

CORAM:

HON'BLE MS. JUSTICE REVA KHETRAPAL

HON'BLE MS. JUSTICE SUNITA GUPTA

J U D G M E N T

: REVA KHETRAPAL, J.

1. The present appeals arise out of the judgment and order dated 15.3.2010 and 17.3.2010 wherein the learned trial court convicted the Appellants for the offence under Section 302 read with Section 34 of the IPC and sentenced them to imprisonment for life.

2. The brief facts of the present case are as under:

On 28th March, 2004, at 8.01 p.m., an information was received by PW 17 Head Constable Siya Nand, duty officer of Police Station Seelampur from Constable Ravinder No.2727/PCR that a boy had been stabbed near the Taj Colony Red Light Traffic Booth, who was in a serious condition. This information was recorded by Head Constable Siya Nand (PW17) in the roznamcha as DD No.17A and the DD was marked to SI Satender Mohan (PW13), who along with Constable Sanjeev and Constable Rajvir reached the spot, i.e., Taj Colony, New Seelampur where he noticed blood lying at the spot on the ground near Ganda Nala. The injured was reported to have been removed to GTB Hospital. SI Satender Mohan (PW13) left Constable Sanjeev Kumar at the spot and he along with Constable Rajvir reached GTB Hospital from where

he collected the MLC of the injured Saleem @ Tikla as per which he was brought dead to the hospital. He met Jeeshan @ Pappu, brother-in-law (sister's husband) of the deceased and recorded his statement. As per the statement of the complainant (Ex.PW2/A), he was residing at E-17/178, Taj Colony, New Seelampur, Delhi and dealing with the sale of cloth strips to cloth traders. Saleem @ Tikla was the brother of his wife Waseem Begum. He was living with his "bhua" (paternal aunt) Ballo closed to his house at E-17/174, Taj Colony and was employed in a shoe factory. On the fateful day, that is, 28.03.2004 at 7.45 p.m., while he (Jeeshan) was standing outside his house Nawab, Shabab and Aftab, sons of Abrar Ahmed Khan, residents of House No.E-17/200, Taj Colony started abusing his brother-in-law Saleem. Nawab and Aftab caught hold of Saleem and exhorted Shabab by saying "*Aaj iska kaam khatam kar de*" whereupon Shabab assaulted Saleem with a double edged dagger on his chest, right hand and left hand. On hearing the noise, Waseem, his wife reached the spot and both of them raised hue and cry by shouting "*Bachao Bachao*". All three assailants fled the spot and since his brother-in-law Saleem was fast losing blood he and his wife took him in a TSR to GTB Hospital where he was declared brought dead.

3. On the aforesaid statement of the witness Jeeshan @ Pappu (PW2), the Investigating Officer PW13–SI Satender Mohan prepared the rukka (Ex.PW13/A) and sent the same through Constable Rajvir Singh to the police station for registration of the case. On the basis of the rukka case FIR No.166/04 (Ex.PW17/B) was registered. Thereafter, investigation was handed over to the then SHO Inspector Data Ram (PW21). During investigation, the Investigating Officer recorded the statement of Waseem (PW1), wife of the complainant at GTB Hospital and sent the dead body to the mortuary for postmortem. The Investigating Officer then prepared site plan Ex.PW21/A on the pointing out of the complainant and requisitioned the Crime Team. Constable Rattan Singh (PW16) from the Crime Team took photographs of the spot. The Investigating Officer then effected seizure of incriminating articles from the spot vide seizure memo Ex.PW2/B and recorded statements of SI Nitin Kumar (PW15) and supplementary statements of Jeeshan (PW2) and Waseem (PW1).

4. The police party then proceeded to search for the offenders. The accused Nawab was arrested from near Metro Station Seelampur on the pointing out of the complainant/Jeeshan (PW2). On the following day, i.e. on 29.03.2004 inquest proceedings were done and postmortem conducted. On 21.5.2004, the exhibits were sent to CFSL, Calcutta through Constable Arun Kumar (PW11). On 4.4.2004, accused Shabab was arrested from near Metro Station Seelampur vide arrest memo Exhibit PW8/A on the pointing out of the PW2 Jeeshan, who made a disclosure statement (Ex.PW8/C). No weapon of offence was recovered despite efforts made in this regard.

Accused Aftab could not be arrested and was declared proclaimed offender by the Court. Chargesheet was prepared and results collected from the CFSL, which are Ex. PW21/B, Ex. PW21/C and Ex. PW21/D.

