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

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Date of Judgment: 18th July, 2017

+ CRL.A. 457/2000

MOHD. WAZIR AND ANR.

..... Appellants

Through: Mr.K.B.Andley, Senior Advocate
with Mr.Mohd. Shamikh and
Mr.Anurag Andley, Advocates

versus

THE STATE

..... Respondent

Through: Ms.Radhika Kolluru, APP for the
State along with Insp. Narender
Singh, PS Kalyan Puri

+ CRL.A. 493/2000

ABDUL KARIM

..... Appellant

Through: Mr.K.B.Andley, Senior Advocate
with Mr.Mohd. Shamikh and
Mr.Anurag Andley, Advocates

versus

STATE OF DELHI

..... Respondent

Through: Ms.Radhika Kolluru, APP for the
State along with Insp. Narender
Singh, PS Kalyan Puri

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MR. JUSTICE CHANDER SHEKHAR

G.S.SISTANI, J. (ORAL)

1. Both these appeals arise out of a common judgment dated 14.07.2000 passed by the learned Trial Court in Sessions Case No.142/98, FIR No.49/96, Police Station Kalyan Puri and the order on sentence dated 20.07.2000, by which all the appellants have been held guilty for the offence punishable under Section 452 and 302 of the Indian Penal

Code (hereinafter referred to as 'IPC'). Appellant Abdul Karim has been sentenced to imprisonment for life for the offence punishable under Section 302 IPC with a fine of Rs.5000/-, in default of payment of fine to further undergo rigorous imprisonment for one year. Appellants Zi-Ul-Haq and Mohd. Wazir have been sentenced to imprisonment for life for the offence punishable under Section 302 read with Section 34 IPC with a fine of Rs.5000/- each, in default of payment of fine to further undergo rigorous imprisonment for one year each. All the three appellants have been further sentenced to undergo rigorous imprisonment for three years each for the offence punishable under Section 452 IPC with a fine of Rs.2000/- each, in default of payment of fine, to further undergo rigorous imprisonment for six months each. Both the sentences were ordered to run concurrently.

2. Since both the appeals arise out of the common judgment and order on sentence, the same are being disposed of by a common judgment.
3. Before the rival submissions of learned counsel for the parties can be noticed, we deem it appropriate to state the case of the prosecution as noticed by the learned Trial Court, which is reproduced as under:

“On 9.2.96 Shri Kalicharan lodged a report with the police, alleging therein that he resides at House No.E-40, Gali No.2, East Vinod Nagar, Delhi, alongwith his family and runs a shop at premises No.12/66, Kalyan Puri, Delhi. He deals in threads and buttons at the aforesaid shop. From the last 5-6 months he was purchasing threads from a factory located at Basti Chunot, Ram Nagar, Paharganj, Delhi. Zia-Ul-Haque, Abdul Karim @ Gulab and Mohd. Wazir, who are the brothers, have been dealing with him and they used to supply threads to him almost every week. In their dealings they used to supply goods on credit also. A sum of Rs.8500/- became due from him to the aforesaid three brothers. On 2.2.96, Abdul Karim and his brother Wazir came to his shop and supplied goods worth Rs.1550/-

to him. They demanded their balance amount too. On 8.2.96, at about 5 p.m. Abdul Karim and Zia-Ul-Haque came to his shop and demanded their money. They said that they were in great need of money. He replied that at that time, he was not in a position to pay and would arrange for their money within a day or two. At that juncture, they pressed for payment of their money, otherwise it would result into a serious consequence. They raised an altercation and left while extending threats to him. On 9.2.96, at 6.45 p.m., he was present at his home alongwith his wife and children. Zia-Ul-Haque, Abdul Karim and Mohd. Wazir came to his house and raised the demand for their money. They insisted that they would collect their money on that very day. In the meantime, his son Devender Kumar aged about 7 years went upstairs to toilet to ease himself. On the pretext of urinating, Abdul Karim also went upstairs. After a few moments, Zia-Ul-Haque and Wazir followed him. He became suspicious and went upstairs, where he saw that Zia-Ul-Haque had gagged the mouth of his son Devender from his right hand and Abdul Karim was stabbing his son with a knife. Mohd. Wazir was exhorting him to inflict more blows on his person. He went ahead to save his son and at that juncture, Wazir gave him a push and they threw his son Devender inside the toilet and went away. It was heavy rain at that time. He got up and raised an alarm "catch, catch, his son has been stabbed". He also ran downstairs following them. They were seen while running by his wife and children. When they had run away then he alongwith his wife had lifted his child and took him to Saxena Nursing Home with the help of a jeep driver, who met them in the street perchance. There doctor told them that it was a police case and they should take the victim to a Govt. hospital. They had taken their son to AIIMS, where he was declared brought dead by the doctors. His son Devender Kumar had stab injuries on his abdomen, chest, left ribs, back and on the right ribs. His son was killed by Abdul Karim, Zia-Ul-Haque and Mohd. Waizir, after having a common intention in this regard. Action be initiated against them."

