

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

**RESERVED ON : 21st August, 2012
DECIDED ON : 21st September, 2012**

+ CRL.A. 123/2012, CRL.M.B.194/2012

MUKEEM & ANR. Appellants.
Through : Mr.K.S.Singh with Mr.Rahul Singh,
Ms.Tripta singh and Ms.Madhu
Sharma, Advocatse.

Versus

STATE (NCT OF DELHI) Respondent
Through : Mr.Sanjay Lao, APP for the State.

+ CRL.A. 208/2012, CRL.M.B.342/2012

KHALID Appellant.
Through : Mr.Satish Tamta with Ms.Ruchi
Kapur, Advocates.

Versus

STATE Respondent
Through : Mr.Sanjay Lao, APP for the State.

**CORAM:
MR. JUSTICE SANJIV KHANNA
MR. JUSTICE S.P.GARG**

S.P.GARG, J.

1. The present appeal is directed against the judgment dated 13.12.2011 and order on sentence dated 16.12.2011 of learned Additional Sessions Judge in Sessions Case No.55/2008 by which the appellants

Mukeem (A-1), Khalid (A-2) and Deepak (A-3) were convicted for committing offences punishable under Section 302/394/34 IPC and 27 of Arms Act and sentenced to undergo imprisonment for life with fine.

2. The prosecution alleged that Daily Diary (DD) No.21 (Ex.PW-17-A) was recorded at police station Nand Nagri on 27.02.2006 at 5:50 P.M. on receipt of information that a child aged 14-15 years was murdered at House No.33A, Gali No.1, Bank Colony. The investigation was assigned to SI Ajay Singh Negi (PW-17) who with ASI Jalbir Singh (PW-14) and Constable Khursid reached there. The incident had taken place in House No.A-14 Adarsh Colony, Bank Enclave. On reaching there, they found the door of the house on the ground floor open. In the meantime, DD No.22 (Ex.PW7/B) was recorded at 05:55 P.M. where the information was conveyed about the murder of a boy at A-14, Adarsh Gali, Bank Enclave. This DD was also marked to SI Ajay Singh Negi.

3. PW-17 (SI Ajay Singh Negi) found that the household articles were lying scattered in the house. A boy aged 14/15 years was found in a pool of blood in the kitchen. He sent the victim in a PCR van to GTB hospital where he was declared 'brought dead'. SI Ajay Singh Negi searched eye-witnesses but in vain. He made an endorsement on DD

No.21 and sent the rukka for lodging First Information Report. Further investigation was taken over by Inspector Veer Singh Tyagi. Crime Team inspected the scene of crime and photographed it. The I.O. lifted blood, earth control, blood-stained towel, blood-stained cricket wicket, blood-stained bed sheet and prepared seizure memos. After completion of investigation, a charge-sheet was submitted against A-1 to A-3 in the court. As per the charge-sheet, the prosecution version is as under :

(a) Amita Goel (PW-9), deceased's mother, disclosed that when she reached the house at 5:10 P.M. from her office and knocked at the door, there was no response from her son-Vaibhav. When she repeatedly knocked at the door, three boys came out and one of them was Mukeem (A-1) earlier employed as a driver with them. They fled the spot on a blue coloured Yamaha motorcycle DL3SAR-3954 parked in front of the house. Inside the house, she found the articles scattered and her son in the kitchen smeared with blood. She became unconscious and came to her senses subsequently. Ram Kumar reached the spot and helped her.

(b) Since A-1 was identified by the deceased's mother as suspect, the police went to village Mandoli to apprehend him but he was not found there. On 28.02.2006, the body was sent for post-mortem.

Dr.Arvind Kumar (PW-4) conducted post-mortem examination of the body. On 03.03.2006, A-1 was arrested when he arrived on motorcycle number DL3SAR-3954 at about 09:00 P.M. from the side of IIT at Kale Sarai. On his search, one gold necklace with beads was recovered from the pocket of the pant. Pursuant to the disclosure statement, A-1 recovered blood-stained shirt from the bed box in the house.

(c) A-3 was arrested on the same night from the house of his maternal grandmother (Nani) at village Saboli and one pair of gold earrings (tops) was recovered at his instance. He also produced a shirt and black pant which he was wearing on the day of incident. A-2 was arrested from his brother-in-law's house at Loni, Ghaziabad and two gold bangles and a knife were recovered. He also produced shirt of light purple colour and light blue jeans pant which he was wearing at the time of incident. A-1 to A-3 also pointed the place of occurrence.

(d) On 06.03.2006 Sagir (since discharged) was arrested from Mandoli.

(e) During investigation, (A-2 and A-3) refused to participate in the Test Identification Proceedings (TIP).

(f) The case property was got identified in Test Identification proceedings.

