

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

**RESERVED ON : 27th JULY, 2012
DECIDED ON : 23rd AUGUST, 2012**

+ Crl.A.03/2012

MOHD. SALEEM Appellant
Through : Mr.R.M.Tufail, Advocate with
Mr.Vishal Sehijpal, Advocate.

versus

STATE (GOVT. OF NCT OF DELHI) Respondent
Through : Ms.Richa Kapoor, APP.

**CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE S.P.GARG**

S.P.GARG, J.

1. The appellant Mohd.Saleem has preferred this appeal against the judgment dated 16.11.2011 and order on sentence dated 18.11.2011 of learned ASJ in SC No.42/2010 by which he was convicted for committing offences punishable under Sections 302/147/148 IPC and 326/149/34 IPC and was sentenced to undergo imprisonment for life with fine of ₹5,000/- under Section 302 IPC; imprisonment already undergone with fine of ₹2,000/- under Section 326/149/34 IPC; imprisonment for two years with fine of ₹500/- under Section 148 IPC and imprisonment for one year with

fine of ₹500/- under Section 147 IPC. All the sentences were to operate concurrently. In nutshell, the prosecution case is as under :

2. The police machinery came into motion after recording Daily Diary (DD) No.36 at 12.16 A.M. on the night intervening 25/26.08.2007 at PS OIA, on getting information from Const.Harbir of PCR that a quarrel had taken place at B-48, Okhla Industrial Area. The investigation was assigned to HC Bhagwan Singh who with HC Bhura Singh, SI Mahender Singh and SI Bhagat Ram reached the spot and came to know that the injured had already been taken to hospital by PCR. He with SI Bhagat Ram and HC Bhura went to AIIMS. Insp.Z.H.Khan also reached there. He collected the MLC of Ram Singh who had been declared dead on arrival. The injured Mani Ram was found unfit for statement. No eyewitness was available in the hospital. On reaching the spot, the Investigating Officer met Manoj, an eye-witness; recorded his statement and he disclosed that Saleem used to tease women. On that day at about 11.00 P.M., the accused and his employee Bismillah, cut jokes with Rama Devi and Ram Singh objected to that. In the quarrel, the accused Mohd.Saleem sustained injuries on head due to fall. They left the spot threatening to see him. After about 20-25 minutes, the accused with his brothers Mohd.Wasim and Nasim, employee Bismillah, Wajid and Ajay

Kumar (facing trial in Juvenile Court) arrived on motorcycles No.DL3SAL9317 and DL6SM5143 make Bajaj Pulsar, armed with big 'churas'. Ajay was armed with a 'danda'. They dragged Ram Singh from the *jhuggi* and started beating him outside the factory at B-48, Okhla Industrial Area. He and his neighbour Kalu and Mani Ram intervened to rescue him. The accused and Bismillah inflicted stab injuries to Ram Singh and he fell down after sustaining severe injuries. The assailants also chased them. Saleem, Mohd.Wasim and Wajid caught hold Mani Ram and stabbed him, as a result of which he also fell down after sustaining injuries. Ajay injured him on head with a 'danda'. The assailants thereafter, fled the spot extending threats on their motorcycles. Kalu made telephone call from phone No.9868788931 at number 100 and accompanied PCR to admit Ram Singh and Mani Ram at AIIMS. Ram Singh expired in the hospital.

3. Insp.Z.H.Khan made an endorsement on the statement and sent the rukka (Ex.PW-22/A) to lodge First Information Report. He prepared site plan; seized blood, earth control, Rajesh @ Kalu's shirt and prepared necessary seizure memos. Crime team inspected the spot. The scene of incident was photographed from various angles.

4. During the course of investigation, inquest proceedings were conducted and the body was sent for post-mortem examination. Dr.Puneet Setia, conducted post-mortem examination of the body of the deceased Ram Singh. Since the informant had indicted the assailants, the police set out to apprehend them. Ajay was arrested from the *jhuggi*. He was interrogated and his disclosure statement was recorded. Thereafter, with Ajay, the police reached Sahin Bagh in front of plot No.F-167 and arrested Saleem, Mohd.Wasim, Nasim, Bismillah and Wajid. They were interrogated and their disclosure statements were recorded. At the instance of the accused, weapons of offence i.e. knives were recovered. The IO sent the exhibits to Forensic Science Laboratory and collected reports subsequently. The motorcycles were seized. Statements of the witnesses conversant with the facts were recorded. Wajid and Ajay being juveniles were produced before Juvenile Court. After completing the investigation, a charge-sheet was filed against the appellant and his associates. They were duly charged and brought to trial.

