of nearly seven years.

5.4 On reading the testimony of the injured Naresh (PW4) there is no doubt in my mind that appellant/accused stabbed Naresh (PW4), while his father Sukhchain Singh held him from behind. In this regard, it may be relevant to extract the testimony of the injured Naresh (PW4) in the cross-examination:

“.....Accused Sukhchain Singh did not have anything in his hand on the second occasion. I did not noticed if anybody else was present at the spot when Sukh Chain Singh hurled abuses on me on the second occasion. The house of Sukh Chain Singh accused is situated at point 'X' in site plan Ex. PW/4DA. The door of house of accused Sukh Chain Singh is not exactly opposite to workshop where I worked but slightly on a side. When Sukhchain Singh hurled abuses on me my mother was present in a plot near workshop where I worked. Again she was in a gali near plot on the side of workshop where I worked. When accused Sukh Chain Singh got abusing me Roshan Singh had also come. Accused Sukh Chain Singh had not caught hold of me by my hands from behind but had hugged me. Roshan Singh gave me knife blow immediately after he came out of his house. I do not remember in which hand Roshan Singh was holding knife. My house was at a distance of 50 meters from spot where I was hit. I cannot tell who were present at the spot after I was injured because I was concerned about my safety. It is incorrect that Sukhchain Singh had not abused me and Roshan Singh had not given me any knife blow....”

6. As regards the submission that the knife (Ex.P1) was not the offence of weapon in view of the fact that Naresh (PW5) had referred to a *kirpan*, is clearly without merit. The reason being that firstly, a careful perusal of even the testimony of Naresh (PW5) who turned hostile and had to be cross-examined by the

prosecution would show that: even he accepted the fact that he saw the injured Naresh (PW4) running towards his house with a stab wound in his abdomen, and that the '*kirpan*' was extricated by the injured Naresh (PW4) himself, which was lifted by the police from *gali*, where PW4 had fallen. In his cross-examination, he accepted the fact that a sketch (Ex.PW5/A) of what he termed as a '*kirpan*', was prepared in his presence. The injured Naresh (PW4) in his testimony clearly referred to the fact that he was attacked by appellant/accused with a knife. There was no suggestion made to Naresh (PW5) as to whether *kirpan* and the knife, which was referred by the injured Naresh (PW4), was the same. As a matter of fact, in his cross-examination, PW5 accepted that the '*kirpan*' was sealed in his presence. No suggestion whatsoever was made to him that the weapon of offence, i.e., the knife which was sealed, was not the weapon of offence which was picked up by the police at the spot from where Naresh (PW4) fell. As a matter of fact, Naresh (PW5) accepted the fact that the recovery memo (Ex.PW5/X-1) which bore his signature, was read by him. The only aspect that PW5 denied was that the knife was recovered from the house of appellant/accused. This by itself, in my view, could not cast a doubt on the prosecution version that the knife which was identified by both PW4 and PW5 was not the weapon of offence. The fact remains that there is sufficient evidence to support that Exhibit P1, i.e., a knife, that the prosecution produced, was the weapon of offence.

7. In view of the aforesaid conclusion, in my opinion, the mere fact that the blood stains on the stained earth and the knife, which the CFSL has referred to as a dagger, could not be matched would

not materially impact the case of the prosecution. As long as there is no doubt in my mind that the testimony of injured Naresh (PW4) is trustworthy, which it is in the instant case, the fact that the blood stains were not matched with the blood sample of PW4, since none was taken, would not effect the conclusion arrived at, based on other cogent evidence on record. The CFSL report, however, at least to some extent, supports the case of the prosecution in as much as, the blood found on both the weapon of offence and the loose earth was of human origin. Therefore, in my view, prosecution has been able to establish that on 03.06.1988 between 12.00 noon and 12.30 p.m., the injured Naresh (PW4) was attacked by the appellant/accused with a knife, while the father Sukhchain Singh held him from behind. The approximate time of the offence is also discernable from the MLC (Ex.PW2/A), where it is recorded that the injured Naresh (PW4) was wheeled into DDU hospital, at about 1.05 p.m., and the assault on him had taken place half an hour prior to his arrival at the hospital. The writing in the MLC is consistent with the version of PW4.

8. The submission of the learned counsel for the appellant/accused that in the case history of assault, as recorded in the MLC, there is no reference to the appellant/accused and his father being the assailants, in my view, is again not material. The reason being that it is not hard to imagine that a knife injury in the abdomen area would have led to an excessive blood loss and shock; and in such a situation, to expect the injured Naresh (PW4) to reel out the names of the assailants is being unrealistic. Furthermore, the FIR which was recorded at 12.30. p.m. on the same day records the name of the appellant/accused and his father as the assailants.

9. The other submission of the learned counsel for the appellant/accused that the prosecution case is impregnated with doubts, is based on the premise that even though the MLC (Ex.PW2/A) recorded the fact that the injured Naresh (PW4) was 'fully conscious' his statement was not recorded by the police. The police, instead, chose to record the statement of the mother Shakuntla (PW1) to register the FIR. In my view this submission misses the point that there is perhaps a difference between an injured being 'conscious' and being 'fit' to give a statement to the police. This position could well have been explained by Dr. R.K. Gupta(PW2) who the defence chose not to confront on this aspect. Therefore, in my view, nothing substantial turns on this submission of the learned counsel for the appellant/accused.

