

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

% *Judgment reserved on: 25.10.2013*

Judgment delivered on :01.11.2013

+ CRL.A. 959/2010

VINOD KUMAR & ANR

..... Appellants

Through: Mr. Mukesh Sharma and
Ms. Chaitanya Siddharth,
Advocates for Appellant No. 1.
Mr. Sudhir Nagar and Mr. Mohit
Singh, Advs for appellant No. 2.

versus

STATE & ANR

..... Respondents

Through: Ms. Richa Kapoor, APP for the
State.

CORAM:

HON'BLE MR. JUSTICE KAILASH GAMBHIR

HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J.

1 The two appellants Vinod Kumar and Joginder are aggrieved by the impugned judgment dated 05.06.2010 vide which they had been convicted for an offence under Sections 302/201/34 of the IPC and each of them had been sentenced to undergo imprisonment for life as also to pay a fine of Rs.50,000/- for the offence under Section 302 of the IPC and in default of payment of fine to further undergo SI for a period of

one year. For the offence under Section 201 of the IPC each of the two convicts had been sentenced to undergo RI for a period of four years and to pay a fine of Rs.5,000/- each and in default of payment of fine to further undergo SI for a period of one month. The third convict Sanjay had been convicted for the offence under Section 201 of the IPC and he already having undergone the sentence imposed upon him, he has not assailed his conviction.

2 Version of the prosecution is that on 26.10.2004, DD No. 2 (Ex.PW-4/A) was received in the police post DDA Flats, Police Station Jahangir Puri wherein it was reported that an accident had occurred at the 'T' point, Jahangir Puri. ASI Kishanjeet (PW-11) reached the spot. A motor-cycle bearing No DL-8SV-1285 and a blue coloured shirt was found lying there. The injured had already been removed to the BJRM Hospital. The MLC of the injured was collected. He was a boy aged between 20-22 years and had been brought dead to the hospital. Cut injuries were found on his body. Information was transmitted to the Police Station Jahangir Puri.

3 The dickey of the motor-cycle contained papers which revealed that the motor-cycle belonged to one Bhim Singh (PW-9). The house of

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Bhim Singh at E-9, Prashant Vihar was located. Bhim Singh identified the motor-cycle to be that of his son who had left the house on this motor-cycle. Bhim Singh thereafter identified the dead body as that of his son. FIR was accordingly registered under Section 302 of the IPC.

4 Statement of Bhim Singh (PW-9) was recorded. As per his version, there was a dispute qua their house E-9, Prashant Vihar where he was residing on a portion of the first and second floor; his brother Rajinder was residing on another portion of the said floor and their elder brother Attar Singh was residing on the ground floor. This house was owned by their mother Ramo Devi who has since expired. On 25.10.2004, a quarrel had taken place between his two brothers Rajender and Attar Singh; Rajender had received injuries; on hearing the incident PW-9 along with his son Abhishek had gone down; when Abhishek tried to intervene, accused Joginder and Vinod Kumar who had also reached there on their motor-cycle started abusing Abhishek. Both Joginder and Vinod threatened Abhishek that they will settle the dispute with him. Further version of PW-9 being that when Abhishek was going to the hospital on his motor-cycle to visit his uncle Rajender, the accused persons followed him. In the morning at about 02:30-03:00

AM, the police had come to his house wherein he was informed that a motor-cycle was lying at the 'T' point of Jahangir Puri; on PW-9 reaching the spot he identified the motor-cycle to be that of his son; he was taken to the BJRM Hospital where he thereafter identified the dead-body of his son Abhishek.

5 On this statement of PW-9 (Ex.PW-9/A), rukka was taken at 05:00 AM in the morning of 26.10.2004 and the FIR under Section 302 of the IPC was registered against the accused persons. Accused persons were arrested vide memos Ex.PW-21/H, Ex.PW-9/X and Ex.PW-9/R.

6 Accused Vinod was arrested at 05:00 PM on the evening of 26.10.2004. Pursuant to the disclosure statements made by him he got recovered a kitchen knife the alleged weapon of offence from a construction park near the APMC dispensary as also a blood stained pant which was lying in an iron trunk; the same were taken into possession vide memo Ex.PW-9/H & Ex.PW-9/J. He had also pointed out the place from where the motor-cycle (allegedly used by the accused persons) was recovered. This was vide memo Ex.PW-9/K.

7 On 27.10.2004, the house of accused Sanjay was raided at Sarai Pepal Thala where accused Sanjay was arrested. His disclosure

statement Ex.PW-9/M was recorded. He got recovered a knife/dagger which was dug out from under the soil near the sewer which was the second weapon of offence and was taken into possession vide memo Ex.PW-9/P. Sanjay also got recovered a blood stained shirt which was lying under the bed Ex.PW-9/Q alleged to be the shirt of Joginder.

