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

+ **CRL.A.434/2000**

Reserved on: January 5, 2018

Decided on: January 29, 2018

DILBAGH SINGH & ANR.

..... Appellants

Through: Mr. Mohit Mathur, Senior Advocate
with Mr. Vikas Walia, Mr. Sumit Misra, Advocates.

Versus

STATE

..... Respondent

Through: Ms. Radhika Kolluru, APP.

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CRL.A.463/2000

PRATEEK

..... Appellant

Through: Mr. Mohd. Shahrukh Hussain,
Advocate

Versus

STATE

..... Respondent

Through: Ms. Radhika Kolluru, APP.

**CORAM: JUSTICE S.MURALIDHAR
JUSTICE I.S. MEHTA**

J U D G M E N T

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Dr. S. Muralidhar, J.:

1. These appeals are directed against the impugned judgment dated 7th July 2000 passed by the learned Additional Sessions Judge (ASJ), Delhi in

Sessions Case No. 103 of 1998 arising out of FIR No. 71 of 1998 registered at Police Station (PS) Nangloi convicting the Appellants for the offences under Section 302 read with Section 34 of Indian Penal Code (IPC) and the order on sentence dated 8th July 2000 of the learned ASJ whereby each of them was sentenced to undergo imprisonment for life with a fine of Rs. 2,000 each and in default of payment of fine, to undergo simple imprisonment (SI) for three months each for the aforementioned offence.

2. Crl. A No. 434 of 2000 is by Dilbagh (Accused No. 2- A-2) and Ram Bhaj (A-3) and Crl A No. 463 of 2000 is by Prateek (A-1). A-2 and A-3 are brothers.

3. The case of the prosecution against the Appellants is that in furtherance of their common intention, they committed the murder of Manjit Singh (the deceased) at around 8.20 pm on 2nd February 1998 at a public place in the street opposite '*choupal*' in village Kamruddin Nagar, Delhi.

Events preceding the filing of the charge sheet

4. The prosecution case commences with a phone call to the police, which was noted as DD No. 19A, to the effect that near the old *choupal* in village Kamruddin Nagar, a fight was going on with 'guns and swords' and that the police should be sent there. As it transpired, this call was made by Manoj Kumar (PW-13), an uncle of the deceased Manjit Singh.

5. On receiving the said call, Inspector P.C. Kansal (PW-23) who was posted at PS Nangloi as Station House Officer (SHO), and was on patrol duty, rushed to the spot where he found ASI Partap Singh (PW-18) already

present there. PW-23 noted that there was a crowd of 15-20 persons. One Bajaj Chetak scooter having registration No. DL-5S-2227 was also found at the spot. On making enquiries, PW-23 learnt that the injured had already been moved to Jaipur Golden Hospital by the members of his family. PW-23 then left Constable Suresh and Constable Desh Raj at the spot and proceeded to the hospital along with PW-18.

Medical evidence

6. Dr. Asish Chandra (PW-3), who first examined the deceased at Jaipur Golden Hospital, Rohini, opined that the deceased was 'brought dead' on the said date. The MLC (Ex.PW-3/A) showed that the time of death was 8 pm on 2nd February 1998. The MLC noted "alleged history of assault". The person who accompanied the deceased was shown as Sunil Kumar (PW-7), another resident of the same village.

7. The post-mortem of the deceased was conducted by Dr. Ashok Jaiswal (PW-4), Chief Medical Officer, Civil Hospital, Delhi on 3rd February 1998. He noticed the following external injuries:

“1. Incised wound 2.5 cm x .8cm muscle deep on left shoulder, lower angle acutely cut.

2. Incised stab wound 2.3 cms x .8 cms on left side of chest, six cms, below left nipple at 4 O' clock position. Lower angle acutely cut.

No other external injury or violence seen on the body.”

8. The internal examination of the chest revealed as under:

“On exploring injury No. 2 it was found to be communicating with the left chest cavity through seventh space directed upward and medially passing through substance of left lung to the left ventricle of

the heart with massive hemothorax on left side. Depth from surface was 12 cms.”

9. PW-4 opined that the injuries were ante mortem in nature and death was due to haemorrhagic shock consequent upon the injuries Nos. 1 and 2. He further opined that injury No. 2 was sufficient to cause death in the ordinary course of nature.