(g) The exhibits were sent to Forensic Science Laboratory and the Investigating Officer collected the reports subsequently. The IO recorded statements of the witnesses conversant with facts at different stages of the investigation. The accused were duly charged and brought to trial.

4. To substantiate the charges the prosecution examined 18 witnesses in all. The statements of the accused were recorded under Section 313 Cr.P.C. to afford them an opportunity to explain the incriminating circumstances. The accused denied the allegations against them and pleaded false implication. A-1 examined DW-3 (ASI Krishan), DW-4 (Ct.Rajneesh), DW-5 (Laxmi Narayan Udapa), DW-6 (HC Anil Kumar) and DW-7(Smt.Aamna Begum) in defence. A-2 and A-3 examined DW-1 (Shri Devi Das @ Devi Ram) and DW-2 (Mumtaz) respectively in their respective defence.

5. After appreciating the evidence and considering the rival contentions of the parties, the Trial Court by the impugned judgment

convicted A-1 to A-3 for the offences mentioned previously. Aggrieved by the said judgment the appellants have preferred the appeals.

6. Learned counsel for the appellants challenged the findings of the Trial Court and urged that it did not appreciate the evidence in its true and proper perspective and fell into grave error in relying upon the testimonies of PW-1 (Ram Kumar) and PW-9 (Amita Goel) without ensuring their credibility and truthfulness. It was contended that they were not present at the spot at the time of occurrence and had not seen the assailants coming out of the house. They were introduced subsequently as planted witnesses to strengthen the case. In the rukka sent at 8:15 P.M., PW-17 (SI Ajay Singh Negi) categorically mentioned that he did not meet any eye-witness or family member of the deceased in the house. The Trial Court did not observe that post-event conduct of PW-1 (Ram Kumar) was highly unnatural. He did not report the incident to the police and conveniently left to attend the marriage. His statement under Section 161 Cr.P.C. was recorded after considerable delay. Number of discrepancies emerged in his deposition to rule out his presence at the spot were ignored without valid reasons. It is highly unbelievable that he would write down the number of the motorcycle on his palm in the absence of

suspicion. The Trial Court did not notice that he was facing two criminal cases. Counsel further urged that the number of injuries inflicted on the boy reveal that it was a case of personal enmity/revenge. The prosecution did not collect documentary evidence to prove A-1's employment as driver with the informant. The circumstances showing the arrest and recoveries of the gold articles are highly suspicious. No independent public witness was joined at the time of alleged recoveries of the gold ornaments and the clothes. In the CFSL reports the deceased's blood was not found on the clothes. The accused were lifted from their houses and illegally detained in the police station. A-2 and A-3 were justified to decline participation in the TIP as they were shown to witnesses. The jewellery of insignificant value was planted upon the accused to create evidence. Learned counsel for A-1 further contended that Constable Khursid was instrumental in falsely implicating him as he had lodged complaints against him.

7. Supporting the judgment of the Trial Court, learned APP urged that it did not call for any interference. The Trial Court relied upon the cogent and reliable testimonies of PWs 1 and 9 to base its conviction as they had seen the accused including A-1 coming out of the house. PW-

9 became unconscious on seeing the horrible scene and came to senses after considerable time. When she regained consciousness, in her statement under Section 161 Cr.P.C. at about 11:00 P.M. she named A-1 and others who came out of the house. She had no ulterior motive to falsely implicate A-1 in the absence of any prior enmity. A-1 was earlier employed as a driver with them. There was no occasion of mistaken identity. The police visited A-1's residence on the same night after his name was revealed by PW-9 (Amita Goel). PW-1 (Ram Kumar) could not inform the police as he had to rush to Faridabad to participate in the function of his close relative i.e. niece. After returning from Faridabad, he immediately recorded his statement under Section 161 Cr.P.C. and named A-1 to be among the assailants. In his statement recorded under Section 164 Cr.P.C. also, he was categorical that A-1 was among the assailants seen by him. The robbed articles were recovered from the possession of the accused soon after the occurrence and they failed to explain how and under what circumstances they got possession of the gold articles belonging to the victims. Necklace recovered from A-1's possession had distinct features and the investigating officer was unable to get 'similar' property to be mixed with the case property. A-2 and A-3 were also

found in possession of robbed articles. They also refused to participate in the Test Identification Proceedings without any justification. The police was able to recover the motorcycle used in the commission of the crime. The blood group of deceased was detected on the clothes of the accused. Minor discrepancies or lapses in the investigation cannot be considered fatal to the prosecution's case. There was no inconsistency between ocular and medical evidence. Dr.Arvind Kumar (PW-4) who conducted post-mortem examination of the body opined that the injuries of the body were possible with the knife recovered from the possession of the accused.

