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

\+ (1) **CRL.A. 1471/2010**

PARVEEN KUMAR ..... Appellant
Through: Mr. R.K. Burman, Advocate.

versus

STATE OF DELHI ..... Respondent
Through: Ms. Richa Kapoor, APP for State with Ms. Karuna Chhatwal, Advocate.

\+ (2) **CRL.A. 1416/2011**

ANIL KUMAR ALIAS BOOTA ..... Appellant
Through: Mr. Medhanshu Tripathi and Mr. Harish Sharma, Advocates.

versus

STATE ..... Respondent
Through: Ms. Richa Kapoor, APP for State with Ms. Karuna Chhatwal, Advocate.

\+ (3) **CRL.A. 458/2012**

GULAB SINGH ALIAS HATHI ..... Appellant
Through: Mr. S.K. Balian, Advocate.

versus

STATE ..... Respondent
Through: Ms. Richa Kapoor, APP for State with Ms. Karuna Chhatwal, Advocate.

+ (4) **CRL.A. 459/2012**

ANIL KUMAR ..... Appellant
Through: Mr. Vivek Sood with Ms. Janhavi Mahana, Advocates.

versus

STATE ..... Respondent
Through: Ms. Richa Kapoor, APP for State with Ms. Karuna Chhatwal, Advocate.

% Date of Decision : May 17, 2013

CORAM:
HON'BLE MS. JUSTICE REVA KHETRAPAL
HON'BLE MS. JUSTICE SUNITA GUPTA

J U D G M E N T

: REVA KHETRAPAL, J.

1. Challenge in the aforesaid four appeals is to the conviction of the Appellants for the offences under Section 302 read with Section 34 of the Indian Penal Code, 1860, awarding an imprisonment for life to all the four Appellants with the fine of ₹ 2,000/- each, in default three months simple imprisonment each.

2. The facts germane to the case of the prosecution are as follows. The first informant was Vikas, the brother of the deceased Rajesh. The version of PW3 Vikas is that he has a piggery farm. Prior to the incident two to four times his pigs were stolen but the matter was not

reported to the police. On the day of the incident i.e. on 6.5.2002, he and his brother Rajesh had gone to the vicinity of Jindpur Godown at about 9.00 p.m. to take back their pigs, which happened to be grazing there at that time. When they were sitting on the stairs of a shop and were watching their pigs, at about 9.30 p.m., a white coloured Maruti Van came from the G.T. Road and stopped near the pigs. There were four persons in the van. They alighted from the van and started catching their pigs. Seeing this, Rajesh followed those four boys. He (Vikas) was behind Rajesh. Two of the boys were accused Gulab from their Village viz, Village Mukhmelpur and Anil, resident of Village Bakoli, both of whom used to work at their shop. Gulab had left their shop about one or one and a half year before the incident. Anil of Village Bakoli had left about 15-20 days before the incident. The name of the third accused was Anil Kumar, son of Hukum, who was also a resident of village Mukhmelpur. The fourth accused Parveen also resided in their village. Accused Anil of Village Bakoli and accused Parveen Kumar resident of their Village caught hold of his brother Rajesh. Accused Anil of Village Bakoli exhorted: ***"Aaj inka kaam tamam kar dete hai"*** while accused Gulab Singh stabbed 6-7 times on the face and head of his brother with a knife, and accused Anil of their Village gave 3-4 danda blows on the head of his brother Rajesh. When he tried to save his brother, Anil @ Boota of their village exhorted ***"Iska bhi kaam tamam kar do"***. Due to their fear, he ran from there to save himself; he ran towards his village. Accused persons chased him for some distance. He came home and narrated the entire incident to his elder brother Vijay. He and his

brother Vijay came back to the spot on a two wheeler scooter and searched for Rajesh, who was not found at the spot but was found lying in the bushes, at a distance of 3-4 paces from the spot, in an injured condition. He (Vikas) and his brother Vijay lifted him and put him on the scooter and he drove towards the police station. On the way just before the police station, a PCR Van met them. Thereupon, his brother Vijay sat in the PCR Van with his injured brother Rajesh and he followed them on his two wheeler scooter to Babu Jagjivan Ram Hospital, Jahangir Puri, Delhi, where Rajesh was declared brought dead. The police recorded his statement Ex.PW3/A. He accompanied the police officers to the place of occurrence and the IO prepared the site plan at his instance. The following day, i.e., on 7th May, 2002 at about 9.00 a.m., he and his brother Vijay and others went to the hospital where they identified the dead body of Rajesh and his statement to this effect was recorded by the police. Police had seized his blood stained shirt and the blood stained clothes of his brother, which also he identified.

