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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment Reserved on: 2nd August, 2017

Judgment Pronounced on: 12th September, 2017

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CRL.A. 1702/2014

RAJ KUMAR @ LALA

..... Appellant

Through : Mr. Sheikh Israr Ahmad, Advocate

versus

STATE NCT OF DELHI

..... Respondent

Through : Ms. Radhika Kolluru, APP

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CRL.A. 158/2015

RAHUL @ BHURI

..... Appellant

Through : Mr. Jitendra Sethi, Mr. Ambar
Tewari, Mr. Hemant Gulati and Ms.
Anshika Sethi, Advocates

versus

STATE, NCT OF DELHI

..... Respondent

Through : Ms. Radhika Kolluru, APP

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MR. JUSTICE CHANDER SHEKHAR

G.S.SISTANI, J.

1. Both the appeals arising out of a common judgment have been argued together and are being disposed of by a common judgment.
2. Present appeals have been instituted under Section 374 of the Code of Criminal Procedure, 1973 ('Cr.P.C.') against the judgment dated 10.11.2014 and order on sentence dated 13.11.2014 passed by the Additional Sessions Judge ('Trial Court') in Sessions Case 08/2014 arising from FIR 17/2013 Police Station Ambedkar Nagar, by virtue of which both the appellants have been convicted under Section

302/34 of the Indian Penal Code (hereinafter referred to as 'IPC') and sentenced to undergo simple imprisonment for life with a fine of Rs.20,000/- each and in default of payment of fine, to further undergo simple imprisonment for one year. The appellant Raj Kumar @ Lala was also convicted under Section 27 of Arms Act, 1959 and was sentenced to undergo simple imprisonment for a period of three years with a fine of Rs.10,000/- and in default of payment of fine, to further undergo simple imprisonment for a period of six months. Both the sentences awarded to the appellant Raj Kumar @ Lala were ordered to run concurrently.

3. The present case pertains to the murder of one Rohit ('deceased') at the hands of the appellants and one Asif (declared juvenile in conflict with law 'JCL'). Before the rival submissions of the learned counsel of the appellants can be considered, we deem it appropriate to state the case of the prosecution, as noticed by the Trial Court, which is as under:

"1. DD No.51-A regarding stabbing of a person near the bus stop of Bus Route No. 521, Sector 5, Ambedkar Nagar, was received in Police Station Ambedkar Nagar on 14.01.2013 and the said DD was marked to ASI Mam Chand for necessary action. After receiving the DD No.51- A, ASI Mam Chand along with Ct. Ram Avtar reached near bus stand 521, the road dividing C and D Block, Dakshin Puri, but could not find any public witness there. Police officials came to know that injured has been taken to hospital in PCR Van. In the meanwhile, staff of the beat also reached the spot. ASI Mam Chand left beat HC Ratan Lal and Ct. Vineet at the spot and proceeded to Trauma Centre, AIIMS with HC Ram Avtar and in the hospital collected the MLC of Rohit Gupta s/o Sh. Rakesh Kumar Gupta, The injured was declared dead in the hospital by the concerned Doctor and no public witness was found at the hospital. ASI Mam Chand came at the spot and found lot of blood there. No public witness was found at the spot. Hence, an FIR u/s. 302 IPC, PS Ambedkar Nagar was

lodged and investigation was marked to the SHO PS Ambedkar Nagar Inspector Abhay Singh Yadav, the then SHO PS Ambedkar Nagar. The spot was got inspected by the crime team, photographs were taken. Investigating Officer prepared the site plan of the spot. Investigating Officer collected the chappals of the deceased, earth control and blood samples from the spot and got them sealed in sealed pullanda and deposited the same in the police station. Thereafter Himanshu, brother of the deceased, came to the spot and Investigating Officer recorded the statement of Himanshu. Himanshu in his statement u/s 161 Cr.PC stated that he is running a dhaba at Bus Stand Route No. 521, Dakshin Puri and his brother Rohit used to come to his dhaba occasionally to assist him. On 14.01.2013, at about 11 pm when Himanshu and deceased Rohit were in the process of closing the dhaba, accused Raj Kumar @ Lala, Rahul @ Bhuri and Asif, who were known to Himanshu came to the dhaba and demanded food from Rohit. Rohit told them that dhaba has been closed and food is not available. On hearing this accused Raj Kumar and his associates started abusing Rohit. Himanshu intervened and rescued his brother and accused Raj Kumar @ Lala, Rahul @ Bhuri and Asif left the dhaba. After sometime, Himanshu and Rohit closed the dhaba and started going to their house. Himanshu was 20-25 steps ahead of Rohit, when all of a sudden Rohit cried and when Himanshu turned back, he found that Raj Kumar, Rahul and Asif were fighting with Rohit. Himanshu run [sic: ran] to save his brother and found that accused Rahul @ Bhuri and Asif have caught hold of Rohit and Raj Kumar @ Lala attacked Rohit on his thigh with a knife a number of times. When Himanshu cried for help, accused Raj Kumar @ lala and Rahul @ Bhuri alongwith Asif (juvenile in-conflict with law) ran away. Someone called 100 number. Himanshu was terribly scared. After sometime, PCR Van came to the spot and took Rohit to Trauma Centre. Himanshu reached Trauma Centre after sometime and found that Rohit was unable to speak and Rohit was declared dead by the Doctor. Himanshu was highly perturbed and stayed outside the hospital for one and half hour. After sometime, when Himanshu became normal, he went to his house and from the house he went to the spot. Himanshu specifically stated in his statement u/s 161 Cr.PC that accused Raj Kumar, Rahul and

Asif (juvenile) have killed his brother in pursuance of a conspiracy.

2. Thereafter, Investigating Officer searched for the accused but the accused could not be found. The dead body was got identified by relatives. On 17.01.2013, Investigating Officer received a wireless message that three boys have been apprehended in case FIR No.18/13 and one of those boys is juvenile and those three boys have disclosed their involvement in the present case. On receiving this information, Investigating Officer along with his staff reached big park at H-Block, Dakshin Puri and Inspector Investigation presented the three boys to the Investigating Officer and told him that these three boys have admitted their involvement in the present case. The names of those boys came to be known as Asif, Raj Kumar and Rahul. Asif was found to be juvenile and separate proceedings were conducted with respect to Asif as per the directions of the Juvenile Justice Board. Accused Rahul @ Bhuri and Raj Kumar @ Lala were interrogated by the Investigating Officer and they were arrested in the present case. Accused Raj Kumar got recovered a knife used in the commission of the crime from the H-Block park, Dakshin Puri. The knife was seized and kept in a pullanda. The place of incident was identified by both the accused persons.”

4. After completion of the investigation chargesheet was filed against both the appellants. Charge under Section 302 read with Section 34 of IPC was framed against both the appellants. A charge under Section 27 of Arms Act was also framed against the appellant Raj Kumar. To bring home the guilt of the appellants, prosecution examined 23 witnesses in all. The statement of the appellant Rahul was recorded under Section 313 Cr.P.C wherein he pleaded innocence and stated that he was picked up from his home and falsely implicated in the present case. In his statement under Section 313 Cr.P.C., the appellant Raj Kumar stated that on 15.01.2013, he had gone to Karkardooma Court Complex to attend the proceedings of his case; his father was forced to call him to the Police Station and

after attending the case at Karkardooma Court, he went to the Police Station where he was falsely implicated. The appellants examined three witnesses in their defence.