8. We have heard the submissions of both the parties and have examined the Trial Court record minutely. At the outset, it may be mentioned that homicidal death of the child is not under challenge. Dr.Arvind Kumar (PW-4) proved the post-mortem report (Ex.PW-4/A) and was of the opinion that injuries No.1 to 6 were sufficient to cause death in the ordinary course of nature. The victim had 17 external stab incise injuries on the body. Indisputably, it is a case of culpable homicide.

9. Trial Court relied upon the testimony of PW-1 and PW-9 who claimed that they had witnessed the accused coming out of the house.

The accused vehemently challenged the findings of the Trial Court on this aspect.

10. PW-9 (Amita Goel), deceased's mother, claimed that on the day of occurrence, she reached the house at about 5:10 P.M. and found motorcycle Yamaha bearing No. DL3SAR-3954 parked in front of her house. She knocked at the door and called her son Vaibhav but he did not open it. She kept on calling her son. In the meantime, her neighbour Ram Kumar reached there. She saw three boys coming out of her house. One of them was recognised accused Mukeem (A-1) who was earlier employed as a driver by them. They started the motorcycle and left the spot. The other two boys were aged 19-20 years.

11. The occurrence took place in between 4:00 P.M. to 5:30 P.M. on 27.02.2006. DD No.21 (Ex.PW-17/A) was recorded at the police post Harsh Vihar at 5:55 P.M. Another DD No.22 (Ex.PW-17/B) was recorded at 5:50 P.M. It is not clear who were the informants. In DD No.21 place of occurrence was described House No.33A, Gali No.7, Bank Enclave. However, in DD No.22 the place of incident was stated A-14, Adarsh Gali, Bank Enclave. The victim was taken to GTB hospital in a PCR van and was medically examined vide MLC (Ex.2/A) at 6:16

P.M. The prosecution did not examine Head Constable Harsh of PCR who had taken the child to the hospital. The investigation was assigned to PW-17 (SI Ajay Singh Negi) who with ASI Jalbir, Constable Khurshit and Constable Ramesh reached the spot. After sending the victim in the PCR van to GTB hospital, he reached the hospital and collected the MLC where the child was declared brought dead. On return to the spot, he did not find any eye-witness. He made endorsement (Ex.PW17/C) on DD No.21 and sent the rukka through Constable Ramesh for lodging the First Information Report at 8:15 P.M. There is specific mention in the rukka (Ex.PW-17/C) that till the time of sending it, no eye-witness or family member of the deceased met him there. The rukka does not record presence of PW-9 (Amita Goel) and PW-1 (Ram Kumar) at the spot. They did not come forward to apprise the Investigating Officer that they had seen three assailants including A-1 coming out of the house. PW-17 (SI Ajay Singh Negi) was unable to make any inquiry and record their statements under Section 161 Cr.P.C. In the cross-examination, he reiterated that at the hospital or spot he did not meet PW-1 (Ram Kumar) and PW-9 (Amita Goel). PW-18 (Insp.Veer Singh Tyagi) came at the spot at about 9:00 P.M.

12. PW-9 was a clerk in Syndicate Bank, Preet Vihar. As per the attendance Register (Ex.DW5/DA) proved by DW-5 (Laxmi Narayan Udupa), the then Manager, she was present in the Bank from 10:00 to 5:00 P.M. He, however, stated in the cross-examination by APP that the clerical staff used to come to the Bank at 8:45 A.M. and leave by 3:45 P.M. but he had no record to show that on the day of incident Amita Goel was employed at the extension counter from 8:45 A.M. to 3:45 P.M. She used to travel by bus. Her version of reaching the spot at 5:10 P.M. that day has not been corroborated by any other evidence. Her conduct is highly unnatural and abnormal. When she knocked at the door of the house and did not find any response from inside, she did not raise alarm. When three assailants allegedly came out of the house after opening the door, she and PW-1 (Ram Kumar) did not confront them. No attempt was made to raise alarm at that time also. It is unbelievable that they (PW-1 and PW-9) would allow the assailants to flee on motorcycle. Even after coming to know about the brutal murder of the child, PW-1 and PW-9 did not report the incident to the police. They did not inform the neighbours or any other person about the complicity of A-1. According to the prosecution, on receipt of DD No.21 (Ex.PW7/8) SI Ajay Singh Negi had

reached the spot at about 6:00 P.M. but he did not find PW-1 (Ram Kumar) and PW-9 (Amita Goel) at the spot. The child was found inside the kitchen in injured condition and PW-17 sent him in a PCR van to GTB hospital. Neither PW-1 nor PW-9 accompanied the child to GTB hospital. None of them narrated the incident to PCR official or the Investigating Officer. The police was unaware till their statements were recorded under Section 161 Cr.P.C. at about 11:30 P.M. that they had seen the three assailants including A-1 coming out of the house. It is hard to believe that they would remain silent and not disclose the crucial clue to the police to enable them to apprehend the culprits immediately. The court can understand the mental condition and trauma of the mother after she found her son smeared with blood and became unconscious. However, it has come in PW-9's testimony that when she regained consciousness, she found several persons present in her house. Even then, she did not name A-1 to be one of the perpetrators of the crime. Police recorded her statement at 11:30 P.M. She did not explain the inordinate delay in making the statement to the police. In the cross-examination, she stated that she had questioned the assailants as to where her son was. She and Ram Kumar did not try to apprehend the accused. She admitted that she