3. In support of its aforesaid case, the prosecution examined 17 witnesses. All the accused were examined under Section 313 Cr.P.C. Three accused persons, namely, Anil Kumar @ Boota, Parveen and Gulab Singh chose to lead evidence in their defence and examined four witnesses. After scrutinizing the testimony of the witnesses of the prosecution and those of the accused, the learned Sessions Judge held that the prosecution had successfully established its case against all the four accused and convicted them for the offence punishable under Section 302/34 IPC.

4. Assailing the judgment, Mr. S.K. Balian, the learned counsel for the Appellant Gulab Singh @ Hathi contended that the entire case of the prosecution was a manipulated one as was clear from a bare glance at the FIR itself, running into three leafs. While the first leaf of the FIR bore serial no.7, the second leaf of the FIR had serial no.17 printed on it. The writing on the first page was different from the writing on the second page and all this clearly showed that the central leaf of the FIR bearing Serial No.17 had been replaced by removal of the leaf initially recorded by the duty officer concerned. This conclusion was buttressed by the fact that Column no.11 in the FIR records *"P.M.Conducted"*. This belied the prosecution's own case that the rukka was sent at 1.55 a.m. on the night intervening 6.5.2002 and 7.5.2002 for registration of the FIR and the postmortem was conducted on 7.5.2002 at about 12.30 p.m. He further contended that the eye witness account of the solitary eye witness, namely, PW3 Vikas was replete with material discrepancies, which rendered his testimony wholly incredible. Thus, for instance, PW3's deposition that the accused had kept the headlights of the van on at the time of the occurrence was altogether unbelievable, for why would the accused expose their identity in such a manner. His statement made in cross-examination that the Maruti Van stopped at a distance of 20-25 paces from them was belied by the scaled map which reflected the distance to be 400 mtrs. between the stairs where the witness stated he was sitting with the deceased and the place where the Maruti Van stopped.

5. He contended that even otherwise the entire story of the prosecution was an improbable one as is reflected from the following:- (i) The witness (PW3 Vikas) ran away from the spot when his brother was being brutally attacked by four persons. (ii) The father and mother did not come to the spot at all though the incident was narrated in their presence by PW3 Vikas to PW4 Vijay. (iii) No dead human being can be carried on a two wheeler scooter by a pillion rider. (iv) Though the rukka was shown sent at 1.55 a.m. on 7.5.2002, the FIR was sent at 4.00 a.m. for being delivered to the Ilaqa Magistrate through a special messenger, and was eventually delivered to the Ilaqa Magistrate at 12.30-1.00p.m. (v) The dagger is shown to have been recovered from a place 200-300 mtrs. away from the place from where the danda/bat was recovered. (vi) PW4 Vijay Kumar (brother of the deceased), PW12 SI Ram Sharan and PW15 ASI Sudama Sharma stated that the accused Gulab @ Hathi and Anil @ Boota were captured in the Subzi Mandi area from a "Phad", but PW10 Constable Yashvir stated that the aforesaid two accused persons were overpowered at the railway station, where they were sitting on the last stair of the railway station.

6. On behalf of the Appellant Anil @ Boota, Mr. Medhanshu Tripathi, Advocate mounted an assault on the impugned judgment by contending that no findings/reasons as such had been recorded by the learned Additional Sessions Judge to bolster his verdict of guilt of the accused persons. He further contended that the witnesses in one voice (except the complainant) had stated that there was no light at the place of incident and even PW1 Sanjay Verma, who had taken

photographs of the spot and who was a private photographer, stated that it was a dark night and that photographs were taken under the search light. No independent witness was examined by the prosecution at the time of the recovery of the alleged weapons of offence. The theory that the Appellant Gulab @ Hathi was carrying a trap in his hand when he alighted from the Maruti Van also stood demolished as no such trap or any trap at all was recovered in the course of investigation. The manipulation in the FIR is apparent on the face of it and merits rejection of the prosecution case in toto. The Supreme Court in a number of judgments including those reported in **Motilal and Anr. vs. State of Rajasthan,** ***(2009) 7 SCC 454, Thanedar Singh vs. State of M.P, (2002) 1 SCC 487, Mehraj Singh vs. State of U.P, (1994) 5 SCC 188*** **and State of U.P vs. Shri Krishan,** ***2005 SCC (Crl.) 1551*** has held that where there is fudging of the FIR, the whole case of the prosecution deserves to be rejected. This apart, the unnatural conduct of the next of kin of the deceased, namely, PW3 Vikas (brother of the deceased) and the father and mother of the deceased renders the whole prosecution story highly improbable ***(See State of Punjab vs. Sucha Singh, AIR 2003 SC 1471)***. At best, it was a case of theft as no previous enmity between the deceased and the Appellants is even alleged to have existed. He further contended that as per the prosecution version three or four days prior to the day of the incident the accused persons had come to steal the pigs of the deceased and this probably was the reason why they were named in the FIR. Non-disclosure at the first instance as to how the injuries had been sustained by the deceased in the MLC

