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

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Judgment delivered on 29th March, 2016

+ **CRL.A. 1461/2012**

VINOD @ SURAJ @ MOTA

..... Appellant

Through : Mr.Vivek Sood, Mr.Prem Prakash,
Ms.Shruti Kukreja and Mr.Rakesh
Sharma, Advs.

versus

STATE NCT OF DELHI

..... Respondent

Through : Mr.Sunil Sharma, APP for the State
along with Inspr.Karun Sagar and
Inspr. Raj Singh, P.S. Rohini.

+ **CRL.A. 503/2012**

VINOD @ RATANIA

..... Appellant

Through : Mr.Hans Raj Singh, Adv.

versus

STATE

..... Respondent

Through : Mr.Sunil Sharma, APP for the State
along with Inspr.Karun Sagar and
Inspr. Raj Singh, P.S. Rohini.

+ **CRL.A. 58/2012**

VICKY

..... Appellant

Through : Mr.R.N. Sharma, Adv.

versus

STATE

..... Respondent

Through : Mr.Sunil Sharma, APP for the State
along with Inspr.Karun Sagar and
Inspr. Raj Singh, P.S. Rohini.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

G.S.SISTANI, J

1. Three appeals have been heard together and are hereby disposed of by a common judgment.

2. All the three appeals arise out of the judgment and order on sentence dated 26.11.2011 passed by learned Additional Sessions Judge-01 (Outer), Rohini, Delhi, whereby all the three appellants have been sentenced to undergo imprisonment for life with fine of Rs.10,000/-, each, and in default of payment of fine, six months simple imprisonment for the offence punishable under Section 302/34 of the Indian Penal Code. It was also directed that benefit of Section 428 of the Indian Penal Code would be given to the appellants.
3. The case of the prosecution, as it unfolds, is that a couple i.e. Suman and her husband, Sunil, were residing at K-Block, Lal Janta DDA Flats, Vijay Vihar, Delhi. Babli, cousin sister of Suman, was residing at R-Block, Lal Janta DDA Flats, Vijay Vihar, Delhi, which was situated near the house of Suman and Sunil. Since Babli was unwell, Sunil, Suman and one Deepak, had gone to the house of Babli on 9.1.2008. Suman was preparing food in the kitchen when a person called Sunil by stating that Vicky, Vinod @ Suraj @ Mota and Vinod @ Ratania were calling him downstairs. Initially Sunil had refused to go downstairs, as he had quarrelled with Vinod @ Suraj @ Mota on previous occasions but on the insistence of Ravi he had gone downstairs. Sunil was then attacked by Vicky, Vinod @ Suraj @ Mota and Vinod @ Ratania, who inflicted blows on Sunil with a beer bottle, bricks, etc. Sunil ran towards nallah to save himself but was stopped by Vicky and thereafter he was again beaten up by the said persons. The Police was accordingly informed. Head Constable Raj Kumar and Constable Balwan Singh posted at Police Post Vijay Vihar were on patrolling duty. On receipt of the information that some boys were beating one boy on the road from Vijay Vihar to Sultanpuri near Shamshan ghat and also stabbed him near Shamshan Ghat, they reached there but since none was found at the informed place, they returned back and when they

reached near I-Block, Lal Quarter, Vijay Vihar, at the corner of Som Bazar Road, they saw 2-3 boys standing there, who hid themselves after they saw the police personnel. Sunil was found lying there in an injured condition. ASI Sudama Sharma and Constable Bhuwan Chand after receipt of DD No.38 also reached there. Sunil in injured condition was removed to BSA Hospital. ASI Sudama went to BSA Hospital and obtained the MLC report of Sunil, who was declared unfit to give his statement due to head injuries. Sunil was then referred to RML Hospital. ASI Sudama made an endorsement on DD no.38A and sent Constable Bhuwan for registration of the FIR. FIR bearing no.21/08 under Section 307 IPC was registered. ASI Sudama also went to the hospital where statement of Suman, wife of Sunil, was recorded. The exhibits were collected. ASI Sudama completed other formalities of investigation. Sunil (hereinafter referred to as 'the deceased') expired on 12.1.2008. Post-mortem of the deceased was conducted by Dr.V.K. Jha, PW-14, who opined the cause of death as 'comma' as a result of head injuries consequent to blunt force diverted upon head of the deceased.

4. After completion of investigation, charge sheet was filed and charges were framed against the appellants to which they pleaded not guilty and claimed trial.
5. In support of its case, the prosecution has examined 27 witnesses. The defence has led only one evidence. Statements of the appellants were recorded under Section 313 of the Code of Criminal Procedure.
6. Mr. Vivek Sood, learned counsel for the appellant in CRL.A.1461/2012, Mr. Hans Raj Singh, learned counsel for the appellant in CRL.A.503/2012 and Mr. R.N. Sharma, learned counsel for the appellant in CRL.A. 58/2012, contend that the impugned judgment and order on sentence both dated 26.11.2011 are erroneous on facts as well as on law, and the same are

liable to be set aside. It is further submitted that there are glaring contradictions and infirmities in the case of the prosecution as against the appellants. Counsel next contended that the material witnesses including the wife of the deceased had turned hostile and hence no order of conviction could have been passed in this case.

7. Mr. Sood, learned counsel for the appellant/ Vinod @ Suraj @ Mota in CRL.A.1461/2012, submits that the recoveries attributed to the appellant/ Vinod @ Suraj @ Mota are fabricated and concocted. It has also been strongly urged before this Court by all the three counsels for the appellants that the presence of Sh. Santosh, PW-4, who is the brother of the deceased, is doubtful as he was not present at the spot of the incident. It has also been contended by counsels for the appellants that PW-4 is a planted witness. Another ground, which has been urged, is that in case it is presumed that PW-4, Santosh was present at the spot, the name and parentage of the deceased would have been reflected in the MLC whereas it has been written as unknown.
8. Another argument, which has been raised by counsels for the appellants, is that the prosecution has failed to record the statement of Tulsi, who had called the PCR. It is contended that Tulsi was neither examined under Section 161 of the Code of Criminal Procedure nor he appeared as a witness before the trial court.
9. Learned counsel for the appellants have laid great stress in their arguments with regard to the testimony of PW-4, Santosh. It is contended that in the evidence, PW-1, Smt. Suman, and PW-5, Sh. Deepak, who were the eye-witnesses as per the prosecution, have not, at any stage, named PW-4, Sh. Santosh, as being present at the spot of the incident. It is further contended that although PW-4 in his testimony has stated that PW-1, Smt. Suman, and PW-5, Sh. Deepak, tried to save Sunil but both these witnesses have not

supported the case of the prosecution and they have not stood to their testimony with regard to this fact.

10. Another ground, which has been raised by the counsel for the appellants, is that in case PW-4, Sh. Santosh, was present at the spot, he would have removed his injured brother to the hospital. To the contrary the injured was removed to the hospital by a CATS ambulance. It is further contended that in the testimony of PW-10, HC Raj Kumar, it is nowhere mentioned that PW-4, Sh. Santosh, was present at the spot. Similar argument has also been raised with regard to the testimonies of PW-12, Constable Bhuvan; PW-16, ASI Sudama Sharma; and PW-21, Sh. Sanjay Mehndiratta, as none of these witnesses have mentioned the presence of PW-4 at the spot of the incident.
11. Attention of this Court is drawn by the counsel for the appellants to the Rukka, Exhibit PW-16/A, to show that Rukka does not mention that PW-4 was present, neither the FIR, Exhibit, PW-6/A, mentions the name of PW-4, as an eye-witness. It is, thus, contended by counsel for the appellants that in case PW-4, who is none else but the real brother of the deceased, was present at the spot, he would have either tried to save his brother or at least removed him to the hospital. It is next contended that the testimony of PW-4 is unreliable as according to this witness he had put the deceased in his auto but since the auto did not start, he left the spot for 10-15 minutes in search of an auto. It is next contended that neither the auto was seized nor the blood stained clothes of PW-4 were seized for forensic examination. Counsels contended that all the above instances would show that PW-4 was not present at the spot.
12. It has further been contended by counsel for the appellants that PW-4 is an interested witness, his testimony is doubtful and there is no evidence to corroborate the evidence of PW-4 and, thus, it would be highly unsafe to convict the three appellants on the sole testimony of PW-4. Another

argument, which has been raised, is that the beer bottle, sought to be recovered on 16.1.2008, is highly improbable on the ground that, firstly, there is a delay and, secondly, the beer bottles have been recovered from a public place and, thus, not much significance can be attributed to these recoveries. Similar argument has also been raised with regard to the blood stained clothes, which were recovered at the instance of the appellant, Vinod @ Suraj @ Mota after a gap of seven days.