did not notice any kind of weapon such as lathi, danda or knife in possession of the accused at that time. She did not disclose the number of the motorcycle to the police. It is highly improbable that PW-9 and PW-1 would not reveal the name of A-1 a prime suspect in the crime as there was no occasion for him along with two others to enter the house of the victim in her absence. A-1 was employed as driver about four years prior to the occurrence and was not a regular visitor to the house. The exit of the strangers from the house must have alerted the witnesses to name them immediately as suspects. These circumstances make her presence and her statement that she had seen A-1 to A-3 is highly suspicious and doubtful.

13. PW-1 (Ram Kumar) claimed that when PW-9 (Amita Goel) was knocking at the door, he happened to reach there. He testified that after some time, A-1 along with two boys came out of the house. When PW-9 (Amita Goel) asked them as to where her son Shanu was, A-1 replied that he was inside the house and thereafter, all the three went away on a blue colour motorcycle parked outside the house. The number of the motorcycle was DL-3SAR-3954.

14. Admittedly, PW-1 (Ram Kumar) did not report the incident to the police. He did not make call to police at No.100. He did not

accompany the victim to the hospital. The police reached the spot soon after the occurrence but did not find him at the spot. He did not come forward to disclose to the police that he had seen the assailants including A-1 coming out of the house. He did not confront the assailants and did not enquire as to why they had entered the house in the absence of PW-9 (Amita Goel). He did not attempt to catch hold of them or restrain them from fleeing on the motorcycle. Even after coming to his house which was at a short distance, he did not inform his wife and family members about the complicity of A-1. He attempted to explain his absence stating he had gone to Faridabad to attend a marriage. In the examination-in-chief, he did not give explanation as to why he did not report the incident to the police or the neighbours. He even did not testify that he had gone to attend the marriage at Faridabad. Only in the cross-examination, he came up with the plea that he left the house at 05.45 P.M. and went to Faridabad with her niece Dimple to attend a simple function of ring ceremony. He returned to the victim's house at 11.15 P.M. and his statement was recorded by Insp.Veer Singh Tyagi on 27.02.2006. He did not give any reason why he did not inform the police at number 100 and when the PCR officials reached the spot and took the child to the hospital, why he did not

divulge the assailants's name to them. SI Ajay Singh Negi has stated that he had sent the child to GTB Hospital in the PCR van. There was no excuse for PW-1 (Ram Kumar) not to name A-1 as one of the culprits to the Investigating Officer who was in search of eyewitnesses. Till he sent rukka at 08.15 P.M., PW-17 did not find any eyewitness and family member of the deceased. PW-1 (Ram Kumar) claimed close association with the victim's family for the last ten years. Such a close acquaintance is not expected to conveniently leave to attend a function after witnessing the gruesome incident and would not disclose the family members or relatives in the function about the incident. There was no hitch for PW-1 to report the occurrence to the police even during his presence in the function at Faridabad. His conduct is unreasonable and makes his presence at the spot doubtful. His plea that he had noted the number of the motorcycle on which the assailants fled the spot on his palm does not inspire confidence. This statement/conduct is contrary to the casualness shown is not informing and stating fact to the police. His statement on these vital facts has not been corroborated by any of his family member during investigation. Even after coming to know that the child was brutally injured and soon after the assailants including A-1 had come out

of the house, he did not raise alarm. He did not inform neighbours. In his examination, he admitted that he left the house after the police arrived the spot and took Shanu to hospital. His silence at that time not to disclose the material facts rules out his presence at the spot. He did not try to overpower the accused.

15. PW-15 (Sh.S.K.Malhotra, ACMM) recorded his statement under Section 164 Cr.P.C. on 08.03.2006. The Investigating Officer did not explain as to what forced him to get his statement recorded under Section 164 Cr.P.C., belatedly. In that statement also he disclosed arrival of the police in his presence but did not explain why he did not provide the crucial clue about the incident to them. PW-1 (Ram Kumar) appears to be a doctored witness. His statement cannot be reconciled with the contemporaneous official record i.e. DD entry No.21, rukka and the FIR.

