

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

Reserved on: 12th August, 2015

% **Date of Decision: 7th September, 2015**

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CRL.A. 129/2015

ABID

..... Appellant

Through Mr. Jitendra Sethi and Mr.
Hemendra Jailiya, Advocates.

versus

STATE (NCT OF DELHI)

..... Respondent

Through Ms. Aashaa Tiwari, APP.

CRL.A. 133/2015

BABU

..... Appellant

Through Mr. Jitendra Sethi and Mr.
Hemendra Jailiya, Advocates.

versus

STATE (NCT OF DELHI)

..... Respondent

Through Ms. Aashaa Tiwari, APP.

CRL.A. 135/2015

NASEEM

..... Appellant

Through Mr. Jitendra Sethi and Mr.
Hemendra Jailiya, Advocates.

versus

STATE (NCT OF DELHI)

..... Respondent

Through Ms. Aashaa Tiwari, APP.

CRL.A. 137/2015

JONNY

..... Appellant

Through Mr. Jitendra Sethi and Mr.
Hemendra Jailiya, Advocates.

versus

STATE (NCT OF DELHI) Respondent
Through Ms. Aashaa Tiwari, APP.

CRL.A. 491/2015

SHAMEEM Appellant
Through Ms. Rakhi Dubey, Advocate.

versus

STATE (NCT OF DELHI) Respondent
Through Ms. Aashaa Tiwari, APP.

CRL.A. 536/2015

RABI-UL-ISLAM Appellant
Through Mr. Jitendra Sethi and Mr.
Hemendra Jailiya, Advocates.

versus

STATE (NCT OF DELHI) Respondent
Through Ms. Aashaa Tiwari, APP.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE R.K.GAUBA

R. K. GAUBA, J:

1. The six appellants before us stood trial in Sessions Case No.32/14 arising out of FIR 427/08 of Police Station, New Friends Colony on the charge for offences punishable under Sections 302/34 Indian Penal Code, 1860 (IPC) for the murder of Mohd. Anwar son of Mohd. Shahid, under

Sections 307/34 IPC for attempted murder of Mohd. Bilal and Mohd. Aslam (PW-15) and under Sections 323/34 IPC for voluntarily causing injuries to Joshna Begum (PW-3) and Shilpi (PW-12) in the course of an incident that statedly occurred at about 8.30 PM on 01.07.2008 in front of shop of Bilal, Indira Gandhi Camp, Taimur Nagar, New Delhi. By judgment dated 07.11.2014 of the Additional Sessions Judge, 02-South East, Saket Courts, New Delhi, they have been held guilty and convicted, as charged. By order dated 20.11.2014 of the learned trial judge, they have been awarded imprisonment for life with fine of Rs.10,000/-, in default simple imprisonment for one year for the offence under Section 302/34 IPC, rigorous imprisonment for seven years with fine of Rs.5,000/- each, in default simple imprisonment for six months for the offence under Section 307/34 IPC and rigorous imprisonment for one year each for the offence under Section 323 IPC, with set off in terms of Section 428 of the Code of Criminal Procedure, 1973 (Cr.P.C.).

2. The trial judge returned the findings of guilty, primarily believing the eye witness account of Joshna Begum (PW-3) against the appellants Rabi-Ul-Islam (Crl.A.No.536/2015) – accused No.1 (A-1), Abid (Crl.A.No.129/2015) accused No.2 (A-2), Babu (Crl.A.No.133/2015) accused No.3 (A-3), Jonny (Crl.A.No.137/2015) accused No.4 (A-4), Naseem (Crl.A.No.135/2015) accused No.5 (A-5) and Shamim (Crl.A.No.491/2015) accused No.6 (A-6). Feeling aggrieved, each of the convicted persons has come up with appeal seeking to assail the impugned judgment and order on sentence.

3. Before we proceed to consider the contentious issues, it would be advantageous to take note of certain introductory, or indisputable, facts.

4. Joshna Begum (PW-3), aged 30 years at the relevant point of time, is the wife of Mohd. Aslam (PW-15), both residents of Jhuggi No.90, Indira Gandhi Camp, Pahari No.1, Taimur Nagar, New Friends Colony. Mohd. Anwar son of Mohd. Shahid, the person stated to have suffered the homicidal death in the incident alleged in this case (and so hereinafter referred to variously as “the victim” or “the deceased”) and Bilal (also described by PW-3 as “Cobra Bilal”), since deceased, one of the several persons who were injured in the same incident, were real brothers of Joshna Begum (PW-3). It may be mentioned here that Bilal was cited as witness for the prosecution but he died on 12.1.2012, before his testimony could be recorded.

5. In the *rukka* (Ex.PW-16/A), of which the statement of Joshna Begum (Ex.PW-3/A) is a part, and which was the basis of the First Information Report (FIR) (Ex.PW-4/A), the place of occurrence is described as one in front of shop of Bilal. It appears initially the name “Dulal” had been mentioned as the owner of the shop but the same was later corrected. Joshna Begum (PW-3) in her evidence clarified that Dulal is the name of her son-in-law. The correction in the name of the shop owner, initially recorded as Dulal, changed to the name of Bilal, is of no import.

6. Shilpi Begum (PW-12) is the niece of Joshna Begum (PW-3), she also being a resident of a nearby house in the same locality. The prosecution alleged that she was also assaulted and injured in the incident.

7. Mohd. Aslam (PW-15) has had criminal antecedents. He faced trial in a case under NDPS Act and admittedly was convicted and had remained in jail on such account. In fact, when his turn came for being examined as a witness in this case, he was produced on 11.09.2013 before the trial court, on production warrant, from Central jail No.5, Tihar, where he had been lodged for the preceding 40 months. Joshna Begum (PW-3) has conceded that PW-15 had faced a number of criminal cases including three involving offences of theft, one under Arms Act, another under Section 324 IPC for causing hurt to one Shahida with knife, and yet another for attacking Parul Begum, mother of the appellant Rabi-Ul-Islam (A-1) with a weapon.

8. The deceased Mohd. Anwar also had a questionable history. Joshna Begum (PW-3) admitted that he was initially married to a lady named Lakhi. He had contracted a second marriage with another woman named Suki, at a time when she (Suki) was married to another person named Ravi Teli, on which count, the relationship of Anwar and Ravi Teli, resident of Pahari No.2 in same area, had been strained. Ravi Teli had shifted to Kashmir, some time after the incident of this case, and settled there, having contracted another marriage.

9. According to the FIR, the incident had occurred at 8.30 PM on 01.07.2008, in the course of which seven persons from the side of the assailants had participated, they including the six appellants and another named Shaheen son of Almeen. The said Shaheen could not be arrested. He was eventually declared proclaimed offender (PO). Shaheen concededly was married to Babli, daughter of Joshna Begum (PW-3). All

the appellants, except Jonny son of Roop Chand (Crl.A.137/2015) are related to Shaheen (PO). The prosecution case has been that, on account of differences between Shaheen (PO) and his wife Babli, the relationship between the first informant and those related to her, on one hand, and the appellants, on the other, had been strained. It is, however, conceded that both sides lived in the same area and would know each other by names and faces.

10. On 01.07.2008 at 9.10 PM Mohd. Anwar (the victim) was brought to Holy Family Hospital, New Delhi by his relative named Aash Mohd., resident of House No.265/161, Indira Gandhi Camp, Pahari No.1, Taimur Nagar (mobile phone No.9868357326) with history of assault suffered at 8.30 PM earlier on the same date. Aash Mohd. himself has not been examined as a witness by either side. Joshna Begum (PW-3) described him as her “*Devar*” (younger brother of her husband). Mohd. Anwar was examined by Dr. Rajiv Kant Shastri against medico legal report (MLC) prepared vide Ex.PW-5/DA. As per the document, the victim was conscious and had himself given the history of the injuries suffered at the hands of assailants, four to five in number, they having used “a sharp bladed weapon”. He had a cut on his left hand besides multiple puncture wounds over the chest and upper back. The MLC of the victim (Ex.PW-5/A) indicates that Holy Family Hospital informed the local police at 11.05 PM on the same night. This fact is corroborated by DD No.52 (Ex.PW-9/A).

