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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of Judgment: 11th September, 2017

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CRL.A. 201/2017

VIJAY KUMAR

..... Appellant

Through: Mr. J.K. Sharma, Mr. Anuj Kumar & Mr.
Atul Bansal, Advocates

Versus

STATE

..... Respondent

Through: Mr. Rajat Katyal, APP

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MR. JUSTICE CHANDER SHEKHAR

G.S.SISTANI, J. (ORAL)

1. The present appeal has been filed under Section 374 of the Code of Criminal Procedure (hereinafter referred to as 'Cr.P.C.') against the judgment dated 15.11.2016 by which the appellant has been convicted under Section 307 of the Indian Penal Code (hereinafter referred to as 'IPC'). Challenge is also led to the order on sentence dated 26.11.2016 by which the appellant has been sentenced to undergo imprisonment for life and to pay a fine of Rs.10,000/-, in the default, to further undergo simple imprisonment for a period of three months.

2. The case of the prosecution as noticed by the Trial Court reads as under:-

"1. The case of the prosecution was that on 18.06.2012 at 3.00 a.m. in the bedroom of H. No. 27-B, Pocket E, Dilshad Garden, Delhi, Vijay Kumar (Hereinafter 'the accused') given (sic: gave) tawa (pan used for baking) blows on head of his wife Mithlesh and step-son Akshay with such intention or knowledge or under such circumstances

that if by that act, he had caused death of his wife Mithlesh, he would have been guilty of murder of his wife which is punishable under section 307 of the Indian Penal Code, 1860 (Hereinafter referred to as 'IPC').

The charge-sheet:

2. On 18.06.2012 at 6.50 a.m., PW-5 ASI Vijay Singh received a PCR call regarding admission of Akshay and Mithlesh in serious condition in Emergency, GTB Hospital vide DD No. 8A Ex.PW5/A. PW-16 ASI Suresh Pal with PW-11 Ct. Ravi Kumar reached at GTB Hospital. He collected MLC Ex.PW2/A in respect of Akshay and MLC Ex.PW3/A in respect of Mithlesh. Akshay was reported 'under observation' and Mithlesh was reported 'unfit'. He could not find the injured persons.

3. On 18.06.2012 at 9.20 a.m., PW-10 SI Munesh received information from Max Balaji Hospital through Dr. Farida regarding admission of Akshay and Mithlesh in Max Balaji Hospital. Thereafter, PW-16 ASI Suresh Pal with PW-11 Ct. Ravi Kumar reached Max Hospital, Patparganj, Delhi-92. He came to know that Mithlesh had been taken to operation theatre. Akshay was under treatment in Emergency Ward. Akshay made the statement Ex.PW4/A, which is translated as under:

“Statement of Akshay Kumar S/o Late Sh. Sunil Kumar R/o Pocket E-27B, Dilshad Garden, Delhi. Age 19 years.

Stated that I am residing at the aforesaid address with my mother who is a teacher in Vivekanand School. I am studying in IInd year in Hotel Management & Catering Institute, Shimla, H.P. Now a days, I am on vacation. I have come to my mother. My father Sunil Kumar expired before 15 years. My mother Mithlesh Thakur did second marriage with Vijay Sharma who is a resident

of Palampur, Himachal Pradesh, who is presently, residing with my mother in H. No. 27-B, Pocket-E, Dilshad Garden, Delhi. Vijay Sharma was doing business in share market. He used to suffer losses in share market. He used to demand money from my mother. On this issue, there used to be frequent quarrel between Vijay Sharma and my mother. In the night of 18.06.2012 at about 3.00 a.m., I and my mother Mithlesh Thakur were sleeping together on bed. At that time, while I was sleeping, Vijay Sharma, at once, attacked on my head with an iron tawa which is used for baking roti (bread). I woke up. I felt giddiness (chakkar sa aa gaya). Thereafter, Vijay Sharma attacked several times with the said tawa on head of my mother. I asked him not to hit my mother. Vijay Sharma again attacked on my head and immediately, Vijay Sharma fled from the house. Condition of my mother became very serious. I woke up my neighbours who with the help of other neighbourers admitted me and my mother in GTB Hospital. Thereafter, my maternal uncle (mama) resident of H. No. 70-A, Block-R, Dilshad Garden, Delhi admitted us in MAX Hospital, Patparganj. Vijay Sharma caused head injuries to me and my mother Mitlesh Thakur with an iron tawa with the intention to cause death. Legal action be taken against Vijay Sharma who is second husband of my mother. I have heard statement. It is correct.”

