

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

+ **Crl. Appeal No. 671/2009**

% **Reserved on: 15th February, 2013**
Date of Decision: 24th May, 2013

PHOOL CHAND MAURYA AND ORS. Appellant
Through Ms. Rakhi Dubey, Advocate for appellant
Nos.1 and 3.
Mr. Ajay Verma and Mr. Shiv Kumar
Dwedi, Advocates for appellant No.2.

Versus

STATE NCT OF DELHI ...Respondent
Through Mr. Sanjay Lao and Ms. Richa Kapoor,
Additional Public Prosecutors.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

SANJIV KHANNA, J:

The appellants Phool Chand Maurya, Mohan Lal and Yogesh Kumar Maurya impugn common judgment against them by the Trial Court, dated 21st April, 2009 in FIR No. 155 of 2005, under Section 302/323/34 Indian Penal Code (IPC) for murder of Kuldeep and causing injury to his family members Raju and Dolly. By Order of Sentence dated 27th April, 2009 for the offence under Section 302/34 IPC, they have been sentenced to life imprisonment and fined Rs 500/- each, in default of which they shall undergo simple imprisonment for

two months. For the offence under Section 323/34 IPC they have been sentenced to undergo simple imprisonment for six months each.

2. The prosecution case is that on 13th June, 2005 at around 10.30 P.M. Mohan Lal, Phool Chand and Yogesh caused injuries to Kuldeep and to his brothers Raju (PW-2) and Dolly (PW-3) at Harijan Colony, Lodhi Road Arjun Camp on the road between houses of Raju (PW-2) and the appellant Mohan Lal and Yogesh. The police came into action on receiving the PCR information (Ex. PW-14/A), timed 13th June, 2005 at 22.49, that a quarrel had taken place at Lodhi Road Arjun Camp. The informant's name was Vijay. This information was relayed by Ct. Uma of 3668/Police Control Room, to ASI Balbir Singh (PW-6) at the Police Station Lodhi Colony vide DD No. 15 A (Ex.PW 6/A) on 13th June, 2005 at 11.03 P.M. Thereafter, at 11.58 P.M. DD No.16A, Ex.PW6/B was recorded on telephone information that the injured Kuldeep and Raju have been admitted to AIIMS Hospital by Head Constable Pretpal of PCR Van.

3. In the hospital Kuldeep remained unconscious, as per the MLC (Ex. PW-19/A) recorded and proved by Dr. Loli Noba (PW-19) dated 13th June, 2005, 23.00 hrs. It records that there were penetrating injuries on the body of 23 year old male which were caused by a sharp end weapon. Kuldeep succumbed to injuries and expired

subsequently. His Post- Mortem Report was (Ex. PW-18/A) prepared by Dr. Shalini Girdhar from AIIMS Delhi on 14th June, 2005 at 3.00/4.00 P.M. Dr. Shalini Girdhar has been examined in the Court twice, as PW-8 and PW-18. It transpires from the Trial Court records that Dr. Shalini was called again on request of the counsels of the appellants, as they had not cross-examined her earlier, though an opportunity was given. In the post mortem examination rigor mortis was found to be present over the body. There was no sign of decomposition. Latrogenic stich wound of size 2 cm were present on the left chest and on left second intercostal space and following antemortem injuries were present:

- “ 1. Stab Wound of size .5 x .5 cms on epigastric region 21 cm. from sternum, 101 cm from hid, 13 cm from neck nipple, 11 cm from mid axillary line directed inwards and upwards around the wound there was contuse margin of size .2 x .1 cm. On cut opening the wound it penetrated into right medial aspect of 9th intercostal space and into lower aspect of right lower in the area of .2 x .4 cms.
2. Another stab wound of .5 x .5 cm on lateral aspect of left chest wall 24 cm. from iliac wound 17 cm from middle line, 17 cm from middle line 7 cm. from mid line directly inward and outward and into the middle of left line in area of .2 x .1 cms causing left lung collapse.
3. Another stab wound of .2 x .1 cm present of left lateral aspect of thigh, 82 cm from heel, 11 cm from iliac wound and cut opening. It had penetrated into the muscles of left thigh.”

