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

\+ **Crl. Appeal No. 1212/2011**

Reserved on: 26th February, 2013

% **Date of Decision: 29th July, 2013**

PAWAN ....Appellant

Through Mr. Amit Sinha and
Mr. Harpreet Singh Rai, Advocates.

Versus

STATE …Respondent

Through Mr. Sanjay Lao, APP.
Insp. Manoj Sinha, I.O.

\+ **Crl. Appeal No. 1028/2011**

SANDEEP ....Appellant

Through Mr. Avninder Singh and
Mr. Sandeep Satkar, Advocates.

Versus

STATE …Respondent

Through Mr. Sanjay Lao, APP.
Insp. Manoj Sinha, I.O.

\+ **Crl. Appeal No. 1594/2011**

JASWANT ....Appellant

Through Mr. Vikas Padora, Advocate.

Versus

STATE …Respondent

Through Mr. Sanjay Lao, APP.
Insp. Manoj Sinha, I.O.

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

SANJIV KHANNA, J.

Appellants Sandeep, Pawan and Jaswant, by the impugned judgment dated 16th December, 2010, have been convicted under Section 302/34 of the Indian Penal Code (IPC, for short) for murdering a blind man named Umed Singh, a money lender by occupation. By order of sentence dated 21st December, 2010, they have been sentenced to life imprisonment and fine of Rs.15,000/- each. In default of payment of fine they have to undergo SI for four months.

2. In the early morning of 24th February, 2007, dead body of Umed Singh was found lying in Gali No. 8, Nehru Nagar, Anand Parbat, New Delhi. Police Control Room was informed vide Ex. PW14/B at 6.36 AM on 24th February, 2007. Consequent thereto DD Entry No. 11A dated 24th February, 2007 (Ex. PW13/B) was recorded at 6.55 AM. Subsequently, FIR No. 43/2007 was recorded at 9.45 A.M. on the basis of the statement made by Mahinder Singh (PW-19), brother of the deceased.

3. The prosecution case was premised upon statements of eye-witnesses: Kamal (PW-4) Deepak (PW5), Manoj Kumar (PW6) and Praveen Kumar (PW10). However, apart from PW-10, all other public witnesses i.e. PW-4, PW5 and PW6, Kamal, Deepak and Manoj Kumar, along with other public witnesses Sunil Kumar (PW-8), Anand Prakash (PW12) and Guddi (PW -23), turned hostile and did not substantially support the prosecution case. PW-2 Ram Dulari, aunt of PW-10, also turned coat during her cross-examination. We have dealt with this grave and serious aspect in some detail below. This leaves us with the testimony of (PW-10) Praveen Kumar which forms the substratum of the

prosecution case. Before we examine his testimony we shall deal with how the FIR came to be registered in the first place.

Registration of the FIR and Court deposition of the Complainant

4. Vikrant (PW25) was one of the first ones to learn about the death of Umed Singh. He has deposed that on 24th February, 2007 at 6.30 AM, he came to know that a dead body was lying in Nehru Nagar, Delhi, near his house. He went there, seeing the commotion, and noticed that the dead body was of his maternal uncle Umed Singh. He immediately informed PW-19 Mahender Singh, brother of the deceased and his uncle. However, he was not aware that Praveen (PW10) or his Bua Raj Dulari (PW2) had any knowledge about what lead to Umed Singh's death.

5. The complainant Mehender Singh (PW19) reached the spot and FIR (Ex. PW13/A) was registered, on the basis of his statement. The FIR records that Umed Singh, a blind man who had lost his eye-sight 15 years back, was resident of Nehru Nagar, Delhi. Umed Singh had good relations with Raj Rani (PW-2) and her sons, who were residing in Gali No. 7, Nehru Nagar. He often had his dinner with them and, generally, afterwards one of Raj Dulari's sons would drop him back to his residence. Even on 23rd February, 2007, i.e. the evening before the incident, Umed Singh had dined at Raj Rani's house. Then on the morning of 24th February, 2007, Mahender Singh (PW19) received information, on the mobile from his nephew Vikrant (PW-25) that Umed's body was lying at Gali No. 8. He immediately reached the spot and on making repeated enquiries from neighbours and Raj Dulari's sons, he learnt that Jaswant, his brother Vikram, Sandeep and some other persons had committed the murder due to some old enmity.

6. In PW-19's court deposition, however, he changed his stance and averred that when he reached the crime spot and made enquiries, the persons present informed him that Jaswant, Sandeep and Pawan were the perpetrators of the crime. Thus, Vikram's name was not mentioned in his court deposition. He has deposed that he knew the appellants as they were residents of the same locality, Nehru Nagar, Anand Parbat, where he used to reside earlier. In his cross-examination PW-19 has stated that on making enquiries from Praveen (PW 10), Raj Dulari (PW2) and other neighbours, he came to know that his brother Umed Singh was killed by Jaswant, his brother Vikram and Sandeep. He voluntarily added that Praveen (PW-12) had told him Pawan was also involved in murder of his brother Umed Singh. He had gone to the house of Praveen, on 24th February, 2007 at about 7.30 AM, and at that time Praveen had apprised him that the appellants Jaswant, Sandeep and Pawan were the assailants. His statement (Ex. PW19/A) was recorded at 9.30 AM at the Police Station wherein he had named Pawan as one of the assailant. He was confronted with the said statement wherein the name of Pawan was not mentioned. He vehemently denied that Pawan was falsely implicated. We only record that Vikram, as it apparent, was in judicial custody in the night intervening 23rd and 24th February, 2007, and could not have been present at the crime spot as deposed to and accepted by one of the investigating officers Manoj Sinha (PW- 26). It was Pawan who was charge-sheeted by the prosecution. Since PW19 is not an eye-witness not much reliance can be placed on his statement under Section 161 Cr.P.C (Ex.PW-13/A) which was based on enquiry from neighbours and Raj Dulari's sons.