8 On 31.10.2004 at the pointing out of PW-9 accused Joginder was arrested. His disclosure statement Ex.PW-9/S was recorded. Pursuant to his disclosure statement, he got recovered a blood stained chocolate coloured pant and a shirt belonging to the co-accused Sanjay having blood stains on the collar of the shirt; the same was taken into possession vide memo Ex.PW-9/U.

9 Rajender Mann (PW-10) the injured witness has also corroborated this version of PW-9 qua the incident of 25.04.2010 wherein he had received grievous injuries. He reiterated the version of PW-9 that accused Joginder and Vinod had threatened Abhishek and Bhim Singh “dekh lenge kaam tamam kar denge” when Abhishek had tried to intervene to save him in the quarrel between Rajinder and the family of Attar Singh.

10 Ravinder Kumar (PW-15) was a witness to the recovery of the

knife which had been recovered at the instance of accused Sanjay. He had however not supported the version of the prosecution and had been declared hostile.

11 The medical evidence adduced by the prosecution was the MLC of the victim which had been proved Ex.PW-1/A showing that the victim had been brought in a dead condition to the hospital.

12 The post-mortem on the victim was conducted by Dr. L.C. Gupta (PW-6). The following injuries were noted upon his person:-

- 1. Two incised wounds of elliptical shape were present at back of right flank.*
- 2. One incised wound present at left side back of spine.*
- 3. Two incised wounds at front of top of right shoulder.*
- 4. One incised wound at right middle finger.*
- 5. One incised wound at lateral aspect of left arm.*
- 6. Two stabbed wounds at left arm.*
- 7. One incised wound at the left side face which extending to tip of chin and fractured the mandible and teeth which were missing from their sockets.*
- 8. Incised wound left side face.*
- 9. Incised stabbed wound chest cavity deep at right side fourth intercostal space.*
- 10. One incised wound at left side chest lower part.*
- 11. Abraded bruise at left shoulder radial.*
- 12. Imprint abrasion at left side upper chest having size 12x2 cm.*

13 Cause of death was shock resulting from internal hemorrhage

consequent to ante-mortem injury to right lung which was sufficient to cause death in ordinary course of nature and mode of death was homicide.

14 The opinion on the two weapons of offence Ex PW-6/A was also given by the said doctor; opinion being to the effect that the injuries on the person of the deceased could have been caused by the said weapons.

15 Initial investigation was carried out by ASI Kishan Jeet (PW-11) who along with HC Ramesh Kumar (PW-14) had reached the spot. This was pursuant to DD No. 2 received through constable Suresh Malik (PW-4). Inspector Satpal Yadav (PW-21) was the Investigating Officer. He was joined by HC Rajvir Singh (PW-12).

16 Statements of the accused persons under Section 313 of the Cr.PC were recorded. In their statements, all the accused persons pleaded innocence. They have stated that they have been falsely implicated in the present case.

17 Two witnesses were led in defence by accused Vinod. DW-1 and DW-2 have both set up a defence that accused Vinod was working as a driver in the bus owned by DW-1 and on the fateful day he was on duty; he had been picked up by the police in the early hours of 26.10.2004

from his house and has been falsely implicated. This defence however did not find favour with the Court.

18 On the basis of the aforementioned evidence collected by the prosecution, the accused persons had been convicted for the offences as noted hereinabove.

19 Arguments had been addressed at length by the learned counsel for both the appellants.

20 On behalf of accused Vinod, arguments had been addressed by the counsel Mr. Mukesh Sharma. Besides oral submissions, written arguments had also been filed. It is pointed out that this is admittedly a case of circumstantial evidence; there is no eye-witness account; unless and until all the links in the chain stand complete, the conviction of the appellant cannot be founded. Submission being that the version of PW-9 has to be read with great circumspection and caution as he was an interested witness being the father of the victim. His version is not only exaggerated but is far from the truth. It is pointed out that Guddu, the prime witness i.e. the person who had first removed the injured to the BJRM hospital has not been examined; in fact no effort has been made by the prosecution even to trace him. Further submission being that the