further takes away from the credibility of the prosecution story. Then again, as per the testimonies of witnesses the clothes of the accused were blood stained, but as per the recovery memos the clothes were not blood stained.

7. On behalf of the third accused Parveen Kumar, Mr. R.K. Burman, Advocate placing reliance upon the Punjab Police Rules, Volume III, Rule 24.5 (1)(b) and under Section 157 Cr.P.C., contended that the prosecution had fallen foul of the aforesaid provisions and Rules, which required the copy of the FIR to be immediately forwarded to the Ilaqa Magistrate and the delay in doing so lends credence to the allegation of the defence that there was interpolation of the FIR. All incriminating material had been seized and sealed by the Investigating Officer on 6.5.2002 but it was sent to the FSL on 25.6.2002, which is reflective of the falsity of the prosecution story. Relying upon the judgment of the Supreme Court rendered in **Varun Chaudhary vs. State of Rajasthan,** ***AIR 2011 SC 72***, he further contended that adverse inference was liable to be drawn against the prosecution as in the instant case the tyre marks of the Maruti Van in which the accused persons had come to the spot were not lifted from the place of offence and compared with the tyre marks of the Maruti Van used by the accused so as to establish the presence of the said vehicle at the place of offence.

8. Mr. Vivek Sood, learned counsel for the Appellant Anil of Village Bakoli contended that even if the facts narrated by the star witness of the prosecution, viz., PW3 Vikas are accepted as gospel truth, the conviction of the Appellants under Section 302 IPC is liable

to be set aside as the *mens rea* required under Section 300 of the IPC is conspicuously absent. The prosecution's own case is that the primary objective of the accused persons was to steal the pigs belonging to the deceased and his family. The incident happened on the spur of the moment. It was neither pre-meditated nor pre-planned. The stabs inflicted are in the nature of indiscriminate blows on the face and head and are not aimed at the abdomen or any other vital part of the body. Mr. Sood in this context relied upon the judgment of the Supreme Court in ***Sunder Lal vs. State of Rajasthan, (2007) 10 SCC 371***. In the said case, the accused was alleged to have inflicted a blow on the head of the deceased with 'gandasi' with the intention to kill him and also inflicted injuries on his hand and the co-accused had inflicted injuries on his legs with lathi while he was sleeping. The deceased succumbed to his injuries on the same day. The learned trial court relying upon the dying declaration of the deceased convicted the accused under Section 302/34 and sentenced them to life imprisonment. The Supreme Court, however, held that considering the fact that the occurrence took place in the night in almost dark conditions with feeble light and attack was made indiscriminately, the appropriate conviction would be under Section 304, Part I IPC with a custodial sentence of 10 years.

9. Reliance was also placed by Mr. Sood on the judgments of the Supreme Court in ***Kalegura Padma Rao and Anr. vs. State of Andhra Pradesh (2007) 12 SCC 48, Rakesh Singha vs. State of H.P., (1996) 9 SCC 89*** and ***Kandaswamy vs. State of Tamil Nadu, (2008) 11 SCC 97*** to contend that the factual scenario in the instant

case, in the light of the legal principles laid down in the aforesaid decisions, merited the conviction of the accused under Section 304, Part I IPC and not under Section 302 IPC.

10. Ms. Richa Kapoor, learned Additional Public Prosecutor sought to rebut the contentions of the Appellants' counsel by submitting that the case of the prosecution was fully supported by the ocular, medical and documentary evidence on record. The prosecution version delineated in the first instance by PW3 Vikas is wholly supported by the testimonies of PW8 Constable Satya Narain, PW15 ASI Sudama Sharma and PW16 Head Constable Hargobind. The argument of the Appellants' counsel that the First Information Report in the instant case was a manipulated document is rendered at naught by the rukka, which verbatim contains the version set out in the FIR, and in which PW3 Vikas has clearly given the names of all the four accused persons. As a matter of fact, the narration of the prosecution story in the rukka Ex.PW3/A recorded at the instance of PW3 Vikas, the First Information Report Ex.PW16/A and the testimony of PW3 Vikas are wholly *in tandem* and there is no variation in the three versions. Since no question is raised about any interpolation in the rukka, the necessary corollary is that there is no manipulation in the FIR. This in fact is borne out by the order of the learned trial court dated 16.2.2004 and subsequent order dated 29.9.2005 passed on the application filed by the defence for examining the duty officer. The learned trial court in its order dated 29.9.2005 in fact clearly recorded that the FIR register in original which had been produced before the learned trial court clearly

