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

+ **CRL.A. No. 1414 of 2010 and Crl.M.B.165/2013**

Date of Decision: 18 September, 2013

KHEM CHAND

..... Appellant

Through: Mr. R.N. Sharma and Mr. Neeraj
Bhardwaj, Advocates.

versus

STATE

..... Respondent

Through: Ms. Fizani Husain, APP for the
State.

CORAM:

HON'BLE MS. JUSTICE SUNITA GUPTA

J U D G M E N T

:SUNITA GUPTA, J.

1. The challenge in this appeal under Section 374 of Criminal Procedure Code, 1973 is to the judgment dated 24th November, 2010 in Sessions Case No.34/2009 arising out of FIR No. 239/2003 under Sections 302/308/452/323/34 IPC registered at Police Station New Usman Pur vide which the appellant Khem Chand was convicted under

Sections 304-I/34 of Indian Penal Code, 1860 while co-accused Harish, Dharam Pal and Surender were convicted under Sections 323/34 IPC and order of sentence dated 25th November, 2010 vide which the appellant Khem Chand was sentenced to undergo rigorous imprisonment for five years and also to pay fine of Rs.10,000/-. In default of payment of fine, to undergo simple imprisonment for ten months, whereas his co-accused were sentenced to the period already undergone and to pay fine of Rs.5,000/- each. In default of payment of fine the convicts were to undergo simple imprisonment of five months. The convicts were granted benefit of Section 428 Cr.P.C.

2. The gravamen of the charge against the appellant and co-accused is that on 14th December, 2003 on receipt of information regarding quarrel at Jai Prakash Nagar, Gali No. 4, towards Bittu Chowk, Usman Pur, DD No. 51B Ex.PW13/A was recorded by PW13-Constable Shiv Ram. On receipt of this DD, PW17-Sub Inspector Bhagwat Prasad along with PW23-Constable Satveer Singh reached the place of occurrence i.e. L-Block, Jai Prakash Nagar, Gali No.4 at Bittu Chowk at the crossing of Gali No. 4 and 9. Some blood was lying near naali. They were informed that a quarrel had taken place at the factory of Ram

Singh. Blood stains from Gali No. 4 to Gali No. 9 were found. One blood stained hawai chappal was lying near the factory of Ram Singh. No eye witness was available. He came to know that injured had already been removed to GTB Hospital. MLC of Raj Kumar was collected on which doctor declared him 'brought dead'. He also collected MLC of Mittar Pal and Anup Singh. Doctor declared them unfit. One Veermati (PW1), wife of Ram Singh met him at the hospital. He recorded her statement Ex.PW1/A, prepared rukka Ex.PW17/B and sent the same through Constable Satveer for registration of FIR, on the basis of which FIR No. 293/2003 under Sections 302/308/452/323/34 IPC was registered. He along with the complainant came back at the place of occurrence. SHO Police Station New Usman Pur and members of crime team and photographer met him there. Photographs were taken. Site plan Ex.PW17/C was prepared. Blood lying at the spot, hawai chapple lying near the factory of Ram Singh was seized. During the course of investigation, accused Khem Chand, Dharam Pal, Harish and Surender were arrested. Their disclosure statements were recorded. In pursuance to the disclosure statement Ex.PW2/B made by co-accused Harish, a brick piece was got recovered which was taken into

possession vide memo Ex.PW17/E. Post-mortem on the dead body of Raj Kumar was got conducted. Accused Mahesh could not be arrested. After completion of investigation, chargesheet was submitted for offence under Sections 302/308/323/452/34 IPC. After committal of the case, charge for offence under Sections 304/34 IPC was framed against accused Khem Chand while charge under Sections 308/34 IPC was framed against accused Harish Kumar, Surender and Dharam Pal. All the accused pleaded not guilty and claimed trial.

3. In order to substantiate its case, prosecution examined 28 witnesses. All the incriminating evidence was put to the accused persons while recording their statement under Section 313 Cr.P.C. Their case is one of denial simplicitor by stating that they are not concerned with this case. Although, initially they stated that they want to lead defence evidence, however, no evidence was led in defence. After minutely going through the testimony of the witnesses, vide impugned order, the appellant was held guilty for offence under Section 304-I IPC while the remaining accused were convicted for offence under Sections 323/34 IPC and sentenced, as stated above.

4. Feeling aggrieved by the impugned order, present appeal has been preferred by one of the accused only, namely, Khem Chand.

5. It was submitted by Sh. R.N. Sharma, learned counsel for the appellant that the conviction of the appellant has been based on wrong appreciation of evidence. None of the prosecution witnesses supported the case of the prosecution. There are material contradictions in their testimony. Even the blood lifted from the spot was not sent to FSL. Blood stained clothes were also not taken into possession. Under the circumstances, prosecution has failed to prove the guilt of the appellant beyond reasonable doubt. As such, the appellant is entitled to be acquitted. Reliance was placed on the decisions in *Jag Narain Prasad v. State of Bihar*, AIR 1998 SC 2879, *Ajay Sharma v. State of Rajasthan* AIR 1998 SC 2798, *Jainul Haque v. State of Bihar* AIR 1974 SC 45, *Garib Singh and Ors. v. State of Punjab* AIR 1973 SC 460, *Raghubir Singh v. State of Haryana* 1998 (1) C.C. Cases 378 (HC), *Baji v. State of U.P.* 1998 (1) JCC (SC) 184, *Parshuram Singh v. State of Bihar*, 2002 (1) JCC 349, *Jibril v. State of U.P.* 2000(4) Crimes 18 (SC), *State (Delhi Admn.) v. Balbir Singh and Ors.* 1991 JC 56 (Delhi), *Ramashish Yadav & Ors. v. State of Bihar* 1999(2) JCC (SC)

471, *Shahul Hameed alias Ameetha & anr. V. State* 1990 (2) Crimes 178, *Malempati Pattabi Narendra v. Ghattamaneni Maruthi Prasad* 2000 (2) JCC (SC) 702 and *Inderjit v. State* 1986 CrL. L.J. 966.