5. Initially, accused Nawab Anwar Khan and Shabab Khan were sent to face trial for the charge under Sections 302/34 IPC. A separate charge for the offence under Section 27 of the Arms Act was also framed against accused Shabab Khan. Accused persons pleaded not guilty for the aforesaid charges and claimed trial. The evidence of the prosecution witnesses was recorded. Later on, accused Aftab Khan was also arrested on 25th July, 2006 and a supplementary chargesheet filed against him. He too claimed trial and the prosecution witnesses were recalled for examination.

6. The statements of the accused persons were recorded under Section 313 Cr.P.C. in which they stated that they had been falsely implicated. The accused persons examined 6 witnesses in their defence. The trial court on consideration of the evidence on record held that the prosecution had successfully proved on record that it was the accused persons and none else who had assaulted Saleem @ Tikla and committed his murder. All the three accused persons were accordingly convicted under Sections 302/34 IPC. Accused Shabab was also held guilty for the offence under Section 27 of the Arms Act and convicted for the said offence.

7. We have heard Mr. Banamali Shukla on behalf of the Appellants Shabab Khan, Aftab Khan and Nawab Anwar Khan and the learned counsel for the State.

8. Mr. Shukla contended that the prosecution story is a concocted and tailor made story. The place of occurrence as disclosed by the alleged eye-witnesses itself is doubtful. As per PW9 Constable Ravinder Singh, the information which was received by the PCR and was reduced into writing in the form of Ex.PW9/A was that a boy had been stabbed near the Traffic Booth Red Light, Taj Colony. In the site plan, there is no mention of any traffic booth or red light and this altogether falsifies the case of the prosecution. The testimony of PW10 Ishrat Khan is also relevant. The first information to the police was given by this witness by virtue of the police control room log, i.e., the call made by PW10 Ishrat Khan and as per the said call, recorded in DD No.17A, the incident had taken place not at the spot mentioned by PW1 and PW2, but 200 mtrs. away from the spot, viz., the Red Light Traffic Booth of Taj Colony. The learned trial court in paragraph 17A of its judgment has noted that SI Satender Mohan (PW13) who partly investigated the case deposed that on 28.3.2004 on receipt of DD No.17A he along with Constable Sanjeev and Constable Rajvir went to the Red Light Traffic Booth where he noticed blood lying at the spot on the ground near Taj Colony street near Ganda Nala. This shows that the murder was committed at the red light and not outside the house of accused persons as claimed by PW1 and PW2. Further, it has come in the cross-examination of the IO himself that the Traffic Booth is 200 mtrs. away from Taj Colony, Seelampur where the alleged incident is stated to have taken place.

9. Learned counsel next contended that the two alleged eye-witnesses (PW1 and PW2) are the relatives of the deceased and are

interested witnesses and as such their testimony deserves to be rejected. In support of his contention, he placed reliance on the case of ***M.C. Ali & Anr. vs. State of Kerala* AIR 2010 SC 1639**, wherein the Supreme Court held that evidence of interested witnesses cannot be believed in the absence of independent corroboration. This was a case which absolutely lacked independent evidence. Also, the case of ***Javed Masood and Anr. vs. State of Rajasthan*, AIR 2010 SC 979** was cited by the learned counsel for the accused in which the Supreme Court stated as follows:

“....we find it difficult and impossible to place any reliance whatsoever on the evidence of PW5 who is a highly interested and partisan witness. No reliance can be placed on his evidence in order to convict the appellants of the charge under Section 302, IPC. For the same reasons, the evidence of PWs 13 and 14 also is to be discarded.”

10. It was further contended that there are major contradictions and discrepancies in the testimonies of these two eye-witnesses which renders their evidence altogether unreliable and the Appellants deserve to be acquitted on this ground alone. PW1 Waseem Begum claims that PWs1 and 2 rushed to the spot and saw the incident as it was taking place, while PW2 Jeeshan @ Pappu states that he was standing outside his house when he heard the noise of quarrel taking place at about 20 paces from where he was standing. His wife came out and he (PW2) and she went to the place of quarrel. Learned counsel contended that an incident of the alleged nature takes place within a matter of seconds and hence the testimony of PW1 and her

presence on the spot deserves to be disbelieved on account of the clearly contradictory statements of PW1 and her husband PW2. Further, PW1 in her cross-examination had come out with a new story by stating that accused Nawab was holding an iron chain with which he had first pressed the neck of Saleem and then the chain was thrown down and Saleem was stabbed. No chain has been recovered in the course of investigation or produced by the prosecution as case property. PW2 Jeeshan has also made no reference to any iron chain. The two versions of the incident given by PW1 Waseem Begum and PW2 Jeeshan are thus clearly contradictory to each other and reflective of the fact that the eye-witness account of these witnesses is not worthy of credence. Heavy reliance was placed in this regard upon the judgments of the Supreme Court in *Anil and Anr. vs. State of Maharashtra, 2013 (1) C.C. Cases (SC) 259*; *Eknath Ganpat Aher and Ors. vs. State of Maharashtra and Ors., AIR 2010 SC 2657* and *Govind Raju @ Govinda vs. State by Srirampuram and Anr., AIR 2012 SC 1292*. It was also submitted that PW2 Jeeshan @ Pappu was a stock witness of the police in several cases and also a mukhbir of the police.