3. Charge under Section 307 of IPC was framed against the appellant to which he pleaded not guilty and claimed to be tried. In order to prove its case, the prosecution examined 19 witnesses. The statement of the appellant was recorded under Section 313 of Cr.P.C. whereby it was stated that he was not present in Delhi on the day of the occurrence and he was at his native village attending to his ailing father. It was further stated that the appellant was falsely implicated by his parents-in-law, brother-in-law and his step son. The appellant pleaded innocence and claimed to be falsely implicated in the

present case. Dr. Asha Bakshi (CW1) was examined as a Court witness who testified that the victim Mithlesh remained under her treatment from 18.06.2012 till the date of her discharge i.e. on 26.07.2012. She further deposed that Mithlesh was in a vegetative state at the time of her discharge and was on tube-feeding and tracheostomy.

4. Mr. Sharma, learned counsel for the appellant submits that the impugned judgment passed by the Trial Court is based on surmises and conjectures. Learned counsel further submits that the appellant has not been named at the first opportunity available, i.e., at the time of recording of the MLC. Attention of the Court is drawn to the MLC of the victim and also the MLC of PW4, who was also an injured witness, being the step son of the appellant. Learned counsel has highlighted that neither in the MLC of PW4 nor in the MLC of the victim the appellant has been named and thus, it was an afterthought.
5. Learned counsel for the appellant further submits that as per the case of the prosecution, the victim was repeatedly hit by a *tawa* on her head by the appellant at 3:00 AM. It is also the case of the prosecution that PW4, the step son of the appellant who was born out of the first marriage of the victim, was also sleeping in the same room with the victim and had sustained injuries. Counsel contends that the MLC of PW4 does not show the kind of injuries alleged by him and in all probability; the injuries sustained by PW4 were self-inflicted injuries. Learned counsel further contends that it is evident upon reading the MLC that although the victim was taken to the hospital by one Aman, but neither the statement of Aman was recorded nor was he examined in the Court who could have been an important witness to shed light on the incident.

6. Mr. Sharma submits that the appellant has been falsely implicated in the present case as PW4 and his sister were both against the second marriage of their mother with the appellant. It is contended that for the above reason, the testimony of PW4 is highly suspicious, not reliable and thus the order of conviction based on the sole testimony of PW4 is not sustainable.
7. Additionally, it is contended by the counsel for the appellant that the testimony of PW4 cannot be relied upon as he is an interested witness, being the son of the victim. It is further contended that there is no evidence on record, which can link the appellant to the incident. There is no evidence to show that the appellant was present at the house when the incident took place. It is also contended that the appellant was arrested after two months of the incident from Chandigarh. The so-called weapon of offence, which was a *tawa*, recovered at the instance of the appellant is highly improbable as the recovery was made from an open place, being a public park, which is used by public as a thoroughfare and thus recovery of the *tawa* is doubtful. Counsel submits that it is unusual that blood of PW4 was found on the said *tawa*, who according to the prosecution, was attacked first while the victim who was attacked subsequently with great force by the same *tawa* did not contain blood of the victim. It is also contended that delay in lodging the FIR has not been explained. The incident took place at 3:00 AM, while the *rukka* was sent at 11:00 AM. Learned counsel also submits that merely because the appellant was not found at the spot and was absconding, that by itself cannot be a ground to hold him guilty.
8. *Per contra*, Mr. Katiyal, learned counsel for the State submits that the prosecution has been able to establish its case beyond any shadow of doubt. Attention of the Court is also drawn by Mr. Katiyal to the Answers to the

Question No's 3 and 4 in the statement made by the appellant under Section 313 of Cr.P.C. to show that the appellant admitted his presence at the flat in question. In fact, the appellant has categorically stated that he used to sleep in the same room along with his wife. PW4 who was the step son of the appellant was visiting them during the vacations and he was sleeping in the adjoining room. Reliance is placed on Section 106 of the Indian Evidence Act, 1872 (in short 'Evidence Act'). It is submitted that since the appellant was present in the house, being the husband of the injured person, the onus would shift on him to explain as to how she sustained injuries. It is also submitted while relying on Section 8 of the Evidence Act that the conduct of the appellant was highly unusual. The appellant was arrested two months after the incident and there was no explanation rendered by him for his abscondence.