11. It may be noted here itself that Mohd. Anwar died during treatment in the Holy Family Hospital, half past midnight of the night intervening

1st and 2nd July, 2008. The medical certificate of the cause of death (Ex.PW-16/DA) issued by the Holy Family Hospital stands testimony to this fact. After the needful formal proceedings, including preparation of the death report (Ex.PW-22/C) by Inspector M.A.Khan (PW-22), the then Investigating Officer (IO), the dead body was subjected to post-mortem examination conducted in the mortuary of All India Institute of Medical Sciences (AIIMS) by Dr. Puneet Setia, senior resident of the Department of Forensic Medicine on 02.07.2008. The post mortem examination report (Ex.PW-19/DA) was formally proved, in absence of the author (he having left the services of the hospital and being no longer available) by Dr. Adarsh Kumar (PW-21), Additional Professor, Forensic Medicine, AIIMS.

12. The autopsy report noted ante mortem injuries on the dead body as under :

“1. Stab wound 1.6 x 0.4cm x cavity deep present over back of right side of chest, 27 cm below right shoulder, 5.5 cm away from midline and 114 cm above right heel. The wound is vertically placed, with upper margin sharp and lower margin blunt. It enters the chest cavity producing an entry wound of 2 cm in the space between 6th & 7th rib and then enters the middle lobe of right lung, producing a wound of size 1.4 x 0.5 cm and depth 1 cm. Total length of the wound is 5 cm. The direction is upward, inward and forward.

2. Stab wound 0.9 x 0.5 x 1.5 cm present over back of left side of chest 15 cm to the left of midline, 113 cm above left heel and 31 cm below left shoulder. The wound is horizontally placed, with both margins acute and undermining of right edge. The direction is inward, upward and forward.

3. *Scratch Abrasion 13 x 0.2 cm present over back of left shoulder, inner end is 3.5 cm away from midline and 13 cm below the tip of shoulder horizontally placed.*
4. *Scratch abrasion 12 x 0.2 cm present over back of left shoulder, 6 cm above and parallel to injury No.3.*
5. *Reddish blue contusion in an area 8.5 x 4 cm present in the area between injury No.3 & 4.*
6. *Abrasion 3 x 2 cm present over back of left elbow.*
7. *Reddish contusion in an area 1.5 x 1.5 cm present over back of right elbow.*
8. *Reddish blue contusion in an area 4 x 3 cm present over back of right leg.*
9. *Bluish contusion in an area 5 x 0.5 cm present over inner side of left elbow.*
10. *Stab wound 1.5 x 0.6 cm x cavity deep present over left side of front of chest, 3.5 cm away from midline, 6 cm below and to the right of left nipple and 120 cm above the left heel. It pierces the intercostal space between 6th & 7th rib producing a wound of size 3 cm. It pierces the pericardium making a cut of 1.5 cm and then goes into the right ventricle, making a wound of 1.5 cm and then going through the right ventricular cavity it comes out of the posterior wall of right ventricle, producing a wound of size 0.3 x 0.3 cm. The entry wound shows undermining of right edge and both the margins are acute. Total length of the wound is 6 cm and direction is backward, downward and toward right.*
11. *Abrasion 1 x 0.4 cm present over front of left side of chest, 6 cm above the nipple and 10.5 cm away from midline.*
12. *Stab wound, vertically placed, 1.9 x 0.5 x 10.5 cm present over front of left shoulder, 5.5 cm below tip of acromion, 14 cm away from midline and 20.5 cm above the elbow joint. The wound travels in the subcutaneous tissue in its entire length. The upper margin is acute and lower obtuse with undermining of right edge. The direction is inward, downward and backward.*

13. Incised wound 1.5 x 0.2 cm, horizontally placed, present over nose.

14. Incised wound 1.5 x 0.1 cm, horizontally placed, present over left upper eyelid.

15. Incised wound 6 x 3 x 4 cm present in webspace between thumb and index finger of left hand with fracture and dislocation of carpometacarpal joint.”

13. In the opinion of the autopsy doctor, the death had occurred due to cardio respiratory failure consequent upon injuries inflicted to the heart and lung. The injury nos.1 and 12 mentioned above had been produced by single edged stabbing weapon, while injury nos.2 and 10 had been inflicted by double edged stabbing weapon. The injury nos.3 and 4, in contrast, had been caused by sharp pointed object and injury nos.13 to 15 by sharp edged weapon. The rest of the injuries had been produced by some blunt object. In the opinion of autopsy doctor injury nos.1 and 10, individually and collectively, were sufficient to cause death in ordinary course of nature.

14. During the course of investigation SI Kailash Chand Meena, PW-16, the initial Investigating Officer (IO), after having got the FIR registered on the basis of his *rukka* (Ex.PW-16/A) and Inspector M.A.Khan (PW-22), who took over the investigation in the wake of the FIR had taken the necessary preliminary investigative steps at the scene of incident, *inter alia*, by preparing the site plan (Ex.PW-16/DB), later followed up by preparation of scaled site plan (Ex.PW-1/A) through SI Mahesh Kumar (PW-1) and getting the scene photographed through Constable Girdhar (PW-13), the result of his efforts being photographs

Ex.P1 to P5 and inspection by the crime team led by SI Nafe Singh (PW-2) leading to crime team report (Ex.PW-2/A). The Investigating Officer had also seized, from the scene of incident, certain exhibits which bore testimony to the gory incident in the form of blood stains, including plastic container (Ex.P1), plastic *katta* (cement bag) (Ex.P2), pieces of concrete (*rodi*) (Ex.P3), blood stained earth (Ex.P4) and blood stained brick (Ex.P5), formally seized vide seizure memo (Ex.PW-3/Z). The Investigating Officer also seized the blood stained clothes (one jeans trousers, one shirt and one vest) besides a *maala* (necklace) of the deceased Mohd. Anwar, as had been handed over in a sealed parcel by the Holy Family Hospital, vide seizure memo Ex.PW-16/D. It may be mentioned that all the exhibits, including certain others to which we shall make a reference later, were sent, in due course, to forensic science laboratory, Govt. of NCT of Delhi (FSL) which issued its reports (Ex.PW-19/A and B) only to confirm that the blood group of the deceased being “A” and his clothes bearing his blood stains.

15. From the abundant material on record, summarized as above, there can be no two opinions about the fact that Mohd. Anwar had suffered the vicious assault at about 8.30 PM on 01.07.2008 at the hands of a number of persons at the place mentioned earlier. Given the nature of injuries, and the sheer number of them, there can be no disputing the fact that the assailants intended to either cause his death or inflict such bodily injuries as were likely to cause death. Since Mohd. Anwar died in a matter of few hours after being brought to the hospital in such gravely injured state, it

stands established beyond pale of any controversy, that his death was a case of culpable homicide within the meaning of Section 299 IPC.

16. The prosecution had relied upon material showing that four persons on the side of the first informant Joshna Begum (PW-3), including herself, had also suffered injuries at the same time as Mohd. Anwar had been assaulted. While Mohd. Anwar (the deceased) had been taken to the Holy Family Hospital, which is close by, by his relative Aash Mohd., the other four injured – Joshna Begum (PW-3), Mohd. Aslam (PW-15), Shilpi Begum (PW-12) and Bilal (since deceased), had been transported by Head Constable Nathi Ram of PCR to the trauma Centre of AIIMS.