13. Mr. Sood, learned counsel appearing for the appellant Vinod @ Suraj @ Mota, submits that the case of the prosecution is highly weak and improbable. Learned counsel has also laid great stress in his argument that the site plan is unreliable for the reason that the same does not mention the spot from where PW-4 saw the incident. The first site plan prepared does not show the electricity poles whereas the subsequent site plan shows the electricity poles. The site plan does not show the auto rickshaw in which PW-4 had tried to take his brother to the hospital and in fact PW-4 in his testimony has not supported the case of the prosecution with regard to the preparation of the site plan. It has also been contended that PW-9, SI Manohar Lal, Draftsman, has testified in his statement that the site plan was made at the instance of the Investigating Officer and not PW-4. It has further been contended that in the absence of enough light PW-4 could not have seen the faces of the persons, who had attacked his deceased brother as it has come in the testimony of PW-12 that there was no light as public persons had broken it. It has also been contended that as per the call made by Tulsi and the FIR, a person had been stabbed, however, the same is not supported by the medical evidence, although as per the testimony of Dr. V.K. Jha, PW-14, the injury was caused by a blunt force diverted upon head of the deceased.

14. Learned counsel for the appellants submits that the conduct of PW-4 is

unacceptable as a brother and his reactions are not normal as neither he tried to save his brother nor informed the Police nor took him to the hospital. It is contended that in this case PW-4, who claims to be an eye-witness, did nothing to save his brother. It has further been contended that as per the own deposition of PW-4 he reached the hospital at 10.00 p.m. If this part of the testimony is to be admitted then there would be no reason for sending the Rukka on the basis of DD entry, neither the statement of PW-4 was recorded soon-after the incident.

15. Another reasoning with regard to presence of eye-witness at the place of the incident, PW-16, ASI Sudama Sharma, has testified that no eye-witness had met him at the spot or at the hospital.
16. PW-19, Constable Mohd. Qasim has testified that he had not noticed any family member of the deceased at RML hospital. It has also been pointed out that PW-21, Sh. Sanjay Mehndiratta, Assistant Ambulance Officer in CATS, has testified that no family member was present when the injured was removed to the hospital.
17. Another argument, which has been raised by learned counsel for the appellants, is that in the inquest proceedings, which were prepared on 12.1.2008, the persons suspected were not named and even in the column of injuries it has been stated only 'head injuries.' However, no details were entered.
18. Another argument, which has been raised by counsel for the appellants, is that the statement of PW-4 was not recorded on the next morning but in fact the statement was recorded subsequently to solve the blind murder and to falsely implicate the present appellants.
19. Additionally, Mr. Sood has argued as an alternate prayer that even if the case of the prosecution is accepted, the case would fall under Section 325 or 304 Part II of the Indian Penal Code since the deceased died after three

days of the incident. The beatings, even as per the prosecution, were indiscriminate and were not at the specific place. There was no mens rea attached, which is evident from the evidence of PW-10, HC Raj Kumar, and PW-12, Ct. Bhuvan, that they had seen the victim crying in pain and in case the intention was to kill him the appellants would have ensured his death on the spot.

20. It has also been submitted by Mr. Sood that the prosecution has failed to establish any motive. It is next contended that the evidence of PW-8, Sh. Ram Sahai, is also unreliable as in case he received a phone call from his son, PW-4, there was no reason for him not to have called the Police and further as per the testimony of PW-8, Sh. Ram Sahai, he reached the spot within 10-15 minutes. In case PW-8 had reached the spot within 10-15 minutes, he would have certainly found PW-4, Santosh, at the spot, as per the testimony of PW-4. Resultantly, the testimonies of these witnesses are unreliable and the same cannot form the basis of conviction.
21. In support of the submissions made that only interested and partisan prosecution witnesses have been examined and no independent witness was examined, learned counsel for the appellants have relied upon ***Hem Raj and Others v. State of Haryana***, reported at (2005) 10 SCC 614, more particularly paras 8 and 9, which read as under:

“8. The fact that no independent witness - though available, was examined and not even an explanation was sought to be given for not examining such witness is a serious infirmity in the prosecution case having regard to the indisputable facts of this case. Amongst the independent witnesses, Kapur Singh was one, who was very much in the know of things from the beginning. Kapur Singh is alleged to have been in the company of PW5 at a sweet stall and both of them after hearing the cries joined PW4 at Channi Chowk. He was one of those

who kept the deceased on a cot and took the deceased to hospital. He was there in the hospital by the time the first I.O.-PW9 went to the hospital. The evidence of the first I.O. reveals that the place of occurrence was pointed out to him by Kapur Singh. His statement was also recorded, though not immediately but later. The I.O. admitted that Kapur Singh was the eye-witness to the occurrence. In the FIR, he is referred to as the eye-witness along with PW5. Kapur Singh was present in the Court on 6.10.1997. The Addl. Public Prosecutor 'gave up' the examination of this witness stating that it was unnecessary. The trial court commented that he was won over by the accused and therefore he was not examined. There is no factual basis for this comment. The approach of the High Court is different. The High Court commented that his examination would only amount to 'proliferation' of direct evidence. But, we are unable to endorse this view of the High Court. To put a seal of approval on the prosecution's omission to examine a material witness who is unrelated to the deceased and who is supposed to know every detail of the incident on the ground of 'proliferation' of direct evidence is not a correct approach. The corroboration of the testimony of the related witnesses-PWs 4 & 5 by a known independent eye-witness could have strengthened the prosecution case, especially when the incident took place in a public place.

9. Non-examination of independent witness by itself may not give rise to adverse inference against the prosecution. However, when the evidence of the alleged eye-witnesses raise serious doubts on the point of their presence at the time of actual occurrence, the unexplained omission to examine the independent witness-Kapur Singh, would assume significance. This Court pointed out in **Takhaji Hiraji Vs. Thakore Kubersing Chamansing & Others [(2001 6 SCC 145)]**

“[I]f already overwhelming evidence is available and examination of other witnesses would only be a repetition or duplication of the evidence already adduced, non-examination of such other witnesses

may not be material. In such a case, the court ought to scrutinize the worth of the evidence adduced. The Court of facts must ask itself whether in the facts and circumstances of the case, it was necessary to examine such other witness, and if so, whether such witness was available to be examined and yet was being withheld from the Court. If the answer be positive then only a question of drawing an adverse inference may arise. If the witnesses already examined are reliable and the testimony coming from their mouth is unimpeachable the Court can safely act upon it, uninfluenced by the factum of non-examination of other witnesses. In the present case we find that there are at least 5 witnesses whose presence at the place of the incident and whose having seen the incident cannot be doubted at all. It is not even suggested by the defence that they were not present at the place of the incident and did not participate therein."

22. In support of the submissions made with regard to the recovery being made at a public place is insignificant, learned counsel for the appellants have relied upon ***Mani v. State of Tamil Nadu***, reported at (2009) 17 SCC 273, more particularly paras 24 to 26, which read as under:

"24. Now, it is nobodys case that at the time the discovery was made by accused no. 1, accused no. 2 also made certain discoveries. Therefore, the witness was not certain as to who made the discovery. This is apart from the fact that discovery admittedly was made from 300 feet away from the dead body of Sivakumar and after Sivakumars body was inspected by P.W.14 as early as on 25.11.1996. It would be impossible to believe that the inspector did not search the nearby Spots and that all the articles would remain in open unguarded till 6th December, 1996 when the discovery had allegedly been made. This was nothing but a farce of discovery and could never have been accepted particularly because all the discovered articles were lying bare open barely 300

feet away from the body of the deceased Sivakumar.

25. Even this witness had to admit that he never enquired as to in whose name the house of Mani stand. He claims that P.W.14 had done the same whereas P.W.14 is completely silent about such investigation. It is, therefore, obvious this discovery could have never been accepted by both the courts below & both the court have completely ignored this vital admission. It need not be stated that where the discovery of the relevant articles have been made from the open ground though under the bush, that too after more than 10 days of the incident, such discovery would be without any credence. It does not stand to any reasons that the concerned investigating officer did not even bother to look hither and thither when the dead body was found. We are, therefore, not prepared to accept such kind of farcical discovery which has been relied by the courts below without even taking into consideration the vital facts which we have shown above.

26. The discovery is a weak kind of evidence and cannot be wholly relied upon on and conviction in such a serious matter cannot be based upon the discovery. Once the discovery fails, there would be literally nothing which would support the prosecution case. We have already held that the prosecution has failed to prove that the house where alleged blood stains were found belonged exclusively or was possessed exclusively by the appellant, we have further pointed out that the discovery was absolutely farcical. There is one other very relevant factor ignored by both the courts that the prosecution never made any attempts to prove that the clothes belonged to the appellants. There is literally no evidence to suggest anything to that effect. Therefore, even if we accept the discovery, it does not take us anywhere near the crime. Both the Courts below have ignored this very important aspect. Once these two important circumstances are disbelieved, there is nothing which would remain to support the prosecution theory.