9. Additionally, it is contended by the counsel for the State that the weapon of offence i.e. *tawa* has been recovered at the instance of the appellant. The blood group found on *tawa* matched with the blood of PW4. The said *tawa* was also duly identified by PW4 in the TIP proceedings. It is further submitted that the testimony of PW4 is truthful and reliable and this by itself is a ground for conviction of the appellant. It is contended that the evidence of PW4 would show that the victim, i.e., his mother is still bed-ridden and is not in a position to walk and talk. Reliance has also been placed on the testimony of CW1 to show that the victim was in a vegetative state at the time of her discharge and was on a feeding tube and tracheostomy.
10. We have heard learned counsels for the parties and considered their rival submissions and also given our thoughtful consideration to the matter.

11. The case of the prosecution is mainly based on the testimony of the injured witness PW4 Akshay, who is the step son of the appellant and the complainant in the present case. PW4 has testified that he was studying Hotel Management from Hotel Management and Catering Institute, Shimla (Himachal Pradesh) and was in his second year. His mother (victim) was a teacher in Vivekanand School. His mother could not walk and talk because of the head injury suffered by her and she was being administered food through the food pipe. The father of PW4 namely Sunil Kumar expired when he was studying in fifth standard. His mother solemnized her second marriage with the appellant Vijay Sharma six years prior to his deposition in Court. The appellant was engaged in share market and was suffering losses. The appellant used to demand money from his mother to settle the losses suffered by him. On the demand so made by the appellant, there used to be quarrels between the mother of PW4 and the appellant. On 18.06.2012, at about 3.00 AM, when PW4 was sleeping with his mother in his house, the appellant who was duly identified by PW4 in the Trial Court hit him on his head with a *Tawa* due to which his head started spinning. Thereafter, the appellant started hitting his mother and gave several blows with the said *Tawa* on her head. PW4 attempted to save his mother by holding the hand of the appellant but the appellant did not stop and gave several blows to his mother. Subsequently, the appellant ran away from the spot. PW4 shouted for help and called his neighbours. PW4 took his mother to GTB hospital with the help of the neighbours. PW4 called his maternal grandfather on his phone, at his residence at Dilshad Garden and informed him about the incident. Initially, PW4 was medically examined at GTB Hospital vide MLC No. C-2791/12 which was proved as Ex.PW2/A. Thereafter, PW4 alongwith

his mother was shifted to Max hospital by his maternal uncle. ASI Suresh Pal (PW16) met PW4 at Max Hospital and recorded his statement which was proved by him as Ex.PW4/A. His mother remained admitted at Max Hospital for about one month after the incident. On 20.06.2012, PW4 accompanied police to the place of the incident from where two blood stained pillows were seized vide seizure memo Ex.PW4/B. However, the said *Tawa* by which the appellant caused injuries to PW4 and his mother could not be recovered from the house. The appellant also could not be apprehended by the police. PW4 identified the said *Tawa*, cushion and pillow with stains of blood in the Trial Court.