16. PW-12 (Anil Kumar Goel) categorically claimed that A-1 was employed by him as a driver four years prior to the occurrence in 2002 on a monthly salary of ₹2,800/- and he worked for a month only. PW-9 (Amita Goel) corroborated his version and testified that A-1 worked as a driver with them. In the cross-examination, she explained that her husband did not know how to drive and he was employed as a driver for

one month in October, 2002. PW-1 (Ram Kumar) also deposed that he identified A-1 as he was a driver with PW-12 (Anil Kumar Goel). We have no reason to disbelieve PW-9 and PW-12 regarding employment of A-1 as driver with them. In their statements recorded under Section 161 Cr.P.C., they had disclosed to the police about his employment as driver with them. The police even visited A-1's house on the same night after getting his address from them. A-1 was arrested on PW-12's identification. They had no ulterior motive to falsely claim his employment as driver with them about four years prior to the incident. A-1 did not produce any document to show that he was minor in 2002, and had no licence to drive a four wheeler. Her mother appeared as DW-7 but did not claim that A-1 never worked as a driver with the family of the victim. In the absence of any material discrepancies in the statements of the witnesses, we are of the view that the prosecution established that A-1 worked as a driver with the family of the deceased in 2002. But this does not prove or show their involvement. This evidence indicates that the family members may have suspected involvement of A-1.

17. A-2 and A-3 were arrested on the night intervening 3/4.03.2006. On 04.03.2006, an application for conducting TIP was

assigned to PW-16 (Sh.Pooran Chand, MM) and he fixed 08.03.2006 for conducting it at Tihar Jail. However, A-2 and A-3 refused to participate in the Test Identification Proceedings and their statements were recorded. PW-16 proved the proceedings Ex.PW-16/A and Ex.PW-16/B. A-2 declined to participate in the Test Identification Proceedings alleging that he was shown to the witnesses in police post Harsh Vihar on 04.03.2006 at 11.00 A.M. and was beaten by them. This explanation may not be correct as no complaint was lodged by A-2 before the Metropolitan Magistrate before whom he was produced for seeking judicial custody remand. No such injuries were recorded by the concerned Metropolitan Magistrate during remand proceedings. A-3 did not participate in the Test Identification Proceedings stating that he was beaten by deceased's father at the police post Harsh Vihar on 03.03.2006 at 10.00 A.M. He further stated that there were four or five witnesses and other persons from the locality and he was shown to them. Again, this explanation may not be correct as no complaint was lodged with the Court at the time of his seeking custody. The application for Test Identification Proceedings was moved on 04.03.2006 itself, without undue delay and the accused were sent to judicial custody. The application was assigned to Link

Metropolitan Magistrate, Tihar Jail for 06.03.2006. There was thus no possibility of the police to show the accused to the witnesses as alleged. A-3 did not examine any witness to prove when and from where, he was arrested in this case. DW-1 (Devi Das) examined by him, merely stated that A-3 was not arrested on 03.03.2006 and 04.03.2006. DW-2 (Mumtaz) examined by A-2 merely stated that on 03.03.2006 at about 05.15 P.M. A-2 was forcibly lifted however, she did not lodge any complaint to the higher authorities for his arrest on 03.03.2006. PW-17 (SI Ajay Singh Negi) and PW-18 (Insp.Veer Singh Tyagi) categorically denied that the accused were shown to any witness after their arrest. No material contradictions have been elicited on this aspect in their cross-examination. We are of the view that the accused had no reasonable explanation to decline to participate in the Test Identification Proceedings. However, the moot question is whether PW-1 and PW-9 had in fact seen A-1, A-2 and A-3 on 27.02.2006. In view of the above discussion their statements to the said effect have been disbelieved. In these circumstances, the failure of the accused A-2 and A-3 to participate in the TIP or their recognition in the Court loses significance.

18. It is alleged that motorcycle No.DL-3SAR-3954 (Ex.PW-7/B) was recovered from the possession of A-1 on 03.03.2006 at the time of his arrest and seized vide seizure memo Ex.PW-7/B. The accused has disputed this circumstance. According to the prosecution, PW-1 and PW-9, had noticed motorcycle No.DL-3SAR-3954 parked outside the house and the assailants including A-1 had fled on it. PW-1 (Ram Kumar) even testified that he had noted the number of the motorcycle on his palm. However, neither did PW-1 nor did PW-9 report to the police that motorcycle (Ex.PW-7/B) was used in the commission of the crime. No such fact finds mention in the rukka (Ex.PW-17/A) sent by PW-17 (SI Ajay Singh Negi) at 08.15 P.M. PW-18 (Insp. Veer Singh Tyagi) deposed in the cross-examination that he had recorded the statement of PW-1 (Ram Kumar) and PW-9 (Amita Goel) in between 11.00 P.M. to 11.30 P.M. on 27.02.2006. He did not explain what steps were taken by him to intercept the motorcycle whose number was brought to his notice on 27.02.2006 itself. There is no evidence on record if any message was flashed to the various police stations to seize the motorcycle used in the offence. The Investigating Officer did not contact the Transport Authorities to find out as to who was the registered owner of the said

