

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

Date of Decision: 30th May, 2014

+CRL.A.819/2011

RAVI KUMAR & ORS.

..... Appellant

Through: Sh. Ajay Verma, Advocate for
appellant No.1-Ravi Kumar
Mr. K. Singhal, Advocate for
appellant No.2-Karamvir
Mr. Vivek Sood, Advocate for
appellant No.3-Raj Kumar
Mr. Jitender Sethi, Advocate
for appellant No.4-Sanjay.

versus

STATE

..... Respondent

Through: Mr. Sunil Sharma, Additional
Public Prosecutor for State

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CORAM:

HON'BLE MR. JUSTICE KAILASH GAMBHIR

HON'BLE MS. JUSTICE SUNITA GUPTA

J U D G M E N T

: SUNITA GUPTA, J.

1. Kuldeep along with his mother, brother and sister was residing in House No. 73, Gram Sabha, Sewak Park, Uttam Nagar, Delhi. Sapna along with her father accused Ravi and other family members was residing at House No.71, Gram Sabha, Sewak Park, Uttam Nagar Delhi. Kuldeep developed a love affair with Sapna which became eye

sore to the family of Ravi and his brothers. The relations between the two families became strained and the hatred developed to such an extent that not only the father of Sapna but her uncles also planned to commit murder of Kuldeep. With this pre-concerted plan, on 14th October 2006 at about 8:45 PM when PW2 Sunny along with his brother Kuldeep and his cousin PW3 Rupesh were returning from Balmiki Mandir located in their Colony and reached near the house of Shyam Khanna, all the four accused persons namely Ravi Kumar, Karamvir, Raj Kumar and Sanjay came out of the *gali* behind them and accused Ravi Kumar addressed to co-accused persons that Kuldeep has caused damage to their reputation because of an affair with his daughter Sapna and therefore, he should be killed. Thereafter, accused Raj Kumar caught hold of Kuldeep's hands while Karamvir caught hold of his feet. When PW2 Sunny and PW3 Rupesh tried to come forward to save Kuldeep, accused Sanjay wielded a *danda* at them and threatened them not to come forward to save Kuldeep. Meanwhile, accused Ravi Kumar who was carrying a large knife(*Chhura*) stabbed Kuldeep on his abdomen and chest several times. After having caused injuries to Kuldeep, all the four accused

persons ran away from the spot towards their house.

2. On 14th October, 2006 at about 9:15 PM, on receipt of an information, regarding murder having been taken place at Sewak Park opposite the house of Ashok Bagri, Head Constable Nempal Sharma recorded DD No.40A and informed Inspector Suresh Chand who along with Inspector R.S. Chahal reached the spot, i.e., opposite to House No. B-1, Sewak Park, Uttam Nagar where they met other police officials and came to know that Kuldeep has been murdered by accused Ravi Kumar, Karamvir, Raj Kumar and Sanjay with the help of a *chhura*. Blood was lying in the *gali* and the *chabootra*. One *danda* and a pair of blood stained hawai chappal belonging to the deceased was also found lying at the spot. Inquiry revealed that Kuldeep had been taken to Panchsheel Hospital. Inspector Suresh Chand went to Panchsheel Hospital where he came to know that the deceased had been taken to DDU Hospital by his brother Sunny. Thereupon Inspector Suresh Chand went to DDU hospital where he came to know that Kuldeep had been declared brought dead. PW2 Sunny met inspector Suresh Chand at the hospital. His statement Ex.PW2/A was recorded by Inspector Suresh Chand on the basis of

which rukka was prepared and the same was sent to police station which resulted in registration of FIR 979/2006 u/s 302/34 IPC.

3. It is further the case of prosecution that there was strong resentment in the area and large crowd has gathered who were screaming *maaro maaro*. The accused persons were hiding inside their house. They were arrested from their house and pursuant to the disclosure statement made by the accused Ravi Kumar, a *chhura* was recovered from below the water tank at the place of worship at the back side of his house. After completing investigation, charge sheet was submitted against all the accused persons for offence under Section 302/34 IPC.

4. In order to substantiate its case, prosecution in all examined 28 witnesses. All the incriminating evidence was put to the accused persons while recording their statement under Section 313 Cr.P.C. wherein they denied the case of the prosecution, and alleged false implication in the case. It was further pleaded that on the day of incident which was a Saturday, they were busy in the *Chowki of Kali Mata*. At that time, police came to their house and took them and implicated them in this false case. However, they did not prefer to

lead any evidence in their defence.

5. After meticulously examining the evidence led by the prosecution and the other materials on record, vide impugned judgment dated 21st May, 2011 and order on sentence dated 6th June, 2011, learned Additional Sessions Judge, Rohini, Delhi convicted all the appellants for offence under Section 302/34 IPC and sentenced them to undergo Rigorous Imprisonment for life. In addition, accused Ravi Kumar was directed to pay fine for a sum of Rs.50,000/-, in default of payment of fine, to undergo Simple Imprisonment for six months while accused Karamvir, Raj Kumar and Sanjay were directed to pay fine for a sum of Rs.2,000/- each, in default of payment of fine, to undergo Simple Imprisonment for a period of two weeks. The convicts were granted benefit of Section 428 of the Code of Criminal Procedure, 1973.

6. Feeling aggrieved by the impugned judgment and the order on sentence, present appeal has been preferred by the appellants.

7. We have heard Sh. Ajay Verma, learned counsel for appellant No.1-Ravi Kumar, Mr. K. Singhal, learned counsel for appellant No.2-Karamvir, Mr. Vivek Sood, learned counsel for appellant No.3-

Raj Kumar, Mr. Jitender Sethi, learned counsel for appellant No.4 and Mr. Sunil Sharma, learned Additional Public Prosecutor appearing for the State and have perused the record.

8. It was submitted by learned counsel for the appellants that:

- Out of 28 witnesses examined by the prosecution, the alleged eye-witnesses are PW2 Sunny, PW3 Rupesh, PW5 Shyam Khanna and PW6 Krishan Kumar. The moot question is whether the so called eye witnesses PW2 and PW3 are reliable and truthful? Whether PW6 is an eye-witness or a post incident witness or is a planted witness and what is the reliability of the version given by PW5?
- PW 2 Sunny is the real brother of deceased Kuldeep while PW3 Rupesh is the cousin brother, therefore, both are close relatives of the deceased.
- Presence of PW2 and PW3 at the spot is highly doubtful as no effort was made by them to save Kuldeep when he was being allegedly assaulted by the accused persons.
- PW3 did not render any help to PW2 in taking the injured to Hospital nor accompanied him to Panchsheel Heart and

Medical Centre.

- According to PW2, he took the injured to Panchsheel Heart and Medical Centre where after checking by the doctor, Kuldeep was advised to be taken to DDU Hospital. While he was waiting for some vehicle, a red colour van reached at the spot along with Head Constable Roop Singh and then the deceased was shifted to DDU Hospital and he came back to the spot. Quite surprisingly, assuming this to be correct even this witness had not met the Investigating Officer PW23 or PW28 at the spot nor at the Panchsheel Hospital but as per PW23, PW2 Sunny had only reached in the emergency after he reached the DDU Hospital.
- PW9 Dr. R.K. Sharma has deposed that one of the attendant was brother of the deceased, but this fact does not find mention in the letter of examination Ex.PW9/A nor in his statement under Section 161 Cr.P.C. Hence, this is material improvement and is of no evidentiary value.
- PW23 Inspector Suresh Chand has admitted that he reached the spot at 9:45 p.m. and then went to Panchsheel Hospital at 11:00

p.m. but surprisingly he could not meet any eye witness. As per the MLC of the deceased Kuldeep, he was brought to the hospital at 11:50 p.m. by Constable Roop Kumar. It was most unnatural on the part of PW2 not to have accompanied the injured brother for further treatment and instead he gave a false explanation of going back to the house to inform his family members about the death of Kuldeep.

- According to PW2, he was accompanied by Arun Kumar to Panchsheel Hospital but Arun Kumar was not examined as a witness.
- According to PW3, PW2 asked him to go back to the house and take care of his mother as such there was no occasion for PW2 to have come back to the spot hence his non-availability at Panchsheel Hospital or his not accompanying injured brother to DDU Hospital creates a doubt about the presence of the witness at the time of occurrence. Both these witnesses are close relatives of deceased and, therefore, claimed themselves to be the eye witnesses of the incident.
- Rukka was sent at about 1:30 p.m. i.e. after five hours of the

occurrence. As such, there is enormous delay in lodging the FIR.

- Despite the fact that a huge crowd had gathered at the spot, but no public person had been joined in the investigation. This shows that the investigation is lopsided, biased and tainted.
- No reliance can be placed on the testimony of PW5 Shyam Khanna and PW6 Krishan Kumar, both of whom have not supported the case of prosecution.
- As per the information given to the PCR, a quarrel had taken place at Sewak Park metro station Uttam Nagar, Delhi. As per the subsequent information given to PCR there was a quarrel with Kuldeep in which he sustained knife blows and was removed to Panchsheel Hospital where he was declared brought dead. As per the statement of Dr. R.K. Sharma, Kuldeep was brought by some person from Sewak Park and was declared dead.
- No incident took place in front of the house of Shyam Khanna. In fact, deceased Kuldeep sustained knife injuries in some quarrel at Sewak Park and thereafter he was removed to

hospital by some person and was declared dead. Had he been taken to Panchsheel Heart and Medical Centre by PW2 Sunny the same would have found mention in the letter of examination given by Dr. Sharma.

- Since the relations between the appellant-Ravi and the family members of the deceased had become strained therefore due to animosity not only accused Ravi but his brothers, who are the appellants in this case, were also falsely implicated in the present case.
- The role assigned to Raj Kumar was catching hold of hands of Kuldeep whereas the role assigned to accused Karamvir was catching hold of his feet and role ascribed to appellant-Sanjay was that he had given several *danda* blows on the person of the deceased and had also threatened PWs Sunny and Rupesh not to come forward to save their brother.
- Ocular version given by these witnesses is contrary to medical evidence as in the post mortem report Ex.PW27/A, no injury on the person of the deceased was found to be caused by blunt object and the injuries were caused with sharp edged weapon

only.

- *Danda* was alleged to be found at the spot which although gave positive result for Human Blood but blood group was not opined, therefore, it is not established that blood on *danda* was that of deceased.
- Finger prints of accused Sanjay were not taken to match with finger prints on *danda* to show that it was used by accused Sanjay.
- Reference was made to Modi's Medical Jurisprudence and Toxicology for submitting that blunt object like *danda*, lathi could result in causing abrasion, bruises or contusion which is missing in the post mortem report. As such, presence of accused Sanjay at the time of the incident is highly doubtful.
- If Raj Kumar had caught hold of the hands of the deceased, then his clothes would have been smeared with blood but no blood was found on his clothes. Moreover, according to the mother of the deceased Kuldeep, she was informed that Ravi stabbed him.
- Karamvir was falsely roped in the present case being the

brother of the accused Ravi.

- All the accused persons were present in their house as it was a Saturday and accused Sanjay is visited by *mata ki chowki*.
 - Accused Karamvir, Raj Kumar and Sanjay did not share common intention with co-accused Ravi.
 - The incident had taken place due to grave and sudden provocation as Kuldeep used to tease daughter of appellant Ravi, he had circulated her photographs in the locality. The appellant had even sent his daughter to her maternal uncle's house but Kuldeep did not stop his activities. On the date of incident a quarrel took place and in heat of passion, the incident took place.
 - The case of the appellant is covered by Exception IV of Section 300 of Indian Penal Code, as the crime was committed under grave and sudden provocation and therefore the offence is liable to be converted from Section 302 IPC to Section 304(1) IPC.
9. Refuting the submissions of learned counsel for the appellants it was submitted by learned Additional Public Prosecutor appearing on

behalf of the State that:

- This is a case of honour killing as deposed by the witnesses that according to accused Ravi his honour was being lowered down in the society due to the acts of Kuldeep. Therefore, the motive to commit the crime is writ large.
- The appellant Ravi cannot be allowed to take the plea of grave and sudden provocation for the first time at the appellate stage as no such plea was taken before the Trial Court. Rather before the Trial Court, his case was one of denial simplicitor.
- In case the appellant wants to bring his case within the exceptions, it is incumbent upon him to prove that the case is covered by Exception-IV. However, the circumstances do not show that there was any provocation on the date of incident. Moreover, to bring the case within the meaning of Exception-IV provocation has to be grave and sudden. As per the case of appellant Ravi, the deceased was having affair with his daughter Sapna and the appellant had been distributing photos/pamphlets much prior to the incident. On the fateful day, no quarrel had taken place. Rather all the four accused in

furtherance of their common intention with premeditation armed with weapon came and acted in a most cruel manner and inflicted as many as seven injuries on the chest and abdomen of Kuldeep.