recovery of the kitchen knife (Ex.P-8) which had been sought to be foisted on the appellant is clearly doubtful as the sketch of the knife (Ex.PW-9/L) as also its seizure memo Ex. (PW-9/H) show that the knife was blood stained but at the time when the FSL had examined it, it had opined that there was no blood found on the knife. This creates a doubt on the aforementioned recovery; no credence can be placed upon such a recovery; PW-15 who was a witness to this recovery has also turned hostile. Further submission being that the testimonies of DW-1 and DW-2 who had adduced evidence in defence had clearly stated that accused Vinod was working as a driver with DW-1 and even on the fateful day he was on duty; his duty hours were between 05:30 PM to midnight; DW-2 has reiterated the version of DW-1 that the accused was arrested from his house at 06:00 AM on 26.01.2004. Testimonies of these witnesses were unduly ignored by the trial Judge. In the alternative it has been submitted that all cases of death do not qualify as a 'murder' and even presuming that death of the victim had occurred at the hands of the appellants, this case is not covered under Section 302 of the IPC but at best can be covered under Section 304-II of the IPC and to support this submission, reliance has been placed upon Explanation IV of

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Section 300. Reliance has also been placed upon the judgments reported as Jagriti Devi Vs. State of H.P. 2009 (14) SCC 779 and Shakti Dev Vs. State of Rajasthan 2007 (15) SCC 68.

21 On behalf of the second appellant Joginder apart from oral submissions, written argument had also been filed by counsel Mr. Sudhir Nagar. Arguments are by and large on the same account. Submission being that the recovery of the shirt purported to have been got recovered by co-accused Vinod from the house of third accused Sanjay cannot be read against the present appellant for two reasons; firstly this recovery was effected pursuant to the disclosure statement made by another co-accused and secondly for the reason that there was no evidence brought forward by the prosecution to establish that this shirt which was recovered from the house of Sanjay in fact belonged to Joginder; no witness of the prosecution has adduced evidence to the said effect. There is also no evidence to establish that the shirt button which was seized from the spot (vide memo Ex.PW-9E) was in any manner connected with the shirt; this seizure is also doubtful for the reason that the versions of PW-9, PW-11 and PW-21 on this point are clearly contradictory; whereas PW-9 has deposed that the button was recovered

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from under the rear wheel of the motor-cycle; PW-11 has deposed that it was recovered under the tyre and the third witness has deposed that when he revolved the handle of the motor-cycle, one button was found implying thereby that it was recovered from under the front tyre. These inherent contradictions not being reconciled, no reliance can be placed upon such a version set up by the prosecution. Recovery is clearly doubtful. Further submission in this context being that the recovery memos qua all the other exhibits which were recovered from the spot are joint recoveries but only the button had been seized vide single recovery memo which clearly evidences that this was an afterthought manipulation and a concocted version set up by the prosecution. To support his submission, learned counsel for the accused Joginder has placed reliance upon a judgment reported as Aghnoo Nagesia Vs. State of Bihar (1966) 1 SCR 134; submission being that only so much of a confession which leads to the discovery of a fact can be read as evidence under the provisions of Section 27 of the Evidence Act; otherwise a confession is liable to be discarded in toto. Reliance has also been placed upon Kamlesh Singh Vs. State Manu/DE/2397/2013 to support a submission that where in similar circumstance a blood stained shirt and

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axe had been recovered pursuant to a disclosure statement of the accused and the blood group not having been identified, no reliance was placed on such a recovery. Submission being reiterated that the appellant can in no manner be connected with the crime; he is entitled to a benefit of doubt and a consequent acquittal. Further submission being that testimonies of PW-9 & PW-10 have been relied upon by the trial Court as a “last seen evidence” which is a misnomer as these testimonies do not fall within the scope of ‘last seen’. To support this submission reliance has been placed upon Pradeep @ Sanjay & Others Vs. State 2011 (2) Crimes 499; it is pointed out that in a similar circumstance where accused persons had followed a red line bus in which the deceased was travelling on their scooter, the Court had noted that this would not qualify as a “last seen”. On all counts, both the appellants are entitled to a benefit of doubt and a consequent acquittal.

22 Arguments had been refuted by the learned Public Prosecutor for the State. It is submitted that the impugned judgment suffers from no infirmity. Submission being that all the links in the chain of circumstantial evidence stand complete. The version of PW-9 and PW-10 clearly show that both the appellants were nursing a vehement

revenge against Abhishek for having intervened in the quarrel which had taken place just minutes before between their mother and other brothers on the one hand and their uncle Rajender on the other hand. The incident had also been documented in two cross FIRs Ex.PW-17/A and Ex. PW-17/B are undisputed documents. Their testimonies qualify in the category of “last seen”. Motive of the crime was to seek revenge against Abhishek for the aforementioned act is also evident as also the fact that the parties were litigating in Court over this property i.e. E-9, Prashant Vihar. The recoveries which were the weapon of offence as also blood stained motorcycle which was used in the crime and which was recovered at the pointing out of the accused Vinod clinched the matter; submission being that the accused persons can in no manner escape their fate. On the issue of recovery which has been vehemently argued by both the learned counsel for the appellants, submission of the learned public prosecutor is that any information given by the accused in his disclosure statement which leads to the discovery of a fact can be read and is an admissible piece of evidence under Section 27 of the Evidence Act; this is de hors the fact that the said accused has not specifically stated that he could get the aforementioned recovery effected. To support

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this submission, learned public prosecutor has placed reliance upon judgment in the case of Antulay 30 Cr. L. J 659 as also another judgment of the full Bench of Allahabad High Court reported as Misri Vs. Emperor Cr. L. J. (Vol 10) 439.