5. The Trial Court found that the testimonies of PW-2 Himanshu and PW-1 Sharwan Kumar coupled with the medical evidence if properly appreciated, without taking into consideration the defects in the investigation, it could safely be concluded that the accused/appellants had committed the murder of the deceased and convicted the appellants as noticed in paragraph 2 foregoing.
6. Mr. Jitender Sethi, learned counsel appearing for the appellant Rahul submits that the judgment of the Trial Court is based on surmises and conjectures. The Trial Court has failed to take into consideration that PW-2 Himanshu was in fact not an eyewitness as he was not present at the time of the crime, which is evident from the fact that PW-2 did not accompany his injured brother from the place of the incident to the hospital. Moreover, his name does not find mentioned in the MLC prepared by the doctor and further from the testimony of PW-7 ASI Mam Chand, it has emerged that there was no eyewitness at the spot. Elaborating his arguments further, Mr. Sethi contends that the statement of PW-2 Himanshu who is real brother of the deceased cannot be believed as having been present at the place of the incident he would have tried to save his brother or at least made a call to police officials or his own family members. It is, thus, contended that the testimony of PW-2 is unreliable and cannot be trusted. Reliance is placed on the judgments in the cases of *State (Govt. Of NCT of Delhi) v. Naresh & Anr*, 2012 (2) JCC 830 (paragraph 8) and *Balraj Singh v. The State of Punjab*, 1976 CrL. LJ 1471 (P&H) (paragraphs 13 and 20).

7. Relying on the testimony of PW-7 ASI Mam Chand, it is further contended that this witness has deposed that he received a call at 11:50 PM on the intervening night of 14-15.01.2013 and thereafter he came at the spot and found no eyewitness either at the spot or in the hospital. Reliance was placed on the *rukka* to show even at that stage no person was named and PW-2 appeared only around 03:00 AM. i.e. after three and half hours of the incident.
8. Mr. Sethi contends that a phone call was made to the Police by PW-1 Sharwan Kumar from his mobile phone No.9716078703 who is running a flower shop near the place of the incident. This witness has also testified that he had informed Himanshu (brother of the deceased) about the incident. PW-1 also deposed that Himanshu arrived at the spot within 5-7 minutes of the telephone call. It is also contended that had Himanshu been at the spot there was no occasion for PW-1 Sharwan Kumar to inform PW-2 Himanshu.
9. The attention of this Court has been drawn to the PCR form, wherein the name of Himanshu also does not find mention though it is stated that at 01:00 AM family members were present at the hospital but how the deceased was stabbed was not known. This is in direct contravention to the testimony of PW-2 that after the incident he went home to get his family members while according to the PCR form, his family members were already present at 01:00 AM at the hospital.
10. Mr. Sethi, learned counsel for the appellant Rahul further goes on to submit that PW-2 Himanshu being an eyewitness, the site plan should have been prepared at his instance while the testimony of PW-22 Insp. Abhay Singh would show that the site plan was prepared by him at the instance of PW-7 ASI Mam Chand. It is

strenuously argued before us that PW-2 has been introduced as an eyewitness which is evinced by a careful examination of serial number of witnesses at the site plan, which would show that initially PW-2 was not shown as a witness, but as a mere cover up his name was added by renumbering the witnesses.

11. Learned counsel for the appellant submitted that on a careful examination of the site plan placed on record would show that there were three places where the incident took place; *firstly*, where the deceased was stabbed; *secondly*, where the deceased was stabbed again; and *thirdly*, where the deceased dropped while no such description was given by PW-2, who claims to be an eyewitness, which casts a serious doubt with regard to his presence. Even otherwise, the case of prosecution and the testimony of PW-2 cannot be believed as in case the appellant Rahul caught hold of the deceased then there would not have been three distant places as described in the site plan. He further submits that as per the testimony of PW-2, the appellant Rahul did not stab the deceased.
12. It is also contended by learned counsel for the appellants that a copy of the brief facts prepared on 15.01.2013 at 11:50 AM. by the Investigating Officer and sent to the Doctor with a request to conduct post-mortem does not show the name of either PW-2 Himanshu as an eyewitness or the name of the appellants. Reliance is placed in the case of ***Ghan Shyam & Ors. v. State, II (2007) DLT (CRL.) 54 (DB)*** (paragraphs 6 and 8).
13. It has also been urged that there are contradictions between the statements of PW-2 Himanshu (brother of the deceased) and PW-7 ASI Mam Chand with regard to the recording of the statement of PW-2. PW-7 deposed that when he came back at the spot, he

recorded the statement of PW-2 while PW-2 testified that his statement was recorded at the hospital. In the statement of the appellants under Section 313 Cr.P.C., a question was put to them with regard to the recording of the statement at the Police Station. No question was put for recording of the statement at the hospital or at the place of the incident.

14. Additionally, Mr.Sethi relies upon *Nankaunoo v. State of U.P.*, (2016) 3 SCC 317 (paragraph 13) in support of his arguments that no case under Section 302 of IPC would be made out in the absence of the opinion rendered by the doctor that the injury suffered by the deceased was sufficient to cause death in the ordinary course of nature. Reliance is also placed on the judgment in the case of *Balwant Singh v. The State*, 1976 CLR Delhi 43 in support of his contention that once the Court reaches the conclusion that the investigation is tainted then the entire case of the prosecution would become suspicious and open to serious challenge. In this case, Mr.Sethi contends that the tampering with the names of the witnesses on the site plan prepared along with the fact that no report was sent to the *Ilaka* Magistrate and the apparent contradictions in the testimony of PW-2 Himanshu who claims to be an eyewitness would show that the entire case of the prosecution is tainted and unreliable and only points towards the innocence of the appellants. It is also apparent from the observation of the Trial Court that in this case proper investigation was not done.
15. Mr.Sheikh Israr Ahmed, learned counsel appearing for the appellant Raj Kumar, additionally contended that the testimony of PW-2 would show that he knew all the accused persons and appellant Raj Kumar resides at a distance of 250-300 meters from the place of

incident and 30 meters from the *dhaba* of PW-2 Himanshu and deceased and in case, PW-2 would have disclosed the names of the appellants, then his house would have been raided, but no such raid had taken place. The deceased and his brother were known to the appellant Raj Kumar as they had been tenants for two years in the house of appellant Raj Kumar and they would have raided the house of appellant Raj Kumar within hours of the incident which was not done.

16. Additionally, it is contended that reading of the testimony of PW-2 would show that no case under Section 302 IPC is made out for the reason that there was no motive established. The incident took place in the heat of moment, when the deceased had refused to serve food to the appellants claiming that the *dhaba* had been closed.
17. It is also contended that the appellant Raj Kumar stabbed the deceased not on a vital part of the body but only on the thigh. If there was an intention to kill the deceased, he would have attacked one of the vital parts of the body and not only on the thighs. The post-mortem report and the opinion of the doctor does not state that any blow which was inflicted on the deceased could have resulted in his death.
18. Learned counsels for the appellants have also contended that the recovery of the weapon is not reliable as the recovery was made from an open public place and there was no public witness associated with the recovery. Furthermore, the FSL report does not establish that the death was caused with the same weapon.
19. *Per contra*, Ms.Kolluru, learned counsel for the State submits that the presence of PW-2 Himanshu stands clearly established by the testimony of PW-1 Sharwan Kumar that when he spoke to him on

telephone, he seemed to be highly perplexed. Reliance is also placed on the testimony of PW-7 ASI Mam Chand to show that this witness had also deposed that PW-2 seemed to be in a highly perturbed state of mind when he came to the spot. Learned counsel has laboured hard to establish the presence of PW-2 at the spot by placing strong reliance on the MLC to show that the material particulars which find mention in the MLC could only have been provided by PW-2, who was none other than the younger brother of the deceased. Furthermore, not only the parental name but also the complete address has been provided which could not have been provided by PW-20 ASI Rameshwar from the PCR van who brought the injured to the hospital. Ms. Radhika further submits that the PCR form would also show that initially some friends and relatives were attempting to remove the deceased in a PCR, thus the presence of PW-2 would stand established. Learned counsel also submits that not only the presence of PW-2 is established at the time of the incident, but even soon thereafter, which is evident upon a reading of the testimonies of PW-7 ASI Mam Chand, PW-15 ASI Ratan Lal as also PW-22 Inspector Abhey Singh, who have testified that at 3:00 AM, PW-2 was present at the place of incident. Learned counsel submits that much should not be read into where the statement of PW-2 was recorded as PW-2 in his testimony has stated that after the incident, he went to the Hospital from where he went to the place of the incident and was then taken to the Police Station and in such a situation, his answer could have been misunderstood and in any case no prejudice would have been caused to the appellants herein.

