

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

Date of reserve : 01.03.2012

Date of decision:21.03.2012

+ **CRL.A. No. 1590/2011, Crl. M.(Bail) 2303-2304/2011**

SANJAY SONKAR & ANR.

..... Appellant

Through : Mr. Naveen Gaur with Mr. Kaushlinder Singh
Advocates.

Versus

STATE

..... Respondent

Through : Mr. Sanjay Lao, APP.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE S.P.GARG

MR. JUSTICE S. RAVINDRA BHAT

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1. In this appeal, correctness of the judgment and order of the learned Additional Sessions Judge, Delhi, dated 11-11-2011 convicting the present appellants for the offences punishable under Section 302/34, and sentencing them to undergo imprisonment for life, has been impugned. Although the

appeal was registered before this Court in 2011, the Court heard the matter finally since the incident took place in December, 2003, and the Appellants have been continuously in custody for over 8 years. The Trial Court records were called for, and considered, in the light of the submissions made by counsel for both parties.

2. The prosecution case is that in an incident which took place at 03:15 PM on 06.12.2003, one Ajay was shot dead by the present appellants. The prosecution alleged that the motive for the crime was that the deceased had complained and deposed against the accused in a previous incident, in which they were accused of and implicated in, having committed an offence punishable under Section 308 IPC. According to the prosecution, intimation about the commission of the offence was received by the police, through a PCR intimation on the day of the offence at 03:25 PM (Ex.PW-08/A). The prosecution alleged that as soon as intimation was received about the incident, PW-9 reached the spot of occurrence since the police post was less than a kilometer away. The injured Ajay was taken away to the hospital in a gypsy vehicle. It was alleged that the injured Ajay was taken to the Penta-Med Hospital at 03:30 PM (EX PW-17/A). It is also alleged that the statement of the complainant/informant Sanjeev Kumar, who deposed during the trial as PW-7, was recorded at 05:30 PM after which the F.I.R. was registered. In the statement recorded by PW-7, it was alleged that the present appellants had approached Ajay, held out a threat that since he had deposed against them and that as they had now been cleared or acquitted, they would get rid of him from the world. After uttering these words, the deceased Ajay

was fired upon with country- made pistols. Upon his being taken to the hospital, he was declared dead.

3. On the basis of the information collected, and statements recorded, the police started investigation into the crime; after its conclusion, the accused, who were arrested in the meanwhile, were charged with having committed the offences for which they stood trial. They entered the plea of not guilty; the prosecution, therefore, lead evidence in the form of oral testimony of 25 witnesses, besides other materials such as post-mortem report, ballistic report, seizure memos etc. After considering all this, the Trial Court, by the impugned judgment held that the appellants were guilty as charged and sentenced them to undergo prison terms mentioned previously in this judgment.

4. It is argued on behalf of the appellants that the impugned judgment is unsustainable because it has glossed over vital contradictions and discrepancies in the testimonies of the prosecution witnesses and also failed to take into consideration glaring omissions and gaps which would have led to the benefit of doubt being given to the accused. While not disputing that the accused had been implicated in a previous offence, where it had been alleged that they had committed acts of aggression against the deceased, learned counsel emphasized that after full trial, the appellants had been acquitted. Therefore they really did not have any motive for committing the crime contrary to what was argued before the trial court and accepted readily by it.

5. It was argued that the Trial Court was unduly influenced by the testimonies of PW-2 and PW-7 the so-called eyewitnesses. Here it was

pointed out that both the witnesses were brothers of the deceased. They could not consequently by any means, be termed as independent; they were clearly partisan and had an interest in implicating the accused. Learned Counsel emphasized that the testimonies of these two witnesses clearly established that at least three others were present during the alleged incident and were eyewitnesses. These three were Santosh, Jaibhagwan and Bhajan. The prosecution story about PW-2 and PW-7 being present at the site could not be believed for the reason that the MLC in this case, PW-17/A mentioned the names of the said three individuals who had not been examined as witnesses and did not mention the names of these two witnesses who claimed to have been present at the spot when the shooting incident occurred. Characterizing this to be the clearest pointer to the un-tenability and falsity of the prosecution version, learned Counsel urged that the Trial Court fell into error in not giving any importance to this aspect.