23 We have heard the arguments of the learned counsel for the parties, appreciated their arguments and perused the record.

24 Record reveals that the property E-9, Prashant Vihar was owned by Ramo Devi, the mother of Bhim Singh (PW-9), Rajender (PW-10) and Attar Singh. All three were real brothers. The ground floor of E-9, Prashant Vihar was in occupation of Attar Singh and his family comprising of his wife Savitri Devi and sons Sanjay and Bijender. The first floor and second floor was in joint occupation of Rajender Singh and his family as also Bhim Singh and his family. On the date of the incident, the other two sons of Attar Singh i.e. accused Vinod and Joginder were living at Sarai Pepal Thala. These facts are admitted.

25 As per the version of Bhim Singh (PW-9), on 25.10.2004 at about 10:00-10:30 PM, a quarrel took place between his two brothers i.e. Rajender and the family of Attar Singh i.e. his wife Savitri and sons Sanjay and Bijender. On hearing this quarrel, PW-9 along with his son

Abhishek (the deceased) came down. Abhishek tried to intervene and sought to pacify his cousin i.e. son of Attar Singh. Meanwhile, the accused Joginder and Vinod who were living elsewhere came there on their motor-cycle; they had also learnt about the incident; they started abusing Abhishek. Rajender suffered injuries; so also Savitri Devi the wife of Attar Singh. Accused Joginder and Vinod threatened Abhishek that since he had tried to intervene that they would settle the matter with him. Thereafter Abhishek on his motor-cycle went to see his uncle Rajender who had been removed to the BJRM Hospital; the accused persons i.e. Joginder and Vinod also followed him on their motor-cycle.

26 On this version of PW-9, a lengthy cross-examination had been effected but the credibility of this witness remained untarnished; he stuck to his stand. Suggestions have been given to this witness qua disputes inter-se between the brothers qua the property E-9, Prashant Vihar and Civil Suit No. 2017/99 pending before the High Court on this count. However, on a specific query put to the accused persons (question No. 9) that Bhim Singh and Abhishek had tried to pacify this quarrel by intervention, there was an evasive reply; it was not even a denial; the answer was in the form of "I do not know".

27 The fact that this quarrel had in fact taken place is evident by the cross FIRs which had been registered qua this incident. FIR No. 897/2004 (Ex.PW-17/A) which had been registered at Police Station Prashant Vihar on the same day at 12:30 PM on the complaint of Rajender; the accused were Savitri Devi and her two sons Sanjay and Bijender. The second FIR i.e. FIR No. 898/2004 (Ex.PW-17/B) was also registered under Section 308 of the IPC at a later point of time in which the complainant was Savitri Devi and her two sons. The MLC of Savitri Devi (w/o Attar Singh) had been recorded by the doctor at the BJRM Hospital noting simple injuries upon her person. Rajender had been examined in the hospital at 11:25 PM.

28 This incident had occurred between 10:00-10:30 PM on the said day and testimony of PW-9 on this count was also corroborated by the version of Rajender (PW-10). He had deposed that on the fateful day his bhabhi Savitri Devi at about 10:30 PM started quarreling with him along with Sanjay and Vinod; he received grievous injuries; Sanjay had an iron rod and Savitri was having a danda. PCR had been informed. Abhishek, his nephew had come down to intervene into the matter.

Meanwhile Bhim Singh and Joginder and Vinod, the other two sons of

Attar Singh had also reached the spot. PW-10 has reiterated that Vinod and Joginder had threatened Abhishek that because of his intervention, they would set him right “dekh lenge kaam tamam kar denge”; at that time, he was conscious; he was thereafter removed to BJRM Hospital. He has further deposed that accused Vinod and Joginder had tried to forcibly take possession of a part of the portion of E-9, Prashant Vihar although as per the family settlement, Attar Singh had been allotted his share in the property at Sarai Peepal Thala. Thus the fact that there were disputes between the brothers qua this property has come on record.