17. The MLCs of Shilpi Begum (PW-12) and Bilal (the deceased) have not been formally proved during the trial. Reference to the MLC (Ex.PW-14/DA) of Mohd. Aslam (PW-15) did come in the course of statement of Constable George Kutti (PW14), during cross-examination, only to bring home the fact that he was one of the injured persons brought to the hospital on 01.07.2008 and given treatment there. Head constable Nathi Ram of PCR who is stated to have accompanied these four injured persons to AIIMS has not been examined.

18. The MLC (Ex.PW-3/DA) of Joshna Begum (PW-3), however, was formally proved by the examining medical officer, Dr. Dhananjay Prasad (PW-17). This evidence has proved, with no dispute raised by the defence, that Joshna Begum had been brought to trauma centre of AIIMS at 9.48 PM on 01.07.2008 with history of assault suffered at 8.30 PM on the same date, her injuries including lacerated wounds over right thumb and right middle finger.

19. The information about the incident had come to the notice of the police station vide DD No.26A, a copy of which was made over to SI Kailash Chand Meena (PW-16) at 9.05 PM. The evidence of PW-16, unchallenged to this extent, brought out that he accompanied by Constable Amar Singh, had reached the spot to find tell-tale signs of the incident (blood stains near the shop, in the street in front of Baital Noor Masjid and on its wall etc.). He was joined there, amongst others, by Head Constable (later ASI) Ram Prasad (PW-18) who was on patrolling duty in the area. These police officials learnt that some injured persons had already been removed by a PCR van to trauma centre AIIMS and another to a private hospital. PW-16, thus, proceeded with Constable Amar Singh to trauma centre, AIIMS. The *rukka* (Ex.PW-16/A) which was later sent to the Police Station at 0230 hours on 02.07.2008 reveals that he had found MLCs of five persons recorded, including those of Joshna Begum (PW-3) and Mohd. Aslam (PW-15)). According to the *rukka*, at that stage, Mohd. Aslam (PW-15) was unfit for statement, while Joshna Begum (PW-3) was declared fit for statement. The assertion of PW-16 in this regard is confirmed by a certificate to such effect endorsed on MLC (Ex.PW-3/DA) of Joshna Begum (PW-3).

20. Interestingly, in the *rukka* (Ex.PW-16/A), the three other MLCs referred were MLC Nos. 126612 of Babu (A-3), 126613 of Jonny (A-4) and 126614 of Abid (A-2). It was brought out during the hearing on these appeals that the three MLCs of the said three appellants, though collected by the Investigating Officer, were not submitted with the reports under Sections 173 Cr.P.C. to the Court. Reference to these MLCs came to be

made during the trial at the stage of evidence of the witnesses Constable Amar Singh (PW-11) and SI Kailash Chand Meena (PW-16), relating to the investigation but no effort was made, by either side, to adduce formal evidence in their regard.

21. Initially, arguments were raised on behalf of above three appellants that the *rukka* (Ex.PW-16/A) wrongly showed that they had left the hospital after medical aid in the wake of MLCs whereas the fact was (as per defence) that they had actually been detained and arrested from the hospital, thereby not allowed to leave, only to be falsely shown arrested at 7 PM on 02.07.2008 at another place. In response to such submissions, the learned counsel for the State, however, pointed out the conflicting stand taken by the said three appellants in their respective statements under Section 313 Cr.P.C. (specifically in answer to question nos.25 and 26) wherein it was claimed that they had been picked up from their respective houses on 02.07.2008 to be taken to the police station.

22. Against the above backdrop, though having initially submitted disinclination to rely on the MLCs of the appellants, the learned counsel representing Abid (A-2), Babu (A-3) and Jonny (A-4) eventually submitted before us on 12.08.2015 that the MLCs be taken on record and treated as exhibits (duly proved). Thus, with the consent of the Additional Public Prosecutor for respondent-State, the MLCs of Abid (A-2) vide Ex.DY, Babu (A-3) vide Ex.DX and Jonny (A-4) vide Ex.DZ were taken on record, as per proceedings recorded on 12.08.2015. These documents have been referred to in the course of arguments by both sides.

23. The aforementioned three MLCs (Ex.DX, Ex.DY and Ex.DZ) show that Babu (A-3), Jonny (A-4) and Abid (A-2) were examined in trauma centre of AIIMS at 10.53 PM, 10.55 PM and 10.57 PM respectively on 01.07.2008. They were accompanied by a person named Shahid (or Shahida as appearing in the latter two documents). They appear to have come to AIIMS, on their own, with history of assault about two hours prior to their arrival in the hospital. Babu (A-3), as per MLC (Ex.DX) had a clean lacerated wound of the size 3cm and 1cm on the scalp besides swelling on left parietal region. Jonny (A-4) was found to have suffered a lacerated wound of the size of 2cm., 1cm. on right temporal region. Abid (A-2), on the other hand (his name is wrongly mentioned as Aaved), had suffered abrasion on the forehead and a lacerated wound over dorsum of right hand.

24. We may now examine the case for the prosecution against each appellant, as indeed the evidence adduced in support.

25. As mentioned earlier, the case primarily rests on the testimony of Joshna Begum (PW-3), one of the persons who suffered injuries in the same incident. Bilal, one of the injured persons could not be examined since he died before his testimony could be recorded. Shilpi Begum (PW-12) had initially given evidence, by and large, corroborating the statement of PW-3 Joshna Begum. But, she turned hostile during cross-examination (w.e.f. 31.05.2013). Mohd. Aslam (PW-15) was totally non-supportive of the prosecution case denying the involvement of the appellants in the incident. It has been the argument of the respondent-State that Shilpi (PW-12) and Mohd. Aslam (PW-15) have been hesitant

to support the prosecution case on account of duress exerted by, or at the instance of, the appellants.

26. Before we examine the arguments to such effect, it would be appropriate to see the prosecution story from the perspective of Joshna Begum (PW-3) whose statement (Ex.PW-3/A) was recorded by SI Kailash Chand Meena (PW-16) in the trauma centre of AIIMS. The document would reflect that there had been some quarrel between the two sides, two days before the date of incident wherein Farooq, brother of Rabi-Ul-Islam (A-1) had been assaulted. Formal evidence to confirm the said background is not available. Be that as it may, according to PW-3, in the FIR, she with her husband PW-15 had gone out for some shopping and when they had reached near the shop of Bilal at about 8.30 PM, Rabi-Ul-Islam (A-1), Abid (A-2), Shaheen (PO) and Jonny (A-4) had appeared on the scene. Rabi-Ul-Islam (A-1) carrying a knife, Abid (A-2) also carrying a knife, Shaheen (PO) and Jonny (A-4) both carrying iron rods (*sariyas*) were joined immediately after by Babu (A-3), Naseem (A-5) and Shameem (A-6), each carrying wooden sticks (*dandas*). PW-3 reported in the FIR that A-1 had challenged her husband PW-15 by referring to the incident of assault on the person of Faruq and saying that he would not leave him alive. She alleged that Rabi-Ul-Islam (A-1) had assaulted on the head of PW-15 with knife and when the latter tried to evade by raising his left hand, he suffered an injury on the left thumb. She claimed that when she had tried to come to rescue of her husband raising alarm, the said assailants (the appellants and the PO) had started assaulting her in which course Abid (A-2) hit her with knife on her left

hand. She stated that Babu (A-3) and Shaheen (PO) had caught hold of husband and Abid (A-2) had stabbed him in the waist with knife. According to her, she had raised alarm for help on hearing which her brothers Anwar (the deceased) and Bilal (since deceased) came on the scene. PW-3 further alleged in the FIR that the seven assailants had then started assaulting her said brothers in the course of which Rabi-Ul-Islam (A-1) and Abid (A-2) inflicted several wounds on their persons. She also spoke about the assault by others with wooden sticks and iron rods. According to her, Shilpi (PW-12) had tried to come to their rescue but was inflicted injuries. She stated that upon someone informing the police, PCR van had come and she with her husband, having been brought to trauma centre AIIMS, had heard that her brother Anwar had died in the Holy Family Hospital.