6. Rebutting the submissions, it was submitted by Ms. Fizani Husain, learned Additional Public Prosecutor for the State that there is no infirmity in the impugned order. The prosecution case stand establish from the testimony of witnesses which found due corroboration from the medical evidence. The fact that blood stained clothes were not seized or blood lifted from spot was not sent to FSL, can at best be said to be a lapse on the part of investigating officer of the case but that itself is no ground to throw the case of prosecution. That being so, the appeal being devoid of merits, is liable to be dismissed.

7. I have given my considerable thoughts to the respective submissions made by learned counsel for the parties and have perused the record.

8. The material witnesses regarding the incident and the genesis of the case are PW1 Veermati, PW2 Ram Singh, PW3 Vijay Singh, PW5 Anup Singh, PW6 Mittar Pal and PW8 Vajinder Singh.

9. It has come on record that PW2 Ram Singh was running a factory at Gali No. 4, Jai Prakash Nagar, Delhi where he used to get the clothes stitched on contract basis. Vijay Singh, Mittar Pal, Anup Singh, Vajinder Singh and Raj Kumar used to work in his factory as *karigar* at the relevant time.

10. On 14th December, 2003 during day time Harish and his brother Surender had come to the factory and they expressed their displeasure over Vijender Singh while abusing him saying that why he had sent a message that Harish had died. Vijender tried to pacify Harish and Surender saying that he had not sent such type of information to anyone but they were not pacified and left the place while threatening to see him. In the evening, at about 9:30 p.m. Harish, Surender and Dharam Pal came. Anup Singh, Mittar Pal, Vajinder, Raj Kumar and Vijay Singh were present at the factory. As soon as Harish, Surender and Dharam Pal reached there, they started calling names to Vijender and started grappling with him. Vijender tried to go inside the factory but he was restrained from going further, but was saved by the other employees and was made to run away from there. Harish, Surender and Dharam Pal started quarrelling with Vijay Singh, Anup Singh,

Mittar Pal and Raj Kumar. There upon, Vijay Singh went to the house of Ram Singh and informed PW1 Smt. Veermati regarding quarrel and giving beatings by Surender, Harish and Dharam Pal. Veermati reached the spot. Appellant Khem Chand who used to reside in neighbourhood got enraged, came and caught hold of Raj Kumar. Raj Kumar asked him not to intervene and pushed Khem Chand, as a result of which he received injuries on his forehead. Khem Chand caught hold of Raj Kumar and called his son Mahesh to finish them. On this Mahesh came running from his house with an open knife. Khem Chand caught hold of Raj Kumar. Mahesh stabbed Raj Kumar. Blood started oozing from his body and then all the persons ran away from there.

11. In order to substantiate the aforesaid case of prosecution, the most material witness is PW1 Smt. Veermati who unfolded that she was residing at J-15/2, Gali No. 1, Jai Parkash Nagar, Delhi. She had another house in Gali No. 4, Jai Parkash Nagar, where her husband had installed stitching machines where *karigars* used to work on those machines and used to reside therein. On 14th December, 2003 at about 10:00 p.m. she was present at her house. One *karigar*, namely, Vijay came and informed that a quarrel was going on in the house at Gali

No.4. She accompanied Vijay to that house and found Surrender, Harish and Dharam Pal giving beating to Anup, Mittar Pal and Raj Kumar. They were known to her prior to the incident as they were doing the same trade of stitching. Khem Chand was standing at the gate of his house and said “*In Saalon Ne Humari Nind/Soona Haram Kar Dia Hai*” and then he came running to house. He caught hold of Raj Kumar. Raj Kumar asked him as to “*who is he to intervene in their matter*” and pushed Khem Chand, as a result of which Khem Chand received injury on his forehead. Khem Chand again caught hold of Raj Kumar and called his son exhorting “*Ek Aad To Thikane Laga Do*”. On this, Mahesh came running from his house with an open knife. Veermati caught hold of Mahesh. However, he pushed her and stabbed Raj Kumar. After sustaining stab injury, blood starting oozing from the body of Raj Kumar. All the persons ran away from there. Raj Kumar ran towards the gali and fell down on the corner of one house. She held him and requested some persons to take him to the hospital, but nobody agreed. She went to STD booth and gave a call to the police. Police came there and removed Raj Kumar to hospital in the police vehicle. She accompanied him to the hospital. After checking, the doctor

declared Raj Kumar as dead. Her statement Ex.PW1/A was recorded by the police on which she affixed her thumb impression at point 'A'. From the hospital she came to the spot along with the police and police lifted the blood, blood stained earth and one hawai chappal of Raj Kumar from the spot. The place where Raj Kumar had fallen down had blood stains which were also lifted by the police. The site plan was also prepared by the police. The accused persons were apprehended by the police on the same day. She identified the chappal Ex. P-1 which was taken by the police from the spot. She further deposed that she can also identify Mahesh Kumar, if shown to her. Since the witness did not support the case of the prosecution with regard to the apprehension of accused persons and identification of documents on which she affixed her thumb impression, she was cross-examined by learned Additional Public Prosecutor.

12. Testimony of Veermati has been assailed on following grounds:
 - (i) The witness was in advance stage of pregnancy and therefore it was not possible for her to reach the spot and witness the incident.
 - (ii) She was not believed by the prosecution as she was declared hostile and cross-examined by Additional Public Prosecutor for the State.

- (iii) Her testimony suffers from discrepancy and improvements.
- (iv) There was no electricity in the premises in question, therefore, it was not possible for her to identify the accused.