5. To prove the charges against the accused, the prosecution examined twenty-three witnesses in all. The statements of the accused were recorded under Section 313 Cr.P.C. to afford them an opportunity to explain incriminating circumstances. They denied their involvement in the

commission of the offence and pleaded false implication. They however, did not examine any witness in defence.

6. After appreciating the evidence and considering the rival contentions of the parties, the Trial Court by the impugned judgment convicted the appellant for the offences mentioned previously. Mohd.Wasim, Nasim and Bismillah were convicted for committing the offences under Section 326/149/34 IPC; 148/147 IPC and were sentenced to undergo imprisonment for the period already undergone etc. It appears that they have not challenged their conviction by the impugned judgment. Since the appellant alone has come in appeal, the evidence of the prosecution witnesses will be appreciated qua him only.

7. Learned counsel for the appellant Mr.R.M.Tufail has vehemently assailed the findings of the Trial Court and urged that it did not appreciate the evidence in its true and proper perspective and relied upon the testimonies of PW-1 (Ms.Preeti), PW-2 (Rajesh @ Kalu) without ensuring their credibility. PW-1 (Ms.Preeti) being the wife of the deceased was an interested witness. She made vital improvements in her deposition and was cross-examined by learned APP after declaring her hostile. The Trial Court ignored the testimonies of PW-3 (Rama Devi) and PW-6 (Mani Ram) without valid reasons. Both the witnesses turned hostile and

did not support the prosecution case. The prosecution miserably failed to establish motive of the accused to inflict fatal injuries to the deceased. No evidence came on record to infer that the accused used to tease women. No such complaint was ever lodged against him by any such victim. PW-3 (Rama Devi) refuted the allegation that on the day of incident, the accused had teased her. Learned counsel contended that adverse inference is to be drawn against the prosecution for withholding material and crucial witness Manoj Kumar on whose statement the First Information Report was lodged. Manoj Kumar was a fictitious person and the close relative of the deceased denied his existence. Testimony of PW-2 (Rajesh @ Kalu) has not been corroborated. He was introduced as a false witness and his presence at the spot is highly doubtful. Neither did he intervene in the incident nor did he take the injured to the hospital. The police did not medically examine him to ascertain if he sustained injury in the occurrence. The police did not lodge First Information Report on the statement of Mani Ram who was conscious to make statement in the hospital. The counsel further pointed out that PW-2 (Rajesh @ Kalu) was unable to pin-point the knife with which the injuries were inflicted. No Test Identification Proceedings were conducted for identification of the case property.

8. On the other hand, learned APP supported the judgment and urged that it did not call for any interference. PW-2 (Rajesh @ Kalu) and PW-1 (Ms.Preeti), who witnessed the occurrence have fully supported the prosecution and despite lengthy cross-examination, the accused could not elicit material discrepancies to disbelieve them. The assailants were named in the First Information Report and specific role was attributed to each of them. The accused were arrested soon after the occurrence and pursuant to their disclosure statements, the police succeeded in recovering the weapons of offence. PW-3 (Rama Devi) and PW-6 (Mani Ram) were victims but they did not opt to support the prosecution and turned hostile. They cannot be permitted to sabotage the prosecution case as they joined hands with the accused for ulterior purposes. Turning hostile of some witnesses cannot be a ground for the acquittal of the accused. He further contended that no adverse inference can be drawn against the prosecution for non-examination of Manoj Kumar because despite best efforts, he remained untraced. There is consistency between the ocular and medical evidence. Minor variations in the testimony of the prosecution witnesses are not fatal to the prosecution case.

9. We have considered the submissions of both the parties and have examined the Trial Court record. Homicidal death of deceased Ram

Singh is not under challenge. PW-5 (Dr.Shiva Prasad) proved post-mortem examination report (Ex.PW-5/A) in which cause of death was opined as respiratory arrest consequent upon injury to the lung. Injury No.1 was opined sufficient to cause death in ordinary course of nature. All injuries were ante mortem and fresh in duration. Undoubtedly, it is a case of homicide.