11. As regards the antecedents of the deceased, it was contended that PW13 SI Satender Mohan in the course of his cross-examination had admitted that the deceased was involved in 4-5 criminal cases of different police stations and he was a criminal of the area of his division of PS Seelampur. PW5 Constable Kaptan Singh and PW6 Constable Jai Prakash when cross-examined also admitted that the deceased was a declared bad character of the Trans-Yamuna area.

This fact had also clearly emerged in defence evidence. DW4 ASI Giri Raj Singh in the course of his testimony had stated that he had brought the summoned Register No.9, Part III in respect of Saleem @ Tikla which showed that there were six cases registered against Saleem @ Tikla, son of Israr, at Police Station Seelampur. He proved on record entries with regard to all the aforesaid cases as Ex.PW4/A running into three pages. The aforesaid evidence on record conclusively showed that deceased Saleem @ Tikla was a bad character of Police Station Seelampur and other police stations in Delhi having enmity with at least 100 persons of the area and adjoining areas; it may be possible that the deceased was separately assaulted by a completely different set of persons for settling their enmity with the deceased and the accused persons had been made scapegoats by the police. Alternatively, it was contended that PW1 and PW2 were inimical to the accused persons because they were in the same business having business rivalry.

12. Learned counsel for the accused next contended that the genesis of the story of the prosecution is based on the call made to the PCR by PW10, namely, Ishrat Khan, son of Puttan Khan, who called the PCR on 100 number and gave the information that some person had been stabbed near the traffic booth Seelampur, Delhi. The caller, i.e., PW10 Ishrat Khan as per the contemporaneous record claimed to know the identity of the Appellants, but in the witness box he refused to identify the accused persons as the assailants. Thus, the only independent witness has not supported the case of the prosecution put forth by PW1 and PW2. The case of *Javed Masood and Anr.*

(*Supra*) was relied upon in this regard by the counsel for the accused. In this case the independent witness failed to support the prosecution case but his testimony was corroborated by the police witnesses. His evidence with the evidence of the police witnesses was held to be binding on the prosecution in view of the fact that he was not declared hostile by the prosecution.

13. As regards motive for the commission of the crime, it is contended that the prosecution has failed to prove the motive behind the murder of the deceased. Motive is a necessary ingredient of any crime and the prosecution having failed to prove any motive on the part of the accused persons to eliminate the deceased, the prosecution story cannot be believed. Mr. Shukla to press upon his point placed reliance on the case of *State of Rajasthan vs. Hakam Singh, 2011 (6) SCALE 568*, wherein the Apex Court while emphasizing the significance of the presence of motive in a crime has held as follows:

“3. Once there is no motive and the accused himself had taken the deceased to the hospital, shows that he had no intention to commit a crime, much less to give a gunshot, which would inevitably result in the death of deceased....”

14. It is also submitted that there was civil litigation pending between PW2 Jeeshan and the elder brother of the accused, namely, Khursheed which was the motive for the false implication of the accused persons by the alleged eye-witnesses. Reference in this context was made to the testimony of DW2 Raj Rani, UDC, Record Room Civil, Karkardooma Courts who was summoned with the file of Civil Suit No.759/06 Jeeshan @ Pappu vs. Khursheed Ahmed

decided on 7.11.2006 by Shri Mukesh Kumar, learned Civil Judge, Delhi, the certified copy of the plaint whereof is proved as Ex.DW2/A and of the order sheet dated 7.11.2006 as Ex.DW2/B.