4. The appellants were charged for the offence punishable under Sections 120-B, 452 and 302 read with Section 34 of IPC, to which they

pleaded not guilty and claimed to be tried. To bring home the guilt of the appellants, the prosecution examined 22 witnesses in all. The statements of the appellants were recorded under Section 313 of the Code of Criminal Procedure (hereinafter referred to as '*Cr.P.C.*') wherein the appellant Zia-Ul-Haq admitted that he had supplied threads and buttons to PW8 Kali Charan 6 months prior to the incident. However, he denied supply of goods to PW8 Kali Charan in the month of February, 1996. Other allegations were denied by him and pleaded to be innocent and claims to be falsely implicated in the present case. The appellant Abdul Kareem stated that he had been falsely implicated in the present case as he was in love with Hira (daughter of Kali Charan). The appellant Mohd. Wazir reiterated the same as deposed by the appellant Abdul Kareem that his brother Abdul Kareem was in love with Hira and on that account he was also falsely implicated in the present case. The appellants examined two witnesses in their defence.

5. Learned counsel for the appellants submits that the learned Trial Court has erred in law in convicting the appellants under Section 302/452 of IPC. It is contended that the judgment of the learned Trial Court is contrary to law and facts. The learned Trial Court has failed to take into account that the witnesses were interested witnesses and despite neighbours and other public witnesses being available, no evidence was led. It is contended that the testimony of PW-8 Kali Charan is not reliable as he was not an eye witness. It is also contended that the learned Trial Court has heavily relied upon the testimonies of both PW-5 Rajneesh and PW-8 Kali Charan, whereas they were planted witnesses. It is also the contention of the learned counsel for the appellants that PW-6 Munni Devi, mother of the deceased, is also an

interested witness; her testimony is unreliable and unworthy of reliance. The presence of PWs 6 and 8 is doubted having regard to the fact that despite the stand of the prosecution that the deceased was removed in an injured condition with ten injuries in a jeep, while he was in the lap of his parents, their blood-stained clothes were not seized, which would show that PWs 6 and 8 were not present at the place of the incident. Learned counsel further submits that since the alleged recovery of the weapon of offence from Nizamuddin has not been believed by the learned Trial Court and Nizamuddin stands acquitted, this factor alone would be sufficient to doubt the entire case of the prosecution against the appellants as well. Learned counsel has also very strenuously urged before this Court that the copy of the Special Report was not sent to the local Magistrate expeditiously.

6. It is contended that the FIR was ante-dated and time was taken to falsely implicate the appellants on account of the fact that appellant Abdul Karim had an affair with the daughter of PW-8 (sister of the deceased), which was not approved by the family and it is for this reason that the appellants have been falsely implicated. Reliance is placed on the judgment in the case of *Meharaj Singh (L/Nk.) v. State of U.P.*, reported at (1994) 5 SCC 188, more particularly paragraph 12. Counsel further contends that neither any public witnesses were examined nor public witnesses examined at the time of the arrest of the appellants. It is contended that the case of the prosecution would be unbelievable and improbable as according to the prosecution the appellant Abdul Karim was arrested while he was wearing the same blood-stained clothes as worn by him at the time of the alleged offence. Counsel contends that the weapon of offence was not believed by the learned Trial Court, which fact gains importance as

the Doctor was not examined as to whether the injuries could have been caused by the said weapon.

7. The learned counsel contends that the driver of the jeep in which the injured was taken to the Hospital was not examined and despite the fact that PW-8 admitted in his cross-examination that neighbours were present, yet statement of none of the neighbours were recorded. Counsel also submits that since appellant Abdul Karim had an affair with the daughter of PW-8, it is for this reason that Hira was not examined despite the fact that she was available. Attention of the Court is drawn to the cross-examination of the mother of the deceased, wherein she has stated that her children were present and awake in the house. Additionally, counsel appearing for the appellants Mohd. Wazir and Zia-Ul-Haque have contended that there are no sufficient grounds in holding these appellants guilty or being party to the heinous crime of murder of child 07 years of age. Learned counsel further submits that the story of the prosecution is highly improbable and unbelievable as it is not possible for three persons to have escaped after murdering a 07 years old child in the presence of the entire family, human conduct is such that the parents of the child including the brother and sister would have made efforts to nab the culprits at the spot considering this fact that only one, out of the three persons were armed with the knife.
8. *Per contra*, Ms. Radhika Kolluru, learned counsel appearing for the State submits that the State has been able to establish its case beyond any shadow of doubt. The testimonies of the eye witnesses are truthful and reliable, including the testimony of child witness. It is further contended that the presence of the appellants stand duly established, the motive stands duly established, the weapon of offence