showed that there were printing errors in the said register at Serial nos.7 & 17 and the present was not the only case where the serial no. was wrongly printed on the second folio.

11. In the context of the fact that Column no.11 in the FIR mentioned the words *"PM conducted"*, Ms. Kapoor contended that the words *"to be"* between the words *"PM"* and *"conducted"* appear to have been skipped. The FIR was recorded at 2.25 a.m. on 7.5.2000 and the postmortem was conducted at 12.30 p.m. on the same day and this is borne out by the aforesaid two documents. Merely because the words *"Postmortem conducted*" appear in the FIR, the contents of the FIR will not be rendered false. It is trite that any act of omission or commission or an irregular act of the Investigating Officer cannot result in throwing out the entire case of the Prosecution, more so as the contents of the rukka and the FIR are identical and both the said documents bespeak of the presence of the eye witness at the time of the incident. Learned APP contended that in any event the aforesaid submission of the defence deserved no consideration for a similar plea made before the Hon'ble Supreme Court in the case of ***Radhey Sham vs. State of Haryana, (2001) 10 SCC 206*** was not countenanced by the Supreme Court. In the said case, it was submitted on behalf of the Appellant that since the FIR number was mentioned on the Recovery Memo, therefore, it was apparent that the FIR was first registered and thereafter the Recovery Memo was prepared. Rejecting this contention, the Supreme Court opined:-

> *"In our view, the aforesaid submissions deserve no consideration because with regard to the FIR, FIR*

number is mentioned on the recovery memo but that would not vitiate the recording of FIR."

12. Then again, it cannot be lost sight of that the testimonies of PW8 Constable Satya Narain and PW15 ASI Sudama Sharma clearly delineate the manner in which investigation was conducted and leave no manner of doubt about the authenticity of the rukka recorded by PW15 ASI Sudama Sharma which was sent through Constable Rohtas to the Police Station for getting the case registered.

13. Dealing with the contention of the Appellants that the delay in sending the FIR to the Ilaqa Magistrate was destructive of the case of the prosecution, learned APP contended that there was no such delay as alleged or at all, as is borne out from the testimony of PW5 Constable Surinder, who had taken the special report of this case to the senior police officers and the area Magistrate on his motorcycle. In his cross-examination, PW5 Constable Surinder, on being asked, stated that he had departed from the PS at about 4.00 a.m. on a motorcycle. It had taken him one hour in reaching Tis Hazari Court from PS Alipur. He had handed over the copy of the FIR in the Court of the learned M.M. at about 12.30 or 1.00 p.m. Significantly, a Court question was posed to this witness with regard to the delay, which along with the reply is reproduced hereunder:-

"Court Question:- Would you explain that when you left PS at 4.00 AM and reached court premises within one hour then how you delivered the copy of FIR in the court of Magistrate at 12.30 or 1.00 PM?
Ans. First I went to the office of Joint C.P. Again said at the house of Joint C.P. on Mandir Marg, New Delhi. My motorcycle went out of order at ITO, since I had

> *taken route of Outer Ring Road for reaching Mandir Marg. I had taken that route on account of traffic jams. Since the shops were not opened, I waited there upto 10.30 AM. I got my motorcycle repaired. It was repaired at 11.30 AM. By that time office of Joint CP was opened and copy of FIR was delivered in his office. From there I came to Tis Hazari and delivered the copy of FIR in the court of Ld. MM.*

In the course of further Court questions posed to the witness, he stated that in those days the concerned Magistrate was residing at Sujan Singh Park, New Delhi and that he was not aware of any shorter route from Police Station Alipur to Mandir Marg than the one adopted by him.