15. Contention was also sought to be raised that there were no electrification plans for the colony in question, namely, Taj Colony, New Seelampur. This area has yet to receive electricity and, therefore, the story of PW1 and PW2 that they had witnessed the incident was a false one. DW5 Shri S.S. Verma, Sr. Manager in Planning and Construction, BYPL, Delhi in his testimony had clearly stated that there was no proposal till date for electrification of this area. As per DW6 Shri Vishal Modi, Sr. Manager, however, the electrification work of Taj Colony, Seelampur was conducted during the period intervening 14.7.2006 to 14.2.2007 and this shows there was no electricity in the area on the date of the commission of the crime. In this background, it was urged that the case of the prosecution that PW1 and PW2 had seen the accused persons in the light of a bulb installed on the light post is a concocted story and at any rate a highly doubtful one. Mr. Shukla in this context referred to the case of *Durbal vs. State of U.P. AIR 2011 SC 795*, the relevant portion of which is reproduced herein below:

“15. It is also required to note that all the eye-witnesses had stated in their evidence that lantern was burning in the verandah and Kaldhari (PW 1), Sheo Kumar (PW 2) and Sonai (PW3) were having torch lights in their hands and only with the help of the lantern and the torch lights they could recognize and identify the assailants. The lantern and the torch lights

though were alleged to have been seized vide seizure mahazar Exts.Ka-2 and Ka-3 respectively, were not produced in the Court. The seizure memos Ext.Ka-2 and Ka-3 did not contain the crime number and other recovery particulars. In the circumstances, it becomes highly doubtful as to whether those torch lights and lantern were actually seized during the course of investigation by the Investigating Officer. The Investigating (PW 8) did not explain as to why the crime number was not noted on Exts.Ka-2 and Ka-3 and as to why the material objects if all seized, were not produced in the Court. The very fact that the lantern and torch lights were pressed into service for the purpose of identifying the accused, itself suggests that it was a pitched dark night during the mid winter and it was not possible to identify the assailants without the aid of lantern and torch lights. It is highly doubtful as to whether PWs 1, 2 and 3 had actually torch lights in their hands as stated by them, in the absence of their recovery details in the seizure memo and their non production before the Court. Moreover, Kaldhari (PW 1) refused to state as to whether the assailants were covering their faces with chadar. His evidence does not inspire any confidence.”

16. Reliance was also placed by him in this context upon the decision rendered in ***M.C. Ali and Anr. (Supra)***. In this case the Supreme Court while acquitting the accused persons who had also been acquitted by the trial court but convicted by the High Court, noted that the incident took place in the dark. None of the torches were recovered or produced by any of the concerned persons. There was also no moonlight. The Supreme Court opined that in such

circumstances it had been rightly held by the trial court that the recognition of the six accused may not be possible and it was not entirely unbelievable that the torches had been introduced to ensure that the accused could be said to have been identified.

17. Learned counsel next contended that the weapon of the alleged offence was not recovered during the investigation; hence the non-recovery of the weapon of offence is a serious lacuna in the prosecution case. Then again, though the case of the prosecution was that the body of the deceased was oozing with blood, the blood stained clothes of the alleged eye-witnesses who had taken the deceased to the hospital were not seized in the course of investigation. Most importantly, there was a grave contradiction in the ocular testimony and the medical evidence. It has come in the evidence of PW1 and PW2, who falsely claimed themselves to be the eye-witnesses, that the weapon of offence was a double-edged knife but the medical report shows that the injury caused to the deceased was by a single-edged knife. The doctor examined by the prosecution, namely, PW4 Dr. S. Lal contradicted the statements given by PWs 1 and 2 with regard to the weapon used for the commission of the offence in that he deposed that the injury on the chest which caused the death was inflicted by a single sharp edged weapon. Learned counsel contended that the medical evidence has more value than ocular evidence because the medical expert is possessed of special knowledge, experience, skill and expertise to give the opinion regarding his field. For this reason the prosecution has not produced any knife before the Court as the production of the knife would have

falsified the testimony of the eye-witnesses. Furthermore, the learned trial court had framed charge against the accused of intentionally causing the death of the deceased with the help of a double-edged dagger and such charge framed by the learned trial court is unsustainable in the light of the medical evidence on record that the injury caused to the deceased was by a single-edged weapon. For this reason alone, the judgment of the learned trial court deserves to be set aside and the accused persons acquitted of the charge framed against them.

18. Mr. Shukla, learned counsel for the accused also contended that the prosecution has failed to establish ‘common intention’ of the accused under section 34 of the IPC. In this context, he relied upon the decision of this Court rendered in the case of ***Man Singh, Prem, Bale & Others vs. State* 1979 (16) DLT 70** which highlighted the following principles relating to joint criminal liability:

“29. Before dealing with the question of joint criminal liability, for which these two appellants can be held responsible, we would like to state the principles governing such liability within the contemplation of section 34 of the IPC. This section envisages only a rule of evidence. It does not create a distinct or substantive offence. The leading features of this provision are common intention and the element of participation in action. The criminal act has to be in furtherance of the common intention.

