

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

% *Judgment Reserved on: 4th February, 2010*
Judgment Pronounced on: 17th March, 2010

+ **CRL APPEAL NO.156/2005**

RAJESH & ORS. Appellants
Through: Mr.P.D.Sharma, Advocate

versus

STATE Respondent
Through: Mr.M.N.Dudeja, Advocate

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MR. JUSTICE SURESH KAIT

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

PRADEEP NANDRAJOG, J.

1. Vide impugned judgment and order dated 04.12.2004, appellants, Rajesh, Sanjay and Amit, have been convicted for the offence of having murdered Sat Parkash @ Santosh (herein after referred to as the "Deceased"), for which offence they have been sentenced to undergo imprisonment for life and pay fine in sum of Rs.1,000/- each; in default to undergo rigorous imprisonment for one year. Additionally, the appellants have also been convicted for the offence of having attempted to murder Mohd.Safiq, for which offence they have been

sentenced to undergo rigorous imprisonment for a period of five years and pay fine in sum of Rs.500/- each; in default to undergo rigorous imprisonment for a period of six months.

2. Case of the prosecution is that on 04.12.2002 the appellants went to the shop of Rampher PW-3, where they quarrelled with Rampher and his brother-in-law Sant Lal PW-17, and stabbed Sant Lal. On 09.12.2002 at about 01.30 P.M. armed with knives and danda the appellants again came to the shop of Rampher to take revenge as they were nursing a grudge against Rampher and his family. The deceased, who was the brother-in-law of Rampher was present in the shop at that time. The appellants gave several knife and danda blows to the deceased. At the time when the appellants were attacking the deceased, Mohd.Safiq PW-10, tried to save the deceased from the clutches of the appellants upon which the appellants inflicted injuries upon the person of Mohd.Safiq. The appellants fled from the place of the incident after causing serious injuries to the deceased and Mohd.Safiq. The deceased and Mohd.Safiq were removed to the hospital where the deceased was declared brought dead. Mohd.Safiq was given treatment and he survived. Rampher PW-3 and Ram Prakash PW-4 witnessed the appellants attacking the deceased and Mohd.Safiq PW-10.

3. Needless to state, the case of the prosecution hinged upon the veracity and credibility of the testimony of Rampher PW-3, Ram Prasad PW-4 and Mohd.Safiq PW-10.

4. Process of criminal law was set into motion when at around 01:55 P.M. on 09.12.2002, DD Entry No.17A, Ex.PW-1/B, was recorded by ASI Pritam Singh PW-1, to the effect that a wireless information has been received from HC Ishwar Chand informing that a quarrel had taken place near fire station at Ravidas Marg and that one person who has been stabbed has been removed to the hospital.

5. The events which preceded the recording of the aforementioned DD Entry are that HC Ishwar Chand PW-5, who was on patrolling duty, was informed by an unknown person that two persons are lying in an injured condition at Ravidas Marg. HC Ishwar Chand immediately proceeded to Ravidas Marg where he found the deceased and Mohd.Safiq lying on the road in an injured condition and he removed them to Lady Harding Hospital.

6. On receipt of the DD Entry Ex.PW-1/B, SI Jai Raj Singh PW-25, Inspector Ram Meher Singh PW-23, SI Dhanpat Singh PW-19 and Const.Pritam Singh PW-5, reached the place of the incident where they learnt that the deceased and Mohd.Safiq

have been removed to the hospital upon which they proceeded to the hospital. On reaching the hospital, the aforesaid police officers learnt that the deceased had been declared brought dead as recorded in the MLC Ex.PW-2/A of the deceased. They further learnt that Mohd.Safiq PW-10, had been admitted in the hospital and was not fit for making a statement, as recorded on the MLC Ex.PW-2/B of Mohd. Safiq. It may be noted here that the relevant portion of the MLC Ex.PW-2/B of Mohd. Safiq reads as under:-

“Name of relative or friend H.C. Ishwar Jan Rai 1192
PCR IC-OSCAR-47

Date & time of examination 2.10 pm; 9/12/02

Local exam

- i) A CLW 3 cm present on the lt. side of cheek
- ii) A CLW 3 cm present on the lt. side of the chin
- iii) Abrasions over the lt. knee"

7. At the hospital, SI Jai Raj Singh PW-25, met Rampher PW-3, who claimed to be an eye-witness to the incident in question. SI Jai Raj Singh recorded the statement Ex.PW-3/A of Rampher and made an endorsement Ex.PW-25/A thereon, and at around 04.15 P.M. handed over the same to Const.Pritam Singh PW-5, for registration of an FIR. Const.Pritam Singh took the endorsement Ex.PW-25/A to the police station where ASI Pritam Singh PW-1, registered the FIR No.359/2002, Ex.PW-1/A.