23. As far as the submissions made that recovery is not enough to convict

accused is concerned, counsel for the appellants have relied upon **Alizan v. State**, reported at 2010 (2) JCC 1493, more particularly para 29, which read as under:

“29. We are left with the recovery of blood stained clothes and the alleged weapon of offence. Such kinds of recoveries have always been treated as weak recoveries as held in the decisions reported as AIR 1963 SC 1113 Prabhu vs. State of UP; AIR 1977 SC 1753 Narsinhbhai Haribhai Prajapati etc. vs. Chhatrasingh & Ors.; AIR 1994 SC 110 Surjit Singh and Anr. vs. State of Punjab; 1999 CrL. LJ 265 Deva Singh vs. State of Rajasthan and JT 2008(1) SC 191 Mani vs. State of Tamil Nadu.”

24. In Support of his submission that belated recovery of blood-stained clothes is insignificant, learned counsel for the appellants have relied upon three judgments rendered in the case of (i) **Khalil Khan v. State of M.P.**, reported at 2004 SCC (CRI) 1052, more particularly para 7; (ii) **Narender Singh v. State**, reported at 2013 V (DELHI) 853, more particularly para 21; and (iii) **Latoori v. The State**, reported at 24 (1983) DLT 241, more particularly para 13.

25. Para 7 of **Khalil Khan** (supra) reads as under:

“7. If this part of the evidence of the prosecution is to be excluded then, in our opinion, there is no sufficient material to hold the appellant guilty. Be that as it may, we may refer to the recovery part relied upon by the courts below. We notice that one of the witnesses to the recovery has not supported the prosecution case. That apart the incident in question had taken place on 6th April, 1986 and the accused was arrested only on 11th April, 1986, nearly four days thereafter. We find it extremely difficult to believe that a person who is involved in such a serious crime like murder would still be wearing clothes which are blood stained even four days after the murder which fact we find is opposed to normal human conduct. In this background, the evidence of the hostile witness that the recoveries were made at the

police station assumes importance. We think it is not safe to place reliance on this part of the prosecution case also.”

26. Para 21 of **Narender Singh** (supra) reads as under:

“21. Recovery of clothes i.e. the shirt and the pant of the appellant with blood stains on 10th August, 1997, nearly three days after the occurrence is debatable and doubtful. The prosecution version is that there were blood stains on the shirt and the pyjama and the FSL report Ex.PW19/A confirms the blood group which matches with the blood group of the deceased. As per the prosecution case, the appellant had come back to his own house in the buggy with his sister and sister-in-law. In case there were fresh blood stains on the clothes worn by the appellant, it would have been noticed and the appellant would have been questioned. The clothes would also have been washed as nobody would like to keep dirty blood stained clothes in their house. The appellant, as per the police case was arrested on 10th August, 1998 and had made disclosure statement Ex.PW7/B on the same day. The said disclosure statement does not mention the place where the clothes were concealed and hidden. As per the seizure memo, Ex.PW7/C, clothes were recovered from the house of the appellant on 10.8.1997. On the same day itself i.e. 10th August, 1997, the appellant was taken to the fields of Rattan Singh where he purportedly identify the place of occurrence. The pointing out memo (Ex.PW7/D) is not admissible and would not be covered under Section 27 of the Evidence Act. The place of occurrence was already known to the police and as per the investigations made by them on 8.8.1997, the dead body of Sangeeta was recovered from the same place. Surprisingly, the police could not recover the sickle as per their case on 10th August, 1997. On 11th August, 1997, one day police remand was obtained from the Metropolitan Magistrate and the sickle was recovered as per seizure memo/pointing out memo Ex.PW7/E on 12th August, 1997. It is not indicated in the seizure

memo/pointing out memo or in the sketch (Ex.PW7/F) that any blood stains were found on the sickle.”

27. Para 13 of **Latoori** (supra) reads as under:

“13. PW-12 Dr. Ramani in cross-examination stated that since the injuries were equally tapering on both the ends they are likely to have been caused with a double edged weapon but the possibility of the injuries having been caused with a single sharp edged weapon cannot be ruled out. The knife Ex. P. 7 recovered at the instance of Raju was a single sharp edged weapon. The medical evidence as well as the non-detection of human blood on the knife Ex. P. 7 makes it doubtful if the knife P-7 was used in the commission of the crime. Even otherwise also, the recovery of the blood stained clothes after more than 11 days of the occurrence and the recovery of the knife P-7 at the instance of Raju are by themselves not enough to base the conviction.”

28. With regard to Blood stained clothes not recovered from the eye witness though deceased was profusely bleeding and presence of such eye-witness is doubtful, learned counsel for the appellants have relied upon **State of Rajasthan v. Taran Singh**, reported 2003 (12) SCC 341, more particularly para 9, which reads as under:

“9. Having noticed this explanation the High Court came to the conclusion that this is an inference which could not have been drawn by any reasonable person from the material on record and we are in agreement with the said finding of the High Court because we notice from the evidence of PWs.1 and 2 when they picked up the deceased, he was still bleeding profusely and according to them, PW-1 carried him on his shoulder while PW-2 held the chest of the deceased. Frankly we are unable to understand how the deceased could have been carried in the manner spoken to by these 2 witnesses. Be that as it may, as held by the High Court in our opinion, if really these two witnesses carried the deceased, the possibility of these witnesses' clothes being

not blood-stained, is next to impossible. In this background, if we examine the narration of incident by these two witnesses, like the High Court, we also notice that according to these witnesses when they came from the hospital and started walking towards their village, on the way they found the accused persons and their followers waiting in a jeep and a tractor abusing abovesaid Surendra Singh. We first of all, do not find any acceptable reason why the accused persons should have been abusing said Surendra Singh amongst themselves when there was nobody from the side of Surendra Singh to listen to said abuses. That apart, we notice it is the version of these two witnesses that the deceased decided to bring about peace between the two groups, hence, proceeded towards the accused saying that now since the election is over, let there be no fight any further. It was at this stage, A-2 exhorted A-1 to kill the deceased stating that he is the brother of Surendra Singh, and when the deceased heard this exhortation, he allegedly turned around and ran which would mean he started running towards the hospital from where he came. At that time, A-1 shot him on his back. As noticed by the High Court, if we examine the sketch plan then this part of the evidence of PWs.1 and 2 does not find support from prosecution's own case because the direction in which the deceased and PWs.1 and 2 were walking, was opposite to the place where the hospital was situated (as could be seen from the sketch) and if deceased turned around and started running back, it should be towards the hospital, if so from the sketch we find that the body of the deceased was lying not in the direction of the hospital but in the direction of a shop belonging to one Gopal Pandit in the Thara which is in the opposite direction. Therefore, there is serious discrepancy also in regard to the manner in which the incident took place atleast as evident from the sketch plan produced by the prosecution and as spoken to by the two witnesses. In this context, the High Court took into consideration the defence put forward by the accused persons who had stated that after the incident in which Surendra Singh was injured, the members of the group belonging to said Surendra Singh which included the deceased, came to the Chowk Bazar and wanted to

attack the supporters of the group of the accused persons who were in the shop of one Om Prakash Satyanarain which was situated near the bus-stand and said Om Prakash and others who were in the shop, noticing the likely attack from this group, downed the shutters of the shop but the same did not close completely hence, one of the members of the group supporting Surendra Singh by name Safi Mohd. fired with a 12 bore gun which inadvertently hit the deceased who was then peeping between the gaps in the shutter into the shop, and because of that injury the deceased fell down dead on the Thara of the said shop of Om Prakash. Since there is sufficient material to show that the body of the deceased in this case was found lying on the Thara of the shop of said Om Prakash, said defence taken by the accused persons finds some support. At this juncture, we may also consider the material relied upon by the High Court that there was a parallel investigation in regard to the said attack in the shop of Om Prakash and in the said investigation, the investigating agency had recorded certain statements which clearly showed the possibility of the deceased having died in such an attack. This was admitted by PW-7, the I.O. who had noted in the case-diary of that case as follows :

"These points were indicated and included in the file that the dead body was taken to the hospital himself and declared dead by the M.O."

29. With regard to the offence being grievous hurt and not murder, learned counsel for the appellants have relied upon ***Sardul Singh v. State of Haryana***, reported at (2002) 8 SCC 375, more particularly para 13, which read as under:

"13. The next important question is as to what would be the nature of offence really committed, on the facts proved by the prosecution. The sticks said to have been used and recovered are of 'Popular tree', the wood of which was considered to be soft and light and stated to be usually used for manufacturing match sticks. While

testifying on oath before Court, PW-8 has only stated that he and the deceased 'should not be allowed to go' and not allowed to go alive or must be finished. This factor taken together with the nature of sticks used and the admitted rivalry on account of some elections would indicate that the accused meant at best, to give a sound thrashing to the victim. Since it was during night-time, some of the blows might have also landed on the vital portion of the head, even in the absence of any deliberate intention to kill and, therefore, be possibly inferred from the facts proved. The intention to cause death or cause such bodily injury as was likely to cause death in the normal or ordinary course cannot be readily imputed to the accused. Taken individually or even jointly together, if at all the common intention could have been merely to commit an assault and inflict some injuries but not to cause such injuries as would or is likely to cause or result in death. Therefore, A1 and A3 could not be condemned to have committed the murder, though that seems to have been the unintended ultimate result. On the facts proved, the accused could only be safely convicted under Section 325 IPC and not under Section 302 IPC. The plea that it would attract only punishment under Section 323 cannot be countenanced having regard to the grievous nature of the injuries sustained by the victim. These appeals, therefore, merit acceptance only in part, not for any clean acquittal, but for acquittal in respect of the offence under Section 302 IPC and instead, conviction of both the appellants under Section 325 IPC read with Section 34 IPC.”