- The suggestion was given to all the prosecution witnesses that murder was committed by some unknown 'persons' meaning thereby that it was admitted that it was not the act of a single person. Moreover, the deceased was a young boy whereas accused Ravi was a middle aged man. If Ravi alone would have caught Kuldeep then the same would have been resisted by Kuldeep and in that process possibility of Ravi sustaining injuries cannot be ruled out, but no injury was sustained by appellant Ravi. This lends assurance to the testimony of the prosecution witnesses that all the four accused persons came together. Accused Karamvir caught hold of the deceased by his feet, Raj Kumar by his hands and thereafter when Sunny and Rupesh tried to rescue their brother they were prevented from doing so by accused Sanjay and thereafter Ravi inflicted knife blows on the person of the deceased on vital part of his body

i.e. chest and abdomen. *Danda* blows were also given by accused Sanjay, which was reflected in the MLC.

- The *danda* was recovered from the spot and human blood was detected on it.
- At the instance of the accused Ravi, the weapon of offence, i.e., knife was recovered. His blood stained clothes were also recovered. Same were sent to FSL and as per report of FSL, human blood of 'B' Group was detected on the same which was the blood group of deceased.
- The place of incident stands proved from the testimonies of PW2, PW3, PW5 and PW6. Besides that the crime team report and the photographs also proves the place of crime.
- The appellant cannot get any benefit from the information sent to PCR, inasmuch as, it has come on record that after the incident there was great tension in the area and crowd had collected at the spot. Extra force had to be called to control the situation. The accused were inside their house. One of the accused, namely, Raj Kumar who was a Constable in Delhi Police sent a misleading information to the police regarding

quarrel at Sewak Park near metro station at Kakrola, but on reaching the place of incident things became clear that the same had taken place in front of House No. B-1 Sewak Park, Uttam Nagar.

- The impugned judgment does not suffer from any infirmity which calls for interference. As such, the appeal is liable to be dismissed.

10. We have given our considerable thoughts to the respective submissions of the learned counsel for the parties and have perused the Trial Court record.

Eye Witnesses:

11. PW2 Sunny is one of the star witness of the prosecution, who is also the real brother of the deceased Kuldeep Kumar. This witness has unfolded that his brother Kuldeep had an affair with one Sapna, daughter of Ravi Kumar, who lived in their neighbourhood. On account of this affair, family of Ravi Kumar had enmity with Kuldeep. About one month prior to the incident, Ravi gave beatings to his daughter Sapna for being in love with Kuldeep and sent her away to her maternal uncle's house. On the fateful day, i.e., 14th

October, 2006, at about 8:45 pm, he along with Kuldeep and cousin Rupesh(PW3) were returning from Balmiki Mandir, which was located in their Colony. Kuldeep was walking about 15-20 steps ahead of them. They were following him. When Kuldeep reached near the house of Shyam Khanna, all the four accused persons, namely, Ravi Kumar, Karamvir, Raj Kumar and Sanjay came out of the *gali* which was behind them. Accused Ravi Kumar addressed to his co-accused saying that Kuldeep had caused damage to their reputation because of his affair with his daughter Sapna and therefore, he should be killed. Thereafter, accused Raj Kumar caught hold of Kuldeep's hands while Karamvir caught hold of his feet. When PW2 Sunny and PW3 Rupesh tried to come forward to save Kuldeep, accused Sanjay wielded a *danda* at them and threatened them not to come forward to save Kuldeep. Meanwhile, accused Ravi Kumar who was carrying a large knife (*Chhura*), stabbed Kuldeep on his abdomen and chest several times. Sanjay hit Kuldeep with *danda* couple of times. After having caused injuries to Kuldeep, all the four accused persons ran away from the spot towards their house saying that he had been killed.

12. On alarm having been raised by them, their family members reached the spot. His mother tried to shake up deceased Kuldeep and when he did not respond, he took him to nearby Panchsheel Heart and Medical Centre, where after checking, doctor advised to take him to DDU Hospital. He waited for a TSR for quite some time, but none came to that side. A red colour van along with police official HC Roop Singh came there and he shifted Kuldeep to DDU Hospital where doctor declared him dead. When the police official took away his brother Kuldeep to DDU Hospital, he rushed back to his house to inform his family members and then he also went to DDU Hospital where his statement Ex.PW2/A was recorded which bears his signatures at point A. Thereafter, he returned to the spot along with the police officials and pointed out the place of occurrence. On his pointing out, site plan of the place of occurrence was prepared. The police team collected blood samples, blood stained earth, earth control, a pair of hawai chappals belonging to his brother, a blood stained *danda* left at the spot by the accused Sanjay. Thereafter, the accused persons were arrested from their house. Their disclosure statements Ex. PW2/K to PW2/N were recorded. Accused Ravi

Kumar got recovered a knife from below the water tank at the place of worship at the back side of his house. Sketch of the knife Ex.PW 2/O was prepared which was seized. The blood stained clothes of the accused persons were seized by the police. After few days, scaled site plan was prepared in his presence. His clothes were also seized by the police. He further deposed that the accused persons had fled away to their house and were not permitted to come out of their house by the family member, in fact, a large crowd had gathered at the spot.

13. PW3 Rupesh is the cousin brother of the deceased and has corroborated the version of PW2 Sunny by deposing that on 14th October, 2006, he had gone to his masi's house at about 8:30 PM. He along with his cousin brothers Kuldeep and Sunny went to Balmiki Mandir. When they were returning from the Mandir, Kuldeep was walking about 20 steps ahead of them. When they reached near the house of Shyam Khanna, all the four accused namely Raj Kumar, Ravi Kumar, Karamvir and Sanjay came out of the *gali* which was behind them. Accused Ravi declared that Kuldeep had brought defame to them on account of involvement with his daughter and therefore, he should be killed. Accused Raj Kumar caught hold of his

hands, Karamvir caught hold of his feet and accused Sanjay hit him with a *danda* on his chest. Accused Ravi Kumar stabbed Kuldeep on his abdomen and chest. When they raised alarm, Sanjay threatened them by wielding his *danda* saying that they will also be attacked in the same fashion. On alarm being raised by them, all the accused persons ran away, leaving behind the *danda* and Ravi ran away along with his knife. In the meantime, his *Masi*(aunt) namely Premlata also reached there and on seeing Kuldeep she fainted. Sunny took Kuldeep to Panchsheel Hospital by lifting him. He picked up his *massi* and took her to her house. Thereafter, he also went to Panchsheel Hospital where he was told by Sunny that doctor had advised that Kuldeep be taken home as he had not survived. However, Sunny was not satisfied with the medical advice and wanted to take him to DDU Hospital. He waited for some vehicle to take the injured to DDU Hospital. In the meantime, police officials reached there and they stopped a van and took Kuldeep to DDU Hospital. Sunny advised him to take care of his mother as he was going to DDU Hospital. Then he reached his *massi*'s house. Crowd had gathered and police had also reached the spot. At about 2:00

AM, Sunny returned home along with police officials. He pointed out the place of occurrence to the police and the site plan was prepared at his instance. Police officials seized blood, blood stained earth, earth control, a pair of hawai chappal of deceased Kuldeep and a *danda* vide seizure memos which bears his signature. Thereafter, police officials went to the house of accused persons and after interrogation, accused Ravi got recovered the *Chhura*/knife from a worship place under a water tank which was on the rear side of the house of the accused Ravi Kumar. I.O. also got removed clothes of all the accused persons which were sealed and separately kept in a cloth pulanda.

14. Learned counsel for the appellants challenged the testimony of PW2 Sunny and PW3 Rupesh basically on two grounds:-

- a. They are closely related to the deceased and so are interested witnesses;
- b. They are not truthful and reliable witnesses.

15. As regards the first limb of the argument, it is not in dispute that PW2 Sunny was the real brother and PW3 Rupesh was the cousin brother of deceased Kuldeep. However, relationship itself is not a

factor to affect the credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person. It is a well settled legal proposition that the evidence of related witnesses can be relied upon if it has a ring of truth to it and is cogent, credible and trustworthy. Such evidence however needs to be carefully scrutinised and appreciated before any conclusion is made to rest upon it. But the evidence cannot be disbelieved merely on the ground that the witnesses are related to the deceased.

16. In *Shanmugam and Anr. v. State Rep. by Inspector of Police, T. Nadu*, (2013) 12 SCC 765 Hon'ble Supreme Court while dealing with the aspect of creditworthiness of the evidence of relatives of the victim held:

"12. far more important than categorisation of witnesses is the question of appreciation of their evidence. The essence of any such appreciation is to determine whether the deposition of the witness to the incident is truthful hence acceptable. While doing so, the Court can assume that a related witness would not ordinarily shield the real offender to falsely implicate an innocent person. In cases where the witness was inimically disposed towards the accused, the Courts have no doubt at times noticed a tendency to implicate an innocent person also, but before the Court can reject the deposition of such a witness the accused must lay a foundation for the argument that his false implication springs from such enmity. The mere fact that the witness was related to the accused does not provide that foundation. It may on the contrary be a circumstance for the Court to believe that the version of the witness is truthful on the simple logic that such a witness would not screen the real

culprit to falsely implicate an innocent. Suffice it to say that the process of evaluation of evidence of witnesses whether they are partisan or interested (assuming there is a difference between the two) is to be undertaken in the facts of each case having regard to ordinary human conduct prejudices and predilections.

*13. The approach which the Court ought to adopt in such matters has been examined by this Court in several cases, reference to which is unnecessary except a few that should suffice. In **Dalip Singh v. State of Punjab** AIR 1953 SC 354, this Court observed:*

26. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalisation. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts.

17. In **Namdeo v. State of Maharashtra**, (2007) 14 SCC 150, Hon'ble Supreme Court held that a close relative cannot be characterised as an “interested” witness. The only rule of caution in this regard is that the evidence of such witness must be scrutinised carefully. If on such scrutiny, his evidence is found to be reliable, inherently probable and wholly trustworthy, conviction can be based even on the 'sole' testimony of such witness.

18. In **Gangabhavani v. Rayapati Venkat Reddy and Ors.**, AIR

2013 SC 3681, Supreme Court discussed the legal proposition dealt by the court in their earlier judgments with respect to the evidence of related witnesses and held:

"14. In view of the above, it can safely be held that natural witnesses may not be labelled as interested witnesses. Interested witnesses are those who want to derive some benefit out of the litigation/case. In case the circumstances reveal that a witness was present on the scene of occurrence and had witnessed the crime, his deposition cannot be discarded merely on the ground of being closely related to the victim/deceased."

19. In **Gajoo v. State of Uttarakhand**, (2012) 9 SCC 532, it was observed:

"13. Similar view was taken by this Court in the case of State of A.P. v. S. Rayappa and Ors. (2006) 4 SCC 512. The court observed that it is now almost a fashion that public is reluctant to appear and depose before the court, especially in criminal cases and the cases for that reason itself are dragged for years and years. The Court also stated the principle that, "by now, it is a well-established principle of law that testimony of a witness otherwise inspiring confidence cannot be discarded on the ground that he being a relation of the deceased is an interested witness. A close relative who is a very natural witness cannot be termed as interested witness. The term interested postulates that the person concerned must have some direct interest in seeing the accused person being convicted somehow or the other either because of animosity or for some other reasons."