Statement of Eye Witness

7. The main eyewitness, Praveen Kumar (PW10), was 16 years old at the time when he witnessed the gruesome murder and about 17 years of age at the time of his court deposition. He has been unflinching in his court testimony. He has deposed that he was residing with his bua Raj Dulari (PW-2) who Umed Singh considered as his sister. Umed Singh was blind and used to lend money to different persons on interest. He often visited PW-2's residence for dinner and afterwards Praveen (PW10) or his brothers would accompany him on his walk back to his residence. As usual, on 23rd February, 2007, Umed had dinner at the residence and, at about 11 P.M., PW-10 went with Umed Singh for dropping him to his house. When they reached near Gali No. 8, Jaswant, Pawan and Sandeep approached them and rebuked Umed Singh for helping one Raju Hakla in running away. They were cornered at a vacant spot and abused. While Sandeep stood as a guard to avoid intervention, Jaswant and Pawan took out their knives. What ensued was a gruesome attack on Umed. Continuous blows were given using fists and leg kicks, including some injuries on his face. Umed Singh was repeatedly and continuously stabbed, specifically being targeted on his nose, buttocks and thighs. Umed's clothes were taken off and he was pushed and dragged towards a pahari. Blood started oozing from the stab wounds. He fell down and ultimately died, succumbing to his injuries. Few persons from the locality came outside of their houses but the appellants threatened them that they would meet the same fate in case they interfered. Jaswant and Pawan took away Umed Singh's gold ring, cash and mobile phone – Nokia make with camera. All this while, PW-10 was asked to squat and witness the incident. He was stabbed on his hand and they made him remove his clothes. They threatened to kill him

in case he made any statement to the police. During the occurance, two phone calls were received on the mobile phone of Umed from PW-10's bua Raj Dulari (PW-2) by the appellant Jaswant. Witnessing all this, PW10 became unconscious. When he gained conscious, at around 4.00 A.M., he retrieved his clothes, which were left at the spot by the appellants, and made way to his house. He was terrified and his clothes were smeared with blood. Police came to his house at 10 A.M. and he, along with his bua PW-2 Raj Dulari, went to the crime spot. At his instance site plan (Ex. PW-26/B) was prepared. His blood stained clothes i.e. pant and shirt were seized by police vide Ex. PW10/A which was signed by him. Slippers worn by PW10 were also seized. He concluded his court deposition by categorically affirming that the three appellants had killed Umed, in his presence.

8. Learned Counsel for the appellants has submitted that there are material contradictions between the statement of Praveen (PW10) and his bua Raj Dulari (PW2). Her statement was recorded on 18th March, 2008 and 19th March, 2008. On 18th March, 2008, Raj Dulari (PW2) had deposed that PW10 Praveen resided with her family. She has accepted that a blind man Umed used to come to her house to take tea and meals, occasionally, but stated that someone from the gali would drop him home. On 23rd February, 2007, Umed had his meal there and left for his house, at Gali No. 12, with her nephew Praveen (PW-10). At 11.45 PM, she made a call from her son Dev Raj's mobile to Umed but someone else picked up the phone and asked her to call in the morning. She dialed Umed's number for the second time using her other son Kamal's phone. This time she heard abuses from the other side and she cut the line. PW10 Praveen returned home on 24th February, 2007 at 4.00 A.M., in perplexed condition. His clothes were blood stained, so she washed

them. They were later produced before the police and seized. She then claimed that Praveen had not told her about the incident and the fact that he became unconscious thereafter. On 19th March, 2008, she has accepted that she made a call from mobile number 9811314752 to the mobile phone of Umed but denied that the said mobile phone was received by a third person who had told her on the phone that they had done away with the blind man and that she and Praveen(who was also with them) would be killed if she called again. She has denied that Praveen narrated the incident to her, that night. At this point, she was cross-examined by the Public Prosecutor but she persisted and denied the suggestions given to her. On cross-examination by the counsel for the appellant, contrary to her examination-in-chief, she has denied that Umed took dinner, at their residence, on 23rd February, 2007 at night. She has averred that clothes of Praveen were stained with mud/dust and not with blood. She has accepted that she was called with Praveen, to the Police Station at 10.30 A.M. next day, and they remained there till 11.30 A.M. In essence, PW-2 has partly supported the prosecution case. It is an accepted position that she is not an eye-witness to the incident. After perusal of her statement, we are inclined to accept her examination-in-chief as it is sufficiently corroborated by PW-10, in the court. We are unable to find any material contradiction in her examination-in-chief and PW-10's statement. The averments in her cross-examination to the effect that Umed did not have dinner with them a night before, she had not tried to contact Umed when Parveen (PW-10) did not return home or that she didn't even have Umed's phone number are difficult, in fact impossible, to believe. The reason for distinct change in her stand can be gauged from the Trial Court order dated 18th March, 2008, which records that:

> "Public witness Raj Dulari had submitted that she has been constantly threatened on behalf of the accused persons and that she had lodged various reports before the concerned SHO but nothing has been done so far. Let the DCP intervene in the matter and direct the concerned SHO to provide police protection to the witnesses."

On the very next day i.e. 19th March, 2008, PW2 turned hostile.