motorcycle. The police visited the house of A-1 on the night intervening 27/28.02.2006 but did not find the motorcycle there. On 03.03.2006, at the time of apprehension of the accused (A-1), the motorcycle was seized from his possession vide seizure memo (Ex.PW-7/B). No independent public witness was associated at the time of the recovery of the motorcycle. PW-12 (Anil Kumar Goel) was a witness to the seizure memo. However, in his examination-in-chief, he did not disclose that PW-1 or PW-9 had informed him that motorcycle No.DL-3SAR-3954 was used in the crime. The police did not join PW-1 and PW-9 at the time of seizure of the motorcycle. After coming to know that the police was in his search, after visiting his house, it is unbelievable that A-1 would roam freely with the motorcycle in question. Key of the motorcycle was not produced in the Court. PW-18 (Insp. Veer Singh Tyagi) admitted that seizure memo regarding key of motorcycle was prepared. When asked about the key, he stated that he did not know what happened with the key. Malkhana register No.19 (Ex.PW-15/C) did not record if key of the motorcycle was deposited. The IO also failed to collect any document to show that the motorcycle in question was registered in the name of the accused and if so, since when. Personal search memo Ex.PW-1/B reveals

that Registration Certificate recovered from the possession of the accused was in the name of one Sabina D/o Akram Ali. There is no mention if any driving licence was recovered at the time of arrest of A-1. All these circumstances cast serious doubt if motorcycle (Ex.PW-7/B) was recovered from the possession of the accused in the manner alleged by the prosecution or that the said motorcycle was used by the assailants to flee from the spot.

19. The possession of the fruits of the crime, soon after it has been committed, affords a strong and reasonable ground for the presumption that the party in whose possession they are found is the real offender, unless he can account for such possession in some way consistent with his innocence. However, the prosecution is required to prove beyond doubt that the suspect was found in possession of the robbed/stolen articles. The witnesses deposed that when they entered in the house after the occurrence, the articles in the house were found scattered. Cases of burglary by unknown persons are not uncommon. However in the present case, there is no evidence that the main door, or other windows or doors, were broken, to gain access to the house. Possibility of a known person knocking at the door to make an entry

cannot be ruled out, but it cannot be said with certainty that the deceased would have acquiesced Mukeem, who had worked for only one month about five years back, to enter the house, along with two others. Entry by someone who was better known is more probable. There is also a probability that the door may have been left open. Possibility of only one person committing both robbery and murder seems remote, keeping in view large number of stab wounds on the body and manner in which house was ransacked.

20. Photographs show that the almirahs were opened and household articles were scattered all over. From the photographs, and as per the prosecution, robbery was motive and the culprits had succeeded in taking whatever valuables they found. Detailed description of missing articles, which were later allegedly recovered from the accused, is relevant and important. At the same time, caution and care has to be taken to ensure that the valuables so recovered have not been planted.

21. As noticed above, in the present case testimony of Amita Goel (PW-9) has been disbelieved. It is apparent that PW-9 and PW-12 suspected and believed that A-1 was behind the said murder and robbery. This is clear from the fact that the police had visited A-1's residence on

the same night. As far as arrest of A-2 and A-3 is concerned, no public witnesses were joined. But, what makes the recoveries in the present case a suspect, are following reasons :

(i) No inmate of the house reported to the Investigating Officer that any article from the house was stolen/robbed in the incident. Rukka (Ex.PW-17/C) was sent for lodging First Information Report only under Section 302 IPC.

(ii) No list of missing articles with their description was given to the police during the initial investigation.

(iii) Details of missing articles were given by PW-12 only on 01.03.2006 after the cremation, though the offence was committed on 27.02.2006. The details were given only of three recovered articles i.e. one gold set, two bangles and two ear-rings. In addition, it was stated that ₹3500/- were missing.

(iv) The robbery therefore was of limited articles i.e. three in number. This appears and looks to be inconsistent with the manner in which the house was ransacked and the almirahs were broken.

(v) Loss of the said articles could have been easily ascertained and would not have required verification and inventory. The delay in

recording the details of the articles gave an opportunity and chance to plant recovery.

(vi) As per the prosecution version, one article each i.e. the gold set, two bangles and two ear-rings were recovered from A-1, A-2 and A-3, respectively. Therefore, recovery, as per the prosecution version, has been attributed to each one of three accused in respect of each stolen article.

(vii) The recovery in the present case is not substantial. The police allegedly recovered all the stolen articles i.e. the gold set, two bangles and two ear-rings on the same night intervening 03/04.03.2006 from different accused persons and at different locations.

(viii) The police visited A-1's house many times before his arrest on 03.03.2006 at about 09.00 P.M. No attempt was made by the police during those visits to search his house to recover the stolen/robbed articles.