20. Testing on the anvil of the above legal principles, it will be suffice to say that merely because PW2 Sunny and PW3 Rupesh are close relatives of the deceased, it is not sufficient to doubt their credibility. In fact, they being the close relatives would not allow the real culprit to go scot free and make allegations against the accused

persons to falsely implicate them in such a heinous crime. The only rule of caution is that the testimony of such related witnesses must be reliable, trustworthy and duly corroborated by other evidences. Once it is established that their depositions are cogent, inspires confidence, do not suffer from any material contradictions and is in consonance with the above legal principles, the Court would be justified in relying upon such valuable piece of evidence.

21. Coming to the second limb of argument that the testimony of PW-2 and PW-3 is not reliable and trustworthy as they were not the eye witnesses to the incident, both these witnesses were subjected to lengthy cross-examination, however, nothing material could be elicited to discredit their testimony except certain minor contradictions.

22. Minor discrepancies are bound to occur due to normal errors of perception and observation, errors of memory due to lapse of time, due to mental disposition due to shock and horror at the time of occurrence. In fact such discrepancies are inevitable. Such minor discrepancies only add to the truthfulness of their version. If, on the other hand, these witnesses give evidence with mechanical accuracy,

it could be cogitated that they were giving tutored versions. The question is whether embellishments in statement of witnesses can destroy the core of the prosecution story.

23. Hon'ble Supreme Court in ***Bakhshish Singh v. State of Punjab and Anr.***, (2013) 12 SCC 187 dealt with the applicability of contradictions and embellishments:

*"31. This Court in several cases observed that minor inconsistent versions/discrepancies do not necessarily demolish the entire prosecution story, if it is otherwise found to be creditworthy. In **Sampath Kumar v. Inspector of Police** (2012) 4 SCC 124, this Court after scrutinizing several earlier judgments relied upon the observations in **Narayan Chetanram Chaudhary v. State of Maharashtra** (2000) 8 SCC 457 to the following effect:*

"21.....42. Only such omissions which amount to contradiction in material particulars can be used to discredit the testimony of the witness. The omission in the police statement by itself would not necessarily render the testimony of witness unreliable. When the version given by the witness in the court is different in material particulars from that disclosed in his earlier statements, the case of the prosecution becomes doubtful and not otherwise. Minor contradictions are bound to appear in the statements of truthful witnesses as memory sometimes plays false and the sense of observation differ from person to person."

24. In ***Rohtash Kumar v. State of Haryana***, (2013) 14 SCC 434, Hon'ble Supreme Court considered the issue of discrepancies in the depositions:

"24. It is a settled legal proposition that while appreciating the evidence of a witness, minor discrepancies on trivial matters which do not affect the core of the case of the prosecution must not prompt the court to reject the evidence in its entirety. Therefore, irrelevant details which do

not in any way corrode the credibility of a witness should be ignored. The court has to examine whether evidence 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 witnesses and whether the earlier evaluation of the evidence is shaken, so as to render it unworthy of belief. Thus, the court is not supposed to give undue importance to omissions, contradictions and discrepancies which do not go to the heart of the matter, and shake the basic version of the prosecution witness.”

25. In *State of U.P. v. Naresh*, (2011) 4 SCC 324, the Supreme Court after considering a large number of its earlier judgments held:

“30. In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about the truthfulness of the witness and other witnesses also make material improvement while deposing in the court, such evidence cannot be safe to rely upon. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety. The court has to form its opinion about the credibility of the witness and record a finding as to whether his deposition inspires confidence.

Exaggerations per se do not render the evidence brittle. But it can be one of the factors to test credibility of the prosecution version, when the entire evidence is put in a crucible for being tested on the touchstone of credibility.

Therefore, mere marginal variations in the statements of a witness cannot be dubbed as improvements as the same may be elaborations of the statement made by the witness earlier. The omissions which amount to contradictions in material particulars i.e. go to the root of the case/materially affect the trial or core of the prosecution's case, render the testimony of the witness liable to be discredited.”

26. A similar view has been reiterated in *Tahsildar Singh and Anr. v. State of U.P.*, AIR 1959 SC 1012; *Pudhu Raja and Anr. v. State, Rep. by Inspector of Police*, JT 2012 (9) SC 252; *Lal Bahadur v. State (NCT of Delhi)*, (2013) 4 SCC 557; *State of U.P. v. M.K. Anthony*, AIR 1985 SC 48; *State rep. by Inspector of Police v. Saravanan & Anr.*, AIR 2009 SC 152; and *Vijay @ Chinee v. State of M.P.*, (2010) 8 SCC 191.

27. In view of the legal proposition enunciated above, the minor contradictions appearing in the testimony of the witnesses does not materially affect the core of the prosecution case nor render the testimony of the witnesses liable to be discredited.

28. Further the presence of PW2 and PW3 on the spot at the time of incident is established not only from their ocular testimony but also from the circumstantial evidence which has come on record. According to PW-2, after Kuldeep fell down on being stabbed by accused Ravi Kumar, he and Rupesh tried to revive him while all the accused ran away from the spot. Rupesh ran away from the spot to fetch a TSR for carrying Kuldeep to hospital but since no vehicle was available, PW-2 without wasting further time physically lifted

Kuldeep to Panchsheel Hospital which was about 100 mtrs. away from the spot of incident. The fact that Kuldeep was brought to Panchsheel Hospital by Sunny finds corroboration from the testimony of Dr. R.K.Sharma (PW-9) who has deposed that brother of the deceased Kuldeep had brought him to the hospital and despite the fact that he declared Kuldeep dead, his brother insisted that Kuldeep should be thoroughly examined due to which reason he advised him to take Kuldeep to DDU hospital.

29. Learned counsel for the appellant submitted that the factum of Kuldeep being brought to hospital by his brother does not find mention in the certificate PW-9/A given by the Doctor nor in his statement u/s 161 Cr.P.C recorded by the police, as such it was a material improvement in the testimony of the witness. Although it is true that in certificate Ex.PW 9/A, it is not specifically mentioned that Kuldeep was brought to hospital by his brother but it is pertinent to note that testimony of Dr. R.K.Sharma in this regard has not been challenged by the accused in cross examination. His attention was neither drawn to the certificate Ex.PW 9/A nor to his statement recorded u/s 161 Cr.P.C. In fact, none of the accused have preferred to

cross examine this witness at all. Under the circumstances there is no reason to disbelieve the testimony of this witness, keeping in view the fact that he is a totally independent witness who is neither related to the complainant party nor is on any inimical terms with the accused.

30. Testimony of Dr. R.K.Sharma and Sunny also find corroboration from the testimony of Const. Roop Singh (PW-15), who on receipt of information from PCR had gone to the place of incident but came to know that the injured was taken to Panchsheel Hospital. When he reached Panchsheel Hospital he met Sunny who wanted Kuldeep to be taken to DDU hospital. Since no vehicle was found, they tried to stop number of vehicles. Finally he managed to stop a private van which carried the deceased to DDU hospital but Sunny did not accompany him at that time.

31. The Investigating Officer Insp. Suresh Chand (PW23) also corroborates the testimony of Dr. R.K.Sharma to the extent that he was informed by Dr.R.K.Sharma that brother of deceased Sunny had brought him to the hospital. Moreover, according to PW2, in the process of removing his injured brother to hospital, his clothes were smeared with blood. This part of his testimony find corroboration

from FSL result which gave positive result of human blood of 'B' group on the clothes of this witness which is the blood group of deceased.

32. Learned counsel for the appellant submitted that it has come in the statement of the witness that when Sunny had removed his brother to hospital, at that time one Arun had helped him to take the injured to Panchsheel Hospital, however, the said Arun was neither cited as a witness nor examined by prosecution. Mere non-examination of Arun is of no consequence inasmuch as it would be unsound to lay down a rule that every witness should be examined even though their evidence may not be material. In *Namdeo(supra)*, it has been laid down that Indian legal system does not insist on plurality of witnesses. Neither the legislature under Section 134 of the Evidence Act, 1872 nor the judiciary mandates that there must be particular number of witnesses to record an order of conviction against the accused. Our legal system has always laid emphasis on value, weight and quality of evidence rather than on quantity, multiplicity or plurality of witnesses.

33. It is further the submission of learned counsel for the appellant that the testimony of Sunny reveals that while the deceased Kuldeep

was being taken to DDU hospital he had gone back to his house to inform his family members, which is an unnatural conduct in the given circumstances and as such his plea is only an after thought in order to justify his absence at DDU hospital when the deceased was taken to DDU hospital by the police. This submission again is bereft of merit inasmuch as place of incident is just 100 mtrs away from Panchsheel Hospital and house of the deceased is situated about 150 mts from Panchsheel Hospital meaning thereby that the house of deceased from hospital was at a walking distance. After Dr.R.K.Sharma had declared Kuldeep dead and while his body was being taken to DDU hospital, Sunny had decided to go back to inform his family members. It has come on record that when Sunny had left the spot with his brother, his mother who had already reached the spot had become unconscious on seeing the condition of her son Kuldeep, on which Sunny had asked his cousin Rupesh to take his mother home. In this background, after Dr. R.K.Sharma declared Kuldeep dead and when the body of Kuldeep was being taken to DDU hospital in order to confirm the same, if Sunny went to his house to inform his family members about the death of Kuldeep, there is nothing unusual

about it. Thereafter he reached DDU hospital and met Insp. Suresh Chand who recorded his statement wherein he gave a detailed version of the entire incident and the role played by each and every accused. In this scenario, there is no reason to doubt the presence of Sunny at the spot at the time of incident and witnessing the incident which formed the basis of registration of FIR.

34. Testimony of Rupesh has been challenged on the ground that he did not accompany the deceased to Panchsheel Hospital nor to DDU hospital. Here again a valid explanation is forthcoming. The house of the deceased was adjacent to the place of incident and both the accused and deceased were next door neighbours. On hearing alarm, mother and sister of the deceased came to the spot. Mother of deceased Kuldeep fainted on seeing the body of her son. Since no vehicle was available, Sunny took Kuldeep to Panchsheel Hospital and instructed Rupesh to take his mother home and to take care of her as she had become unconscious. As such the mere fact that Rupesh did not accompany Sunny to Panchsheel Hospital does not cast any doubt regarding his presence at the spot or witnessing the incident. The testimony of PW2 Sunny and PW3 Rupesh are therefore cogent,

consistent and truthful. The facts unfolded by them are found to be consistent. No inherent infirmity attacking the substratum of the case is noted in their testimony. They projected the sequence of events in a cohesive manner. True account of events have been projected by the witnesses. They are reliable witnesses and accountability of the accused can be adjudged on their testimonies.

35. As far as the testimony of PW 5 and 6 are concerned, PW-5 Shyam Khanna has deposed that on 14th October, 2006, he was present at his house. On hearing commotion from the *gali* at about 8:30 PM and on hearing the cries of *maar gaye-maar gaye*, he went outside his house in the street, where he saw a crowd of 10-15 persons. Kuldeep was lying on the ground. Blood was oozing from his body. His sister and mother were sitting near him. He remained on the spot for some time. He has not seen such a terrifying scene. He went back to his house and closed the door. After some time, police arrived at the spot after the deceased had been taken away by Sunny, younger brother of Kuldeep to hospital. Some blood had fallen on the platform built outside his house. When the police came, they collected blood from that platform and also from the *gali*. He

was called by the police to join the proceedings. The witness did not support the case of prosecution in all material particulars and, as such, he was cross-examined by learned Additional Public Prosecutor for the State and in cross-examination, he admitted that all the four accused are residents of house No. 71, Gram Sabha, Sewak Park, Uttam Nagar, Delhi. According to him, he had seen Sunny when he picked up Kuldeep and took him to hospital. However, he did not see Rupesh at that time.