9. The fact that PW2 made a call to Umed is established from the telephone records mark Ex. PW9/A which was proved by Jyotish Maharana (PW9), Executive Vodaphone, Essar Mobile Services Ltd. He has produced and proved the call details of mobile number 9811384459, i.e. Umed's phone number, for 24th February, 2007. The call details Ex. PW9/A show two incoming calls were made to mobile phone No. 9811384459 on 24th February, 2007 at 12.09 A.M. and 12.15 A.M. These calls were for 21 and 31 seconds respectively which corroborate the statement of PW2 and PW-10 about telephone calls being made to Umed Singh.

10. Learned Counsel for the appellants have submitted that the telephone number noted in seizure memo Ex. PW19/B mentioned Umed's number as 9811384559 and not 9811384459 but this, one can gauge, is merely a typographical or writing error. PW19 Mahender Singh has deposed that Nokia make N93 phone was given by him to Umed on 20th February, 2007, as it was his birthday. The bill for the said mobile phone from Benz (India) Pvt. Ltd. (Ex. PX) has the name of Mahender Singh (PW-19) and records the IMEI No. of the replaced phone as 351851015917827. The back cover of a phone was seized vide Ex. PW-20/B from the site of occurrence. The Nokia Phone had IMEI number 351851015917827, as is mentioned in Ex. PW19/B. First 14

numbers the IMEI number mentioned in Ex. PW19/B tally with the IMEI number mentioned in the call details (Ex. PW9/A) which records the IMEI number as 351851015917820. We record that only the first 14 digits of the IMEI number are relevant as the last digit keeps on changing. The Learned Counsel for the appellants contested the call details on the ground that these have not been proved and there is non-compliance of Section 65B of the Evidence Act. We note that PW9 Jyotish Maharana, who proved the call records Ex.PW-9/A, was not cross-examined by the appellants on the said aspect. We have nothing to go against testimony of PW-19 and PW-2 who have affirmed and corroborate that call records related to the deceased. PW-19, in his cross-examination, has averred that he spoke to the deceased Umed almost daily and had last conversed with him on 22nd February through his mobile number 9811285287. This stands confirmed by call records (Ex. PW-9/A) which shows an incoming call from PW-19's number on 22nd February, 2007. Similar controversy had arisen in State ***(NCT of Delhi) v. Navjot Singh Sandhu*** (2005) 11 SCC 600 wherein the Supreme Court observed as under:-

> **"150.** According to Section 63, secondary evidence means and includes, among other things, "copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies". Section 65 enables secondary evidence of the contents of a document to be adduced if the original is of such a nature as not to be easily movable. It is not in dispute that the information contained in the call records is stored in huge servers which cannot be easily moved and produced in the court. That is what the High Court has also observed at para 276. Hence, printouts taken from the computers/servers by mechanical process and certified by a responsible official of the service-providing company can be led in evidence through a witness who can identify the signatures of the certifying officer or otherwise speak of the facts based on his personal knowledge. Irrespective of the compliance with the requirements of Section 65-B, which is a provision

> dealing with admissibility of electronic records, there is no bar to adducing secondary evidence under the other provisions of the Evidence Act, namely, Sections 63 and 65. It may be that the certificate containing the details in sub-section (4) of Section 65-B is not filed in the instant case, but that does not mean that secondary evidence cannot be given even if the law permits such evidence to be given in the circumstances mentioned in the relevant provisions, namely, Sections 63 and 65."

11. On the question of involvement of the appellant Pawan, it has been vehemently argued that his name was not mentioned by PW-19, in his first statement Ex. PW19/A, whereas name of Vikram, brother of Jaswant, is mentioned. This is factually correct but PW19/A mentions about presence of some other persons. We have noted that Mahender Singh (PW19) is not an eye-witness and had made the said statement on the basis of repeated enquiries from the neighbours and Raj Dulari's son. In Ex PW- 19/A, PW-9 has not referred to enquiries from PW2's nephew Praveen (PW10). PW-19's court deposition states that PW-10 had mentioned and implicated appellant Pawan. According to PW-10, the key eyewitness, it was Pawan who was the third assailant. The FIR indicates that there were at least three assailants but the third person could not have been Vikram as, it is clear from the testimony of Manoj Sinha (PW26) that he was in judicial custody at the relevant time. We do not think, in these circumstances, the court deposition of PW10 Praveen should be ignored and the appellant Pawan can be given benefit of doubt. We would like to reproduce the observations made by the Supreme Court in ***Jitender Kumar vs. State of Haryana*** (2012) 6 SCC 204, wherein it has been observed:

> "16. As already noticed, the FIR (Ext. P2) had been registered by ASI Hans Raj, PW-13 on the statement of Ishwar Singh, PW-11. It is correct that the name of accused Jitender, son of Sajjan Singh, was not

mentioned by PW-11 in the FIR However, the law is well-settled that merely because an accused has not been named in the FIR would not necessarily result in his acquittal. An accused who has not been named in the FIR, but to whom a definite role has been is attributed in the commission of the crime and when such role is established by cogent and reliable evidence and the prosecution is also able to prove its case beyond reasonable doubt, such an accused can be punished in accordance with law, if found guilty. Every omission in the FIR may not be so material so as to unexceptionally be fatal to the case of the prosecution. Various factors are required to be examined by the Court, including the physical and mental condition of the informant, the normal behavior of a man of reasonable prudence and possibility of an attempt on the part of the informant to falsely implicate an accused. The Court has to examine these aspects with caution. Further, the Court is required to examine such challenges in light of the settled principles while keeping in mind as to whether the name of the accused was brought to light as an afterthought or on the very first possible opportunity.