12. During cross-examination, PW4 stated that at the time of the incident, he was residing in a two room house. The appellant used to sleep in a separate room. At the time of the incident, the appellant was smoking *bidi* in the other room while he was watching T.V. till 2:15 AM. The appellant hit PW4 on his head with the edge of *Tawa* once. It was voluntarily stated by PW4 that while the appellant was hitting his mother, he tried to save his mother by holding the hands of the appellant and at that time the appellant again attempted to hit him with the *Tawa*. As a result of which, PW4 sustained injuries on the right side of his head and started bleeding. The clothes of PW4 including his *banyan* and jeans were drenched with blood. PW4 shouted for help when the appellant was hitting his mother. One neighbour namely Nitin and few other neighbours gathered outside the house of PW4. His mother was taken to the GTB Hospital in the car of Nitin who accompanied them to the Hospital. PW4 had admitted that he was not in agreement with the decision of his mother to marry the appellant. PW4 denied the suggestion that his sister was also against the marriage of his

mother with the appellant. It was further stated by PW4 that there were frequent quarrels between his mother and the appellant and were witnessed by him. PW4 further stated that he informed his maternal grandfather from GTB Hospital at about 4:30 AM about the incident, while using the mobile of Nitin. The clothes worn by his mother at the time of the incident were blood stained. However, he did not remember as to whether the Police officials seized the same. PW4 denied the suggestion that the appellant had not given any *Tawa* blow on his head or on the head of his mother. PW4 further denied that his mother had fallen down on the floor and had sustained injuries on her head; also denied that the appellant never demanded money from his mother; further denied that no quarrel had taken place between his mother and the appellant over the demand of money by the appellant. This witness was recalled for cross-examination after a period of one year. But nothing has emerged which can create a dent in the case of the prosecution.

13. Another important witness is PW6 Jitender Pal Gosai (brother of the victim) who testified that the victim was his younger sister. The victim had re-married with the appellant whom he had duly identified in the Trial Court. On 18.06.2012 at about 8.00 AM, PW6 received a phone call from his nephew Akshay Kumar (PW4) informing that the condition of his mother was serious and had been admitted at GTB hospital. PW4 also informed him that the head of his mother was fractured by the appellant. When PW6 reached at GTB hospital, he saw that his sister was bleeding profusely and the doctor informed them that they were helpless to treat her further. Thereafter, PW6 took his sister to Max hospital, Patparganj, Delhi. The statement of PW6 was also recorded by the Police. It was deposed by PW6 that he could not tell as to why the appellant assaulted his sister. PW6 was

cross-examined by the Public Prosecutor in the Trial Court whereby he admitted that his nephew (PW4) also sustained injuries in the incident. PW6 further admitted that his nephew had told him that the appellant gave injuries to his nephew. PW6 was cross-examined by the defence counsel; however, his testimony remained uncontroverted and supported the case of the prosecution.

14. Besides the above public witnesses, PW10 SI Munesh was the Duty Officer on the fateful day at Police Station Seemapuri. She received information from MAX Hospital, Patparganj regarding admission of PW4 Akhsay and Mithlesh. The said information was recorded vide DD No. 24B which was proved by her as Ex.PW10/A. The FIR was recorded by PW10 which was proved as Ex.PW10/B.
15. The appellant was arrested on 19.08.2012 by PW14 HC Praveen Kumar from H. No. 2164, Sector-21C, Chandigarh vide arrest memo Ex.PW14/A and the personal search of the appellant was conducted vide memo Ex.PW14/B. The weapon of offence i.e. *tawa* was recovered from a heap of garbage under a tree at Hanuman Vatika Park, Dilshad Garden, Delhi and was duly identified by PW4 Akshay in the TIP proceedings. The seizure memo of *tawa* was proved by PW14 as Ex.PW14/D.
16. PW16 ASI Suresh Pal was the initial Investigating Officer who had recorded the statement of Akshay (PW4) and made endorsement vide Ex.PW16/A for registration of the instant case. The site plan of the spot was prepared by PW16 and was proved by him as Ex.PW16/C. PW17 SI Hukam Singh was the subsequent Investigating Officer who recovered *tawa* pursuant to the disclosure of the appellant and also conducted TIP of the said *tawa*.