36. PW6, Krishan Kumar is the cousin of the deceased Kuldeep. He has stated that on 14th October, 2006 at about 8:45 PM he was present at his house. On hearing the noise of *bachao bachao*, he came out of his house and saw that crowd had gathered. Kuldeep was lying on the ground in front of his house and also the house of Shyam Khanna. He saw all the four accused running towards their house. Accused Ravi was carrying a long knife in his hand and they left behind a *danda* on the spot. He further stated that he had seen accused Ravi stabbing Kuldeep, while accused Raj Kumar and Karambir had pinned him down. Accused Sanjay was carrying a *danda* in his hand and was standing at the spot. The mother, sister

and brother of Kuldeep were raising alarm. Sunny shifted Kuldeep to Panchsheel Hospital. Police arrived at the spot and took all the four accused persons and their family members to the police station. This witness also did not support the case of prosecution, as such, he was cross-examined by learned Public Prosecutor for the State and in cross-examination, he admitted that Sanjay left behind his bamboo stick near Kuldeep when he escaped from the spot. In cross-examination by learned counsel for the accused, he stated that when he reached the spot, mother, sister and brother of Kuldeep were present with him. He was the fourth person to reach at the spot. He further deposed that his statement was recorded on 10th November, 2006 at his house by the police officials. Earlier on the day of occurrence, the police officials made inquiries from him but he refused to make the statement to the police because accused persons are his immediate neighbours.

37. Testimony of both these witnesses have been challenged by the learned counsel for the accused, inasmuch as, they have not supported the case of prosecution. It is settled law that mere fact that witness has not supported the case of prosecution is not in itself sufficient to

reject his evidence in *toto*. The evidence of hostile witness can be relied upon at least up to the extent it supports the case of prosecution.

38. In *Sathya Narayanan v. State rep. by Inspector of Police*, (2012) 12 SCC 627, Hon'ble Supreme Court referred to its earlier decision rendered in *Mrinal Das & Others. v. State of Tripura*, (2011) 9 SCC 479 where while reiterating that corroborated part of evidence of hostile witness regarding commission of offence is admissible, it was held as under:-

"67. It is settled law that corroborated part of evidence of hostile witness regarding commission of offence is admissible. The fact that the witness was declared hostile at the instance of the Public Prosecutor and he was allowed to cross-examine the witness furnishes no justification for rejecting en bloc the evidence of the witness. However, the Court has to be very careful, as prima facie, a witness who makes different statements at different times, has no regard for the truth. His evidence has to be read and considered as a whole with a view to find out whether any weight should be attached to it. The Court should be slow to act on the testimony of such a witness, normally, it should look for corroboration with other witnesses. Merely because a witness deviates from his statement made in the FIR, his evidence cannot be held to be totally unreliable. To make it clear that evidence of hostile witness can be relied upon at least up to the extent, he supported the case of prosecution. The evidence of a person does not become effaced from the record merely because he has turned hostile and his deposition must be examined more cautiously to find out as to what extent he has supported the case of the prosecution."

39. Therefore, the testimony of PW5 Shyam Khanna, even if declared hostile, can be read to the extent of its corroboration. PW5 Shyam Khanna has proved the place of incident which was in front of

his house from where blood lying at the spot was lifted by the police in his presence. He has also established the presence of the brother, sister and mother of the deceased. He has also corroborated the version of PW2 Sunny to the extent of place of incident and the fact that it was Sunny who removed the deceased to the hospital. This witness has tried to show that he was also an eye witness to the incident but this claim of his witnessing the incident seems to be doubtful inasmuch as it has come in his testimony that he came out of his house when he heard the noise of weeping of a woman who was crying '*maar gaye, maar gaye*'. This shows that when he came out of his house, the incident had already taken place and mother and sister of the deceased had reached the spot. This being the background, the testimony of Krishan Kumar can only be read to the limited extent of place of incident; presence of brother, sister and mother of the deceased at the spot and the factum of PW2 Sunny carrying the victim to the hospital.

Recovery of Knife

40. The ocular testimony of PW2 and PW3 that appellant Ravi inflicted several knife blows on the abdomen and chest of Kuldeep,

find corroboration from the recovery of knife at the instance of appellant Ravi. It has come on record that immediately after the incident, the family members of the deceased had reached the spot. The accused were hiding inside their house. There was resentment in the area and a large number of persons had collected in the *gali* and were raising slogans of *maro-maro* on which Inspector Suresh Chand gave instructions to SI R.S. Meena, ASI Jai Prakash and other staff to preserve the scene of crime and take care of the accused persons and he also called other staff from the police station to control the crowd and take care of accused. SI Balihar Singh (PW-28), Additional SHO R.S. Chahal got opened the door of the house of the accused persons and took them out from the back side. When the accused were taken out from the room, somebody from the public pelted stone which hit on the head of the accused Karamvir due to which he sustained injuries. Thereafter, all the accused were arrested and their personal search was conducted. Accused Ravi Kumar made a disclosure statement Ex.PW2/K and pursuant to the same, he took the police party on the back side of his house at a place of worship where there was cemented water tank and took out a *chhura* which was lying

below the water tank which was blood stained and blade of *chhura* was found slightly bent from the tip. Sketch of the *chhura* Ex. PW2/O was prepared and it was seized vide memo Ex.PW2/X. The recovery of this *chhura* was effected in the presence of PW2 Sunny and PW3 Rupesh who have identified the same weapon with which injuries were inflicted on the person of Kuldeep by accused Ravi.

41. The testimony of Inspector Suresh Chand regarding making of disclosure statement by accused Ravi Kumar and subsequent recovery in pursuance to the disclosure statement find corroboration from SI R.S. Meena, PW2 Sunny and PW3 Rupesh Kumar. The knife/dagger Ex. P3 has been duly identified by PW2 and PW3 to be the same knife with which injuries were inflicted on the person of Kuldeep by accused Ravi Kumar. Furthermore, the knife was produced before Dr. Anil Shandilya (PW27) in order to obtain his subsequent opinion. The dagger Ex.P3 was examined by the doctor and thereafter, he gave his subsequent opinion that the injuries mentioned in the post mortem report could be caused by the weapon examined by him or similar like weapon. The dagger was also sent to CFSL and as per the report Ex.PW23/J, the dagger Ex.P3 got recovered by accused Ravi Kumar

soon after the incident showed positive result for human blood of group B which was also the blood of deceased Kuldeep.

Recovery of danda

42. While assaulting Kuldeep, accused Sanjay gave danda blow on the person of deceased and when PW2 and PW3 tried to rescue their brother, they were threatened by weilding this danda by accused Sanjay. After causing injuries to Kuldeep, all the accused persons ran away from the spot. The *danda* was left behind while Ravi took away the knife with him.

43. The ocular testimony of both these witnesses that accused Sanjay was carrying a *danda* with him with which he frightened Sunny and Rupesh not to come forward to save Kuldeep and the fact that he also hit Kuldeep with *danda* a couple of times find corroboration from the circumstantial evidence.

44. On receipt of information, SI Lalit Kumar (PW-12) along with members of the crime team including photographer HC Vijay Kumar (PW-1) reached the spot and both these witnesses have deposed that besides blood, one *danda* was also lying at the spot. The photographs Ex.P-2(7 to 12) also shows the presence of *danda* lying at the spot.

Insp. Suresh Chand has corroborated their testimony regarding lying of *danda* at the spot which was seized vide seizure memo Ex. PW 2/B. During the course of investigation, *danda* was sent to CFSL which gave positive report for human blood. Although the blood group could not be opined on the same but non-detection of blood group is not fatal. In *Ramnaresh & Ors. v. State of Chattisgarh*, (2012) 4 SCC 257 which was a case u/s 302/499/376(2)(g) read with Section 34 IPC, the plea taken was that the CFSL report does not connect the accused with the commission of crime as the CFSL report did not give the group of the blood/semen. Repelling the contention, it was held by Hon'ble Supreme Court that CFSL report was inconclusive but not negative which would not provide the accused with any material benefit. Although it is true that fingerprints of the accused Sanjay were not taken in order to compare the same with the fingerprints on the *danda*, but that again is not such a factor which may provide any benefit to the accused, keeping in view the testimony of PW 2 and PW3, coupled with the fact that the *danda* was found lying at the spot which was stained with blood moreover no finger prints could be detected on the *danda*.

Medical Evidence

45. Dr. R.K.Sharma (PW-9) has proved that Kuldeep was brought to Panchsheel Hospital by his relatives and his brother was accompanying him. He declared him 'brought dead' and advised him to take the deceased to DDU hospital.

46. PW16 Dr. Bhawna was posted as Casualty Medical Officer at DDU Hospital. She has deposed that on 14th October, 2006 at 11:50 PM, a patient, namely, Kuldeep was brought by Constable Roop Singh with alleged history of assault. On medical examination, she prepared his MLC Ex.PW16/A and found following injuries:-

1. Incised stabbed wound over sternum, gaping, viscera visible.
2. Incised wound- stab just below umbilicus, depth full finger could be inserted.
3. Incised wound over left side of chest lateral to mid clavicular line.
4. Incised wound over left lumbar region, tailing downward.
5. Incised wound left forearm flexor aspect below elbow.
6. Incised wound left forearm flexor aspect middle 1/3rd.
7. Incised wound left forearm extensor aspect, soft tissues exposed.
8. Clots in nostrils and bleed from oral cavity seen.

9. Subcutaneous emphysema (present of air) felt over left side chest wall.

47. PW27 Dr. Anil Shandilya conducted post mortem on the dead body of Kuldeep and prepared the post mortem report Ex.PW 27/A.

On examination he found the following injuries:-

External injuries:

1. Incised stab wound over sternum front of chest of size 2.8cm x 2cm x chest cavity deep 2.4cm lateral to midline right side with clean cut well defined regular margins with dried up blood clots.
2. Incised stab wound over left nipple longitudinally placed left side chest of size 4.8cm x 2.9cm x chest cavity deep with clean cut well defined regular margins with dried up blood clots.
3. Incised wound right side from umbilical over abdomen of size 3cm x 2cm into muscle deep with clean deep with well defined regular margins with dried up blood clots.
4. Incised wound over left lumbar region 2.5cm x 1.9cm x S.C. to muscle deep with well defined regular margins with dried up blood clots.
5. Incised wound flexor aspect left forearm 3cm below elbow or size 7cm x 3cm x muscle deep with well defined regular margins with dried up blood clots.
6. Incised wound left arm flexor aspect middle 1/3 of size 2.5cm x 2cm x muscle deep with well defined regular margins with dried up blood clots.

7. Incised wound over left forearm distal 1/3 of size 4cm x 2cm x subcutaneous to muscle deep with well defined regular margins with dried up blood clots.

Internal injuries:

1. Head: Pale (Brain matter)
2. Neck: NAD
3. Chest: Wound No.1 - penetrating right side chest wall underlying structures and entering the chest cavity piercing right lung through and through correspondingly with sharp cut.
Wound No. 2 - Penetrating left side chest wall underlying structure and left ventricle of heart through and through correspondingly with sharp cut.

Chest cavity full of liquid blood and clots about 2.6 ltrs.

4. Abdomen: All viscera pale, stomach containing semi digested unidentifiable food.
48. It was opined that cause of death was due to haemorrhage and shock resulting from injury to lungs and heart, consequent upon stab injury which was sufficient to cause death in ordinary course of nature. All injuries were ante mortem in nature caused by sharp edged weapon.
49. He further deposed that on 15.11.2006 he received an application along with one sealed parcel containing weapon of

offence. The weapon i.e. knife/churra shown to him was having reddish brown stains on both surfaces of blade and wooden handle with bend pointed tip. The inner edge was sharp in whole length and the upper edge blunt about $\frac{3}{4}$ in length and the rest tapering edge of upper border sharp with bent pointed tip. He gave his subsequent opinion along with the sketch of dagger Ex.PW27/B opining that the injuries mentioned in the post mortem report could be caused by the examined weapon of offence i.e. dagger Ex.P3 or similar like weapon.

50. It was submitted that the medical evidence is at variance with the ocular testimony, inasmuch as, according to the post mortem report and the evidence given by the doctor, no blunt injury was found on the body of the deceased Kuldeep and injuries were caused by sharp edged weapon. However, the ocular testimony is to the effect that couple of *danda* blows were given on the person of deceased Kuldeep and injuries were caused by sharp edged weapon.

51. The question before us, therefore, is whether the "medical evidence" should be believed or whether the testimony of the eye witnesses should be preferred. There is no doubt that ocular evidence

should be accepted unless it is completely negated by the medical evidence. *Abdul Sayeed v. State of M.P.*, (2010) 10 SCC 259 following *State of Haryana v. Bhagirath*, (1999) 5 SCC 96 and *Solanki Chimanbhai Ukabhai v. State of Gujarat*, (1983) 2 SCC 174. This principle has more recently been accepted in *Gangabhavani v. Rajapati Venkat Reddy*, AIR 2013 SC 3681.