20. Learned counsel also submits that there is no tampering of the site plan. In fact, PW-22 has given a truthful account of the fact that the site plan was prepared at the instance of PW-7, however, the final report was prepared in the presence of PW-2 and it is for this reason that there are three witnesses at the site plan, including PW-2 which shows that the site plan was prepared at his pointing out. It is also clarified by the learned counsel for the State that the case diary reveals that attempts were made to trace the missing person who had fled from the incident and thus, the submission made by the counsel for the appellants that no raid was conducted is without any force.
21. Ms.Kolluru also contends that a knife was recovered at the instance of the appellant Raj Kumar, which was buried in the soil and the knife contained human blood, although no grouping could be established. It is also contended that there could have been no motive to implicate the appellants by the persons of the deceased family at the cost of real culprit fleeing from the spot.
22. Ms.Kolluru further submits that it is well established that different persons react in a different way in the same situation. To say that the evidence of PW-2 Himanshu cannot be relied upon as his reaction of not helping his brother or returning home to inform his family is unusual cannot be accepted. Reliance is placed on the judgment in the case of *Leela Ram v. State of Haryana*, (1999) 9 SCC 525 (paragraphs 7, 8, 10 and 11).
23. Learned counsel for State has also relied upon the judgment in the case of *Sukhdev Yadav and Others v. State of Bihar*, (2001) 8 SCC 86 (paragraphs 12 to 16) in support of her contention that minor contradictions and variations which do not go to the root of the matter cannot affect the case of the prosecution. She has also relied

upon the judgment in the case of ***Baleshwar Mandal and Another v. State of Bihar***, (1997) 7 SCC 219 (paragraphs 4 and 5) to show that minor lapses cannot be fatal to the case of the prosecution. Reliance is placed on the judgments in the case of ***State of Himachal Pradesh v. Jeet Singh***, (1999) 4 SCC 370 (paragraphs 22 to 28); ***State of Maharashtra v. Bharat Fakira Dhiwar***, (2002) 1 SCC 622 (paragraphs 21 and 22); ***Kulvinder Singh & Anr. v. State of Haryana***, AIR 2011 SC 1777 (paragraph 15); and ***Ramesh Kumar alias Rameshwar v. State***, 2010 CRL.L.J. 85 (paragraphs 13 to 16 and 25) with regard to weapon of offence having been found in open place and the law relating thereto.

24. Mr.Sethi, learned counsel for the appellant Rahul contends in rejoinder that merely because the MLC contains complete particulars would and cannot lead to the conclusion that PW-2 was present at the place when the incident took place or he stated that his injured brother was taken to the PCR van, when PW-2 has himself not testified that he provided the particulars of the injured person nor PW-20 ASI Rameshwar has deposed that the brother of the injured was present and that he had provided the particulars of the deceased. Based on the testimony of PW-2, Mr. Sethi contends that this witness deposed that he remained at the spot for 25 to 35 minutes and since the offence took place around 11:35 PM, he could not have reached at the Hospital at 12:25 AM when the MLC was recorded. It is also contended that PW-13 Constable Rajbir, who was on duty at the Trauma Centre has not testified that either PW-2 had approached him to inquire about the condition of the deceased or provided details of the assailants. While relying upon the judgment in the case of ***Surinder Kumar & Ors. v. State***, 42 (1990)

DLT 1 (paragraph 10), Mr.Sethi highlighted that it is the duty of an experienced police constable to enquire about the name of the assailants if an eyewitness knows it and report the same. Mr. Sethi also submits that merely because the details could have been provided, that by itself would not be a ground to falsely implicate the appellants as the prosecution has to show evidence to sustain the order of conviction. Mr.Sethi submits that the presence of PW-2 at the time of preparation of the MLC remains doubtful.

25. We have heard the learned counsel for the parties, considered their rival submissions and given thoughtful consideration to the matter. The prime prosecution witness remains the brother of the deceased PW-2 Himanshu. Mr.Ahmad and Mr.Sethi have addressed extensive arguments to impugn the presence of PW-2 at the *locus in quo*, which can be summarized as under:

- (i) The name of PW-2 does not find mention in the MLC (Ex.PW-6/A);
- (ii) PW-7 ASI Mam Chand has testified that there was no eyewitness at the spot of incident or the hospital;
- (iii) The conduct of PW-2 Himanshu is unnatural as he neither attempted to save his brother, contact the police or his family members;
- (iv) Even in the *rukka* prepared at 2:25 AM, there is no name of any eyewitness and thus, it is clear that PW-2 appeared only around 3 AM;
- (v) The factum that PW-1 had to call PW-2 and inform about the incident proves the absence of PW-2;

- (vi) The name of PW-2 is absent in the PCR Form, though it is mentioned that the family members were present though how the deceased was stabbed was unknown;
 - (vii) The site plan was not prepared at the instance of PW-2, but at the instance of PW-7, and does not show where the eyewitness was standing and the same has been tampered to introduce PW-2;
 - (viii) There is a difference between the testimony of PW-2 and the site plan;
 - (ix) Name of PW-2 Himanshu is also absent in the brief facts prepared to be sent along with the application for conducting postmortem;
 - (x) There are contradictions as to the place where the statement of PW-2 was recorded; and
 - (xi) Had the assailants been named by PW-2 in the night itself, there would have been an immediate raid in the house of appellant Raj Kumar.
26. In order to appreciate the contentions raised by the learned counsel for the appellants, it would be necessary to examine the testimonies of the material witnesses.
27. PW-2 Himanshu (brother of the deceased) in his examination-in-chief deposed that his family consists of parents and three brothers including him. Rahul is the eldest brother, the deceased was the middle one, while he is the youngest. On 14.01.2013 at about 11:00 PM, he alongwith his elder brother/deceased were present in their *dhaba* and were closing down for the day. Three persons, being the appellants and Asif (JCL), came to his *dhaba* and demanded food to be served, to which his deceased brother declined and told that the

dhaba had closed for the day. They then started using abusive language and grappled with the deceased. He intervened and rescued his brother. Thereafter, all the three persons left. After 5-10 minutes of their leaving, they closed their shop and started walking towards their home. The deceased was 22-25 paces behind PW-2. Somewhere before the park, he heard the cries of his deceased brother. On looking behind, he saw the appellant Raj Kumar stabbing the deceased 4-5 times on his thighs. The other two persons including appellant Rahul were holding his deceased brother. He started shouting due to which the appellants and Asif (JCL) fled away from the spot. He rushed towards the deceased, who was bleeding extensively and had fallen in front of the shop of PW-1 Sharwan. Thereafter, his neighbouring shopkeeper PW-1 Sharwan, who sells flowers, informed PCR officials. PCR vehicle came and took the deceased to Trauma Centre. PW-2 followed them to the Trauma Centre by an auto rickshaw. He was informed by the doctor that his brother had died. He became highly perturbed for 1-1½ hour. Thereafter, he returned home and informed his parents as he was not carrying his phone at that time. He along with his family returned to the hospital at about 2:30/3:00 AM. His statement was recorded by the police in the hospital.

28. The witness was thoroughly cross-examined, where he stated that he had left the *dhaba* first and was followed by the deceased. At the time of the incident, there was no public witness around. He had tried to lift his brother up. The deceased had moved in the direction of their shop and had come near the flower shop of PW-1 Sharwan. All other shops in the area were closed and only the flower shop of PW-1 Sharwan was open, who was the first person to come near

them. The deceased had not stated anything to PW-1 at the time. He remained with the deceased till the PCR vehicle reached the spot and remained at the spot for about 25-30 minutes after PCR van left the spot. Police officials had started investigation when he left for the Trauma Centre. He further stated that he had first taken a lift on motorcycle from a passerby till the corner, from where he had taken an auto rickshaw. He categorically denied the suggestion that he had any conversation with the police officials who had come to the spot before he left for the Trauma Centre. Upon reaching the Trauma Centre, he first saw his brother and on seeing him, became perturbed and came out. He was unable to gather his senses for one and a half hour. It was only later that the doctor had informed him that his brother had died. At the stage, the PCR officials were still in the hospital. His statement was recorded by the PCR officer when he had returned to the hospital after visiting his house. From the hospital, he was taken to the scene of incident and later to the police station.