There was a cut present on left thigh of the pant which corresponded with injury No. 3. Time since death was opined as about 12 hours. Opinion regarding cause of death was given as hemorrhagic shock due to injury no.1 and no. 2 caused by sharp edged weapon which was sufficient to cause death in ordinary course of nature. All the injuries were antemortem in nature. Opinion of Dr. Shalini regarding the weapon of offences and her cross-examination on the same will be dealt with subsequently. It is clear from the post mortem report that Kuldeep died a homicidal death and this fact remains unchallenged and an accepted position.

4. The MLCs of Raju (PW-2) and Dolly (PW-3) was prepared by Dr. Parvez, who had since left the hospital and his handwriting was proved by Dr. Ram Choudhary (PW-17) of AIIMS Hospital. The MLC of Raju (Ex. PW-17/A), aged 27 years, delineates that there was small bruised wound on right side forehead and abrasions on the chest and the injured had alleged history of assault. It was recorded on 13th June, 2005 at 11.27 P.M. The MLC of Dolly (Ex. PW-17/B), aged 20 years, was recorded, on 14th June, 2005 at 1.02 A.M. that, there was a punctured wound 0.3 cms on epigostic and 0.6 cms deep. There was soft swelling around the wound.

5. To support the prosecution case, reliance has been placed on four eyewitnesses- Malti (PW-1) sister in law of the deceased, Raju (PW-2) and Dolly (PW-3) brothers of the deceased and Mamta (PW-7).

6. Malti (PW-1), sister-in-law of the deceased was also the complainant whose statement (Ex. PW-1/A) formed the basis of rukka. In her court statement, she has deposed that the appellants had quarreled with Kuldeep, 7-8 days prior to the incident but the matter was over. On 13th June, 2005 at about 10.30 P.M. Kuldeep, her brother-in-law and her husband Raju (PW-2) were returning from work when the appellants Mohan Lal, Phool Chand and Yogesh caught her husband and Kuldeep and started beating them up. The appellants were armed with danda and some pointed object. Blows of the pointed object were given on Kuldeep's back, stomach and chest portion. She has stated that her husband Raju (PW-2) was given blows with a pointed object. When she tried to intervene, she was caught by hair and pushed, so she fell on the road. Thereafter, the appellants ran away and police removed them to the hospital. In the cross-examination, she has averred that Kuldeep's house was 5-6 jhuggies away from her house, in the same row. Kuldeep was a painter by profession and returned home at 10.30 P.M. usually. On the day of the incident, Raju

(PW-2) and Kuldeep were returning together and she was alone at the jhuggi. She did not remember when the quarrel had taken place but it was prior to the incident. It occurred probably at around 8.00/8.30 P.M. for about half an hour. She has stated that she did not know the reason for the earlier quarrel and neither was police informed about it. The matter was reconciled on that day and there was no other quarrel, prior to the incident. She has denied that Kuldeep was a criminal, had a bad character, had quarrels with others or had been to jail before. She has accepted that Kuldeep was a daily drinker but stated that he drank moderately. She has stated that she did not see the persons gathered, at the spot and there was no electricity that day, in the jhuggi. The deceased Kuldeep and Raju (PW-2) did not have any weapon with them. All the three appellants were together, the appellant Mohan Lal was armed with "Sua" (ice poker), the appellant Karan @ Phool Chand was armed with dhanda and the appellant Yogesh had a brick. The appellant Phool Chand had pulled her hair. She had called the police which reached there at 10.45-11.00 P.M. and Kuldeep was removed to the hospital. She had reached the hospital at 11.00 P.M. and her statement was recorded at 11.30 P.M. She has denied that the case was concocted and Kuldeep had sustained injury because he was beaten up by an unknown person. In the cross-examination by the counsel of appellant Mohan Lal, she has denied that she had lost her

consciousness after the incident. She knew that sua was a pointed one but there was no specific mark of identification that she could recollect. She had not sustained any injury, during the incident.