52. Substantially similar question arose in *Bastiram v. State of Rajasthan*, 2014 III AD (SC) 348 and a plea was taken that the Trial Court and the High Court erroneously gave primacy to the ocular evidence disregarding the medical evidence. It will be advantageous to reproduce the relevant observations which are as under:-

“38. The expression “medical evidence” compendiously refers to the facts stated by the doctor either in the injury report or in the post mortem report or during his oral testimony plus the opinion expressed by the doctor on the basis of the facts stated. For example, an injury on the skull or the leg is a fact recorded by the doctor. Whether the injury caused the death of the person is the opinion of the doctor. As noted in *State of Haryana v. Bhagirath*, (1999) 5 SCC 96 on the same set of facts, two doctors may have a different opinion. Therefore, the opinion of a particular doctor is not final or sacrosanct.

39. What about the facts recorded by a doctor—are they sacrosanct? In *Kapildeo Mandal v. State of Bihar*, (2008) 16 SCC 99 the facts found by the doctor were preferred over the eye witness testimony. The ocular evidence was to the effect that the deceased suffered firearm injuries. However, the doctor conducting the post mortem examination stated that he did not find any indication of any firearm injury on the person of the deceased. No pellets, bullets or any cartridge were found in any of

the wounds. Accepting the "medical evidence" on facts, it was observed that:

"[T]he medical evidence is to the effect that there were no firearm injuries on the body of the deceased, whereas the eyewitnesses' version is that the Appellant-accused were carrying firearms and the injuries were caused by the firearms. In such a situation and circumstance, the medical evidence will assume importance while appreciating the evidence led by the prosecution by the court and will have priority over the ocular version and can be used to repel the testimony of the eyewitnesses as it goes to the root of the matter having an effect to repel conclusively the eyewitnesses' version to be true.

40. Similarly, a fact stated by a doctor in a post mortem report could be rejected by a Court relying on eye witness testimony, though this would be quite infrequent. In *Dayal Singh v. State of Uttaranchal*, (2012) 8 SCC 263 the post mortem report and the oral testimony of the doctor who conducted that examination was that no internal or external injuries were found on the body of the deceased. This Court rejected the "medical evidence" and upheld the view of the Trial Court (and the High Court) that the testimony of the eye witnesses supported by other evidence would prevail over the post mortem report and testimony of the doctor. It was held:

"[T]he trial court has rightly ignored the deliberate lapses of the investigating officer as well as the postmortem report prepared by Dr C.N. Tewari. The consistent statement of the eyewitnesses which were fully supported and corroborated by other witnesses, and the investigation of the crime, including recovery of lathis, inquest report, recovery of the pagri of one of the accused from the place of occurrence, immediate lodging of FIR and the deceased succumbing to his injuries within a very short time, establish the case of the prosecution beyond reasonable doubt. These lapses on the part of PW 3 [doctor] and PW 6 [investigating officer] are a deliberate attempt on their part to prepare reports and documents in a designedly defective manner which would have prejudiced the case of the prosecution and resulted in the acquittal of the accused, but for the correct approach of the trial court to do justice and ensure that the guilty did not go scot-free. The evidence of the eyewitness which was reliable and worthy of credence has justifiably been relied upon by the court."

41. *An opinion given by a doctor, based on the facts recorded on an examination of a victim of a crime, could be rejected by relying on cogent and trustworthy eye witness testimony.”*

53. Reverting to the case in hand, according to Dr. Anil Shandilya, injuries were by sharp edged weapon. No question was put by either of the sides as to whether any injury could have been caused by blunt object. However, a specific question was put to Dr. Bhawna in her cross examination as to whether in the MLC of Kuldeep, she found any injury caused by a blunt weapon and she replied:

Injury No.9 – subcutaneous emphysema over the chest could have been caused by both- a blunt instrument or a sharp instrument. This injury was one in which there was air under the skin and this could have been possible either on account of the knife given on the chest or because of breaking of ribs or otherwise. This breaking of ribs could have taken place either by way of a blunt force impact or fall.

54. Under the circumstances, the possibility of Injury no.9 caused by blunt object could not be ruled out by Dr. Bhawna. Therefore, it cannot be said that no injury was caused by *danda* by accused Sanjay. The *danda* was also blood stained and on scientific examination,

human blood was detected on the same. Even assuming for the sake of argument that the *danda* was not used for causing any injury on the person of Kuldeep, at least it stands proved that the same was used by him to prevent Sunny and Rupesh to come forward to save their brother Kuldeep and they were threatened by wielding this *danda*.

Scientific evidence

55. The scientific evidence also conclusively proves the case of prosecution. During the course of investigation, following articles were seized:-

- (i) From the spot, blood sample, blood stained earth, sample earth, pair of blood stained *hawai chappal* make Rexona Ex.P-1 belonging to deceased Kuldeep and a blood stained *danda* Ex.P2 were seized vide seizure memo Ex.PW 2/B;
- (ii) A dagger/churra Ex.P3 was recovered at the instance of accused Ravi which was seized vide seizure memo Ex.PW2/X;
- (iii) After the arrest of accused persons, their clothes were seized vide seizure memos Ex.PW2/Q, Ex.PW2/R, Ex.PW2/S and Ex.PW2/P.

(iv) The clothes of complainant Sunny were seized vide seizure memo Ex.PW2/T;

(v) After post mortem examination, doctor handed over clothes of the deceased and his blood sample which were seized vide seizure memo Ex.PW 23/H.

56. All these exhibits were sent to CFSL, Kokatta and as per the CFSL report Ex.PW23/J, pair of Hawai Chappal, *danda*/bamboo stick, dagger, pant, banian of accused Ravi Kumar; shirt, pant and banian of accused Karamvir; T-Shirt, half pant and shirt of PW-2 Sunny; shirt, vest, jeans and vest of deceased Kuldeep gave positive result for “human blood”. However, no blood could be detected on the clothes of accused Sanjay and Raj Kumar. On the dagger, clothes of accused Ravi Kumar, clothes of PW-2 Sunny, human blood of Group B was detected which was the blood group of the deceased. The effect of the same is that the human blood of B group which was of the deceased was found on the dagger Ex.P-3 which was got recovered from accused Ravi Kumar and proves that it was the same dagger which was used as a weapon in committing the offence. The bamboo stick/*danda* Ex.P-2 used by accused Sanjay which he left at

the spot while running away also showed positive result of human blood establishing that it was used on the victim. The clothes of Sunny Ex.P-14 to P-17 gave positive result of human blood of Group B which establishes presence of Sunny at the spot and that he had taken the deceased to the hospital and, therefore, while removing the deceased to hospital, his blood came on his clothes. The clothes of accused Ravi Kumar, Ex. P-5 and P-6 also showed positive result for human blood of Group B as that of deceased Kuldeep establishing his presence at the spot of incident and that the blood of the deceased Kuldeep came on his clothes while he attacked Kuldeep. Clothes of accused Karamvir Ex.P-7 to P-9 also gave positive result for human blood. The allegations against accused Karamvir was of catching hold of the deceased from his legs and the presence of human blood on his clothes establishes his presence at the spot. Moreover, no explanation has been given either by accused Ravi Kumar or Karamvir as to how blood came on their clothes.

57. Much emphasis was laid by learned counsel for the appellants Raj Kumar and Sanjay that no blood was detected on their clothes. The allegations against accused Raj Kumar are of catching hold of

hands of deceased Kuldeep and therefore, blood may not have come on his clothes. As regards Sanjay is concerned, the allegations against him are of wielding *danda* at Sunny and Rupesh to prevent them from helping the deceased and of giving *danda* blows to the deceased. The mere non-detection of blood on his clothes does not ipso facto prove his absence at the spot or non-participation in the commission of offence.

58. The result of the aforesaid discussion is that testimony of PW-2 and PW-3 are of sterling quality and both the witnesses stood the test of cross examination. Moreover their ocular version of the incident find substantial corroboration from the recovery of weapon of offence, medical evidence and the scientific evidence.

Motive

59. Motive to commit crime in the instant case is writ large inasmuch as it is evident from the testimony of prosecution witnesses that deceased Kuldeep was having a love affair with Sapna, daughter of accused Ravi Kumar, due to which differences had arisen between the families. According to PW-2 Sunny and PW-4 Prem Lata, accused Ravi Kumar had even given beatings to his daughter Sapna

and two to three months prior to the incident had sent her to her maternal uncle's house. He had also threatened Kuldeep and asked him to desist from his activities. Not only that accused Ravi Kumar and Sanjay had visited the house of Prem Lata and asked her to advise Kuldeep to refrain from his activities. Even the Investigating Officer Suresh Chand has deposed that there was previous dispute between the parties since the deceased had distributed the objectionable photographs of the daughter of the accused Ravi. On this account Ravi had sent his daughter to Rajasthan at her maternal uncle's house despite which he continued with this objectionable behaviour. The photograph of deceased Kuldeep with Sapna, Ex.PW 2/V and PW 2/W proves the same. It was in this background that on the fateful day when deceased Kuldeep along with his brother Sunny and cousin Rupesh were returning from Balmiki Mandir, all the four accused in order to take revenge since reputation of their family was at stake, committed the gruesome murder.

60. In *Molu v. State of Haryana*, AIR 1976 SC 2499, it was observed that when the direct evidence regarding the assault is worthy of credence and can be believed, the question of motive becomes

more or less academic. Sometimes motive is clear and can be proved. However, sometimes the motive is shrouded in mystery and it is very difficult to locate the same. If, however, the evidence of the eye witnesses is credit worthy and is believed by the Court which has placed implicit reliance on them, the question whether there is motive or not becomes wholly irrelevant. To the same effect is the law laid down in *Rishi Pal v. State of Uttarakhand*, 2013 II AD (SC) 103.

61. Keeping in view the testimony of PW2 and PW4, the eye witness account of the incident narrated by PW Sunny and Rupesh and the other circumstances available on record, the motive to commit the crime is established beyond reasonable doubt.

Non examination of independent witnesses

62. It was submitted by learned counsel for the appellants that despite the fact that number of persons had gathered at the spot but no independent witness was joined in the proceedings. It is common experience that public persons are generally reluctant to join police proceedings. There is general apathy and indifference on the part of public to join such proceedings. In *Appabhai & Anr. v. State of*

Gujarat, AIR 1988 SC 696, it was held by Hon'ble Supreme Court that:

"11. It is no doubt true that the prosecution has not been able to produce any independent witness to the incident that took place at the bus stand. There must have been several of such witnesses. But the prosecution case cannot be thrown out or doubted on that ground alone. Experience reminds us that civilized people are generally insensitive when a crime is committed even in their presence. They withdraw both from the victim and the vigilante. They keep themselves away from the Court unless it is inevitable. They think that crime like civil dispute is between two individuals or parties and they should not involve themselves. This kind of apathy of the general public is indeed unfortunate, but it is there everywhere whether in village life, towns or cities. One cannot ignore this handicap with which the investigating agency has to discharge its duties. The court, therefore, instead of doubting the prosecution case for want of independent witness must consider the broad spectrum of the prosecution version and then search for the nugget of truth with due regard to probability, if any, suggested by the accused."

63. Hon'ble Supreme Court in **Krishna Mochi v. State of Bihar**, 2002 6 SCC 81 in this regard held as under:

"31. It is matter of common experience that in recent times there has been sharp decline of ethical values in public life even in developed countries much less developing one, like ours, where the ratio of decline is higher. Even in ordinary cases, witnesses are not inclined to depose or their evidence is not found to be credible by courts for manifold reasons. One of the reasons may be that they do not have courage to depose against an accused because of threats to their life, more so when the offenders are habitual criminals or high-ups in the Government or close to powers, which may be political, economic or other powers including muscle power. A witness may not stand the test of cross-examination which may sometimes be because he is a bucolic person and is not able to understand the question put to him by the skilful cross-examiner and at times under the stress of cross-examination, certain answers are snatched from him. When a rustic or illiterate witness faces an astute lawyer, there is bound to be imbalance and, therefore, minor discrepancies have to be ignored. These days it is not difficult to gain over a witness by money power or giving him any other allurement or giving out threats to his life

and/or property at the instance of persons, in/or close to powers and muscle men or their associates. Such instances are also not uncommon where a witness is not inclined to depose because in the prevailing social structure he wants to remain indifferent.”