27. At the trial, Joshna Begum (PW-3) narrated the sequences of events broadly confirming her initial version in the FIR.

28. Shilpi Begum (PW-12) is the daughter of the sister of Joshna Begum (PW-3). In her examination-in-chief, she affirmed that on 01.07.2008 at about 8.30/9 PM when she had reached the shop of Bilal, she had heard Joshna crying for help. She went there running and saw the appellants along with Shaheen (PO) beating Joshna, Bilal, Aslam and Anwar with knives, *sariyas* (iron rods) and *dandas* (wooden sticks). She confirmed the word of PW-3 that it was Rabi-Ul-Islam (A-1) and Abid (A-2), who were armed with knives, while Jonny (A-4) and Shaheen (PO) were armed with iron rods, the rest wielding wooden sticks. She claimed that she had tried to intervene but was also beaten up with wooden sticks.

She stated that she had run away to save herself. She spoke about the PCR van coming taking the injured persons including herself and Anwar dying in the Holy Family Hospital.

29. Shilpi Begum (PW-12), having been examined on 22.12.2012, was cross-examined partly on 14.02.2013, then on 31.05.2013 and finally on 24.10.2013. Till her statement under cross-examination on 14.02.2013, she was fully supportive to the case for the prosecution affirming what was testified by her in the examination-in-chief. She, however, made an about-turn on 31.05.2013. Under continued cross-examination by counsel for A-1 and A-2, she stated (on 31.05.2013), *inter alia*, that on 02.07.2008, she had seen Joshna Begum (PW-3) crying with her family at about 11 AM sitting outside her house, though she did not have any conversation with her. She denied that she had accompanied the police officials in connection with any of the investigative steps including for purposes of preparation of the site plan or identifying the assailants. A part of her statement, under cross-examination on 31.05.2013 needs to be extracted *in extenso*. It reads as under :

“It is correct that on 22.12.12 I had identified the accused persons, present in the court today at the asking of the police officials, who had shown their faces outside the court room. Vol. The police officials told me that they have recorded my statement to this effect and that I will have to give statement as per them and identify the accused. I did so under their pressure. My today statement that I had not seen them committing any crime on 1.7.08 is correct. They were not present at the spot on 1.7.08. It is wrong to suggest that Ravi Teli and his associates had committed the crime on 1.7.08. vol. I had not seen anyone on 1.7.08.

xxx

It is correct that my statement u/s 161 CrPC which was recorded by the police officers was not read over to me. It is correct that I am not aware about the contents and the names of the assailants mentioned in the statement.”

(emphasis supplied)

30. To say the least, we do not approve of the manner in which record of deposition of the witness, quoted above, has been recorded. It indicates disconnect. We notice that the victim had not stated that she had not seen the accused person committing the crime on 01.07.2008 before the suggestion resulting in the response noted in portion underlined by us above was allowed. This was most improper. The learned trial Court should have taken care to note if the suggestion given actually stemmed from the statement made by the witness or not.

31. Be that as it may, PW-12 was re-examined by the Additional Public Prosecutor, five months after the U-turn made by her, only to find that the witness (PW-12) would reiterate that her statement on 22.12.2012 identifying the appellants as the assailants was under the hands of the police.

32. Mohd. Aslam (PW-15) was called for evidence on 11.09.2013, after Shilpi (PW-12) had made the somersault. As noted earlier, PW-15 was in jail for more than three years, corresponding to the time spent by the appellants also in jail on account of the case at hand. PW-15 gave a new twist to the tale by stating that, on 01.07.2008 at about 8 - 8.30 PM, when he along with his wife Joshna Begum (PW-3) had gone to the shop of Mohd. Bilal for making some purchase and having left the wife at the

said place when he was on way back to his house, he was attacked by Ravi Teli assisted by 5 – 6 boys (whose names he was not aware of) with knife. He attributed the assault by Ravi Teli on account of grudge harboured by the latter due to the reason that he had arranged the marriage of Mohd. Anwar (the deceased) with Suki, wife of Ravi Teli. He stated that he had also been assaulted with wooden sticks and injured on his head, shoulder, left palm and right wrist and was taken to trauma centre, AIIMS. He deposed that he had learnt about the murder of Mohd. Anwar on being discharged from the trauma centre on 07.07.2008, but would not know who had committed the said offence. He absolved the appellants from any role in the assault on his own person. Mohd. Aslam (PW-15) was cross-examined by the learned Additional Public Prosecutor, but to no avail.

33. The learned trial judge found the evidence of Joshna Begum (PW-3) worthy of reliance and accepted the prosecution case primarily on its basis. It has been argued on behalf of the appellants that PW-3 cannot be trusted as her version is replete with contradictions and inconsistencies. The defence argued that PW-3 is prone to exaggeration and has indulged in shifting stands withholding, at times, certain material information. It is the submission of the counsel for the appellants that PW-3, being inimically placed, had motive to falsely implicate and that this is shown by her insistence at one stage that Babu (A-3), who was initially suspected to be a juvenile, be treated as an adult and sent to regular jail (*"Bada jail"*). The defence also argues that it was PW-3, who falsely floated the theory of Abid (A-2), Babu (A-3), Jonny (A-4), Naseem (A-5)

and Shameem (A-6) having gone into hiding in the wooded area behind CRRI flats, close to the locality where they were residing. It was submitted that the Investigating Officer, in a partisan manner, had indulged PW-3 in such theory and had falsely shown the arrest of these appellants from the said place, followed by planting of clothes allegedly worn by each of these persons, showing them as dumped at one place. It was submitted that the Investigating Officer had also planted evidence as to recovery of the weapons including knife allegedly at the instance of Abid (A-2), wooden stick at the instance of Babu (A-3) and iron rod at the instance of Jonny (A-4) vide seizure memos Ex.3/P, 3/R, 3/N respectively.

34. The learned counsel further argued that the knife recovered from Abid (A-2) could not possibly have been the weapon of offence used in inflicting the fatal injuries on the person of the deceased, this having regard to the nature of weapon indicated by the autopsy doctor also for the reason that subsequent opinion (Ex.PW-5/A) on the subject in this regard is not confirmatory. The defence pointed out that no weapon of offence (knife) is shown recovered from Rabi-Ul-Islam (A-1) or for that matter, from Naseem (A-5) or Shameem (A-6).

35. The appellants argued that the wavering stand of Shilpi (PW-12) and non-corroboration by Mohd. Aslam (PW-15) isolates Joshna Begum (PW-3) as the solitary witness rendering her version highly suspect. It was argued that the deposition of Mohd. Aslam (PW-15) throws up the possibility that there may have been two different incidents one occurring near the house of Mohd. Aslam (PW-15) where he was assaulted by Ravi

Teli and his associates out of vendetta for his role in arranging the second marriage of Suki and the other in which Mohd. Anwar (the victim) suffered homicidal death. The argument developed is that Joshna Begum (PW-3) has tried to mix up the two incidents and show them as one episode falsely setting herself up as the eye-witness. It is argued that the word of prime witness (PW-3) having been belied by another witness for the prosecution (PW-15), the charge against the appellants respecting the alleged role in the injuries of Mohd. Anwar (the deceased) cannot be held brought home.