The eye witness account

10. According to PW-23, Ashok Kumar (PW-10), brother of the deceased, met him at the Jaipur Golden Hospital and gave his statement (Ex.PW-10/A). In the said statement under Section 161 Cr PC, PW-10 stated that on 2nd February 1998 at about 8 or 8.15 pm he was standing outside his house in the street when Devender and Prateek, Accused No. 1 (A-1) came there on a two wheeler scooter and were proceeding towards *choupal* of the Village Kamruddin Nagar. Devender Singh got down from the scooter and then called the deceased, Manjit Singh, from the house. Thereafter PW-10, the deceased and Devender started moving towards *choupal*. The two uncles of PW-10, Manoj (PW-13) and Sanjiv Kumar (PW-8) were also standing in a *gali* (lane) near the *choupal* at that time. Even as they were watching, Dilbagh (A-2) and Rambhaj (A-3) caught hold of the deceased from two sides and Devender and Rambhaj exhorted A-1 stating “*mar sale ko*”. On hearing this, both PWs 8 and 13 rushed to save Manjit but in the meanwhile A-1 took out a knife from his pants and stabbed Manjit twice on the chest. All the four then left the scooter behind and ran away.

11. PW-10 and the two uncles of the deceased raised an alarm and chased them. Meanwhile, Sunil (PW-7) reached the spot and with the help of other

persons gathered there, took the deceased in a car belonging to the family of the deceased to the Jaipur Golden Hospital where he was declared brought dead.

12. PW-10 informed the police that on the day previous to the date of the incident i.e. 1st February 1998, the deceased and A-1 had quarrelled at a marriage party in Chirag Delhi. That marriage party had gone from their village. Although the quarrel had been settled there itself, A-1 had stated that he would not spare the deceased. Thus apart from projecting himself as an eye witness to the crime, PW-10 also supplied the motive for the crime.

Investigation

13. On the basis of the statement of PW-10, an FIR was registered. PW-23 prepared a rough site plan (Ex.PW-23/B) at the instance of PW-10. He also prepared the marginal notes on the rough site plan. A photographer was called to take the photographs of the crime scene. Blood and blood stained concrete was lifted from the spot and sealed in parcels. Some control concrete from the road at the spot was also taken and converted into a parcel. The two wheeler scooter used by two of the accused was also seized.

14. According to PW-23, on 3rd February 1998 he along with his staff went to Jaipur Golden Hospital where the dead body of the deceased was lying. It was identified by two other uncles of the deceased Karam Singh (PW-1) and Jagdev Singh (PW-2) and their statements were recorded. Thereafter, the post-mortem of the deceased took place in the manner as already indicated.

15. PW-23 stated that they had searched for the accused persons. After A-1

surrendered before the Court of the learned Metropolitan Magistrate (MM) on 8th February 1998, PW-23 formally arrested him on the following day. A-1 made a disclosure statement. According to PW-23, one blood stained shirt and pant worn by A-1 were removed from his person and the same were converted into parcels and sealed. A-1 supposedly pointed out the place of occurrence.

16. On 12th February 1998 Dilbagh (A-2) and Ram Bhaj (A-3) surrendered at the PS and were arrested. They too made their disclosure statements and pointed out the place of occurrence. PW-23 continued to look for the accused Devender but he could not be traced. He was declared a proclaimed offender (PO).

17. At the instance of PW-23, Om Prakash (PW-5) prepared the scaled site plan (Ex.PW-5/A). Thereafter, the charge sheet was filed and by an order dated 27th August 1998 of the learned ASJ, the charge as mentioned hereinabove was framed against the accused. They pleaded not guilty and claimed trial.

Defence of the accused

18. The prosecution examined 23 witnesses. In the respective statements under Section 313 Cr PC, while A-1 denied most of the circumstances, he *inter alia* volunteered that Devender (A-4) lived in Rajender Park and not in Kamruddin Nagar. When asked if he had anything else to say, A-1 maintained that he was innocent and that he had been falsely implicated. A-2 also denied the circumstances. When asked if he had anything to say, he maintained that he did not know the deceased as he was indisposed since

22nd January 1998. He also maintained that he had gone to Sonapat on 1st February 1998 with his brother-in-law Mohinder.

19. In his statement under Section 313 Cr PC, A-3 denied most of the circumstances put to him. When asked if he had anything to say, A-3 stated: "I had gone to Jaipur 2-4 days prior to incident and returned on 10th. I am innocent."

Impugned judgment of the trial Court

20.1 The trial Court, in the impugned judgment, came to the following conclusions:

(i) Since the entire incident happened all of a sudden the question of the three eye witnesses i.e. PWs 8, 10 and 13, "saving Manjit could not arise." The natural conduct of these PWs was to raise alarm and to chase the accused persons which they did. However, they were unsuccessful in apprehending the culprits.

(ii) The deposition of PWs 8, 10 and 13 was natural. There was no substance in the contention that the statements were parrot like. There cannot be a cast-iron reaction by every person who witnesses such an event. Unless reaction demonstrated by an eye witness in such a situation was so improbable or so inconceivable from any human being pitted in a similar situation, it would be unfair to dub their reaction as unnatural.