13. As regards the submission that the witness was in advance stage of pregnancy and delivered a child after 10-15 days of the incident, as deposed by PW3 Vijay Singh, therefore, it was not possible for her to come to the spot while running, the contention is without any substance, because the best person to depose about this fact was Veermati herself. She has deposed that at the time of incident she was six months pregnant and she gave birth to a child after 3-4 months. To the same effect is the testimony of her husband Ram Singh. Moreover, from the fact that the witness was pregnant, at the most, it can be taken that she may not be in a position to run, but her presence at the spot has been proved by all the prosecution witnesses. Moreover, it was she who had informed about the incident to the police. Even PW4 ASI Om Prakash who was posted at PCR Van Bekar 43, North-East Zone has deposed that on receipt of call at about 10:30 p.m. from gali No. 9 Bittu Chowk regarding quarrel, he reached the spot and found a body in pool of blood. He was removed to GTB Hospital in PCR van along with one

lady Veermati. He denied the suggestion that no PCR call was received or injured was not removed to hospital along with Veermati in PCR Van. He was not cross-examined by accused Khem Chand despite opportunity given. As such, it is proved that Veermati was present at the spot and accompanied the injured to hospital in PCR Van.

14. Not only that, on receipt of DD No. 51B Sub Inspector Bhagwat Prasad reached the spot and on coming to know that injured has been removed to hospital, he went to GTB Hospital where he met Veermati and recorded her statement Ex.PW1/A which became bed rock of investigation. Under the circumstances, presence of Veermati on the spot stands proved.

15. As regards the submission that the witness did not support the case of the prosecution in all material particulars, a perusal of her testimony reveals that she was cross-examined by learned Additional Public Prosecutor only regarding apprehension of accused and identification of documents on which she put thumb impression. Moreover, it is a settled law that the mere fact that a witness has been declared hostile by the prosecution is not a ground to discard his/her

testimony *in toto* and that portion of the testimony which supports the prosecution can be considered and form the basis of conviction.

16. Normally, when a witness deposes contrary to the stand of the prosecution and his own statement recorded under Section 161 of the Code of Criminal Procedure, the prosecutor, with the permission of the Court, can pray to the Court for declaring that witness hostile and for granting leave to cross-examine the said witness. If such a permission is granted by the Court then the witness is subjected to cross-examination by the prosecutor as well as an opportunity is provided to the defence to cross-examine such witnesses, if he so desires. In other words, there is a limited examination-in-chief, cross-examination by the prosecutor and cross-examination by the counsel for the accused. It is admissible to use the examination-in-chief as well as the cross-examination of the said witness in so far as it supports the case of the prosecution. It is settled law that the evidence of hostile witnesses can also be relied upon by the prosecution to the extent to which it supports the prosecution version of the incident. The evidence of such witnesses cannot be treated as washed off the records, it remains admissible in trial and there is no legal bar to base the conviction of the accused upon such testimony, if

corroborated by other reliable evidence. Section 154 of the Act enables the Court, in its discretion, to permit the person, who calls a witness, to put any question to him which might be put in cross-examination by the adverse party. The view that the evidence of the witness, who has been called and cross-examined by the party with the leave of the court, cannot be believed or disbelieved in part and has to be excluded altogether, is not the correct exposition of law. The Courts may rely upon so much of the testimony which supports the case of the prosecution and is corroborated by other evidence. It is also now settled cannon of criminal jurisprudence that the part which has been allowed to be cross-examined can also be relied upon by the prosecution.

17. Dealing with the legal position with regard to a hostile witness in the light of Section 154 of the Evidence Act, 1872, in ***Koli Lakhmanbhai Chanabhai v. State of Gujarat (1999) 8 SCC 624***, Hon'ble Supreme Court reiterated that testimony of a hostile witness is useful to the extent to which it supports the prosecution case. When a witness is declared hostile and cross-examined with the permission of the court, his evidence remains admissible and there is no legal bar to

have a conviction upon his testimony, if corroborated by other reliable evidence.

18. In *Prithi v. State of Haryana (2010) 8 SCC 5363* it was held as under:

“Section 154 of the Evidence Act, 1872 enables the court in its discretion to permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party. Some High Courts had earlier taken the view that when a witness is cross-examined by the party calling him, his evidence cannot be believed in part and disbelieved in part, but must be excluded altogether. However this view has not found acceptance in later decisions. As a matter of fact, the decisions of this Court are to the contrary. In *Khujji @ Surendra Tiwari v. State of M.P. (1991) 3 SCC 627*, a three-Judge Bench of this Court relying upon earlier decisions of this Court in *Bhagwan Singh v. State of Haryana (1976) 1 SCC 389*, *Sri Rabindra Kumar Dey v. State of Orissa (1976) 4 SCC 233* and *Syad Akbar v. State of Karnataka (1980) 1 SCC 30* reiterated the legal position that: (Khujji case, SCC p. 635, para 6)

6. ...the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent their version is found to be dependable on careful scrutiny thereof.”

19. In *Ramesh Harijan v. State of Uttar Pradesh (2012) 5 SCC 777* it was reiterated that the evidence of such witnesses could not be treated as effaced or washed off the record altogether but the same could be accepted to extent that their version was found to be dependable on a careful scrutiny thereof. Similar view has been reiterated by Hon'ble Supreme Court in *Balu Sonba Shinde v. State of Maharashtra (2002) 7 SCC 543*, *Ganga Kanojia and Anr. V. State of Punjab (2006) 13 SCC 516*, *Radha Mohan Singh @ Lal Saheb v. State of U.P. AIR 2006 SC 951*, *Sarvesh Narain Shukla v. Daroga Singh and Ors. AIR 2008 SC 320* and *C. Muniappan and Ors. v. State of Tamil Nadu AIR 2010 SC 3718*.