36. It was further submitted that there has been unexplained delay in lodging of the FIR and in arranging the inquest under Section 174 Cr.P.C. The learned counsel argued that the evidence as to the place where the *rukka* was prepared is inherently contradictory in as much as Joshna Begum (PW-3) took a decision that she had not gone to the Holy Family Hospital where SI Kailash Chand Meena (PW-16), insist he had recorded her statement after reaching the said hospital from where he sent the *rukka* for registration of the FIR.

37. As noted by us in earlier part of this judgment (para 23) Babu (A-3), Jonny (A-4) and Abid (A-2) had also come to AIIMS on 01.07.2008 and had been medically examined against MLCs (Ex.DX, Ex.DY and Ex.DZ respectively) in the night of 01.07.2008. Initially, the defence plea was that these three appellants had been detained by the police in the hospital itself and later falsely shown arrested on 02.07.2008 from the wooded area behind CRRI flats as per arrest memos (Ex.PW-3/D, Ex.PW-3/F and Ex.PW-3/C respectively) on 02.07.2008. As noted in the

proceedings dated 12.08.2015, this argument was given up in the face of contradictory stand taken by these three appellants in their statements under Section 313 Cr.P.C. The defence now relies on the MLCs (Ex.DZ, Ex.DX and Ex.DY respectively) to submit that Abid (A-2), Babu (A-3) and Jonny (A-4) had suffered injuries in the course of the incident which is the subject matter of the present prosecution, at the hands of the opposite party referring, by implication, to the deceased (Mohd. Anwar) and others on his side as the aggressors. The submission is that the investigating police was not fair in as much as no investigation was made into the injuries suffered by the persons sent up for trial. In this line of argument, without it being explicitly submitted, there is a hint of claim to “self defence”.

38. We have given our anxious consideration to the above noted submissions on behalf of the appellants. We, however, find these arguments to be devoid of substance.

39. Before we set out our reasons for not accepting the arguments of the defence, we must note the wholly unfair manner in which the proceedings concerning the recording of evidence of material witnesses were conducted. Joshna Begum (PW-3) was indeed the most crucial witness in as much as it was on her statement that the FIR had been registered. She was called to the witness box for the first time on 07.05.2010. Her statement would continue till 11.05.2012. It is indeed shocking that it took two years for the trial Court to complete the evidence of just one witness. Her examination-in-chief was recorded piecemeal and she had to come to the court for this purpose on three dates

of hearing (07.05.2010, 21.12.2010 and 04.08.2011). Her cross-examination required appearance in Court on eight dates (25.08.2011, 27.08.2011, 29.10.2011, 17.03.2012, 23.03.2012, 02.04.2012, 21.04.2012 and 11.05.2012). We could appreciate the lengthy cross-examination since she was the most crucial witness but for the fact that it was highly repetitive and replete with enquiries into even unnecessary aspects. Clearly, the underlying object appears to have been to tire out the witness and in this process somehow secure contradictory statements, as were likely to occur with the passage of time. This allows ample time and opportunity to put pressure, give inducements or threats to the witness under deposition by adopting all kinds of tricks and manoeuvrings. The caution of the law, per section 309 Cr.P.C., that the proceedings be continued “from day-to-day until all the witnesses in attendance have been examined” seems to have been thrown to winds.

40. Shilpi Begum (PW-12) appeared on 22.12.2012 and as already noted earlier, was also compelled to come again and again. The bits and pieces in which her statement was recorded smacks of intention to create openings to win her over. The fact that she, having supported the prosecution case on the first two appearances, made an unmistakable somersault on the third hearing only reinforces such impression. Mohd. Aslam (PW-15), himself in jail as an under-trial prisoner, *albeit* in another case, would have been privy to what was going on in the court. No wonder, he refused to support the word of his wife (PW-3). After all he, with his own criminal antecedents, and trials in other cases to face, was most the vulnerable.

41. The case at hand reminds us of the way trial proceeded in the case of *Khujji v. State* (1991) 3 SCC 627. The prime witness for prosecution, who had supported the charge against the accused in that case, had turned hostile upon being recalled for cross-examination after a long gap of time. The Supreme Court upheld the conviction on the basis of evidence for the prosecution ruling, *inter alia*, that the evidence of such hostile witness, to the extent it was corroborated by other evidence, could be acted upon. It was observed thus :

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

42. It is not correct to contend that Joshna Begum (PW-3) had a motive to falsely implicate. She did have her set of grievances on account of matrimonial dispute concerning her daughter (Babli) with her husband Shaheen (PO). This would necessitate a meticulous scrutiny and study of her deposition, but not its *ex facie* rejection. It seems that her daughter (Babli) had buried the differences with her matrimonial family. But, that does not necessarily mean that peace had been restored between the families. Noticeably, the defence only confirmed the strained relations by bringing up that Mohd. Aslam (PW-15) also faced the criminal charge of assaulting the mother of Rabi-Ul-Islam (A-1). If relations had improved, PW-3 would not be inclined to incriminate the members of the family of her son-in-law by false accusation. Her brother Mohd. Anwar having

been killed, it was only natural for Joshna Begum (PW-3) to feel concerned about how the assailants were treated. Therefore, we read nothing into her insistence that Babu (A-3) be treated as an adult. We proceed to examine the alleged discrepancies in Joshna Begum's (PW-3) testimony.

43. Going by the sequence narrated in the FIR, PW-3 and her husband had been accosted first by Rabi-Ul-Islam (A-1), Abid (A-2), Shaheen (PO) and Jonny (A-4). Immediately thereafter, they were joined by the other three including Babu (A-3). PW-3 did state on 25.08.2011 that on reaching near the shop of her brother, it was Jonny (A-4) and Babu (A-3), who had met them. In our view, this small mix up by the witness in the chronology of the arrival of the assailants must be ignored. She is an illiterate woman, who had narrated the sequence of events correctly in her examination-in-chief and may have become confused in the extensive cross-examination conducted over several dates. The fact remains that her consistent stand has been that the seven assailants had converged, though in two separate groups around the same time.

44. Joshna Begum (PW-3) did mention at one stage that thumb of her husband had been chopped off. This is an exaggeration. Neither the MLC of Mohd. Aslam (PW-15), nor the injured himself, support this version. In our view, however, this cannot disturb the larger picture as the statement of the witness about PW-15 being injured is corroborated by the testimony of the latter.

45. We find no contradiction in the police proceedings about the place where statement of Joshna Begum (PW-3) was recorded by SI Kailash

Chand Meena (PW-16). The *rukka* (Ex.PW-16/A), contemporaneously prepared, shows that SI Kailash Chand Meena (PW-16) had met Joshna Begum (PW-3) in the trauma centre of AIIMS. The police official had gone to the said hospital fully aware that another injured had been transported to the Holy Family Hospital. At that stage, he had no way of knowing that the injured taken to the private hospital was in a critical condition. In the trauma centre AIIMS, PW-16 found Joshna Begum (PW-3) fit for giving statement. He recorded her version and by the time he completed the exercise he had learnt that Mohd. Anwar, who had been taken by a relative through private arrangement to the Holy Family Hospital, had died. The fact that this information had reached while PW-16 was with Joshna Begum (PW-3) and Mohd. Aslam (PW-15) in the trauma centre AIIMS is reflected even in the statement (Ex.PW-3/A) of the first informant. The endorsement (Ex.PW-16/A) narrates that after recording the statement of Joshna Begum (PW-3), upon receipt of information vide DD No.52B, he had rushed to the Holy Family Hospital from where he would dispatch the *rukka* at 0203 hours on 02.07.2008.