(iii) There is no merit in the contention of the accused that the absence of the three witnesses from the spot immediately after the incident showed that

they had not witnessed the crime. It is not even disputed that Sunil Kumar (PW-7) was the first to reach the spot and take the deceased immediately to the hospital in a car. The statement of PW-7 that on hearing the noise he came out confirmed the presence of the PWs. The absence of PWs 8, 10 and 13 when the IO reached the spot was understandable as they were at the hospital to which the deceased had already been moved.

(iv) The mere fact that information about the quarrel given by PW-13 to the police also mentioned guns and was contrary to the case of stabbing of the deceased by A-1, was also of no avail to the accused persons. Further, no advantage accrued to the accused persons from opinion of the Dr. Jaiswal (PW-4) that use of a sword could not be excluded.

(v) The testimony of PW-13 read as a whole was 'consistent, cogent and trustworthy' and his conduct "before and after the occurrence seems natural." In reply to the suggestion that another discrepancy arose as 'guns and swords' being mentioned in the first DD entry, PW-13 explained: "it is correct that I told the PCR that a quarrel with swords and guns had taken place in the village". This could have been a typographical mistake. It should be read as 'incorrect' instead of 'correct'. That is why PW-8 denied the suggestion that he came to know there had been a quarrel with guns and swords at his house. No attempt was made to get any clarification about the telephone call made by PW-13 to the police. It could not be inferred that PW-13 had given such information to the police.

(vi) PW-4 was asked whether a sharp edged weapon which caused the

injury to the deceased would be 12 cm long or more. Such a weapon “will be generally taken as a knife and not a sword”. While PW-4 did say that such a weapon (sword) of the dimensions mentioned in the post-mortem report “cannot be excluded,” the accused cannot take advantage of that opinion of PW-4 as regards the weapon of offence.

(vii) The deposition of Ct. Krishan Kumar (PW-16) in his examination-in-chief on 4th October 1999 supported the prosecution. However, he did a somersault when he stated that PWs-8, 10 and 13 met the SHO outside the hospital and told him that they did not know till that time as to what incident had taken place. This appeared to be an afterthought.

(viii) The information received on telephone did not disclose the commission of a cognizable offence and therefore, when the FIR was ultimately registered it reflected the correct provision as regards the offence.

(ix) The motive for the crime was the quarrel at the *baraat* (marriage party) between the deceased and A-1 over the matter of dancing.

(x) The accused shared a common intention to commit the crime. It was a pre-arranged plan to ensure that the deceased was brought to the place near *choupal* to execute the plan of committing his murder in which the accused were successful. This left no room for doubt that the deceased was killed by the accused in furtherance of their common intention.

(xi) There was no evidence led by the accused to show that they were present elsewhere at the time of occurrence. The blood stain on the shirt of

A-1 matched the blood group of the deceased. This was an additional circumstance which proved the fact of stabbing of the deceased by A-1 which resulted in the blood spilling on to the shirt of A-1.

(xii) Since the accused was absconding and on the run, “the possibility of his continuing to wear the same clothes cannot be ruled out.” The serological examination corroborated the eye-witness account of the occurrence through PWs, 8, 10 and 13.

20.2 The three accused were convicted and sentenced in the manner indicated hereinabove.

Submissions of counsel for the Appellants

21. Mr. Mohit Mathur, learned Senior counsel appearing for the Appellants Dilbagh and Ram Bhaj in Criminal Appeal No. 434 of 2000, made the following submissions:

(i) The three eye-witnesses were not natural witnesses. Their presence is not spoken of by Sunil Kumar (PW-7) who first reached the spot and found the deceased lying in a pool of blood. The eye witnesses were not there when PW-7 took the deceased to the hospital in the car that belonged to the family of the deceased.

(ii) None of the eye-witnesses were present at the spot even when the police reached there. This is plain from the evidence of ASI Pratap Singh (PW-18) and Ct. Krishan Kumar (PW-16). PW-16 further clearly stated in his deposition that it is only after he reached the hospital that the three eye-

witnesses reached there. They met the SHO outside the hospital and told the SHO that they did not know at that point how the incident took place.

(iii) PW-13 admitted that he called the police and gave the information that the quarrel had taken place with 'guns and swords' in Village Kamruddin Nagar. He admitted to have given information to the police and yet the trial Court wrongly construed this as a typographical error. This information which was reduced to DD entry 19A ought to have formed the basis of the FIR and not the statement of PW-10.

(iv) None of the alleged eye-witnesses tried to save the deceased despite being close relatives, one being his brother and the other two his uncles. A reference was made to the decision in *Anil Phukan v. State of Assam 1993 CrL LJ 176*.