20. Under the circumstances, mere fact that witness was declared hostile in regard to apprehension of accused and her thumb impression on document is not sufficient to discard her testimony in regard to actual incident which was narrated by her in cohesive manner.

21. She projected the sequence of events in a cohesive manner. True account of events has been projected by her. She fared well during the course of cross examination. Defence could not dispel the case detailed by this witness. She is a reliable witness and accountability of the

accused can be adjudged on her sole testimony. It is well settled that in a criminal trial even a solitary witness can form the basis of conviction. Law does not postulate or require that a particular number of eye witnesses should depose before conviction can be sustained. It is not the number but credibility which can be attached to a statement that matters. Conviction is possible on the basis of statement made by sole eye witness where his presence at the spot is established and proved. The incident in the instant case has taken place at Krishna Nagar at Gali No.4 and her presence at the spot is established. Moreover, her testimony finds corroboration from other prosecution witness.

22. As regards certain variation in the testimony of the witness, a perusal of the same goes to show that it is not on basic substratum of the case. Even if some minor contradictions or improvements have taken place that does not affect the sub stratum of the case. The incident took place on 14th December, 2003. The witness came to be examined for the first time on 6th December, 2004. Thereafter her cross-examination was deferred from time to time and she was cross-examined on 7th May, 2005, 20th July, 2005 and 24th February, 2006. The witness is illiterate, which is reflective from the fact that her initial statement made to the

police, the documents and in her deposition she has put her thumb impression. Since the witness is illiterate and was subjected to such grilling cross-examination by learned counsel for the accused, certain discrepancies were bound to occur in her testimony as human memory fades away with lapse of time. In *state of U.P. v. M.K. Anthony* AIR 1985 SC 48, it was reiterated that cross-examination is an unequal duel between a rustic and refined lawyer.

23. Dealing with discrepancies, improvement and variance in *Krishna Pillai v. State of Kerala*, 1981 Cr.L.J. 1743: AIR 1981 SC 1237, it was held as under :-

"The prosecution evidence no doubt suffers from inconsistencies here and discrepancies there, but that is a short coming from which no criminal case is free. The main thing to be seen is whether those inconsistencies etc. go to the root of the matter or pertain to insignificant aspects thereof. In the former case, the defence may be justified in seeking advantage of the incongruities obtaining in the evidence. In the latter, however, no such benefit may be available to it. That is a salutary method of appreciation of evidence in criminal cases."

24. In *Sidhan Vs. State of Kerala*, 1986 Cr.L.J. 470, it was held:-

"Minor discrepancies regarding minute details of the incident including the sequence of events and

overt acts are possible even in the versions of truthful witnesses. In fact such discrepancies are inevitable. Such minor discrepancies only add to the truthfulness of their evidence. If, on the other hand, these witnesses have given evidence with mechanical accuracy that must have been a reason to contend that they were giving tutored versions. Minor discrepancies on facts which do not affect the main fabric need not be taken into account by the Courts if the evidence of the witnesses is found acceptable on broad probabilities."

"The principles that can be culled out from the aforesaid decisions are minor discrepancies and inconsistencies cannot give (sic) importance. The Court has to see whether inconsistencies can go to the root of the matter and affect the truthfulness of the witnesses while keeping in view that discrepancies are inevitable in case of evidence of rustic and illiterate villagers, who speak them after long lapse of time."

25. In *2010 III AD (Delhi) 34 Gore Lal v. State*, Division Bench of this Court observed that variances on the fringes, discrepancies in details, contradictions in narrations and embellishments in inessential parts cannot militate against the veracity of the core of their testimony, provided there is the impress of truth and conformity to probability in the substantial fabric of the testimony delivered. High Court relied upon CrI. A. No.327/2007 titled as *Akbar & Anr. v. State*, and

decisions of Hon'ble Supreme Court reported as *Tahsildar Singh v. State of UP*, AIR 1959 SC 1012, *Bharwada Bhoginbhai Hirjibhai v. State of Gujarat*, AIR 1983 SC 753 & *Leela Ram (Dead) through Dulichand v. State of Haryana*, AIR 1999 SC 3717 and observed that 13 principles are to be followed while evaluating evidence of eye witnesses:

“I. While appreciating the evidence of a witness, the approach must be whether the evidence of a witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the Court to scrutinize the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief.

II. If the Court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details.

III. When eye-witness is examined at length it is quite possible for him to make some discrepancies. But courts should bear in mind that it is only when discrepancies in the evidence of a witness are so

incompatible with the credibility of his version that the Court is justified in jettisoning his evidence.

IV. Minor discrepancies on trivial matters not touching the core of the case, hyper technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole.

V. Too serious a view to be adopted on mere variations falling in the narration of an incident (either as between the evidence of two witnesses or as between two statements of the same witness) is an unrealistic approach for judicial scrutiny.

VI. By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.

VII. Ordinarily, it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.

VIII. The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind whereas it might go unnoticed on the part of another.

IX. By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.

X. In regard to exact time of an incident, or the time duration of an occurrence usually people make their estimates by guess work on the spur of the moment at the time of interrogation. And one

cannot expect people to make very precise or reliable estimate in such matters. Again, it depends on the time-sense of individuals which varies from person to person.

XI. Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to be confused, or mixed up when interrogated later on.

XII. A witness though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross examination by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him.

XIII. A former statement though seemingly inconsistent with the evidence need not necessarily be sufficient to amount to contradiction. Unless the former statement has the potency to discredit the later statement, even if the later statement is at variance with the former to some extent it would not be helpful to contradict that witness.”