8. Relevant would it be to note that the statement Ex.PW-

3/A of Rampher reads as under:-

"I reside at the aforesaid address and sell betel and cigarettes from my shop at the corner of street No.2, (illegible), Ravidas Marg. Two – three months ago my brother-in-law Sant Lal came from village in search of employment and used to reside with me. My two nephews Ram Prakash and Satya Prakash @ Santosh also used to reside with me. Ram Prakash also sells tea from a shop at road. One week ago Satya Prakash @ Santosh also came to me from Noida in search of employment and sometimes he used to sit at my shop. Sometimes Sant Lal also used to help me. Sometimes Sant Lal also used to help me. In the night of 04.12.2002 Rajesh @ Nauua who is the son of Moti Lal and resident of G-Block, Street No.2, accompanied by his two friends came to his shop. Rajesh @ Nauua demanded cigarette from my brother-in-law who was running my shop at that time. When Sant Lal demanded money for the cigarettes purchased by Rajesh @ Nauua Rajesh and his friends quarrelled with Sant Lal. Rajesh @ Nauua stabbed Sant Lal and thereafter Rajesh and his friends fled from the place of the incident. Today at about 01.30 P.M. I was present near my shop when Nauua along with his same two friends who had accompanied him on 04.12.2002 and were of medium height came there. One of the said two boys was armed with a stick (danda) of about one meter in length and he hit Satya Prakash @ Santosh who was sitting on his shop with the same upon which Satya Prakash fell down. Rajesh @ Nauua said 'Rascal you were saved that day; today we would take revenge'. Thereafter within a span of few minutes Rajesh @ Nauua and his friends took knives from their arm sleeves and stabbed Satya Prakash @ Santosh multiple times which hit Satya Prakash @ Santosh on his neck and face. During the time Satya Prakash @ Santosh was being attacked, Safiq who is a resident of Katputhli Colony, Shadipur, Delhi and used to work in the opposite between intervened. Nauua and his friends also gave knife blows to Safiq which hit him on his

various body parts. I raised hue and cry upon which many people gathered there. Rajesh @ Nauua and his friends carrying knives in their hands fled from there. In the meanwhile a PCR van came there and removed Satya Prakash @ Santosh to Lady Harding Hospital. The doctor declared Satya Prakash @ Santosh brought dead. Rajesh @ Nauua and his friends inflicted knife and danda blows on Satya Prakash with an intention of murdering him which caused his death. Dangerous injuries have been sustained by Safiq due to knife blows inflicted upon him. The friends of Rajesh were of medium height and that he can identify them. An action be taken against Nauua and his friends.”

9. Since the deceased was declared brought dead, his body was sent to the mortuary of Lady Harding Hospital where Dr.Sumit Seth PW-8, conducted the post-mortem and gave his report Ex.PW-8/A, which records following external injuries on the person of the deceased:-

“1. A stab wound is present 2 cm above the sternol notch in the midline. The wound is 3 x 0.5 cm x 5 cm deep. The margins are clean cut. The angle of the right side is acute and that on the left side is rounded. The shape of the wound is elliptical. The principle direction of the wound is toward the left and backward. The wound is obliquely placed the inner end lower than the upper outer end. A track is established starting from the mid line towards the left side with cutting of the carotid sheath of left side with its structure. The track ends blindly near the left margin of the first thoracic vertebrae. There is extensive haemorrhage present over the subcutaneous tissue & sternocleidomastoid muscle of the left side.

2. A clean cut incised wound of dimensions 2.5 x (illegible) cm is present over the left cheek bone (zygma) obliquely (illegible) inner margin is lower than the outer end. (margins) illegible is spindle

shaped. The incised wound is deeper on the (illegible).

3. A clean cut incised wound present over the ramu (illegible) mandible of the left side over the middle half portion, 3 cm above the margin of jaw. Obliquely placed The dimension of wound is 3.5 x 1 cm x skin deep

4. A clean cut incised wound is present over the outer lateral aspect of neck obliquely place 3 cm below the margin of jaw, 5 cm below the angle of jaw. The dimension of wound is 3.1 x 1 cm (spindle shaped) x skin deep.

5. 0.5 x 0.3 cm (illegible) wound present below the left lower lip (2 cm below lowerlip). The wound is skin deep.

6. An abrasion of size 3 x 2 cm, dark red in colour is present over the left side of forehead, 3 cm from the midline & 2.5 cm from the left eyebrow."

10. The doctor opined that the death of the deceased was caused due to haemorrhagic shock resulting from injury No.1 which was further opined to be sufficient to cause death in the ordinary course of nature.

11. On 10.12.2002 the doctor declared Mohd.Safiq to be fit to give a statement, upon which Inspector Ram Meher Singh PW-23, recorded the statement Ex.PW-10/A of Mohd.Safiq under Section 161 Cr.P.C. wherein he also indicted the appellants as the persons who had attacked him and the deceased.

12. On the same day i.e.10.12.2002 the police recorded the supplementary statement Ex.PW-23/DB of Rampher under

Section 161 Cr.P.C. wherein Rampher ostensibly stated that he had given wrong details regarding the manner in which the deceased was murdered by the appellants in his statement Ex.PW-3/A as he was perplexed at the time of making the said statement. He disclosed that the knife blow was inflicted on the person of the deceased by only one of the persons who had accompanied Rajesh whereas the other person had given danda blow to the deceased.