(v) The deposition of the doctor who conducted the post-mortem, Dr. Ashok Jaiswal (PW-4), to the effect that injuries on the deceased could have been caused by sword was again brushed aside by the trial Court. Even PW-13 admitted that he had given that information. The weapon of offence was, therefore, not recovered.

(vi) There was a discrepancy in the rough site plan which did not indicate the presence of the eye-witnesses and scaled site plan which indicated their presence. In the death report, the identification of the dead body was not by the three eye witnesses but by PWs 1 and 2. This also showed that the so-called eye-witnesses were not present when the incident occurred.

(vii) It is extremely unusual for Prateek to be continuing to wear blood stained clothes one week after the incident. The blood group on the shirt of Prateek might have matched that of the deceased but the blood group of A-1 was not ascertained.

(viii) The time of preparing the rough site plan at the instance of PW-10 was contradicted by his statement that he arrived there from the hospital only on the next morning at around 10 am. This contradicted the evidence of the IO (PW-23).

22. On behalf of the Appellants (A-2 and A-3) it is pointed out that their role was alleged to be that of holding the deceased from both sides and that in the spur of the moment Prateek (A-1) took out the knife and stabbed the deceased. It could not be said that in those circumstances Dilbagh and Rambhaj (A-2 and A-3) shared a common intention with A-1. Reliance is placed on the decision in *Shambhu Kuer v. State of Bihar (1982) 1 SCC 264* and *Ramashish Yadav v. State of Bihar 1999 (3) AD (Crl) 561*.

23. On behalf of the Appellant A-1 (Prateek) apart from adopting the above submissions, it was submitted that the mere fact that he was absconding for some time by itself cannot be held against him as the manner of his arrest as depicted by the prosecution was denied by him.

Submissions of the APP for the State

24. Ms. Radhika Kolluru, learned APP for the State, on the other hand supported the impugned judgment of the trial Court. She submitted that

merely because the three eye-witnesses were related to the deceased it would not render their evidence untrustworthy or inadmissible. They appeared to be natural witnesses and their explanation that they chased the accused and therefore, were not found at the spot by PW-7 appears to be natural and probable.

25. Ms. Kolluru further submitted that the blood on the shirt of A-1 matching the blood group of the deceased was a crucial piece of evidence. She submitted that the identification of the dead body by PWs 1 and 2 could be explained by the documents on record, and there was no serious discrepancy in that regard. It is further submitted that PWs 8, 10 and 13 corroborated each other on all the material particulars. There was no reason for the Court to discard their testimonies which were cogent and convincing.

Law relating to interested witnesses

26. The prosecution case rests essentially on three eye witnesses PWs 8, 10 and 13. One of them (PW-10) was the brother of the deceased Manjit and the other two were his uncles. They were therefore interested witnesses. The trial Court has in the present case accepted their evidence as being truthful and trustworthy whereas the case of the Appellants is otherwise. One of the eye witnesses (PW-10) also spoke of the motive for the crime viz., the quarrel that had ensued the previous night at a *baraat* in which A-1 and the deceased had a quarrel. A further aspect to be noted is that even the three accused in the case are related to each other.

27. In ***Darya Singh v. State of Punjab (1964) 3 SCR 397***, the Supreme Court pointed out that where a related or interested witness is hostile to the

accused, his evidence must be carefully scrutinised and all the infirmities taken into account. It was observed:

“There can be no doubt that in a murder case when evidence is given by near relatives of the victim and the murder is alleged to have been committed by the enemy of the family, criminal courts must examine the evidence of the interested witnesses, like the relatives of the victim, very carefully. But a person may be interested in the victim, being his relation or otherwise, and may not necessarily be hostile to the accused. In that case, the fact that the witness was related to the victim or was his friend, may not necessarily introduce any infirmity in his evidence. But where the witness is a close relation of the victim and is shown to share the victim's hostility to his assailant, that naturally makes it necessary for the criminal courts examine the evidence given by such witness very carefully and scrutinise all the infirmities in that evidence before deciding to act upon it..... [I]t may be relevant to remember that though the witness is hostile to the assailant, it is not likely that he would deliberately omit to name the real assailant and substitute in his place the name of the enemy of the family out of malice. The desire to punish the victim would be so powerful in his mind that he would unhesitatingly name the real assailant and would not think of substituting in his place the enemy of the family though he was not concerned with the assault. It is not improbable that in giving evidence, such a witness may name the real assailant and may add other persons out of malice and enmity and that is a factor which has to be borne in mind in appreciating the evidence of interested witnesses. On principle, however, it is difficult to accept the plea that if a witness is shown to be a relative of the deceased and it is also shown that he shared the hostility of the victim towards the assailant, his evidence can never be accepted unless it is corroborated on material particulars.”