17. The Court shall also examine the role that has been attributed to an accused by the prosecution. The informant might not have named a particular accused in the FIR, but such name might have been revealed at the earliest opportunity by some other witnesses and if the role of such an accused is established, then the balance may not tilt in favour of the accused owing to such omission in the FIR.

18. The Court has also to consider the fact that the main purpose of the FIR is to satisfy the police officer as to the commission of a cognizable offence for him to conduct further investigation in accordance with law. The primary object is to set the criminal law into motion and it may not be possible to give every minute detail with unmistakable precision in the FIR. The FIR itself is not the proof of a case, but is a piece of evidence which could be used for corroborating the case of the prosecution. The FIR need not be an encyclopedia of all the facts and circumstances on which the prosecution relies. It only has to state the basic case. The attending circumstances of each case would further have considerable bearing on application of such principles to a given situation. Reference in this regard can be made to State of U.P. v. Krishna Master and Ors., (2010) 12 SCC 324] and Ranjit Singh

and Ors. v. State of Madhya Pradesh (2011) 4 SCC 336]."

In the said case, as noticed in paragraph 16, name of Jitender was not mentioned in the statement of Ishwar Singh (PW11) which formed the basis of the FIR which was registered, but in view of the statement of eye-witnesses, Jitender was convicted.

12. In the present case, Praveen's (PW10) statement under Section 161 was recorded at about 11.00 AM but after the FIR was registered on 24th February, 2007. Mehender Singh (PW19), there is no doubt, has stated in his court deposition that he had gone to the house of Praveen i.e. residence of Raj Dulari (PW2), Praveen's bua, on 24th February, 2007 at 7.30 AM, but he had also stated that Praveen had named the three appellants and not brother of Jaswant i.e. Vikram. As noted above, in his statement Ex. PW19/A, he has not mentioned the name of Praveen nephew of Raj Dulari (PW2) but has mentioned about information provided by sons of Raj Dulari (PW2) and neighbours. It is noticeable that the name of Pawan was mentioned in the remand application moved by Manoj Sinha (PW26) on 23rd July, 2007, after arrest of Sandeep. Police remand of Sandeep for 3 days was granted on 23rd March, 2007, recording that his remand was required for apprehending Jaswant and Pawan. Thus, involvement of Pawan was known as alleged and spoken by the witnesses and was in the knowledge of the police on 23rd March, 2007. We have already recorded that as per the police version Praveen had named Pawan as one of the assailants, in his statement under Section 161 Cr.P.C., purportedly recorded on 24th February, 2007 i.e. the day on which the FIR was registered.

13. Two more assertions in the deposition of Praveen (PW10) may be noticed and dealt with. Praveen has stated that he had suffered stab

wound injury on his hand but there is no MLC and Investigating Officer (PW26) deposed that he did not notice and was not informed about injuries suffered by Praveen. Failure to get the MLC of Praveen (PW10) may be a lapse but does not create doubt about his testimony. Praveen (PW10) in his deposition has averred that blood oozed from the injury but his medical was not done. He had got 6-7 stitches but there was no scar left due to medication. Secondly, it was stated that no blood stain was found on the clothes of Praveen (PW10), as per FSL report, which though placed on record has not been given exhibit number. The FSL report states that blood was found on pant and shirt H1, H2 as well as on the shirt and pant 12A and 12A and on under garments 13A and 13B. Blood of group B was found on Exhibits H1, H2, 13A, 13B, but there was no reaction on the shirt and pant Ex. 12A and 12B. There are indications that the shirt and pant worn by Praveen (PW10) was washed by Raj Dulari (PW2), after PW10 had returned home. The appellant's contention that buckle and buttons were found on the clothes worn by PW10, is contrary to the deposition made by PW10 that buckle of the pant and buttons of his shirt were broken, but has to be rejected as enough to doubt the prosecution case. PW10 or PW2 who could have answered the said question, were not specifically questioned on the said aspect. Buckle and buttons could have been stitched, as it was stated that the clothes were washed.

14. The testimony of PW-10 as to the injuries caused to the victim i.e. the deceased Umed Singh is supported by the medical evidence. PW-24 Amit Kumar Pundhir from Department of Forensic DDU Hospital, New Delhi has proved the postmortem report (Ex. PW-24/A) of Umed Singh, 40 years old male. He has observed that the dead body seems to be forcibly removed with multiple injuries over the body. External general

observation was that there were dried up blood clots on the face and the neck. Rigor mortis was noticed all over the body and post mortem lividity was present over the back except over pressure areas. The first and second incisors were found missing from the upper socket on the left side. External and internal injuries included:

> "External injuries:
>
> 1) Incised wound of 11 cm x .5 cm present over bi-lateral parietal regions, bone deep obliquely placed, across the midline with dried up blood clots.
>
> 2) multiple incised looking lacerated wounds noted over left parietal aspect- 2 in number of sizes 2 cm x .3 cm and 3 cm x 1 cm, over right occipital regions 3 cms x .5 cm in size, over midline of 4 cm x 1 cm size with dried up blood clots, all subcutaneous to muscle deep;
>
> 3) incised looking lacerated wound, multiple in number noted over back of right ear/mastoid process- 3 in number parallel of sizes 3 cm x 1 cm x muscle deep, 2 cm x .3 cm x muscle deep and .3 cm x .1 cm x subcutaneous tissue deep and over the posterior aspect of left ear, 3 cm x 2 cm x cartilage deep, by-lateral angle of left ear, 3 cm x 2 cm x cartilage deep, by lateral angle of right eye- 1 cm x 1 cm x muscle deep, over right side of disfigured nose of size – 3 cm x 1.5 cm x nostrial deep, over right side of lower lip of size 2 cm x .4 cm x subcutaneous tissue deep;

4) swelling with underlying bruising/contusions /haematoma collection noted over right scapular region in an area of 9 cm x 4 cm.

