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

+ **CRL.A.892/2010**

SHAHNAWAZ @ SHANU Appellant
Through: Mr. Rajat Wadhwa, Advocate.

versus

STATE Respondent
Through: Ms. Ritu Gauba, APP

AND

+ **CRL.A. 1399/2010**

SAMEER SALMANI @ SONU Appellant
Through: Mr. Bhupesh Narula, Advocate

versus

STATE Respondent
Through: Ms. Ritu Gauba, APP

Date of Decision: 16th July, 2013

CORAM:

HON'BLE MS. JUSTICE REVA KHETRAPAL

HON'BLE MS. JUSTICE SUNITA GUPTA

J U D G M E N T

: SUNITA GUPTA, J.

1. Challenge in this appeal is to the impugned judgment dated 31.05.2010 and order on sentence dated 04.06.2010 passed by learned Addl. Sessions Judge in Session Case No. 119/2007 arising out of FIR No. 283/2007, Police Station Vivek Vihar whereby both the accused persons were convicted for offence under Section 302/34 and 323/34 IPC and sentenced to undergo life imprisonment with a fine of Rs. 3000/- each, in default of payment of fine to further undergo simple imprisonment for one month for offence punishable under Section 302/34 IPC and to undergo simple imprisonment for 3 months each for offence punishable under Section 323/34 IPC. Both the sentences were to run concurrently.

2. Prosecution case emanates from the fact that on 08.07.2007 at about 2.30 AM a call was received by HC Narender Kumar (PW10) from Ct. Harbir (PW20) regarding admission of two persons in Dr. Hedgewar Hospital in injured condition and one Radhey Lal declared 'brought dead' on which DD No. 4A Ex. PW10/A was recorded at Police Station Vivek Vihar which was assigned to SI Maman Khan (PW22). SI Maman Khan along with Ct. Sunil Kumar (PW9) reached

Dr. Hedgewar Hospital, Karkardooma, Delhi and obtained MLC No. 1622/2007 in respect of Shiva Prabhakar and also MLC No. 1621/2007 of Radhey Lal who was declared 'brought dead'. SI Maman Khan recorded the statement of injured Shiva Prabhakar (PW4) on the basis of which, a case under Section 302/323/34 IPC was registered and investigation was conducted by Inspr. Sandeep Gupta who collected the relevant documents from SI Maman Khan and prepared the site plan at the instance of complainant. One black colour shoe of right foot of the deceased was recovered from the spot. Santro car bearing No. DL7CC 0282 was standing outside Dr. Hedgewar Hospital in damaged condition. On inspection of the car, a portion of the handle of hand pump and other shoe of deceased was found which were seized. The car was taken into possession and was sent to police station.

3. Crime team was called at the spot. The dead body of the deceased was sent to Subji Mandi Mortuary. Post mortem on the dead body was conducted by Dr. Rohit who gave his post mortem report Ex. PW26/A opining that death in this case was due to vertebral damage consequent upon blunt force impact to the neck vide injury

no. 5 in the post mortem report i.e. spinal column injury. The clothes of the deceased were seized, viscera was preserved and was given to the investigating officer along with blood soaked gauze piece. The dead body was identified by Ashok Kumar (PW1) and Ram Kishan (PW2) and the same was handed over to the relatives of the deceased.

4. It is further the case of the prosecution that on 10.07.2007, on the basis of secret information, both the accused were arrested vide arrest memo Ex. PW7/C and Ex. PW7/D. Their personal search was conducted vide memo Ex. PW7/A and PW7/B. On interrogation, accused Shahnawaj made a disclosure statement Ex. PW7/F whereas accused Sameer Salmani made a disclosure statement Ex. PW7/E. Both the accused pointed out towards the spot where the incident occurred vide pointing out memos Ex. PW7/I and Ex. PW7/H. Accused Shahnawaj led the police party to street of Gautam Gali, Jwala Nagar and pointed out the place where he had thrown the piece of handle of hand pump and took out the broken handle from the drain and the same was seized vide Ex. PW7/J. Thereafter, they led the police party to street at Jwala Nagar and pointed out a hand pump

from which the handle was separated. The red colour motorcycle No. DL 5SV 0705 make Unicorn was seized vide memo Ex. PW7/G.

5. On 11.07.2007 both the accused were produced in the court of Metropolitan Magistrate in muffled face and an application Ex. PW25/C was moved for conducting Test Identification Parade (TIP). On 12.07.2007 both the accused refused to join TIP proceedings. During the course of investigation, a scaled site plan was prepared by Ct. Sonu Kaushik. Exhibits were sent to CFSL Calcutta. After completing the investigation charge-sheet was submitted.

6. Charge for offence under Section 302/34 IPC and 323/34 IPC was framed against both the accused to which they pleaded not guilty and claimed trial. In order to substantiate its case, prosecution examined 26 witnesses. All the incriminating evidence was put to both the accused while recording their statements under Section 313 Cr.P.C. wherein they denied the case of the prosecution and alleged false implication in this case. Initially, both the accused stated that they want to lead defence evidence but no evidence was led by them. After hearing the learned counsel for the parties and perusing the record, vide impugned judgment dated 31.05.2010, conviction order

was passed against both the accused which has been assailed by filing the present appeals.