has been recovered and as per the FSL report, blood of the deceased was found on the clothes of the appellant Abdul Karim. Blood group AB of the deceased was also matched on the clothes of the appellant Abdul Karim. Testimonies of all the witnesses being PW-5 Rajneesh, PW-6 Munni Devi, PW-8 Kali Charan, PW-12 Sanjay and PW-14 Prabha have been consistent and have deposed on identical lines as to the time and place of incident. The scientific evidence also connects the appellants with the murder of the deceased. The appellants were named and arrested at the shortest possible time. It is disputed that the learned Trial Court has not believed the recovery of the weapon of offence from the testimony of PW-11 Deepak Sharma. Counsel explains that as far as jeep driver is concerned, his statement was recorded under Section 161 Cr.P.C., thereafter he became unavailable. Serious steps were taken to trace him and on this account, he had to be dropped as the trial was getting delayed.

9. Ms. Radhika has also contended that Hira was not examined as she had become unconscious and was not fit to give the statement, which is evident upon reading of the testimonies of PW-12 Sanjay and PW-14 Prabha. She further explains that merely because PW-6 has stated that all her children were present in the house cannot imply that Hira was fit to make a statement to the police. Counsel submits that PW-12 has also clarified that ground floor portion of the house was lying vacant and, thus no tenant was there to make a statement. She submits that Courts have taken judicial notice of the fact that neighbours and public witnesses are often reluctant to give statements. Thus, for this reason together with the fact that since the prosecution had taken the statement of the mother, father, two brothers and one sister, it was not necessary to record the statement of other persons.

While relying upon the judgments in the cases of *Kartik Malhar vs. State of Bihar* reported at (1996) 1 SCC 614, *Durg Pal vs. State* reported at 221 (2015) DLT 683 and *Jite vs. State* reported at MANU/DE/1791/2017, where it has been repeatedly held that it is not the number of witnesses which is important, but it is the quality of witnesses which is to be considered.

10. We have heard the learned counsel for the parties and considered their rival submissions and given thoughtful consideration to the matter. In order to deal with the contentions of both the parties, it would be appropriate to examine the testimonies of the material witnesses.
11. The first question which arises for our consideration is as to whether the testimonies of PW8 Kali Charan and PW5 Rajneesh are reliable and trustworthy.
12. The main evidence against the appellants consisted of the evidence of the eyewitnesses namely PW8 Kali Charan and PW5 Rajneesh. It is true that both the two eyewitnesses were close relations of the deceased but the occurrence had taken place inside the house, PW8 and PW5 were the natural witnesses and were in fact were present at the ground floor when the occurrence took place. The testimonies of PW8 Kali Charan and PW5 Rajneesh cannot be ignored and discarded merely because they happen to be the family members of the deceased. The incident took place at about 06.45 PM and the relatives of the deceased were the most natural witnesses.
13. The evidence of the eyewitnesses is sought to be corroborated by the evidence of PW6 Munni Devi and PW14 Prabha (sister of the deceased) who reached the spot immediately after the appellants killed the deceased. Undoubtedly, the testimony of the interested witness can be relied upon if found to be reliable and trustworthy. However, there

is a duty on the Court to scrutinise the evidence available on record carefully and the same can be relied upon in case the evidence is truthful and reliable. No enmity has been ascribed to the family members of the deceased to discredit their testimonies.

14. In the case of ***Piara Singh and others vs. State of Punjab*** reported at (1977) 4 SCC 452, it was held by the Hon'ble Supreme Court that if the evidence of the interested witness is credit-worthy then there is no bar to convict the accused on the basis of it. Relevant part of Para 4 reads as under:

“4..... It is well settled that the evidence of interested or inimical witnesses is to be scrutinised with care but cannot be rejected merely on the ground of being a partisan evidence. If on a perusal of the evidence the court is satisfied that the evidence is credit-worthy there is no bar in the Court relying on the said evidence. The High Court was fully alive to these principles and has in fact found that the evidence of these three witnesses has a ring of truth. After having perused the evidence ourselves also we fully agree with the view taken by the High Court.....”

(Emphasis Supplied)

15. In the case of ***Anil Kumar vs. State*** reported at ***ILR (1996) 2 Del 708***, the importance of interested witnesses has been discussed and it was held that the statement of a witness cannot be discarded and ignored simply because he happens to be a relation of the deceased. Relevant para 11 and 14 read as under:

“11. We are sorry we are unable to agree with the contention of the learned counsel for the appellant. This is not the correct position of the law. The statement of a witness cannot be discarded and ignored simply because he happens to be a relation of the deceased. The relations of the deceased are the most natural witnesses inasmuch as man is a gregarious being. He lives and is expected to live in the company of his relations and friends. Thus if some

calamity befalls a man, naturally it would be his or her relations only who would witness the same. Admittedly, there is no dispute with regard to the fact that the deceased was murdered during the intervening night of 25/26th February, 1986. The murder is alleged to have been committed at 2.00 a.m. in the night. Thus who could have been the other witness other than the wife of the deceased at such an odd hour of the night. Thus we are of the view that PW1 Smt. Ram Rati is the most natural witness in the circumstances of the case. Her testimony as such cannot be ignored and discarded simply because she happens to be the wife of the deceased.