28. *In Jayabalan v. UT of Pondicherry (2010) 1 SCC 199*, the Supreme Court held:

“23. ...where the court is called upon to deal with the evidence of the interested witnesses, the approach of the court, while appreciating the evidence of such witnesses must not be pedantic. The court must

be cautious in appreciating and accepting the evidence given by the interested witnesses but the court must not be suspicious of such evidence. The primary endeavour of the court must be to look for consistency. The evidence of a witness cannot be ignored or thrown out solely because it comes from the mouth of a person who is closely related to the victim.

29. In *Raju alias Balachandran v. State of Tamil Nadu (2012) 12 SCC 701* it was explained:

“But, more than the categorization of a witness, the issue really is one of appreciation of the evidence of a witness. A court should examine the evidence of a related and interested witness having an interest in seeing the accused punished and also having some enmity with the accused with greater care and caution than the evidence of a third party disinterested and unrelated witness. This is all that is expected and required.”

Analysis and reasons

30. Keeping the above legal requirement in view, the Court proceeds to analyse the evidence of the three related, and interested, eye witnesses. The Court would like to begin its analysis by examining DD 19-A which was received first by the police. One of the purported eye witnesses, Manoj Kumar (PW-13), an uncle of the deceased, admitted in his cross-examination that he did make that call telling the police that a quarrel was taken place at Village Kamruddin Nagar with the guns and swords.

31. The precise answer given by him in his cross-examination reads as under:

“It is correct that I told the PCR that a quarrel with swords and guns had taken place in the village. It is correct that I had not given the names of the assailants while giving information to the police.”

32. While it may not be necessary at that stage to give all particulars, if indeed PW-13 had after chasing the accused called the police, the message he would have given would be about his own nephew having been attacked with the knife by the accused and not that some quarrel was going on with guns and swords. Considering that the case of the prosecution does not involve guns or swords, there is a grave doubt that PW-13 actually saw the occurrence.

33. The approach of the trial Court to the above reply is, to say the least, confused. On the one hand the trial Court has in para 47 of the impugned judgment accepted that he did give the above affirmative reply. Yet, the trial Court surmises that since he stated that he has not heard sound of gun fire, and further stated that he was chasing the accused, “it is not understandable why he would admit the suggestion that he told the PCR that a quarrel with swords and guns had taken place in the village.” The next sentence in the same paragraph of the impugned judgment reflects the confusion. It reads as under:

“No attempt is made to elicit from him that in the face of his whole testimony suggesting stabbing of Manjit by Pratik, how he justifies giving of information to the police regarding quarrel with swords and guns and how he came to know of it.”

34. It is not understood why the accused should seek any justification from this witness as to why he gave such information to the police. It is for the prosecution to explain this obvious discrepancy. The trial Court therefore, wrongly shifted the burden in this regard to the accused.

35. Moving forward, in the same paragraph on the one hand the trial Court observes that “PW-13 nowhere concedes that he had not given information to the PCR” and then inexplicably concludes as under:

“In the face of this the recording of a suggestion ‘it is correct that I told the PCR that a quarrel with swords and guns had taken place in the Village’ could have been a typographical mistake by recording as ‘correct’ instead of ‘incorrect’ that is why PW-8 Sanjiv Kumar denied the suggestion that he came to know at his house that there has been a quarrel with guns and swords.”

36. The above reasoning appears to be flawed. If in fact PW-13 has himself not denied giving the above information to the PCR, it is but natural and consistent that he accepts that it is correct that he told the PCR that a quarrel took place. When the deposition of PW-13 in his cross-examination is read as a whole, it is apparent that there was no error in the recording of the above answer. The word ‘correct’ was not wrongly typed. It is in fact the trial Court which has made serious mistake in reading the word ‘correct’ in the above sentence as ‘incorrect’. The statement in the cross-examination of PW-8 that he was told by PW-24 about the telephone call to the PCR in fact corroborates the above testimony of PW-13.

37. There is, therefore, merit in the contention that the information given to the police by PW-13 in first instance, on the basis of which DD 19A was drawn up, ought to have led to the registration of the FIR since it did disclose the commission of a cognisable offence. It is this DD 19 A that was handed over to ASI Pratap Singh who then proceeded to the spot. However, as it transpired, it was the statement of PW-10 which formed the basis of the FIR that came to be registered. There is another DD No 20 which is

mentioned in the MLC. However that was not brought on record by the prosecution. The reason for this has not been satisfactorily explained.