30. With regard to culpable homicide not amounting to murder, learned counsel for the appellants have relied upon ***Kandaswamy v. State of Tamil Nadu***, reported at (2008) 11 SCC 97, more particularly paras 5, 9 and 10, which read as under:

“5. The appellant questioned the correctness of the judgment and conviction and sentence as imposed by the Trial Court under Section 302 IPC and sentenced to undergo for life imprisonment.

9. *This brings us to the crucial question as to which was the appropriate provision to be applied. In the scheme of the IPC culpable homicide is genus and 'murder' its specie. All 'murder' is 'culpable homicide' but not vice-versa. Speaking generally, 'culpable homicide' sans 'special characteristics of murder is culpable homicide not amounting to murder'. For the purpose of fixing punishment, proportionate to the gravity of the generic offence, the IPC practically recognizes three degrees of culpable homicide. The first is, what may be called, 'culpable homicide of the first degree'. This is the gravest form of culpable homicide, which is defined in Section 300 as 'murder'. The second may be termed as 'culpable homicide of the second degree'. This is punishable under the first part of Section 304. Then, there is 'culpable homicide of the third degree'. This is the lowest type of culpable homicide and the punishment provided for it is also the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second part of Section 304.*

10. *When the factual scenario is considered in the background of the legal principles set out above, the inevitable conclusion is that the appropriate conviction would be under Section 304 Part I IPC. Custodial sentence of 10 years would meet the end of justice."*

31. Additionally, Mr. R.N. Sharma, learned counsel for the appellant Vicky in CrI.A.58/2012, and Mr. Hans Raj Singh, learned counsel for the appellant Vinod @ Ratania in CrI.A.503/2012, have submitted that no recoveries have been made from either of these two appellants.
32. Mr. Sunil Sharma, learned counsel for the State, has vehemently opposed the present appeals. Mr. Sharma submits that PW-4, Santosh, was a natural eye-witness and simply because he is the brother of the deceased and an interested witness, it cannot be said that his testimony is not reliable and trustworthy as he has given a vivid description of the sequence of events. Mr.Sharma further submits that although PW-1 and PW-5 have turned

hostile but the evidence of a witness, who has turned hostile can be looked into, which is trustworthy. While relying on the testimony of these two witnesses, more particularly the testimony of PW-15 Deepak, learned counsel for the State, contends that it is established that the appellants were present at the place of the incident, the appellants and the deceased were drinking beer and at that stage a quarrel had taken place between them. Learned counsel for the State next submits that although both these witnesses were won over but this part of the testimony is reliable and supports the testimony of PW-4. Counsel further submits that reading of the testimonies of PW-1, 4 and 5 would establish two things i.e. firstly, all these three witnesses and PW-7, Babli, were present on 9.1.2008 near the place where the incident took place, which clearly establishes the presence of the appellants. Secondly, it establishes that since they were drinking beer, the beer bottle, which was used, was also available at the place of the incident. It is also pointed out by Mr. Sharma that although even the wife and the cousin sister, Babli, have turned hostile and there may have been certain discrepancies in the statement of PW-4 but this is for the reason that even at the time of evidence 22-25 supporters of the appellants were sitting in the Court, which has been noticed. It has also been contended that there is no reason for the brother of the deceased, PW-4, to implicate the appellants at the cost of letting go the real culprits, who had murdered his brother.

33. Mr. Sharma has also drawn the attention of this Court to the site plan, which is severely criticised by the counsel for the appellants, at point A, which shows the presence of the persons; point B where the deceased was attacked; and point C where the deceased was left, to show that the site plan was made giving the necessary details which were required. Mr. Sharma has submitted that reading the testimony of PW-4 as a whole

would show that his testimony stands fully corroborated with the testimonies of various other witnesses. PW-4 has testified that his brother was attacked by the appellants. PW-1 Suman and PW-5, Deepak, had tried to intervene and due to their intervention the deceased got an opportunity to run and tried to escape but he was chased down and beaten at the spot, which also finds mention in the site plan and, thus, his testimony is corroborated. To show that PW-4 was not present at the spot as he did not accompany the injured to the hospital is also not corroborated for the reason that this witness himself during cross-examination has testified that he tried to look for an auto. Thus, his absence at the time when the ambulance reached the spot has been reasonably explained. PW-4 has also testified that he had made a phone call to his father, Sh. Ram Sahai, this fact also stands supported by the testimony of PW-8, Sh. Ram Sahai, who had also testified the same in his evidence. In fact PW-8 Sh. Ram Sahai had cautioned his son not to call the Police.

34. Mr. Sharma submits that this is a reasonable reaction of a father to ask his son to move away from the spot of the incident. In fact, his father had told him not to go to the place of the incident till he reaches there.
35. Mr. Sharma further contends that it has been repeatedly held by the Supreme Court that different persons react differently in different situations. While a person may run away in fear another person may make an attempt to save the victim. One person may hide another person may become speechless.
36. Mr. Sharma explains the delay in recording the statement of PW-4 up to the next morning at 8.00 a.m. and also explains his absence after the brother of this witness was mercilessly beaten. Mr. Sharma also explains that PW-4 has testified that he ran away to call his father and went in search of an auto.

37. Mr. Sharma, learned counsel for the State, contends that the motive stands proved even by the testimony of those witnesses i.e. PW-1 and PW-5, who turned hostile and did not support the case of the prosecution that a quarrel had taken place. Mr. Sharma has also contended that no suggestion was given to PW-4 that he was not present at the spot and in the absence of any suggestion having been made it is presumed that PW-4 was present at the place of the incident.
38. Mr. Sharma points out that in his testimony, PW-8, Ram Sahai, has testified that *“the accused Suraj present in court today had developed enmity with my son Sunil. All the remaining accused persons in Court today are friends and relatives of Suraj, who in connivance with each other had murdered my son Sunil”*. Learned counsel for the State submits that there is no cross-examination on this issue. Also in the cross-examination, this witness has testified that *“It is correct that in view of this suggestion put to this witness there is a presumption that it was admitted by the defence that Santosh was present at the spot of the incident”*. No suggestion was put to PW-8, Ram Sahai, and PW-4, Santosh, that PW-4 was not present at the place of the incident.
39. Mr. Sharma has also contended that the blood stained clothes were recovered at the instance and on the disclosure made by the appellant, Vinod @ Suraj @ Mota, the clothes were sent to the forensic science laboratory, blood was detected on all the exhibits and the blood on the clothes matched with the blood group ‘O’ of the deceased. Counsel further submits that on his arrest the clothes and beer bottle were recovered. Mr. Sharma also contends that there is no explanation tendered by this appellant with regard to blood on his clothes. Relying on the scientific evidence, Mr. Sharma submits that upper portion of the glass bottle which was recovered on the pointing out of the appellant Vinod @ Suraj @ Mota matched with

the pieces of glass, which were found and sent for opinion. Mr. Sharma has also differentiated and drawn a distinction with regard to the submission made by counsel for the appellants that the bottle was found at an open place, which was accessible to one and all. Mr. Sharma points out that the weapon of offence was not a knife or a pistol, which could have been easily removed or would have attracted attention of any passer-by being as simple as a broken bottle, a thing which is not unusual in our country to be found on the road and, thus, the judgment sought to be relied upon by the learned counsel for the appellants in support of this contention would not be applicable to the facts of this case.

40. Mr. Sharma also submits that the prosecution cannot be faulted for not examining Tulsi, who had called the PCR at 8.42 p.m., and had given the information. This information was received by PW-15 and in case the defence so desired PW-15, who received the information, could have been questioned at that stage with regard to Tulsi and thus, such an argument cannot be raised at this stage.
41. It is also submitted by Mr. Sharma, that there was no occasion for the police to seize the Auto, as at that point of time when the Police arrived PW-4 was not present at the spot and there was no occasion for the Police to connect the Auto to the crime having been committed.
42. Mr. Sharma, has also explained the testimony of PW-4 to show that this witness has not disputed that the plan was prepared at his pointing out, but what he has said is *“I did not make any statement to the police that I along with Police reached at the spot from hospital where on my pointing out police had prepared site plan of the place of occurrence.....”* It is clarified that firstly this witness is an illiterate person and secondly, the statement would have been recorded in Hindi and then translated and all this witness has testified is that he did not make any statement to the police, and not that

the site plan was not prepared on his pointing out; neither such a question was posed to him; moreover, PW-16, A.S.I. Sudama Sharma has testified that he prepared the site plan at the instance of PW-4 Santosh. This witness has not been cross-examined on the point that the site plan was not prepared at his pointing out. Mr. Sharma has also contended that at this stage, to say that there was not enough light is an argument which is not available now to the appellants, as no suggestion was put to any of the witnesses that in the absence of light they could not have recognized the persons, who attacked Sunil. He has also drawn attention of the court to the testimony of PW-9, S.I. Manohar Lal, who in his cross-examination has pointed out that the place of incident is a four storied house inhabited by the residents. Mr. Sharma contends that this would clearly establish that the area had light and not that it was an area which was completely plunged into darkness.