5) contused wound of size 6 cm x 4 cm noted over left shoulder on exploration underlying localized haematoma with fracture of underlying localized harmatoma with fracture of underlying clavicle bone-lateral one third with blood clots noted:

6) contused wound of size 2 cm x 1 cm noted over lateral aspect of right arm just above the elbow line;

7) multiple incised wounds noted over right hip-gluteal aspect, 3 in number, of sizes 2 cm x .8 cm x 3 cm x 1.2 cm x 2.5 cm and 3.5 cm x 1.2 cm x 6 cm. Two incised wounds noted over posterior aspect of upper thigh on the right lowe limb of sizes 3 cm x 1.2 cm x 3 cm and 3 cm x 1.5 cm x 6.5 cm. One more incised wound noted over the posterior aspect of right thigh, middle third region of size 1.6 cm x .4 cm x 3 cm. Three incised wounds noted over left hip gluteal aspect of sizes 3 cm x 1 cm x 6 cm x 4 cm x 1 cm x 3.5 cm and 3.5 cm x 1.5 cm x 5 cm. All injuries have same characteristic having clean cut, well defined, regular margins with contusions around it, elliptical in shape.

8) incised wounds 2 in number, noted over left lower leg, a) of 4 cm x 1 cm x 1.5 cm in size over lateral aspect 17 cm above the ankle joint and b) of 1.5 cm x .5

cm x 1 cm in size over medial aspect 20 cm below the knee joint."

Internal injuries

On internal injuries it was noted that sub scalp extravasation of clotted blood noted in bilateral occipital, frontal and left parietal regions with fractured base of skull on left side through middle cranial fossa with localized haematoma fractured side with brain. Bilateral congested and oedematous with subdural and sub-arachnoid haematoma with corresponding contusions of brain matter with blood clots at the base of the brain (contusions noted in parieto-occipital region-bilateral). "

15. In the opinion of PW-24 the death had occurred almost 3/4th of a day prior to the postmortem examination. All the injuries were found ante-mortem in nature caused by both sharp edge weapon and hard blunt object. Cause of death was opined to be cranio-cerebral damage from head injury consequent upon blunt force impact. In the cross-examination, PW-24 has averred that none of the incised injury was such which could separately cause death.

Investigation, subsequent arrest and recoveries made by the police

16. Apart from the said evidence, we have statements of police officers regarding the investigation, arrest of the appellants and recovery of the gold ring made on the basis of the disclosure statement of the appellant Sandeep. Recovery of the ring pursuant to the disclosure statement of the appellant Sandeep (Ex. PW-20/F) is also proved by PW-

19, Mahender Singh, who had gone with the police officers to the spot i.e. Idgah Park, Rani Jhansi Road. Similar statements have been made by PW-10A, HC Bijender and PW-21, SI Jitender Kumar.

17. The Investigating Officer PW- 26 Manoj Sinha, has averred that on 24th February, 2007 he was posted at the Police Station Anand Parbat when he received DD No.6 (Sic 6A Ex. PW-17/A). On the spot ASI Suresh Kumar and Ct. Bahadur were present. PW-26 found the blood stained clothes and articles in front of House No. 291/1 Gali No. 8 Nehru Nagar. A trail of blood was found going from House No. 291/1 to House No. 276/277 where dead body of a blind man was found having stab wounds, the pants were drawn to knees and shirt was open. The Complainant Mahender Singh (PW-19) identified the dead body and his statement (Ex. 19/A) was recorded, on the basis of which FIR (Ex.13/A) was registered. Photographs were taken on the spot and articles like blood stained earth, blood stained stone, cotton gauze, earth samples were taken from front of House No. 291/1 and seized vide Exhibit PW-20/A. In front of the house No. 291/1 eight articles belonging to the deceased: 11 coins, one chappal, safa, two handkerchiefs, broken dark glasses, key, cover of mobile phone were seized vide memo Ex. PW-20/B. pant and shirt were seized vide seizure memo Ex. PW-20/C. Near the dead body one audio wrist watch was seized vide memo Ex. PW-20/C. From front of the House No. 276/277 he recovered a blood stained stone, blood in gauze piece and sample of stone which were seized vide seizure memo Ex. PW-20/D. The body was sent to mortuary. Supplementary statement of Vikrant (PW-25), who had informed the complainant and the PCR van, was recorded. Thereafter, one Praveen came to the spot with his paternal aunt and handed over his blood stained pant shirt which was seized vide memo Ex. PW-10/A. At the instance of Praveen a site plan

(Ex. PW-26/B) was prepared and his aunt Raj Dulari's statement was recorded. He also recorded the statements of witnesses Kamal (PW-4), Manoj (PW-6), Deepak (PW-5) and Sunil (PW-8). The complainant again came to the spot and handed over the mobile phone receipt (Ex. PX) seized vide memo Ex. PW-19/B. On 25th February, 2007, dead body identification statements were recorded and inquest papers were made (Ex. PW-26/C). After the post mortem, the dead body was handed over to Mahender Singh (PW-19). On 26th February, 2007, he went to the house of the appellant Jaswant and statement of Guddi (PW-23) was recorded.