29 Learned counsel for the appellant has drawn attention of the Court to the version of PW-9 wherein he has stated that “after that” i.e. after Rajender had been removed to the hospital, Joginder and Vinod had threatened Abhishek; emphasis being on the words “after that”; submission being that the testimony of PW-10 on this score that he had heard the accused persons threatening Abhishek is an incorrect version and in fact PW-10 had already been removed to the hospital at the time when these threats had been extended by the accused and he could not have heard the said threats; as such his testimony is liable to be disbelieved.

30 There is no gainsaying that the testimony of a witness has to be read as a whole and no one line or sentence can be picked from one part of the version to give it a meaning which an otherwise reading of the whole version would not indicate. Version of PW-9 has to be read in its entirety. A lengthy cross-examination had been effected of this witness. He has even gone on to give the timings of the incident; he has reiterated that the quarrel between Rajender and the family of Attar Singh had occurred between 10:00-10:30 PM; it has been reiterated that Abhishek had tried to intervene to pacify the family of Attar Singh not to beat Rajender; accused Joginder and Vinod had also entered the scene of the incident on their motor-cycle; when Abhishek tried to intervene, he was threatened by the accused Joginder and Vinod that they would set him right; Rajender had received grievous injuries in the incident; he was removed to the hospital; Abhishek had gone after his uncle to visit him in the hospital which was between 10:30-11:00 PM. Even presuming that this sentence “after that” has to be taken in the context in which the argument had been addressed, the earlier version of PW-9 clearly shows that when Joginder and Vinod had entered the scene of incident on their motor-cycle, they had started abusing Abhishek. Obviously they were in

a rage. The detail of these abuses has not been mentioned but the submission of the learned Public Prosecutor that these abuses could well have contained threats and intimidating words cannot be ruled out. This is especially so keeping in view the fact that in this entire version, PW-9 has not explained the words which were used by the accused in their threat but has only spoken of threats (i.e. they will settle the dispute with him) having been extended by them to Abhishek.

31 The motor-cycle being driven by Abhishek was bearing No. DL-8SV-1285 LML which was found lying at the 'T' junction of Shiv Dharam Kanta, Jahangir Puri (place of incident) when PW-11 along with PW-14 had reached the spot. This motor-cycle was in the name of PW-9; it had been taken into possession vide memo Ex.PW-9/C. The motor-cycle which was driven by the accused persons was bearing No. 2932; it was a Hero Honda motor-cycle; the pointing out memo of this motor-cycle was prepared at the instance of accused Vinod; it was standing on the ground floor of his residence i.e. 65, Sarai Pepal Thala. The pointing out memo-cum-possession memo of this motor-cycle is Ex.PW-9/K. A perusal of Ex.PW-9/K shows that this motor-cycle had blood stains on the right side of its body i.e. on its handle covers. This

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memo was also attested by PW-9. These metallic handles when examined by the CFSL had opined to contain human blood group of 'A' origin which was also the blood group of the deceased. On a specific query put to the accused persons on this score, there was again an evasive reply in the form of "I do not know"; it was not even a denial. This was yet another piece of clinching evidence; as the accused were unable to explain as to how human blood of 'A' origin was detected on the handle of their motor-cycle which was parked on their ground floor verandah. The fact that this motor-cycle was registered in the name of their brother Sanjay is also not in dispute.

32 The aforementioned collected evidence proved on record thus establishes that on 25.10.2004 at about 10:00-10:30 PM a quarrel had taken place between Rajender on the one hand and the wife and sons of Attar Singh on the other hand. The other two sons of Attar Singh namely Vinod and Joginder had come to E-9, Prashant Vihar on hearing about this quarrel. Abhishek had also tried to intervene in this quarrel but in this course, he was intimidated and received threats at the hands of Vinod and Joginder. Rajender had suffered grievous injuries. Savitri Devi had also received injuries. Both the injured parties had been

removed to the hospital. Abhishek had gone to visit his uncle Rajender on the motor-cycle of his father. This was between 10:30-11:00 PM. DD No. 2 (Ex.PW-4/A) was received in the police post Jahangir Puri at 12:20 PM giving information that at the 'T' point of G.T.K. Road, Shiv Dharam Kanta, Jahangir Puri a dead-body of an unknown person was lying; this information was received at 12:20 PM meaning thereby that the murder of Abhishek had already been committed between 11:00-12:20 PM.

33 By 12:20 PM Abhishek was already a dead man; he had been removed to the BJRM Hospital where he was brought in dead which was evident from his MLC (Ex.PW-1/A).