7. We have heard the learned counsel for appellants, Mr. Rajat Wadhwa and Mr. Bhupesh Narula and Additional Public Prosecutor for the State, Ms. Ritu Gauba and perused the record.

8. It was submitted by learned counsel for appellants that there are three statements of complainant in which he has given different versions regarding number of accused, weapons of offence and genesis of the incident. If truth and falsehood are so inter-mingled that it is difficult to separate the two, then entire evidence has to be rejected. Reliance was placed on *Kanbi Narizi Virji and Ors vs. State of Gujarat*, AIR 1970 SC 219. It was contended that suspicion cannot take the place of proof and in case of doubt, accused are entitled to get benefit of the same. Further if the accused persons were known to the complainant from before, why their names were not mentioned in the FIR. Mentioning the names of accused three days after registration of FIR shows the manipulation and false implication of accused person in this case. Reliance was placed on *Jagir Singh Vs. The State*, (1975) 3 SCC 562 where non-disclosure of name of

assailant, claimed to be previously known, at the first possible instance while admitting deceased in the hospital and reporting that incident to police constable on duty was held to be an unnatural conduct and it was held that conviction cannot be based on such testimony. It was further submitted that the other two witnesses namely Silky and Bimla have not supported the case of the prosecution at all. As regards Sanjay Sharma is concerned, no reliance can be placed upon his testimony. He is a planted witness. Despite alleging to be an eye witness of the incident, he did not inform the police and even his family members. According to him after reading in the newspaper and seeing the news on TV channel he went to police station and gave the statement. The conduct of the witness is quite unnatural and no reliance can be placed on his testimony. Reliance was placed on *Jagdish & Ors vs. State of Karnataka*, 2007 Cr.L.J.2434; *Birappa @ Anr, vs. State of Karnataka*, (2010) 9 SCR 205; *Gopal Singh & Ors vs. State of M.P*, (2010) 5 Scale 602. Furthermore, according to Inspector Sandeep Gupta, the site plan was prepared at the instance of complainant. However, it does not bear his signatures. Moreover, according to him,

from the Santro car, one black colour shoe of the deceased; portion of hand pump was seized, however, Shiva Prabhakar is not a witness to the seizure memo. Although finger prints from the car were taken but the same were not matched with the finger prints of the accused in order to connect them with the crime. It was further submitted by Mr. Bhupesh Narula, Advocate for appellant that while putting incriminating evidence to the accused, learned Addl. Sessions Judge was not clear about the evidence and in fact the questions have been put as per the charge-sheet which cannot be made basis of putting questions to the accused while recording his statement under Section 313 Cr.P.C. as such it was submitted that prosecution has failed to bring home guilt of accused beyond shadow of doubt as such accused are entitled to be acquitted.

9. Rebutting the submissions of learned counsel for the appellant, it was submitted by learned public prosecutor that even if a different version was given by the complainant in his statement under Section 161 Cr.P.C. the initial statement which formed the basis of registration of FIR cannot be ignored. Reliance was placed on ***Babla @ Gurdeep Singh vs. State of Chhatisgarh***, (2013) 1 SCC (CrI.) 417

where it was held that once registration of the FIR is proved by the police and the same is accepted on record by the Court and the prosecution establishes its case beyond reasonable doubt by other admissible, cogent and relevant evidence, it will be impermissible for the Court to ignore the evidentiary value of the FIR.. The presence of the complainant at the spot is amply proved in as much as he himself sustained injury in the incident; it was he who brought the injured to hospital and thereafter he as well as injured were examined and their MLCs were prepared. The case of Shiva Prabhakar that he had consumed alcohol is corroborated by the medical evidence where smell of alcohol was detected. Immediately after medical examination, DD No. 4A was recorded. Police reached the hospital where his statement was recorded. Further the factum of car of the complainant being damaged by the accused persons also finds mention in the rukka Ex. PW22 A. The FIR stands proved. Omission to mention name of accused in FIR is not fatal since specific role of the accused had been attributed. Reliance was placed on *Jitender vs. State of Haryana*, 2012, C.V. L.J 3085 where it was observed as under:-

“.....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 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. 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. 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.....”