17A. PW-26 has averred that he had investigated about the involvement of Vikram, brother of appellant-Jaswant, but found that he was not involved since he was in judicial custody from 24th June, 2003 to 14th December, 2007.

18. It has been contended and submitted on behalf of the appellant Pawan that he was externed from Delhi vide DCP's order dated 21st November, 2006. It was submitted that Pawan was not in Delhi because of the said externment order. We do not find any merit in the said contention. ASI Subeydin (PW-30) has stated that on 5th September, 2009 he was posted as ASI in PS Anand Parbat when at about 7.15 P.M. secret informer met them at Sabzi Mandi and informed that the appellant Pawan would come to his house. PW-30 ASI Subeydin, along with Ct. Gyanender, joined investigation of this case with IO Inspector JS Joon. After some time, when the appellant Pawan came from Zakhira bridge side and turned towards Gali No. 7, all of them apprehended him. Arrest memo and personal search memo were exhibited as Ex. PW-30/A&B. In the cross-examination he accepted that no departure entry was lodged

in the police station, yet we do not doubt his testimony. The same is adverted to and affirmed by PW-31, Inspector J S Joon who was posted as additional SHO, police station Anand Parbat on 5th September, 2007 and had accompanied ASI Subeydin (PW-30) and Ct. Gyanender and has deposed on identical lines. Pawan, PW-31 has deposed, was a bad character of the area and was recognized by ASI Subeydin. The fact that externment order was passed against appellant-Pawan does not mean that he could have not violated the externment order or visited Delhi and committed the said crime.

19. Jaswant was arrested on 15th November, 2007 and his arrest has been deposed to by PW-29 Insp Sanjay Kumar, PW-27 HC Lakhvinder Singh and PW-28 Inspector Om Prakash. Appellant Jaswant Singh, during the investigation of FIR No. 1533/07 of P.S Sultan Puri, had made a disclosure statement. (As no recoveries have been made, his disclosure statement is of no evidentiary value). PW-28, Inspector Om Prakash has stated that on 15th November, 2007, SI Sanjay from Special Team, Crime Branch, Prashant Vihar informed them about arrest of appellant Jaswant Singh in FIR No. 1533/07, under Sections 186/353/307 IPC and Section 25/27 Arms Act and thereupon arrest order was made in the present case.

20. Learned counsel for the appellant has relied upon the decisions of Delhi High Court in ***Rajinder vs. State of Delhi,*** 2011 (2) JCC 1134; ***State vs. Trilok*** 2012(4) AD (Delhi) 373 and ***Vijay Kumar & Anr. Vs. State*** 60 (1995) DLT 261 (DB). In Trilok's case (supra), a Division Bench of this court referred to ***Vadivelu Thevar vs. State of Madras*** AIR 1957 SC 614, wherein oral testimony of witnesses has been classified into three categories – (1) wholly reliable; (2) wholly unreliable; and (3)

neither wholly reliable nor wholly unreliable. In the last category of cases, the court has to be circumspect and has to look for corroboration of material particulars by reliable testimony, direct or circumstantial. However, the submission that the court must insist upon plurality of witnesses in proof of any fact was rejected, as it would indirectly encourage subornation of witnesses. The court must weigh carefully testimony which falls under category 3 and satisfy that the evidence is reliable, free of dents. In ***Vijay Kumar's case*** (supra), a Division Bench of Delhi High Court referred to several earlier judgments on the question of non incorporation of name of witnesses or the name of the accused in the FIR, while sending the inquest report etc. After referring to several decisions wherein the courts doubted prosecution version, it was observed that in a case on perusal of the statement of the witnesses and keeping in view the other circumstances, the court comes to the conclusion that the witnesses are truthful, reliable and trustworthy, it can ignore lapses on the part of the Investigating Officer failing to record substance of FIR in the daily diary, sending of special report promptly to the concerned Magistrate or recording of brief facts. Therefore, lapses on the part of the prosecution have to be examined in each case and thereafter the court is required to apply its mind whether the said lapses are fatal and create doubt about the statement made by the ocular witnesses. These judgments do not lay down a universal affirmative or omnibus principle that in case name of witness or accused is not mentioned in the FIR, the accused is entitled to acquittal. In ***Podda Narayana and Ors. Vs. State of Andhra Pradesh*** 1975(4) SCC 153, Supreme court observed that proceedings under Section 174 Cr.P.C., 1878, have a limited scope and details of overt acts in the inquest report are neither necessary nor a practice in law. The object of recording

brief facts in the inquest report is to find out whether a person has died a unnatural death, homicidal death or due to suicide. The question regarding details as to how the deceased was assaulted or who had assaulted him and under which circumstances he was assaulted, it was observed, was foreign to the ambit and scope of the proceedings under Section 174 Cr.P.C.

21. It was submitted that there was delay in sending copy of the FIR to the Metropolitan Magistrate and reliance was placed on ***Mohd. Badal vs. State*** 2011 (2) JCC 911. In the present case, the FIR was recorded on 24th February, 2007 at 9.45 A.M. in the morning. The FIR (Ex. PW13/A) was dispatched to the court by a special messenger and was received by the Magistrate concerned on 25th February, 2007 at 7.15 PM. We do not think in the present case delay in receipt, of the FIR is determinative though questions were put to the Investigating Officer on the reason and cause for delay in receipt of the FIR. No adverse inference can be drawn from the same. It is important here to note and record that the appellants herein were arrested after considerable time and not immediately after recording of the FIR. Appellant Sandeep was arrested on 22nd March, 2007, Jaswant was arrested on 15th November, 2007 and Pawan was arrested on 5th September, 2009 (see observations of the Supreme Court in ***State of A.P. vs. S. Rayappa & Ors.*** 2006(4) SCC 512).