13. In view of the statements Ex.PW-3/A and Ex.PW-10/A of Ram Prakash and Mohd.Safiq respectively, the police set out to apprehend the appellants.

14. On 11.12.2002 at about 05.00 P.M. the police arrested the appellants as recorded in the arrest memos Ex.PW-20/A, Ex.PW-20/B and Ex.PW-20/C. The appellants were interrogated and their disclosure statements were recorded. Pursuant to the recording of his disclosure statement, appellant Amit got recovered a t-shirt, pant, knife and stick. We need not note the contents of the disclosure statements of appellants Rajesh and Sanjay as the same are completely inadmissible in evidence as they admit of guilt. We note that neither any recovery was effected nor was a fact discovered pursuant to the said statements made by appellants Rajesh and Sanjay.

15. The exhibits seized by the police during the investigation including the clothes, knife and stick recovered at the instance of appellant Amit were sent to Forensic Science Laboratory for serological examination. Vide FSL report Ex.PW-23/F, it was opined that human blood was detected on the clothes, knife and stick recovered at the instance of appellant Amit; group whereof could not be determined.

16. Armed with the statements Ex.PW-3/A and Ex.PW-10/A of Rampher and Mohd. Safiq, the post-mortem report Ex.PW8/A of the deceased and the FSL report Ex.PW-23/F, the police filed a charge sheet against the appellants. (It may be noted here that Sant Lal PW-17, was not cited as an eye-witness to the occurrence in the charge sheet).

17. Charges were framed against them for having committed offences punishable under Sections 302 and 307 IPC read with Section 34 IPC.

18. Ignoring the testimony of the police officers who participated in the investigation of the present case, we note the testimony of such witnesses, in respect whereof, submissions were made during the arguments of the appeal on the issue, whether Rampher PW-3, Ram Prasad PW-4, Mohd Safiq PW-10 and Sant Lal PW-17, were at all eye-witnesses.

19. Rampher PW-3, deposed that on 09.12.2002 at about 01.30 P.M. he had gone from his shop to his home for taking lunch. His home is at a distance of 20 steps from his shop. The deceased and Ram Prakash who were his nephews were sitting in his shop at that time. He saw from his house that appellants Sanjay and Amit came to his shop and gave beating to the deceased. Appellant Sanjay gave knife blows to the deceased whereas appellant Amit gave danda blow to him. Appellants Sanjay and Amit fled from the spot after inflicting injuries on the person of the deceased. He did not see appellant Rajesh inflicting any injury on the person of the deceased. On 04.12.2002 at about 09.30 P.M. he was sitting in his shop when appellant Rajesh came there and started beating him. After sometime appellant Amit also came there. The statement Ex.PW-3/A bears his thumb impressions.

20. Since there was a variation between the testimony of Rampher and the contents of his statement Ex.PW-3/A, Rampher was declared hostile by the prosecutor. On being cross-examined by the learned prosecutor, Rampher admitted that the contents of his statement Ex.PW-3/A are correct.

21. On being cross-examined by the defence about the manner in which the deceased was murdered by the appellants, Rampher stated (Quote): *'It was one accused*

person, Rajesh, who had attacked Satya Prakash with knife several times. The accused Sanjay had hit Satya Prakash with Danda. Sanjay had used the Danda only on Satya Prakash'. On being cross-examined by the defence about the attack on Mohd. Safiq, Rampher stated (Quote): 'Shafiq works in a shop opposite our shop. He was not attacked with Danda. He was attacked with knife'.

22. Ram Parkash PW-4, the brother of the deceased, deposed that on 09.12.2002 in the noon time he had come to shop of the deceased. When he was near the shop of the deceased he saw the appellants coming to the shop of the deceased. Appellant Sanjay had a Danda in his hand whereas appellant Amit had a knife in his hand. Appellant Sanjay gave a danda blow on the head of the deceased whereas appellant Amit stabbed him with knife multiple times. Appellant Rajesh was giving exhortations to the other appellants to kill the deceased. He i.e. Ram Prakash, raised a hue and cry upon which Mohd Safiq, who is a tailor came. When Mohd Safiq tried to save the deceased, appellant Sanjay gave a danda blow to him whereas appellant Amit gave a knife blow to him. Thereafter the appellants fled from the place of the incident. A PCR van arrived at the place of the incident and removed the

deceased and Mohd.Safiq to the hospital. He and Rampher accompanied the deceased and Mohd.Safiq to the hospital.

23. Mohd.Safiq PW-10, deposed that on 09.12.2002 at about 1.35 P.M. he was present outside his shop when he saw appellants Rajesh and Sanjay inflict knife and danda blows to a person who sits on a betel shop. On seeing appellants Rajesh and Sanjay causing injuries to that person he became perplexed and started running but the said appellants chased him and attacked him with knife and danda.