14. Learned APP on the basis of the aforesaid testimony of PW5 Ct.Surinder contended that there was no such delay in the dispatch of the FIR to the Ilaqa Magistrate as could cast a shadow of doubt on the prosecution case. Relying upon the decision rendered by the Hon'ble Supreme Court in the case of ***State of Gujarat vs. Raghunath Vamanrao Baxi, 1985 AIR 1092***, she contended that it would be wrong to reject the evidence of the police officers/official witnesses on the mere ground that they are interested in the success of the prosecution case. In the said decision, the Supreme Court made the following pertinent observations:-

> *"For that matter it would be wrong to reject the evidence of police officers either on the mere ground that they are interested in the success of the prosecution. The court may be justified in looking with suspicion upon the evidence of officers who have been demonstrated to have displayed excess of zeal in the conduct and success of the prosecution. But to reject*

> *the evidence of all official witnesses as the High Court has done in the present case, is going far too far. We think that it is extremely unfair to a witness to reject his evidence by merely giving him a label."*

15. On the aspect of identification of the accused persons and the insufficient light available for the aforesaid purpose, learned APP submitted that whereas in the instant case the eye witness had the opportunity of seeing the accused persons from a very close distance, they could have been identified by voice, by gait and by other features, clothes, manner of speaking, etc. Reference in this context was made by her to the judgments of the Supreme Court rendered in the case of ***State of Uttar Pradesh vs. Manoharlal and Others, 1981 Supp. SCC 35*** and to the decision in ***Kedar Singh and Others vs. State of Bihar, 1999 Cri.LJ 601***, wherein it is held that even on a dark night it is possible for the eye witnesses to identify the accused by other means through the shape of his body, clothes, gait, manner of walking etc. Identification is possible by voice too. She submitted that the assailants were well known to the deceased and the eye witnesses. Three out of the four assailants, namely, Parveen Kumar, Anil Kumar @ Boota and Gulab @ Hathi were residents of the same village as the deceased. Besides this, two of the assailants, namely, Anil Kumar of Village Bakoli and Gulab Singh @ Hathi had worked in the shop of the deceased and the eye witness.

16. Adverting to the contention of Mr. Medhanshu Tripathi on behalf of the Appellant Anil @ Buta of village Bakoli that the only role ascribed to his client was of catching hold of the deceased Rajesh

and exhortation, and for this alone he could not be held guilty of the offence punishable under Section 302 read with Section 34 IPC, learned APP submitted that it is trite that where the accused is described to have played only the role of catching hold of the deceased, thereby facilitating assault upon him by the co-accused, Section 34 IPC comes into play. Reference in this context was made by her to the decisions of the Supreme Court in ***Israr vs. State of U.P., AIR 2005 SC 249*** and ***Ramesh Singh @ Photti vs. State of A.P.,*** Appeal (Crl.) 868 of 2003 decided on 25th March, 2004. In both the aforesaid decisions, the Appellant had caught hold of the hands of the deceased to facilitate stabbing by the co-accused and it was held that this by itself indicated that the Appellant shared the intention of the co-accused to cause the death of the deceased.

17. In our considered view, the prosecution has successfully established the commission of the crime in the instant case through ocular, circumstantial and medical evidence. It stands proved on record that vide DD No.23A (Ex.PW16/C) recorded at 10.22 p.m., on 6.5.2002, a wireless message was received at P.S.Alipur to the effect that on the road between Bakoli and Hamirpur, the electricity wire was lying broken and on receipt of this message ASI Sudama Sharma and Constable Satya Narain departed from Police Station Alipur. On their arrival back at Police Station Alipur, another DD being DD No.28A, was recorded by the duty officer at 12.06 p.m., to the effect that information had been received through Head Constable Ramesh that Rajesh, son of Mahabir and his brother Vikas (wrongly recorded as Vijay) had been grazing pigs at their farm at Alipur Telco, when

four or five persons came there with the intention of stealing pigs, who had assaulted Rajesh on his head and neck with knife, who was now admitted in BJRM Hopsital. On receipt of this information, the SHO was apprised and a copy sent to PW15 ASI Sudama Sharma, who subsequently departed for the hospital. He obtained the MLC of the deceased and on the statement of Vikas (PW3) recorded rukka (Ex.PW15/C), recording therein that the doctor had opined that the patient was brought dead to the casualty by the police at 11.40 p.m. and declared dead at 11.50 p.m. The time of the dispatch of rukka, as reflected in the rukka, is 1.55 a.m. on 7.5.2002; and the endorsement thereon shows that FIR was registered vide DD No.31A at 2.25 a.m. on 7.5.2002. As per the testimony of PW8 Constable Satya Narain, he had taken the dead body to the mortuary for postmortem and the postmortem report Ex.PW6/A shows that postmortem was conducted by PW6 Dr. B.N. Acharya on 7.5.2002 at 12.30 p.m. At about 4.00 a.m. on the same day, i.e. on 7.5.2002, DD No.33 was recorded (Ex.PW16/D), which reflects the departure of PW5 Constable Surinder from PS Alipur, on motorcycle No.DL-1SL 5154, with the special report to the senior officials, including the Ilaqa Magistrate. At about 6.30/6.45 p.m., on receipt of secret information, accused Parveen and Anil of village Bakoli were apprehended from a fish farm in Alipur, Delhi and their arrest memos prepared (Ex.PW15/E and Ex.PW15/F). Disclosure statement was made by accused Anil resident of Village Bakoli that knife was in the possession of Gulab @ Hathi and danda was in the possession of Anil @ Boota. A disclosure statement was also made by accused Praveen. The said