Medical Evidence:

17. PW1 Dr. Akshay testified that on 05.11.2012, he was working as a Junior Resident, Department of Accident & Emergency at GTB Hospital, Delhi. At about 12.35 PM, the patient namely Akshay was brought to the Casualty of GTB Hospital by Const. Manoj Kumar (PW7) from PS Seemapuri. PW1 took the blood sample of Akshay (PW4) vide MLC No. 83303 and proved the medical examination report dated 05.11.2012 as Ex.PW1/A.
18. PW2 Dr. Ranjeetesh, CMO, GTB Hospital proved MLC of Akshay as Ex.PW2/A which was prepared by Dr. Krishanavtar, Junior Resident, GTB Hospital, Delhi. As per the MLC of Akshay (Ex.PW2/A), he was examined on 18.06.2012 at 04.45 AM vide MLC No.C-2791/12. It was also mentioned in the MLC that Akshay was conscious and oriented at the time of his examination.
19. PW3 Dr. P. Ram, CMO, GTB Hospital, Delhi proved the MLC of Mithlesh as Ex.PW3/A which was prepared by Dr. Basu, Junior Resident, GTB Hospital. PW3 collected the blood sample of Mithlesh vide MLC Ex.PW3/B. After examination of the said *tawa*, PW3 opined that 'the possibility of causing injury by the said *tawa* cannot be ruled out'.
20. PW9 Dr. Kishlay Dutta, In-Charge, Emergency Medicine Deptt, MAX Hospital, Patparganj opined that the nature of injury sustained by Mithlesh was '*grievous*' which was rendered by him vide Ex.PW9/A.
21. The counsel for the appellant has contended that the testimony of PW4 cannot be relied as he is an interested witness, being the son of the victim who was against the second marriage of his mother with the appellant.

22. The main evidence against the appellant consisted of the eyewitness account of PW4. It is true that PW4 was the step son of the appellant but as the occurrence had taken place inside the room in the dead of night, where PW4 alongwith his mother was sleeping in one room and the appellant was sleeping in the other room. The testimony of PW4 cannot be ignored and discarded merely because he happens to be the step son of the appellant who was against the second marriage of his mother with the appellant. The incident took place at about 03.00 AM in the morning thus the presence of PW4 cannot be doubted. Furthermore, the evidence of the eyewitness PW4 is sought to be corroborated by the evidence of PW6 Jitender Pal Gosai (brother of the victim) who reached the GTB hospital immediately after PW4 informed him about the critical condition of his mother. On reaching hospital, PW6 found that his sister was bleeding profusely and the doctors showed their inability to provide further treatment to her. Thereafter, the victim was taken to the MAX hospital by him. The statement of PW6 was also recorded by the Police at the hospital.
23. Undoubtedly, the testimony of an interested witness can be relied upon if found to be reliable and trustworthy. However, there is a duty on the Court to scrutinise the evidence available on record carefully and the same can be relied upon in case the evidence is found to be truthful and reliable. This Court can also not loose track of the fact that PW4 Akshay is an injured witness as well who sustained injuries on his head as per the MLC Ex.PW 2/A.
24. In the case of *Piara Singh and others vs. State of Punjab* reported at (1977) 4 SCC 452, it was held by the Hon'ble Supreme Court that if the evidence of

the interested witness is credit-worthy then there is no bar to convict the accused on the basis of it. Relevant part of Para 4 reads as under:

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

(Emphasis Supplied)

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

“11. We are sorry we are unable to agree with the contention of the learned counsel for the appellant. This is not the correct position of the law. The statement of a witness cannot be discarded and ignored simply because he happens to be a relation of the deceased. The relations of the deceased are the most natural witnesses inasmuch as man is a gregarious being. He lives and is expected to live in the company of his relations and friends. Thus if some calamity befalls a man, naturally it would be his or her relations only who would witness the same. Admittedly, there is no dispute with regard to the fact that the deceased was murdered during the intervening night of 25/26th February, 1986. The murder is alleged to have been committed at 2.00 a.m. in the night. Thus who could have been the other witness other than the wife of the deceased at such an odd hour of the night. Thus we are of the view that PW1 Smt. Ram Rati is the most natural witness in the circumstances of the case. Her testimony as such cannot be

ignored and discarded simply because she happens to be the wife of the deceased.

.....

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

(Emphasis Supplied)

26. In the case of ***Abdul Sayeed v. State of M.P.***, reported at **(2010) 10 SCC 259**, the Apex Court discussed the special evidentiary status accorded to the testimony of an injured witness whose presence is evident from the injuries sustained by him. The relevant para 28 to 30 read as under:

“28. The question of the weight to be attached to the evidence of a witness that was himself injured in the course of the occurrence has been extensively discussed by this Court. Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone. “Convincing evidence is required to discredit an injured witness.”