46. The above facts are sufficient to also reject the argument of delay in registration of FIR. In our judgment, the police proceedings were as prompt as the circumstances would have permitted. The first intimation about the incident had come vide DD No.26A. PW-16 testified that he had received a copy of the said DD entry at 9.05 PM. Then stationed in police station (New Friends Colony), he had first set out to the place of occurrence (Taimur Nagar Pahari). Having inspected the said place, and having made local enquiries, finding no eye-witness or injured at the spot,

upon learning that the injured had been shifted to hospitals he had opted to first to go to the trauma centre, AIIMS. In the trauma centre, he collected the MLCs, recorded the statement of Joshna Begum (PW-3) and upon intimation about the developments at the Holy Family Hospital he proceeded there. This entire sequence would obviously have consumed time. The DD No.29A (Ex.PW-4/C) regarding registration of the FIR at 2.45 AM on 02.07.2008 and DD No.30A (Ex.PW-4/D), followed by DD No.32A (Ex.PW-4/E), about the dispatch of the special reports under Section 157 Cr.P.C. at 3.30 AM on 02.07.2008 and return of the special messenger by 6.35 AM on 02.07.2008 give us further assurance as to the prompt registration of the FIR and there being no inordinate delay.

47. We also repel the submissions concerning delay in the inquest proceedings. It has to be borne in mind that death had occurred in the Holy Family Hospital, late in the night. The record shows that the dead body was released only the next morning. The postmortem examination was conducted at 2.30 PM on 02.07.2008. The autopsy report (Ex. PW-19/DA) certifies that the inquest papers had been received at 1.35 PM. The reliance on *Balwant Singh Vs State of Delhi* 1976 CLR (Delhi) 43 and *Shyam Sunder Vs State* 1996 JCC 35 (Delhi) is thus misplaced.

48. We find the evidence as to the circumstances in which A-2 to A-6 are stated to have been arrested consistent and, thus, reliable. The evidence of Inspector M.A.Khan (PW-22) on this score finds corroboration from the testimony of SI Kailash Chand Meena (PW-16). Joshna Begum (PW-3), who is shown as an attesting witness to the documents prepared at the time of arrest (arrest memos and personal

search memos) created some confusion by stating that by the time she was called, the accused persons had already been apprehended. She claimed that the documents relating to arrest had been prepared in the police station where she was asked to sign. The two police officials would have the court believe their version that the proceedings were recorded in the forest area where the appellants had gone into hiding. In our view, even if the paper work in such regard was completed upon return to the police station, a claim on different lines by the police witnesses would not distract one from the fact that the appellants were actually arrested on 02.07.2008. As already noted, the appellants have abandoned the plea initially taken that they were detained during the night of 01.07.2008 from trauma centre AIIMS. They have now reverted to stick to their version in statements under Section 313 Cr.P.C. that they were picked up from their respective houses on 02.07.2008. It is only the place of arrest on which they seek to contradict the prosecution story. They, thus, accept the prosecution evidence that they were arrested on 02.07.2008.

49. The prosecution case about recovery of the clothes of the appellants A-2 to A-6 from the forest area, however, is not very convincing. Inspector M.A.Khan (PW-22) and SI Kailash Chand Meena (PW-16) would have us believe that after their arrests, in the wake of their disclosure statements and at their pointing out, the said appellants got recovered the clothes which were on their respective person at the time of the incident, and that the same were seized vide formal seizure memos (Ex.PW-3/U to Y), *inter alia*, in the presence of Joshna Begum (PW-3).

We reject this part of the evidence of the prosecution for the reason it is *per se* inadmissible. Going by the proceedings recorded, at the time of alleged recovery, the clothes were lying in a dump, close to the boundary wall of the forest area. The Investigating Officer attributes each apparel as the clothes of a particular accused on the basis of information given by the latter. Such statement to the police officer by a suspect in custody cannot be allowed to be introduced in evidence, particularly in absence of any material showing discovery of any further fact confirming the said connection. This recovery is inconsequential since examination of the clothes of these five persons by FSL has not evinced any conclusive result as to presence of blood of human origin matching with that of any of the victims.

50. Joshna Begum (PW-3) did speak about she coming to know of the fact that the accused persons had hidden themselves in jungle behind Meera Bai College, Taimur Nagar and having informed the police in such regard around noon time on 02.07.2008. But, it appears, she was trying to assume for herself a role larger than life. The police records do not credit this information to her. Inspector M.A.Khan (PW-22) clarified that he had developed this information through his secret sources whereupon the forest area was searched, though after joining Joshna Begum (PW-3) as a witness. In our view, this cannot totally discredit Joshna Begum (PW-3). The fact remains that these appellants were arrested on 02.07.2008, a fact not disputed. The plea of the appellants that they were picked up from their respective houses on the said day has remained unsubstantiated. In

any case, this aspect would not be of much consequence and determinative factor to decide this appeal.

51. We do not find any reason to disbelieve the evidence of the prosecution about the recovery of knife (Ex.P-17) pursuant to the disclosure and at the instance of Abid (A-2), from beneath his bed in his *jhuggi* No.S-265/125, Pahari No.1, Indira Gandhi Camp, Taimur Nagar, Delhi in the presence of SI Kailash Chand Meena (PW-16) and Joshna Begum (PW-3) vide seizure memo (Ex.PW-3/P). It is proved by these witnesses that recovery was made in the wake of information gathered from the said appellant during interrogation, as reduced into writing in disclosure memo (Ex.PW-3/O). The knife was found to be bearing blood stains. Its measurement had been taken and sketch was prepared vide Ex.PW-16/B. The knife was sent, in due course, with other exhibits, to FSL. The reports of analysis (Ex.PW-19/A) in FSL, coupled with that of its biology division (Ex.PW-19/B) show that the knife was found bearing blood stains of human origin, though the grouping could not be established. The fact that the knife had blood stains of human origin adds to the incriminating circumstances for which Abid (A-2) owed some explanation. Since Abid (A-2) would come up only with bald denial, this circumstance only reinforces the effect of ocular evidence adduced [*Khujji (supra)*].

52. In addition to the blood stains, the prosecution has also relied on confirmation as to the probable use of the knife (Ex.P-17), recovered from the possession of Abid (A-2), for causing the stab injuries on the person of the deceased, in the form of opinion of Dr.Shalini Girdhar (PW-

5) of the Department of Forensic Medicine and Toxicology, AIIMS. The exhibit (P-17) was sent to her for opinion in the light, *inter alia*, of the autopsy report, on 28.08.2008. She had prepared a sketch (Ex.PW-5/B) and after considering the post-mortem report given her opinion vide Ex.PW-5/A. In her view, this cutting instrument could have been used for causing injury nos. 1, 2, 3, 4, 10, 12, 13, 14 and 15 (as noted in the autopsy report, Ex.PW-19/DA).

53. The appellants have raised two questions in the context of opinion given by Dr. Shalini Girdhar (PW-5). One grievance is that the weapon was not taken to the autopsy doctor. This must be rejected for the simple reason the autopsy doctor was not available which is why the prosecution had to bring in another doctor (PW-21) to prove the post-mortem examination report. The second criticism, which has been pressed more vigorously, is that this knife (Ex.P-17) is a single edged weapon which could not have produced injury nos. 2 and 10 in as much as the opinion (of PW-5) in its regard is in conflict with the earlier opinion (of the autopsy doctor) that the said two injuries had been caused by a double edged stabbing weapon. Similarly, the autopsy doctor had opined injury nos. 3 and 4 to have been suffered by the deceased by a sharp pointed object whereas Dr. Shalini Girdhar (PW-5) opined that they had been caused by a single edged weapon (Ex.P-17).