10. As regards some discrepancy in the statement of the complainant, it was submitted that this witness was extensively cross-examined from 20.01.2009 to 27.02.2009 for 5 dates of hearing. His cross-examination was intentionally got deferred by accused in order to win him over. There was deliberate delay on the part of the accused which does not give benefit to the accused. It was device of defence to shatter the testimony of the witness. Moreover, the medical evidence fully corroborates the oral testimony of prosecution witness. As regards non lifting of finger prints of accused from the car, it was submitted that it has come in the statement of Shiva Prabhakar that with the help of 3/4 more persons he removed the injured Radhey in the car, therefore, finger prints of those 3/4 persons would also have come on the car, therefore, it was futile to take finger prints of the accused. As regards remaining part of hand pump recovered from the drain, it was submitted that there was no purpose of sending it to finger print expert as it was recovered from drain and therefore it became wet and as such the print vanished. As regards PW3 Sanjay

Sharma is concerned, it was submitted that he is not a planted witness but was a chance witness. There is no reason to disbelieve his statement. Remaining part of the handle of hand pump was recovered at the instance of accused Shahnawaj which is strong incriminating piece of evidence against him. It was submitted that the entire material on record was duly scrutinized by learned Addl. Sessions Judge. The impugned order does not suffer from infirmity which calls for interference and as such appeals are liable to be dismissed.

11. We have given considerable thought to the respective submissions of the learned counsel for both the parties and have perused the record.

12. It is not in dispute that Sh. Radhey Lal met a homicidal death inasmuch as he was taken to the doctor at Dr. Hedgewar Aarogya Sanstahan, Karkardooma by Shiva Prabhakar and was examined by Dr. Abhishek Biswas (PW 19), who on examination found the patient to be unconscious, pulse not palpable, blood pressure not recordable, no air entry in chest, heart sound not audible, pupils were fixed and dilated, ECG was flat. On local examination number of injuries were found on his person. He was declared as “brought dead”. He

prepared MLC to this effect PW-19/A. Post mortem on the dead body of Radhey Lal was conducted by Dr. Rohit who gave a detailed post mortem report, Ex.PW-26/A. As per post mortem report following external injuries were found:-

1. Contusion in 3x1 cm over the nose;
2. Abrasion in 3x1 cm over upper back of left forearm;
3. Abrasion in 2x1 cm over upper back of left forearm, 1 cm above injury no.2.
4. Multiple abrasion in the area of 8x4 cm over left side of forehead.
5. Contusion in 3x2 cm on back of neck.

13. On internal examination, following injuries were noted:-

1. Head

Effusion of blood in scalp layers in occipital region.

XX XX XX XX XX XX

5. Spinal column

- a. Fracture dislocation of C-5 and C-6 vertebra with effusion of blood in surrounding muscle.

It was opined that death in this case was due to vertebral damage consequent upon blunt force impact to the neck via injury no.5 in the post mortem report i.e spinal column injury. All the injuries were ante-mortem. Injury no.5 was sufficient to cause death in ordinary course of nature.

14. The sole question for consideration is: who was responsible for this homicidal death.

15. Prosecution sought to substantiate its case by examining PW-3 Sanjay Sharma, PW 4 Shiva Prabhakar; PW-5 Vimla and PW-6 Silky who are alleged to be eye-witnesses of the incident.

16. PW-4 Shiva Prabhakar is the most material witness and is the complainant. On 08.07.2007, on receipt of DD.No.4A, Ex.22/A SI Maman Khan (PW-22) reached Dr. Hedgewar hospital and met complainant Shiva Prabhakar and recorded his statement which is to the following effect:-

He is resident of G-27, Radha Puri, Krishna Nagar Dairy and is working as Editor in fine cut production house, Kaushambi, Ghaziabad, U.P. On that day he had gone to attend the marriage of daughter of his neighbour, Mr. Terry at Amar Banquet Hall near P.S. Geeta Colony. After consuming some liquor and in order to take more liquor, he went along with his friend Radhey who used to reside in front of his house to Jwala Nagar, in his Santro Car No.DL-7CC-0282 at about 1.30 a.m. He purchased liquor from a girl namely Sonu for a sum of Rs.200/-. He consumed some liquor then and there and thereafter they started proceeding in his Santro Car at about 1.45 a.m. Suddenly 3-4 boys came on Bullet motorcycle. One of them knocked

the glass of his car. He started his car. Then one of the boys who was having base ball bat and one or two, probably armed with rods, started beating him. Firstly he was beaten and thereafter, Radhey who was sitting on the rear seat was also beaten. After getting down from the car, Radhey started running in the back street. At that time, those boys were beating him. Those boys gave beating to Radhey in the street and kept on beating him despite the fact that he tried to make them understand and were extorting "*In saloon ko jaan se maar kar ke chodna hai*". Thereafter they escaped on their motorcycle. He heard a noise of a lady that the motorcyclist had killed his friend. He got down from his car and saw that his friend Radhey was lying in the street and blood was oozing out of his body. However, he was alive. He asked for help. 3-4 children came and with their help he removed Radhey on the back seat of his car and took him to Ram Singh hospital, Krishna Nagar where he was advised to take him to Dr. Hedgewar hospital. Then he took him to Dr. Hedgewar hospital where he was declared "brought dead". His car was got damaged by those boys. Radhey died due to beatings given by those boys. He can

identify those boys. All are strong built and are in the age group of 25-30 years.