6. It is urged that not only did the non-examination of three independent witnesses seriously undermine its credibility, what the Trial Court overlooked was the fact that the testimony of PW-21 mentioned that the statement of PW-7 was recorded at 07/08:00 PM. Elaborating on this aspect it was urged that even though the prosecution witnesses deposed that the special report was sent to the Magistrate at around 10 PM that night, the evidence on record revealed that the concerned Magistrate received the report much later, at 06:00 AM next morning. This fact gave a complete lie to the prosecution story that the F.I.R. was registered around 06:00 PM the previous evening. In fact the deposition of PW-21 about the statement being recorded much later, and the special report in fact being received by the

Magistrate nearly 10 hours later, casts grave doubts and suspicions about the real time when the FIR was registered. The prosecution was clearly under a duty to explain this delay; since none was offered or even given in the present case, the court ought to have concluded that the F I R was ante-timed.

7. PW-2 Vijay Kumar, brother of the deceased stated that on the fateful day, he was sitting at his *thiya*, whereas his other brothers Ajay and Sanjeev were also sitting on their *thiyas*. His father had left the vegetable market by that time for their house. There were four *thiyas* between his *thiya* and that of his brother Ajay. Sanjeev's *thiya* adjoined his *thiya* and the distance between that and the *thiya* of Ajay was 20 paces. He deposed that the appellant Sanjay, Sonu and another Sonu son of Jagdish were roaming around with their associate Kanchu near the vegetable market for the last 20-25 minutes. The witness further stated that Sanjay was known to him earlier as he was an accused in another case involving Ajay, where the latter was the complainant; he was roaming around in the vegetable market at Azadpur and he knew the other accused Pappu son of Roshan Pehalwan who also was roaming around in the market. He further claimed that he knew Sanjay's elder brother, Pappu. According to him Ajay was sitting on his stool at his *thiya*, and Pappu went near that; at that time he saw a country made pistol in the hand of Sanjay and Sonu son of Roshan had a long knife in his hands. Sanjay kicked Ajay due to which he fell down from the stool. Sanjay took out his weapon, pointed it to the right side of Ajay's abdomen and challenged him by saying “*Sale tere chakkar mein court ke teen sale kate hai, hum bari ho gaye, aj tujhe duniya se bari kar dete hain*”, after which

Sanjay fired a shot at Ajay and injured him. The witness deposed that Sonu, son of Roshan Pehalwan attacked Ajay with his knife and stabbed his head. The other accused Sonu, who had a knife, stepped on the right arm of Ajay to ensure that he did not get up; all the accused surrounded him. When Ajay tried to get up, Sanjay loaded his *katta* and fired again and caused injuries on his right shoulder. Sonu son of Roshan continued stabbing Ajay, while the other Sonu was standing, keeping his legs on Ajay, and waving his knife in the air threatening to stab anyone who went to save the injured. PW-2 claimed that he raised an alarm to save his brother from the accused. According to him Pappu too stabbed Ajay on the chest, also holding out a threat that in case somebody moved forward to save him, he too would face dire consequences. PW-2 alleged that as a consequence of this fear, no one went forward and were terrorized. After this attack all the accused and Pappu ran towards the pan shop *thiya*. While running, they continued to threaten members of the public that in case anybody interfered with them, he too would be stabbed; they were also waving their weapons in the air. PW-2 also deposed that the incident was witnessed by his brother Sanjeev; Ajay was wearing a jacket and grey coloured trousers; he was taken to the Pentamed hospital by Sanjeev and his servant Subedar (i.e. Santosh Subedar), who was also sitting there. PW-2 left for his house to collect money and also inform people there. Whilst at home he received a call asking him to reach the hospital; his mother gave him ₹ 10,000/-; he went to the hospital. Ajay was breathing but he immediately died thereafter. The police too reached the hospital.