54. PW-5 was called upon, under cross-examination, to explain the above differences in her opinion vis-à-vis the opinion in the autopsy report. She conceded that the thickness of the blade of the knife may demonstrate the size of the wound it can cause. She stood by her opinion

(Ex.PW-5/A), *inter alia* stating that even a punctured wound can be caused by a sharp pointed object. In her submission, even an injury caused by such single edged weapon may be termed as punctured wound.

55. The ocular evidence shows that Rabi-Ul-Islam (A-1) and Abid (A-2) had used knives to cause injuries on the person of the deceased. It is only one of the said two cutting instruments which has been recovered during investigation. Some of the injuries suffered by the deceased were actually caused by a single edged weapon. We are not prepared to discard the evidence about possible use of the knife (Ex.P-17) recovered from the possession of Abid (A-2) only because PW-5's opinion for the same is based on examination of injuries and possible weapon of offence used. Such opinion *per se* has an element of hypothesizing and approximation, and would give way to ocular evidence of the eye witnesses.

56. In absence of any discrepancies in the evidence respecting the seizure of iron rod (Ex.P-10) and wooden stick (Ex.P-9) pursuant to disclosures (vide Ex.PW-3/M and Ex.PW-3/Q respectively) and on the pointing out of Jonny (A-4) and Babu (A-3) respectively, also must be believed. It must, however, be added that these weapons are not shown to be bearing any tell-tale signs (in the form of blood stains etc.) to confirm their specific use in the assault.

57. In our view, the non-recovery of the weapon used by Rabi-Ul-Islam (A-1) is of no consequence. The recovery, if made, would undoubtedly have reinforced the case against him. Even in the face of failure of the investigating agency to recover the said knife, there is abundant material to believe the ocular evidence, particularly of Joshna

Begum (PW-3), as to his involvement and use of knife. It must be remembered that Rabi-Ul-Islam (A-1) had absconded and had to be declared proclaimed offender. He was arrested only on 05.02.2009, vide proceedings Ex.25/B.

58. For reasons further elaborated hereinafter, we reject the contention that the testimony of Shilpi (PW-12) and Mohd. Aslam (PW-15) should result in the evidence of Joshna Begum (PW-3) being disbelieved.

59. As noted earlier, Shilpi Begum (PW-12) had supported the prosecution case in entirety during her examination-in-chief. She stuck to that version even when she had been called for the second time, for cross-examination. Her cross-examination remained inconclusive and by the time she stepped into the witness box on the next date she had suppurated and turned hostile. We have already recorded our disapproval of the manner in which her deposition was recorded on 31.05.2013. It seems words were being put in her mouth without she saying so willingly. She did try to wriggle out of what was her stand on the previous two dates but apparently something had happened during the interregnum to make her shift from her previous position. We reject the version given by her on 31.05.2013 for the simple reason the explanation that she had identified the appellants on 22.12.2012 under pressure because their faces had been shown her outside the court room is frivolous. It has been nobody's case that the two sides involved in the incident did not know each other from before. On the contrary, they were fully familiar and acquainted, not only on account of they being residents of same neighbourhood but also because Babli, the daughter of Joshna Begum (PW-3), who is an aunt of

Shilpi Begum (PW-12) is married to Shaheen (PO), a member of the clan to which most of the assailants belonged.

60. We find resonance of what was noticed (concerning the trial of similarly placed case) in *Khuji* (supra). In the case at hand, witnesses seem to have been brow-beaten or forced and made to change their version. Following the view taken in *Khuji* (supra), we accept the version of Shilpi Begum (PW-12), as given during her examination-in-chief to be the correct one. The said part of her testimony, treated as one not effaced on account of the hesitation later shown by her, provides full corroboration to the word of Joshna Begum (PW-3) and, thus, can be acted upon.

61. It seems to us that Mohd. Aslam (PW-15) had also lost heart over the period or for other reasons refused to affirm the prosecution case. He is indeed a witness hostile to the case for which the appellants were prosecuted. A close scrutiny of his testimony, however, shows that he has not entirely negated the version of Joshna Begum (PW-3), not the least with regard to the fatal stabbing of Mohd. Anwar. Noticeably, he was reluctant only to support the prosecution charge about the appellants being the author of his own injuries. He spoke about he having left Joshna Begum (PW-3) alone near the shop of Bilal and himself being assaulted elsewhere by another group (led by Ravi Teli).

62. In our judgment, Mohd. Aslam (PW-15) has only feebly resumed the defence theory which was developed during the protracted cross-examination of Joshna Begum (PW-3). The name of Ravi Teli had not cropped up during investigation. A role was attributed to Ravi Teli by the

defence only during the deposition of Joshna Begum (PW-3) without it being clarified as to what was the basis on which such assumption was being claimed. The story concerning Ravi Teli, in fact, has no legs to stand on. The version gets torpedoed now by the alternative plea of “self-defence” propounded during hearing on these appeals, on the basis of MLCs (Ex. DZ, DX and DY) of Abid (A-2), Babu (A-3) and Jonny (A-4). If the said three appellants had actually suffered injuries in self-defence, at the hands of those on the side of Joshna Begum, the suggestions concerning involvement of Ravi Teli are nothing but fiction.

63. It is common that the witnesses tend to exaggerate. Improvements or variations in the ocular version only puts the Court to caution requiring a closer scrutiny of the eye-witness account. A witness who is related to the victim does not *per se* become suspect. Allowance has to be given for exaggerations or embellishments and the evidence of even an “interested” witness may be accepted and acted upon, provided the contradictions, inconsistencies, exaggerations or embellishments do not convert the prosecution case altogether into a new story or render it impossible for grain to be separated from chaff or be such as to make the truth and falsehood inextricably mixed up [*Subal Ghorai Vs State of West Bengal* JT 2013 (4) SC 527 and *Sheesh Ram Vs State of Rajasthan* (2014) 3 SCC 689].

64. In our assessment, Joshna Begum (PW-3), though closely related to the victim and other injured persons, has stood the test of cross-examination well, even though it was tormentingly lengthy, repetitive protracted and, as in *Subal Ghorai* (supra) “rambling”. The fact that she

herself was injured in the same incident further confirms her presence at the scene.

65. The evidence of Joshna Begum (PW-3), in our assessment, is consistent and worthy of reliance. There are no such contradictions or inconsistencies in her deposition as could render her version implausible. Her testimony inspires confidence, notwithstanding small variations or stray exaggerations, inasmuch as they do not go to the root. Some wear and tear, on account of passage of time, particularly cannot render her word incredible, particularly when it is corroborated in material particulars by other ocular testimonies and supported by the medical evidence. Thus, we find the cases of *Bhagirath Vs The State of Madhya Pradesh*, 1976 C.L.R. (S.C.) 116 and *Mukhwant Singh & Ors. Vs State of Delhi*, 1991(2) C.C. Cases 1(HC) distinguishable on facts.

66. It has been the argument of the appellants that the investigation has been tainted. Reliance is placed on *Laxmi Singh & Ors. Vs State of Bihar*, AIR 1976 SC 2263 to argue that adverse inference be drawn since the prosecution has not explained the injuries sustained by Abid (A-2), Babu (A-3) and Jonny (A-4). We are not impressed with this line of argument. In our view, the shifting stand taken vis-à-vis the MLCs of these appellants shows that the theory “self-defence” has been set-up as an afterthought. It is inherent in this defence that the two sides had actually clashed with each other. The core issue in such scenario is as to which side was the aggressor. Having regard to the fact that the injuries suffered by Abid (A-2), Babu (A-3) and Jonny (A-4) were trivial in nature, as compared to the extensive injuries inflicted on the person of Mohd.

Anwar, with deadly weapons in active use, resulting in his death, there can be no doubt that the appellants were the aggressors and the other side at the receiving end. In these facts and circumstances, the injuries of the three appellants stand explained and the theory of self-defence raised rather hesitatingly must be rejected.