17. Another statement of this witness was recorded under Section 161 Cr.P.C., Ex. PW-4/B on 10.07.2007 wherein he gave an entirely different version by stating that on the intervening night of 7-8.07.2007 at about 12.30-1 a.m, he along with his friend Radhey Lal went to take beetel. Both of them went to gali No.4, Jwala Nagar in his Santro car because he wanted to consume liquor. He used to purchase liquor from Sonu Sansan in gali No.4. He parked his car at the corner of Gali no.4. Thereafter they went to the house of Sonu Sansan. 2 boys were already consuming liquor there who were known to him. 3 days prior to the incident, a quarrel had taken place between him and these boys near the house of Sonu Sansan because one Silky(Hizda) also used to come over there whom he thought was a girl. 3 days prior to the incident, under the influence of liquor he teased Silky and at that time, the two boys quarrelled with him. One was 'fatty' and was of fair complexion and the other was of medium height and was of wheatish complexion. The fatty boy was known as Shanu while the medium height boy was known as Sonu. When he

and Radhey came out of the house of Sonu Sassan after purchasing liquor, they found Silky whom he used to consider as a girl and that day he came to know that he is a enunch. After meeting Silky he talked to her and slightly teased her. Silky came along with them to the corner of the car where he was talking to her. Radhey was sitting on the back seat of the car. In the meantime, both the boys who were consuming liquor at the house of Sonu Sassan came on red colour motor cycle and on seeing him talking to Silky got agitated and told him that he is disturbing Silky daily and they will finish him that day. They went away and after some time, they came back armed with handle of hand pump and danda. At that time, he was sitting on the driver seat and Radhey was sitting on the rear seat. Both these boys started breaking his vehicle. The thin fellow exhorted "*Mar dalo saale ko. Ye log bahut ladkiyo ko tang karte hai.*" Upon this, fatty one told "*Sonu in dono main se koi bachne na pai*". In the meantime Radhey got down from the car and ran towards gali No.4 to save himself. Both the boys followed Radhey and were saying that he should not be left alive that day and they started beating him. The fatty boy hit Radhey on his back with the handle of hand pump and

both the boys kept on beating Radhey till the time he fell down. He was witnessing the incident while hiding in a street. After Radhey fell down, they proceeded towards him. In order to save himself, he sat in the car and started the car. In the meantime, Shanu and Sonu reached near his car. Shanu hit the handle of hand pump towards him which fell inside the car. The incident was witnessed by one or two passersby. He raised alarm and both the boys escaped. Silky also went away. Thereafter with the help of small children he removed Radhey in the car and took him to hospital where he was declared brought dead. On the date of incident he was scared and was under tension and therefore could not give complete details.

18. In his deposition before the Court, he testified that in the intervening night of 7/8.07.2007, he along with Radhey went to Jawahar Nagar near Vishwas Nagar for purchasing liquor in his Santro Car No. DL 7CC 0282. They went to the house of Sonu Sassan for purchasing liquor and started taking liquor inside his house. Both the accused were also present in that house and were also taking liquor at that time. They started throwing the smoke of cigarette from their mouth towards him. After sensing that both the

accused persons were in a mood to quarrel, they came back to the vehicle. Both the accused followed them to his Santro car and started breaking his window panes. He came out of the car and made enquiries from them why they were breaking the window panes. Immediately both the accused persons started beating him. They were having rod like objects in their hands. They hit his head by those objects. However, he saved his head by putting his hand over his head. They also gave beatings over his back and other parts of his body. He became unconscious as he had taken liquor. After some time when he gained consciousness, people informed him that his friend Radhey was lying at a distance. He raised alarm for help and with the help of 3-4 boys, he put Radhey on the rear seat of his car and took him to Ram Singh hospital. However, hospital authorities refused to admit Radhey and asked him to take Radhey to Dr. Hedgewar hospital as it was a medico-legal case. Immediately he took Radhey to Dr. Hegewar hospital where doctors declared him “brought dead”. He informed the police who came and recorded his statement Ex.PW-4/A. He was also taken to the spot. Since the witness did not support the case of prosecution as he was resiling

from his previous statement, as such he was declared hostile and in cross examination, he was confronted with the statement Ex.PW-4/B recorded on 10.07.2007 under Section 161 Cr.P.C and then he admitted the contents of that statement.

19. Although it is true that testimony of an injured witness stands on a higher pedestal than any other witness since he being injured, his presence at the spot is proved, complainant Shiva Prabhakar sustained injuries and his MLC Ex.PW 11/A was prepared; moreover, it was he who had taken Radhey Lal to Dr. Hedgewar hospital; his Santro Car was also damaged. However, the crucial question for consideration is whether the appellants are responsible for damaging the car, causing hurt to Shiva Prabhakar and giving such fatal injuries to Radhey Lal which resulted in his death in as much as it is the cardinal principle of criminal jurisprudence that a person is presumed to be innocent till his guilt is proved beyond reasonable doubt. Burden of proof is always on the prosecution to prove its case beyond shadow of doubt. A perusal of initial statement Ex.PW 4/A dated 08.07.2007 which formed the basis of registration of FIR goes to show that as per the complainant he had gone to attend the marriage of the daughter of his