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14. It is manifest from above that there is no such law that the statement of a particular witness is liable to be flung to the winds simply because he happens to be a close relation of the deceased. The correct position of law is that there is no such bar. However, the Court while relying upon the statement of a close relation, so called interested witness, would be on its tiptoe and guard and would scrutinise the said statement more carefully. However, thereafter if it comes to the conclusion that the said statement is worth placing the reliance it would not hesitate from doing so simply because the witness is an interested one. After a careful scrutiny of the statement of PW1 Smt. Ram Rati, wife of the deceased, we are of the view that there is absolutely no reason whatsoever as to why her statement should not be relied upon. The learned counsel has failed to point out any infirmity or weakness whatsoever in her statement.

(Emphasis Supplied)

16. PW8 Kali Charan (father of the deceased) deposed in his examination-in-chief that on 09.02.1996 at about 6.45 pm, the appellants Abdul Karim @ Gulaab, Mohd. Wazir and Zia-Ul-Khan came to his house. He knew them because he used to purchase threads from their factory situated at Pahar Ganj, Delhi. On 02.02.1996, the appellants had supplied threads worth Rs. 1500 to him. Thereafter, on 08.02.1996

the appellants Abdul Karim and Zia-Ul-Haq came to his shop and asked for the money. PW8 showed his inability to pay and asked for some more time. The appellants started abusing him and left his shop after threatening him. PW8 further deposed that he owed Rs. 8500 to the appellants Wazir, Karim and Zia-Ul-Haq. On 09.02.1996 at about 6.45 pm, the appellants Zia-Ul-Haq, Karim and Wazir came to his home and asked him to pay immediately. The said demand was made by the appellant Karim. At that time, it was drizzling. In the meanwhile his son Devender aged about 7 years went upstairs to ease himself. Thereafter, the appellant Abdul Karim followed Devender and was subsequently followed by the appellant Wazir and Zia-Ul-Haq. PW-8 got suspicious, he along with his son Rajneesh aged about 5 years followed all of them upstairs and found appellant Zia-Ul-Haq gagging his son Devender and the appellant Abdul Karim stabbed him with a knife which resulted in the protrusion of his intestine. The appellant Wazir was standing nearby and was exhorting them saying '*Karim Saley Ko Aur Chaku Mar*'. PW8 came forward to save his son but he was pushed aside by the appellant Mohd. Wazir and the appellants Wazir and Zia-Ul-Haq threw his son in the lavatory. He raised an alarm to catch the appellants but the appellants fled away from the spot. His son was removed to the hospital in a jeep. Firstly, he was taken to Saxena Nursing Home whereupon he was advised to go to Malhotra Nursing Home. Finally, his son was taken to AIIMS hospital where his son was declared brought dead.

17. PW8 Kali Charan in his cross-examination stated that at the time of incident it was raining therefore, neighbours did not reach the spot in the beginning. Later, after hearing the cries of his son the neighbours reached the spot whose names he did not remember. The neighbours

were interrogated by the Police in his presence. The testimony of PW8 remained consistent to the statement made to the police. It was stated by PW8 that he had found blood on the clothes of the appellant Abdul Karim. PW8 further stated in his cross-examination that his son was removed in a jeep. He was aware about the identity of the driver of the jeep who was named as Dalip. The statement of Dalip was recorded by the Police on the day of incident.

18. PW5 Rajneesh (brother of the deceased) aged about 5 years at the time of his deposition testified in his examination-in-chief that on 09.02.1996, he was present at his home when the appellants Zia-Ul-Haq, Karim and Wazir came there. His brother went up-stairs for easing himself. The appellants Abdul Karim and Wazir followed the deceased. It was drizzling at the time of the incident. The appellant Karim had a knife in his hand and gave fatal blows to his brother while the appellant Zia-Ul-Haq gagged his mouth with his hand and the appellant Wazir was exhorting appellant Karim to give more blows to his brother. His brother had died at the spot. In his cross-examination the role assigned by him to the appellants remained consistent and withstood the test of cross-examination. PW5 also stated that at the time of incident he was the first person who reached the spot and informed his father about the stab injuries given to his brother. Thereafter, his father (PW8 Kali Charan) followed him.
19. PW6 Munni Devi (mother of the deceased) deposed on similar lines as deposed by PW8 with regard to the incident of 02.02.1996 and 08.02.1996 which took place in her presence. She deposed that at the time of incident she was accompanying her husband at his shop. PW6 deposed that on 09.02.1996 at about 06.45 pm all the appellants came to her home and asked for an amount of Rs. 8500/-. Her husband