64. The apathy and indifferent attitude of the public at large is manifest from the material available on record, inasmuch as,

i) PW6 Krishan Kumar is the first cousin of the deceased. It has come in his cross-examination that police officials met him on the day of occurrence and made inquiries from him but he refused to make the statement to the police because the accused persons were his immediate neighbours. It was only on 10th November, 2006 that his statement could be recorded by the police. If being close relative of the deceased, he was hesitant in making statement to the police since the accused persons and the complainant party were resident of the same locality, therefore, he did not want to depose against accused persons due to neighbourhood, then, possibility of any other independent person of the locality coming forward to join the investigation is quite remote. Moreover, when he appeared in Court, he chose not to support the prosecution version.

ii) PW5 Shyam Khanna was the resident of the same locality and the gruesome murder has taken place in front of his house. Even this

witness has deposed that on hearing commotion in the *gali*, he came outside his house and saw Kuldeep lying on the ground and blood was oozing from his body. Large number of people had gathered there. After sometime, he went back to his house and closed the door. Since blood had fallen on the platform built outside his house, therefore, when police came and collected the blood from that platform and also from *gali*, then he was called by the police to join the proceedings. Even then when he appeared in the witness box, he chose not to support the case of prosecution.

(iii) It has come in the statement of PW15 Constable Roop Singh that on receipt of information regarding commission of murder, he went to the spot and came to know that injured had been removed to Panchsheel Hospital. Therefore, he went to Panchsheel Hospital where he met Sunny who was standing outside the hospital and wanted to shift his brother to DDU Hospital but was unable to arrange any vehicle. As such, he requested one private van for taking the injured to DDU hospital. On his asking, the van driver took the injured in his van, however, at Uttam Nagar Bus Terminal, the driver of the van stopped the vehicle and refused to go further saying that

Kuldeep has already expired and he did not want to be involved in any court case. It was only after his persistent asking, after quite some time, that he agreed and took the injured to DDU hospital but he did not disclose his name and address. All this reflects that although on humanitarian grounds, the private van driver initially agreed to take the injured to DDU Hospital but later on refused to go further as he did not want to be involved in any court case. The first cousin of the deceased Krishan Kumar (PW5) initially refused to give any statement, the accused being his neighbour. PW5 Shyam Khanna despite deposing that he had never seen such a terrifying scene chose to close the door of his house instead of rendering any help to Sunny and Rupesh to remove injured to hospital. In that scenario, if any other independent person of the locality did not agree to join, no adverse inference can be drawn. Moreover, there is no reason to disbelieve the testimony of PW2 and PW3 which find corroboration to some extent from PW5 Shyam Khanna and PW6 Krishan Kumar and all the other circumstantial evidence as discussed above.

Place of incident:-

65. The case of the prosecution is that the murder of deceased had

taken place opposite the house of Shyam Khanna and Krishan Kumar whereas the case of defence is that the murder of Kuldeep had been committed by some unknown person near the metro station and accused persons were falsely implicated on the basis of suspicion. For raising this submission, reliance was placed on Ex. PW23/DA vide which a call was given to PCR at 2055 regarding a quarrel at Sewak Park Metro Station, near Kakrola. At 2056, another call was made that a boy, namely, Kuldeep, s/o Jasbir, r/o House No. 73, Gram Sabha, Sewak Park, Uttam Nagar had a quarrel in which he received knife blows. He has been removed to Panchsheel Heart and Medical Centre where he was declared 'brought dead' by the doctor. Relying upon this information given to PCR, it was submitted that Kuldeep sustained knife injuries in a quarrel at Sewak Park Metro Station near Kakrola and was removed by some people from Sewak Park to Panchsheel Heart and Medical Centre where he was declared 'brought dead'. However, on the basis of suspicion, the accused persons were falsely implicated in this case.

66. The accused persons cannot get any benefit from the PCR call. According to Inspector Suresh Chand on verification, it was found

that this PCR call Ex. PW23/DA was made by accused Raj Kumar. As per record, accused Raj Kumar was working as Constable in Delhi Police. As such, possibility of making this call for the purpose of creating a defence cannot be ruled out. Moreover, seeing the gruesome murder of Kuldeep, there was agitation amongst the residents of the area and in order to bring the situation under control, extra police force had to be called by Inspector Suresh Chand at the spot. Large crowd gathered outside the house of accused persons and were raising slogan '*maro maro*' and being apprehensive of danger to their lives this call of quarrel may have been made by the accused Raj Kumar. All the accused were hiding inside their houses. The relatives of the deceased and the persons of the locality were in aggressive mood and wanted to take revenge. Situation was very tensed. Even when the accused persons were taken out from their house, somebody from the public threw a stone which hit on the head of Karamvir due to which he sustained injuries.

67. Moreover, vide DD No.46 Ex. PW15/C at 9:35 PM information was given that a murder had taken place at Dwarka Mor, Sewak Park near the house of Ashok Bagri. Prior thereto DD No.40A

Ex.PW23/A was also recorded on receipt of information from W60 operator at 9:15 PM regarding a murder near the house of Ashok Bagri at Dwarka Mor, Sewak Park. As per this DD, ASI Jai Prakash was being sent to the spot. Information was also given to additional SHO, Inspector Suresh Chand and in-charge PP R.S. Meena. Inspector Suresh Chand, PW23 has deposed that on receipt of DD No.40A Ex.23/A, he along with Additional SHO Inspector R.S. Chahal reached at the spot, i.e., opposite house No. B-1, Sewak Park, Uttam Nagar where he met SI R.S. Meena, ASI Jai Prakash, Costable Nasib Singh and other staff and found blood lying in the *gali* opposite house No. B-1, Sewak Park and on the wall of *chabootra*. Besides that, one *danda* and one pair of blood stained *hawai chappal* of the deceased was also lying at the spot. The Crime Team comprising of SI Lalit Kumar(PW12) and Head Constable Vijay Kumar(PW1) also reached the place, i.e., House No. B-1, Sewak Park, Uttam Nagar and prepared the Crime Team report Ex.PW12/A and photographs Ex.P2 (7 to 12) were taken.

68. PW2 and PW3 have also deposed regarding commission of murder of Kuldeep near the house of Shyam Khanna. PW5 Shyam

Khanna is resident of B-2A, Sewak Park, Uttam Nagar. This witness has also deposed that on hearing the commotion in the *gali* and hearing the cries of '*maar gaye-maar gaye*', he came outside his house in the *gali* and saw deceased lying on the ground, blood was oozing from his body. Some blood had fallen on the platform built outside his house. House of PW6 Krishan Kumar is opposite the house of PW5 Shyam Khanna and this witness has also deposed that Kuldeep was lying on the ground in front of his house and that of the house of Shyam Khanna. Under the circumstances, there is no doubt about the place of incident which stand established from the oral testimony of the witness coupled with the crime team management report.

Delay in lodging FIR

69. It is urged by the learned counsel for the appellants that there is delay in lodging FIR and in the absence of explanation, the case of prosecution should be thrown overboard. Delay in the lodging of the FIR is not by itself fatal to the case of the prosecution nor can delay itself create any suspicion about the truthfulness of the version given by the informant just as a prompt lodging of the report may be no

guarantee about its being wholly truthful. So long as there is cogent and acceptable explanation offered for the delay it loses its significance. Whether or not the explanation is acceptable will depend upon the facts of each case. There is no cut and dried formula for determining whether the explanation is or is not acceptable.

70. In this context, we may refer with profit to the judgment rendered in *State of H.P. v. Gian Chand*, (2001) 6 SCC 71 wherein a three-Judge Bench has opined that the delay in lodging the FIR cannot be used as a ritualistic formula for doubting the prosecution case and discarding the same solely on the ground of delay. If the explanation offered is satisfactory and there is no possibility of embellishment, the delay should not be treated as fatal to the case of the prosecution.

71. In *Ramdas and Ors. v. State of Maharashtra*, (2007) 2 SCC 170, it has been ruled that when an FIR is lodged belatedly, it is a relevant fact of which the court must take notice of, but the said fact has to be considered in the light of other facts and circumstances of the case. It is obligatory on the part of the court to consider whether the delay in lodging the report adversely affects the case of the

prosecution and it would depend upon the matter of appreciation of evidence in totality.

72. In *Kilakkatha Parambath Sasi and Ors. v. State of Kerala*, AIR 2011 SC 1064, it has been laid down that when an FIR has been lodged in a belated manner, inference can rightly follow that the prosecution story may not be true but equally on the other side, if it is found that there is no delay in the recording of the FIR, it does not mean that the prosecution story stands immeasurably strengthened. Similar view has also been expressed in *Kanhaiya Lal and Ors. v. State of Rajasthan*, 2013 (6) SCALE 242.

73. In *Shanmugam (supra)* there was a delay of few hours in lodging the FIR. In that case also, the brother of the deceased returned to the place of occurrence after the accused persons had left only to find his brother dead with his face and head severely injured. He travelled to Harur to inform his brother who accompanied him to the place of occurrence in a car and then to the police station where the first information report was lodged. It was observed that some time was obviously wasted in this process of travel to and from the place of occurrence and to the police station for lodging the report.

The report gave a detailed account of the incident. The version given by author of the FIR remained consistent with the version given in the first information report and as such, it was observed that there was no reason to disbelieve the prosecution case only because the first information report was delayed by a few hours especially when the delay was satisfactorily explained.

74. Scrutinized on the anvil of the aforesaid enunciation of law, we are disposed to think that the case at hand does not reveal that the absence of spontaneity in the lodgement of the FIR has created a coloured version.

75. It is a matter of record that the incident has taken place at about 8:30 pm. Immediately thereafter, the injured was removed to Panchsheel Heart and Medical Centre by PW2 Sunny where, after examination Dr.R.K. Sharma declared Kuldeep dead. However, Sunny insisted that Kuldeep be thoroughly examined. Therefore, Dr. R.K. Sharma advised him to take Kuldeep to DDU Hospital in case he was not satisfied. Since no ambulance was available, Sunny tried to stop number of vehicles but in vain. When Constable Roop Singh reached Panchsheel Hospital and was informed by Sunny that he

wanted to take his brother to DDU Hospital then he managed to stop a private van and carried the deceased to DDU Hospital. Sunny, however returned to the spot in order to inform his family members and thereafter he went to DDU Hospital where he met Inspector Suresh Chand who recorded his statement Ex. PW2/A, where after FIR was got registered. The report Ex. PW2/A gave a detailed account of the incident. The version given by the author of the FIR remained consistent with the version given in the First Information Report, as such, there is no reason to disbelieve the prosecution case only because the First Information Report was delayed by a few hours specially when the delay was satisfactorily explained.

Plea of alibi

76. The appellants in their statement recorded under Section 313 Cr. P.C. have tried to take a plea of alibi by stating that the alleged incident took place on a Saturday and they were busy in the *chowki of Kali Mata*. Police came to their house and took them and falsely implicated in this case.

77. When an alibi is set up, the burden is on the accused to lend credence to the defence put up by him.

78. Explaining the essence of a plea of alibi, it was observed in

Dudh Nath Pandey v. State of U.P., (1981) 2 SCC 166 that:

“The plea of alibi postulates the physical impossibility of the presence of the accused at the scene of offence by reason of his presence at another place. The plea can therefore succeed only if it is shown that the accused was so far away at the relevant time that he could not be present at the place where the crime was committed.”

79. This was more elaborately explained in ***Binay Kumar Singh v.***

State of Bihar, (1997) 1 SCC 283 in the following words:

“22. We must bear in mind that an alibi is not an exception (special or general) envisaged in the Indian Penal Code or any other law. It is only a rule of evidence recognised in Section 11 of the Evidence Act that facts which are inconsistent with the fact in issue are relevant.”