neighbour at Amar Banquet Hall. Some liquor was consumed by him over there and thereafter in order to purchase more liquor he along with his friend Radhey went to Jwala Nagar in his Santro Car. He purchased liquor from a lady namely, Sonu. After purchasing liquor, when they came back to the Santro Car, **3-4 boys** armed with **base ball bat and rod** came and started beating them and were exhorting not to let them alive. On hearing the noise of a lady that the motorcyclist has killed his associate, he got down from the car and saw Radhey lying on the road. **Blood** was oozing out from his body. With the help of 3-4 boys he removed him to hospital where he was declared dead. The **assailants** were **strong built and between the age group of 25-30 years and he can identify them**. Thus as per the version given in this statement, the assailants were 3-4, weapon of offence was base ball bat and rod, the names of assailants were not given and there is no mention that the assailants were known to the complainant from before. However, in his subsequent statement recorded on 10.07.2007 under Section 161 Cr.P.C, Ex. 4/B there is no mention of the complainant having gone to attend any marriage or that he consumed some liquor over there or that in order to purchase

more liquor, he along with Radhey had gone to Jwala Nagar to purchase more liquor. Rather the version given is that he had gone along with Radhey in order to purchase **beetel**. Thereafter, they went to Jwala Nagar in order to purchase liquor. For the first time in this statement, it was mentioned that when they had gone to purchase liquor at the house of Sonu Sassan, both the accused who were known to him from before, were also present and three days prior to the incident, a quarrel had also taken place between him and these boys on the issue of teasing Silky. A different version was given that after purchasing liquor, when they came out of the house of Sonu Sassan, Silky met them and he started talking to her and teased her. Thereupon both the accused came and on seeing him talking to Silky, got infuriated and threatened to finish him that day. Thereafter they came back armed with **handle of hand pump and danda**, they damaged his car and gave beatings to him and Radhey. In order to save himself when he sat in his car, Shanu threw handle of the hand pump towards him which fell in the car. As per this statement, the number of assailants were reduced to two, the weapon of offence changed from base ball bat and rod to handle of hand pump and

danda and that both the accused were known to the complainant from before and that three days prior to the incident a quarrel had taken place between them. However, in his deposition before the Court, it was stated that when the complainant and his friend had gone to purchase liquor at the hosue of Sonu Sassan, both the accused were present and were taking liquor. They started throwing the smoke of cigarette and sensing that they were in a mood to quarrel, they came back to the vehicle. Accused followed them. They were armed with **rod like objects** in their hand and gave beatings to him. However, he became unconscious as he had taken liquor. When he gained consciousness he was informed that Radhey was lying at a distance. Then, with the help of 3-4 boys he removed him to hospital, meaning thereby that in this statement, neither there is any mention about the complainant having gone to attend the marriage of daughter of his neighbour or thereafter going with Radhey for purchasing beetel. The factum of throwing the smoke of cigarette from their mouth by the accused has also been incorporated for the first time in his deposition before the Court. The weapon of offence has now been changed to “rod like objects”. There is absolutely no mention about Silky or

previous quarrel between him and accused persons on the issue of 'Silky' or prior acquaintance with accused persons. Furthermore, he does not say that he witnessed the accused persons giving beatings to Radhey in as much as according to him, after giving beatings, he became unconscious and when he gained consciousness he was informed by some person that Radhey was lying at a distance.

20. The result is that in all the three statements, different versions are forthcoming regarding the very genesis of the incident, weapon of offence and complainant witnessing the incident. Except for mentioning the fact that his statement Ex. PW4/A was recorded by the police, the complainant has not substantiated the version given in this statement which formed the basis of FIR and in fact he did not support the case of prosecution, as such was declared hostile and was cross- examined by the learned Public Prosecutor. **Babla** (supra) relied on by learned Public Prosecutor does not help the prosecution in as much as in that case, the FIR was proved by the Investigating Officer of the case and according to him he had registered the FIR upon statement of the complainant and it was duly signed by him. It was held that merely because complainant turned hostile, it cannot be

said that the FIR would lose all its relevancy and cannot be looked into for any purpose. Things are entirely different in the instant case. Although Shiva Prabhakar has deposed that he made a statement before the police Ex. PW 4/A on the basis of which FIR was registered. However, the witness himself has given an entirely different version. Moreover, prosecution itself is not relying upon this FIR because after the witness was declared hostile and permission was taken from the Court to cross-examine him, learned Public Prosecutor chose not to put the contents of the FIR to the witness but the witness was confronted with the subsequent statement recorded under Section 161 Cr.P.C., Ex. PW4/B. If the statement, Ex.PW4/B is to be considered, then it is clear that both the accused were known to the complainant from before and a quarrel had also taken place between him and the accused persons three days prior to the incident. Under those circumstances, it was imperative to mention the name of the assailants in the initial FIR. Neither the names of the assailants were given to the duty constable when the complainant took the injured to the hospital nor to the doctor who prepared his MLC as well as that of Radhey Lal nor to the police to

whom statement Ex.PW4/A was given. Such a conduct was held to be unnatural conduct in *Jagir Singh's case* (supra) and it was held that conviction cannot be based on such testimony.