24. Sant Lal PW-17, deposed that he along with his brother-in-law Rampher sells betel and cigarettes from a shop. On 04.12.2002 at about 10.00 P.M. he and Rampher were sitting in their shop when two boys came there and took cigarettes from them. When Rampher demanded money for the cigarettes, the said boys started quarrelling with him. In the meantime a third boy also came there. The said three boys gave beatings to him and Rampher. Appellant Rajesh gave knife blows on his face and fingers. The deceased came there to save them from the clutches of the said three boys. The appellants fled from there. The appellants were the three boys who had attacked him and Rampher on 04.12.2002. On 09.12.2002 the deceased was sitting on the shop in question when the appellants came there and stabbed him with knives.

(It may be noted here that the witness has not deposed a word about the manner in which the crime of murder of the deceased was committed by the appellants)

26. On being cross-examined by the defence about his witnessing the murder of the deceased, Sant Lal stated (Quote): *'On 9.12.02 the accused persons again came on our shop and I did not see who cause murder of Sat Prakash.'*

27. Believing the testimony of Rampher PW-3, Ram Prasad PW-4, Mohd Safiq PW-10 and Sant Lal PW-17, to be creditworthy, the learned Trial Judge has convicted the appellants.

28. At the hearing of the appeal, learned counsel for the appellants advanced following six submissions:-

A The first submission advanced by the learned counsel for the appellants was that there are material contradictions in the statements given by Rampher at various stages. The first contradiction pointed out by the learned counsel was regarding the involvement of the appellants in the crimes with which they were charged. Counsel pointed out that Rampher stated in his statement Ex.PW-3/A that all the three appellants had attacked the deceased and

Mohd. Safiq and that all the three appellants came to his shop on 04.12.2002 and quarrelled with him and Sant Lal whereas he deposed in his examination-in-chief that appellants Amit and Sanjay had attacked the deceased and Mohd.Safiq; that he had not seen appellant Rajesh attacking the deceased and Mohd.Safiq and that appellants Rajesh and Amit had come to his shop on 04.12.2002. Counsel further pointed out that Rampher did not depose a word about the appellants having attacked Mohd.Safiq in his examination-in-chief. Counsel lastly pointed out that Rampher took a somersault in his cross-examination by stating that the contents of his statement Ex.PW-3/A which were at variance with the statement given by him in examination-in-chief are correct. The second contradiction pointed out by the counsel was regarding the manner in which the deceased was murdered by the appellants. Counsel pointed out that Rampher stated in his statement Ex.PW-3/A that all the three appellants had given knife blows to the deceased whereas he deposed in his testimony that appellant Rajesh had given knife blows to the deceased and that appellant Sanjay had

only given a danda blow to the deceased. The third contradiction pointed out by the counsel was regarding the place from where Rampher witnessed the incident. Counsel pointed out that Rampher stated in his statement Ex.PW-3/A that he witnessed the incident in question when he was standing near his shop whereas he deposed in his testimony that he witnessed the incident from his house. Counsel submitted that evidence of Rampher is not worthy of credence as he was shifting stands and there is no scale to find out which of his statements is truthful. It was submitted that evidence of such a vacillating witness should be best ignored and discarded.

B The second submission advanced by the learned counsel for the appellants was that there is a material contradiction between the evidence of Rampher PW-3 and Ram Prakash PW-4. The contradiction pointed out by the learned counsel was regarding the manner in which Mohd.Safiq was attacked by the appellants. Counsel pointed out that Rampher PW-3, deposed that Mohd.Safiq was not attacked with danda by the appellants whereas Ram

Prakash PW-4, deposed that appellant Sanjay gave a danda blow to Mohd. Safiq.

C The third submission advanced by the learned counsel for the appellants was that there are material contradictions between the evidence of Rampher PW-3, Ram Prakash PW-4 and Mohd.Safiq PW-10. The first contradiction pointed out by the learned counsel was regarding the involvement of appellant Amit in the crimes with which he was charged. Counsel pointed out that Mohd Safiq PW-10, deposed that he had seen appellants Rajesh and Sanjay attacking the deceased and that the said appellants had also attacked him whereas Rampher PW-3 and Ram Prakash PW-4, stated that the deceased and Mohd. Safiq were attacked by all the three appellants. The second contradiction pointed out by the learned counsel was regarding the manner in which Mohd.Safiq was attacked by the appellants. Counsel pointed out that Mohd.Safiq PW-10, deposed that he was given danda blows by appellants Rajesh and Sanjay whereas Rampher PW-3, deposed that Mohd.Safiq was not attacked with a danda.