accused then led the policy party to the house of accused Anil from where they produced their blood stained clothes, which were seized and sealed. The blood stained clothes of Vijay (PW5) and Vikas (PW3) were seized at the police station. The Maruti Van was also seized from the fish farm from the accused Parveen and Anil were arrested. Subsequently, on 9.5.2002, Appellants Gulab @ Hathi and Anil @ Buta were apprehended by PW15 ASI Sudama Sharma from the Azadpur Mandi on the pointing out of PW4 Vijay while sitting on the last 'PHAD' Subzi Mandi, Azadpur, Delhi. Their disclosure statements were recorded (Ex.PW4/G and Ex.PW4/H) and at their instance a knife recovered from the bushes which were on the southern side from an electric pole. Appellant Anil @ Boota led the police party to a slope of the G.T.Karnal Road and from the bushes he got recovered a bat in two pieces. Accused Gulab and accused Anil @ Boota were wearing blood stained clothes, which were also seized.

18. A look now at the testimony of PW6 Dr. B.N. Acharya who conducted the postmortem. Ten external injuries are detailed in the postmortem report which are stated to have occurred 12 hours prior to the conduct of the postmortem. Death was caused due to cranio cerebral damage consequent upon head injury sustained. Injury Nos.1 and 2 are head injuries opined to have been caused possibly by the danda seized in the course of investigation. Injury Nos.3, 4, 5 and 6 mentioned in the autopsy report (stated to have been inflicted by Appellant Parveen Kumar) are cut wounds and in the course of cross-examination, it is admitted that these are not stabs or punctured wounds and are not grievous injuries. Injury Nos.1 and 2, on the

other hand, are stated to have caused cranio cerebral damage resulting in the death of the deceased.

19. The FSL reports Ex.PY and PZ further show detection of human blood on the shirts of PW3 Vikas and PW4 Vijay. Human blood was also detected on the clothes seized from all the four accused as well as on the danda and knife recovered at the instance of Appellant Gulab @ Hathi and Appellant Anil @ Boota. Report Ex.PZ also shows that the pants of Appellants Parveen, Anil of village Bakoli and Anil @ Boota were stained with blood of 'B' group while both the shirt and the pants of Appellant Gulab were stained with blood of 'B' group, which was the blood group of the deceased. Thus, there is clinching evidence to establish the case of the prosecution.

20. With regard to the identification of the accused persons, in our opinion, even assuming the light to be feeble, it cannot be lost sight of that all four accused were well known to the deceased and his family and thus their identification by PW3 Vikas cannot be doubted. It may be noted that PW3 Vikas in his cross-examination has stated that he had witnessed the incident at a distance of 2 or 3 paces and by the time his brother was overpowered he had proceeded further and the distance between him and the assailants at that point of time was 10 paces. We see no reason why the eye witness should be disbelieved when he says that he saw the accused at such a close distance while they were assaulting his brother, more so when the accused were very well known to the witness and his family. Even otherwise, no previous enmity is alleged and, therefore, animosity as a reason for

false implication is ruled out. The paucity of light regardless, as held by the Supreme Court in the case of ***Kedar Singh and Others vs. State of Bihar*** and ***State of Uttar Pradesh vs. Manoharlal and Others (supra)***, the Appellants could have very well been identified by their voice, gait, clothes, manner of speaking, etc.