21. The result of the aforesaid discussion is that different versions are given by the witness at three different point of time. Moreover, despite the fact that the appellants were known to the complainant from before, their names were not disclosed at the first available opportunity. Furthermore, in both the statements made to the police, Ex.PW4/A and PW4/B he claims to be an eye witness to the beatings given to his friend Radhey Lal. However, in his deposition before the Court, he categorically stated that after he was given beatings, he became unconscious. When he gained consciousness, he was informed by someone that his friend was lying at a distance then he removed him to hospital. When he was cross examined by learned Public Prosecutor, he claimed to have seen the accused persons beating Radhey. However, in cross-examination by learned defence counsel, he again reiterated that he did not see anybody beating Radhey as he had fallen and was unconscious for some time. Under the circumstance, testimony of such a witness who is changing his

stand time and again cannot form the basis of conviction unless corroborated in material particulars.

22. Moreover, according to this witness, there was no bleeding from the body of Radhey when he lifted him in his car. In fact, he had not seen or noticed at any point of time that there was any bleeding from the body of Radhey. However, this part of his statement is at variance with his initial statement, Ex.PW-4/A where he had stated that on hearing the noise of a lady that the motorcyclist had killed his associate, he got down from the car and saw Radhey lying in the street and blood was oozing out from his body. Moreover, the photographs placed on record also shows that blood was coming from the nostril of Radhey. Furthermore, after the MLC of Radhey was prepared, his clothes were taken into possession which were sent to FSL. As per FSL report Ex.PB, human blood was detected on the clothes of the deceased. This being the scenario, it is not comprehensible as to how the witness did not notice whether there was any bleeding from the body of Radhey.

23. Moreover, the testimony of the witness suffers from various omissions, contradictions and improvements . He was confronted

with various portions of his statements, Ex. PW 4/A and Ex. 4/B where certain facts were omitted or improved upon. Although it is true that the witness was called for the purpose of cross examination on various dates and due to such grilling cross examination some variance was bound to occur and such practice of recalling the witness for the purpose of cross examination time and again has to be deprecated, but the fact remains that in view of the different versions being given by the witness at different point of time affecting the basic sub-stratum of the case renders the testimony of the witness unreliable. In *Sunil W.Shambhu Dayal Gupta vs. State*, (2010) 13 SCC 657, it was held that the omissions which amount to contradiction in material particulars i.e go to the root of the case/materially affect the trial or core of the prosecution case, render the testimony of the witness liable to be discredited.

24. The whole incident is alleged to have taken place at the house of Sonu Sassan, from where liquor was alleged to have been purchased by the complainant. However, for reasons best known to the prosecution, Sonu Sassan was neither joined in the investigation nor examined as a witness. Instead her mother, Bimla was examined,

who did not support the case of prosecution at all. Similarly, the quarrel was alleged to have taken place over Silky and although he was examined as PW6 but this witness also did not support the case of prosecution at all. As such the very genesis of the incident is shrouded with mystery.

25. One more witness, PW3 Sanjay Sharma was examined who deposed that on the intervening night of 7/8.07.2007, at about 1.30 to 1.45 a.m, he had gone to Jwala Nagar, Gali no.4 to purchase liquor. When he entered the Gali, he saw a quarrel taking place. One Santro car was standing there with broken glasses. Two persons were giving beatings to one person and one was having iron rod like object. Both the persons gave beating to the person (now deceased) over the shoulder, by which he fell down. Thereafter they returned back to the Santro car and started giving beatings to the occupier of the Santro car. After giving beatings, the accused left the spot. He identified both the accused persons to be the persons who had given beatings on the date of incident to Shiva Prabhakar and the deceased.

26. As stated above, testimony of this witness has been challenged on the ground that he was a planted witness which has been refuted

by Public Prosecutor by stating that he is not a planted witness but was a chance witness. A perusal of his testimony goes to show that much reliance cannot be placed on the testimony of this witness inasmuch presence of the witness at the dead of the night at the place of incident is highly doubtful inasmuch as according to him, he is not a regular drinker but takes liquor occasionally as a medicine. It seems quite improbable that a person who is not a regular drinker but takes liquor as a medicine would go to purchase liquor in the dead of the night. Moreover, his conduct is quite unnatural inasmuch as despite the fact that according to him he had witnessed the incident, he did not inform the police on that night. According to him, he had seen about the incident in the news telecast at CCN channel on 08.07.2007 and again on 09.07.2007 and then he went to police station on 10.07.2007 and gave his statement. During this interregnum, he did not disclose the incident either to his wife or to any other family member. It seems quite improbable that after witnessing the ghastly crime, the witness would not disclose the incident to his near and dear ones or inform the same to the police. Moreover the witness has made material improvements, as such, was

confronted with material portions of his statement, Ex.PW 3/DA where various facts as stated in the Court did not find mention. Omission to mention various facts and improvements made in his testimony before the Court also casts a doubt regarding his presence at the spot or witnessing the incident.