(ix) Recovery from A-1 is under highly suspicious circumstance. It is stated that he was caught when he was riding a motorcycle and from his pants, the necklace i.e. gold set was recovered. Recovery from A-2 was made on 04.03.2006 from Loni, Ghaziabad, his brother-in-law's

house. Recovery from A-3 of ear-rings was made from the house of his maternal grand mother (nani).

(x) As per prosecution's case, the three appellant accused had not sold or disposed off any of the stolen articles, even after a gap of six to seven days. This does not appear to be probable and is contrary to normal human conduct.

(xi) Section 394 was added only on 01.03.2006, after the statements of Anil Goel and Amita Goel under Section 161 Cr.P.C. were recorded.

(xii) During the alleged recoveries from the possession of the accused or at their instance, no independent public witness was joined. The local police was not associated at the time of the recoveries.

(xiii) The Investigating Officer could not arrange similar necklace or ear-rings to be mixed with the recovered articles for holding Test Identification Proceedings. Consequently, Test Identification Proceedings qua necklace and ear-rings could not be conducted. No family member of the victim was present at the time of recovery of the ear-rings and bangles for identification. Description of the recovered articles including its

weight etc. has not come on record. The Investigating Officer did not collect any documents showing ownership of these articles.

Considering all these circumstances, the recoveries cannot be taken as incriminating circumstance against the accused.

22. It is alleged that on the night intervening 03/04.03.2006 A-2 also recovered a knife lying in the garbage on the roof of the house of his brother-in-law. No independent public witness was associated at the time of recovery of the knife. The knife had no specific identification mark. No photographs of the garbage on the roof were taken. The local police of Ghaziabad was also not informed about the raid and no police official from the local police station was joined in the investigation. It is not clear since when A-2 was residing with his sister. Recovery of knife under these circumstances from an open place accessible to all i.e. roof after six days of the incident is suspicious.

23. The knife was sent to Forensic Science Laboratory. The FSL reports reveal that human blood was deducted on it. However, its group could not be ascertained. Thus it cannot be said with certainty that the knife (Ex.P-1) was used in the commission of offence.

24. A-1, pursuant to his disclosure statement recovered his blood stained shirt lying in a bed box from his house. A-3 produced one yellow colour shirt and black pant which he was wearing at the time of occurrence. A-2 also produced one shirt of light purple colour and one light blue jeans from his house. For the reasons mentioned above, the recoveries of these clothes have not been established beyond reasonable doubt. No reliable evidence is on record to prove that the assailants were wearing these clothes at the time of incident. PW-1 and PW-9 could not prove that they had seen the assailants coming out of the house soon after the occurrence. There was no occasion for the accused to retain bloodstained clothes at their respective houses even after six days after coming to know that the police had suspected A-1 and had visited his house for apprehension. Of course, deceased's blood group (O) was ascertained only on T-shirt, another T-shirt and pant (jeans). The prosecution, however, did not establish what was the blood group of the accused. This blood group 'O' may belong to others as well.

25. There are inherent defects in the prosecution case. The crime team could not lift any chance prints/finger prints on any article. No efforts were made to find out if PW-1 (Ram Kumar) was residing in the

neighbourhood of the victim and was known to them and if so, since when or what business/job he used to do to earn his livelihood and what was its timings. The IO did not examine the shopkeeper from whom PW-1 had allegedly gone to purchase cigarette before reaching the spot. It was not investigated if there was marriage of PW-1's niece at Faridabad or he had attended the said marriage and if so for what duration. No call details of the witnesses and that of the accused were collected. There is no documentary evidence to show that A-1 was employed as a driver with the complainant and if so under what circumstances, he was removed from the job. There was no investigation about the antecedents of the accused to find out their involvement in any such criminal activity. It is not clear how and when A-1 to A-3 came into contact with each other to hatch conspiracy to commit the crime. It was not found from where the assailants had bought the knives. The police did not investigate what forced A-2 and A-3 to reside with his brother-in-law and maternal grandmother respectively. The police even arrested one Sagir who was discharged vide order dated 13.12.2011 by the Trial court. His arrest and involvement of a fourth person is inconsistent with the prosecution case. The police did not contact the transport authorities to find out who was the

registered owner of the motorcycle, when it was purchased and how it came into A-1's possession. Inspector Veer Singh Tyagi strangely came to know about the gruesome incident in his area only at about 9:00 P.M. after rukka was sent by PW-17 (SI Ajay Singh Negi) for registration of the First Information Report. Prior to that, two DD entries 21 and 22 had been recorded about the incident before 6:00 P.M. Despite that PW-18 did not bother to rush to the scene of occurrence to find out the details of the incident. When he was confronted on material facts and inquiries were made from him whether he had mentioned those facts in the case-diary, he expressed ignorance. He refused to refresh his memory after going through the contents of the case diaries. It is not clear in what manner the assailants gained entry inside the house and by what process the articles were robbed i.e. if the lock of the almirah was broken to take out the articles. Deceased's sister doing CA was not examined. It is not clear at what time she reached the spot from her place of work or if she had met PW-1 and PW-9 prior to the lodging of the First Information Report. The IO could not arrange 'similar' case property to be mixed with the recovered articles in Test Identification Proceedings. The IO did not flash message to intercept the motorcycle whose number was revealed to