29. The only other public witness is PW-1 Sharwan Kumar who deposed that he is engaged in the business of selling flowers and has a shop opposite bus stop of route no.521 in the area of Dakshin Puri, New Delhi. A *dhaba* is run close to his shop by two brothers, namely Himanshu and Rahul along with their father who used to come off and on. On 14.01.2013 at about 11-11.30 PM, he saw deceased Rahul to have come and fallen in front of his flower shop with bleeding injuries. He informed the police on 100 number from his mobile 9716078703 and informed the Police officials. The deceased was drenched in blood. Thereafter, Police reached the spot. His statement was recorded by Police after a week or 10 days.

During cross-examination, he denied the suggestion that he had disclosed the name of the deceased to the police officials. He had known Rahul and his brother for over 2-2½ years prior to the incident. He stated that he had left for home after the police had arrived at the spot. On the day, he was neither questioned by the police nor did he volunteer to make any statement to the police. He had informed PW-2 Himanshu using the same mobile phone. PW-2 Himanshu had arrived at the spot within 5-7 minutes of the telephone call. Thereafter, PW-1 left for his home. He had later enquired from PW-2 Himanshu and learnt that the Rahul had died. This conversation had been picked up by the elder brother Rohit and had taken place at about 1:30 AM. He further stated that the PCR officials had removed the injured/deceased to hospital in their official vehicle and PW-2 Himanshu had followed them in some other conveyance. He further stated that when he had called PW-2 Himanshu, he seemed perturbed and told that he was coming in his direction only.

30. Since numerous contentions have been raised regarding the evidence and the inconsistencies in the sequence of events, we proceed to analyse the testimonies of the police witnesses. Now PW-1 has testified that he had called 100 number from his mobile 9716078703. PW-18 L/Ct.Suman Lata deposed that she was posted as Channel Operator in Police Control Room (PCR) at 23:33:23 hours, a call was received from the same number informing about a stabbing incident at Dakshin Puri, Sector-V, near Baba Street/Tanki or Bus Stand of Route No.521. The information was passed on to the network/PCR van/Police Station at 23:35:15 hours. PCR Form

(Ex.PW-18/A) also reads “*ek admi ko chaku mar diya hai*” (one person has been stabbed with a knife).

31. The information was received by PW-20 ASI Rameshwar, who was posted at K-55, PCR Van, who deposed that at about 11:35 PM, a call was received from the Control Room to the effect that one person had been stabbed near Bus Stand of Bus Route No.521 near Baba Street, Dakshin Puri. He along with his staff members reached the spot in the PCR Van where one person had sustained stab injuries on both thighs near groin region was lying there. They removed him to Trauma Centre, AIIMS. They came to know that the name of the injured was Rohit Gupta. During cross-examination, he stated that besides him, there was one driver and gunman in the PCR and no relative or friend of the injured was present. He stated that he cannot comment if the relatives or friends of the injured were present in the hospital as he did not know them. He further stated that when they were removing the injured in the van to the hospital, they were told by some person that his name was Rohit Gupta and he was running a *dhaba* in the vicinity. PW-20 had passed on the particulars at the time of preparation of MLC.
32. PW-13 Ct.Jagbir was posted in Police Station Safdarjung Enclave and was on duty in the Trauma Centre, AIIMS. He deposed that sometime after midnight, PCR Van No.K-55, of which PW-20 ASI Rameshwar was the in-charge had brought an injured person, whose name was probably Rakesh and again said Rohit. He was examined by the doctor and declared brought dead. He had conveyed the information to PS Ambedkar Nagar on telephone. In his cross-examination, he stated that he had collected the name and address of the deceased person from the MLC.

33. The story further unfolds in the testimonies of PW-7, PW-9 and PW-15. PW-7 ASI Mam Chand deposed that on 14-15.01.2013 at about 11:50 PM, he had received the information through DD 51-A (Ex.PW-7/A), which was handed over by PW-15 HC Rattan Lal. Thereafter, he along with PW-9 Ct.Ram Avtar reached the spot and noticed that blood was lying on the road. The injured was removed to the hospital. No eyewitness was available and in the meantime, PW-15 HC Rattan Lal and Ct.Vineet also came there. On his direction, PW-15 HC Rattan Lal and Ct.Vineet remained at the spot in order to guard the same; PW-7 proceeded with PW-9 Ct.Ram Avtar to the Trauma Centre, AIIMS. The deceased was found admitted in an injured condition. He was declared dead by the doctor. He did not find any eyewitness in the hospital. He received the MLC and returned to the spot. But again, no eyewitness was present there. Thereafter, PW-7 prepared the *rukka* on the above information and handed it over to PW-9 Ct.Ram Avtar at 02:25 AM on 15.01.2013 with a direction to take it to the police station for getting FIR registered. PW-22 SHO Abhey Singh Yadav had also arrived at the spot. The copy of the FIR was brought by PW-9 Ct.Ram Avtar at about 3 AM and handed over to the SHO. At that stage, one public witness PW-2 Himanshu in highly perturbed state came to the spot and told the facts about the incident to the SHO. PW-2 disclosed that he is the brother of the deceased and narrated the incident in detail also disclosing the names of the assailants. The SHO (PW-22) then took over the investigation and prepared the site plan, which had been signed by PW-7 as a witness.
34. During cross-examination, PW-7 stated that when he had received DD 55-A, he was outside the police station and around the place of

Mahila Mandal. PW-15 HC Rattan Lal was with him when he went to the spot. He had made enquiry to find out if anyone connected with the victim was present in the hospital or not, but no one could be found there. When he returned to the spot from the hospital, only PW-15 HC Rattan Lal and Ct.Vineet were present at the spot. He had arrived there at about 1:15 AM and prepared the *rukka* while sitting on his motorcycle at the spot. No other police official or public witness had arrived before the *rukka* was sent. PW-9 Ct.Ram Avtar had returned to the spot after the SHO had arrived at the spot. He further stated that he had not seen PW-2 Himanshu arriving and therefore, could not comment on the mode of transportation used by him; he went on to voluntarily state that he only saw him coming to the SHO. He was unaware of the facts disclosed to the SHO by PW-2 Himanshu. He further stated that he had assisted the SHO in preparing the site plan (Ex.PW-7/C) by pointing out the place where the blood had been found and *chappals* were lying.

35. PW-15 ASI Rattan Lal deposed that on 14.01.2013, he was posted as Head Constable in police station Ambedkar Nagar and at 11:40 PM, ASI Liyakat Ali handed over DD 55-A to him. He took the DD entry to the bus stand on Route 521 in Dakshin Puri, where he met PW-7 ASI Mam Chand and PW-9 Ct.Ram Avtar and handed over the DD entry to him. There was blood lying on the road at the said place. PW-7 ASI Mam Chand made efforts but could not find any eyewitness. It was learnt that the injured had been taken to Trauma Centre, AIIMS by PCR vehicle. PW-7 ASI Mam Chand left him at the spot and proceeded to Trauma Centre. He returned at about 1:15 AM on 15.01.2013 from the hospital. PW-7 ASI Mam Chand made further enquiries, however he was unable to locate any eyewitness

even at that stage. Around the same time, PW-22 SHO Abhey Singh had also arrived at the scene. The *tehrir* was sent by PW-7 ASI Mam Chand at about 2:25 AM. The SHO had inspected the scene. The site plan (Ex.PW-7/C) was prepared at the instance of PW-7 ASI Mam Chand. Around the time of proceedings, PW-9 Ct.Ram Avtar had returned with copy of FIR and the original *tehrir*. During the proceedings at the spot, PW-2 Himanshu (brother of the deceased) had also joined. SHO recorded his statement and thereafter, efforts were made to trace the assailants, but no one could be found on the day. During cross-examination, PW-15 stated that he had reached the spot at about 11:50 PM and left the spot at about 3:45 AM the next morning. Public persons were standing at a small distance from the place of occurrence and upon enquiry by PW-7 ASI Mam Chand, they informed that one person had been stabbed and after a call to 100, he has been taken to Trauma Centre. In his presence, PW-7 ASI Mam Chand did not record the name and address of those persons and voluntarily stated that in his presence, PW-7 ASI Mam Chand was conducting enquiries from public persons. PW-7 ASI Mam Chand left the spot at about 12:15 AM and returned at about 1:15 AM. The SHO reached the spot after the *rukka* was prepared and sent. In his presence, the SHO had recorded the statement of one public witness, namely PW-2 Himanshu, who had reached the spot. He stated that he did not know the mode of transport used by PW-2 Himanshu and voluntarily stated that he had seen him coming on foot. The site plan was prepared by the SHO in his presence and he had signed the site plan.