7. Raju (PW-2) has deposed that on 13th June, 2005 at 10.30 P.M., he was present at the house when he heard persons abusing each other. When he came out, he saw the appellant Mohan Lal, Phool Chand @ Karan and Yogesh were beating Kuldeep. The appellant Mohan Lal inflicted injuries with a ‘sua’ (icepoker). The appellant Mohan Lal gave 3 to 4 blows with the said weapon to Kuldeep. When he intervened, he was hit with danda and brick on the head. His brother Dolly was hit with ‘sua’ on the stomach. PW-1 informed the police and PCR Gypsy removed Kuldeep and Raju to the hospital. He identified the sua, used by the appellant Mohan Lal, in the Court. He had, however, stated that he could not identify the danda by which he was hit as there was dim light. He had later identified the dead body of Kuldeep in the hospital (Ex. PW 2/B). In the cross-examination he has averred that he worked in Rai School as a painter, with his brother Kuldeep. On that particular day, Kuldeep had returned 5-10 minutes after PW-2 and not together. He resided with his wife Malti (PW-1) in the jhuggi. There was one light pole at the main road, in front of the jhuggi. When he came outside, 15-20 people had gathered at the spot

but no one intervened. There was no one within a distance of 1 or 2 meters and they were all in front of their respective jhuggies. The quarrel had continued for 5 to 10 minutes. When he had reached the spot, Kuldeep was bleeding through his mouth and nose and blood had fallen on ground. He had not seen Kuldeep on the way, while returning, and Kuldeep had not brought any article with him while returning. Dolly had reached the spot five minutes later and he had stated to the Police that Dolly had sustained injuries with sua on his stomach. He was confronted with his Section 161 Cr.P.C. statement (Ex. PW2/DA), where he had not said so. He was also confronted with his police statement where he had not stated that he was hit by brick and danda but had mentioned about danda injuries. He has stated that he became unconscious after sustaining injury on his head and recovered after 10/15 minutes at the jhuggi. He has accepted that PW-1 did not call the police in front of him. He has averred that there was a quarrel between Kuldeep and the appellants, one week prior to the incident. He has denied that Kuldeep was a black listed criminal of the area or had criminal cases in his name. He has denied that the deceased died due to a quarrel with some other persons. He has stated that police reached there, after about 10 minutes. In the cross-examination by the counsel for the appellant Mohan Lal, he has averred that he had returned home from work at about 9.30 A.M. (sic P.M.). Both his

statements were recorded by SI S.P. Singh but since he was illiterate, he did not know the contents of the statements. Public persons from mohalla were also present there but he could not recollect their name. The appellant Phool Chand had hit him with the danda.

8. PW-3 (Dolly) has averred that on 13th June, 2005, he was at home when his sister Renu apprised him that a quarrel was taking place outside. On reaching the spot, he found that his brother Raju (PW-2) was being beaten up by Mohan Lal and Yogesh, whom he identified in the Court. Both the appellants took Raju in front of their jhuggi, while beating him. When PW-3 tried to intervene, the appellant Yogesh injured him with an ice-poker. He lifted his shirt and saw that he was bleeding from his stomach. In the hospital, he found out that Kuldeep was being treated by the doctors. The shirt was seized by the police, vide recovery memo (Ex. PW-3/A) and was identified by him in the Court, as the one worn by him at the time of the incident. In the cross-examination he has averred that on the day of the incident he was alone in the house, where he lived with this wife who was at her parental home, on that day. He usually returned at 6.00 P.M. and would eat with his parents, in a nearby jhuggi. Renu, his younger sister, stayed with his parents, in the jhuggi situated in front of his jhuggi. He had returned from work at 6. 30 P.M. that day and was