showed his inability to pay and asked a day or two for the payment. At that time, her son Devender was sleeping but on hearing the noise he woke up and went upstairs to ease himself. His son Devender was followed by the appellants Karim, Zia-Ul-Haq and Wazir. Her husband suspected some foul play and followed the appellants upstairs and found that the appellant Karim was stabbing Devender and the appellant Zia-Ul-Haq gagged his mouth while the appellant Wazir exhorted Karim saying '*Or Maro Saley Ko*'. PW6 in her cross-examination stated that her son was taken to the hospital in a jeep, which was driven by his neighbour. She carried her son in her lap and was also accompanied by her husband. She stated that she was not aware about the presence of blood in jeep however; her clothes were blood stained while removing his son to the hospital.

20. PW14 Prabha (sister of the deceased) deposed on similar lines as deposed by PW 8, 5 and 6. PW14 correctly identified all the appellants in Court. She deposed that on 09.02.1996 at about 6.45 pm all the appellants Karim, Wazir and Zia-Ul-Haq came to her house and demanded money from her father. The appellant Karim insisted for the payment of money immediately. Her father asked if he could pay in a day or two. In the mean time, her brother Devender woke up and had gone upstairs. All the three appellants followed his brother. Thereafter, the appellants were followed by her father and brother Rajneesh. After sometime she heard the feeble voice of her father and saw appellant Karim moving down stairs. He saw a knife dripping with blood in the hands of the appellant Karim. Thereafter, she went upstairs and her brother was taken to the hospital. PW14 Prabha in her cross-examination supported the case of prosecution in all material particulars. She stated that her brother Devender was removed to the

hospital in a jeep driven by Deepak. None of the children or any neighbour had accompanied her father to the hospital. At the time of incident she along with Pradeep, Sanjay, Rajneesh, Hira and her parents were present in the house. She further stated that when Police came to her house her parents had not returned from the hospital. The statement of PW14 along with Sanjay, Rajneesh was recorded by the Police on the day of occurrence. Her sister Hira was not in a position to make a statement and Pradeep had gone outside the house.

21. Applying the law to the facts of the present case, it is well settled that the evidence of interested witnesses is not necessarily unreliable. All that is necessary is that the evidence of the interested witnesses should be subjected to careful scrutiny and must be accepted with caution. If on such scrutiny, the testimony is found to be reliable and trustworthy, it may, by itself, be sufficient, in the circumstances of the particular case, to base a conviction thereon.
22. In our view, the evidence of PW-5 and PW-8 is consistent on all material aspects and thus is fully reliable and trustworthy and even if no independent witness is produced it will not adversely affect the case of the prosecution. In the backdrop of the above legal propositions and the facts and circumstances of the case we have found the testimonies of PW-8 Kali Charan, PW-5 Rajneesh, PW-6 Munni Devi and PW14 Prabha as trustworthy and remained consistent with the medical evidence.

Medical Evidence:

23. PW-19 Dr. Alpna Sinha conducted the post-mortem of the deceased (aged 7 years) on 11.02.1996. In her detailed report Ex. PW19/A, she noted the following ante-mortem external injuries on the deceased:

“1) Incised wound 4.5 cm x 2.5 cm x muscle deep, obliquely placed on left side of chest, 0.5 cm from mid-line over 5th and 6th and intercostal space.

2) Stab wound 2 cm x 1.5 cm x chest cavity deep, obliquely placed over left side of chest, cutting 6th rib and 6th intercostal space, 7 cm from mid-line.

3) Stab wound 2.5 cm x 1 cm x chest cavity deep on left side of chest, along interior axillary line, 11 cm from mid-line, cutting 8th rib and 7th and 8th intercostal space.

4) Stab wound 1.5 cm x 1 cm x chest cavity in 5th intercostal space along mid axillary line, 13 cm from mid-line.

5) Incised wound 1.5 cm x 1 cm muscle deep on left side of chest, 5 cm from mid-line over costal margin.

6) Stab wound 1.5 cm x 1 cm x 2 cm long, subcutaneous track on right side of chest, 12 cm from mid-line, along mid-axillary line in 3rd intercostal space.

7) Stab wound with protruding omentum 2 cm x 1 cm x peritoneal cavity deep, obliquely placed 6 cm from midline, just below costal margin on left side of abdomen.

8) Stab wound with omentum protruding, vertically placed 1.7 cm x 1 cm x peritoneal cavity on right side of abdomen, 0.5 cm from mid line, 4 cm below costal margin.

9) Incised wound 2.5 cm x 1.5 cm x muscle deep on the left side of flank, 2 cm below interior superior iliac spine 13 cm from midline

10) Stab wound 1 cm x 0.5 cm x 2 cm on left side of back 0.5 cm from midline, 8 cm above superior iliac-spine.