34 The quarrel between Rajender and the family of Attar Singh; the intervention of Abhishek enraged Joginder and Vinod, being followed by their extending threats to Abhishek had thereafter culminated into this murderous attack on Abhishek. All this had happened within a span of less than 1- ½ hour. Cross FIRs (Ex.PW-17/A & Ex.PW-17/B) under Section 308 of the IPC were registered qua the first part of the incident. In fact Rajender was under medical examination at the BJRM hospital (his MLC reflects the time as 11:25 PM) and Abhishek was on his way

to see him when around the same time at the 'T' junction of Jahangir Puri; he was attacked and murdered. The revengeful grudge which Vinod and Joginder were nursing against Abhishek had led to this assault.

35 This Court is constrained to draw this conclusion not only on the evidence which has been collected and discussed hereinabove but also additional evidence which has been collected by the prosecution and which shall be discussed herein later. However before adverting to this, the provisions of Section 6 of the Evidence Act would become relevant and must be adverted to.

36 Section 6 of the Evidence Act reads herein as under:-

“Section:-6, Relevancy of facts forming part of same transaction.- Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places.”

Illustration ‘a’ is relevant. It reads as under:-

“(a) A is accused on the murder of B by beating him. Whatever was said or done by A or B or the by-standers at the beating, or s shortly before or after it as to form part of the transaction, is a relevant fact.”

37 The principle of law embodied in Section 6 of the Evidence Act is usually known as the rule of *res restae* recognized in English law. The

essence of the doctrine is that a fact which though not in issue, is so connected with the fact in issue “as to form part of the same transaction” becomes relevant by itself. The requirement of this Section is that these statements which are sought to be admitted must have been made contemporaneous with the act or immediately thereafter and not at such interval of time as to allow fabrication or to reduce the statement to a mere narrative of past events. A transaction as the term used in this Section is defined “as a group of facts so connected together as to be referred to by a single name, as a crime, a contract, a wrong or any other subject of enquiry which may be in issue. The statements of PW-9 and PW-10 were contemporaneous or almost contemporaneous with the transaction in issue and the interval between the first incident and second incident was so short that there was no time for fabrication; these declarations of PW-9 & PW-10 qualifying as “*res gestae*” and are relevant facts under Section 6 of the Evidence Act.

38 The testimonies of PW-9 and PW-10 also qualify under the circumstance of “last seen”. The theory of “last seen” as enunciated in judicial pronouncements requires that where the deceased is seen alive with the accused and soon thereafter, the deceased is found dead or

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injured and there is no possibility of any other person accessing the deceased, until and unless, the accused explains the circumstances under which the deceased has been injured or has died, the accused persons must own up for their guilt. The Supreme Court in the landmark judgment of Mahibur Rahman and another Vs. State of Assam (2002) 6 SCC 715 had held that where on account of close proximity of place and time between the event of the accused having last seen with the deceased and the factum of death, a rational mind is persuaded to reach an irresistible conclusion and in the absence of any explanation by the accused on this score, the guilty mind of the accused would become evident.

39 Applying this test to the instant case, the trial Judge had rightly relied upon the versions of PW-9 & PW-10 as a circumstance of 'last seen'. At the cost of repetition and as noted supra the threats and intimidating words uttered by the accused persons to Abhishek were between 10:00-10:30 PM; Rajender had been removed to the hospital and was examined at about 11:25 PM; after Rajender had left for the hospital, Abhishek followed him on his motor-cycle to visit him; accused persons followed thereafter; at the 'T' junction of Jahangir Puri

i.e. just 1-2 kilometers away from the BJRM Hospital, the deceased was found dead. The first DD recording his death was returned in the Jahangir Puri Police Post at 12:20 PM; he had obviously died prior in time. The time span suggests that it was within less than one and half hour that this entire scene had been enacted. The explanation furnished by the accused in their statements under Section 313 of the Cr.PC was that the complainant party wanted to grab their father's property and because of other litigations pending against them, a false case had been registered against them. This defence which they had taken in their statements under Section 313 of the Cr.PC did not find mention in the cross-examination conducted by the learned defence counsel upon the witnesses of the prosecution. This defence was also not the defence taken by DW-1 and DW-2 who had set up a totally contradictory and conflicting defence; their version being that on the fateful day Vinod was working as a bus driver and he was on duty on the said day. It was thus rightly disbelieved by the trial Court. The false answers given by the accused in their statements under Section 313 of the Cr.PC also persuades this Court to hold that this false statement is an additional link in the chain of circumstances which had been collected by the

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prosecution against the accused persons.

40 The non-examination of Guddu i.e. the person who had removed the injured to the hospital does not in any manner advance the defence of the accused; his non-examination does not take away the fact that Abhishek had in fact been injured and had been removed to the hospital. This is evident from DD 2A (Ex.PW-4/A).