38. If indeed PW-13 had witnessed his nephew Manjit being attacked with knives by the accused, and then after unsuccessfully chasing those accused came back to make the call to the police, it is unlikely that he would not inform the police of that fact. He would have at least mentioned that Manjit had been stabbed, even if he was unable for some reason to give the full particulars. If what PW-13 told the police, as recorded in DD 19-A, is correct, viz., that some quarrel was going on in which swords and guns were being used, then it contradicts what he deposed in Court viz., that he and PWs 8 and 10 chased the persons who attacked Manjit and when they returned to the spot, they found that Manjit had already been taken to the hospital. This was why PW-13 was asked about DD 19-A in his cross-examination. His acceptance of having made that call to the police demolishes his testimony in the trial Court. It raises serious doubts about the truthfulness of his claim that he was an eye witness to the occurrence.

39. The mention in DD 19A regarding the use of swords and guns led the defence to ask Dr. Jaiswal (PW-4) about nature of the weapon used. PW-4 pointed out that the external injuries found on the deceased viz., the incised wound on the left shoulder and the stab wound on the left side of chest could have been caused by a sharp edged weapon, the minimum length of which could be 12 cm or more. He added that if the wound was of the dimensions mentioned in the post-mortem report, “such a weapon cannot be excluded.”

PW-4 pointed out that while Injury No. 1 was not sufficient to cause death, Injury No. 2 was sufficient to cause of death in the ordinary cause of nature.

40. It cannot, therefore, be concluded that the version of the eye-witnesses that A-1 had taken a knife and stabbed the deceased on the chest stood corroborated by the medical evidence. This Court fails to appreciate the observation of the trial Court to the effect that “no advantage can be taken” by the accused of the above answer of PW-4. The trial Court observed that “length of the sharp edged weapon was 12 cm or more and the same be generally as knife and not sword.” This was at best a conjecture. A sharp edged weapon which is more than 12 cm cannot also be simply termed as a knife. It was open to the learned APP in the trial Court to have sought a further clarification from PW-4 in this regard. In that absence of such clarification, and in light of the IO (PW-23) confirming that the weapon of offence was not recovered, the Court sees no reason why the accused cannot take advantage of the above reply given by PW-4.

41. The prosecution’s case that the three eye witnesses (PWs 8,10 and 13) were chasing the accused and, therefore, were not found at the spot by PW-7 is not very convincing. If one looks the rough site plan (Ex. PW-23/B), it does not indicate the place where the eye witnesses were standing. This was drawn up on the very next day by the IO on the pointing out of PW-10. The rough site plan only shows the following locations: Letter ‘A’ is the place where the quarrel took place and where Manjit was stabbed. This is shown in front of Sardar Singh’s House, which is marked with the letter ‘C’. ‘B’ is where blood stains were found. ‘D’ is Budh Ram’s shop. ‘E’ is Manjit

Singh's house. 'F' is where scooter on which Prateek and Devender came was found. 'G' indicated the location of the old *choupal*. If indeed PW-10 had himself witnessed the occurrence there was no way he would not have pointed out to the IO where he and PWs 8 and 13 were standing. Even the photograph of the so-called blood stains does not bear out the case of the prosecution that the deceased was found by PW-7 to be lying in a pool of blood. Why no photograph of any pool of blood is available on record, is again not explained by the prosecution.

42. When the rough site plan prepared by the IO on 4th February 1998 is compared with the scaled site plan (Ex. PW-5/A) prepared on 27th April 1998 by PW-5 on the instructions of the IO, several discrepancies come to the fore. First, the letters A to G in the rough site plan either do not find a corresponding mention or are at a different location in the scaled site plan. This is strange considering that PW-5 states that he made rough notes and took measurements as instructed by PW-23. It is another matter that PW-5 claims that after preparation of scaled site plan, he destroyed the rough notes and measurements. The scaled site plan shows only four locations: A to D. 'A' is the place where an electric pole (Sodium light) is located. This is near the old *choupal*. This did not find place in the rough site plan.

43. Point 'B' in the scaled site plan refers to the place where Manjit is supposed to have been caught hold off by A-1 to A-3 and stabbed by A-1 on the chest and where blood was also found. This is shown at a point different from point 'B' in the rough site plan. There it was in front of Sardar Singh's house (which incidentally finds mention but is not marked

with the letter in the scaled site plan). 'C' in the scaled site plan refers to the place where the scooter was parked. This more or less corresponds to letter 'F' in the rough site plan.

44. 'D' in the scaled site plan refers to 'the place from where Ashok and Manoj had seen the occurrence.' This finds no corresponding mention in the rough site plan. Neither Ashok (PW-10) nor Manoj (PW-13) or even Sanjeev (PW-8) was present when the scaled site plan was prepared by PW-5 at the instance of the IO. How then did the IO precisely know where they were standing? Interestingly, if the three eye-witnesses were chasing the accused then the path of the chase ought to have been indicated in both the rough site plan as well as the scaled site plan. Neither plan does.