.....

On left lung there were three stab wounds 2.5 cm x 0.5 cm x 1 cm x, 1 x 0.5 cm x 0.5 cm and 1 cm x 0.5 cm x 1.5 cm over lateral surface of lower lobe. Weight was 100 grams. Right lung was contused having an injury of 1 cm x 1 cm over lower lobe.

...

There were two stab wounds 1 cm x 1.5 cm x 1.5 cm over superior surface of right lobe and the weight of liver was 500 grams.

There were three stab wounds over the spleen.”

24. With regard to the death of the deceased, PW-19 Dr. Alpna Sinha opined the cause of death as haemorrhagic shock due to abdominal and chest injuries No. 2, 3, 4, 6, 7, 8 and 10. The injuries are collectively and individually fatal and were sufficient to cause death in the ordinary course of nature. Injuries No. 1 to 10 were caused by sharp cutting weapon and were fresh in nature.
25. With regard to the weapon of offence, it would be relevant to quote the Court question put to PW-19 Dr. Alpna Sinha which reads as under:

“At this stage a sealed parcel duly sealed with the seal of the court is opened and a dagger Ex. P7 is taken out.

Q. Whether the injuries mentioned in your post mortem report are possible by this weapon of offence?

Ans. The injuries are possible by this weapon.”

FSL Results:

26. PW-22 D. S. Chakotra, Senior Scientific Officer, Chemical Examiner, FSL, Delhi examined the weapon of offence recovered at the instance of Nizamuddin i.e. dagger (Ex.6a) and scabbard (Ex.6b). Clothes of the appellant Karim, including shirt (Ex.9a), sweaters (Ex.9b and 9c), jeans (Ex.7c) and jacket (Ex.7a) were examined. After examination of the above mentioned exhibits, blood of AB group was found on all the exhibits. His detailed report is Ex.PW-22/B.

27. A conjoint reading of the testimonies discussed above, the medical evidence and FSL results placed on record, it stands established that the appellants in furtherance of their common intention were involved in the commission of murder of the deceased Devender. In our view, contradictions if any are not material in nature and do not go to the root of the matter.
28. The next submission made by the counsel for the appellants was that in case PWs 6 and 8 had removed the deceased as claimed by him in the jeep, there would have been blood on their clothes as PW-6 had deposed that the deceased was on her lap. However, her clothes were not taken into possession by the police and not sent for examination.
29. This submission of the learned counsel for the appellants is also liable to be rejected. Even though the blood stained clothes of PW6 and 8 were not seized but their evidence establishes their presence at the place of the incident. It is settled law that faulty investigation cannot come in the way of dispensing justice. Investigating Officer may have faulted in not collecting the blood stained clothes of the eyewitnesses, but the benefit of defective investigation cannot accrue to the accused persons. We need not burden this opinion with judicial pronouncements in this regard; suffice to mention that one may usefully refer to *Sathi Prasad vs. The State of U.P.* reported at *AIR 1973 SC 448*, *State of U.P. v. Anil Singh* reported at *1988 Supp SCC 686* (paragraph 17), *Mohan Singh v. State of Madhya Pradesh*, reported at *(1999) 2 SCC 428* (paragraph 11), *Dhanaj Singh alias Shera & Ors. Vs. State of Punjab* reported at *(2004) 3 SCC 654* (paragraphs 5 and 8), *State of UP v Krishna Master*, reported at *(2010) 12 SCC 324* (paragraph 15).

30. We may also notice a judgment of a co-ordinate bench of this Court, of which one of us (G. S. Sistani, J.) was a member in *Babu and Others vs. State of Delhi* reported at *MANU/DE/1550/2017*, held that if any defect is found in the investigation, benefit of the same could not be extended to the accused persons and they could not get any benefit of the defective investigation until and unless they prove other cogent evidence in their favour and belie the case of the prosecution. It was further held that in the case of defective investigation, the court has to circumspect in evaluating the evidence, but it would not be right in acquitting the accused persons solely on account of the defective investigation by the Investigating Agency.
31. In light of the judgments mentioned in foregoing para, even if we assume that the clothes of PW-6 and 8 were blood stained and the Investigating Officer did not seize them, it amounts to a lapse on the part of the Investigating Agency. It reflects the casual and callous attitude of the Investigating Agency in carrying out its most solemn duty of conducting fair, honest, flawless and scientific investigation into the crime. The discrepancy pointed out by the appellants cannot be said to be significant enough to create a reasonable doubt in the case of the prosecution. Any procedural lapse does not dilute the evidence available on record in the form of the depositions of the eye witnesses which adequately bring home the guilt of the appellants beyond all reasonable doubt.
32. With regard to the contention raised by the counsel for the appellants that the alleged recovery of the weapon of offence from Nizamuddin was disbelieved by the learned Trial Court which resulted in acquittal of Nizamuddin and this ground alone would be sufficient to doubt the entire case of the prosecution against the appellants. This contention

was supported with the fact that the doctor who conducted post-mortem was not examined with regard to the possibility of the injuries by the said weapon.