10. PW-2 (Rajesh @ Kalu) claimed that the occurrence was witnessed by him. He testified that on the night intervening 25/26.08.2007 at about 10/11.00 P.M. Mohd.Saleem and his servant Bismillah were sitting on a *takhat* on the road outside his *jhuggi*. They used to tease women. About 20/25 days earlier they had teased a woman and had sought pardon from her. On that day, they again started teasing their neighbour Rama Devi. Ram Singh (since deceased) objected and told the accused not to tease her. A quarrel ensued in which the accused fell down and sustained injuries on his head. Both the accused and Bismillah left the spot threatening to see him. He further testified that after about 20/25 minutes the accused brought his brothers Wasim, Nasim, servant Bismillah, Wajid and Ajay, shopkeepers (the last two are facing trial in the Juvenile Court) on two motorcycles. They all except Ajay were having '*churas*' in their hands and Ajay was having a '*danda*'. They pulled Ram

Singh and started beating him in front of factory situated at B-48, Okhla Industrial Area. When he and Mani Ram intervened to save Ram Singh, the accused also started beating them. The accused attacked Ram Singh with knives as a result of which he fell down and became unconscious. He, Mani Ram and Manoj started running away. Ajay gave a '*danda*' blow to Mani Ram. The accused, Mohd.Wasim, Nasim and Bismillah caught hold Mani Ram and attacked him with '*churas*' as a result of which he fell down. The witness further deposed that he informed the police at number 100. PCR reached the spot and removed Ram Singh and Mani Ram to AIIMS. Ram Singh was declared brought dead. Condition of Mani Ram was serious. He joined the investigation with the local police and the accused were arrested. They were interrogated and their disclosure statements were recorded. Pursuant to the disclosure statements (Ex.PW-2/K to PW-2/O), the accused recovered the '*churas*' collectively exhibited Ex.PW-2/P2 and its sketches (Ex.PW-2/P to PW-2/T) were prepared. They were seized vide seizure memos (Ex.PW-2/U to PW-2/Y). The police also seized his blood stained shirt (Ex.PW-2/Z). Danda (Ex.P-1) was also recovered.

11. This witness was cross-examined at length. In the cross-examination, he fairly admitted inability to tell which '*chura*' was used by

which accused in causing injuries. He denied the suggestion that Manoj @ Alam was having illicit relations with the deceased's wife and when Ram Singh came to know about it and objected, relations between the two became strained. He further denied the suggestion that Ram Singh was murdered by Manoj and his colleagues due to illicit relations with his wife. He reiterated that when the accused came on two motorcycles, he, Manoj, Ram Singh and Mani Ram were sitting on the *takht* and deceased's wife and children were inside the room. The accused dragged Ram Singh from *takht* to the place of incident and gave beatings to him. He and Mani Ram attempted to intervene and rescue the victim from the hands of the accused. The witness also claimed to have sustained injuries in the incident. He further disclosed that he remained in the hospital for about 20/25 minutes and met the IO at the place of occurrence. Nasim, Wasim, Wajid and Ajay were apprehended at the first instance and at their instance, accused Saleem and Bismillah were apprehended from village Jasola. He denied the suggestion that the accused were falsely implicated by him and Manoj @ Alam and nothing was recovered in his presence.

12. The entire testimony of this independent witness reveals that that he stood the test of searching cross-examination. The accused could not elicit material contradictions, inconsistencies or discrepancies in the

cross-examination to disbelieve his version. No suggestion was put to him that at the time of occurrence, he was not present at the spot. PW-2 was resident of B-48, Sanjay Camp, phase-I, Okhla Industrial Area, New Delhi and the occurrence had taken place near his *jhuggi* at about 11.00 P.M. Being a neighbour, his presence at the spot was quite natural and normal. PW-2 reported the incident to the police and made a telephone call at number 100. His testimony in this regard remained unchallenged. He further testified that PCR van reached the spot and removed Ram Singh and Mani Ram to AIIMS. He had gone to the hospital and remained there for 20/25 minutes and left the hospital at about 12/12.30 A.M. He had informed the concerned doctor that injured Ram Singh was brought by him. PW-7 (HC Thankappan NK), Incharge PCR, deposed that at about 12.00 (night) he received information about a quarrel near *jhuggi* No.B-48. On reaching the spot, he found two persons in injured and unconscious condition. They were taken to AIIMS with the help of one person whose name he did not remember. The accused did not cross-examine him and his testimony remained uncontroverted. Rukka (Ex.PW-22/A) was recorded on the statement of Manoj. In his statement, Manoj informed the police that PW-2 made a telephone call at number 100 from his mobile phone No.9868788931 and admitted Ram Singh and Mani Ram in AIIMS