“23. The Latin word alibi means "elsewhere" and that word is used for convenience when an accused takes recourse to a defence line that when the occurrence took place he was so far away from the place of occurrence that it is extremely improbable that he would have participated in the crime. It is a basic law that in a criminal case, in which the accused is alleged to have inflicted physical injury to another person, the burden is on the prosecution to prove that the accused was present at the scene and has participated in the crime. The burden would not be lessened by the mere fact that the accused has adopted the defence of alibi. The plea of the accused in such cases need be considered only when the burden has been discharged by the prosecution satisfactorily. But once the prosecution succeeds in discharging the burden it is incumbent on the accused, who adopts the plea of alibi, to prove it with absolute certainty so as to exclude the possibility of his presence at the place of occurrence. When the presence of the accused at the scene of occurrence has been established satisfactorily by the prosecution through reliable evidence, normally the court would be slow to believe any counter-evidence to the effect that he was elsewhere when the occurrence happened. But if the evidence adduced by the accused is of such a quality and of such a standard that the court may entertain some reasonable doubt regarding his presence at the scene when the occurrence took place, the accused would, no doubt, be entitled to the benefit of

that reasonable doubt. For that purpose, it would be a sound proposition to be laid down that, in such circumstances, the burden on the accused is rather heavy. It follows, therefore, that strict proof is required for establishing the plea of alibi.”

80. In *Sk. Sattar v. State of Maharashtra*, (2010) 8 SCC 430, it was held that plea of alibi has to be proved with absolute certainty so as to completely exclude the possibility of the presence of the accused at the place of incident at the relevant time.

81. Reverting to the case in hand, PW4 Smt. Premlata, mother of the deceased has admitted in cross-examination that accused Sanjay is a *tantric* and on every Saturday, he used to perform *puja* inside his house and people used to visit him to seek solutions for their problems. However, according to her, Sanjay performs *pooja* between 5:00 to 8:00 pm and she denied the suggestion that Sanjay performs *pooja* till 10:00 pm or that on the date of incident large number of persons were present in the *gali* till late hours, who visited the accused Sanjay for *pooja* and *chowki*. PW6 Krishan Kumar although did not support the case of prosecution, but in regard to this aspect, he supported the prosecution version by deposing that accused Sanjay performs *pooja*, however, he could not say if accused Sanjay sat on *mata ki chowki* on that day. He denied the suggestion that none of the

accused were present at the place of occurrence or that he neither saw the accused persons stabbing Kuldeep nor running away from the spot. The incident in question had taken place around 8:30 pm. Even if it is believed that accused Sanjay performs *pooja* and is visited by *mata ki chowki*, the onus of proving the fact that at the relevant time, he or any of the other accused were not present at the spot, was upon the accused persons and absolutely no evidence has been led by them to prove their presence in the house for performing *mata ki chowki*. As such, the plea of alibi taken up by the accused persons is not proved.

82. The foregoing discussion, goes to show that prosecution has been able to establish that before Ravi Kumar stabbed Kuldeep, both Sunny and Rupesh were kept away by the accused Sanjay who was carrying a *danda* and threatened them and it was accused Ravi, who exhorted his brothers that Kuldeep had defamed his family on account of an affair with his daughter and they should kill him on which Raj Kumar caught hold of the hands of Kuldeep whereas Karamvir caught hold of Kuldeep's feet and pinned down Kuldeep while accused Ravi Kumar inflicted knife blows on the abdomen and chest of Kuldeep.

83. In fact, all the submissions made by the learned counsel for the appellants challenging the incident in question loses significance, as during the course of argument, it was admitted by learned counsel for the appellant Ravi that such an incident had taken place but it was submitted that the circumstances in which the incident had taken place deserves to be noticed. According to him, since the deceased was defaming his daughter and was bringing disrepute to his family, as such, due to sudden and grave provocation, the offence had been committed, as such, the case falls under the exception clause and his conviction under Section 302 IPC is liable to be converted under Section 304 IPC.

84. Learned Additional Public Prosecutor for the State countered the submission by submitting that no such plea was taken by the appellant before the Trial Court, rather during the trial, the case of the appellant was one of denial simpliciter and of false implication. Now, at this stage, the appellant cannot be permitted to take the plea of grave and sudden provocation which is otherwise not proved in the facts and circumstances of the case.

85. In *State of Rajasthan v. Manoj Kumar*, 2014 V AD (S.C.) 243, a similar question arose where the accused persons took the plea of right of private defence in appeal and the same was opposed by the learned counsel for the State on the ground that such a plea was never taken by the accused in their statement under Section 313 Cr.P.C., hence High Court cannot advert to the same. Repelling the contention of learned counsel for the State, Hon'ble Supreme Court observed as under:-

*"11. we may refer with profit to the pronouncement in **Munshi Ram and Ors. v. Delhi Administration** (1968) 2 SCR 455 wherein it has been laid that even if an accused does not take the plea of private defence, it is open to the court to consider such a plea if the same arises from the material on record and burden to establish such a plea is on the accused and that burden can be discharged by showing preponderance of probabilities in favour of that plea on the basis of material on record. In **Salim Zia v. State of Uttar Pradesh** (1979) 2 SCC 648 the observation made by this Court to the effect that it is true that the burden on an accused person to establish the plea of self-defence is not as onerous as the one which lies on the prosecution and that while the prosecution is required to prove its case beyond reasonable doubt, the accused need not establish the plea to the hilt and may discharge his onus by establishing a mere preponderance of probabilities either by laying basis for that plea in the cross-examination of prosecution witnesses or by adducing defence evidence. Similarly, in **Mohd. Ramzani v. State of Delhi** 1980 Supp SCC 215, it has been held that it is trite that the onus which rests on an accused person Under Section 105, Evidence Act, to establish his plea of private defence is not as onerous as the un shifting burden which lies on the prosecution to establish every ingredient of the offence with which the accused is charged, beyond reasonable doubt."*

86. In view of this legal proposition even if no such plea was taken

by the appellant before the Trial Court, it is to be seen whether the appellant has been able to establish such a plea on the basis of material available on record. Before doing so, let us now discuss the principles governing Sections 300 and 302 of the Indian Penal Code.

87. Sections 299 and 300 of the Code deal with the definition of 'culpable homicide' and 'murder', respectively. In terms of Section 299, 'culpable homicide' is described as an act of causing death (i) with the intention of causing death or (ii) with the intention of causing such bodily injury as is likely to cause death, or (iii) with the knowledge that such an act is likely to cause death. As is clear from a reading of this provision, the former part of it, emphasises on the expression 'intention' while the latter upon 'knowledge'. Both these are positive mental attitudes, however, of different degrees. The mental element in 'culpable homicide', that is, the mental attitude towards the consequences of conduct is one of intention and knowledge. Once an offence is caused in any of the three stated manners noted-above, it would be 'culpable homicide'. Section 300, however, deals with 'murder' although there is no clear definition of 'murder' in Section 300 of the Code. As has been repeatedly held by

Supreme Court, 'culpable homicide' is the genus and 'murder' is its species and all 'murders' are 'culpable homicides' but all 'culpable homicides' are not 'murders'.

88. Supreme Court in the case of *Vineet Kumar Chauhan v. State of U.P.*, (2007) 14 SCC 660 noticed the academic distinction between 'murder' and 'culpable homicide not amounting to murder' vividly brought out in *State of A.P. v. Rayavarapu Punnayya*, (1976) 4 SCC 382, where it was observed as under:

“... that the safest way of approach to the interpretation and application of Section 299 and 300 of the Code is to keep in focus the key words used in various clauses of the said sections. Minutely comparing each of the clauses of Section 299 and 300 of the Code and the drawing support from the decisions of the court in Virsa Singh v. State of Punjab and Rajwant Singh v. State of Kerala, speaking for the court, Justice RS Sarkaria, neatly brought out the points of distinction between the two offences, which have been time and again reiterated. Having done so, the court said that wherever the Court is confronted with the question whether the offence is murder or culpable homicide not amounting to murder, on the facts of a case, it would be convenient for it to approach the problem in three stages. The question to be considered at the first stage would be that the accused has done an act by doing which he has caused the death of another. Two, if such causal connection between the act of the accused and the death, leads to the second stage for considering whether that act of the accused amounts to culpable homicide as defined in Section 299. If the answer to this question is in the negative, the offence would be culpable homicide not amounting to murder, punishable under the First or Second part of Section 304, depending respectively, on whether this second or the third clause of Section 299 is applicable. If this question is found in the positive, but the cases come within any of the exceptions enumerated in Section 300, the offence would still be culpable homicide not amounting to murder, punishable under the first part of Section 304 of the Code. It was, however, clarified that these were only

broad guidelines to facilitate the task of the court and not cast-iron imperative.”

89. Having understood the legal principles governing Sections 302 and 304 IPC, let us now examine whether appellant no.1’s case, as he claims, falls under Exception 1 of 300 which offence would be punishable under the first part of Section 304 of the Code or whether the conviction of the appellant by the trial court is liable to be confirmed.

90. In order to examine whether the case of the appellant comes under Exception 1 of Section 300 IPC, let us extract the provision which is as follows:

“Exception 1.-When culpable homicide is not murder.-Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.

The above exception is subject to the following provisos:-

First.-That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person

Secondly.-That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

Thirdly.-That the provocation is not given by anything done in the lawful exercise of the right of private defence.

Explanation.-Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact."

91. We may now refer to the celebrated case of ***K.M. Nanavati v. State of Maharashtra***, 1962 Supp (1) SCR 567, wherein the Supreme Court extensively dealt with the aspect of grave and sudden provocation and observed as under:

"135. Homicide is the killing of a human being by another. Under this exception, culpable homicide is not murder if the following conditions are complied with: (1) The deceased must have given provocation to the accused. (2) The provocation must be grave. (3) The provocation must be sudden. (4) The offender, by reason of the said provocation, shall have been deprived of his power of self-control. (5) He should have killed the deceased during the continuance of the deprivation of the power of self-control. (6) The offender must have caused the death of the person who gave the provocation or that of any other person by mistake or accident.

152. Is there any standard of a reasonable man for the application of the doctrine of "grave and sudden" provocation ? No abstract standard of reasonableness can be laid down. What a reasonable man will do in certain circumstances depends upon the customs, manners, way of life, traditional values etc.; in short, the cultural, social and emotional background of the society to which an accused belongs. In our vast country there are social groups ranging from the lowest to the highest state of civilization. It is neither possible nor desirable to lay down any standard with precision : it is for the court to decide in each case, having regard to the relevant circumstances. It is not necessary in this case to ascertain whether a reasonable man placed in the position of the accused would have lost his self-control momentarily or even temporarily when his wife confessed to him of her illicit intimacy with another, for we are satisfied on the evidence that the accused regained his self-control and killed Ahuja deliberately.

153. The Indian law, relevant to the present enquiry, may be stated thus: (1) The test of "grave and sudden" provocation is whether a reasonable man, belonging to the same class of society as the accused, placed in the situation in which the accused was placed would be so

provoked as to lose his self-control. (2) In India, words and gestures may also, under certain circumstances, cause grave and sudden provocation to an accused so as to bring his act within the first Exception to s. 300 of the Indian Penal Code. (3) The mental background created by the previous act of the victim may be taken into consideration in ascertaining whether the subsequent act caused grave and sudden provocation for committing the offence. (4) The fatal blow should be clearly traced to the influence of passion arising from that provocation and not after the passion had cooled down by lapse of time, or otherwise giving room and scope for premeditation and calculation."

92. In ***Sukhlal Sarkar v. Union of India (UOI) Ors***, (2012) 5 SCC

703, Supreme Court held as under:

"10. The meaning of the expressions "grave" and "sudden" provocation has come up for consideration before this Court in several cases and it is unnecessary to refer to the judgments in those cases. The expression "grave" indicate that provocation be of such a nature so as to give cause for alarm to the Appellant. "Sudden" means an action which must be quick and unexpected so far as to provoke the Appellant. The question whether provocation was grave and sudden is a question of fact and not one of law. Each case is to be considered according to its own facts.

11. Under Exception 1 of Section 300, provocation must be grave and sudden and must have by gravity and suddenness deprived the Appellant of the power of self-control, and not merely to set up provocation as a defence. It is not enough to show that the Appellant was provoked into losing his control, must be shown that the provocation was such as would in the circumstances have caused the reasonable man to lose his self-control. A person could claim the benefit of provocation has to show that the provocation was grave and sudden that he was deprived of power of self-control and that he caused the death of a person while he was still in that state of mind."