33. However, it was disputed by the learned counsel for the State that the Trial Court disbelieved the recovery of the dagger. It was contended by the counsel for the State that merely because Nizamuddin got acquitted by the Trial Court, that would not ipso facto falsify the case of prosecution. Therefore, it cannot be a ground to acquit the appellants. Reliance was placed on para 18 of the impugned judgment which reads as under:

“18. Vijay Pal Ct. had reached the spot on 09.02.1996 alongwith S. P. Rana Inspector. He was sent with rukka for registration of the case and thereafter associated in the investigation. He details that on 10.02.1996 all the four accused persons were arrested. Accused Nizamuddin was arrested from Delhi Guest House at the instance of accused Abdul Karim and from his possession dagger Ex. P-7 was recovered. Dagger Ex. P-7 was taken into possession vide memo Ex. PW2/K. Gopi Chand SI had also detailed the facts in this regard. He deposed that they had gone to Paharganj but the accused persons were not available there. Then the Police went to Churriwalan from where accused Zia-Ul-Haque, Mohd. Wazir and Abdul Karim were arrested at the instance of Kalicharan. They informed them that one of their associate was at Delhi Guest House in the area of Jama Masjid. Accused Nizamuddin was arrested from Delhi Guest House and on his disclosure statement, a dagger was recovered from the mezanine of a room at Delhi Guest House. The said dagger was taken into possession. Dagger Ex. P-7 is the same which were recovered from the possession of accused Nizamuddin. S. P. Rana Inspt. also confirms the facts in this regard. He deposed that accused Abdul Karim led police party to Delhi Guest House and at his instance accused Nizamuddin was arrested. Disclosure statement of accused Nizamuddin was recorded which is Ex. PW2/J and dagger Ex.P-7 was recovered from there. Kalicharan was also brought in the witness box to

corroborate the facts in this regard. He unfolds that disclosure statement of accused Abdul Karim was recorded and accused persons were taken to Delhi Guest House. Accused Nizamuddin was arrested from there at the instance of Abdul Karim. Nizamuddin got recovered dagger from the mezanine of a room. The said dagger is Ex. P-7. Shri D. S. Chakotra had given his report Ex.PW22/A wherein he has opined that on the dagger and raxine scabbard there was human blood. Thus, the testimony of these witnesses bring it over the record that accused Abdul Karim was arrested and on his disclosure statement accused Nizamuddin was arrested from Delhi Guest House. At the instance of accused Nizamuddin dagger Ex.P-7 was recovered on which human blood was found. Dr. Alpna Sinha opines that injuries found on the body of Devender Kumar were possible by the said dagger. Question for consideration comes as to whether this evidence is sufficient to form an opinion that accused Nizamuddin had conspired with the remaining accused persons and in furtherance of the said conspiracy, Devender Kumar was murdered? Except the arrest of the accused Nizamuddin at the instance of Abdul Karim and recovery of dagger Ex.P-7, there is no other circumstance which may suggest the existence of conspiracy to murder Devender Kumar existing between Nizamuddin and other accused persons. The evidence may suggest that accused Abdul Karim had handed over dagger Ex- P-7 to Nizamuddin who had kept it with him. Blood was found on the dagger and scabbard. But this fact will not go to establish that accused Nizamuddin was aware that the said dagger was used in the murder of Devender Kumar. Many hypothesis are possible on the point that blood was there on the dagger when Nizamuddin kept it with him. Therefore mere recovery of dagger Ex-P-7 from the possession of accused Nizamuddin, is not sufficient to attribute accountability to him. There are many loopholes in evidence as regards the role of accused Nizamuddin is concerned in commission of the crime. Evidence brought over the record could establish that accused Abdul Karim, Zia-Ul-Haque and Mohd. Wazir had gone at the house of Kalicharan to demand their money back. When payment was not made, they formed a common intention and murdered Devender Kumar. This evidence demolishes the

existence of conspiracy between the above three accused and accused Nizamuddin. Only recovery of dagger at the instance of accused Nizamuddin has been proved. These circumstance even do not show that he was an accessory after the fact, since for that purpose it has to be established that he was aware that Devender Kumar had been murdered. Evidence on this count is missing. Hence, it is clear that the prosecution could not establish the accountability of accused Nizamuddin. Since the dagger Ex. P-7 was recovered from the room of Nizamudddin, notification issued by Delhi Administration under the Arms Act no where comes into play. Consequently, I am of the opinion that the prosecution has not been able to establish conspiracy between accused Nizamuddin and the other accused persons to commit the murder of Devender Kumar. Nizamuddin deserves an acquittal.”