67. The case of *Samadhan Dhudaka Koli Vs State of Maharashtra 2009 [I] CAR (SC) 140* has no relevance since the non-production of record concerning immediate reports made by the SI Kailash Chand (PW-16) to the police station does not create any doubts. It was not even proved that DD entry was recorded contemporaneous to such reports. The argument of partisan prosecution does not impress us.

68. In the forgoing facts and circumstances, we have no hesitation in affirming the findings recorded by the learned trial court that the appellants, along with Shaheen (PO), had collectively assaulted on the person of Mohd. Aslam (PW-15) and Joshna Begum (PW-3) near the shop of Bilal, sometime around 8.30 PM on 01.07.2008 and when Bilal (since deceased), Mohd. Anwar (deceased) and Shilpi (PW-12) had come to their rescue, they were also attacked and injured by the appellants. We also affirm the findings that in this assault, Rabi-ul-Islam (A-1) and Abid (A-2) were armed with knives which were actually put to use in inflicting injuries on the person of Mohd. Anwar (deceased). We further find that the other appellants were also armed, Shaheen (PO) and Jonny (A-4) carrying iron rods and others carrying wooden sticks. These weapons were used also for inflicting injuries on the persons of Joshna Begum

(PW-3), Shilpi Begum (PW-12), Mohd. Aslam (PW-15) and Bilal (since deceased).

69. The appellants refer to *Subhash & Anr. Vs State of U.P.* 1976 SCC (Crl.) 483 and *Ram Narain Vs State of Punjab* AIR 1975 SC 1727 to argue that from the use of iron rod and wooden stick the intention to kill cannot be gathered. We do not find any merit in this submission for the reason the evidence also shows use of knife by two assailants.

70. It has been argued that since only Rabi-ul-Islam (A-1) and Abid (A-2) were carrying knives, common intention for inflicting the fatal stab wounds cannot be attributed, under Section 34 of IPC, to the other appellants. Reliance is placed on *Kripal Vs State of U.P.*, AIR 1954 SC 706 and *Ishaque and Ors Vs State of West Bengal and Ors*, (2013)14 SCC 581, to argue that sharing of common intention or intention to kill cannot be inferred. In our judgment, the argument lacks merit. Seven persons, each armed with weapon, two of them with stabbing instruments, had converged, almost together, and collectively attacked Mohd. Aslam (PW-15) and Joshna Begum (PW-3). When Bilal (since deceased) and Mohd. Anwar (deceased), both brothers of Joshna Begum (PW-3), tried to intervene, the appellants diverted their collective wrath towards them. What followed thereafter was absolute mayhem. A vicious attack was launched on the person of Mohd. Anwar (victim). The autopsy report shows that he was subjected to assault with all kinds of weapons, sharp-edged cutting instruments and blunt included. The attack was all over his body including on the vital parts. Two specific injuries, both in the chest region, individually and collectively, were sufficient to cause death in the

ordinary course of nature. It is clear from the evidence that the appellants intended to cause these injuries.

71. In the face of proof that deadly weapons were used by the seven assailants, collectively focusing their attention on one individual, causing extensive damage to his body, there is no scope for entertaining the plea that the intention was anything but to cause death. When all the seven assailants, including the appellants before us, were active participants in the attack on the person of Mohd. Anwar, there can be no doubt that they were so engaged since they shared the common intention to cause his death. Thus, the death of Mohd. Anwar must be held a case of culpable homicide amounting to murder.

72. In above view of the matter, we hold that the learned trial Court has correctly appreciated the evidence on record to find the appellants guilty on the charge of murder under Section 302/34 of IPC.

73. As noted earlier, the MLC of Mohd. Aslam (PW-15) has not been proved in accordance with law. The document (Ex. PW-14/DA) was referred in the evidence in some other context. The author of this MLC has not been examined. In these circumstances, the prosecution did not prove the extent or nature of injuries suffered by him. Thus, we find it difficult to uphold the conclusion reached by the learned trial Court that the injuries suffered by Mohd. Aslam (PW-15) were such as were likely to result in his death. The conviction of the appellants for the offence under Section 307/34 of IPC on this account, therefore, cannot be sustained.

74. The evidence of Joshna Begum (PW-3) and Shilpi Begum (PW-12) has collectively brought out that both of them and Bilal (since deceased) had also been injured in the attack, at the hands of the appellants. We, thus, affirm the findings of the learned trial Court holding the appellants guilty on the charge for offences under Section 323/34 of IPC for the injuries suffered by Joshna Begum (PW-3), Shilpi Begum (PW-12), Bilal (since deceased) and additionally for the hurt caused to Mohd. Aslam (PW-15).

75. Before concluding, against the backdrop of what we have noticed in earlier part of this judgment we feel it necessary to remind the trial Courts of their duty in light of the following observations of the Supreme Court in *Vinod Kumar Vs State of Punjab*, (2015) 3 SCC 220:

57.1. Adjournments are sought on the drop of a hat by the counsel, even though the witness is present in court, contrary to all principals of holding a trial. That apart, after the examination-in-chief of a witness is over, adjournment is sought for cross-examination and the disquieting feature is that the trial Courts grant time. The law requires special reasons to be recorded for grant of time but the same is not taken note of.

57.2. As has been noticed earlier, in the instant case the cross-examination has taken place after a year and 8 months allowing ample time to pressurize the witness and to gain over him by adopting all kinds of tactics.

57.3. There is no cavil over the proposition that there has to be a fair and proper trial but the duty of the court while conducting the trial is to be guided by the mandate of law, the conceptual fairness and above all bearing in mind its sacrosanct duty to arrive at the truth on the basis of the material brought on record. If

an accused for his benefit takes the trial on the path of total mockery, it cannot be countenanced. The court has a sacred duty to see that the trial is conducted as per law. If adjournments are granted in this manner it would tantamount to violation of the rule of law and eventually turn such trials to a farce. It is legally impermissible and jurisprudentially abominable. The trial courts are expected in law to follow the command of the procedure relating to trial and not yield to the request of the counsel to grant adjournment for non-acceptable reasons.

57.4. In fact, it is not at all appreciable to call a witness for cross-examination after such a long span of time. It is imperative if the examination-in-chief is over, the cross examination should be completed on the same day. If the examination of a witness continues till late hours the trial can be adjourned to the next day for cross-examination. It is inconceivable in law that the cross-examination should be deferred for such a long time. It is anathema to the concept of proper and fair trial.

57.5. The duty of the court is to see that not only the interest of the accused as per law is protected but also the societal and collective interest is safeguarded. It is distressing to note that despite series of judgments of this Court, the habit of granting adjournment, really an ailment, continues. How long shall we say, "Awake! Arise!". There is a constant discomfort. Therefore, we think it appropriate that the copies of the judgment be sent to the learned Chief Justices of all the High Courts for circulating the same among the learned trial Judges with a command to follow the principles relating to trial in a requisite manner and not to defer the cross-examination of a witness at their pleasure or at the leisure of the defence counsel, for it eventually makes the trial an apology for trial and compels the whole

society to suffer chicanery. Let it be remembered that law cannot allowed to be lonely; a destitute.

76. In the result, we partly allow the appeals by setting aside the conviction of the appellants, and the sentence awarded to each of them, for the offence under Section 307/34 of IPC. The findings of guilty and conviction for offences under Section 302/34 of IPC and under Section 323/34 of IPC, as indeed the sentences awarded for the same, are maintained.

77. The appeals are disposed of in above terms. The appellants be informed through Superintendent, Central Jail with copy of this judgment being made available to each of them.

(R. K. GAUBA)
Judge

(SANJIV KHANNA)
Judge

SEPTEMBER 07, 2015/ll/afa