8. PW-7 was the informant; he mentioned that the incident occurred at 3:00 PM or 3:15 PM when Ajay was sitting on his seat at the shop in the market. All the accused went to the shop; Sanjay held a *Katta* and the other accused were holding knives. Sanjay told Ajay that he had made him appear in the court for three years and that he had been acquitted; he further stated that he (Sanjay) and the other accused would acquit him i.e. the deceased from the world. According to the witness, Sanjay then placed the *Katta* on Ajay's abdomen and fired a shot; the injured fell forward and the other accused started giving him knife injuries. Sonu, son of Roshan, gave knife blows on the head and the other Sonu, son of Jagadish, stood on the hands of his brother while brandishing their knives and abused him. The accused Sanjay loaded his katta and, after abusing him, fired at his hand. Then, they all ran away shouting and abusing. PW-7, along with members of the public in the Mandi and his servant Santosh, lifted Ajay; at that time he was breathing. They took him to the Pentamed hospital, where he expired half an hour later.

9. Counsel for the appellant argued that the depositions of both PW-2 and PW-7 were untrustworthy and it was extremely doubtful whether they were in fact eyewitnesses. It was argued in this context that PW-2's conduct was highly unnatural. Though he saw his brother Ajay being attacked and there was a fair chance to save him, since the other brother Sanjeev was admittedly present, and could have easily overcome the assailants, neither of them took any action. It was highly improbable that when a relative and a sibling was brutally attacked,

brothers would be mute spectators and continue to watch the spectacle without even making an effort to save the victim. It was argued that there were material contradictions about the attack itself. The testimony of PW-2 showed that two shots were fired at Ajay. It was alleged that he was alive when being taken to the hospital. PW-2's testimony showed that everything did not happen at one go; they first confronted Ajay, then Sanjay fired a shot and after that other accused stabbed Ajay. There was sufficient time if the brothers had so chosen, to intercede and stop the attack upon Ajay. It was argued that this unnatural conduct is underlined by the fact that PW-2 admittedly did not accompany his brother when he was taken to the hospital. He unhurriedly went home, claiming that money was needed. If in fact he had witnessed a horrendous event such as a murderous attack upon his brother, he would barely have had his wits about him and certainly not been composed enough to realize the necessity of going home and collecting cash with a view to taking it to the hospital for the purpose of treatment of the injured. The first instinct in such emergencies would be to be with the injured and rush him to the hospital so that no time is lost. Learned counsel emphasized that in fact if PW-2 had witnessed the incident, the testimony could have been easily corroborated by other independent witnesses whose names emerged from the record, but in respect of whom the prosecution made no effort to corroborate the allegations against the accused.

10. It was contended that the prosecution story was also unbelievable, because if indeed PW-7, the informant, had gone to the hospital, and accompanied the injured Ajay, there was no reason why the doctor who recorded the MLC would not have mentioned his name. In this respect,

much emphasis was placed on Ex. PW-17/A, the MLC, which lists Santosh, Jai Bhagwan and Bhajan. Counsel submitted that even PW-7 admitted that these individuals had gone to the hospital. The non-examination of these natural eyewitnesses ought to have led the Trial Court to draw an adverse inference against the prosecution. Its omission to do so rendered its findings liable to be interfered with.

11. Counsel argued that apart from Ex. PW-17/A, there were other materials in the form of testimonies of PW-17 and PW-21, which established that PW-7 did not go to the hospital as was claimed by him. They significantly failed to mention his presence; however the names of the other three individuals were stated. This clearly established that neither PW-2 nor PW-7, the brothers of Ajay, in fact reached the hospital, contrary to the latter's claims. This was unnatural conduct, which the Court should have taken due note of, and been cautious in accepting their version. Counsel relied on the decision reported as *Darya Singh v State of Punjab* AIR 1965 SC 328 to urge that the Courts should be slow in accepting the testimonies of relatives, who claim to be eyewitnesses to an incident which is a criminal offence, in view of the propensity to readily indulge in false implication.