34. To deal with the submission in relation to the failure to seek medical opinion with regard to the weapon of offence during investigation, it would be necessary to discuss the cross-examination of PW-19 Dr. Alpna Sinha which reads as under:

“It is correct that during the course of investigation, no opinion was sought from me that the injuries were possible by dagger Ex. P.7. I was not informed by Surender Rana Inspt. that weapon of offence was recovered in the case. I had not mentioned in my post mortem report that the injuries were caused by a single edged or double edged weapon. Sometimes the injuries caused by a double edged weapon look like an injury caused by a single edged weapon. It is correct that normally injuries caused by a double edged weapon looked different and distinct then the injuries caused by a single edged weapon. Ex.P.7 was not shown to me at any stage except today. It is correct that the injuries caused by double edged weapon are spindle in shape. This fact is not mentioned in my report. My opinion that injuries were possible by Ex.P.7 is only an opinion which cannot be said to definite. I had mentioned the duration of injuries in my report. In my report I have mentioned about the fresh injuries and not about the fresh body. Opinion regarding duration of injuries may fluctuate

upto 12 hours on either side. Stomach was empty. It is correct that Ex.P.7 has not been measured by me before giving the opinion.”

35. In view of the above, we are of the considered view that the learned Trial Court has not disbelieved the recovery of dagger and acquittal of Nizamuddin has nothing to do with the present appellants as there is ample evidence on record against them. Therefore, failure of the investigating agency to seek medical opinion with regard to the weapon of offence during investigation does not weaken the case of prosecution. It only amounts to a procedural lapse.
36. With regard to the submission made by the appellants that the copy of Special Report was not sent to the local Magistrate expeditiously and there is a considerable delay in sending the copy to the local magistrate. It was also contended that the FIR was ante-dated and time was taken to falsely implicate the appellants on account of the fact that appellant Abdul Karim had an affair with the daughter of PW-8, which was not approved by the family.
37. In this regard, the counsel for the appellants has relied upon the case of **Meharaj Singh's** case (*supra*), wherein the Hon'ble Supreme Court discussed the importance of prompt lodging of FIR and the copy of special report be sent to the local Magistrate promptly in a murder case to avoid any coloured version or exaggerated story.
38. After perusal of the judgment relied upon, we have found that in the given case the prosecution led no evidence to show as to when the copy of the FIR/special report, which was required to be despatched under the statutory provisions of Section 154 read with Section 157 Cr.P.C promptly, to the Magistrate was actually despatched. There was no evidence either to show as to when the copy of the FIR was received by the Magistrate. However, the facts of the present case

differ from the case relied upon. Undoubtedly, delay in lodging the FIR often results in embellishment, which is a creature of an afterthought. In the present case, it is evident from the testimony of Insp. S. P. Rana that FIR No. 49 of 1996 was registered on 10.02.1996 at 12.30 AM and the copy of FIR was sent to the residence of S. S. Malhotra (then Metropolitan Magistrate) at 7.50 AM on the same day. Therefore, in our view there is no delay in sending the copy of special report to the local magistrate and it was sent promptly in accordance with law.

39. Lastly, it was contended that non-examination of Dalip, driver of the Jeep in which the deceased was taken to the hospital casts a doubt in the case of prosecution. In this regard, we agree with the justification rendered by the learned counsel for the State that the statement of Dalip was recorded under Section 161 of Cr.P.C. and serious steps were taken to trace him but as the trial was getting delayed, he was dropped as a prosecution witness. In our view, non-examination of Dalip does not affect the case of prosecution. Furthermore, it is apparent from the evidence that the appellant Abdul Karim was arrested on 10.02.1996 i.e. the day after the incident and this strengthens the case of prosecution with regard to the blood stained clothes as worn by him at the time of arrest and further points out his involvement in the crime. Therefore, in our view it is not improbable that the appellant Abdul Karim was wearing the same blood stained clothes a day after the incident.
40. Taking into consideration the law as laid down by the Apex Court and circumstances of the present case, we are of the view that the learned Trial Court has rightly appreciated the evidence on record. The prosecution has successfully proved the charges levelled against the

appellants. For the reasons stated above, we find no infirmity in the judgment passed by the learned Trial Court and we see no reason to interfere with the same. The conviction of the appellants under Sections 302 read with Section 34 of IPC and under Section 452 of IPC is upheld.

41. Both the appeals therefore fail and are dismissed. The appellants are on bail. The appellants shall serve the sentence as imposed by the learned Trial Court and surrender before the Central Jail, Tihar within three weeks from today. They shall be taken into custody to serve out the sentence.
42. The copy of this judgment be sent to the Superintendent Jail.
43. Trial Court record be sent back.

G. S. SISTANI, J.

CHANDER SHEKHAR, J.

JULY 18, 2017

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