taking them in PCR van. DD No.36 (Ex.PW-10/A) recorded at 12.16 (night) at police station OIA reveals that information was received from Const.Harbir of PCR regarding a quarrel at B-48, Okhla Industrial Area from phone No.9868788931. Number of memos prepared at the spot bear signature of this witness and confirms his presence at the spot. The witness further claimed that he intervened to rescue the victims and in the process also sustained injuries. Blood stained shirt of PW-2 (Sh.Rajesh @ Kalu) was seized vide seizure memo (Ex.PW-2/Z) on 26.08.2007 and sent for examination to Forensic Science Laboratory (FSL). As per FSL reports (Ex.PW-23/A and Ex.PW-23/B), human blood was detected on the shirt shown at Sl.No.15. It further confirms his presence at the spot. He has not been cross-examined on this aspect.

13. No ulterior motive has been assigned to PW-2 for falsely implicating the accused in the incident. He was residing in the neighbourhood of the deceased as well as of the accused. Nothing has emerged to show that he was having strained relations with the accused prior to the occurrence. In the cross-examination, he elaborated that he used to repair gas-stoves. He denied the suggestion that he used to indulge in filling of gas cylinders and selling of kerosene oil without licence and had got the patronage of the police. He clarified that he appeared before

the Court for the first time in this case and never deposed anywhere in any case before any Court. He further denied that an altercation had taken place with the accused 20/25 days prior to the incident. He refuted the suggestion that the accused was falsely implicated by him and Manoj due to enmity. The accused did not lodge any complaint against this witness for any alleged altercation. The defence taken by the accused is inconsistent.

14. During the course of arguments, it was vehemently contended that Manoj was a fictitious entity and never resided in the locality. Counsel took exception for not producing him before the Court. It was argued that there was no such person with the name Manoj and the prosecution case must fail due to non-examination of this crucial witness who was a complainant. We are not impressed with these submissions. Suggestions were put to PW-2 that Manoj Kumar was having illicit relations with the deceased's wife and his murder was due to objection to that relationship. The accused has failed to reconcile two inconsistent pleas. On one hand, he alleges that there were illicit relations between Manoj and deceased's wife and his murder was the result of strained relationship. On the other hand, the counsel has argued that Manoj is a fictitious entity and he never lodged any complaint with the police.

15. The Trial Court record reveals that Manoj was cited as a witness to be examined by the prosecution. During trial, summons were issued to Manoj Kumar to secure his presence in the Court. On 26.05.2008, after considering the report on the process returned unexecuted, the Court handed over 'Dasti' summons to the Investigating Officer to ensure his presence for 27.05.2008, 24.02.2009, 09.04.2009, 03/04.06.2009, 18.11.2009 and 14.09.2010. On 06.12.2010, IO/SHO was directed to produce Manoj on the next date of hearing or report whether they were in a position to produce him or not. On 01.02.2011, the investigating officer reported that Manoj Kumar was not available at the given address and he could not trace him despite best efforts after he changed the address two years back. On 09.02.2011, the prosecution was directed to conclude the entire prosecution evidence on the next date of hearing. Manoj was again reported to be untraceable. On 06.07.2011, the Trial Court closed the prosecution evidence. The order-sheets reveal that all efforts were put to trace Manoj and produce him before the Court. However, after he shifted to a new place, he could not be searched and the prosecution failed to produce him before the Court. No adverse inference can be drawn against the prosecution as despite best effort his presence could not be secured in the Court. The case was registered on the

statement of Manoj and he gave graphic details about the incident. He himself sustained injuries and was medically examined vide MLC marked PW-21/DA on judicial file. We have no reason to believe that Manoj was a fictitious entity.