45. The above omission is significant in view of the stand of the three eye witnesses that they chased the accused till the house of Dilbagh Singh which is shown in the scaled site plan (and not in the rough site plan) to the left of old *choupal*. However, it is quite close to the place where Manjit was attacked. If indeed the chase ended when Dilbagh Singh entered his house, as claimed by the eye-witnesses, they should have pointed this out to the IO when he drew the rough site plan. Further they could not have taken too long to return to the spot before Manjit was removed to the hospital by PW-7 in the car of Manjit's family.

46. There are further reasons to doubt the truthfulness and reliability of the evidence of PWs 8, 10 and 13. In the first place, PW-7, Sunil Kumar who was the first to reach the spot, on hearing the noise of some quarrel happening in front of his house, and saw the deceased lying in a pool of

blood, did not notice any of the three eye witnesses. PW-7 removed Manjit Singh who was “lying in a pool of blood” to the Jaipur Golden Hospital in a “private vehicle” belonging to the family of Manjit Singh. PW-7 clearly states that the “family members of Manjit Singh also reached” the hospital only thereafter. PW-7 stated: “I did not see any family member of Manjit present at the spot.” This is despite accepting as correct that “many persons of the locality had assembled where Manjit was lying in the pool of blood.” PW-7 stated: “I do not remember the names of the persons who help me in putting Manjit Singh on the car.” This is consistent with PWs 8, 10 and 13 not being present when the incident took place. In fact even the eye witnesses have not disputed that PW-7 Sunil was already in the hospital with the deceased when they reached there. Incidentally, even when the police reached the spot, they too found none of the eye witnesses.

47. PW-8, another uncle of the deceased, basically repeated the version of PWs 10 and 13 about Manjit being attacked by the three accused and then their chasing the accused for about 100 yards. PW-8 clarified that Ashok (PW-10) chased Ram Bhaj and Dilbagh upto 50 yards. He volunteered that they could not catch them as they entered the house of Dilbagh.

48. PW-8 stated that when he, and PWs 10 and 13, reached the hospital at 9.30 pm the police had already arrived there. Further, PW-7 also met them. PW-8 maintained that he returned home from the hospital at 10.30 pm on 2nd February along with Ashok and Manoj and that “our statement had already been recorded by the police before that time i.e., 10.30 pm.” PW-8 also claimed in his cross-examination that he and Ashok (PW-10) “had only

chased the accused and none else had chased.” PW-8 claimed that he had not entered the house of Dilbagh Singh as it was closed from inside. However, PW-8 admitted that he did not disclose to the police that Dilbagh and Rambhaj had entered their house, before the eye witnesses left for the hospital. The police was not informed on telephone about the presence of the accused persons inside their houses. These answers give rise to doubts whether PW-8 was indeed present in the vicinity and witnessed the occurrence.

49. The car in which Manjit was taken to the hospital by PW-7 belonged to Attar Singh (the father of PW-1 and PW-13). The car in which the three eye-witnesses reached the hospital subsequently belonged to Jagdev (PW-2), the brother of PW-8. It was PW-1 and PW-2 who identified the dead body of Manjit at the hospital. Even PWs 1 and 2 had not witnessed the occurrence. Ct. Krishan Kumar (PW-16) further clearly stated in his deposition that it is only after he reached the hospital that the three eye-witnesses, PWs 8, 10 and 13, reached there. He further stated: “It is correct that they told the SHO that they did not know till then how the incident took place.”

50. PW-13 claimed to have reached the hospital only at 9.45 pm and that his statement was recorded there by the IO till 10 pm. He claimed that along with the other 2 eye witnesses, and PW-1 and 2, he left for home at 10.30 or 10.45pm. This is contradicted by PW-10 who states that he returned home the next morning. Therefore, PWs 8, 10 and 13 cannot also be said to be consistent in their versions.

51. The trial Court did not consider the above inconsistencies and

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contradictions serious enough to impeach the credibility of the eye witnesses. This Court is unable to agree with the trial Court on the above conclusion. The analysis of their testimonies in light of the other evidence on record shows that they cannot be said to be either truthful or reliable. Also, the distance travelled by the eye witnesses during chase was completely lost sight of by the trial Court. It failed to look carefully at the rough and scaled site plans. The house of Dilbagh Singh and Ram Bhaj (who were brothers) was just 40-45 yards from the place of occurrence. The story of their coming back to the spot only after PW-7 took Manjit away is not believable.

52. In response to the submission on behalf of the accused that it was unnatural for none of the three eye witnesses to come to the rescue of the deceased, the trial Court surmised that since killing took place at the spur of the moment, it happened “so suddenly and within no time that the question of these PWs saving Manjit could not arise”. In the first place, the witnesses themselves did not say this. Secondly, all three of them chasing the accused, with not one of them attending to the injured Manjit, is certainly unnatural and unexpected particularly since each of them is closely related to the deceased.