Hostile Witnesses

22. It is essential here to mention that there were other public witnesses, in the present case, who have turned hostile before the Trial Court. PW-4 Kamal Kumar has averred that he knew the appellants but refused that he was a witness to the present incident and denied making

his Section 161 Cr.P.C statement. In the cross-examination by learned A.P.P., he has averred that he ran a PCO in Gali No. 11, Nehru Nagar, Delhi but denied he went with Deepak (PW-5) for dinner and saw the incident between Gali No. 8 and 9. He has denied that people had tried to intervene but were threatened. In the cross-examination, he has averred that he was called at the Police Station on 24thFeruary, 2007 at 11.00-12.00 P.M. with Deepak (PW-5) but he did not remember the police official. Deepak (PW-5) has similarly turned hostile saying he was not a witness to the incident and did not make any police statement. In the cross-examination by the Learned A.P.P., he has denied that he went to PW-4's PCO at 10.30 P.M., then went for dinner with him and while returning from Gali No.9, they heard noises from Gali No.8 and saw the appellant Jaswant and Pawan causing injury to the deceased saying he was Raju Hakla's man and should be done away with. He has stated that his statement was recorded in the Police Station after 10.00 A.M., when cross-examined by the appellants counsel. PW-6 Manoj Kumar has averred that he ran a General Store at Gali No. 9 and on 22nd March 2007 (should be 23rd March 2007) two-three persons came heavily drunk and asked for cigarettes. When he refused they started throwing goods in the shop. However, he could not see their faces as there was no electricity and it was night time. He has denied that it was the appellants who had thrown goods at his shop and had taken out the knife. He denied seeing the appellants surrounding a blind man and Praveen and taking them to Gali No. 8. Thus, these three witnesses who were supposed to have seen the incident between gali No.8 and Gali No.9, where the deceased was cornered, have denied seeing anything though they worked in that area. PW-4 Kamal has denied that Deepak came to his shop on 23rd February, 2007 at 10.30 P.M. while Deepak

(PW-5) first stated that he had gone to shop of PW-4 on that day but he did not remember that he had gone there at 10.30 P.M. PW-6 Manoj Kumar, on the other hand, has accepted that he was there at the shop at 10.30 P.M. but astonishingly could not see faces of the persons who came and threw his goods around the shop. None of them have suggested, any plausible explanation on several aspects but have tried to exonerate the appellants.

23. PW-23 Guddi has averred that on 24th February, 2007, at about 4-5 A.M. police came, the police officials obtained signatures. The appellant Jaswant is the husband of her sister namely Raj Kumari, who had since expired due to burn injuries. In the cross-examination by the Learned A.P.P she averred that it was wrong to suggest that on 24th February, 2007, at about 3-4 A.M. the appellant Jaswant came with his shoes and clothes drenched in blood and took his other clothes. She denied that on asking him why his clothes were drenched, he had told her that he came out of prison yesterday and committed murder of a blind man in Gali No.8, Nehru Nagar. She was declared hostile.

24. PW-8 Sunil Kumar has deposed that he was a tailor and subscriber of mobile no. 9213359393. He could not remember the date but one day, at 9.20 P.M. at Subzi Mandi Nehru Nagar he met appellant Sandeep who took his phone and used it for 3-4 minutes. Thereafter, they both went to Gali No. 9, Nehru Nagar and went to their houses. In the cross-examination by the Learned A.P.P, he has denied that he met appellants Jaswant and Pawan there too and Jassu had spoken to Anand for 15-20 minutes and, thereafter, all three left for Gali No.7. In the cross-examination by the appellants' counsel, he averred that he had not stated anything to the Investigating Officer, except what he deposed in

the court testimony. PW-12 Anand Prakash has averred that he was a Salesman at Himachal Pradesh and in the month of February 2007, he was having a mobile phone Tata Indicom no. 9213190098 on which a call was received from Sunil's mobile and it was Sandeep on the phone. He has averred that Sandeep was asking return of Rs 300/- which he had borrowed 5-7 days prior. In the cross-examination by the Learned APP he has denied that he heard Jaswant stating that he had come out of jail and threatened him that he would make 2-3 scenes today which would make PW-12 afraid. He accepted that Jaswant had stayed in Gali No.8 around 8-10 years back and they were in the same school. In the cross-examination by the counsel for appellants, he averred that his statement was recorded a week after the incident. The neighbours Sunil, Deepak, Kamal and other persons had also been called and threatened. It was Investigating Officer Manoj Sinha who had threatened that if PW-12 would not depose against the appellants, he would be hanged. Least to say, taking or relying on anything from these statements would be an exercise in futility.

25. The Supreme Court in ***State v. Sanjeev Nanda*****,** (2012) 8 SCC 450 has highlighted common feature and prodigious problem of public witnesses turning hostile in criminal cases. It observed:

> **"99.** Witness turning hostile is a major disturbing factor faced by the criminal courts in India. Reasons are many for the witnesses turning hostile, but of late, we see, especially in high profile cases, there is a regularity in the witnesses turning hostile, either due to monetary consideration or by other tempting offers which undermine the entire criminal justice system and people carry the impression that the mighty and powerful can always get away from the clutches of law, thereby eroding people's faith in the system.