27. Coming to the investigation part, according to SI Maman Khan after receipt of DD No.4A, Ex. PW 22/A, he went to Dr. Hedgewar hospital where he collected MLC of Radhey Lal and Shiva Prabhakar and recorded statement of Shiva Prabhakar and sent the rukka to police station for registration of the case. According to him he came back to the spot, i.e Gali no.4, opposite house no.206, Jwala Nagar Shahdara, Delhi along with Shiva Prabhakar. Inspector Sandeep Gupta also reached the spot and prepared site plan, Ex.PW4/DX at the instance of Shiva Prabhakar. However, the site plan does not bear the signature of Shiva Prabhakar. Similarly, as per the testimony of SI Maman Khan and Inspector Sandeep Gupta, one black colour right leg shoe belonging to deceased Radhey Lal was lying at the spot which was lifted and was seized vide memo Ex. PW9/A after sealing in a pullanda. Even this seizure memo does not bear signatures of

Shiva Prabhakar. Shiva Prabhakar does not depose that either site plan was prepared at his instance or any shoe belonging to deceased Radhey Lal was seized by the police in his presence.

28. Things did not end here. According to police officials, they came back to Dr. Hedgewar hospital and at that time Shiva Prabhakar was present with them. Santro car bearing No.DL 7CC 0282 was parked near casualty ward of the hospital. The car was seized vide memo Ex.PW 9/C. On the front seat of the car, a portion of handle of hand pump was lying. From beneath the back seat of the car, the left leg shoe of black colour, belonging to Radehy Lal was recovered. The handle of the hand pump and left leg shoe of Radhey Lal were seized vide seizure memo Ex.PW9/B. Surprisingly although Shiva Prabhakar was alleged to be present at the time of preparing the seizure memo, but the seizure memo does not bear his signatures. No satisfactory explanation is forthcoming as to why signatures of Shiva Prabhakar were not obtained on the seizure memo despite his presence over there.

29. Further, as per prosecution version, on 10.07.2007, on the basis of secret information, the accused were arrested. They made

disclosure statements. Accused Shahnawaz led them to Gautam Gali, Jwala Nagar and pointed out the place where he had thrown the piece of hand pump handle and took out a piece of hand pump handle from the drain beneath the sweet shop. The piece of hand pump handle was seized vide memo Ex. PW 7/D. Admittedly, there is no independent witness to this recovery of piece of hand pump despite the fact that it has come in the testimony of all the police officials that there was no dearth of independent witnesses as there were residential houses, shops etc. Even if it is taken that there is no reason to disbelieve the testimony of the police officials regarding recovery of piece of hand pump handle at the instance of Shahnawaz, the same does not lead us anywhere, inasmuch as although the piece of hand pump handle which is allegedly recovered at the instance of Shahnawaz and piece of hand pump handle which was recovered from the Santro car of the complainant were sent to FSL and it was opined that two parts of the broken handle of hand pump were physically matching and one part was the broken part of the other but the crucial question is whether this was the weapon of offence used in the commission of crime. This hand pump was not put to the doctor

who conducted post mortem on the dead body of Radhey to ascertain whether injuries on the person of Radhey were possible by this weapon of offence. Moreover, no blood was detected on this weapon of offence nor the finger prints of the accused. Although as regards fingerprints, an explanation has been given that since it has been recovered from the drain and as such had become wet, therefore, finger prints could not be lifted, but keeping in view the fact that different versions were given by the complainant in his three statements regarding the weapon of offence used by the assailants and even PW 3, Sanjay Sharma has deposed that the assailants were armed with iron rod like objects, it is not established beyond doubt that this hand pump was the weapon of offence used for committing the crime.

30. Moreover, according to Inspector Sandeep Gupta, during the course of investigation, he called Ct. Sonu Kaushik, (PW 16), Assistant Draftsman and he prepared scaled site plan, Ex.PW 16/A. However, a perusal of the scaled site plan, Ex.PW16/A goes to show that it does not depict the place from where recovery of piece of hand pump was effected. It was admitted by Inspector Sandeep Gupta that

after receiving the scaled site plan he came to know that Ct. Sonu Kaushik had prepared the scaled site plan on the day of incident only i.e 08.07.2007 and he did not send any notice to him as to why he did not mention the fact of recovery on 10.07.2007 in scaled site plan as told by him on 31.07.2007. Admittedly, no site plan of the place of recovery of piece of hand pump was prepared by Inspector Sandeep Gupta on 10.07.2007. Under the circumstances, firstly the recovery of piece of handle of hand pump at the instance of Shahnawaz is not duly proved, moreover, it is not established beyond reasonable doubt that this was the weapon of offence which was used in the commission of crime.