36. PW-9 Ct.Ram Avtar had accompanied PW-7 ASI Mam Chand, who deposed that on the intervening night of 14-15.01.2013, he was on

emergency duty with PW-7 ASI Mam Chand. After receiving DD 51-A, he had proceeded with PW-7 ASI Mam Chand to the spot. Blood was lying there and no eyewitness was found. PW-15 HC Rattan Lal and Ct.Vineet had also reached the spot. They were left at the scene of incident, while PW-9 and PW-7 ASI Mam Chand went to the Trauma Centre, AIIMS. One injured person named Gupta was found in the hospital and he had been declared dead. PW-7 ASI Mam Chand collected the MLC; no eyewitness was present in the hospital. They returned to the spot. Again, no eyewitness was found. PW-7 ASI Mam Chand had given him the *rukka* at 2:25 AM on 15.01.2013, which was taken by him to the police station where FIR was registered. PW-9 brought the copy of FIR and *rukka* back to the spot. PW-22 Ins.Abhey Singh was also present there and he took over the investigation. During cross-examination, PW-9 stated that they had learnt from a public person that the victim had been taken by PCR vehicle to Trauma Centre AIIMS. He further stated that he did not know the particulars of the public person. They stayed at the Trauma Centre from about an hour and had reached there about 12:30 AM or so.

37. The investigation in the matter was undertaken by PW-22 Ins.Abhey Singh, then SHO PS Ambedkar Nagar; who deposed that on the intervening night of 14-15.01.2013 at about 1:15 AM, after finishing his work, he had reached the place of occurrence involved in FIR 17/2013. PW-7 ASI Mam Chand, PW-15 HC Rattan Lal, Ct.Vineet and PW-9 Ram Avtar were present at the place and PW-7 was in the process of preparing his *rukka*. He informed the entire sequence of events and sent his *rukka* through PW-9 Ram Avtar, on which the FIR 17/2013 (Ex.PW-10/A) was registered. PW-22 further deposed

that he had prepared the site plan (Ex.PW-7/C) at the instance of PW-7 ASI Mam Chand. PW-9 had returned with a copy of FIR and handed over the same to him/SHO with the original *tehrir*. PW-2 Himanshu (brother of the deceased) had also come, whose statement was recorded by PW-22. Then the witness tried to trace the assailants.

38. PW-22 was thoroughly cross-examined, wherein he stated that on 15.01.2013 at 1:15 AM, he had received the information of the incident. He returned at 5 AM after conducting the proceedings. When he reached, PW-7 ASI Mam Chand was writing the *rukka*. He did not find any public witness there. The distance between the place of occurrence and the *dhaba* of the deceased is about 25-30 steps. When he had prepared the site plan PW-1 and PW-2 were not present at the spot and immediately said that only one witness PW-2 Himanshu came at the spot. He voluntarily stated that PW-1 was involved afterwards in the investigation. PW-2 Himanshu had come to the spot after the exhibits were collected and had come at about 3 AM. The site plan (Ex.PW-7/C) was not prepared in the presence of PW-2 Himanshu; again said that the final site plan was prepared in the presence of PW-2 Himanshu. The site plan was signed by PW-2 Himanshu and PW-7 ASI Mam Chand. The site plan was prepared on the pointing out of PW-7 ASI Mam Chand. No specific location was indicated separately by PW-2 Himanshu. The exact location of point A and B in the site plan (Ex.PW-7/C) were described to PW-22 by PW-7 ASI Mam Chand and voluntarily stated that the same was also confirmed by PW-2 Himanshu. He further stated that he went for the search of the accused at different places. No public

person was accompanying him. He did not visit the house of the accused in the course of the search.

39. We may also notice the medical evidence, which corroborates the ocular testimony on record. Both the MLC (Ex.PW-6/A) and the postmortem report (Ex.PW-17/A) show two stab wound on the inner aspect of the right thigh of the deceased.
40. Though at first blush, the contentions of the learned counsel for appellants seem persuasive, however, on a careful analysis of the ocular evidence of the foregoing witnesses, we find that a complete sequence of the chain of events is established. On the fateful night intervening 14-15.01.2013, the deceased and PW-2 Himanshu were in the process of closing down their *dhaba*, when three persons including the appellants and Asif (JCL) came and demanded food. The deceased declined by informing that the *dhaba* had been closed for the day. This did not please the accused, who started abusing and grappling. The PW-2 Himanshu intervened and saved his elder brother. Then they closed the shop and started walking towards their home. PW-2 Himanshu was 22-25 paces ahead of the deceased when the accused returned and stabbed the deceased. The appellant Rahul and Asif (JCL) tried to hold the deceased, while the appellant Raj Kumar gave two stab blows on his thighs. The shrieks of his brother drew the attention of PW-2, who looked behind to witness the incident. PW-2 Himanshu started shouting and rushed towards the deceased, however, the accused were able to flee. The deceased was extensively bleeding and fell in front of shop of PW-1 Sharwan. This was witnessed by PW-1 Sharwan, who called the Police Control Room (PCR) at 23:33:23 (Ex.PW-18/A) from his

mobile number 9716078703 and informed that “*ek admi ko chaku mar diya hai*” (one person has been stabbed with a knife).

41. We stop here to note as to which place the appellant was actually stabbed. Learned counsel for the appellants have contended that the site plan (Ex.PW-7/C) is in contradiction with the testimony of the eyewitnesses. We do not find so. PW-2 Himanshu had specifically stated in his cross-examination that his brother “*had moved in the direction of our [their] shop and had come near the shop of Sharwan.*” Similarly, PW-1 Sharwan deposed that he saw the deceased “*to have come and fallen*” in front of his shop. Neither stated that the deceased was completely immobilized or was not trying move from one spot to another. This is in consonance with the site plan (Ex.PW-7/C). PW-7 ASI Mam Chand, PW-15 ASI Rattan Lal and PW-22 Ins.Abhey Singh had consistently testified that the site plan (Ex.PW-7/C) was prepared by PW-22 at the instance/pointing out of PW-7 ASI Mam Chand, who had pointed based on the blood and the *chappal*. The points ‘A’ and ‘B’ were marked at the instance of PW-7. PW-2 Himanshu had come at about 3 AM, when the site plan (Ex.PW-7/C) was being prepared and had confirmed the points. His name was, accordingly, added and probably because there was no space to add the name of a witness at the bottom of the page, the name of PW-2 Himanshu was added at serial number 1 after renumbering the witnesses. The same can, by no means, lead to the conclusion that the document was tampered as the same remains in consonance with the ocular testimony. We have also gone through the photographs (Ex.PW-5/1 to Ex.PW-5/15) placed on record and particularly Ex.PW-5/10, Ex.PW-5/11, Ex.PW-5/14 and Ex.PW-5/15, which clearly show the

presence of blood at points 'A' and 'B' in front of shop 'Om Sai Service' in the background in consonance with the site plan (Ex.PW-7/C) and the scaled site plan (Ex.PW-3/A).