> **101.** We cannot, however, close our eyes to the disturbing fact in the instant case where even the injured witness, who was present on the spot, turned hostile. This Court in *Manu Sharma* v. *State (NCT of Delhi)* [(2010) 6 SCC 1 : (2010) 2 SCC (Cri) 1385] and in *ZahiraHabibullah Sheikh (5)* v. *State of Gujarat* [(2006) 3 SCC 374 : (2006) 2 SCC (Cri) 8 : AIR 2006 SC 1367] had highlighted the glaring defects in the system like non-recording of the statements correctly by the police and the retraction of the statements by the prosecution witness due to intimidation, inducement and other methods of manipulation. Courts, however, cannot shut their eyes to the reality. If a witness becomes hostile to subvert the judicial process, the court shall not stand as a mute spectator and every effort should be made to bring home the truth. Criminal justice system cannot be overturned by those gullible witnesses who act under pressure, inducement or intimidation. Further, Section 193 IPC imposes punishment for giving false evidence but is seldom invoked."

26. In ***Zahira Habibullah Sheikh and Anr. v. State of Gujarat*, (2006) 3 SCC 374**, the Supreme Court recorded its disquiet and dejection on the issue of hostile witnesses and held that:

> **"40.** "Witnesses" as Bentham said: are the eyes and ears of justice. Hence, the importance and primacy of the quality of trial process. If the witness himself is incapacitated from acting as eyes and ears of justice, the trial gets putrefied and paralysed, and it no longer can constitute a fair trial. The incapacitation may be due to several factors, like the witness being not in a position for reasons beyond control to speak the truth in the court or due to negligence or ignorance or some corrupt collusion. Time has become ripe to act on account of numerous experiences faced by the courts on account of frequent turning of witnesses as hostile, either due to threats, coercion, lures and monetary considerations at the instance of those in power, their henchmen and hirelings, political clouts and patronage and innumerable other corrupt practices ingeniously adopted to smother and stifle the truth and realities coming out to surface rendering truth and justice, to become ultimate casualties. Broader public and societal interests require that the victims of the crime who are not ordinarily parties to prosecution and the interests of the State represented by their prosecuting agencies do not suffer even in slow process but

> irreversibly and irretrievably, which if allowed would undermine and destroy public confidence in the administration of justice, which may ultimately pave way for anarchy, oppression and injustice resulting in complete breakdown and collapse of the edifice of rule of law, enshrined and jealously guarded and protected by the Constitution. There comes the need for protecting the witness….."

27. In the present case allegation of threats made by the appellants was recorded by the trial court in its order dated 18th March, 2008. PW-2 Raj Dulari had made the said allegation. We have reproduced the said order of the trial court dated 18th March, 2008 and noticed the examination of chief of PW2 recorded on 18th March, 2008 and the change in her deposition recorded on 19th March, 2008. We have given and recorded our reasons, why we have accepted the deposition of PW2 recorded on 18th March, 2008. The deceased was brutally assaulted for considerable period and then dragged in a crowded locality. Yet, no public witness, apart from PW-10 Praveen Kumar, has come out and deposed about the occurrence that night. This is a matter of serious concern. It is difficult to accept that no one would have seen the actual occurrence and the incident went unnoticed.

28. Sample data of about 116 criminal appeals decided between period of July 2012 to 31st May, 2013, by Division Benches of the High Court to which one of us (Sanjiv Khanna, J.) was a member, indicates that in 44 cases, public witnesses had turned hostile, i.e. in 37.9 % cases public witnesses had turned hostile. Importantly out of 44 cases, in 27 cases (61.36% cases) the public witnesses were material and important.

Further in 18 cases out of 44 cases (40.91%), public witnesses were completely hostile, while in 26 cases (59.09%), they turned hostile in cross-examination or accepted that incident had occurred yet exculpated the accused. Out of the said 44 cases, 12 cases (27.27%) were cases of crime against women or a girl child. Percentage of cases where public witnesses have turned hostile would be much larger, if we examine data of cases decided by the trial courts. This sample data of 116 cases consists primarily of appeals against conviction and sentence of 10 years and above. Three reasons can be attributed/ascribed when a public witnesses turn hostile; (i) the witness was threatened or lured; (ii) the police had not recorded true and correct statements under Section 161 Cr.P.C. or the witness was planted; or (iii) for personal reasons like relationship and friendship, the witness did not want to depose against the accused. The problem exists and the causes are known but corrective and reformative steps are required to tackle the problem. The aforesaid summary and conclusions are tentative and the figures are approximate but they give a fair idea of the thorny problem and its seriousness. A greater study and scrutiny is required of the problem, challenges, remedial steps taken, their effectiveness and steps that are required to be taken to ensure witness protection, greater objectivity and fairness in investigation, and to inculcate, sensitize and impart knowledge and inform the public of importance and their obligation to state true and correct facts on oath in the courts. In ***State (GNCT of Delhi) v. Sidhartha Vashisht @ Manu Sharma & Anr.*** (2013) 3 RCR (Crim) 417, a Division Bench of Delhi High Court scrupulously dealt with and examined this issue. After taking note of observations of the Supreme Court in this regard, highlighting various reports and studies, the Court issued pertinent directions to the State Government. In view of the

situation, the Government should take appropriate measures and implement them expeditiously.

29. In view of the aforesaid discussion, we do not find any merit in the present appeals and the conviction of Sandeep, Pawan and Jaswant is upheld and their sentence is also maintained. The appeals are disposed of.

(SANJIV KHANNA)
JUDGE

(SIDDHARTH MRIDUL)
JUDGE

JULY 29th, 2013
kkb