43. Mr. Sharma has argued that it is not necessary for an inquest report to give details and names of the assailants. In support of his submission, Mr. Sharma, has placed reliance on *Khujji @ Surendra Tiwari v. State of Madhya Pradesh*, reported at (1991) 3 SCC 627 and more particularly paragraph 8 thereof.
44. With regard to the submission that statement under Section 161 Cr.P.C. of PW-4 was ante-dated, counsel for the State submits that no such suggestion was ever made to any of the witnesses. With regard to delay in recording the statement under Section 161 of the Code of Criminal Procedure of the PW-4 the only witness, reliance is placed on *Lahu Kamlakar Patil and Anr. v. State of Maharashtra*, reported at (2013) 6 SCC 417 and more particularly paragraph 26, to show that the reaction of PW-4 was not unnatural as he testified that he ran away to call his father. It is submitted that a person who sense danger to his life would have reacted in this way.

Paragraph 26 of the judgment ***Lahu Kamlakar Patil*** (Supra) reads as under:

“26. From the aforesaid pronouncements, it is vivid that witnesses to certain crimes may run away from the scene and may also leave the place due to fear and if there is any delay in their examination, the testimony should not be discarded. That apart, a court has to keep in mind that different witnesses react differently under different situations. Some witnesses get a shock, some become perplexed, some start wailing and some run away from the scene and yet some who have the courage and conviction come forward either to lodge an FIR or get themselves examined immediately. Thus, it differs from individuals to individuals. There cannot be uniformity in human reaction. While the said principle has to be kept in mind, it is also to be borne in mind that if the conduct of the witness is so unnatural and is not in accord with acceptable human behaviour allowing of variations, then his testimony becomes questionable and is likely to be discarded.”

45. Counsel has also placed reliance on ***Maya Kaur Baldevsingh Sardar and Anr. v. State of Maharashtra***, reported at (2007) 12 SCC 654 and more particularly the headnote ‘A’ and paragraphs 7 and 15, which are reproduced below:

“A. Criminal Trial – Appreciation of evidence -- Reaction or conduct of eye witness- Delay in disclosure of names of accused persons to police by sole eyewitness – Being enraged by secret marriage of R with a boy belonging to a lower caste, accused parental family members of R came to house of R’s in-laws carrying arms, pushed R from first floor to ground floor of the house causing her severe injuries and killed other inmates of the house - Facts showing that R had no ill will against her parents and other family members and the manner in which murder had been engineered came as a rude shock to her - She remained in a state of shock and uncommunicative for 5-6 days and it was only after

recovering from her trauma and provision for her security that she disclosed the names of the accused -- Held, in the circumstances delay in revealing names of the accused to police was natural and prosecution case cannot be discarded on the plea that R had not seen the incident and she had been forced to become an eyewitnesses - Penal Code, 1860, Ss.302, 307, 120-B, 34.”

7. Mr. Vijay Kotwal, the learned senior counsel for the accused-appellants has first and foremost argued that the incident had happened in the evening of 30-5-1999 but Rajvinder Kaur(PW1), the solitary eye witness, had not disclosed the names of the accused to the police till the 8-6-1999 which clearly revealed that she had not seen the incident and that she had been forced to become an eye witness to the murders.

“15. A serious argument has been raised as to the events which had led to the arrest of the accused long before the 8-6-1999 and on the basis on which the arrests had been made. We find no suspicious circumstance in the arrests for the reason that Maya Kaur and Nirmal Kaur who have admitted their presence and had also been seen by several witnesses, had been arrested on 31-5-1999 itself and it was possibly on their interrogation that the other accused had been arrested subsequently. We also find from the record that no question had been put to the Investigating Officer in this regard, as it is possible that if he had been questioned, he would have given a cogent explanation.”

46. It is submitted that even when the victim tried to escape and he rushed towards *Nallah* by the side of Shamshan Ghat road, the son of Ramjilal, namely, Vicky caught hold of the victim Sunil, and the appellant gave a blow with the said bottle on the head of Sunil and he uttered that he has settled his previous score with the deceased. Thereafter the appellant, Suraj, present there also gave a blow to the deceased and shouted to kill Sunil that day itself. In view of this conduct and based on the settled position of law,

these appellants cannot derive benefit of Section 304 Part-II IPC.

47. In rejoinder Mr. Sood has argued that it is extremely unusual and thus casts a serious doubt on the presence of PW-4 as in case the victim had been put in Auto of PW-4, the Auto would have contained blood and the clothes of PW-4 would have been soaked with blood and there is no explanation as to why the Auto or the clothes were not seized. Mr. Sood contends that except the statement of PW-4, no other evidence could have corroborated his statement. Further Mr. Sood submits that enmity being the motive would be a double edged weapon inasmuch as in case motive is established, there is enough reason for PW-4 to falsely implicate these three persons in the murder of his brother.
48. The last submission of the learned Counsel for the appellants is that in any event, the present case does not fall within Section 302 of the Indian Penal Code and the appellants be given benefit of Section 304 of the Indian Penal Code.
49. We have heard the detailed arguments of the learned counsel for the appellants and also on behalf of the State.
50. The Trial Court has convicted the appellants herein primarily based on the testimony of PW-4, Santosh, who is the brother of the deceased. We may also notice that some of the important witnesses in this case have turned hostile, including PW-1, Suman, wife of the deceased. However, upon reading of the testimony of PW-1, it stands established that it was in the month of January, 2008 when she was preparing meals on the first floor of the house of her cousin sister Babli which is situated in Lal Quarter, Vijay Vihar near her house. She heard noise of someone who was shouting "*Sunil Bhai ki ladai ho rahi hai neeche*". It was night time, she went downstairs. The later part of the testimony did not support the case of the prosecution, but during cross-examination, she deposed that it was correct

that friend of her deceased husband Deepak had accompanied them to the house of Babli. The witness was confronted with her statement made to the police on all material aspects. However, as stated above, the incident and the place of the incident stand duly established. It also stands established that PW-1 and her deceased husband had gone to the house of her cousin sister Babli on the fateful day and PW-1 was preparing food at the time when the incident took place. It also stands established that it was night time.

51. PW-2, Sanjay had testified that on 16.01.2008, he had gone to the house of Babli, who is the sister of his mother. At About 7:30 p.m., he had seen the police party. Accused Suraj was in the custody of the police. He joined the investigation, other public persons refused to join the same for personal reasons. He also testified that the accused had pointed out the spot, *i.e.*, R-Block and pointing out memo Ex.PW2/A of the spot was prepared. Accused Suraj pointed out to one broken bottle of beer which was picked up from a dry drain/*nali*. The rough site plan Ex.PW2/C was also prepared from where the broken bottle of beer was seized. Accused also led them to the house No.D-1/19 from where the accused produced one cream colour shawl, one T Shirt on which something was written in English and one *baniyan*. The clothes were blood-stained.
52. PW-4, Santosh is the brother of the deceased. Since he is the star witness of the prosecution and his testimony has been severally attacked, we deem it appropriate to reproduce the same as under:

“It was 9th day of the fourth month of the year 2004,(sic 9th January, 2008) I was driving my auto rickshaw. After leaving the passengers at Rithala, I was coming back at about 8.30 p.m and reached the house of my brother Sunil at K-Block, Lal Janta DDA Flats, Vijay Vihar, Delhi and I found the premises was locked. I thereafter reached to in laws house of my brother Sunil situated at R-Block, Lal Janta DDA Flats, Vijay Vihar, Delhi and

I saw that accused Ratania@ Vinod s/o Prem Singh (pointed out by the witness), accused Danny accused Suraj and accused Vicky (all the accused pointed out by the witness) along with one Ravi who is absconding, were beating Sunil with brickbats and empty beer bottles. The accused Suraj was having beer bottle with which he was giving blows to the said deceased Sunil and other three were beating him with brickbats and fist and blows. I tried to intervene in order to save Sunil. One Deepak and Suman were also intervening to save the said brother Sunil. Due to the said intervention, deceased Sunil had an opportunity to escape and he rushed towards Nala by the side of Shamshan Ghat Road and from the front side the son of Ramji Lal namely the accused Vicky present in court caught hold of the deceased Sunil and said accused Vicky gave a blow with the said bottle at the head of Sunil and uttered he had settled his previous score with the deceased Sunil. Thereafter accused Suraj present in the court, with a broken bottle gave blows to the deceased Sunil and was shouting to kill Sunil that day. When I tried to save the deceased Sunil, accused Suraj rushed towards me with a broken bottle and I ran away to save my life and gave a call to my father. The deceased Sunil fell down near the Nala and thereafter a crowd gathered there and accused started running away from the said spot. I lifted injured Sunil and made him sit in my three wheeler scooter which could not be started and as I was searching for another three wheeler scooter and after about 10-15 minutes PCR van came there which removed the injured Sunil to Sanjay Gandhi Memorial Hospital. Thereafter I came to know that accused Suraj present in court, fell down on a heap of garbage near Nala who was lifted by accused Danny@ Ravi and took away. The accused were having previous enmity with Sunil and they all hatched a plan to kill the said Sunil. The deceased Sunil was shifted from said hospital to RML hospital where he expired on the 3rd day which was a Saturday and he expired at about 2.30 or 3.00 a.m.