42. Coming back to the story unfolding from ocular evidence on record. The deceased was stabbed on two occasions between point 'A' and 'B' when appellant Rahul and Asif (JCL) tried to immobilize the deceased and appellant Raj Kumar gave stab blows. As per Ex.PW-3/A, the distance between points 'A' and 'B' is 730 cms (about 24 ft) and from 'B' to 'C', where the deceased finally collapsed in front of shop of PW-1 Sharwan is 2490 cms (about 82 ft). We proceed to the events after the stabbing. PW-1 Sharwan had called the Police Control Room; which was in turn relayed to Kite 55 PCR Van under the charge of PW-20 ASI Rameshwar. The PCR Van rushed to the spot, where someone had informed PW-20 of the name of the deceased. The deceased was immediately removed and taken to the Trauma Centre, AIIMS, where the name was disclosed by PW-20. Indubitably, the information sent by Kite 55 at about 1 AM states that "*ghar wale saath hain*" (relatives are along) and the same remains in clear contradiction with the ocular account, however it cannot shake the otherwise consistent ocular account supported by medical evidence. PW-20 has stated that no relative or friend of the injured was present. The deceased was received at the Trauma Centre by the PW-13 duty officer. The PCR Van reached the Trauma Centre sometime after midnight and declared by the doctor to be brought dead. The MLC (Ex.PW-6/A) was prepared wherein the particulars of the deceased are given, though in the column of 'relative name', the name of Rameshwar, i.e. PW-20, is written. This is once again in tune with the testimony of PW-20 that he, as

the in-charge of Kite 55, had taken the deceased to the Trauma Centre.

43. The information was also relayed by the control room to the police station, where DD 51-A was recorded and allotted to PW-7 ASI Mam Chand. PW-15 HC Rattan Lal was sent to hand over the DD entry to PW-7. Accordingly, PW-7 along with PW-9 reached the spot where they were joined by PW-15 HC Rattan Lal and Ct.Vineet. There was no eyewitness there. Upon coming to know that the injured had been removed to the Trauma Centre, PW-7 proceeded with PW-9 Ct.Ram Avtar to the Trauma Centre, AIIMS at about 12:15 AM. The deceased was found and he was declared dead by the doctor. Again, no eyewitness was found. They returned to the spot at about 1:15 AM and investigation ensued. *Rukka* was prepared and sent through PW-9 Ct.Ram Avtar at about 2:25 AM for the registration of FIR. In the meantime, PW-22 Ins.Abhey Singh arrived at the spot and took over the investigation. At about 3 AM, PW-2 Himanshu came to the spot on foot and his statement was recorded.
44. In this sequence of events, there was no question of the name of the eyewitness, i.e. PW-2 Himanshu, or of the assailants being present in the *rukka* or the PCR Form. The question then is where was PW-2 Himanshu after witnessing the murder of his brother? The answer is found in the testimony of PW-2 only. He had deposed that when he had heard the cry for help of his brother, he had turned around to witness the stabbing of the deceased. He started shouting and rushed to his brother, however, the assailants ran away. He tried to lift his brother. He became extremely perturbed and went into a state of trance. PW-2 Himanshu waited till the PCR Van (Kite 55)

took his brother. His perplexed state did not allow him to approach the police. Both PW-1 Sharwan and PW-7 ASI Mam Chand have confirmed that they found PW-2 in a highly perturbed state. We find no reason to disbelieve the same as it is not unusual for one to get disturbed after witnessing the death of his own brother first hand. After the PCR van left, PW-2 took a lift on motorcycle from a passerby till the corner, from where he had taken an auto rickshaw. He reached the Trauma Centre and was informed by the doctor about the death of his brother. This is further corroborated by the fact that the MLC (Ex.PW-6/A) contains the father's name and the address of the deceased and such information, can only be tendered by a relative of the deceased. A coordinate bench of this Court was faced with a similar situation in **Noor Mohd. v. State NCT of Delhi, 2012 Cri LJ 28: 2011 SCC OnLine Del 3604** wherein the appellant had alleged that the brother of the deceased, an alleged eyewitness, was unreliable as the MLC was silent about the name of the injured and recorded that the police had brought the body. The same was rejected by the Bench while observing as under:

“7. It is urged by learned counsel for Dalip that PW-3 could not be believed because there was no corroborative material in support of his assertion about having accompanied his brother to the hospital. Reliance was placed upon the MLC (Ex. PW-15/A), which is silent about the name of the injured; besides it recorded that the police had taken the body. Learned counsel argued that if indeed Rahisuddin had witnessed the incident and had either accompanied the PCR or had gone with it, there was no reason for the hospital authorities to exclude the mention of his name. ...

*...
11. As far as the appellant Dalip is concerned, the submission made regarding the omission to mention Rahisuddin in the MLC, in this Court's opinion, are insubstantial. Often the relatives who accompany the injured*

who is a victim of a crime and depose later in the proceedings do not find mention in the medical documents, such as the MLC. The reason most often explained for this omission is by saying that the doctors or any other paramedics who record the MLC are more concerned with the treatment to be given to the injured at that moment rather than noting the names of those who accompany him. This Court notices that PW-3 is consistent in his version - even in his cross-examination that he followed the injured Moinuddin, who was taken in the PCR. This circumstance itself affords an explanation because the MLC (Ex. PW-15/A) records that the injured was taken to the hospital by PCR Official ASI Rajender. It might well have been that when he was admitted, PW-3 had not reached or having reached, was searching for the place where his brother had been taken.”

(Emphasis Supplied)

45. The details in the MLC, infact, show that PW-2 had approached the doctor, though he missed the police officials. The knowledge of the death of his brother, further worsened the mental condition of PW-2, who came out from the Trauma Centre and lost senses for 1 and a half hours. Since PW-2 had already left the Trauma Centre, there was no question of him being found by the police officials (PW-15 or PW-9). It was only when he regained his senses did he return home and came back with his family. Now, there is a contradiction as to the place where the statement of PW-2 was recorded, but considering the state of PW-2 Himanshu, not much can be made from such a minor contradiction. Similarly, we do not find that the inconsistency of PW-2 and PW-1 regarding the phone call and the possession of mobile phone by PW-2 Himanshu is sufficient to discredit their testimonies *in toto*, which otherwise are reliable and consistent. Such *inter-se* discrepancies are normal and can be attributed to errors of observation and lapses of memory [See *Asha v. State of Rajasthan*, 1997 SCC (Cri) 712 (paragraph 9); *Leela*

Ram (Supra) (paragraphs 9, 10, 12 and 13); and **Sukhdev Yadav (Supra)** (paragraphs 1 to 3)].

46. We also do not find any force in the submission of the learned counsel branding the conduct of PW-2 as unnatural. Upon witnessing the assault of his brother, PW-2 shouted and rushed for his aid. Even tried to pick him. He then waited until the PCR Van and then followed it in an autorickshaw. Merely because he did not approach the police officials or his family and remained with his brother cannot be termed to be unnatural. Natural love and affection instinctively directs one to remain with his loved ones in need. If upon knowing the death of the deceased, put him out of commission for 1-1 ½ hours is again not improbable. On regaining consciousness, he acted in a manner most prudent persons would do, first approach his family and then the police. Even otherwise, it is settled that there cannot be any fixed reaction expected of witnesses. In **Leela Ram (Supra)**, the Apex Court observed as under:

“11. The Court shall have to bear in mind that different witnesses react differently under different situations: whereas some become speechless, some start wailing while some others run away from the scene and yet there are some who may come forward with courage, conviction and belief that the wrong should be remedied. As a matter of fact it depends upon individuals and individuals. There cannot be any set pattern or uniform rule of human reaction and to discard a piece of evidence on the ground of his reaction not falling within a set pattern is unproductive and a pedantic exercise.”

47. The Supreme Court in **State of U.P. v. Devendra Singh, (2004) 10 SCC 616** has observed as under:

“6. In view of the rival submissions, it has to be first seen whether the prosecution has established its case. Strictly speaking, the case is not of circumstantial evidence. Human behaviour varies from person to person. Different people

behave and react differently in different situations. Human behaviour depends upon the facts and circumstances of each given case. How a person would react and behave in a particular situation can never be predicted. Every person who witnesses a serious crime reacts in his own way. Some are stunned, become speechless and stand rooted to the spot. Some become hysteric and start wailing. Some start shouting for help. Others run away to keep themselves as far removed from the spot as possible. Yet others rush to the rescue of the victim, even going to the extent of counterattacking the assailants. Some may remain tightlipped, overawed either on account of the antecedents of the assailant or threats given by him. Each one reacts in his special way even in similar circumstances, leave alone, the varying nature depending upon a variety of circumstances. There is no set rule of natural reaction. To discard the evidence of a witness on the ground that he did not react in any particular manner is to appreciate evidence in a wholly unrealistic and unimaginative way. (See Rana Partap v. State of Haryana [(1983) 3 SCC 327 : 1983 SCC (Cri) 601].)”