41 The judgment of *Pradeep @ Sanjay & Others* (supra) relied upon by the learned counsel for the accused Vinod in this context is clearly distinguishable on facts. This was a case where the deceased had already boarded a bus and was travelling in it when the accused persons chose to follow him on their motor-cycle; it was in these circumstances that the Court had noted that this would not qualify as a 'last seen'.

42 The role and the evidence collected qua the other two accused i.e. Vinod and Joginder shall be discussed separately.

43 **Role of accused Vinod**

Accused Vinod was arrested at 05:00 PM on 26.10.2004 itself. He made a disclosure statement (Ex.PW-9/G) followed by a subsequent disclosure statement (Ex.PW-21/H) which was also made on the same day. Pursuant to the aforementioned disclosure statements of Vinod, he had

got recovered a knife (did not contain blood stains) as also a cream colored pant. This was from a sewer near the construction park near the APMC dispensary. It had been taken into possession vide memo Ex.PW-9/H. The cream coloured blood stained pant was found in an iron box at his residence at Peepal Sarai; it was taken into possession vide memo Ex.PW-9/J.

44 Vehement argument of the learned counsel for the appellants is that the knife was not blood stained and thus could not be connected with the crime. On this score, the accused in his disclosure statement had stated that he had washed this knife after this incident. The law on the evidentiary value of a disclosure statement is well settled. A disclosure statement made in police custody is hit by the bar of Sections 25 & 26 of the Evidence Act; it cannot be read in evidence except to the limited extent that it leads to the discovery of a fact and falls within the parameters of Section 27 of the said Act. As per the disclosure statement of Vinod, he had washed the knife. This part of his disclosure has necessarily to be ignored. However the non noting of blood on this weapon by the CFSL would not by itself wash away the recovery as has been vehemently argued. This recovery memo Ex.PW-9/H has been

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attested by the public witness PW-9; the police witness to this memo i.e. PW-12 has also remained consistent on his stand.

45 The blood stained cream coloured pant of Vinod had also been sent to the CFSL; the CFSL vide its report (Ex.PW-22/3) had opined human blood group 'A' on the said pant which was also the blood group of the deceased.

46 The motor-cycle recovered from the court-yard of the residence of Vinod at his pointing out also had blood stains of group 'A' origin on its right side i.e. on its metallic handles. The blood on this motor-cycle of the accused remained wholly un-explained by them.

47 **Role of Accused Joginder**

Record shows that Joginder had been arrested on 31.10.2004 from Azad Pur Food Mandi vide memo Ex.PW-9/H. He has made his disclosure statement Ex.PW-9/S. Pursuant to this disclosure statement, he had got recovered a pant and a shirt which had been taken out from the box of the bed in his house at 65, Sarai Pepal Thala. Both the shirt and the pant had evidenced human blood but reaction could not be known.

48 Accused Vinod had also got recovered a blood stained shirt from

the takht of his house on which two buttons were missing; as per the prosecution this shirt belonged to co-accused Joginder. It had been taken into possession vide memo Ex.PW-9/Q. The vehement submission of the learned counsel for accused Joginder that this recovery has been got effected by Vinod pursuant to a disclosure statement made by Joginder and as such cannot be read against Joginder as also the additional submission that even otherwise there is no evidence to connect this shirt as the shirt of Joginder.

49 Ex.PW-9/E is the seizure of a button (Ex.PW-12) which was alleged to be the missing button of the shirt of accused Joginder. This button had been seized from the spot. On this count, the learned counsel for the appellant has drawn our attention to the report of the crime team (Ex.PW-20/A) as also the photographs which had been taken of the spot; submission being that neither in the crime team report and nor in the photographs does this button find mention; this seizure has been falsely planted upon Joginder. To further advance this argument it has been pointed out that the seizure memo of all the other exhibits show that they were joint seizures whereas the seizure memo of the button is the seizure memo of single item which again throws a doubt on this seizure

and to support this submission attention has been drawn to the other seizure memos; Ex.PW-21/E is seizure memo of two rupees; Ex.PW-9/D is the seizure of other combined exhibits; seizure memo of the plastic chair and T.V. had been proved as Ex.PW-9/E.

50 PW-9 Bhim Singh, PW-11 ASI Kishan Jeet and PW-21 Inspector Satpal Yadav have all been consistent in their version that from the spot a button of a shirt had been recovered which had been taken into possession vide memo Ex.PW-9/E after sealing it in a match box. There is no discrepancy in their versions. In fact all of them in their lengthy cross-examination conducted on this score stuck to their stand that the button was lying under the rear wheel of the motor-cycle. In fact no cross-examination has been effected of PW-11 on this score at all; his testimony had remained unrebutted. This button had been sent to the CFSL who had vide its report examined the button Ex.2A along with the buttons Ex.B-1 to B-7 which were present on Ex.6 (a shirt which had been got recovered at the instance of accused Vinod and purported to be the shirt of Joginder) and the CFSL on the examination of its design, number of holes, diameter and thickness had opined that this button belongs to the said shirt.