12. It was next argued that there were, besides the suspicious circumstances other material discrepancies in the prosecution story which rendered it unreliable. Counsel contended that the eyewitness testimonies varied about the number of injuries inflicted on the deceased; whereas one witness stated that 11 injuries were inflicted, the other stated that only 4 were inflicted. The medical evidence however belied either version. It was argued further that the omission by the police to seize the blood smeared clothes of

PW-7, or that of PW-2 (since the latter claimed that his clothes were blood stained when the deceased was lifted and taken to the hospital); the failure to give the alleged weapon of offence to the doctor for his opinion, and the circumstances surrounding the alleged arrest of the appellants, created grave doubts and suspicions about the veracity of the prosecution story, which could not have been taken at its face value.

13. Learned counsel made a serious grievance that despite availability of several public witnesses, the prosecution did not choose to examine any one of them; that cast a cloud on its fairness, and the entire truthfulness about the involvement and role of the accused. Taken together, these materials were insufficient to conclude that the accused were guilty beyond reasonable doubt.

14. The learned APP urged that the court should not interfere with the findings impugned in the appeal, as there are no compelling circumstances or errors vitiating it. It was urged that both PW-2 and PW-7 were natural witnesses, who were present at the spot, and had witnessed the crime. It was not a case where these witnesses would not have been at the scene of crime, in the natural course of events. Counsel urged that there was no occasion or motive for these witnesses to falsely implicate the accused. Elaborating on this aspect, the APP urged that all the brothers were carrying on business at Sabzi Mandi, when the accused suddenly reached the scene. It was emphasized that the deceased Ajay was repeatedly assaulted by all the accused; they made sure that no one could reach him to save him from their clutches. It was argued that Sanjay took advantage of the helpless position the deceased was in, and fired two shots with his *katta*.

15. The APP argued further that there was hardly any scope for manipulation or false implication, because the crime was reported almost instantaneously. Emphasizing that the first intimation was at 3-25 PM on the date of the incident, the APP urged that the deceased was taken to the hospital immediately, as corroborated by the MLC, which recorded the time as 3:30 PM (EX PW-17/A). It was urged that even though the name of PW-7 was not recorded in the MLC, and that of the others was shown, that did not, in any manner detract from the essential truth of the prosecution version regarding involvement of the accused. It was highlighted that the doctor who recorded the MLC was not expected to find out and write the names of all those who accompanied the injured. The APP relied on the reasoning in the impugned judgment, and argued that non-examination of the witness was not fatal to the prosecution in this case. The prosecution also relied on the ordersheets of the Trial Court to say that the two witnesses cited, Subedar and Sanjiv, repeatedly said that they were threatened. Even the application moved by the police for their examination through video conferencing was not accepted, by the Trial Court. This revealed that the witnesses were intimidated in this case, despite the accused's continued detention.

16. The learned APP argued that there are no material discrepancies in the testimonies of either eye-witnesses. Apart from being natural witnesses, PW-2 and PW-7 corroborated each other about the nature and sequence of attack. There could be minor variations, since no two individuals can perceive and narrate events in the same sequence; much would depend on how they saw them, and the vantage points they were in. Therefore, variations in testimonies regarding the number of times one or the other attacked the

deceased, the number of injuries, etc, were not of much consequence. Counsel argued that in fact if the two witnesses had not seen the incident, they would not have been able to assign the role to each accused; both of them did so, clearly, and corroborated each other on all material aspects, in this regard.

17. It was argued that the Trial Court for all the right reasons disbelieved the testimony of PW-21, because if indeed he had gone to the site at the time deposed to by him, he would in all likelihood have witnessed the incident, which he did not. Similarly, urged counsel, the Trial Court applied its mind carefully to the facts, and all the evidence led during the trial and concluded that Sonu s/o Jagadish was not guilty, and accordingly acquitted him. Having regard to the role of the other accused, i.e. Sanjay and Sonu, of firing and stabbing the deceased, the conviction for the offences punishable under Section 302/34 as well as the offence under the Arms Act, was justified.