26. Substantially similar view was taken in *Sorabh vs. State of M.P.* (1972), 3 SCC 751, *Ganga Dhar v. State of Orissa* AIR 2002 SC 3633, *State of Uttar Pradesh vs. Shankar* AIR 1981 SC 897, *Bhagwan v. State of Maharashtra* AIR 1974 SC 21, *Laxman v. State of*

Maharashtra AIR 1974 SC 308, Rai Singh v. State of Haryana AIR 1971 SC 2505 and Bholu v. State of Haryana AIR 1976 SC 2499.

27. In view of this legal position the minor discrepancies not touching the basic substratum of the case is not sufficient to render her testimony liable to rejection.

28. As regards the submission that there was no electricity at the spot and, therefore, it was not possible to identify the accused, although, it is true that it has come on record that there was no electricity and electricity used to be taken from neighbourhood or earthen lamp were used, but it has also come on record that light was coming from adjoining house. Moreover, the accused persons were not strangers, but were well known to the prosecution witnesses from before. Therefore, it was not difficult to identify them.

29. It has come in her cross-examination that there was no enmity between accused or her family or between accused Khem Chand and deceased Raj Kumar. At no point of time, any quarrel had taken place between accused Khem Chand and his son Mahesh with any of her workers including the deceased. In the absence of any animosity, ill

will or grudge against the accused, there is no rhyme or reason as to why she will falsely implicate the appellant in such serious crime.

30. Under the circumstances, the entire incident including the role played by accused Khem Chand stands proved from the testimony of this witness. Moreover, her testimony finds corroboration from other witness.

31. PW2 Ram Singh is the husband of PW1-Smt. Veermati and has deposed that on the date of incident, he had gone to Gandhi Nagar. He was informed by his wife on telephone that a quarrel had ensued between Raj Kumar and Khem Chand. Khem Chand caught hold of Raj Kumar and Mahesh stabbed him with a knife. He came back to the place but did not find anybody. From there, he came to know that injured had been taken to the hospital by police. As such, he went to GTB Hospital where he came to know that Raj Kumar had succumbed to injuries. Thereafter, he went to Police Station Usman Pur, but his wife was not there. He came back to the spot where the police officials and his wife were present. He accompanied the police officials to the house of accused Khem Chand from where he was arrested. Thereafter, the remaining accused persons were arrested.

32. PW3 Vijay Singh was working as a tailor under Ram Singh at Jai Parkash Nagar and has deposed that a quarrel had taken place at about 10:00 p.m. on 14th December, 2003 between Vajinder and Harish. He called Veermati from her house. Despite intervention of Veermati the quarrel did not subside. Khem Chand was residing in that gali. He got enraged and stated that these persons daily make noise till late night and do not allow to sleep and asked Mahesh "*In Aadmi Ko Thikan Say Laga Do*". Khem Chand caught hold of Raj Kumar and Mahesh gave knife blow to Raj Kumar as a result of which Raj Kumar started bleeding. He ran for some distance but fell down at gali No. 4. All the persons fled from the spot. He identified Khem Chand and also the remaining accused. Certain leading questions were put to the witness by learned Additional Public Prosecutor wherein he admitted that an incident had taken place during day time when Harish and Surender had come to the factory and expressed their displeasure over Vajinder Singh as to why he sent the message that Harish had died. Despite the fact that Vajinder tried to pacify Harish and Surender, but they did not pacify and left the place while threatening to see him. He further admitted that in the evening at about 9:30 p.m. Harish, Surender and

Dharam Pal came there and started grappling with the remaining workers. He then went to call Veermati who accompanied him from her house to the factory. All these facts were admitted by the witness, however, he merely stated that he did not state these facts to the police. In the cross-examination by learned counsel for the accused persons, he deposed that Veermati is her *bua*. According to him, he was tutored outside the Court by her *bua* and her counsel as to what he had to depose in the Court. In pursuance to a Court question as to whether his testimony is based on tutoring or he was disclosing the correct facts as per the incident, he repeated that he was narrating the facts which had actually taken place. The testimony of the witness to some extent was shaky, inasmuch as, at one time he tried to show that Ram Singh was present at the factory when the incident had taken place but, thereafter, he stated that Ram Singh was not present in the factory when the incident took place and he came later on. He admitted that he and Veermati lifted the body of Raj Kumar in order to check his injuries. He also admitted that when the police officials reached the spot Veermati was present and body of Raj Kumar was removed from the spot by the police officials, however, then he tried to show that

Veermati had gone to her residence and remained there throughout the night. But thereafter stated that Veermati had gone along with the police with the dead body of Raj Kumar. He further deposed that none of the neighbours rendered any assistance in lifting the body of deceased Raj Kumar who has sustained injuries on his right thigh.

33. PW5 Anup Singh was another worker who was working in the factory of Ram Singh. This witness has also deposed about the altercations which had taken place at about 2/2:30 p.m. on 14th December, 2003 between Vajinder and Harish and thereafter Harish left the spot after threatening to see him. At about 9:30 p.m. they came back along with Dharam Pal and started abusing Vajinder and gave beatings to him. When he tried to rescue Vajinder then they started beating him and his brother Mittar Pal. Harish gave a brick blow on his head, as a result of which he sustained injuries. His brother sustained injury over the head near the right ear. Police reached the spot. However, he deposed that someone gave a stab injury to Raj Kumar. The person who stabbed Raj Kumar had exhorted that they are fighting daily and doing *ghapla* and when Raj Kumar told the person as to why he is intervening in between, then that person gave a call by saying that

that day they will set them at rest and in the meantime that boy brought a knife and entered the door by giving a push to the wife of the factory owner and stabbed Raj Kumar. He further deposed that the person who stabbed Raj Kumar was not present in the Court. He identified accused Dharam Pal and Harish. Since this witness did not support the case of the prosecution in all material particulars, he was cross-examined by learned Additional Public Prosecutor. In cross-examination he admitted that Harish along with his brother had come to the factory during day time on 14th December, 2003. Dharam Pal caught hold of him and Surender caught hold of Mittar Pal and Harish gave brick blow on the head of Mittar Pal and on his foot. He admitted that he had mentioned the name of Khem Chand and Mahesh in his statement as Khem Chand told *“In Sallon Ne Roj Roj Jhagra Kar Ke Sabhi Ki Neend Haram Kar Rakhi Hai In Ka To Kuch Karna Hi Parega”*. He also admitted having stated to the police that Khem Chand called Mahesh by saying *“In Salon Ka Jayda Dimag Ho Gaya Hai Inn Mein Say Ek Adh Ko Thikane Lagana Pare Ga”*. On hearing this, Mahesh left the place by saying that he is just coming and immediately thereafter he returned back with an open knife and attacked Raj Kumar. Veermati tried to intervene, but