48. Recently, this very Court in **Ram Surat v. State**, Crl.A. 1236/2012 dated 25.08.2017 had repelled the submission of the appellant therein that the conduct of the eyewitness was unnatural as he did not run towards the place of occurrence nor attempted to stop the accused and not even tried to catch hold of him, but rushed to his house to call his wife, while observing as under:

“16. ...Even otherwise, the behaviour and the conduct of PW-17 seems to be most natural and probable, it is natural that every person who witnesses a crime or faces such a situation behaves in a different manner. If there were 5 or 10 persons, their narration of the incident and their conduct and behaviour would be different from one another. ...

...

23. As per the appellant, the reaction of the main eye witness, PW-17 was unnatural in the event of crime and hence he is a planted witness. In contradiction to this, Criminal Courts should not expect a set reaction from any eye witness on seeing an incident like murder. If five persons witness one

incident there could be five different types of reactions from each of them. It is neither a tutored impact nor a structured reaction which the eye witness can make. Unless the reaction demonstrated by an eye witness is so improbable or so inconceivable from any human being pitted in such a situation, it is unfair to dub his reactions as unnatural.”

(Emphasis Supplied)

49. In the present case, the conduct of PW-2 Himanshu is not improbable or inconceivable to such a degree to raise a doubt about his presence. Nothing else has been shown to attribute any reason to PW-2 to falsely depose against the appellants. No enmity has been ascribed to him.
50. Learned counsel for the appellants had also contended that the absence of the names of the eyewitness PW-2 and the assailants in the brief facts/short summary contained in the application for postmortem (Ex.PW-22/D) shows that even at 11:50 AM on 15.01.2013, the police was unaware of their identity and thus, PW-2 has been implanted in the case later on. We are unable to subscribe to the view as it stands to simple logic that while preparing a short summary for the doctor, the police officials would include the details of the incident, i.e. the manner and location of the injuries caused, and not the details of the persons involved therein. Additionally, we have already found the testimony of PW-2 Himanshu to be trustworthy and supported by the testimony of numerous other prosecution witnesses. No reliance can even be placed on the judgment in ***Ghan Shyam (Supra)*** as therein the Court had already detected the fabrication of evidence and delay in reporting the matter which were coupled with the absence of the names of the assailants in the inquest form and the application for

postmortem. Even further, the testimony of the alleged eyewitness therein was not corroborated by any other piece of evidence.

51. As regards the final contention that if the names were disclosed by PW-2 Himanshu in the night itself, then the house of appellant Raj Kumar would have been immediately raided. Both PW-15 HC Rattan Lal and PW-22 Ins. Abhey Singh have deposed that efforts were made in the night itself to trace the assailants, but no one could be found. At the same time, we do not think that the mere failure of conducting a raid in the night can raise a doubt on the case of the prosecution. Faulty investigation cannot be a ground to let offenders go scot free. In the present case, the lacking investigation is writ large by the fact that the statement of the person who made the PCR Call, i.e. PW-1 Sharwan, was recorded after a considerable delay.
52. Even the judgments of the Punjab and Haryana High Court in the case of **Balraj Singh (Supra)** and of a coordinate bench of this Court in **Naresh (Supra)** do not come to the aid of the appellants. In the former, the factual matrix therein was completely different, the eyewitness therein, PW-8 Karam Singh, was found to be an interested witness being the brother of the deceased as the incident was allegedly owing to a family feud and his presence was doubted as his contention of remaining concealed was patently false in the face of the fact that the alleged assailant had been disarmed and surrounded by many persons alleviating any scope of threat. Similarly, in **Naresh (Supra)**, the coordinate bench while dealing with a leave to appeal against an order of acquittal, found the presence of eyewitnesses doubtful as there was an *inter se* contradiction and inconsistencies as well as *qua* the documents and statement of Investigating Officer. Additionally, the conduct of the

witnesses, one being a constable, was found to be unnatural in not intervening or assisting in removal of the injured; however, there is a difference between what might be expected of a police constable and a public witness. Even otherwise, we have already found that the entire sequence of events narrated by all the prosecution witnesses to be consistent with each other and the medical evidence. Even the judgment in **Surinder Kumar (Supra)** does not help the appellants as the proper chronology of events has been established by ocular evidence.

53. There is yet another incriminating circumstance against the appellants being the recovery of the weapon of offence, i.e. button actuated knife (Ex.P-1), as the instance of appellant Raj Kumar. PW-15 ASI Rattan Lal and PW-22 Ins. Abhey Singh have deposed that on 17.01.2013, during the course of investigation of another FIR 18/2013, Asif (JCL) had pointed to the appellants herein as his accomplices and thereafter, pursuant to his disclosure statements (Ex.PW-15/A and Ex.PW-15/C), appellant Raj Kumar got the knife Ex.P-1 recovered concealed under the earth (buried) from the corner of Bada Park, H-Block, Dakshin Puri. This is in tune with the testimony of PW-21 Ins. S.K. Sharma, the investigating officer in FIR 18/2013.
54. The contentions raised by the learned counsel for the appellants is twofold: *first*, the recovery was from an open public place and *second*, there was no public witness. As regards the first, it is a fictitious notion often urged before us, however, the test is not whether the place of recovery was open or accessible, but whether it was ordinarily visible. Recently, this very Bench in **Dinesh Kumar Mathur v. State, 2017 SCC OnLine Del 9809** had while relying

upon the recovery of a *darati* and blood stained clothes from a polythene bag concealed amongst the roots of a *bargad* (banyan) tree, had discussed numerous judgments of this Court and the Supreme Court, which is extracted *in extenso* below:

“31. The second limb of the argument of Ms. Dubey is that the recovery was from an open area visible to the naked eye and hence, outside the contours of Section 27 of the Evidence Act. In this regard, we may usefully refer to the judgment of the Apex Court in State of H.P. v. Jeet Singh, (1999) 4 SCC 370 wherein recovery was effected from tobacco bushes, heap of rubbish situated in the compound of the residence of the accused and his cowshed and the High Court had repelled the circumstance inter alia as recoveries made were “open and accessible to others”; this was reversed by the Supreme Court observing as under:

“26. There is nothing in Section 27 of the Evidence Act which renders the statement of the accused inadmissible if recovery of the articles was made from any place which is “open or accessible to others”. It is a fallacious notion that when recovery of any incriminating article was made from a place which is open or accessible to others, it would vitiate the evidence under Section 27 of the Evidence Act. Any object can be concealed in places which are open or accessible to others. For example, if the article is buried in the main roadside or if it is concealed beneath dry leaves lying on public places or kept hidden in a public office, the article would remain out of the visibility of others in normal circumstances. Until such article is disinterred, its hidden state would remain unhampered. The person who hid it alone knows where it is until he discloses that fact to any other person. Hence, the crucial question is not whether the place was accessible to others or not but whether it was ordinarily visible to others. If it is not, then it is immaterial that the concealed place is accessible to others.”

(Emphasis Supplied)

[See also Titu v. State, ILR (2007) 1 Del 990 (paragraphs 28 and 29)]

32. Similarly, the Supreme Court in *State of Maharashtra v. Bharat Fakira Dhiwar*, (2002) 1 SCC 622 found the recovery of a blood stained grinding stone from tall grass from a place very close to the house of the accused/respondent not to be from an open place as “[u]ntil they were disinterred, at instance of Respondent, their hidden state had remained unhampered.”