D The fourth submission advanced by the learned counsel for the appellants pertained to the credibility of the evidence of Sant Lal PW-17. Counsel submitted that the facts that Sant Lal PW-17, did not depose a word about the manner in which the deceased was attacked by the appellants and that Mohd Safiq was attacked by the appellants shows that Sant Lal did not witness the murder of the deceased. Counsel further submitted that there is a material discrepancy between the evidence of Sant Lal PW-17 and Rampher PW-3, regarding the quarrel which had taken between them and the appellants on 04.12.2002. Counsel pointed out that Rampher PW-3, did not depose a word about the presence of the deceased at the time of the quarrel in question whereas Sant Lal PW-17, deposed that the deceased had intervened in the said quarrel.

E The fifth submission advanced by the learned counsel for the appellants was predicated upon the statement Ex.PW-3/A of Rampher, which statement has formed the basis of the FIR registered in the present case. Counsel urged that there is not a word about the presence of Ram Prakash PW-4 and Sant

Lal PW-17, at the time of the occurrence in the statement Ex.PW-3/A and therefore the claim of Ram Prakash PW-4 and Sant Lal PW-17, that they witnessed the occurrence is doubtful.

F The last submission advanced by the learned counsel for the appellants was predicated upon the recording contained in the DD Entry Ex.PW-1/B that 'one person who has been stabbed is removed to the hospital'. Counsel urged that the said recording is suggestive of the fact that it was only the deceased who was found by the police in an injured condition on the spot; that Mohd Safiq was not present on the spot and that he was introduced subsequently to create an eye-witness to the occurrence.

29. The transactions with which the appellants are charged can be divided into following three stages:-

I Stage 1: Stage 1 is the quarrel which took place on 04.12.2002 between the appellants, Rampher and Sant Lal. As per the prosecution, the quarrel dated 04.12.2002 constitutes the motive for the appellants to murder the deceased as the appellants were nursing a grudge against Rampher and Sant

Lal and wanted to teach them a lesson for messing with them. The witnesses examined by the prosecution to prove this stage are Rampher PW-3 and Sant Lal PW-17.

II Stage 2: Stage 2 is the commission of murder of the deceased by the appellants. The witnesses examined by the prosecution to prove this stage are Rampher PW-3, Ram Prasad PW-4 and Mohd. Safiq PW-10.

III Stage 3: Stage 3 is the act of the appellants of inflicting grievous injuries on the person of Mohd.Safiq. The witnesses examined by the prosecution to prove this stage are Rampher PW-3, Ram Prasad PW-4 and Mohd. Safiq PW-10.

30. We have our doubts whether Sant Lal PW-17, was an eye-witness to the occurrence. As already noted herein above, Sant Lal PW-17, was not cited as an eye-witness to the occurrence in the charge sheet. He was introduced later on. That apart while testifying in Court Sant Lal PW-17 did not utter a word about the manner in which the deceased was attacked by the appellants and that Mohd.Safiq. He stated in his cross-examination that he did not see who caused the death of the deceased. The learned Trial Court failed to appreciate that the deposition of Sant Lal in his examination-in-chief that the appellants had come to his shop on

09.12.2002 and murdered the deceased who was sitting there is not an eye-witness account but an account of the incident given by the witness on the basis of knowledge acquired by him from other persons. Thus, we eschew reference to the testimony of Sant Lal pertaining to what happened on 9.12.2002, but we retain his testimony as to what happened on 4.12.2002 for the reason we find credibility in the statement of Sant Lal that he was present at his shop on 4.12.2002.

31. Is Mohd.Safiq PW-10, a credible witness?

32. Learned counsel for the appellants had attempted to show that Mohd.Safiq was not present on the spot at the time of the occurrence on the basis of the recording contained in the DD entry Ex.PW-1/B that one person who has been stabbed is removed to the hospital.

33. The aforesaid submission was advanced unmindful of the evidence of HC Ishwar Chand Ray PW-5 and the MLC Ex.PW-2/B of Mohd.Safiq. HC Ishwar Chand Ray PW-5, deposed that on 09.12.2002 he had found two persons lying in an injured condition on the spot and that he had removed them to Lady Harding Hospital. The aforesaid testimony of HC Ishwar Chand Ray PW-5, was not controverted by the defence. The MLC

Ex.PW-2/B of Mohd.Safiq records that Mohd.Safiq was brought to Lady Harding Hospital at about 2.10 P.M. on 09.12.2002 by HC Ishwar Chand Ray. Thus, the MLC Ex.PW-2/B of Mohd.Safiq establishes that Mohd.Safiq was one of the injured persons removed by HC Ishwar Chand Ray PW-5 from the spot to the hospital. The incident in question had occurred at about 01.30 P.M. on 09.12.2002. Mohd.Safiq was admitted in the hospital at about 2.10 P.M. on 09.12.2002. Three injuries were found on the person of Mohd.Safiq as recorded in his MLC Ex.PW-2/B. The presence of injuries on the person of Mohd.Safiq and the time of his admission in the hospital establish beyond any doubt that he had received injuries in the incident in question.