30. It is well settled that common intention as contemplated by S.34 has to be anterior in time to the commission of the crime. It implies prearranged plan and the existence of prior concert. It may, in the circumstances of a particular case, develop in the

*course of events, though it might not be present in the beginning of the unlawful act.
Thus a finding with regard to the pre-requisite, viz; furtherance of the common intention, is essential before a person can be held guilty under S. 34 of the IPC.”*

19. Mr. Shukla finally contended that death caused by injury on a non-vital portion of the body falls under the purview of S.304 Part II of the IPC and not S.302 IPC. To support his contention he relied upon the case of ***Om Prakash and Ors. vs. State 1990 (18) DRJ 270.***

20. *Per contra*, the learned counsel for the State contended that there was clear and cogent evidence on record to bring home the guilt of the accused persons and the judgment of the learned trial court indicting the accused persons deserved to be upheld.

21. We have perused the judgment of the learned trial court and the evidence adduced by the prosecution and the defence, including the statements of PW1 Waseem Begum and PW2 Jeeshan @ Pappu. PW1 Waseem Begum is the sister of the deceased who testified that around 7.45 p.m. she was present in her house. Her husband was outside the house. She heard a noise of quarrel and rushed outside. A quarrel was taking place two houses away from her house. Her husband had also rushed with her to the place of occurrence where Aftab and Nawab were holding the hands of her brother Saleem. Shabab stabbed her brother with a double-edged knife in his chest. She and her husband took Saleem to GTB Hospital where he was declared brought dead. After sometime, the police came and recorded her statement and that of her husband.

22. PW1 Waseem Begum identified all three assailants of her brother. Though subjected to extensive cross-examination, nothing emerged in her said cross-examination to discredit her testimony in any manner. Significantly, in the course of her cross-examination, she stated that her brother had been stabbed on his chest and also on his left hand by the accused persons. On a specific query put to her, she stated that it is correct that her house has no electrical connection, but stated that they had drawn electricity from the pole.

23. PW2 Jeeshan @ Pappu, brother-in-law of the deceased in his testimony stated that at about 7.45 p.m. he was standing outside his house when he heard noise of quarrel taking place at about 20 paces from where he was standing. His wife came out and both he (PW2) and she went to the place of quarrel. Shabab, Aftab and Nawab were abusing Saleem. He knew accused Nawab and Shabab as they lived one house away from his house. Aftab was also a neighbour and in fact they were all real brothers. Accused Shabab had stabbed Saleem in the chest with a double-edged knife. At that stage, the other two accused were holding Saleem. The incident took place within two minutes. He and his wife took Saleem in the TSR to the hospital where he was declared brought dead. Police had come in the hospital and recorded his statement vide Ex.PW2/A which bears his signatures at point 'A'. Statement of his wife was also recorded in the hospital by the police.

24. PW2 Jeeshan was also subjected to detailed cross-examination. We note at this juncture that in his cross-examination he stated that though there were no electricity meters installed in the houses at Taj

Colony, the people of the colony were using electricity by unauthorized means. He also admitted that 8 or 12 public persons had collected at the place of occurrence who were Ishrat, Rajender, etc. Nothing was elicited from him in the course of his cross-examination to in any manner detract from the statement made by him before the police which was reiterated by him in the course of his testimony.

25. We, therefore, are in agreement with the learned trial Judge who found the testimony of the eye-witnesses to be credible and trustworthy. The fact that both the eye-witnesses are close relatives of the deceased, in our opinion, does not in any manner impair their testimony or discredit the same as the testimony of “interested witnesses”. Being close relatives of the deceased, it does not stand to reason that they would want to screen the real culprit and falsely implicate innocent persons. The contention of the counsel for the accused that PW1 and PW2 had a motive for the false implication of the accused persons being a property dispute between the parties is also not borne out from the record. DW2 has proved on record that a suit was filed by PW2 Jeeshan @ Pappu against Khursheed Ahmed. A bare glance at the plaint (Ex.DW2/A) shows that the said suit was instituted on 25th January, 2006 being Civil Suit No.759/06, i.e., **much after** the commission of the crime in the present case. Document Ex.DW2/B further shows that the suit was dismissed in default for non-appearance on 17.11.2006. Nothing has been brought on record to show that the suit was got restored or that there existed a property dispute between PW2 Jeeshan @ Pappu and Khursheed Ahmed who is stated to be related to the accused persons on the date

of the commission of the offence. For this reason, we find the judgments rendered by the Supreme Court in the cases of *M.C. Ali* and *Javed Masood(Supra)* inapplicable on the facts of this case. In both the said cases, the Supreme Court on facts came to the conclusion that there was long standing enmity between the family of the accused and the family of the witnesses, and the statements of the witnesses on the basis of which the accused could be held guilty were unreliable and therefore rightly refused to rely upon the same. As discussed above, in the present case, the prosecution has failed to prove that PW1 and PW2 were interested witnesses and hence the embargo of relying upon their testimonies does not exist.