At this stage Ld. APP wants to cross examine the witness as the witness has not deposed about certain facts. Heard. Allowed. xxxx By Ld. APP for the state.

It is correct that my statement was recorded by the police in this case. I did not make any statement to the police that I along with the police reached at the spot from hospital where on my pointing out police had prepared site plan of the place of occurrence i.e. near R-1 Block, DDA Janta Flats, Vijay Vihar. I

also did not state to the police that police had recovered pieces of glass of that bottle by which my brother Sunil sustained injuries and those glass pieces were seized by the police vide seizure memo which I had also signed. (Witness is confronted with the seizure memo Mark- X where he denies his signatures at point A). I had not stated to the police that the said broken pieces of glass were sealed with the seal of SS and thereafter the same were taken into possession. (Confronted with supplementary statement dated 10.1.2008, Mark A where the said facts are so recorded). In fact my brother Sanjay had accompanied the police in the investigation of the case in whose presence the broken pieces of glass; brickbats etc. were seized.

xxxxxxxxxx by Sh. A.P Singh, Ld, Counsel for all the accused.

I had not inquired from the neighbourhood of the house of my brother Sunil which was locked, as to where my brother had gone. The house of my brother which was locked was situated in a locality wherein other houses were there also. At the time I reached the place of incident at R Block there was no crowd except the said accused beating the deceased in the said manner. As it was winter season and sun had set down, none from the neighbourhood of the house of in laws of the deceased, came out. As I was attempting to save my said deceased brother, I did not call the police. No other person telephone to the police in my presence. I did not notice as to what clothes were worn by accused Vinod@ Suraj. However, he was wearing a jeans pant. I did not notice the colour of said pant. I did not notice as to what upper cloth he was wearing. I did not notice the clothes of the accused minutely so as to tell the colours of the same but they were wearing T shirts and jeans pants. I did not notice the foot wears of the accused. My father had reported the matter to the police of PS Pahar Ganj of the previous enmity with the deceased of the accused but I have not brought the copy of the same nor I can tell the date, month and year of the same. I do not know if any action was taken by the police on the said complaint. I cannot tell the names and numbers of PCR officials. It is correct the PCR officials had already removed my brother to the hospital before I reached at the spot for bringing auto. I did not ask the name of the auto driver whom I had brought. Police had recorded my statement when my brother was shifted to RML hospital it may be by 9th January at about 10 PM. I went to SGM Hospital. I cannot tell the time of my reaching at RML Hospital. It is incorrect to suggest that I am deposing falsely being the

brother of deceased. It is incorrect to suggest that there was no enmity of any type of accused with my deceased brother. It is incorrect to suggest that I have never joined the investigation with the police.”

53. PW-5, Deepak another witness of the prosecution who has turned hostile testified that he knew Sunil being the resident of Pahar Ganj. He had gone to his house at Rohini from there, he along with Sunil, his wife Suman had gone to the house of Sunil’s sister-in-law Babli in the same locality at Lal Quarter, Rohini. He further testified that all the four accused persons who were present in Court were also present in the locality and they were consuming beer. Sunil had also joined them. As he was not in the habit of drinking and smoking, he had left the place. Thereafter he had not supported the case of the prosecution. He was cross-examined by the learned APP. He was confronted on all material issues with respect to the statement made by him under Section 161 Cr.P.C. During cross-examination, he also stated *“it is incorrect to suggest that I am not identifying all the accused persons present in the court today as I was threatened by the accused persons or their associates. It is correct that the associates and known persons of accused 20 or 25 in number are standing outside the court and 3-4 of them are sitting in the court itself.”*

54. Testimony of PW-6, Head Constable Randhir Singh, reads as under:

“On the night intervening 9/10.1.2008 I was posted at PS Rohini as duty officers from 12 night to 8 am. At about 12.30 in the night I received rukka sent by ASI Sudama Sharma brought by Const. Bhuwan Chand and on the basis of which I got recorded FIR through computer operator by the computer which is kept in the PS in the ordinary course of business of PS. I have brought the original FIR register, the computerised copy of the same is Ex.PW6/B with my endorsement at point X and the copy of FIR to Const. Bhuwan Chand to be handed over to ASI Sudama Sharma for investigation. (Original register seen and returned).”

55. Another important witness of the prosecution who has turned hostile is PW-7, Smt. Babli. She testified as under:

“Suman is my cousin sister and Sunil was her husband. About three years back Suman and her husband visited my house to know about my condition as I was not well. Otherwise, also they used to visit my house frequently. Both of them had come alone none had accompanied them. I asked my sister Suman to prepare meal. After sometime I found that Sunil had a big quarrel with some boys of the area. I do not know who had beaten Sunil as I did not see them. Sunil was taken to hospital where he died. Police had recorded my statement about the quarrel.

At this stage Ld. APP wants to cross-examine the witness as she resiled from her previous statement. Heard. Allowed.”

56. Another material witness is PW-8, Ram Sahai, father of the deceased, who admittedly was not the eye witness. He has testified that on 09.01.2008 at about 9:00 or 9:30 p.m., he received a phone call from his elder son Santosh who informed him that a quarrel had taken place between Sunil, Suraj, Ratania, Danny, Ravi son of Ram Babu and Vicky. He was informed that Sunil had been badly beaten by those boys with bricks, stones and beer bottles. He had then called the police at number 100. He had reached the spot, *i.e.*, Shamshan Ghat Road, near water tank where he met Suman, Santosh and Deepak. Sunil was not present. He went to Baba Saheb Ambedkar Hospital but came to know that Sunil had been referred to RML Hospital. He identified his son who was wrenched in blood. He also testified that accused Suraj who was present in Court had developed enmity with his son Sunil and other accused persons who were friends and relatives of Suraj had murdered his son. During cross-examination, he stated that he was informed about the incident on telephone by his elder son Santosh. He had asked Santosh not to go the place of incident till he reached there.

57. PW-14, Dr. V.K. Jha, Medical Officer, BJRM Hospital, Jahangir Puri, Delhi conducted the post mortem on the body of Sunil. He testified that he observed the following external injuries on the dead body of the deceased:

- “(i) Sutured wound on the right pinnae.
- (ii) Sutured wound on right ring finger and right middle finger in middle phalanges.
- (iii) Sutured wound on forehead 3 in numbers.
- (iv) Craniotomy wound over left parieto temporal region.
- (v) Healed abrasion on right leg on front of leg below right knee.

On internal examination, there was subscalp hematoma over left parieto temporal region and in brain matter there was subdural hematoma. After postmortem examination, I opined cause of death as comma as a result of head injury consequent to blunt force diverted upon head by other party. All injuries were antemortem in nature. Injury no.4 was sufficient to cause death in ordinary course of nature. Time since death was consistent with hospital timing of death i.e. 1.50 a.m. on 12.1.2008. total number of inquest papers were 16 which were handed over to the IO along with the PM report. Blood gauze piece was sealed with sample seal of mortuary. My detailed post-mortem examination report is Ex.PW14/A which bears my signature at point A. The inquest papers are Ex.PW14/B-1 to Ex.PW14/B-8 and Ex.PW8/B and Ex.PW/1 which bear my signatures at point A.

On 28.1.2008, IO moved an application before me seeking opinion on the weapon of offence which was produced by the IO before me having the seal of RS which was broken piece of bottle which is Ex.P5(the witness has correctly identified the piece of bottle) I gave my opinion “in view of post-mortem findings, injury no.1, 2, 3, 5 mentioned in the PM report Ex.PW14/A could have been caused by piece of bottle, cannot be ruled out. Injury No.4 could have been caused by blunt force diverted upon head.”