18. The above narrative shows that the prosecution's case was that the incident took place at around 3 or 3:15 PM. PW-2 and PW-7 are the prosecution's lynchpin; their eyewitness testimony has been completely believed by the Trial Court. It would therefore, be necessary to test their depositions, to see if there is any false note or major contradiction. During the course of hearing, the appellant's counsel was able to point out some discrepancies as regards the number of injuries inflicted upon the deceased; one witness said four injuries were inflicted; the other mentioned more. Similarly, PW-7 observed the incident from his *thiya*, behind some wooden *pattis*. There are undoubtedly variations. One important argument of the

Appellants was that neither of the witnesses made a move to save the deceased. Though this argument appears attractive, one has to keep in mind normal probability and human conduct in such situations. Both the witnesses, who are no doubt brothers of the deceased, are consistent about the attack, in which the victim was first felled to the ground, shot, and stabbed. Although the role of the co-accused was not prominent, as to warrant his conviction, since he was alleged to have kept his foot on the deceased, the role of the present appellants was consistently spoken to. Both were armed; one with a knife and the other with a long knife. The witnesses deposed that the accused repeatedly held out threats, and said that anyone who tried to save or rescue the deceased would also face dire consequences. It is not unreasonable conduct in such cases, even for near relatives to pause, and stand back. This view finds support in the decisions reported as *Gurmej Singh v State of Punjab* 1999 (Supp) SCC 75 and *Tanviben Pankajkumar Divetia v State of Gujarat* 1997 (7) SCC 156. In these circumstances, the conduct of the eyewitnesses in not rushing to save the deceased, while the attack was on, cannot be called unnatural.

19. The second argument which the appellants had made was that PW-2's conduct in not accompanying his injured brother, shows callousness and was highly unnatural. If a reasonable man witnesses a crime, involving his brother, his first instinct would be to take him to the nearest hospital; he did not go there, and went home. Though the argument seems attractive, what the witness said cannot be torn out of context; he clearly mentioned about going home, informing people there, and fetching money. He stated that on reaching home he received a telephone call to reach the hospital

immediately; his mother gave him ₹ 10,000/- which he took to the hospital. Ajay, the victim, breathed his last, after the witness reached there. This conduct, in displaying some presence of mind, in going home to collect money which could possibly be needed for the treatment of the injured brother, and then going to the hospital cannot be termed unnatural. Such behavior is unusual, but not suspicious or unnatural – unusual because not all individuals have their wits about them to react calmly enough to take informed decisions. The Court also notices that the Pentamed hospital is a private institution, and the witness was justified in assuming that some money might be required. This Court does not therefore, find any merit in this submission.

20. The next submission about non-examination of other witnesses who were concededly present at the spot, at the time of occurrence has to be carefully considered. The effect of failure to examine an important witness has been the subject of debate in several decisions. The matter was placed in its proper perspective, in the decision reported as *Takhaji Hiraji v. Thakore Kubersing Chamansing*, (2001) 6 SCC 145 as follows:

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19. So is the case with the criticism levelled by the High Court on the prosecution case finding fault therewith for non-examination of independent witnesses. It is true that if a material witness, who would unfold the genesis of the incident or an essential part of the prosecution case, not convincingly brought to fore otherwise, or where there is a gap or infirmity in the prosecution case which could have been supplied or made good by examining a witness who though available is not examined, the prosecution case can be termed as suffering from

a deficiency and withholding of such a material witness would oblige the court to draw an adverse inference against the prosecution by holding that if the witness would have been examined it would not have supported the prosecution case. On the other hand if already overwhelming evidence is available and examination of other witnesses would only be a repetition or duplication of the evidence already adduced, non-examination of such other witnesses may not be material. In such a case the court ought to scrutinise the worth of the evidence adduced. The court of facts must ask itself - whether in the facts and circumstances of the case, it was necessary to examine such other witness, and if so, whether such witness was available to be examined and yet was being withheld from the court. If the answer be positive then only a question of drawing an adverse inference may arise. If the witnesses already examined are reliable and the testimony coming from their mouth is unimpeachable the court can safely act upon it, uninfluenced by the factum of non-examination of other witnesses. In the present case we find that there are at least 5 witnesses whose presence at the place of the incident and whose having seen the incident cannot be doubted at all. It is not even suggested by the defence that they were not present at the place of the incident and did not participate therein. The injuries sustained by these witnesses are not just minor and certainly not self-inflicted. None of the witnesses had a previous enmity with any of the accused persons and there is apparently no reason why they would tell a lie. The genesis of the incident is brought out by these witnesses.