26. Much has been made by learned counsel for the accused persons about the discrepancies in their testimonies which have been labelled as “material discrepancies”. We do not find any such discrepancies in their testimonies as would throw doubt on the prosecution case. The contradictions, if any, are in our opinion too inconsequential to be dwelt upon. When two persons unfold the same story there is bound to be a slight variation in the manner in which they narrate the incident. This does not mean that they are being untruthful with regard to the occurrence of the incident and so long as the broad outlines of their narration are same the details would be irrelevant as for instance in the present case upon being cross-examined with regard to the details of the incident PW1 Waseem Begum stated that accused Nawab was holding an iron chain with which he had first pressed the neck of Saleem (deceased) and then the chain was thrown down and Saleem was stabbed. True, this fact has

not been disclosed in the testimony of PW2 Jeeshan @ Pappu but it is important to bear in mind that this fact was disclosed by PW1 Waseem Begum in her cross-examination. No query was put by counsel for the accused to PW Jeeshan @ Pappu with regard to the details of the incident and presumably for this reason nothing was disclosed by him in this regard. The fact that the iron chain was not seized as incriminating material by the Investigating Officer is also of no import for the reason that the chain was not used as a weapon of assault upon the deceased. The deceased was stabbed with a knife by accused Shabab while both Nawab and Aftab held the arms of the deceased. The knife, therefore, was the only weapon of assault used by the accused for abruptly ending the life of the deceased.

27. As regards the non-identification of the accused persons by PW10 Ishrat Khan, it is undoubtedly true that PW10 Ishrat Khan who was the first informant did not support the prosecution case in its entirety. He deposed that on 28th March, 2004 at around 8.00 p.m. he was present at his place of work at Taj Colony near Seelampur. He heard some brawl in a gali at pushta. He heard someone saying that one Saleem had been stabbed by knife. Said Saleem was known to him. He informed the police at telephone No.100 from a phone belonging to one Rajender. He had seen the brother-in-law of Saleem (jija) taking Saleem to the hospital in a rickshaw. He had also accompanied Saleem to GTB Hospital where doctors had declared him brought dead. He, however deposed that he had not seen anyone causing injury to the said Saleem. PW10 Ishrat Khan was cross-examined by learned counsel for the State on the aspect of

identification of the accused persons but he categorically denied the suggestion that he knew the offenders and volunteered to state that he had disclosed to the police that it was the deceased who was known to him. Thus, no benefit can accrue to the accused from his testimony and to that extent the decision of the Supreme Court in the case of *Javed Masood (Supra)* relied upon by counsel is clearly distinguishable.

28. A deliberate attempt has been made on the part of the accused persons to use the testimonies of PW1 and PW2 to dispel the case of the prosecution that the place of occurrence was near the Red Light Traffic Booth. The contention raised is that there is a distance of 200 meters between the red light traffic booth and the place of occurrence which, as per the testimonies of PW1 and PW2 took place outside their house. The further contention raised is that in the site plan there is no mention of the traffic booth or red light. These contentions, in our opinion, are of no avail to the accused persons. PW1 Waseem Begum has stated that the incident took place two houses away from their house. PW2 Jeeshan @ Pappu has also stated that while he was standing outside his house, he heard the noise of quarrel taking place at about 20 paces from where he was standing. PW13 SI Satender Mohan who partially conducted the investigation deposed that he had gone to the red light traffic booth along with Constable Sanjeev and Constable Rajbir and had noticed blood lying at the spot on the ground near Taj Colony street near Ganda Nala. Not even a suggestion was put to any of these witnesses including PW13 SI Satender Mohan that the place of occurrence was not near the red

light traffic booth. Had such a suggestion been put to the witnesses presumably they would have thrown light on the proximity of the place of occurrence to the red light traffic booth. The further contention raised on behalf of the accused persons that in the site plan there is no mention of the traffic booth or red light and this shows the falsity of the prosecution case is to our mind wholly untenable. The site plan was prepared on the pointing out of Jeeshan @ Pappu (PW2) and the fact that no red light was pointed out by him in no manner takes away from the case of the prosecution. PW10 Ishrat Khan who had given first information to the police regarding the incident had mentioned the red light traffic booth as recorded in DD No.17A. No query was put to this witness that the place of occurrence was not near the red light traffic booth. Had this been done by the counsel for the accused persons, the matter would have been clarified by the witness.