21. As regards the improbable conduct of PW3 Vikas and the father and mother of the deceased, we are unable to discern any abnormality in their behavior. PW3 Vikas has clearly stated that he tried to rescue his brother but had to run for fear of his own life when Anil of village Bakoli exhorted: *"ISKA BHI KAAM TAMAM KAR DO"*. Even otherwise, it needs no reiteration that to doubt the presence of the witness who did not come to the rescue of the deceased when he was in the clutches of his assailants and to discard his testimony on that ground alone, may result in gross miscarriage of justice. The following observations made by the Supreme Court in the case of ***Rana Partap vs. State of Haryana, 1983 (3) SCC 327*** are apposite in this regard:-

> *"Every person who witnesses a murder reacts in his own way. Some are stunned, become speechless and stand rooted to the spot. Some become hysteric and start wailing. Some start shouting for help. Others run away to keep themselves as far removed from the spot as possible. Yet others rush to the rescue of the victim, even going to the extent of counter-attacking the assailants. Every one reacts in his own special way. There is no set rule of natural reaction. To discard the evidence of witnesses on the ground that he did not react in any particular manner is to appreciate evidence in a wholly unrealistic and unimaginative way."*

22. The doubt sought to be caused on the authenticity of the FIR, in our opinion, is altogether negated by the fact that the FIR contains the version of the rukka *in verbatim*. All the four accused are named in the rukka itself and thus their implication by manipulation of the FIR is ruled out. In fairness to the learned trial Judge, it also deserves to be noted that he had called for the original FIR register and found printing errors galore in the serial numbers of various FIRs and this itself renders at naught the plea of the defence that the FIR was an interpolated document. The slight delay in the dispatch of the FIR to the Ilaqa Magistrate has been satisfactorily explained by PW5 Constable Surinder, who had carried the FIR on his motorcycle and no cogent reason has been pointed out by the defence as to why this Court should doubt the veracity of his statement. Further, there does not appear to us to be any reason to doubt the eye witness account of the real brothers of the deceased PW3 Vikas and PW4 Vijay. PW3 Vikas had witnessed the assault on his brother and his account of the incident appears to be free from exaggerations and embellishments, and in fact, is corroborated by the autopsy report which is reflective of the precise manner in which the deceased was done to death. It is correct that there was no motive for the commission of the offence other than the stealing of pigs grazing in the open, but motive itself loses significance when the oral testimony of the eye witnesses as well as medical and other evidence on record clearly establishes the commission of the crime, the manner in which it was committed and the place where it was committed (See ***Yunis @ Kariya vs. State of***

Madhya Pradesh, Appeal (Crl.) No.522 of 1995 decided on 10th December, 2002). The fact that all the four accused came together two of them, namely, Anil of Village Bakoli and Parveen caught hold of the deceased, Anil exhorted ***"Aaj kaam tamaam kar do"*** while accused Gulab stabbed 6-7 times on his face and head with knife and Anil @ Boota gave 3-4 danda blows on his head and when PW3 Vikas tried to save his brother, Anil @ Boota exhorted ***"Iska bhi kaam tamaam kar do"*** clearly reflects that all the appellants shared common intention. To this extent, the prosecution has been able to prove the case beyond doubt.

23. There is also nothing in the statements of the appellants under Section 313 of the Code of Criminal Procedure, 1973, which requires consideration or creates any doubt about the prosecution version. Appellant – Anil Kumar son of Ram Kishan has taken a plea that he had given a shop on rent to the eldest brother of deceased Rajesh, namely, Vijay. When the meat shops were sealed he got the same vacated. On this account, the complainant party developed animosity towards him and falsely implicated him in this case. He however did not choose to adduce any defence evidence in this regard.

24. Accused Anil Kumar @ Boota son of late Hukum Singh took the plea that on 08.05.2003, he was present at his house at Samaypur Badli. He received a telephone call from his brother Sunil, resident of Mukhmel Pur, Delhi, stating that he is in the police station. Thereupon he along with his elder brothers Rajender and Yogender and two other neighbours went to the police station, Alipur, where he was taken in custody, while his brother was let off.

25. Parveen took the plea of *alibi* by stating that on 6.5.2002 he was at village Sultanpur attending a Jagran at the house of sister of his father. Next day his father telephoned his aunt to send him alongwith Maruti Van. At around 11:30 p.m., he along with his bua Bala, Meenawati and Jagbir went to police station Alipur, where he met his father. He was assaulted by the police and falsely implicated in this case.

26. Accused Gulab Singh took the plea that on 05.05.2002 in the night they were to remove wheat from the fields. Accordingly, they harvested the wheat and put it into a tempo and transported it to their house. On the next day, they went to Samaypur at around 6-7 p.m. He was arrested from his house on 8.5.2002 and falsely implicated in this case.