31. Furthermore, during the course of investigation, mobile crime team was called at the spot. According to Ct. Baldan Singh (PW 18), he lifted five prints of suspects from Santro Car No.DL 7CC 0283 from different portions i.e right side view mirror marked Q1, inside view mirror marked Q2, left side window marked Q3, right side window marked Q4 and bonnet marked Q5. The developed finger prints were sent to FSL, Malviya Nagar, New Delhi. However, these fingerprints do not enhance the case of prosecution inasmuch as

admittedly, finger prints of accused persons were not taken in order to match the same with the finger prints taken from different portions of the Santro Car.

32. Another incriminating piece of evidence relied upon by the prosecution is the refusal to join Test Identification Proceedings (TIP) by the accused. After the accused were arrested, an application was moved by the Investigating Officer of the case for conducting TIP proceedings in respect of both the accused. As per proceedings, Ex. PW 25/A conducted by Shri Vipin Kumar Rai, M.M (PW 25), he went to Tihar Jail for conducting the TIP proceedings. However, both the accused refused to join the proceedings on the ground that their photographs were taken and their face were shown by the police to some persons. It was submitted by learned Public Prosecutor that the accused persons were produced before the Court in muffled face, therefore, there was no occasion for showing them to the witnesses. Since the accused refused to join TIP proceedings, adverse inference has to be drawn against them that, if they had joined the proceedings, they would have been identified by the witnesses. Learned counsel for the appellant, on the other hand, laid emphasis on the fact that

investigating officer of the case had admitted in cross examination that he did not mention that the accused persons were muffled when they were produced in the Court in the arrest memos, personal search memos, disclosure statements. As such possibility of their been shown to the witnesses cannot be ruled out and no adverse inference is liable to be drawn against them on account of their refusal to join the proceedings.

33. Although, it is true, that investigating officer of the case, Insp. Sandeep Gupta admitted in his cross-examination that he did not mention the fact that accused persons were muffled in the arrest memo, personal search memo or disclosure statements, however, record reveals that when application was moved seeking judicial remand of the accused, it was mentioned: "Application for judicial remand of accused in muffled face". Moreover, there is a noting by the learned M.M that the accused were in muffled face but that itself cannot be taken against the accused because prior thereto, they were in the custody of the police and it is the case of appellants that their photographs were taken and they were shown to the witnesses. In any case, as per the version of the complainant himself, the accused

persons were known to him from before, therefore, so far as this witness is concerned, no purpose was going to be served by getting the accused identified from him. During the stage of investigation of the crime, the investigating agency is required to hold identification parade for the purpose of enabling the witness to identify the person alleged to have committed the offence, particularly, when such person was not previously known to the witness or the informer. As held in *Malkhan Singh vs. State of U.P.*, 2003 CrL.L.J. 3535, identification proceedings are not substantive evidence and to hold the TIP is not even the rule of law but a rule of prudence so that the identification of the accused inside the Court room, at the trial can be safely relied upon.

34. In the instant case, complainant claims to know the accused person from before and as such even if the accused refused to join TIP proceedings, that is of no consequence qua this witness. As regards PW3 Sanjay Sharma, although for refusal on the part of accused, an adverse inference may be drawn against the accused persons but that itself is not sufficient to convict them. That may be considered to be an incriminating piece of evidence but in the absence

of corroboration from other pieces of evidence, it will not be safe to convict the accused person on such evidence alone.

35. The result of the aforesaid discussion is that the evidence coming on record falls short of proving the guilt of the accused persons beyond shadow of doubt. The case rests in the realm of suspicion but suspicion, howsoever, strong it may be, cannot take the place of proof. In *Swarn Singh Rattan Singh vs. State of Punjab*, 1957 Cr. JJ 1014 it was observed:

“Considered as a whole, the prosecution story may be true; but between ‘may be true’ and ‘must be true’, there is inevitably a long distance to travel and the whole of this distance must be covered by legal, reliable and unimpeachable evidence before an accused can be convicted.”

36. In *Mousam Singh Roy & Ors. Vs. State of West Bengal*, (2003) 12 SCC 377 it was held:

“27. Before we conclude we must place on record the fact that we are not unaware of the degree of agony and frustration that may be caused to the society in general and the families of the victims in particular, by the fact that a heinous crime like this goes unpunished, but then the law does not permit the courts to punish the accused on the basis of moral conviction or on suspicion alone. The burden of proof in a criminal trial never shifts, and it is always the burden of the

prosecution to prove its case beyond reasonable doubt on the basis of acceptable evidence.”

It was further observed:

“....It is also a settled principle of criminal jurisprudence that the more serious the offence, the stricter the degree of proof, since a higher degree of assurance is required to convict the accused.”

37. This being the legal position, it cannot be said that prosecution has been able to prove the guilt of accused by legal, reliable and unimpeachable evidence. As such, both the appellants are entitled to benefit of doubt. The appeals are accordingly, allowed. Both the appellants are acquitted of the offence alleged against them. They be released forthwith, if not wanted in any other case. Trial Court record be returned.

SUNITA GUPTA, J

REVA KHETRAPAL, J

July 16, 2013
aks/as/rs