16. Moreover, non-examination of a witness is not always fatal to the prosecution case. In *Sambhu Das @ Bijoy Das and Anr. v. State of Assam (2010) 10 SCC 374*, the prosecution could not examine witness who was supposed to have informed about the alleged incident, the Supreme Court held:-

“In our opinion, it is not necessary for the prosecution to examine every other witness cited by them in the charge-sheet. Mere non-examination of some persons does not corrode the vitality of the prosecution version, particularly, the witnesses examined have withstood the cross-examination and pointed to the accused persons as perpetrators of the crime. The trial court and the High court have come to the conclusion that the evidence of PW-1 is trustworthy and reliable. We have also carefully perused the evidence of PW-1, whose evidence is corroborated by PW-8 and the post-mortem issued by PW-6, we are convinced that the trial court and the High Court were justified in believing the testimony of PW-1.”

17. The accused in the statement under Section 313 Cr.P.C. did not state that deceased's wife had illicit relations with Manoj. He also did not examine any witness to prove the serious allegations about the

character of the deceased's wife. Nothing emerged on record if the accused had ever seen Manoj and deceased's wife in objectionable position. Nothing was suggested to PW-1 Preeti (deceased's wife) in the cross-examination if she was having objectionable relations with Manoj. The accused rather pleaded inconsistent defence that Majoj was a fictitious entity.

18. PW-2 (Sh.Rajesh @ Kalu)'s version has been corroborated on material facts by PW-1 (Preeti). She used to reside in a house opposite B-48 Okhla Industrial Area. Her husband used to run a tea shop in front of B-48 company. She testified that at about 11:30 P.M. on the night of occurrence on 25th in the year 2007, the accused Mohd.Saleem accompanied with his brothers and employees came and caught hold her husband. He struck her husband with a knife. Saleem and Naseem also caught hold her neck. The police took her husband to the hospital where he expired. The assailants fled the spot on motor-cycles. In the cross-examination by the learned APP, she disclosed that the accused used to run a meat and chicken shop near her house. She further admitted the suggestion that on that day at about 11:00 P.M. the accused was seated on a cot outside his Jhuggi and had started making fun of Ramadevi and her husband objected to that. She further admitted that her husband was pulled

out from the *jhuggi* by the assailants and was inflicted injuries with knives by Saleem and Bismillah. She further admitted that Mani Ram @ Ram Lal and Kallu (a neighbor) intervened; all the accused had knives with them and they assaulted her husband; Mani Ram was also injured in the incident and was taken to the hospital by the police. She claimed that the incident was witnessed by her with her eyes.

19. In the cross-examination, she denied that at the time of occurrence, she was inside her house. She clarified that she had come out with her child. The incident took place at the gate of the company in front of her house which was at some distance. There was dim street light. She further revealed that she became unconscious and fell down. She was not in senses for about 15/20 minutes after her husband was assaulted with knives. She regained consciousness after the arrival of the police. She denied that the accused was shown to her at the police station. She clarified that the accused used to come regularly to the shop for tea.

20. PW-2 deceased's wife aged about 21 years, an illiterate lady rarely came out in public. The evidence of an illiterate rustic witness is to be appreciated in that context.

21. In the case of '*State of Uttar Pradesh Vs. Krishna Master and Others*' (2010) 12 SCC 324, the Supreme Court held :

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“17. In the deposition of witnesses, there are always normal discrepancies, howsoever honest and truthful they may be. These discrepancies are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition, shock and horror at the time of occurrence and threat to the life. It is not unoften that improvements in earlier version are made at the trial in order to give a boost to the prosecution case, albeit foolishly. Therefore, it is the duty of the court to separate falsehood from the truth. In sifting the evidence, the court has to attempt to separate the chaff from the grains in every case and this attempt cannot be abandoned on the ground that the case is baffling unless the evidence is really so confusing or conflicting that the process cannot reasonably be carried out. In the light of these principles, this Court will have to determine whether the evidence of eyewitnesses examined in this case proves the prosecution case.

24. The basic principle of appreciation of evidence of a rustic witness who is not educated and comes from a poor strata of society is that the evidence of such a witness should be appreciated as a whole. The rustic witness as compared to an educated witness is not expected to remember every small detail of the incident and the manner in which the incident had happened more particularly when his evidence is recorded after a lapse of time. Further, a witness is bound to face shock of the untimely death of his near relative(s). Therefore, the court must keep in mind all these relevant factors while appreciating evidence of a rustic witness.”

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22. Regarding complicity of the accused, she has categorically deposed the he caused injuries to her husband with knife. The occurrence had taken place near her residence. It is not believable that after hearing the commotion, she would not rush out to witness what was happening.