58. The learned counsel for the appellants have pointed out various loopholes in the case of the prosecution. The main thrust of argument of learned counsel for the appellants is that PW-4, Santosh, who is the brother of the

deceased is not an eye witness. His testimony is doubtful and he is a planted witness. It is contended that in case PW-4 was present at the place of the incident, he would have named the appellants and further he would have taken his deceased brother to the hospital whereas the injured was taken to the hospital by a CATS ambulance. It is further contended that PW-1, Suman, PW-5, Deepak, who also as per the case of the prosecution were not eye witnesses did not state in their testimonies that PW-4, Santosh was present at the time of the incident. It was also contended that even the *rukka* did not mention that PW-4 was present at the spot. Testimony of this witness is also stated to be doubtful for the reason that this witness had testified that he had put the deceased in his auto, but since the auto did not start, he left the spot for 10-15 minutes in search for an auto. The case of the prosecution has been doubted also for the reason that neither the blood-stained clothes of PW-4 were seized nor the auto was seized.

59. We find no force in the submissions of the learned counsel for the appellants. No doubt, even the wife of the deceased has turned hostile and so has PW-5, Deepak and thus for the counsel for the appellants to contend that in their testimonies they did not mention the presence of PW-4, is unacceptable. PW-4 has pointed out and identified all the accused persons. He has testified that the accused persons were beating Sunil with brickbats, empty beer bottles and fist and blows. He tried to save his brother and due to his intervention, his brother Sunil had an opportunity to escape and rushed towards *nallah* by the side of Shamshan Ghat Road, when son of Ramji Lal accused Vicky caught hold of deceased Sunil and accused Vicky gave a blow with the said bottle at the head of deceased Sunil and uttered that he has settled his previous score. Suraj gave blows with a broken bottle on the person of deceased and when PW-4, Santosh tried to save the deceased Sunil, accused Suraj rushed towards him with broken bottle, he

ran away to save his life and gave a call to his father. We see no reason to disbelieve the testimony of PW-4. As far as the submission that PW-4 did not take his injured brother to the hospital is concerned, we find that this stands duly explained by PW-4 who stated that he ran for his life and thereafter he tried to put his brother in his auto, but since the auto did not start, he was missing for 10-15 minutes looking for an auto during which period a PCR van came and removed the injured to the hospital. Merely because PW-4 is the real brother of the deceased, it cannot be said that his testimony is neither reliable nor trustworthy. In our view, he has given a vivid description of the sequence of events.

60. No doubt, PW-1 and PW-5 have turned hostile, but it is settled law that such portion of the testimony which is trustworthy can be looked into. Testimonies of PW-1, PW-5 and particularly, the testimony of PW-5, Deepak would establish that the appellants were present at the place of the incident. The appellants and the deceased were drinking beer and that a quarrel had taken place between them. Reading of testimonies of PW-1, PW-4 and PW-5 would establish firstly that all these three witnesses as also PW-7, Babli were present on 09.01.2008 near the place where the incident took place and thus establishes the presence of the appellants. Their testimonies also establish that they were drinking beer. Beer bottle which was also used to hit the deceased was also available at the place of the incident.
61. Counsel for the appellants have pointed out certain discrepancies in the testimony of PW-4. We are of the view that discrepancies in the statement of PW-4 can be overlooked as they do not go to the root of the matter and there would be no reason for PW-4 to implicate the appellants while letting go the real culprits.
62. There is also no force in the submission of the counsel for the appellants

that the site plan cannot be relied upon. The site plan shows at point 'A' the presence of the persons, point 'B' where the deceased was attacked, point 'C' where the deceased was left and thus, in our view, all the vital details find mention in the site plan. The testimony of PW-4 also stands corroborated by the fact that the injured was beaten at point 'B', but due to intervention of the family members, he managed to make attempt to escape, but he was again chased and beaten which finds detailed in the site plan at point 'C'.

63. The submission of learned counsel for the appellants that the testimony of PW-4 is unreliable for the reason that he did not take his brother to the hospital and also for the reason that when the ambulance arrived, he was not present is also without any force. PW-4 in his testimony has explained during cross-examination that when his auto did not start, he tried to look for an auto and was missing for 10-15 minutes and when he reached the spot, an ambulance had already removed his brother to the hospital accordingly the discrepancy stands reasonably explained. His testimony also stands corroborated by the testimony of Ram Sahai, PW-8 that he received a call from PW-4 and he had cautioned his son not to go at the spot till he reaches there. To say that PW-4 did not try to save his brother and thus he was not present at the spot is also without any force. In any case, no suggestion was put to PW-4 at the time of cross-examination of this witness that he was not present at the place of incidence and thus leads to the presumption that he was present at the spot.
64. We may also notice that the blood-stained clothes of the appellant Vinod @ Suraj @ Mota were sent to the Forensic Science Laboratory. Blood was detected on all the exhibits and the blood on the clothes matched with the blood 'O' of the deceased.

It may also be noted that the clothes and beer bottle were recovered at

the instance of appellant and there was no explanation tendered by this appellant as to wherefrom the bloods had come on his clothes. The scientific evidence also shows that the upper portion of the glass bottle, which was recovered on the pointing out by the appellant Vinod @ Suraj @ Mota matches with the glass which was found and sent for opinion. To say that the beer bottle recovered at the instance of the appellant cannot be relied upon as the bottle was recovered from open place accessible to one and all, is also without any force as, in our country, it is not unusual to find garbage, including used cans and bottles lying in open place and a beer bottle cannot be compared with a knife or a pistol which would attract the attention of a passerby or a rag-picker (*kabari*).

65. It has also been argued that the auto was not seized where initially the PW-4 had attempted to put his brother to take him to hospital. In our view, this factor alone cannot be a ground to acquit the appellants.
66. The site plan was prepared at the instance of PW-4, although some discrepancies in his statement have been pointed out which we feel are on account of the statement having been translated from Hindi to English. The site plan was prepared at the instance of PW-4 which is established by the testimony of PW-16, ASI Sudama Sharma.
67. Counsel have also argued before us that there was no light at the site as the public persons had broken it and thus appellants could not have been identified in poor or no light. However, reading of the testimony of PW-9 would reveal that the place of incident was near a four storied houses inhabited by the residents which would provide enough light and it cannot be said that the area was completely dark.
68. We are also unable to appreciate the argument on behalf of the appellants that the names of the assailants were not detailed in the *rukka* which would also show that PW-4 was not an eye witness. In the case of ***Khujji*** @

Surendra Tiwari v. State of Madhya Pradesh, reported at (1991) 3 SCC 627, in para 8 it was held as under:

“8. It was faintly submitted by counsel for the appellant that the evidence of eye-witnesses could not be relied upon as their names did not figure in the inquest report prepared at the earliest point of time. We see no force in this submission in view of the clear pronouncement of this Court in Pedda Narain v. State of Andhra Pradesh, (1975) 4 SCC 153. Referring to section 174 of the Code of Criminal Procedure this Court observed at page 89 as under:

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

We, respectfully agree and see no merit in this submission made by the counsel for the appellant.”

69. The reaction of the brother of the deceased PW-4 to run away from the spot cannot be termed as absolutely unnatural. It was repeatedly held by the Supreme Court of India that different person react differently in different situations. Even otherwise, PW-4 rendered a reasonable explanation in the light of the fact that three persons were beating deceased Sunil with brickbats, empty beer bottles and fist and blows. When he tried to save his brother, accused Suraj rushed towards him with a broken bottle and he ran

to save his life. He was advised by his father not to go to the place of incidence till he reached there. Thus, we find no merit in the submission of the appellants.

70. An argument has also been raised before us that the present case would not fall under Section 302 IPC and the appellants should be given benefit of Section 304 IPC.

71. In the case of ***Pulicherla Nagaraju @ Nagaraja Reddy v. State of Andhra Pradesh***, reported at (2006) 11 SCC 444, it was held as under:

*“...Therefore, the court should proceed to decide the pivotal question of intention, with care and caution, as that will decide whether the case falls under Section 302 or 304 Part I or 304 Part II. Many petty or insignificant matters - plucking of a fruit, straying of cattle, quarrel of children, utterance of a rude word or even an objectionable glance, may lead to altercations and group clashes culminating in deaths. Usual motives like revenge, greed, jealousy or suspicion may be totally absent in such cases. There may be no intention. There may be no premeditation. In fact, there may not even be criminality. At the other end of the spectrum, there may be cases of murder where the accused attempts to avoid the penalty for murder by attempting to put forth a case that there was no intention to cause death. It is for the courts to ensure that the cases of murder punishable Under Section 302, are not converted into offences punishable Under Section 304 Part I/II, or cases of culpable homicide not amounting to murder, are treated as murder punishable Under Section 302. **The intention to cause death can be gathered generally from a combination of a few or several of the following, among other, circumstances: (i) nature of the weapon used; (ii) whether the weapon was carried by the accused or was picked up from the spot; (iii) whether the blow is aimed at a vital part of the body; (iv) the amount of force employed in causing injury; (v) whether the act was in the course of sudden quarrel or sudden fight or free for all fight; (vi) whether the incident occurs by chance or whether there was any pre-meditation; (vii) whether***

there was any prior enmity or whether the deceased was a stranger; (viii) whether there was any grave and sudden provocation, and if so, the cause for such provocation; (ix) whether it was in the heat of passion; (x) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner; (xi) whether the accused dealt a single blow or several blows. The above list of circumstances is, of course, not exhaustive and there may be several other special circumstances with reference to individual cases which may throw light on the question of intention...”