Khem Chand caught hold of Raj Kumar and Mahesh stabbed Raj Kumar by giving push to Veermati and because of stab injury blood started flowing from the body of Raj Kumar. He also admitted that in the mean time Dharam Pal and Surender left him and Mittar Pal and because of fear, they left the place and after some time returned back to the factory for knowing the welfare of Raj Kumar and came to know that Raj Kumar had been removed to hospital in a police vehicle and thereafter a second police vehicle came and they were taken to hospital where they met Veermati who informed that Raj Kumar had died. He also admitted that in the hospital statement of Veermati was recorded. In cross-examination, he deposed that his both the statements are correct and he had forgotten certain facts. He admitted that there was no enmity or altercation between accused Khem Chand and his family on the one hand and workers including Veermati on the other hand. He also admitted that no altercation ever took place between them and Khem Chand prior to the incident.

34. PW6 Mittar Pal is another employee of Ram Singh. This witness has also corroborated the testimony of other workers regarding the incident which took place on 14th December, 2003 during day time and

that at about 9/9:30 p.m. accused Harish, Surender and Dharam Pal came to the factory and started quarrelling with Vajinder. When they tried to rescue Vajinder from their clutches, they were also given beatings. Accused Surender gave brick blow on his head and on the person of his brother as well. According to him, due to sustaining head injury he became unconscious and gained consciousness in the hospital. This witness did not support the case of the prosecution in all material particulars, as such, he was cross-examined by learned Additional Public Prosecutor. He deposed that due to sustaining injuries he suffered mentally and as such in pursuance to the various questions put by learned Additional Public Prosecutor he replied that he does not remember those things.

35. PW8 Vajinder Singh has also unfolded the incident which took place on 14th December, 2002 in the noon time at about 2/2:30 p.m. However, thereafter he did not support the case of the prosecution by deposing that at about 7:30 p.m. Harish and his brother Surender came to the factory, assaulted him, abused him and gave one or two slaps. Thereafter, they went away. According to him, thereafter he went for taking meals and returned back to the factory at about 9:30 p.m., then he

came to know that Raj Kumar has been murdered. He was cross-examined by Additional Public Prosecutor. In cross-examination nothing favourable to the case of prosecution could be elicited.

36. These public witnesses came to be examined at a much later stage. Due to lapse of time, if some of the facts were not deposed accurately by the witnesses that does not mean that their testimony has to be discarded altogether. Furthermore, at the cost of repetition it may be mentioned that accused has not alleged any enmity, ill will or grudge against any of the witnesses for which reason they would falsely implicate him in this case. PW5 Anup Singh and PW6 Mittar Pal also sustained injuries in the incident. They were taken to hospital and their MLC Ex. PW25/A and PW26/A was prepared by Dr. Sumit. Since they sustained injuries in the same incident, their presence at the spot stand proved. Despite the fact that they were declared hostile by the prosecution, their version so far as support prosecution case, can safely be considered. Moreover, an opportunity was afforded to the accused to explain all the incriminating evidence appearing against him while recording his statement under Section 313 Cr.P.C., but the same reflects that his case was one of denial simplicitor and he has merely stated that

he was not involved in the case. No explanation has been furnished as to why the witnesses will depose against him or will implicate him in this case.

37. Furthermore, the ocular testimony of prosecution witnesses find corroboration from the medical evidence, inasmuch as, Raj Kumar was removed to GTB Hospital by PCR van. He was examined by Dr. Durllav Dutta who prepared MLC Ex.PW28/A, and declared “the patient was brought dead”. Post-mortem on the dead body of Raj Kumar was conducted by PW18-Dr. S. Lal who found the following injury on his person:

“Stab incised wound 6x0.3x15 cm present on inner aspect of right thigh, obliquely placed, tailing is present in lower inner end of wound. The wound was present 11 cm above the medial condyle of femur and 16 cm below the groin. The wound goes forward, laterally in upward direction into the thigh and cutting the femoral artery and vessels.”

38. He opined that the cause of death was haemorrhagic shock, as a result of antemorten injury to femoral vessels of thigh, produced by single sharp edged pointed weapon and the injury was sufficient to cause death in ordinary course of nature. In cross-examination, he deposed that the injury was possible by pointed sharp weapon. In

pursuance to a specific question as to whether there could have been chances of survival if immediate medical intervention was there, he deposed that in this case major artery of thigh was cut as such chances of survival were very bleak even if there would have been any medial intervention.