sleeping when Renu told him that a quarrel had taken place. The quarrel had taken place in front of his jhuggi. Public persons were present but no one intervened. PW-3 had an electric connection but there were no electric poles there. He could not tell the distance between his jhuggi and the main road. He has stated that Kuldeep use to drink but not much. Same was the position with Raju. When he had reached, quarrel had taken place and Raju was present, at the spot. The appellant Yogesh and Mohan Lal were beating his brother but he did not see the third appellant at that time. Initially, he saw the appellants and Raju in front of Raju's (PW-2) jhuggi and later Raju (PW-2) was taken outside the jhuggi of the appellants. The distance was only of a few steps. The appellants had quarreled with the deceased only once, prior to the incident. He has denied that he was deposing falsely. In separate cross-examination by the counsel for the appellant Mohan Lal, he has stated that it was dark at the time of incident and there was no street lights but light was coming from the residential houses. He was wearing half sleeves shirt that day but he could not remember the colour or mark of identification. It was a plain shirt which he had handed over to the Investigating Officer at the police station.

9. We have eyewitness Mamta (PW-7) who is a cousin of the deceased. She has averred that on 13th June, 2005 at about 10.30 P.M.

she was proceeding towards her aunt's jhuggi (Kuldeep's mother) when she saw Kuldeep and Raju returning from work. She went to her aunt's house and after a while, heard a quarrel. When she came outside, she saw the appellant Mohan Lal stabbing her brother Kuldeep with sua "ice poker". Kuldeep was bleeding from his mouth and nose. She raised an alarm. Police reached at the spot and removed Kuldeep to this hospital. Dolly (PW-3) and Raju (PW-2) had also sustained injuries during the occurrence. This she had come to know at the hospital. In the cross-examination she has averred that her aunt stayed close to her jhuggi but she did not know the exact distance. She had left her jhuggi prior to 10.30 P.M. when the incident took place. There were only two jhuggies between her aunt's house and Raju's jhuggi. She has averred that there were no light post on the street but voluntarily stated that there were bulbs in the jhuggies which lit the street. She had intervened in the quarrel and had given assistance to her brother Kuldeep, when he fell on the ground. She had kept Kuldeep's head on her lap and Kuldeep had not stood up after sustaining the injuries. The blood had fallen where Kuldeep was and on her clothes. Her statement was recorded at 18th June, 2005. She has stated that Kuldeep was taken to the hospital in an auto (TSR) and Malti (PW-1) had called the police but she did not know from where.

Raju (PW-2) and Dolly (PW-3) had shown their injuries to the police at the hospital. She has denied that she was making a false statement.

10. At this stage, it would be important to highlight and pinpoint discrepancies and different versions, which have been set out and stated in the depositions given by Malti (PW-1), Raju (PW-2), Dolly (PW-3) and Mamta (PW-7).

11. Before we examine the said discrepancies and give our conclusions, it would be relevant, to first notice two different versions on who and how Kuldeep was taken to All Institute of Medical Sciences (AIIMS) and whether there is any material contradiction on the said aspect. Lady Constable Uma (PW-14) has stated that on 13th June, 2005, she was posted at PCR number 100 and at 22.49 p.m. received information regarding a quarrel. This was recorded in the original PCR Form (Ex.PW14/A) which bears her handwriting and signature at point 'A'. Head Constable Preetpal Sharma (PW-15) has averred that on 13th June, 2005 he was posted at PCR Eagle 914 and received a wireless message at about 10.50 p.m. regarding the quarrel. He reached the spot and found deceased Kuldeep and Raju (PW-2) were present there. He shifted both of them to AIIMS. In the cross-examination he has stated that he had seen Raju and Kuldeep lying on the street but no other injured person was found at the spot. (This