51 Thus by cogent evidence the prosecution has been able to establish that the missing button which was recovered from the spot i.e. the scene of crime was the same button of the shirt which had been got recovered at the instance of accused Vinod. The evidence collected up to this point can be read; i.e. that the shirt recovered at the instance of Vinod could be read, if incriminating, against his co-accused Joginder.

52 However how this shirt is connected to accused Joginder has not been answered by the prosecution. Not a single witness of the prosecution has come into the witness box to state that this shirt which had been recovered at the instance of accused Vinod was the shirt of Joginder. This recovery thus cannot be foisted upon Joginder.

53 In view of the aforementioned evidence finding on this score we need not deal in detail with the judgments relied upon by the learned counsel for accused Joginder on this score. However trite it is to say that Section 30 of the Evidence Act is a provision engrained in the Statute; this refers to statements made by one co-accused against the other and their evidentiary value. The judgments relied upon by the learned public prosecutor advancing her proposition that any and all information elicited by the accused in police custody leading to the discovery of a

fact is an admissible piece of evidence may not be relevant at this stage in the context of the findings returned aforesaid accepting the proposition that the recovery of the shirt made at the instance of accused Vinod could be read as a piece of evidence against co-accused Joginder, yet there being no further evidence adduce by the prosecution to show that this shirt in fact was the shirt of Joginder, we need not delve any further into this argument.

54 The third convict who is not in appeal before this Court is accused Sanjay. As noted supra there were three accused persons who had been charge-sheeted. Accused Sanjay has been convicted for the offence under Section 201 of the IPC. He has undergone the sentence imposed upon him. He has chosen not to file any appeal. He has got recovered the second weapon of offence i.e. the dagger from near the dispensary APMC where it was dug out from the earth and had blood stains upon it. This had been seized and taken into possession vide memo Ex.PW-9/P. The serological examination of this dagger had evidenced human blood of group 'A' origin on the said dagger.

55 The post mortem doctor (PW-6) in his subsequent opinion Ex.PW-6/B had opined that the aforementioned weapons Ex PW-9/P and

Ex.PW-9/J could have caused the injuries as noted in the post-mortem of Abhishek.

56 The sum total of the evidence collected by the prosecution establishes the following circumstances:-

- (i) **Last seen**:- PW-9 & PW-10 have proved this circumstance.
 - (ii) **Motive**:- Motive of the crime has been spelt out and explained in the oral testimonies of PW-9 and PW-10 which was corroborated by the cross FIRs Ex.PW-17/A and Ex.PW-17/B. The interference by Abhishek in the quarrel between the family of Attar Singh and Rajender when Abhishek was siding with Rajender further infuriated Joginder and Vinod who were already nursing a grudge against the family of Abhishek and Rajender qua the property at Prashant Vihar for which a litigation was pending interse the parties.
 - (iii) **Recovery**:- Recovery of two weapons of offence, one at the instance of accused Vinod and the second weapon at the instance of accused Sanjay stood proved. So also the blood stained pant of accused Vinod and the human blood group 'A' originated on the metallic handle bar of the motor-cycle parked in the court yard of the residence of the accused Vinod and Joginder and which was admittedly owned by their
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third brother Sanjay. Chocolate coloured pant and shirt recovered at the instance of accused Joginder having blood stains upon it also stood proved.

(iv) **Medical opinion**:- The post mortem doctor had opined that the 12 injuries caused upon the victim Abhishek could well have been caused by the two weapons which had been sent to him for an opinion. The fact that there were 12 wounds inflicted upon the victim is undisputed. All the injuries were by and large grievous. The facts of the case thus do not qualify for the lesser offence under Section 304 of the IPC as had been argued by the counsel for accused Vinod.

(v) **Scientific evidence**:- The report of the CFSL had opined human blood group of 'A' origin on the weapon of offence (recovered at the instance of the accused Sanjay), metallic handle bar of the motor-cycle, cream coloured pant of accused Vinod as also human blood on the pant and shirt got recovered at the instance of accused Joginder.

57 All these links form a complete chain in the evidence collected by the prosecution and have been sufficiently established by the prosecution to nail the accused persons. They are guilty of having committed the murder of Abhishek.

58 Appeal is without any merit. Dismissed.

INDERMEET KAUR, J

KAILASH GAMBHIR, J

NOVEMBER 01, 2013

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