39. As regards other limb of argument that the blood stained earth, etc. which were seized from the spot were not sent to FSL and the blood stained clothes were not seized, this, at best, can be termed to be a defect in the investigation. There are catena of decisions to the effect that defects in investigation by itself cannot be a ground for acquittal. In ***Ram Bihari Yadav Vs. State of Bihar***, AIR 1998 SC 1850, it was held by Hon'ble Supreme Court that if primacy is given to the omissions or lapses by perfunctory investigation by the investigating agency, the faith and confidence of people would be shaken not only in law enforcing agency, but also in the administration of justice. It is true, if on account of any lapse doubts are created in prosecution case, the accused would be entitled to the benefit of that doubt. But, if the prosecution is able to establish its case beyond reasonable doubt against the accused, in spite of lapses, the accused cannot be acquitted because

of the lapse on the part of investigating officer. Substantially similar view was taken in **C. Muniappan and others vs. State of Tamilnadu**, 2010 IX AD (SC) 317 where it was held that where there has been negligence on the part of investigating agency or omissions etc which resulted in defective investigation, there is a legal obligation on the part of the Court to examine the prosecution evidence de hors such lapses carefully to find out whether said evidence is reliable or not or to what extent it is reliable and as to whether such lapses affected the object of finding out the truth. Therefore, the investigation is not the solitary area for judicial scrutiny in a criminal trial. The conclusion of trial in the case cannot be allowed to depend solely on the probity of investigation. That being so, since the case of prosecution stand established from ocular testimony of witness duly corroborated by medical evidence, the lapse on the part of Investigating Officer does not cast any doubt on the prosecution case.

40. As regards the authorities relied upon by learned counsel for the appellant, I have carefully gone through the same. However, all the authorities are on the facts and circumstances of each case and have no application to the facts of the case in hand. **Jag Narain Prasad** (supra)

was a case where the appellant Jag Narain Prasad was tried along with his son Om Prakash for the offence of murder. It was the case of the prosecution that the appellant exhorted his son Om Prakash to fire, thereupon, Om Prakash fired a gun which hit deceased Prabhakar. The deceased died before he could reach the hospital. On facts, it was found that there was no consistency as regards the actual words spoken by the appellant before Om Prakash fired his gun and it was observed that having noticed that his son was going out with a gun the appellant followed him with a view to see what was happening and also to prevent him from committing any offence. As such, the appellant was acquitted. *Ajay Sharma* (supra) was a case where the appellant and two others, namely Daljeet Singh and Ganeshi were convicted for offence under Section 302 read with Section 34 IPC. The charge against them was that three persons came on a motorcycle; Ganeshi and the other caught hold of Kailash Soni and exhorted Daljeet Singh to strike him. On that Daljeet Singh gave 2-3 blows with his kirpan to Kailash Soni which resulted in his instantaneous death. On facts, it was found that the instigation was only to strike and the facts did not reveal that the appellant had shared any common intention to kill the deceased. He

might not even have known that Daljeet Singh was having kirpan under his stockings. As such, his conviction was unsustainable under Section 302 IPC, however, he was convicted for offence under Section 324 read with Section 110 IPC. In *Jainul Haque* (supra) the allegations were that on the exhortation of the appellant the co-accused assaulted the deceased. On facts, discrepancies were found between the evidence of the witnesses given at the trial and the version given in the First Information Report regarding the part played by the appellant. As such, the appellant was acquitted. *Garib Singh and Ors.* (supra) was a case under Section 307 and 323 read with Section 149 IPC and the appellant instigated their companions by giving lalkaras and saying that Swaran Singh should not be spared. It was observed that this evidence of instigation was not enough to establish beyond reasonable doubt the participation of the appellant in the assault which took place upon the injured persons. Such allegations of participation by giving lalkaras are sometimes made only to show additional overt acts so as to take in at least five persons and make out the ingredients of an offence under Section 147 against all of them. In *Raghubir Singh* (supra) the only role ascribed to be accused was that of exhortation. Except that no

other role was attributed to the appellant. Similarly, in ***Baji*** (supra) the only role alleged in the FIR against the appellant was that he provoked others to kill the deceased, but all the eye witnesses made consistent improvements by saying that the appellant also gave blows to the deceased. As such, he was granted benefit of doubt. In ***Parshuram Singh*** (supra) there was a dispute over a timber tree standing on the boundary of fields belonging to two parties. A1 had only a *lathi* in his hand but he did not use it at all. In the same way A4 had a pistol in his hand but he did not use it. Only the other two appellants used their weapons. A1 and A4 only exhorted to kill the deceased while A4 showed his pistol warning the people not to come to the spot. It was observed that these facts reflected that both these appellants were having no intention to kill the deceased and the remaining two accused attacked and killed the deceased. As such, no intention could not be established or proved and the appellant were acquitted. In ***Jibril*** (supra) the appellant allegedly exhorted co-accused to kill the deceased by using words “don’t allow him to flee and don’t spare him this time”. On facts and circumstances of the case, it was found that he could not have uttered above words and the role attributed to him was doubtful.

As such, benefit of doubt was given. **Balbir Chand** (supra) was a case based on the testimony of relative or friend of the deceased which was full of contradiction and omission. The medical evidence did not support the prosecution case. FIR was found to be anti-timed. In the inquest report also name of the accused persons were not given. As such, the prosecution story was fabricated and doubtful. Hence, the accused was acquitted. In **Ramashish Yadav** (supra) two accused caught hold of the deceased while two others gave gandas blow. On facts, it was found that the accused who caught hold of the deceased did not share common intention, as such they were acquitted. **Shahul Hameed** (supra) it was found that it could not be proved that the accused shared common intention with the co-accused. In **Malempati Pattabi Narendra** (supra) the presence of accused at the spot was doubtful and therefore he was given benefit of doubt. **Inderjit** (supra) was also a case where on facts it could not be inferred that who caught hold of the deceased or that he shared common intention with co-accused who stabbed him with knife.

41. As regards the submission that in the inquest report under Section 174 IPC names of the accused persons did not find mention, and

therefore, the same casts a doubt on the prosecution version, the submission is devoid of merits, inasmuch as, in *Pedda Narayan v. State of A.P.* 1975 (4) SCC 153, while referring to Section 174 it was observed as under:

“A perusal of this provision would clearly show that the object of the proceedings under Section 174 is merely to ascertain whether a person has died under suspicious circumstances or an unnatural death and if so what is the apparent cause of the death. The question regarding the details as to how the deceased was assaulted or who assaulted him or under what circumstances he was assaulted appears to us to be foreign to the ambit and scope of the proceedings under Section 174. In these circumstances, therefore, neither in practice nor in law was it necessary for the police to have mentioned these details in the inquest report.”