factum is important and supports our conclusion on the alleged injuries suffered by Dolly). PW-15 got the MLC of injured persons prepared and returned at about 11.45 p.m. Arun Kumar (PW-4) is brother of the deceased Kuldeep. In his court statement recorded on 24th May, 2006, he has deposed that he had identified the dead body of his brother and his identification statement Ex.PW4/DA was recorded on 14th June, 2005. He was recalled for cross-examination on 20th November, 2007, when he was confronted with statement Ex.PW4/DB, purportedly recorded under Section 161, Code of Criminal Procedure, 1973 (Cr.P.C.) on 15th June, 2005 by Inspector Rajiv Midha, who had appeared as PW-16. In Ex.PW4/DB it is mentioned that he (Arun) along with his friend Narender had taken the deceased Kuldeep in an auto rickshaw (TSR) to AIIMS after he had found Kuldeep in an unconscious state and bleeding from nose. There he noticed 2-3 poker/sua injuries on the chest of Kuldeep. Thereupon, PW-2, his wife PW-1, PW-3 and his younger brother Neeru reached the hospital. Mamta (PW-7) informed him that the three appellants had beaten Kuldeep. PW-7 in her cross-examination has stated that Arun (PW-4) had also accompanied Kuldeep to the hospital through PCR van. She (PW-7) also deposed that injured Kuldeep was put in an auto (TSR) and taken to the hospital.

12. The PCR Form (Ex.PW14/A) records that at 22.50 hours the PCR van was communicated and informed about the occurrence and a report was received from the said van at about 23.04 hours that the injured was being taken to the hospital after the PCR van had reached the spot at 22.57 hours. When we read the testimony of PW-15 along with Section 161 statement (Ex.PW4/DB) of Arun and statement of PW-7 it is clear that deceased Kuldeep was taken to the hospital by Arun but PCR van had also reached the spot and then had proceeded to the hospital. To this extent, we do not think that there is any contradiction. However, there is a contradiction between Ex.PW4/DB and PW-15's version whether PW-2 was also taken to the hospital at the same time or PW-2 had reached the hospital later on. When we carefully read Ex.PW4/DB, we find the answer. PW-2 had also reached the hospital immediately after Kuldeep was brought there. MLC of Kuldeep Ex.PW19/A was given number 73576 and was recorded on 13th June, 2005 at about 23.11 hours. MLC of Raju (PW-2) bears the next number 73577 and was recorded on 13th June, 2005 at 11.27 p.m. Raju's MLC (Ex.PW17/A) is very next MLC recorded in the said hospital. The time difference/gap can be explained as Kuldeep was seriously injured but Raju had not suffered grievous injuries. DD Entry 16A, Ex.PW6/B again supports the position that Kuldeep and Raju were taken to AIIMS. We, however, note parentage and other

details are mentioned in the two MLCs, but the said MLCs do not record the name of the person, who had brought them to the hospital.

13. Now, we revert to the contention of the appellants on the purported material contradictions in the statement of the eye witnesses, which for the sake of convenience, can be highlighted as under:-

(i) Malti (PW-1) has not referred to presence and injury to Dolly (PW-3). She has referred to presence of Raju PW-2 and deceased Kuldeep.

(ii) Raju (PW-2) has referred to presence of Dolly (PW-3) and the fact that injuries were inflicted on his stomach. He has also stated that Dolly had gone with him (PW-2) to the hospital.

(iii) Dolly (PW-3) has not deposed or stated that he had seen injuries being inflicted on Kuldeep by the three appellants, but has stated that he had seen Raju PW-2 being beaten up by the appellants Mohan Lal and Yogesh. In his cross-examination he has accepted that the appellant Phool Chand was not seen by him. He has also stated that he had seen Kuldeep in the hospital being treated by doctor i.e he had not seen Kuldeep at the place of occurrence.

Another submission raised is that Mamta's (PW-7) statement is unreliable and is not credible as her statement under Section 161

Cr.P.C. was recorded only on 18th June, 2005. The delay is not explained. Mamta, it is submitted, is a tutored witness.