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21. It would be worthwhile to recapitulate, in the present context, the proceedings before the Trial Court. The prosecution had sought examination of Subedar; on several dates of hearing, orders were made, for service of summons to Subedar, i.e. on 3-3-2007 (when process was not received back); 30-4-2007 (process was received back unserved). On 22-8-2007 an

application was moved that Subedar was afraid of the accused, and that his deposition be recorded through video-conferencing. On 25th August, 2007, the accused's counsel was unavailable; the application for videoconferencing had to be taken up later. 29-9-2008, Trial Court most curiously by its order said that video conferencing would be lengthy and time consuming, and turned it down. A direction was given to IO to provide adequate security to Subedar to depose in the Court. Counsel for the accused said that the threat allegation was unfounded; he also said that the Subedar could be provided security. Importantly, Counsel did not oppose video conferencing. These circumstances were set out by the Court to show that even though in principle no opposition was made for recording evidence through video-conferencing, the Court rejected it on flimsy and untenable grounds. This Court is of opinion that such a view (that video-examination would have been lengthy and time consuming) was misconceived to say the least. It showed a technology resistant approach by the concerned Judicial Officer, who was perhaps unwilling to innovate. The result was that eventually Subedar could not be examined.

22. The second witness, Sanjiv Kumar Banga, on 6-2-2009, complained that he had received threats from the accused persons. Subedar was summoned for the same day; he did not appear. Again, on 9-2-2009 Subedar did not appear; a bailable warrant was issued, and final opportunity was given to the prosecution to produce Subedar. A fresh application was made to provide security to Sanjeev Kumar Banga, though he had given his evidence. The order dated 27-4-2010 gave special directions to the beat officers and constable in the area, to keep special vigil; also a direction to

take special measures for Banga's security. The order of 21-10-2010 records that the prosecution did not furnish any special reason why Subedar was not examined till date. Subedar was asked to be served on 30-11-2010 and directed to be served through SHO. The order of 7-2-2011 states that Subedar could not be served either through SHO or DCP; the Court therefore gave him up.

23. The preceding discussion would reveal that Subedar was initially willing to be examined, if the Court facilitated the process through video-conferencing. The Court for entirely illogical reasons denied the request. The process of trying to serve him took unduly long; the police was not able to trace and serve him. The record also reveals that even the witness who had deposed, sought police protection, stating that he was threatened. Having regard to all these circumstances, this Court is of the opinion that the prosecution could not be faulted for the non-examination of the other witnesses, nor can any adverse inference be drawn in that regard.

24. The next submission which the Court proposes to deal with is delay in sending the special report under Section 157 of the Code of Criminal Procedure, to the concerned area Magistrate. There is no doubt that sending the report is an important check on the powers that the constabulary exercises, and is one method of verifying whether the FIR was lodged in time, and the version of the concerned witnesses, recorded contemporaneously, to rule out false implication. Yet, this is one requirement, and there is no immutable rule that delay in sending that report has to be invariably fatal to the prosecution case. In the judgments of the Supreme Court, reported as *State of Punjab vs. Phola Singh & Anr.*, (2003)