Similarly in *Ghapoo Yadav and Ors. v. State of M.P.* (2003) 3 SCC 528 and *Sukbhir Singh v. State of Haryana* (2002) 3 SCC 327, it was observed that :

...After the injuries were inflicted the injured has fallen down, but there is no material to show that thereafter any injury was inflicted when he was in a helpless condition. The assaults were made at random. Even the previous altercations were verbal and not physical. It is not the case of the prosecution that the accused Appellants had come prepared and armed for attacking the deceased....

72. In view of the aforesaid dictum, let us now examine the present case in the light of abovementioned settled law. We may say that the appellants had not taken undue advantage of the situation and gave five blows in total out of which, a single blow was given on the head of the deceased resulting in his death so it cannot be said that the appellants had intention to cause death of the deceased. Furthermore, the incident took place between the deceased and the appellants on the heat of the moment and the weapon used was a beer bottle so the case is clearly covered under Section 304 of the Indian Penal Code which is defined as under:

“Whoever commits culpable homicide not amounting to murder shall be punished with [imprisonment for life], or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the

intention of causing death, or of causing such bodily injury as is likely to cause death, or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.

73. Section 304 consists of two parts, the first dealing with second degree culpable homicide and the second dealing with third degree culpable homicide as has been noted above. The distinction between 304 Part I and Part II has been drawn by the Supreme Court in the case of ***Alister Anthony Pareira v. State of Maharashtra***, reported at (2012) 2 SCC 648, in the following words:

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

74. In the case of ***Vijay Ramkrishan Gaikwas v. State of Maharashtra***, reported at (2012) 11 SCC 592, it was observed that:

“.... The occurrence thus has the features of an incident in which an injury is inflicted in a sudden fight without premeditation in the heat of passion upon a sudden quarrel within the contemplation of exception 4 to Section 300 of murder as defined in the said section. It is true that only one injury was caused to the deceased but the same is not conclusive by itself, for even a single injury can in a given case constitute murder, having regard to the weapon used and the part of the body chosen for inflicting the injury. The legal position in this regard is

well settled by the decision of this Court in **Bavisetti Kameshwara Rao alias Babai v. State of Andhra Pradesh : 2008 (15) SCC 725:**

(Para 13) It is seen that where in the murder case there only a single injury is, there is always a tendency to advance an argument that the offence would invariably be covered under Section 304 Part II Indian Penal Code. The nature of offence where there is a single injury could not be decided merely on the basis of the single injury and thus in a mechanical fashion. The nature of the offence would certainly depend upon the other attendant circumstances which would help the court to find out definitely about the intention on the part of the accused. Such attendant circumstances could be very many, they being (i) whether the act was premeditated; (ii) the nature of weapon used; (iii) the nature of assault on the accused. This is certainly not an exhaustive list and every case has to necessarily depend upon the evidence available. As regards the user of screwdriver, the Learned Counsel urged that it was only an accidental use on the spur of the moment and, therefore, there could be no intention to either cause death or cause such bodily injury as would be sufficient to cause death. Merely because the screwdriver was a usual tool used by the accused in his business, it could not be as if its user would be innocuous.”

75. In another case of **Jai Prakash v. State (Delhi Administration)**, reported at 1991(2) SCC 32, the Apex Court held as under:

“...when a person commits an act, he is presumed to expect the natural consequences. But from the mere fact that the injury caused is sufficient in the ordinary course of nature to cause death, it does not necessarily follow that the offender intended to cause the injury of that nature. However, the presumption arises that he intended to cause that particular injury. In such a situation the court has to ascertain whether the facts and circumstances in the case are such as to rebut the presumption and such facts and circumstances cannot be

laid down in an abstract rule and they will vary from case to case. However, as pointed out in Virsa Singh case, the weapon used, the degree of force released in wielding it, the antecedent relations of the parties, the manner in which the attack was made that is to say sudden or premeditated, whether the injury was inflicted during a struggle or grappling, the number of injuries inflicted and their nature and the part of the body where the injury was inflicted are some of the relevant factors. These and other factors which may arise in a case have to be considered and if on a totality of these circumstances a doubt arises as to the nature of the offence, the benefit has to go to the accused...’’

76. In the case of ***Kalegura Padma Rao and Anr. v. State of Andhra Pradesh***, reported at (2007) 12 SCC 48, the assault had its genesis in a quarrel which had taken place between the deceased and the accused persons on the preceding evening. On the following morning, 16 accused persons armed with iron rods and axes attacked the victim by entering his house and bolting the door from inside. The beatings were indiscriminately administered. The victim ran out of the house. The accused chased and beat him indiscriminately till finally he fell down near the gram panchayat office. Though taken to a hospital, he succumbed to the injuries sustained by him. On the touchstone of the principles set out in its earlier decisions rendered in ***State of A.P. v. Rayavarapu Punnayya***, reported at (1976) 4 SCC 382 and ***Abdul Waheed Khan @ Waheed and Ors. v. State of Andhra Pradesh***, reported at (2002) 7 SCC 175, the conviction of the Appellants was altered from Section 302 read with Section 149 to Section 304, Part I read with Section 149 of the Indian Penal Code.
77. In the case of ***Kandaswamy v. State of Tamil Nadu***, reported at (2008) 11 SCC 97 where the accused was alleged to have indiscriminately cut the deceased with an Aruval (sharp sickle like weapon) resulting in his

instantaneous death, the conviction under Section 302 was altered to one under Section 304, Part I of the Indian Penal Code, in the background of the legal principles enunciated by the Supreme Court in its earlier decisions.

78. In the case of *Sunder Lal v. State of Rajasthan*, reported at (2007) 10 SCC 371 where one of the accused was alleged to have inflicted a blow on the head of the deceased with a gandasi with the intention to kill him and also inflicted injuries on his hand while the co-accused inflicted injuries on his leg with lathi in the night at about 2.00 a.m. while he was sleeping, considering the fact that the occurrence took place in the night in almost dark conditions with feeble light and attack was made indiscriminately, the Supreme Court held that the appropriate conviction would be under Section 304, Part I of the Indian Penal Code.
79. While deciding the present appeals the aforestated principles culled out by the Apex Court are to be kept in view and there is need to keep in view the true and accurate version of the prosecution as to the origin and genesis of the occurrence, it is inferable from the circumstances that the occurrence had happened in a spur of moment and in the heat of passion upon a sudden quarrel. The inference is fortified by the testimony of PW-5, Deepak, who in his deposition stated as follows:

“All the four accused persons present in the court today were also present in the locality and were consuming beer. Sunil had also joined them. Since I was not in the habit of drinking and smoking I had left the place. Later on I came to know that a quarrel had taken place I came back at the spot and saw that the crowd was there. Sunil was taken to the hospital where he later on died. I cannot tell who had caused the injuries to Sunil. Police had recorded my statement. ”

80. It can be clearly inferred from the deposition of PW-5, Deepak, that the

deceased had joined the appellants who were consuming beer. The deceased in the instant case had received only one injury sufficient to cause death in the ordinary course of nature on his head. The remaining blows were indiscriminate blows administered by the appellants without any *mens rea* and without premeditation. The appellants had no motive to commit murder of the deceased. There were heated arguments and exchange of words when they quarrelled. From the totality of the circumstances as narrated above and keeping in mind the fact of existence of a single fatal blow on the head of the deceased and the further fact that there was darkness when the occurrence took place, it stands established that the case falls under section 304 Part I of the Indian Penal Code.

81. In the absence of any positive proof that the appellants caused the death of the deceased with the intention of causing death or intentionally inflicted that particular injury which in the ordinary course of nature was sufficient to cause death, the offence falls within the purview of part I of Section 304 of the Indian Penal Code. Hence, the possibility that in the sudden heat of passion/arguments between the deceased and the appellants, it led to a sudden fight between them which ultimately led to the death of the deceased cannot be ruled out in entirety.
82. For the reasons stated above, we are of the opinion that the ends of justice would be met if the appellants are sentenced to undergo 10 years imprisonment. Accordingly, we alter the conviction of the appellants from Section 302 of the Indian Penal Code to one under Section 304 Part I of the Indian Penal Code. The order of sentence is accordingly modified to ten years. The appellants shall be entitled to the benefit of remission as well as the period already undergone by them in accordance with law.
83. Accordingly, the appeals Crl.A.1461/2012, Crl.A.503/2012 and Crl.A. 58/2012 stand disposed of and partly allowed in the aforestated terms.

84. The Trial Court record be sent back along with a copy of this order.

G. S. SISTANI, J

SANGITA DHINGRA SEHGAL, J

MARCH 29th, 2016
sc/pst