14. We have considered the said contentions and thoroughly examined and scrutinized the statement of the said witnesses. The said witnesses are virtually uneducated, belong to lower strata of the society. They were inarticulate and it is apparent they did not possess good communication skills. We must also accept that there can be some variations in their versions because it is natural and there is a time gap between the date of occurrence, the dates on which their statements in chief were recorded and the dates of their cross-examination. This fact has been highlighted in the impugned judgment also. In view of the stark difference in what is stated by Malti (PW-1) and Raju (PW-2) and the version of Dolly (PW-3), we have doubts whether Dolly (PW-3) was present at the time of occurrence and had actually seen the same or the injured Kuldeep. The reason is that Dolly (PW-3) had not gone to the hospital and could not be seen in the hospital, when the police official SI S.P. Singh (PW-13), the first Investigating Officer went there, as has been deposed by PW-13. In his examination-in-chief, PW-13 has stated that Dolly was not found in the casualty and, therefore, he had not recorded his statement. Dolly's MLC (Ex.PW17/B) bears number 73616 and was recorded on 14th

June, 2005 at about 1.02 p.m. He had only one puncture wound of 0.3 cm on epigastric region which was 0.6 cm deep. He claims that he was hit in the stomach by a poker. Another reason why we feel that Dolly (PW-3) was not injured and was not an eye witness is the statement (Ex.PW1/A) of Malti, which became the 'rukka' recorded and was then sent for registration of FIR at about 1.50 p.m. on 14th June, 2005. Ex.PW1/A does not mention Dolly's name. The FIR itself was recorded at 2.10 a.m. on 14th June, 2006. In her statement (Ex.PW1/A) Malti had stated as under:-

“I reside at the aforesaid address. Today i.e. on 13.06.2005 at 10:30 O' clock in the evening I was sitting in front of my jhuggi that (I saw) Mohan Lal S/o Rameshwar Prasad, his brother Karan and Yogesh Kumar S/o Inder Pal all residing at Harijan Camp Mehar Chand Market, Lodhi Colony who had a quarrel with Kuldeep and Mohan Lal and his brother 3/4 days ago. Mohan Lal, his brother Karan and Yogesh Kumar badly beat up my younger brother-in-law and my husband. They hit my younger brother-in-law Kuldeep at his leg and back with some sharp edged weapon as a result of which he fell on the ground. Someone called the PCR. Somebody has got us admitted in the AIIMS. Legal action may be initiated against Yogesh Kumar, Mohan Lal and Karan. I heard the statement and found it to be correct.”

15. This was the first recorded version immediately after the occurrence, in the night intervening 14th and 15th June, 2005. In this

statement there is no mention of Dolly or any injury to him. At this stage, we also notice that the shirt purportedly worn by PW-3 at the time of occurrence was seized by the police only on 17th June, 2005.

16. We also have doubts on the statement made by Mamta (PW-7) and whether she had actually seen the occurrence and injuries being caused to Kuldeep. Her statement under Section 161 Cr.P.C. was recorded belatedly on 18th June, 2005, nearly 5 days after the occurrence and no reason or explanation has been given for the said delay. However, we must remember that Mamta (PW-7) was living in the same Jhuggi Jhopri colony and on hearing about the quarrel would have possibly reached the spot within a few minutes and she may have seen injured Kuldeep lying there and looked after him. Similar is the position with regard to Dolly (PW-3), who was also residing in the same Jhuggi Jhopri colony. In fact, PW-3 had stated that he was sleeping when he was told about the quarrel in the street by her sister.

17. However, we do not find any ground or reason to doubt the statement of Malti (PW-1) and substantial part of Raju's (PW-2) court deposition. Raju, as noticed, is an injured witness and had reached the hospital with the deceased Kuldeep or within a gap of few minutes. The court deposition of PW-2 makes it clear that on the said date he and Kuldeep were doing painting work together. They finished the