11 SCC 58; *Balram Singh & Anr. vs. State of Punjab*, (2003) 11 SCC 286; and *Kamma Otukunta Ram Naidu vs. Chereddy Pedda Subba Reddy & Anr.*, (2003) 11 SCC 293, the delay of a few hours in delivery of the special report at the residence of the area Magistrate was not found to be of any significance. In *Phola Singh*, the High Court had observed that there was unusual delay in lodging the FIR, which was registered after deliberation. The incident took place at 5:30 AM; the FIR was lodged at 10:45 A.M. and the special report reached the Magistrate at 2:40 P.M. on the same day. There was evidence that the distance between the Police Post and the Illaqa Magistrate was about 20 Kms. The Supreme Court held that if any question had been put to the Investigating Officer about the time taken in reaching the special report to the Magistrate, the Investigating Officer would have been in a position to explain the delay, if any. Without seeking for a response from the Investigating Officer, it was not open for the accused to allege that there was delay in sending the report.

25. In *Balram Singh*, it was observed by the Supreme Court that if the ocular evidence adduced by the prosecution was worthy of acceptance the element of delay in registering the FIR/complaint or sending the same to the jurisdictional Magistrate by itself would not in any manner weaken the prosecution case. Similarly in *Kamma Otukunta*, the Supreme Court held that where the occurrence had taken place at about 6:30 A.M., the FIR was lodged at 10:30 A.M., the reporting of the FIR at 4:15 P.M. (to the Magistrate) did not mean that there was a delay caused in receipt of the FIR in the Court.

26. In this case, the FIR was endorsed by the Magistrate at 6:00 AM, next morning. Facially, there is delay. However, that factor would become material if there are other suspicious circumstances, which emerge from the record, after an overall analysis of the evidence.

27. The appellants had urged that PW-7's presence as an eyewitness was suspect, because of the fact that the MLC – the earliest objective material on the record, did not show his presence, though it revealed three names, i.e. Santosh, Jaibhagwan and Bhajan. Apart from not examining anyone of them, the absence of PW-7's name in the MLC rendered his version suspicious. PW-17, the doctor did mention in the cross examination that usually the hospital would record the names of those who accompany a victim, and an effort is usually made to identify if a relative of the victim accompanies the victim. The question is whether the omission to mention PW-7's name falsifies his evidence. In almost similar circumstances, the Supreme Court rejected the submission that such an omission is fatal to the prosecution case, in the following terms, in *Sukhchain Singh v State of Haryana* 2002 (5) SCC 100:

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As in the medico-legal report Ext. PE, name of PW 1 was found not mentioned, the High Court presumed that he had not accompanied the injured. Such an assumption is not referable to any legal or factual presumption. It is in evidence that Sukhchain Singh, accompanied by his cousin Jai Karan and other relatives had taken the injured to the hospital. In the report Ext. PE in the column "name of relatives and friends", the name of Sukhdev Singh is mentioned by the doctor. Omission to mention the names of other relatives in the said certificate cannot be attributed to any of the prosecution

witnesses. No question is shown to have been put to PW 1 as to his presence or alleged absence at the time of preparation of medico-legal report Ext. PE. It is neither the requirement of law nor usually expected that names of all the relatives of the injured should be mentioned in the medico-legal report prepared by the doctor in his discretion.

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Therefore, the absence of PW-7’s name from the MLC would not vitiate his evidence; there can be no assumption that he did not witness the incident. There is other material, in the form of witnesses’ statement, supporting his presence. Moreover, he was extensively cross examined on this aspect by all the accused. In fact, during the cross examination, he stated the circumstances under which the deceased was taken to the hospital, i.e. in a red Maruti, and was accompanied by the others, Santosh Subedar, Jaibhagwan and Bhajan. He correctly mentioned their vocations, and also elaborated that Santosh Subedar used to work for the deceased. PW-7’s deposition, in the Court’s opinion, has a ring of truth and cannot be discarded, as is urged on behalf of the Appellants.

28. As regards the submission that there is inconsistency with respect to the number of injuries inflicted, in the testimonies of PW-2 and PW-7, as well as contradictions about the sequence of the attack, this Court recollects the judgment of the Supreme Court in *Rana Partap and Ors.Vs.State of Haryana* (1983) 3 SCC 327

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Every person who witnesses a murder reacts in his own way. Some are stunned, become speechless and stand rooted to the spot. Some become hysteric and start wailing. Some start shouting for help.