These observations were reiterated in *Khujji @ Surendra Tiwari v. State of Madhya Pradesh* 1991 (3) SCC 627.

42. In the instant case, it stands proved from the testimony of Veermati which also, to some extent, finds corroboration from other prosecution witnesses that when the quarrel started initially between Harish, Surender Singh and Dharam Pal with Anup, Mittar Pal, Raj Kumar and Vijay accused Khem Chand initially said “*In Saalon Ne Humari Neeind/Sona Haram Kar Dia Hai*” and thereafter he came to

the place of incident, caught hold of Raj Kumar, who asked Khem Chand not to intervene and pushed him (i.e. Khem Chand) as a result of which Khem Chand received injuries on his forehead. He again caught hold of Raj Kumar and called his son Mahesh exhorting “*Ek Aadh Ko Thikane Laga Do*” and thereafter Mahesh came running from his house with an open knife and despite the fact that Veermati tried to catch hold of him, he pushed her and stabbed Raj Kumar. Under the circumstances, the role assigned to Khem Chand is not only of exhortation but he also facilitating Mahesh by holding Raj Kumar from behind. As a result of which, Mahesh stabbed him on his thigh which proved fatal. The ocular testimony of the prosecution witnesses, as seen above find substantial corroboration from the medical evidence. Under the circumstances, the learned Additional Sessions Judge rightly convicted the appellant for offence under Section 304 IPC.

43. The question then is whether the case falls under Section 304 Part I or Part II of the IPC, inasmuch as, learned Additional Sessions Judge has convicted appellant under Section 304 Part I without assigning any reason. The distinction between the two parts of that provision was

drawn by the Supreme Court in *Alister Anthony Pareira v. State of Maharashtra* (2012) 2 SCC 648, in the following words:

“..... For punishment under Section 304 Part I, the prosecution must prove: the death of the person in question; that such death was caused by the act of the accused and that the accused intended by such act to cause death or cause such bodily injury as was likely to cause death. As regards punishment for Section 304 Part II, the prosecution has to prove the death of the person in question; that such death was caused by the act of the accused and that he knew that such act of his was likely to cause death....”

44. Reference may also be made to the decision of Hon’ble Supreme Court in *Pulicherla Nagaraju @ Nagaraja Reddy v. State of Andhra Pradesh* (2006) 11 SCC 444 where the Court enumerated some of the circumstances relevant to finding out whether there was any intention to cause death on the part of the accused. It was observed:

“...Therefore, the court should proceed to decide the pivotal question of intention, with care and caution, as that will decide whether the case falls under Section 302 or 304 Part I or 304 Part II. Many petty or insignificant matters - plucking of a fruit, straying of a cattle, quarrel of children, utterance of a rude word or even an objectionable glance, may lead to altercations and group clashes culminating in deaths. Usual motives like revenge, greed, jealousy or suspicion may be totally absent in such cases. There may be no intention. There may be no premeditation. In fact, there may not

even be criminality. At the other end of the spectrum, there may be cases of murder where the accused attempts to avoid the penalty for murder by attempting to put forth a case that there was no intention to cause death. It is for the courts to ensure that the cases of murder punishable under Section 302, are not converted into offences punishable under Section 304 Part I/II, or cases of culpable homicide not amounting to murder, are treated as murder punishable under Section 302. The intention to cause death can be gathered generally from a combination of a few or several of the following, among other, circumstances : (i) nature of the weapon used; (ii) whether the weapon was carried by the accused or was picked up from the spot; (iii) whether the blow is aimed at a vital part of the body; (iv) the amount of force employed in causing injury; (v) whether the act was in the course of sudden quarrel or sudden fight or free for all fight; (vi) whether the incident occurs by chance or whether there was any pre-meditation; (vii) whether there was any prior enmity or whether the deceased was a stranger; (viii) whether there was any grave and sudden provocation, and if so, the cause for such provocation; (ix) whether it was in the heat of passion; (x) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner; (xi) whether the accused dealt a single blow or several blows. The above list of circumstances is, of course, not exhaustive and there may be several other special circumstances with reference to individual cases which may throw light on the question of intention...”

45. Coming back to the case at hand, the nature of injury inflicted by the co-accused, part of body on which it was inflicted, the weapon used to inflict the same, there was no premeditation in the commission of crime, there is not even a suggestion that appellant or co-accused had any enmity or motive to commit any offence against the deceased, deceased was not given a second blow once he had collapsed to the ground on account of stab injury on thigh, the appellant and his companion took to their heels, do not suggest that there was intention to kill the deceased. All that can be said is that co-accused had the knowledge that the injury inflicted by him was likely to cause the death of deceased. The case would, therefore, more appropriately fall under Section 304 Part II of the IPC. Appellant having exhorted his son Mahesh and then catching hold of deceased from behind is also liable with the aid of Section 34 IPC. Conviction is, accordingly, altered to Section 304 Part II/34 IPC.

46. As regards quantum of sentence, punishment as prescribed under Section 304 IPC is 10 years imprisonment and fine. Learned Additional Sessions Judge has already taken a liberal view by awarding five years rigorous imprisonment. That being so, no further leniency is called for.

47. Under the circumstances, I hold that there is no merit in the appeal and the same is accordingly dismissed.

48. Since the appeal is dismissed, CrI.M.B.165/2013 also stands disposed of. Copy of the order along with Trial Court record be sent back.

**SUNITA GUPTA
(JUDGE)**

SEPTEMBER 18, 2013

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