93. Applying these legal principles to the facts of the case, it can be said that the defence of accused that his case is covered under Exception 1 of Section 300 does not hold any ground. The plea of

sudden and grave provocation can be taken only when a person is so deeply provoked that he loses his self-control and causes the death of a person while still being in that state of mind. PW2 Sunny in his testimony had stated that on account of the affair between the deceased Kuldeep and Sapna, the family of accused Ravi Kumar had enmity with Kuldeep. He further stated that about a month prior to this incident, Ravi Kumar had caused beatings to his daughter Sapna for being in love with Kuldeep and had sent her away to her maternal uncle's house. This part of the testimony also finds corroboration from the testimony of PW4 Premlata, mother of deceased Kuldeep, who stated that about 2-3 months prior to this occurrence, accused Ravi gave beatings to his daughter Sapna and sent her to her mama's house. PW4 also stated that about 2-3 months prior to this occurrence, accused Ravi and Sanjay came to her house complaining that accused Kuldeep used to tease Sapna and that she should advise him to refrain from doing the same. It is therefore clear that Appellant Ravi had learnt about the affair between Kuldeep and his daughter Sapna much prior to the date of incident. Nothing occurred on the date of the occurrence to have

provoked the accused to lose his self control or to cause his death while still in that state of mind. Hence, the defence of sudden and grave provocation is not available to Appellant no.1. Another relevant point that discards his theory of sudden and grave provocation is that it is proved from the evidence on record that the accused persons were armed with weapons when they came out of the *gali* in front of house No.B-1, Sewak Park. While accused Sanjay was carrying a *danda*, Accused Ravi Kumar was carrying a large knife (Churra). According to the post-mortem report, accused persons inflicted as many as 7 incised wound injuries on vital parts of the body of the deceased, like the lungs and the heart, which according to PW27 Dr Anil Shandilya, Senior Resident, DDU Hospital, were sufficient to cause death in the ordinary course of nature.

94. Learned counsel for the accused Raj Kumar, Karamvir and Sanjay submitted that the only role ascribed to accused Raj Kumar and Karamvir is that of catching hold of the hands and feet of the deceased whereas, the role qua accused Sanjay, as proved on record, is only regarding wielding of *danda* to prevent PW2 & PW3 coming

to rescue of Kuldeep. None of these accused, according to the learned counsels, shared any common intention to commit the murder of deceased.

95. The nuances of Section 34 of the Indian Penal Code has been explained by Hon'ble Supreme Court in several decisions, but we will only refer to the decision in the case of *Nadodi Jayaraman and Ors. v. State of Tamil Nadu*, (1992) 3 SCC 161 and *Saravanan and Anr. v. State of Pondicherry*, (2004) 13 SCC 238. In the case of *Nadodi Jayaraman and Ors.* (Supra), the Court has observed:

"9. Section 34 of Indian Penal Code enacts that when a criminal act is done by several persons in furtherance of the common intention of all, each of such persons, is liable for that act in the same manner as if it were done by him alone. The section thus lays down a principle of joint liability in the doing of a criminal act. The essence of that liability is found in the existence of "common intention" animating the accused leading to the doing of a criminal act in furtherance of such intention. The section is intended to meet a case in which it is difficult to distinguish between the act of individual members of a party and to prove exactly what part was played by each of them. It, therefore, enacts that once it is found that a criminal act has been committed by several persons in furtherance of the common intention of all, each of such persons is liable for the criminal act as if it were done by him alone. It is thus an exception to the general rule of criminal jurisprudence that it is the primary responsibility of the person who actually commits a crime and only that person can be held guilty and punished in accordance with law for his individual act."

96. It is thus clear that the criminal act referred to in Section 34 Indian Penal Code is the result of the concerted action of more than one person if the said result was reached in furtherance of the common intention and

each person must be held liable for the ultimate result as if he had done it himself.

97. A perusal of Section 34 of the Indian Penal Code would clearly indicate that there must be two ingredients for convicting a person with the aid of Section 34 of the Indian Penal Code. Firstly, there must be a common intention and Secondly, there must be participation by the accused persons in furtherance of the common intention. If the common intention is proved, it may not be necessary that the acts of the several persons charged with commission of an offence jointly must be the same or identically similar. The acts may be different in character, but must be arising out of the same common intention in order to attract the provision. The said principle is reiterated in a three-judge bench decision in *Suresh and Anr. v. State of U.P.*, (2001) 3 SCC 673 and *Ramaswami Ayyangar and Ors. v. State of Tamil Nadu*, (1976) 3 SCC 779, wherein the court has stated that the acts committed by different confederates in the criminal action may be different, but all must in one way or the other participate and engage in the criminal enterprise, for instance, one may only stand guard to prevent any person coming to the relief of the victim or to otherwise facilitate the commission of crime. Such a person also commits an "act" as much as his co-participants actually committing the planned crime. In the case of an offence involving physical violence, the

person who instigates or aids the commission of the crime must be physically present and such presence of those who in one way or the other facilitate the execution of the common design, is itself tantamount to actual participation in the 'criminal act.'

98. Insofar as common intention is concerned, it is a state of mind of an accused which can be inferred objectively from his conduct displayed in the course of commission of crime and also from prior and subsequent attendant circumstances. As observed in *Hari Ram v. State of U.P.*, (2004) 8 SCC 146, the existence of direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the circumstances appearing from the proved facts of the case and, the proved circumstances. Therefore, in order to bring home the charge of common intention, the prosecution has to establish by evidence, whether direct or circumstantial, that there was plan or meeting of mind of all the accused persons to commit the offence before a person can be vicariously convicted for the act of the other.

99. Following this judgment in *State of Rajasthan v. Shobha Ram*, (2013) 14 SCC 732, Hon'ble Supreme Court reversed the order of acquittal passed by the High Court in view of the fact that the factual

situation appearing in that case revealed that A-1 and A-2 were brothers having an old enmity with the deceased. On the date of incident A-1 assaulted the deceased with stones and A-2 was sitting on the chest of the deceased. It was observed that A-1 and A-2 had a common intention to assault and kill the deceased persons with A-2 as a participant in the crime with the intention of lending weight to the commission of an offence pursuant to a pre-concerted plan.

100. In, *Satbir @ Lakha v. State of Haryana*, 2013 (1) SCC (Cri) 129, a quarrel ensued. Appellant and other accused A-3 and A-4 caught hold of PWs while A-1 inflicted knife injuries on them. It was held that but for the overt act of appellant and other accused in having held the victims, there would have been no scope for A-1 to have inflicted injuries. Conviction u/s 34 read with Sections 307 and 324 IPC was affirmed by High Court and Apex Court dismissed the appeal.

101. In *Raj Paul Singh & Another v. State*, (2013) 1 SCC (Cri) 7, A-1 in fully drunken condition started abusing complainant in filthy language. Complainant's husband warned appellant not to abuse complainant. A-1 did not pay heed and asked his wife to get a knife.

A-1's wife A-2 brought knife and gave it to A-1 who then stabbed the complainant. As a result whereof he fell down with bleeding injury and was taken to hospital where he died subsequently. A1 was arrested and at his instance knife was recovered. It was held that deceased was unarmed and there was absolutely no physical threat from deceased to the appellants, and A1 after being provided with knife by A2 stabbed deceased on left side of chest on instigation of A2, resulting in the death of the deceased. This was, thus a case where the appellants took undue advantage and acted in a cruel or unusual manner. Appellants were rightly held guilty of committing murder under Section 302 read with S.34 IPC.

102. Applying the settled principles of law to the facts of the present case, it is evident that the common intention entertained by the accused persons is apparent from their acts and conduct. All the accused, namely, Ravi Kumar, Sanjay, Karamvir and Raj Kumar are real brothers who were aggrieved by the conduct of Kuldeep as he was having love affair with the daughter of Ravi Kumar which affected their family reputation. In pursuance to their common intention, when Kuldeep was returning from Balmiki Mandir along

with his brother Sunny and cousin Rupesh, he was surrounded by all the accused persons. Accused Ravi addressed his co-accused to finish Kuldeep on that day as he was lowering down their reputation. In pursuance thereof while Karamvir and Raj Kumar caught hold of Kuldeep and pinned him down, accused Sanjay who was carrying a *danda* in his hand tried to keep away the brothers of Kuldeep, namely, Sunny and Rupesh from coming near Kuldeep to provide any assistance to him and thereafter, accused Ravi inflicted indiscriminate knife blows on the deceased resulting in as many as seven injuries due to which Kuldeep succumbed to injuries. The deceased was unarmed and there was absolutely no physical threat from his side to the appellants. The mere fact that the role ascribed to Karamvir and Raj Kumar was only of catching hold does not lessen their liability, inasmuch as, had they not pinned him down, it was not possible for accused Ravi alone who was a middle aged person to inflict several knife blows on Kuldeep who was a young man aged about 24 years. Role of Sanjay is no less than that of remaining co-accused. Under the circumstances, the criminal act was done with the common intention of all the accused to commit murder of Kuldeep.

103. The irresistible conclusion of the aforesaid discussion is that the entire material available on record was minutely considered by the learned Trial Court and the impugned judgment and the order on sentence do not suffer from any infirmity or perversity which calls for interference. While finding no merit in the appeal, we dismiss the same.

104. Before parting with this judgment we express our deep anguish and pain for the brutal and shocking murder of a young boy of 24 years at the hands of the father of the girl with whom he was in love and relationship and his three brothers. Both the boy and girl were major in age and residing in the same locality. It is often said that when two individual gets attracted towards each other and enter into a relationship due to bonding of love then their relationship is above the barriers of caste, creed, religion and status. Indian Society is based on the deep rooted value system and traditional value system still plays a key role in social operation, be it solemnization of marriages and other customary functions. Despite radical societal changes caused due to multiple factors, the parental dominance over the lives of their children, which includes their education and career decision still

exists and more importantly in a marriage decision. There are families where still the children give due respect to the wishes of their parents and relatives in the selection of their brides/bride grooms, but in the last two decades and may be more than that one can see revolutionary changes in the behaviour patterns of young children. The economic and social dynamics of the society are changing very fast. This can be witnessed by the increasing number of live-in relationships which are justified by the young generation on the ground that the institution of marriage is too burdensome as proven by the increasing divorce cases. Moreover, with the changing times these live-in relationships have acquired a legal mandate and are slowly becoming socially accepted. There are many platforms besides the schools and colleges where teenagers come across and get attracted towards each other. The growing acceptance of this reality in the society is reverberated by the media and more and more such relationships are now seeing the light of the day.

105. Therefore, the need of the hour is that the boys and more importantly girls have to be very careful and cautious before taking such an important decision concerning their lives before entering into

the most sanctimonious relationship of marriage or even to have live in relationship. One of the major reasons contributing increase in the rape cases is a failure of live in relationship or any immature decision on the part of such young adults which more often end up in a broken relationship but sometimes after indulging into physical relationship. However, this places an implied onus on the shoulders of the persons involved in such relationships to act responsibly and maturely. On the other hand when the question comes to the acceptance of these relationships the parents are also expected to behave with more sensitivity and maturity as such issues need to be resolved with patience, understanding and tolerance and instead of indifference or with a bent of mind of alienating the two. It is often noticed that any impetuous act to smother such relationships often has a backlash in the form of resentful feelings or even rebellious actions. Therefore, it is with great sensitivity that the parents need to acknowledge the growing independence of their children and rationally and dispassionately deal with these emotive issues giving due respect to their feelings.

106. The precious life of deceased Kuldeep perhaps would not

have met such a tragic end and these accused persons perhaps would not have suffered severity of punishment of life imprisonment had they acted in a sensible and mature manner with due patience, tolerance and understanding to resolve the things instead of taking the law in their own hands.

Appellants be informed through the concerned Superintendent, Jail. Copy of the order along with Trial Court record be sent back.

(SUNITA GUPTA)
JUDGE

(KAILASH GAMBHIR)
JUDGE

MAY 30, 2014

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