34. Insofar as the recording contained in the DD Entry Ex.PW-1/B that one person who had been stabbed is removed to the hospital is concerned, it is apparent that the author of the said DD entry i.e. ASI Pritam Singh PW-1, incorrectly recorded the information given by HC Ishwar Chand Ray PW-5 while preparing the DD Entry Ex.PW-1/B. Be that as it may, a DD entry is not a substantive piece of evidence inasmuch as it only sets into motion the involvement of the police in the investigation. By its very nature, it is a record of a cryptic information received at the police station.

35. When the evidence of an injured eye-witness is to be appreciated, the under-noted legal principles enunciated by the courts are required to be kept in mind.

(a) The presence of an injured eye-witness at the time and place of the occurrence cannot be doubted unless there are material contradictions in his deposition.

(b) Unless, it is otherwise established by the evidence, it must be believed that an injured witness would not allow the real culprits to escape and falsely implicate the accused.

(c) The evidence of injured witness has greater evidentiary value and unless compelling reasons exist, their statements are not to be discarded lightly.

(d) The evidence of injured witness cannot be doubted on account of some embellishment in natural conduct or minor contradictions.

(e) If there be any exaggeration or immaterial embellishments in the evidence of an injured witness, then such contradiction, exaggeration or embellishment should be discarded from the evidence of injured, but not the whole evidence.

36. Nothing tangible could be elicited by the defence from the cross-examination of Mohd.Safiq which could cast a doubt on his veracity. No suggestion was given to Mohd.Safiq in his cross-examination that he was inimical to appellants Rajesh and Sanjay. No discrepancy, much less material, has been shown to us between the examination-in-chief and cross-examination of Mohd.Safiq. In such circumstances, we have no reason to hold that Mohd.Safiq is not a credible witness.

37. Are Rampher PW-3 and Ram Prashad PW-4, credible witnesses?

38. Witnesses can be classified into three categories. Wholly reliable; partially reliable and wholly unreliable.

39. Witnesses in category one can be believed without corroboration. Witnesses in the last category have to be discarded. It is the mid category witnesses which create a problem for the reason the Courts have to sift their testimony to separate the grain from the chaff. To do so, corroboration is the only method available.

40. A perusal of the evidence of Rampher PW-3, contents whereof have been noted in paras 19-21 above, shows that Rampher PW-3, has been shifting stands. In view of shifting

stands taken by Rampher PW-3, Rampher falls in category two i.e. partially reliable witness.

41. Is the testimony of Rampher PW-3, corroborated by any ocular or documentary evidence?

42. The testimony of Rampher PW-3, with regard to the quarrel which took place on 04.12.2002 between the appellants, Rampher and Sant Lal is corroborated by the testimony of Sant Lal PW-17, in material particulars. The only discrepancy between the testimony of Rampher PW-3 and Sant Lal PW-17, is regarding the presence of the deceased at the time of the quarrel. The evidence of Rampher PW-3 and Sant Lal PW-17 shows that the appellants gave beatings to Rampher and stabbed Sant Lal. It is possible that Rampher got very scared and did not notice that the deceased has come to his shop at the time of the quarrel.

43. In the decision reported as Malkiat Singh v State of Punjab (1991) 4 SCC 391 Supreme Court has held that it is settled law that the First Information Report is not substantive evidence. It can only be used to contradict the maker thereof or for corroborating his evidence and also to show that the implication of the accused was not an after-thought. In the instant case, the FIR Ex.PW-1/A records that Rampher has

stated that the appellants gave knife blows on the neck and face of the deceased. The findings of the doctor who had conducted the post-mortem of the deceased after the registration of the FIR as recorded in the post-mortem report Ex.PW-8/A are that two and four wounds were found on the neck and face respectively of the deceased. Therefore, the FIR Ex.PW-1/A establishes that Rampher was present at the spot at the time of the occurrence, for the reason, unless Rampher had seen someone giving knife blows to the deceased, he could not have correctly stated the situs of the injuries suffered by the deceased, prior to the conduct of the post-mortem of the deceased.

44. The evidence of Rampher PW-3, pertaining to the involvement of appellants Rajesh and Sanjay in the occurrence stands duly corroborated by the evidence of Mohd.Safiq PW-10.

45. However, there is a serious discrepancy between the evidence of Rampher PW-3, and Mohd.Safiq PW-10, regarding the involvement of appellant Amit in the occurrence. While Rampher PW-3 and Ram Prasad PW-4, have deposed that all the three appellants had attacked Mohd.Safiq and murdered the deceased Mohd.Safiq PW-10, had given a clean chit to appellant Amit.

46. Similar is the position in respect of the evidence of Ram Prasad PW-4. There is a similar contradiction between the evidence of Ram Prasad PW-4 and Mohd.Safiq PW-10.