33. In *Ibrahim Musa Chauhan @ Baba Chauhan v. State of Maharashtra*, 2013 (3) SCALE 207 the Supreme Court found the recovery of a plastic bag containing hand grenades from a heap in which lay broken tiles was not from an open place. The relevant portion reads as under:

“133. Undoubtedly, the appellant's disclosure statement had been made before the police, as well as the panch witness. The fact that he did not disclose the place where the contraband had been hidden remains entirely insignificant, for the reason that he had led the police party to the said place, and that the said recovery had been made at his behest. The open space from where the recovery had been made though was accessible to anybody, it must be remembered that the contraband had been hidden, and that it was only after digging was done at the place shown by the appellant, that such recovery was made. Hence, it would have been impossible for a normal person having access to the said place, to know where the contraband goods were hidden.”

(Emphasis Supplied)

34. In a recent judgment, a coordinate bench of this Court, of which one of us (G.S. Sistani, J.) was a member, in *Jite v. State*, MANU/DE/ 1791/2017 had repelled the submission that the recovery of the weapon of offence, i.e. dagger, was doubtful as being recovered from a park allowing access to the public in general, by finding that as the dagger was concealed in a heap of construction material and the same was recovered on the very next day, it could not be said to have been effectuated in an open and accessible place.

35. Coming to the case at hand, we find the recovery of the blade of the darati to be reliable. The Investigation Officer (PW-27) stated that the kabristan remains closed and not in use and hence, it cannot be said that the area was open or

accessible. Be that as it may, all the three witnesses to the recovery (PW-10, 21 and 27) have testified that the recovery was effected from a polythene bag concealed amongst the roots of a bargad (banyan) tree and only part of the polythene was visible from outside. In such circumstances, the recovery cannot be said to be from an open area visible to the naked eye. As long as the polythene remained disinterred, its hidden state continued and its recovery remains inside the purview of Section 27 of the Evidence Act.”

55. The judgments relied upon by Ms.Kolluru are to the same effect and we need not burden this judgment by extracting them as well. Accordingly, the recovery of the knife (Ex.P-1) from the corner of Bada Park cannot be doubted as the same was buried under the ground. Until it remained disinterred, its hidden state continued and the consequent recovery is within the purview of Section 27 of the Evidence Act.
56. We are also unable to second limb of arguments of the arguments as it is not mandatory, but only a rule of prudence that a public witness should be associated at the time of recovery [***State v. Vikas @ Bhola & Anr.*, ILR (2013) 5 Del 4032** (paragraph 13)]. It is only when other cause is shown to suspect the recovery that the same may be discarded. A coordinate bench of this Court in ***Titu v. State*, ILR (2007) 1 Del 990** (paragraph 30) had observed that merely because all the witnesses of recovery were police witnesses and no independent public witness was joined for affecting the recovery would not be fatal [See also ***Ramesh Kumar (Supra)*** (paragraph 25) and ***Jite v. State*, MANU/DE/1791/2017** (paragraph 27)]. Accordingly, the absence of a public witness cannot impeach the veracity of the testimonies of PW-15, PW-21 and PW-22.

57. Further, the FSL in its report (Ex.PW-22/F) detected the presence of human blood on the knife (Ex.P-1) (marked as Exhibit ‘7’ in report). Thus, the same also points towards the guilt of the appellants herein. The failure of matching of blood group on serological analysis is of no consequence.
58. Accordingly, in view of the ocular evidence duly supported by the medical and forensic evidence and the recovery of the knife (Ex.P-1) at the instance of appellant Raj Kumar, we find no infirmity in the order of the Trial Court, so far the order of conviction is concerned.
59. For the sake of comprehensiveness, we may also add that having regard to the notification dated 17.02.1979 issued under Section 4 of the Arms Act and the dimensions of Ex.P-1 (Ex.PW-15/E and Ex.PW-19/D), even the order of conviction under Section 27 of the Arms Act cannot be faulted with.
60. The only question which remains is the applicability of Section 302? We find that the present case falls under Exception 4 of Section 300 IPC, which reads as under:

“Exception 4.—Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.

Explanation.—It is immaterial in such cases which party offers the provocation or commits the first assault.”

61. A coordinate bench of this Court, of which one of us (G.S. Sistani, J.) was member, in ***Kamaljeet v. State***, MANU/DE/1752/2017 (paragraph 40) observed that “[t]o bring a case under the exception, fourfold requirement must be satisfied: first, there must be a sudden fight; second, absence of pre-meditation; third, the accused must have been overcome with the heat of passion; and fourth, the

accused must not have taken undue advantage or acted in a cruel or unusual manner.”

62. In ***Sandhya Jadhav v. State of Maharashtra***, (2006) 4 SCC 653 a solitary knife blow was given to the deceased when he attempted to intervene and separate the convicts trying to assault his uncle. The Supreme Court converted the conviction to Section 304 Part I observing as under:

“8. For bringing in operation of Exception 4 to Section 300 IPC, it has to be established that the act was committed without premeditation, in a sudden fight in the heat of passion upon a sudden quarrel without the offender having taken undue advantage and not having acted in a cruel or unusual manner.

9. The Fourth Exception to Section 300 IPC covers acts done in a sudden fight. The said Exception deals with a case of prosecution not covered by the First Exception, after which its place would have been more appropriate. The Exception is founded upon the same principle, for in both there is absence of premeditation. But, while in the case of Exception 1 there is total deprivation of self-control, in case of Exception 4, there is only that heat of passion which clouds men's sober reason and urges them to deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1; but the injury done is not the direct consequence of that provocation. In fact Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon equal footing. A “sudden fight” implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor in such cases could the whole blame be placed on one side. For if it were so, the Exception more appropriately applicable would be Exception 1. There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not

have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. The help of Exception 4 can be invoked if death is caused (a) without premeditation; (b) in a sudden fight; (c) without the offender having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the "fight" occurring in Exception 4 to Section 300 IPC is not defined in IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two or more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner. The expression "undue advantage" as used in the provision means "unfair advantage".

(Emphasis Supplied)

[Also see **Abhijeet Raj v. State (Govt. of NCT of Delhi)**, MANU/DE/1264/2016 and **Jagtar Singh v. State of Delhi**, 190 (2012) DLT 445]

63. In the present case, a tiff started over the petty issue of non-serving of food by the deceased. This erupted into a sudden fight, which was pacified by PW-2 Himanshu. Thereafter, the deceased and PW-2 closed their *dhaba* and within a couple of minutes, the appellants and Asif (JCL) returned and appellant Raj Kumar stabbed the deceased while the other two held him. There was no cooling off period and the tempers continued to run high [See **Jite (Supra)** (paragraphs 38-43) and **Arjun v. The State (Govt. of NCT of Delhi)**,

Crl.A. 983/2015 dated 14.07.2017 (paragraph 35)]. Thus, it is clear that the incident occurred during the course of a sudden fight in the heat of passion. The *situs* of the stab injuries, despite the assailants having ample of opportunity to strike at some other vital portion, shows that there was no premeditation. Finally, there is nothing to show that the appellants had acted in a cruel or unusual manner. All the essentials of Exception 4 stand satisfied and the conviction must be converted. Having regard to the injuries on the body of the deceased and the weapon of offence, it cannot be said that the appellant intended to cause such bodily injury as was likely to cause death [*Ashok Kumar v. State*, MANU/DE/1135/2009 (paragraphs 9-11)]. Accordingly, the conviction of the appellant is modified from Section 302 to one under Section 304 Part II of the Indian Penal Code.

64. We had also called for the fresh nominal rolls of the appellants, as per which, appellant Raj Kumar has undergone about 5 years 5 months' imprisonment including remission, while appellant Rahul has undergone 5 years 1 month imprisonment including remission. Having regard to the culpability of the appellants, we are of the view that the ends of justice would be met if the appellants are sentenced to imprisonment for seven and a half years under Section 304 Part II. The order of the Trial Court with regard to fine under Section 302 shall be read as for one under Section 304 Part II and remains the same.
65. Consequently, the appeals are allowed in part, the conviction and order on sentence recorded by the Trial Court is modified to the extent indicated hereinabove.
66. The appeals stand disposed of.

67. Trial Court record be returned along with copy of this judgment.
68. Copy of this judgment also be sent to the concerned Jail Superintendent for updating the jail record.

G. S. SISTANI, J.

CHANDER SHEKHAR, J.

SEPTEMBER 12th 2017

// b/pst



नित्यमेव जयते