27. Accused Parveen examined DWI Ramesh Chand, his father and DW2 Jagbir, both of whom have deposed that Parveen went to village Sultanpur to attend MATA KA JAGRAN organised by his sister – Smt. Bala. Accused Gulab Singh examined DW3 Dharam Pal, his uncle, who merely deposed that about three years back when he was coming from his fields to his house at around 2 p.m. he came to know that the son of Mahavir was murdered. On that day, i.e., on 6th May, 2013 between 2.00 to 2.15 p.m., accused Anil @ Boota and accused Gulab Singh were in the gali next to his house. Thereafter DW4 Raj Singh was also examined by Gulab Singh and Anil @ Boota. He also deposed that on 6.5.2002, at around 2/2.30 p.m. he came to know that son of Mahavir was murdered. A complaint was lodged by the villagers concerning the slaughter of pigs in the street.

The name of Mahavir whose son was slaughtered figured in the said list marked D-1.

28. At the outset, it may be mentioned that the pleas taken by the appellants in their statements recorded under Section 313 Cr.P.C. have seen the light of the day for the first time in their statements and no such suggestions were given to any of the prosecution witnesses. The plea taken by Anil Kumar son of Ram Kishan is that when the shop was got vacated from the eldest brother of deceased Rajesh, the complainant party developed animosity towards him and he was falsely implicated. No evidence in this regard is forthcoming as to whether any shop was given on rent to the eldest brother of deceased Rajesh or the same was got vacated. Even no suggestion to this effect was given to the material prosecution witnesses. The plea of Anil Kumar @ Boota that on receipt of telephone call from his brother Sunil that he is in the police station, he went to the police station along with his elder brothers Rajender and Yogender and neighbours, where his brother was let off and he was taken in custody does not appeal to reason. It is not explained as to why this accused would be taken in custody without any reason or fault and why his brother would be detained in police station till then. The brother Sunil has not been examined by the accused to substantiate his version. Accused Parveen has tried to take a plea of *alibi* by stating that he had gone to attend Jagran at the house of his aunt at village Sultanpur. This plea of *alibi* was required to be proved by him by cogent evidence. A vague suggestion was given to PW3 Vikas that the accused had gone to village Sultanpur in his own vehicle and to PW4 that he had gone

to the house of his father's sister in a Maruti Van, however, the reason for going to the house of his father's sister was not put to the witnesses in their cross-examination. The sister of father of the accused has not been examined by the accused in order to prove that there was any Jagran in her house or that the accused had come to her house during evening hours on 06.05.2002. As such, this plea of *alibi* is not proved. Similarly Gulab Singh has examined DW3 Dharam Pal and DW4 Raj Singh, however their testimonies do not in any manner help the accused in as much as they merely stated that they came to know that son of Mahavir was murdered and a complaint was lodged by the villagers regarding slaughter of pigs in the street. The complaint marked D1, however, has not been proved. Under the circumstances, none of the appellants get any benefit from the witnesses examined by them in defence. On the other hand prosecution has been able to bring home the guilt of the accused beyond any shadow of doubt.

29. Now, it is to be seen whether conviction of the Appellants is liable to be converted to Section 304, Part I or Part II as contended by Mr. Vivek Sood, counsel for the Appellant Anil Kumar. As already noted above, reliance was placed by Mr. Sood upon the judgments of the Supreme Court in ***Sunder Lal, Kalegura Padma Rao, Rakesh Singha*** and ***Kandaswamy (supra)***. We have carefully perused the said decisions rendered by the Hon'ble Supreme Court and in our opinion none of the judgments relied upon by the counsel has any application to the facts of the case in hand inasmuch as it was on the peculiar circumstances of those particular cases that conviction was

altered to Section 304, Part I or Part II. In the instant case, the accused persons inflicted as many as 10 injuries on the deceased with danda and knife. Injury Nos.1 and 2 are stated to have caused cranio cerebral damage resulting in the death of the deceased. The force with which these injuries were inflicted speaks of the intent of the accused persons to cause the death of the deceased. The danda itself broke into two pieces. We are, therefore, unable to persuade ourselves to interfere with the judgment of the learned trial court by altering the conviction under Section 302 IPC to one under Section 304, Part I or Part II IPC. The loopholes in the investigation and the minor discrepancies in the evidence pointed out by the defence counsel are also too inconsequential to persuade us to hold the accused persons innocent of the offence for which they have been charged. The sequence of events as unfolded by the evidence of the prosecution witnesses and the documentary evidence on record, in our considered opinion, cogently and conclusively establishes the guilt of the accused persons.

30. The Appeals are without merit and are accordingly dismissed.

REVA KHETRAPAL
JUDGE

SUNITA GUPTA
JUDGE

May 17, 2013
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