work and had come back to their residence i.e. Jhuggi Jhopri colony. He was sitting in his Jhuggi when he heard commotion; he came out and saw the three appellants. Appellant Mohan Lal had given 3-4 blows to Kuldeep with a poker/sua. The other two appellants had inflicted injuries by brick and danda. He too suffered injuries when he tried to rescue Kuldeep. In the cross-examination, he clarified that when he reached the spot, Kuldeep was already bleeding through his mouth and nose. Raju (PW-2) has observed that Dolly (PW-3) reached the spot after 5 minutes after he had reached. In his Section 161 statement Ex.PW2/DA, PW-2 has not stated that Dolly had sustained injuries with sua at the hands of the accused persons. PW-2 has stated that he had come home 5-10 minutes before Kuldeep returned from the site where they were doing painting work. PW-1 Malti has no doubt stated that PW-2 and Kuldeep came together and PW-2 had not entered the Jhuggi whereas PW-2 had stated that he was in his Jhuggi when he heard the commotion/quarrel but this difference or contradiction is not significant or material. PW-2 and deceased Kuldeep were working together at a nearby place at a walking distance. They came back almost together within a small time gap. This minor discrepancy does not affect the credibility and truthfulness of the statement of PW-2 or PW-1. Testimony of PW-2 should not be disbelieved as he himself was injured and is an eye witness and his

presence at the spot is certain. As per MLC (Ex.PW17/A) he had suffered small bruise wound on his forehead and abrasions on his chest. The injuries mentioned in the post mortem report corroborate the testimony of PW-2 that a poker/sua was used for inflicting the said injuries. Dr. Shalini Giridhar (PW-18), who had conducted the post mortem (Ex. PW- 18/A) on the body of Kuldeep, has deposed that the weapon of offence, which was shown to her, at the tips had circumference of .5 cm and at the other end it was 1 cm. The wounds in question were extremely small in width but were long and deep. She opined that the injuries mentioned in the post mortem report could have been caused by a poker/sua. PW-1 has also deposed about presence of PW-2 Raju.

18. In the present case, two pokers/sua were recovered on the basis of the disclosure statements made by appellants Mohan Lal and Yogesh, Ex.PW13/G and Ex.PW13/F, respectively. On FSL examination, on one poker human blood was detected, but the blood group could not be ascertained. On the other poker no blood could be detected. The said two pokers/suas were recovered from Jhuggis at the pointing out of appellants Mohan Lal and Yogesh and were marked P-2 and P-3, respectively. However, there appears to be some confusion as to the sua or poker on which human blood was detected, whether

was recovered from Mohan Lal or Yogesh. We notice that PW-1 and PW-2 have not deposed that appellant Yogesh was carrying any sharp instrument. PW-1 in the cross-examination has stated that Kuldeep was given blows with a pointed object after he was beaten up by the three appellants without specifying who had given the blow by the pointed object. But, in her cross-examination, PW-1 clarified that Mohan Lal was armed with the poker and Phool Chand was armed with a 'danda' and Yogesh was carrying a brick. PW-2 Raju has stated that appellant Mohan Lal had inflicted injuries with the pointed object, i.e. poker or sua, with which he had given 3-4 blows. He has stated that the other appellants had inflicted injuries with danda and brick. It would be logically understood that the other appellants i.e. Phool Chand and Yogesh were carrying danda and brick. FSL report (Ex.PX), therefore, lends support to the testimony of PW-1 and PW-2 that only one poker was used and this poker was used by the appellant Mohan Lal and the statement of PW-3, Dolly that a second poker/sua was used by appellant Yogesh is incorrect and wrong. This is another ground/reason to disbelieve Dolly PW-3. Injury on Dolly (PW-3) appears to have been inflicted afterwards and not at the time of this occurrence leading to death of Kuldeep.

19. The place of occurrence as per the un-scaled site plan and the scaled site plan, which by mistake have not been ascribed exhibit numbers, show that the occurrence had taken place outside the Jhuggi of Raju (PW-2), which is on the opposite side of the Jhuggis of Yogesh and Mohan Lal. The un-scaled site plan was marked Ex.PW13/B in the testimony of SI S.P. Singh (PW-13), who had prepared the same. The scaled site plan was drawn by SI Madan Lal (PW-10) and was mentioned as Ex.PW10/A, in his statement.

20. PW-1 and PW-2 have referred to the motive i.e. previous conflict and enmity between the appellants and Kuldeep. The three appellants in their statement under Section 313 Cr.P.C. have accepted that there was a quarrel with the deceased Kuldeep, but have claimed that this was amicably settled after interference by the neighbours. The three appellants have stated that at the time of the occurrence, they were sleeping in their Jhuggi as they had chest pain because they were T.B. patients.