10. In support of his submission that no child witness was cited by the prosecution even though children were present at the spot where a scuffle had broken out between PW4, the appellant/accused and his father; the learned counsel relied upon the judgment of this Court in ***Mohd. Rafiq vs State of NCT of Delhi*** in ***Crl. A. No. 390/2004 dated 02.03.2009***, in particular, paragraphs 24 & 25. There is no quarrel with the proposition that in terms of Section 118 of the Evidence Act, all persons are competent to testify which includes the children, unless a court comes to the conclusion that the witness is unable to understand the questions put to him, and give rationale answers, on account of their tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind. The very fact that I have come to the conclusion that the testimony of the injured Naresh (PW4) is trustworthy, and that there is no impediment in

law in convicting the assailants, based on the sole testimony of the injured; this aspect by itself would not, in my view, impact the case of the prosecution. The other judgment of this court relied upon by the counsel for the appellant/accused is ***Jafar Malik vs The State 160 (2009) DLT 224***, in particular, paragraph 17 wherein there is a quotation from the judgment of the Supreme Court in ***Dasari Siva Prasad Reddy vs Public Prosecutor, High Court of A.P. (2004) 11 SCC 282***. In that case the Supreme Court has observed that a mere 'strong suspicion' cannot be the basis for convicting an accused. In a criminal case the distance between 'may be true' and 'must be true' has to be covered by the prosecution by placing on record reliable evidence. It is evident that the principle of law laid down by the Supreme Court is undoubtedly to be applied in every case. In the facts of the present case, in my view, the prosecution has travelled the distance between 'may be true' and 'must be true'.

11. As regards the submission of the learned counsel for the appellant/accused that the defence of the appellant/accused was compromised because he was not given the copy of the statement recorded under Section 161 of the Cr.P.C. of the injured Naresh (PW4), despite the fact that in the testimony of PW11 there is a reference to the fact that the 'statements of the witnesses' was recorded by him, is also in my view, again without merit. The reason being that, firstly, the order passed by the trial court on 11.05.1989, at the time of committing the case for trial by the Sessions Court, clearly records that the documents supplied to the appellant/accused is admitted to be complete. Therefore, now to say that all documents were not made available to the

appellant/accused is without merit. I have, therefore, no doubt that the prosecution has complied with the provisions of Section 207 of the Cr.P.C. Secondly, in any event, as rightly contended by the learned APP, no suggestion was made to SI Balbir Singh (PW11) in this regard. I have, therefore, no doubt that if the prosecution had recorded a statement of the injured Naresh (PW4) under Section 161 of the Cr.P.C., it would have been supplied to the appellant/accused.

12. The submission of the learned counsel for the appellant/accused, that Balwan Singh, who was cited as a witness, was not examined by the prosecution is also, in my view, without substance. The fact that Balwan Singh, in the first instance, was cited as a witness, but was not examined, does not by itself create a dent in the case of the prosecution. SI Balbir Singh (PW11) in his testimony has only stated that Balwan Singh was cited as one of the prosecution witnesses, and that the address of Shakuntla (PW1) and Balwan Singh was the same. He, however, denied the suggestion that the address of Balwan Singh and Shakuntala (PW1) appearing in the list of witnesses was supplied by him. I may also point out that in the order sheet dated 06.01.1992 of the trial court, there is a reference to the report of the bailiff which suggests that Balwan Singh had left the given address for some unknown place. Thereafter, on several occasions Balwan Singh was present, and then again Balwan Singh stopped appearing is also apparent from order of the trial court dated 06.10.1998. It seems that because of the delay the prosecution on 07.07.1999, after the completion of the testimony of Shakuntla (PW1), stated before the trial court that they have no other witness to examine

except SI Balbir Singh, I.O. (PW11). SI Balbir Singh, I.O. (PW11) was examined on 27.07.1999 at which point in time the evidence for prosecution was closed. The record to my mind does not suggest that there was any deliberate design in the prosecution not examining Balwan Singh.

13. The other submission of the learned counsel for the appellant/accused, that the delay in cross examination of Shakuntla (PW1) by a period of seven years compromised his defence; is also without merit. The order sheet of 04.11.1992 of the trial court, shows that it was on the request of learned counsel for the appellant/accused that the cross-examination of Shakuntla (PW1) was deferred as the counsel had made a submission that he would like to cross-examine Shakuntla (PW1) along with the injured Naresh (PW4). The same request, it seems, was made by the learned counsel for the appellant/accused on several dates wherein he used the cross-examination of Shakuntla (PW1) as a ground to seek adjournments from time to time. That Shakuntla (PW1) was produced on several occasions for cross-examination, is evident from order sheet dated 16.12.1998, which reads as under:-

“present ADD PP for the State

Both the accused on bail. PW Shakuntla – Ct. Sudershan Lal are present, but could not be examined. Counsel of the accused has not come. PW Shakuntla came at least nine times. She has been compensated. PW P.P. Srivastava is also present & discharged. Adjourned to evidence on 17.02.1999.”

13.1 I am also of the opinion that as a matter of fact the device employed by the defence in delaying the cross-examination of

Shakuntla (PW1) has resulted in her turning hostile. Therefore, the submission that the delay in cross-examination of Shakuntla (PW1) and the examination of other witnesses in the interregnum by the prosecution has compromised the defence of the appellant/accused, is completely untenable. A perusal of the order-sheet would show that the delay worked to the disadvantage of the prosecution and not that of the defence. As a matter of fact, if the other witnesses had not been examined, this case would have died its natural death.

14. Having regard to the evidence placed on record, I am of the view that the prosecution has been able to prove its case against the appellant/accused beyond a reasonable doubt. Resultantly, the impugned judgment is sustained. The appellant/accused shall be taken into custody to serve the remaining part of his sentence as awarded by the trial court. The appeal is dismissed.

SEPTEMBER 22, 2009
kk

RAJIV SHAKDHER, J