Her presence at the spot is quite reasonable and natural. She had no ulterior motive to falsely name the accused for causing murder of her husband. Being deceased's wife she must be interested to bring the real culprit to book. She lost her husband in young age and was not expected to screen the real offender. Material facts deposed by her remained unchallenged in the cross-examination. The accused did not deny his arrival along with his associates on the spot. He did not controvert her specific assertion that her husband had objected to the accused's cutting jokes/making fun with Rama Devi. No ill-will or motive was assigned to her for falsely implicating the accused. She was categorical that the accused was amongst the assailants and he actively participated in the commission of the offence and inflicted injuries on her husband with knife. She was also certain that the assailants had come on motor-cycles and fled the scene after the occurrence. Of course she could not narrate the entire incident specifying the role to the other assailants in causing injuries to her husband and Mani @ Ram Lal. The Court can well understand her trauma and mental stress when she saw the horrible incident whereby her husband was brutally injured with knives by the assailants including the accused.

23. PW-1 (Preeti) and PW-2 (Rajesh @ Kalu) have categorically and in certain terms spoken the involvement of the accused in the crime and we have no reasons to disbelieve their cogent version. Both of them disclosed that the assailants arrived at the spot on motor-cycles. Subsequently, motor cycles used in the crime i.e. Bajaj Pulsar DL3SAL9317 (black colour) and Bajaj Pulsar DL6SM5143 were recovered by seizure memos (Ex.PW12/D and Ex.PW-12/C). Complainant Manoj had also disclosed that these Bajaj Pulser motor-cycles were used by the assailants. Subsequently, the motor-cycle No. DL6SM5143 was taken on superdari by financier Ankur Trade Links Pvt. Ltd. when Wajid at whose instance the motor-cycle was recovered, did not oppose its release. Motor-cycle No.DL3SAL9317 belonged to accused Wajid and was taken on superdari by Naseem Ahmed.

24. There is no inconsistency between the ocular and medical evidence. The post-mortem examination of the body was conducted by Dr.Puneet Setia. PW-5 (Dr.Shiva Prasad) proved the post-mortem report (Ex.PW-5/A) prepared by Dr.Puneet Setia as he had left the services and his whereabouts were not known. As per post-mortem examination, two injuries of various dimensions were found on the deceased and injury No.1 was opined sufficient to cause death in the ordinary course of nature.

Autopsy surgeon was of the opinion that injury No.1 and 2 were caused by double edged stabbing weapon.

25. PW-19 (Dr.Rajneesh Kumar) proved the MLC (Ex.PW-19/A) pertaining to injured Ram Lal @ Mani Ram. Injuries clean lacerated wound (CLW) of various dimensions were found on his person. In the alleged history, it was mentioned that he was assaulted with knife around 12:05 A.M. on 26.08.2007. In the cross-examination, he revealed that on 26.08.2007 on arrival, the patient was fit for statement. The accused has highlighted that when injured Ram Lal @ Mani Ram was found fit for statement, why the Investigating Officer did not record his statement to lodge First Information Report. There is some inconsistency. As per MLC (Ex.PW-19/A) the patient was declared unfit for statement at 15:10 A.M. on 26.08.2007. Again he was declared unfit for statement on two other occasions on 27.08.2007. Only on 04.09.2007 he was declared fit for statement. It is not clear if Ram Lal @ Mani was fit to make statement when the police visited him.

26. It is true that PW-6 (Mani Ram) turned hostile and did not assign any role to the accused in inflicting injuries to him and others. He merely stated that on 25.08.2007 at about 11.00 P.M. he was sleeping on the *takhat* outside his *jhuggi* opposite to factory No.B-48, Okhla, Phase-I

and got up on hearing commotion. He started running towards his *jhuggi*. Ajay (having a shop in the market) hit him with a rod on head as a result of which he fell down in the 'gali' and became unconscious. He further revealed that when he was lying in the 'gali', 'somebody' hit him with a knife thrice on the right side of abdomen. When he tried to get up, he was hit by assailants who were 3-4 in number and they stabbed him on stomach. He was discharged from the hospital after 27-28 days. He further stated that Wasim was also with Ajay at that time. He was cross-examined by learned APP, after seeking Court's permission. He denied the statement (Ex.PW-6/E) recorded under Section 161 Cr.P.C.