21. As far as appellant Mohan Lal is concerned, he is the actual perpetrator, who had inflicted injuries resulting in death of Kuldeep. In all three injuries were caused. Two of them were sufficient in ordinary course of nature to cause death as per the post mortem report. Injury No.1 had penetrated into the right medial aspect of 9th

intercostals space and into lower aspect of right lobe of liver and the second injury had penetrated into the 7th intercostals space and into the middle of left lung. The third injury was on the left thigh. He has been rightly convicted under Section 302 IPC and also under Section 323 read with Section 34 IPC for having caused injuries on Raju (PW-2). He is, however, entitled to acquittal under Section 323 read with Section 34 IPC for alleged injuries caused to Dolly (PW-3).

22. As far as appellants Yogesh and Phool Chand are concerned, they were stated to be armed with a brick and danda, respectively. As per the site plan, appellant Mohan Lal had a separate Jhuggi whereas the appellant Yogesh was residing in an adjacent but a different Jhuggi. The three appellants are related. Mohan Lal and Phool Chand are brothers and Yogesh is their relative. The question is whether the appellants Yogesh and Phool Chand shared common intention with the appellant Mohan Lal to commit murder or the murder was committed by Mohan Lal in furtherance of “common intention” shared by them. PW-1 and PW-2 are silent about the beginning of the actual occurrence and what had happened before the first injuries were inflicted on Kuldeep. PW-1 had come out of his Jhuggi after the poker wound had been inflicted on Kuldeep. PW-2 has stated states that when he saw Kuldeep, he was already bleeding from his nose and mouth, but has

also averred that he had seen Mohan Lal giving 3-4 blows from the poker. He has not stated that appellants Yogesh and Phool Chand had caught hold of deceased or aided the appellant Mohan Lal. When and how Phool Chand and Yogesh came out, whether Mohan Lal came out with them or separately is not forthcoming. Yogesh, PW-2 has stated, only had a brick in his hand, whereas Phool Chand had a small danda of the size of a cricket stump. Poker, it is well known, is used to break ice and is available in houses where ice is used for cooling. June is a summer month. It is possible that during the quarrel the appellant Mohan Lal may have brought the poker from his Jhuggi and inflicted the wounds. We also notice that there are no specific injuries on the deceased from any danda or brick. PW-2 no doubt has suffered minor injuries, but these it is apparent were inflicted after the stab wounds were given to Kuldeep.

23. In view of the aforesaid facts, we do not think that the appellants Yogesh and Phool Chand can be attributed with common intention under Section 34 IPC to commit murder of Kuldeep. They did not share the said common intention to commit murder or were co-participants in act/acts which in furtherance thereof could have lead to murder under Section 302 IPC. At best, it can be said that they had nurtured common intention under Section 304, Part-II IPC. We,

therefore, give them benefit of doubt and hold that they did not share common intention to commit murder under Section 302 IPC. Their conviction is accordingly modified to Section 304, Part-II read with Section 34 IPC.

24. On the question of quantum of sentence, the appellant Phool Chand and Yogesh have already suffered incarceration of about six years each and their sentences have been suspended. The period of incarceration already undergone by them would be sufficient and we do not think that they should be again sent to jail. Sentence of appellant Mohan Lal has not been suspended. His conviction and sentence under Section 302 IPC is maintained. Their conviction and sentence under Section 323 read with Section 34 IPC for causing injuries to Raju PW-2 are maintained. Section 428 Cr.P.C. will apply. However, appellant Mohan Lal and appellants Yogesh and Phool Chand have been acquitted under Section 323 IPC for purported injuries suffered by PW-3, Dolly. The appeals are accordingly disposed of.

(SANJIV KHANNA)
JUDGE

(SIDDHARTH MRIDUL)
JUDGE

MAY 24th, 2013
NA