29. With regard to the absence of light at the spot, it is clear from the evidence on record that though the area of Taj Colony was not receiving electricity, electricity was being drawn by the inhabitants of the colony from unauthorized sources. PW1 Waseem Begum in the course of her cross-examination has admitted it to be so. Interestingly, on a suggestion put to him, PW2 Jeeshan @ Pappu too stated that it is correct that no electricity meters are installed in houses at Taj Colony and that people use electricity by unauthorized means. Both PW1 Waseem Begum and PW15 SI Nitin Kumar stated that there was street light at the spot from an electric pole. The Investigating Officer PW21 ACP Data Ram too stated that there was

street light in that gali. On a query put to him, he stated that an electric pole was there at a distance of about 10 meters from the spot. Thus, the aspect of absence of light also does not come to the rescue of the accused persons. The decisions relied upon in this regard are also clearly distinguishable on facts. Both in the case of ***Durbal*** and ***M.C. Ali (Supra)*** the admitted position was that there was no street light and the witnesses were equipped with torches in the light of which they allegedly identified the assailant. In the present case there is on record evidence of the police officials and the independent witnesses that there was street light in the area.

30. Adverting next to the aspect of non-recovery of the weapon, in our considered opinion, the non-recovery of the weapon cannot render at naught the case of the prosecution in the light of the fact that the deceased died a homicidal death caused by a knife, the fatal blow having been inflicted on the left side of his chest. As per the postmortem report, the deceased sustained the following injuries:

“1. Stab incised wound 4 x 0.3 cm x cavity deep, present Lt. middle front of chest, vertically placed. 6.0 cm Lt to mid line and 2.5 cm medial to nipple and 12.0 cm below the mid point of clavicle, the lower angle is acute and upper angle is blunt. The wound enter the chest cavity through 4th and 5th intercostals space by cutting 5th rib, going backward, inward and medially direction to enter the pericardium and then perforate the Heart from anterior surface and coming out from postern aspect on anterior surface of heart, the side of wound is 2.3 x 0.2 cm and in postern surface the size of wound is 1.2 x 0.2 cm. There is about 2.0 litre of blood present in chest cavity. Total dept of wound is about 15.0 cm.

2. *Incised wound 2.5 x 0.4 cm x muscle deep present Lt side of chest over anterior axillary line, 8.0 cm below the Nipple and 13.0 cm Lt to midline. The wound the Horizontally placed and tailing is present on outer end.*

3. *Incised wound 1.2 x 0.2 cm present dorsum of Index finger of Lt hand.*

4. *Reddish Abrasion 0.5 x 0.5 cm present Lt side of forehead, 1.0 cm lateral to outer end of eye brow.”*

The cause of death is opined as hemorrhagic shock due to ante mortem stab injury on chest produced by single sharp-edge weapon. Injury No.1 is stated to be sufficient to cause death in the ordinary course of nature. The postmortem report has been proved on record by PW4 Dr. S. Lal who stated that death had occurred 18 hours before the autopsy. The autopsy was done at 12.10 p.m. on 29.3.2004 and therefore as per the postmortem report the deceased died at 6 a.m. or 7 a.m. or thereabout on 28.3.2004.

31. On behalf of the appellants, Mr. Shukla has pressed into service the variation between the ocular and medical testimony to contend that the discrepancy between the two must prove fatal to the case of the prosecution. We are not inclined to agree with the aforesaid submission as the law is well settled that in case of conflict between the medical and ocular evidence, ordinarily, the medical evidence has to be ignored being merely opinion evidence unless medical evidence renders the ocular evidence improbable.

32. In *State of U.P. vs. Hari Chand*, (2009) 13 SCC 542, the Supreme Court while laying down that unless the oral evidence is totally irreconcilable with the medical evidence, has primacy placed reliance upon the following pertinent observations made in the case of *Krishnan vs. State*, (2003) 7 SCC 56 : 2003 SCC (Cri) 1577, pp.62-63, paras 20-21:

“20. Coming to the plea that the medical evidence is at variance with ocular evidence, it has to be noted that it would be erroneous to accord undue primacy to the hypothetical answers of medical witnesses to exclude the eyewitnesses' account which had to be tested independently and not treated as the 'variable' keeping the medical evidence as the 'constant'.