him. The police did not search the house of the accused prior to their arrest. The IO did not record the statement of any employee of the bank where PW-9 used to work to find out at what time she had left the bank that day. No neighbour of the victim was examined to ascertain till which time PW-9 (Amita Goel) remained unconscious. PW-1's family members were also not examined to corroborate his version. PW-1 was facing trial in two cases, one under Section 307 IPC and other under Section 506 IPC. No documents regarding the ownership of the gold ornaments were collected. Cash of ₹3,500/- allegedly robbed could not be recovered.

26. Number of discrepancies have emerged in the testimonies of the witnesses. PW-5 (Const. Sunil) of Mobile Crime Team took photographs (Ex.PW-5/A1 to PW-5/A7). In the cross-examination, he disclosed that when they reached the spot, deceased's mother and sister were present in the house and were weeping bitterly. They remained at the spot for about 40-50 minutes and his statement was recorded by the IO at about 6:30 or 7:00 P.M. He deposed about the presence of Inspector Veer Singh Tyagi there at that time. PW-18 (Inspt.Veer Singh Tyagi) to the contrary claimed that he reached the spot at about 9:15 P.M. and did not find Amita Goel, deceased's mother, in the house. She met him at

11:00 P.M. as she had fainted and had come to the spot from the neighbourhood. PW-6 (Const.Ramesh) deposed that when he handed over copy of the FIR to Inspector Veer Singh at the spot, Amita Goel and Ram Kumar were present at the spot. In the cross-examination, he stated that when they reached the spot, one lady i.e. Amita Goel was lying unconscious. She was interrogated by the SHO at about 7:30 P.M. When rukka was sent, Amita Goel was present in her drawing room. He further stated that Ram Kumar remained present throughout at the spot and he could not tell the exact time when he left the spot.

27. PW-11 (SI Anil Kumar Pandey), Incharge Mobile Team, in the cross-examination revealed that during his visit from 6:30 P.M. to 7:20 P.M. he checked the entire house for lifting chance prints but did not find any female lying unconscious in the house. It contradicts PW-18's statement that he had requested the crime team at about 9:15 P.M. to inspect the scene of crime.

28. PW-7 (HC Vijay Kumar), member of the raiding team, stated that when they reached A-3's house he was found sleeping in the house. PW-17 (SI Ajay Tyagi) stated that he was sitting on a 'deewan'. They

gave different timings as to when they reached A-3's house. PW-18 stated that he did not see the accused sleeping in the house.

29. PW-7 (HC Vijay Kumar) gave inconsistent version as to how they reached the spot where A-1 was arrested. He stated that informer met them on the way at about 5:45 A.M. and left their company after 5-10 minutes. PW-17 (SI Ajay Singh) on the other hand deposed that he organized a raiding party and reached Kale Sarai. They received information that A-1 would come at the house of his in-laws at about 9:00 P.M. He passed on the information to the SHO and requested him to join Amita Goel or any other family member to identify A-1. At about 8:15 P.M. IO along with Anil Goel reached near IIT Gate and he verified the information from the secret informer. PW-18 (Inspt.Veer Singh Tyagi) still gave another version that on 03.03.2006 at about 6:00 P.M. he received information from SI Ajay Kumar Tyagi about the arrival of A-1. He, thereafter, went to Anil's house and took him along with him and reached Kale Sarai at 8:15 to 8:30 P.M. At about 9:00 P.M. A-1 was arrested and identified by Anil Goel. In the cross-examination, he disclosed that he had sent the vehicle to call Anil Goel. Anil Goel met them at his house at about 6:15 P.M. PW-15 (Anil Goel) contradicted him

and in the examination-in-chief deposed that on 03.03.2006 at about 6:30 P.M., he visited PS Nand Nagri and was associated in the investigation by the police.

30. On the basis of above discussion, we hold that the prosecution failed to establish the chain of circumstances which could link the appellants with the crime. In the result, the appeals are allowed and the impugned judgment is set aside. The appellants are acquitted giving them benefit of doubt. The appellants shall be released forthwith if not required to be detained in any other case. The Trial Court record be sent back forthwith. All pending applications stand disposed of.

(S.P.GARG)
JUDGE

(SANJIV KHANNA)
JUDGE

September 21, 2012
sa/tr