Others run away to keep themselves as far removed from the spot as possible. Yet others rush to the rescue of the victim, even going to the extent of counter-attacking the assailants. Every one reacts in his own special way. There is no set rule of natural reaction. To discard the evidence of witnesses on the ground that he did not react in any particular manner is to appreciate evidence in a wholly unrealistic and unimaginative way.

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Furthermore, the Courts should also be conscious of the fact that minor discrepancies are bound to arise between the testimonies of witnesses. Sometimes, consistency in all particulars alerts the Court to the possibility of the witness being tutored. Whether the inconsistencies between witnesses’ depositions are on material or vital aspects is also important. A useful guide to considering testimonies of ocular witnesses was expressed in the decision in *State of U.P. v. M.K. Anthony* AIR 1985 SC 48, thus:

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While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view the deficiencies, draw- backs and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hyper- technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole. If the court before whom the witness gives evidence

had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details. Even honest and truthful witnesses may differ in some details unrelated to the main incident because power of observation, retention and reproduction differ with individuals. Cross examination is an unequal duel between a rustic and refined lawyer.

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29. In this case, the variations and discrepancies between the testimonies of PW-2 and PW-7 are not vital. There is no variation as to who were the attackers, or the place of the incident; nor is there any variation or contradiction about the role played by the different accused, or the time when the incident took place. Similarly, both the witnesses reached the hospital, within reasonable time; PW-7 accompanied his injured brother; PW-2 went home to collect money, and then went to the hospital. The statements of these witnesses were also recorded by the police within a reasonable time. As a result, the variations about the sequence of attack, or the number of injuries inflicted, would not deflect from the credibility of their testimonies.

30. An argument had been made by the Appellants about the prosecution version being untrustworthy, on account of the testimony of PW-21, the brother-in-law of the deceased. This witness mentioned having been informed that the incident took place, at around 3:00 PM on the date of occurrence; he also stated that he reached the hospital around 3:30 PM. He

denied knowledge about who were the attackers; the witness appears to have deviated from the statement recorded under Section 161 Cr. PC and was put leading questions by the prosecution with the permission of the Court. While this testimony is no doubt at variance with that of the other witnesses, much significance cannot be attached to his deposition because he did not claim to have actually seen the incident. Even if he had named the accused, that would have been at best hearsay evidence. Therefore, we are of the view that the Trial Court correctly rejected his deposition.

31. The motive for the crime emerges, in this case, from the testimony of PW-7; he stated that Sanjay was known to him earlier as he was an accused in another case involving Ajay, where the latter was the complainant; he also knew him as he used to roam around in the vegetable market at Azadpur and he knew the other accused Pappu son of Roshan Pehalwan; they too used to frequent the market. In the previous case, FIR No. 498/ 2000, the appellant Sanjay and another had been accused of committing the offence punishable under Section 308, IPC. In this background, Sanjay pointed a *katta*, at Ajay and said “*Sale tere chakkar mein court ke teen sale kate hai, hum bari ho gaye, aj tujhe duniya se bari kar dete hain*” The witness, PW-7 was cross examined extensively on this aspect. However, his testimony remained unshaken. The appellant Sanjay and his associates were acquitted of the charges leveled against them in the earlier incident; this was the cause of their angst and grudge. That also proved to be the motive for the murder of Ajay.

32. This Court is of the opinion that the Trial Court’s reasoning, in acquitting one of the co-accused, on the ground that his role as an

accomplice with common intent to commit the offences was not proved, cannot be faulted. The fourth accused eluded justice, and was declared as a proclaimed offender.

33. In view of the above discussion, this Court is of the opinion that the reasoning and findings of the Trial Court, convicting the Appellants for the offences, in the manner, recorded in the impugned judgment, are sound. The appeal therefore, has to fail; it is accordingly dismissed. All the applications also stand disposed of.

S. RAVINDRA BHAT
(JUDGE)

S.P.GARG
(JUDGE)

MARCH 21, 2012