29. *While deciding this issue, a similar view was taken in Jarnail Singh v. State of Punjab (2009) 9 SCC 719, where this Court reiterated the special evidentiary status accorded to the testimony of an injured accused and relying on its earlier judgments held as under: (SCC pp. 726-27, paras 28-29)*

“28. Darshan Singh (PW 4) was an injured witness. He had been examined by the doctor. His testimony could not be brushed aside lightly. He had given full details of the incident as he was present at the time when the assailants reached the tubewell. In Shivalingappa Kallayanappa v. State of Karnataka 1994 SCC (Cri) 1694 this Court has held that the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies, for the reason that his presence on the scene stands established in case it is proved that he suffered the injury during the said incident.

29. In State of U.P. v. Kishan Chand (2004) 7 SCC 629 a similar view has been reiterated observing that the testimony of a stamped witness has its own relevance and efficacy. The fact that the witness sustained injuries at the time and place of occurrence, lends support to his testimony that he was present during the occurrence. In case the injured witness is subjected to lengthy cross-examination and nothing can be elicited to discard his testimony, it should be relied upon (vide Krishan v. State of Haryana (2006) 12 SCC 459. Thus, we are of the considered opinion that evidence of Darshan Singh (PW 4) has rightly been relied upon by the courts below.”

30. The law on the point can be summarised to the effect that the testimony of the injured witness is accorded a special status in law. This is as a consequence of the fact that the injury to the witness is an

inbuilt guarantee of his presence at the scene of the crime and because the witness will not want to let his actual assailant go unpunished merely to falsely implicate a third party for the commission of the offence. Thus, the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies therein.”

(Emphasis Supplied)

27. Applying the law to the facts of the present case, it is well settled that the evidence of interested witnesses is not necessarily unreliable. All that is necessary is that the evidence of the interested witnesses should be subjected to careful scrutiny and must be accepted with caution. If on such scrutiny, the testimony is found to be reliable and trustworthy, it may, by itself, be sufficient to base a conviction thereon. In view of the above, we have found that PW4 was the most natural witness who was present with the victim and had given a graphic description of the entire incident. His presence on the spot cannot be doubted as he was injured in the incident during the process of preventing the blows given to him as well as to his mother who was sleeping next to him. In our view, the evidence of PW4 is consistent on all material aspects and thus is fully reliable and trustworthy and even if no independent witness is produced it will not adversely affect the case of the prosecution. In the backdrop of the above legal propositions and the facts and circumstances of the case, we have found the testimony of PW4 Akshay Kumar as trustworthy which remained consistent with the medical evidence. We find no force in the argument raised by the counsel for the appellant regarding interested witness and thus, the evidence of PW4 cannot be brushed aside lightly by saying that he was an interested witness.

28. As far as the contention with regard to the plea of alibi claimed by the appellant is concerned. Attention of the Court has been drawn by the counsel for the State to the Answers to the Question No. 3 and 4 made in his statement under Section 313 of Cr.P.C. which read as under:

“Question No.3: Whereas it has come in evidence against you that you were residing alongwith your wife Smt. Mithlesh and her son Akshay in a two room accommodation bearing No. 27-B, Pocket-E, Dilshad Garden, Delhi. What you have to say?

Ans. We were residing in the said flat. Akshay was studying in Shimla. He was not residing with us in the said flat.

Question No. 4: Whereas it has come in evidence against you that Smt. Mithlesh and Mr. Akshay, who had come to his house in holidays as he was doing Hotel Management Course in Shimla, used to sleep in one room and you used to sleep in the other room. What you have to say?

Ans. It is correct that Akshay had come to his house in vacations. Akshay used to sleep separately and we both husband and wife used to sleep in one room.”