47. A quarrel had taken place between the appellants and Rampher on 04.12.2002. The deceased was murdered in connection with the said quarrel. The possibility that only appellants Rajesh and Sanjay murdered the deceased and that Rampher and Ram Prasad have implicated appellant Amit along with the other appellants as he was party to the quarrel which had taken place on 04.12.2002 cannot be ruled out. The chances of happening of the said possibility are further increased by the fact that Rampher PW-3 and Ram Prasad PW-4, have contradicted themselves and each other with respect to the manner in which the deceased and Mohd.Safiq were attacked by the appellants as pointed out by the learned counsel for the appellants. When the feelings run high and there is an enmity, there is tendency to drag in an innocent person against whom the witness has a grudge along with the guilty. In such a situation, the courts are required to be circumspect and should separate grain from chaff. (See the decision of Supreme Court reported as Dalip Singh v State of Punjab (1954) 1 SCR 145).

48. This takes us to deal with the contradictions pointed out by the learned counsel for the appellants.

49. Insofar as the contradiction regarding the place from where Rampher witnessed the incident are concerned, the distance between his shop and house was mere twenty steps as deposed by Rampher PW-3. In that view of the matter, the statement of Rampher PW-3, that he witnessed the occurrence when he was present near his shop does not contrary to his deposition that he witnessed the incident from his house.

50. As regards the submission that the deposition of Rampher PW-3, that Mohd.Safiq was not given a danda blow is in contradiction to the evidence of Ram Prasad PW-4 and Mohd.Safiq PW-10, suffice would it be to state that a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen. The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind whereas it might go unnoticed on the part of another.

51. In dealing with the submission that the presence of Ram Prakash PW-4, does not find a mention in the statement

Ex.PW-3/A of Rampher, it would be most apposite to quote following observations of Supreme Court in the decision reported as Babu Singh v State of Punjab (1996) 8 SCC 699:-

“7. So far as PW 14 is concerned one of the arguments advanced by the learned counsel for the appellant is the fact that his name did not find place in the FIR as a witness to the occurrence. FIR can be used only for the purpose of corroborating or contradicting the maker thereof. That apart, the FIR was lodged by the father who has stated to have seen the ghastly occurrence, one son killing the other and at that juncture if he did not mention the name of Jai Narayan to be a witness to the occurrence, the evidence of Jai Narayan cannot be doubted on that score. It is well settled that if the witness is found to be independent and reliable and is believed to be present during the occurrence then his evidence cannot be rejected on the sole ground that his name has not been mentioned in the FIR. Non-mention of name of a witness may be an honest omission, inadvertent mistake or may be due to various other conceivable reasons. It has been held by this Court in the case of *Nirpal Singh v. State of Haryana*, that the name of the witness examined on trial not having been given in the FIR though may be of some relevance but by itself would not entail rejection of his evidence. On examining the first information report we find that no mention has been made as to who are the witnesses to the occurrence. That by itself cannot be the ground to discard the evidence of the witness who has stated to have witnessed the occurrence if intrinsically nothing has been brought out in the cross-examination to impeach his testimony. In the circumstances we are unable to persuade ourselves to agree with the submission of the learned counsel for the appellant that non-mention of the name of Jai Narayan in the FIR is sufficient to impeach his veracity.....” (Emphasis Supplied)

52. In the decision reported as State of UP v Mansingh (2003)

10 SCC 414 Supreme Court observed as under:-

“10. One of the circumstances highlighted by the High Court to discard the evidence of PW 8 is non-mention of his name in the FIR. As stated by this Court in *Chittar Lal v. State of Rajasthan* evidence of the person whose name did not figure in the FIR as a witness does not perforce become suspect. There can be no hard-and-fast rule that the names of all witnesses, more particularly eyewitnesses, should be indicated in the FIR. As was observed by this Court in *Shri Bhagwan v. State of Rajasthan* mere non-mention of the name of an eyewitness does not render the prosecution version fragile.”

53. In the instant case, the FIR Ex.PW-1/A was prepared on the basis of the statement of Ex.PW-3/A of Rampher, the uncle of the deceased. Rampher witnessed the deceased being brutally attacked by the appellants just about two and half hours prior to the recording of his statement Ex.PW-3/A. In such circumstances, the possibility that Rampher being in a state of shock at the time of the recording of his statement Ex.PW-3/A forgot to mention about the presence of Ram Prakash in said statement cannot be ruled out. Therefore, the evidence of Ram Prakash cannot be doubted on the score that his name does not find a mention in the FIR Ex.PW-1/A.

54. The matter can also be looked from another angle.

55. As already stated herein above, no question was put to Rampher regarding the non-mention of the name of Ram Prakash in the statement Ex.PW-3/A.

56. In taking the said view, we are supported by the decisions of Supreme Court reported as Rahim Khan v Khurshid Ahmad AIR 1975 SC 290, State of UP V Anil Singh 1988 (Supp) SCC 686 and Sunil Kumar v State of Rajasthan (2005) 9 SCC 298.

57. The sum and substance of the above discussion is that we accept the evidence of Mohd.Safiq PW-10, in its totality. We accept the evidence of Rampher PW-3 and Ram Prakash PW-4, qua appellants Rajesh and Sanjay but reject the same qua appellant Amit. We further hold that the prosecution has been able to establish that a quarrel took place between the appellants and the family members of the deceased on 04.12.2002 i.e. 4 days before the occurrence.