21. It is trite that where the eyewitnesses' account is found credible and trustworthy, medical opinion pointing to alternative possibilities is not accepted as conclusive. Witnesses, as Bentham said, are the eyes and ears of justice. Hence the importance and primacy of the quality of the trial process. Eyewitnesses' account would require a careful independent assessment and evaluation for [their] credibility which should not be adversely prejudged making any other evidence, including medical evidence, as the sole touchstone for the test of such credibility. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses held to be creditworthy; consistency with the undisputed facts; the 'credit' of the witnesses; their performance in the witness box; their power of observation, etc. Then the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation.”

33. In *Bhajan Singh @ Harbhajan Singh and Ors. vs. State of Haryana, (2011) 7 SCC 421*, the Supreme Court laid down the parameters for the assessment of inconsistencies between the ocular and medical evidence in the following terms:-

“Thus, the position of law in such a case of contradiction between medical and ocular evidence can be crystallised to the effect that though the ocular testimony of a witness has greater evidentiary value vis-à-vis medical evidence, when medical evidence makes the ocular testimony improbable, that becomes a relevant factor in the process of the evaluation of evidence. However, where the medical evidence goes so far that it completely rules out all possibility of the ocular evidence being true, the ocular evidence may be disbelieved.”

34. In a recent decision of Supreme Court rendered in *Gajoo vs. State of Uttarakhand, (2012) 3 SCC (Cri) 1200 = (2012) 9 SCC 532*, it was noted that according to PW2 and PW3 the deceased was killed by the use of daranti which the accused was carrying, while according to the medical evidence the death resulted from asphyxia. The Supreme Court while noting that one of the accused, namely, Rampal was pushing down the deceased on the earth in the ‘aangan’ while Gajoo had inflicted the injuries with daranti in one hand and holding the neck of the deceased with the other hand, held that it was the pressing of her neck and body to the earth by both the accused of much greater strength than the deceased, that resulted in her death. The Court thus held that as such, there was no variance between the medical evidence and the ocular evidence but even for the sake of argument if there is some variance, it would still be so immaterial and

inconsequential that it would not give any benefit to the accused. The Court observed:

*“It is a settled principle by a series of decisions of this Court that while appreciating the variation between the medical evidence and ocular evidence, **primacy is given to the oral evidence of the witnesses.** Reference can be made to the judgments of this Court in *Kapildeo Mandal v. State of Bihar* (2008) 16 SCC 99 : (2010) 4 SCC (Cri) 203, *State of U.P. v. Krishna Gopal* (1988) 4 SCC 302 : 1988 SCC (Cri) 928 and *Bhajan Singh v. State of Haryana* (2011) 7 SCC 421 : (2011) 3 SCC (Cri) 241.”*

35. The question which arises for our consideration, therefore, is whether the medical evidence in the instant case completely rules out the possibility of ocular evidence being true. We think not. On a conjoint reading of the ocular and medical evidence on record we find that there is no inconsistency insofar as the weapon of offence is concerned. Both the eye-witnesses and the doctor have opined that the death of the deceased was caused by a sharp-edged weapon. The difference in the medical and ocular testimony is that while according to the ocular testimony it was a double-edged weapon, according to the doctor who conducted the postmortem it was a single-edged weapon. PW1 and PW2 perceived it to be a double-edged knife, the opinion of the doctor was that it was a single edged knife. The knife has not been recovered during investigation and as such the opinion of the doctor could not be sought as to whether the stab injuries found on the deceased could have been inflicted with the recovered weapon of offence. In such circumstance to discard the otherwise clear,

cogent and credible testimonies of the eye witnesses would not, in our opinion, militate against all settled canons of appreciation of evidence.

36. Adverting to the argument of the counsel for the accused that the prosecution case must fail the prosecution having failed to establish any motive for the commission of the crime by the accused, we note that motive in the instant case is of no particular significance. It is a well settled proposition of law that motive is of paramount importance when the case is based entirely on circumstantial evidence. Motive to a great extent loses relevance when there is ocular evidence which is cogent and convincing. Thus, we are not inclined to throw out the case of the prosecution merely on the ground that the prosecution has failed to establish the motive for the commission of the offence assuming this to be true.

37. To conclude, the learned trial court has relied upon the credible eye-witness account of PW1 and PW2, and we see no reason to differ from the findings of the trial court, more so as their testimonies are supported by the evidence of the police officials. The common intention of the accused to commit the offence also stands established from the evidence on record. We, therefore, uphold that the conviction of the Appellants under Section 302 IPC with the aid of Section 34 IPC.

38. Resultantly, all the three appeals are dismissed.

39. Accused Aftab Khan and Nawab Anwar Khan are directed to surrender today before this Court. Their bail bonds stand discharged.

**REVA KHETRAPAL
JUDGE**

**SUNITA GUPTA
JUDGE**

May 24, 2013
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