27. Apparently, PW-6 (Mani Ram) has not presented true facts before the court. He was injured in the occurrence in which deceased Ram Singh sustained injuries. He was taken to the hospital along with Ram Singh at the same time by PW-2 (Rajesh @ Kalu) in the PCR van and was admitted at AIIMS. In the MLC (Ex.PW-9/A) it was recorded that he was assaulted with a knife at 12:05 A.M. on 26.08.2007. The witness was conscious at the time he was admitted in AIIMS. It is not believable that he won't know the name of the assailants who inflicted knife blows on his person.

28. Similarly PW-3 (Rama Devi) did not opt to support the prosecution and turned hostile. She denied that on the day of occurrence she was teased by the accused-Saleem. In the cross-examination by learned APP after court's permission, she denied the contents of statement (Ex.PW3/A) to have been made to the police under Section 161 Cr.P.C. In the cross-examination, she, however, admitted that one 'Alam' used to reside in the Jhuggi of the deceased in those days. She is related to PW-6 (Mani Ram) who was seriously injured in the incident. She did not explain who had caused injuries to her brother-in-law Mani Ram and what was the motive of the assailants. Apparently, she also did not present the real facts before the court.

29. It is settled principle of law that statement of a hostile witness can also be relied upon by the Court to the extent it supports the case of the prosecution. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether.

30. Undoubtedly, injuries were caused to the deceased and Mani Ram with sharp weapons. The police is alleged to have recovered knives (Ex.PW-2/U to 2/X) pursuant to the disclosure statements of the accused. However, the recovery of knife cannot be considered as incriminating circumstance against the accused as PW-2(Rajesh @ Kalu), star witness

for the prosecution, fairly admitted that he was unable to identify the specific knife used by him in the commission of crime. He also could not identify as to which weapon was recovered from which accused. All the knives were collectively exhibited as Ex.PW-2/P. Only on one knife at serial number 13 'human' blood was detected. It could not be ascertained if the blood group of the deceased was there on this '*chura*' to infer if it was used in the commission of the offence. However, no adverse inference can be drawn against the prosecution merely because the prosecution failed to connect the weapon of offence with the crime. The post-mortem examination clearly establishes use of sharp weapon in causing the injuries.

31. In the statement recorded under Section 313 Cr.P.C., the accused did not give plausible explanation to the incriminating circumstances. He came up with the defence that he was not present at the spot at the time of occurrence. He, however, did not elaborate as to where else he was present at that time. He did not examine any family members or witnesses from the locality to prove his defence of 'alibi'.

32. There was no delay in lodging the First Information Report. The occurrence took place at about 11:25 P.M. Daily Dairy No.36B (Ex.Pw10/A) was recorded about the quarrel at 12:16 A.M.(night) after

receiving information from PW-7(HC Thankappan N.K.) who received information regarding quarrel at about 12:00 mid night and reached with PCR at the spot. He removed both the deceased Ram Singh and injured Mani Ram to AIIMS and admitted them there. MLC (Ex.PW-16/A) reveals that deceased Ram Singh was admitted at AIIMS at about 12:48 mid night on 26.08.2007. Mani Ram was admitted at the same time vide MLC (Ex.PW19/A). Rukka was sent after conducting necessary proceedings at 6:00 A.M. on 26.08.2007. PW-9 (HC Rameshwar) handed over the copy of the FIR to be delivered to the area Magistrate after registering the FIR on the basis of the rukka at 6:45 A.M. PW-14 (Ct.Vijender) was examined to prove that he went to the residence of Sh. Satish Kumar, Metropolitan Magistrate, at Sonipat, Haryana to deliver the said report. FIR on record contains the endorsement of the Metropolitan Magistrate showing that he received the First Information Report at his residence at 2:00 P.M. on 26.08.2007. Since the FIR was lodged promptly without undue delay, there was least possibility to fabricate a false case to implicate the accused whose name finds mention in the First Information Report.

33. In the light of the above discussion, we find no merit in the appeal preferred by the appellant against the impugned judgment. The

same is without merits and is dismissed. The Trial Court record be sent back forthwith.

CRL.M.B.6/2012

In view of the order passed above, the bail application is disposed of as infructuous.

**(S.P.GARG)
JUDGE**

**(SANJIV KHANNA)
JUDGE**

AUGUST 23, 2012
tr/sa