58. The only piece of incriminating evidence left against appellant Amit is the recovery of blood stained clothes and knife at his instance. Mere recovery of blood stained clothes and knife at the instance of appellant Amit does not connect him with the crime (s) with which he is charged. (See the decision of Supreme Court reported as Narsinbhai Haribhai Prajapati v. Chhatrasinh and Ors AIR 1977 SC 1753, Surjit Singh v. State of Punjab 1993 CriLJ 3901 and Mani v State of Tamil Nadu 2008 (1) JCC 277)

59. In view of the above discussion, we hold that the prosecution has been able to establish through the evidence of Mohd.Safiq PW-10, Rampher PW-3 and Ram Prakash PW-4, that appellants Rajesh and Sanjay had murdered the deceased and attacked Mohd.Safiq. The prosecution has failed to prove its case against appellant Amit.

60. Are appellants Rajesh and Sanjay guilty of attempting to murder Mohd.Safiq i.e. an offence punishable under Section 307 IPC?

61. To bring an offence within the ambit of Section 307 IPC the prosecution must establish actus reus and mens rea. The requisite intention be of any of the kinds referred to in Section 300 IPC and that knowledge being the alternative to intention in clause "fourthly" of Section 300, if established, it too would be sufficient. How do we gather the intention? It has to be gathered from the nature of weapon used, the number of the injuries inflicted, manner in which the weapon was used, seriousness of the resultant injury, severity of the blow, part of the body where injuries are inflicted and antecedent and subsequent conduct of the accused.

62. The MLC Ex.PW-2/B of Mohd.Safiq records that two wounds were found on face of Mohd.Safiq and that abrasions

were found on his knee. In view of the fact that appellants Rajesh and Sanjay inflicted injuries on non-vital body parts of Mohd.Safiq, we find it difficult to hold that appellants Rajesh and Sanjay had with an intention to cause the death of Mohd.Safiq or that they can be presumed to have known that death of Mohd.Safiq would be caused because of injuries inflicted by them.

63. Now the question which arises is that whether the accused is guilty of causing "simple hurt" or "grievous hurt" to Mohd.Safiq.

64. Section 319, IPC defines the term hurt. Under Section 319, I.P.C., whoever causes bodily pain, disease or infirmity to any person is said to cause hurt. Any hurt falling under any of the clauses under Section 320, IPC is grievous hurt. A person therefore, cannot be said that he has caused grievous hurt unless the hurt caused is one of the kinds of hurt specified under Section 320, I.P.C. Therefore it is the duty of the Court to give a finding on its own whether the hurt was simple or grievous. The Court is not concerned with the classification made by a doctor as to whether the hurt was simple or grievous. A doctor is to describe the facts in respect of the nature of injury and the Court is to decide whether the nature

of the injury described by the doctor comes within any of the clauses of Section 320, I.P.C. Section 320 reads as follows:

“Grievous hurt: The following kinds of hurt only are designated as "grievous":

First - Emasculation

Secondly - Permanent privation of the sight of either eye.

Thirdly - Permanent privation of the hearing of either ear.

Fourthly - Privation of any member of joint.

Fifthly - Destruction or permanent impairing of the powers of any member or joint.

Sixthly - Permanent disfiguration of the head or face.

Seventhly - Fracture or dislocation of a bone or tooth.

Eighthly - Any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits.

65. The situs of the injury inflicted upon the victim goes a long way in determining that whether a hurt is a “grievous hurt in terms of clause eighthly of Section 320 IPC. (See the decision of Supreme Court reported as Niranjan Singh v State of UP AIR 2007 SC 2434)

66. In the instant case, appellants Rajesh and Sanjay had inflicted the injuries on the non-vital body parts of Mohd. Safiq.

We thus hold that appellants Rajesh and Sanjay are guilty of causing hurt to Mohd.Safiq by means of a dangerous weapon i.e. an offence punishable under Section 324 IPC.

67. The end result of the above discussion is as follows:-

I Appellant Amit is acquitted of all the charges framed against him.

II The conviction and sentence awarded by the learned Trial Court to appellants Rajesh and Sanjay in respect of offence punishable under Section 302 IPC is maintained.

III The conviction of appellants Rajesh and Sanjay for the offence punishable under Section 307 IPC is modified to the one under Section 324 IPC. Appellants Rajesh and Sanjay are sentenced to undergo a term of three years for committing offence punishable under Section 324 IPC.

68. Appellants Rajesh and Sanjay are on bail. We cancel the bail bonds and surety bonds furnished by them and direct them to surrender and suffer the remaining sentence.

69. Appellant Amit is in jail. We direct that a copy of this decision be sent to Superintendent Central Jail Tihar with

further direction that unless required in custody in any other case, Amit be set free forthwith.

**(PRADEEP NANDRAJOG)
JUDGE**

**(SURESH KAIT)
JUDGE**

**MARCH 17, 2010
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