29. Reading of the statement so made by the appellant as extracted in the foregoing para shows that the appellant was present on the fateful night in his house where his wife and step son were sleeping in one room and the appellant was sleeping in the other room. No evidence has been adduced by the appellant to support his plea of alibi on the day of occurrence. In the absence of which, a reasonable inference can be drawn against the appellant and the onus stands shifted on the appellant under Section 106 of the Evidence Act as to how his wife had sustained injuries when she was sleeping in a bolted room at their house.

30. The principle underlying under Section 106 of the Evidence Act is well settled. The provision of Section 106 of the Evidence Act itself is unambiguous and categoric in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, if the victim was sleeping with the appellant in the same house and was residing as husband and wife, the burden is on the appellant to offer an explanation as to how his wife had sustained injuries. He must furnish an explanation which appears to the Court to be probable and satisfactory. If he does so, he must be held to have discharged his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act. Thus, in the given facts and circumstances of the present case, the failure of the appellant to offer a reasonable explanation in discharge of the burden placed on him provides an additional link with the crime.
31. Be it noted, that in the present case the prosecution has succeeded in proving the fact by definite evidence that the victim was present in the company of her son (PW4 Akshay Kumar) in one room and the appellant was sleeping in the other room at their house. Thus, the case of the prosecution cannot be doubted. In case, the appellant was not present at the spot on the day of occurrence, why did he not lodge a report or register an FIR that his step son and wife has been injured. The conduct of the appellant is highly incriminating against him as he was arrested two months after the incident and there was no satisfactory explanation rendered by him in his statement under Section 313 of Cr.P.C. exculpating his involvement.
32. With regard to the contention raised by the counsel for the appellant that the alleged recovery of the weapon of offence i.e. *tawa* from a public park which

was used by the public as a thoroughfare would be a sufficient ground to doubt the entire case of the prosecution against the appellant.

33. To deal with this submission, we may profit with the view taken by the Supreme Court of India in the case of ***State of Himachal Pradesh v. Jeet Singh***, reported at (1999) 4 SCC 370, wherein the Apex Court discussed the scope of Section 27 of the Evidence Act on the recovery of the weapon of offence at the instance of the accused. The relevant para 26 reads 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)

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***, reported at 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 on hand, we find the recovery of *tawa* to be reliable which was recovered from a heap of garbage under a tree at Hanuman Vatika Park. There was no delay in effecting the recovery of *tawa* as the appellant was arrested on 19.08.2016 at 2.45 PM from Chandigarh and the said *tawa* was recovered at about 9.00 PM on 19.08.2016 from the above mentioned place. Furthermore, the said *tawa* was duly identified by PW4 in the TIP proceedings and the presence of blood on *tawa* which belonged to PW4 further connects the said *tawa* with the crime.
36. The counsel for the appellant has also contended that the name of the appellant has not been named at the first opportunity available, i.e., at the time of recording of the MLC. Additionally, it was contended that PW4 and the victim were brought to the hospital by one Aman who was not examined by the prosecution as a witness.
37. To deal with this submission, we may profit from the view taken by the Hon'ble Supreme Court in the case of *Pattipati Venkaiah v. State of A.P.*, reported at (1985) 4 SCC 80, wherein the argument of the accused with regard to the failure to disclose the names of the assailants by the eye witnesses at the time of the preparation of the MLC of the injured was repelled by observing that the primary job of the doctor is to save the life of the injured and to inform the Police officials and if the doctors start examining the informants they are likely to become witnesses of the occurrence which is not permissible. The relevant para 17 reads as under:

“17. Another argument advanced before us was that although PWs 1 and 2 were supposed to be eyewitnesses, they never cared to disclose the name of the assailant to the doctor when the body of the deceased was taken to the hospital. This argument is only stated to be rejected. A doctor is not at all concerned as to who committed the offence or whether the person brought to him is a criminal or an ordinary person, his primary effort is to save the life of the person brought to him and inform the police in medico-legal cases. In this state of confusion, PWs 1 and 2 may not have chosen to give details of the murder to the doctor. It is well settled that doctors before whom dead bodies are produced or injured persons are brought, either themselves take the dying declaration or hold the post-mortem immediately and if they start examining the informants they are likely to become witnesses of the occurrence which is not permissible.”

(Emphasis Supplied)

38. Reading of the MLC of PW4 and the victim would show that the name of the appellant was not mentioned as assailant. In our view, absence of the name of the appellant as assailant would not confer any benefit to the appellant in the presence of the other evidence available on record. It merely amounts to a procedural lapse and does not affect the case of the prosecution. As the primary job of the doctor is to save the life of the injured rather examining the informants. Furthermore, we concur with the finding of the Trial Court that it was never been the case of the defence that there was no such person Aman residing in the neighbourhood of PW4. With regard to the delay in lodging the FIR, we do not find any merit in the argument raised by the counsel for the appellant as the incident took place at 3.00 AM on 18.06.2012 and the *rukka* was sent at 11.00 AM which led to the registration of FIR at 11.45 AM on the same day of 18.06.2012.

39. Reading of the testimonies of the aforementioned witnesses alongwith the entire material available on record show that there are no material contradictions which go to the root of the matter and their testimonies remain consistent on all material particulars. The prosecution has successfully proved its case against the appellant. We find no infirmity in the order of conviction passed by the learned Trial Court.
40. As far as the sentence of the appellant under Section 307 of IPC is concerned, the following aggravating factors were relied upon by the learned Trial Court which read as under:
- i) The appellant was an educated person being a software engineer who was swayed by his indifferences or emotions;
 - ii) The appellant attacked his wife Mithlesh while she was sleeping;
 - iii) The offence was not committed in a heat of passion;
 - iv) The manner in which the appellant attacked his wife Mithlesh appears to be a pre-meditated;
 - v) The appellant attacked the victim with an iron *tawa* several times and thereby rendered her to a vegetative being;
 - vi) The impact of the attack on the skull of Mithlesh is evident from the MLC, as per which the victim sustained multiple fractures on the skull. The skull was reduced to a pulp which rendered her immobile and made her non-responsive. The victim was being fed from a tube and was also breathing through a pipe inserted in her trachea. The appellant had reduced a able bodied person to a vegetative stage;
 - vii) The conduct of the appellant in the jail was also noted by the Trial Court which was found to be unsatisfactory.

41. Thus, after consideration of the brutality with which the attack was made on the victim, the learned Trial Court has awarded a harsh and stern punishment of imprisonment for life under Section 307 of IPC.
42. As far as the sentence under Section 307 of IPC is concerned, a coordinate bench of this Court, of which one of us (G.S. Sistani, J.) was a member, in the case of *Arun Kumar Mishra vs. State* reported at **2017 SCC Online Del 10815**, after consideration of all the aggravating factors upheld the sentence of life imprisonment awarded to the accused by the Trial Court under Section 307 of IPC. In the peculiar facts of the case, the accused was having one-sided love for the victim and when she did not agree to marry, bullets were pumped into her spine damaging her spinal cord which reduced her to vegetative stage. While maintaining the sentence awarded to the accused, this Court held that undoubtedly no yardstick can be laid down for sentencing; however a balance approach has to be adopted by maintaining a balance between the aggravating and mitigating circumstances of the given case. Also see *Ramjee Lal v. State (Govt. of NCT) Delhi* reported at **241 (2017) DLT 290**, wherein the sentencing policy was discussed by this Court.
43. On a conjoint reading of the eye witness account of PW4, the medical evidence and the submission tendered by the learned counsel for the State that as on date the victim is suffering every day and is still bed-ridden and is not in a position to follow the daily routine. After consideration of all the aggravating factors noted by the Trial Court, we concur with the findings of the learned Trial Court. Undue sympathy to the appellant will diminish the public confidence in justice delivery system.
44. We find that the prosecution has been able to conclusively prove the guilt of the appellant Vijay Kumar beyond reasonable doubt. We find no infirmity in

the order on sentence passed by the learned Trial Court. Accordingly, the appeal stands dismissed.

45. Copy of this judgment be sent to the concerned Jail Superintendent for updating the jail record.
46. Trial Court record be sent back along with a copy of this judgment.

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47. In view of the judgment passed, the bail application stands dismissed.

G.S.SISTANI, J

CHANDER SHEKHAR, J

SEPTEMBER 11, 2017
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