53. In this context, the decision in *Anil Phukan v. State of Assam* (*supra*), is relevant. There the Supreme Court was dealing with a case where the sole eye witness to the murder was one Ajoy, the nephew of the deceased. However, Ajoy’s conduct of not attempting to save his uncle from the assault was held by the Supreme Court to be unnatural enough to render him

an unreliable witness. The Supreme Court, while giving the Appellant accused the benefit of doubt, observed:

“Of course, mere relationship with the deceased is no ground to discard his testimony if it is otherwise found to be reliable and trustworthy. In the normal course of events, a close relation would be the last person to spare the real assailant of his uncle and implicate a false person. However, the possibility that he may also implicate some innocent person along with the real assailant cannot be ruled out and therefore, as a matter of prudence, we shall look for some independent corroboration of his testimony, to decide about the involvement of the appellant in the crime. Since, there are some doubtful aspects in the conduct of Ajoy PW3, it would not be safe to accept his evidence without some independent corroboration, direct or circumstantial. The unnatural conduct of Ajoy PW3 which has come to our notice from the record is that though he was present along with the deceased at the time of occurrence, on 21.3.1976, at about 8 p.m., he made no attempt to save his uncle from the assault. He did not even continue to stay there, though of course according to him, he ran for his life on being advised so by his uncle.”

54. If the eye witness testimonies of PWs-8, 10 and 13 are kept aside, there is no other independent evidence to prove the presence of three accused at the scene of crime. In the circumstances, the question of A-1, A-2 and A-3 having to plead and prove alibi, as held by the trial Court, did not arise. Turning to the motive for the offence, it is stated to be the altercation on the previous day at a marriage function at Chirag Delhi between A-1 and the deceased. For this again, we only have the evidence of the interested eye witnesses, PWs 8, 10 and 13, who stand discredited. If the testimonies of the eye witnesses were clear, consistent and truthful, motive may not be of much significance. However, in the present case, with the direct evidence of the interested eye witnesses not inspiring confidence, motive does assume

significance. It cannot, therefore, be said that the failure of the prosecution to prove the motive for the crime in the present is not fatal to its case.

55. As far as A-2 and A-3 are concerned, the role attributed to them is that of holding either arm of the deceased. The fact that A-1 took out a knife at the spur of the moment, makes it highly doubtful that A-2 and A-3 shared the common intention of killing the deceased. In ***Shambhu Kuer v. State of Bihar*** (*supra*), the Supreme Court noted that the evidence in that case was that Shambhu Kuer the Appellant had “caught hold of the deceased and the latter scuffled to get himself released. Immediately thereafter Mandip took out a knife and started assaulting the deceased.” It was concluded that: “From the mere fact that the appellant caught hold of the deceased and scuffled with him, while Mandip took out a knife and commenced the assault, it cannot be inferred beyond reasonable doubt, that he shared the intention of Mandip to murder the deceased.”

56. In ***Ramashish Yadav v. State of Bihar*** (*supra*), the Supreme Court was dealing with a case where accused Ram Pravesh Yadav and Ramanand Yadav came and caught hold of the deceased Tapeswar, whereafter two other accused, Samundar Yadav and Sheo Layak Yadav, came with *gandasa* in their hands and gave the deceased blows by means of the *gandasa*. Acquitting the two who caught hold of the arms of the deceased, the Supreme Court held:

“The distinct feature of section 34 is the element of participation in action. The common intention implies acting in concert, existence of a pre-arranged plan which is to be proved either from conduct or from circumstances or from any incriminating facts. It requires a prearranged plan and it presupposes prior concert. Therefore, there

must be prior meeting of minds. The prior concert or meeting of mind may be determined from the conduct of the offenders unfolding itself during the course of action and the declaration made by them just before mounting the attack. It can also be developed at the spur of the moment but there must be pre-arrangement or premediated concert. This being the requirement of law for applicability of section 34 IPC, from the mere fact that accused Ram Pravesh Yadav and Ramanand Yadav came and caught hold of Tapeswar, whereafter Samundar Yadav and Sheo Layak Yadav came with gandasa in their hands and gave blows by means of gandasa, it cannot be said that the accused Ram Pravesh Yadav and Ramanand Yadav shared the common intention with accused Samundar Yadav and Sheo Layak Yadav. Consequently, accused Ram Pravesh Yadav and Ramanand Yadav cannot be held guilty of the charge under section 302/34 IPC but accused Samundar Yadav and Sheo Layak Yadav did commit the offence under section 302/34, having assaulted deceased Tapeswar on his head by means of gandasa on account of which Tapeswar died.

57. The fact that the blood on the shirt of A-1 matched the blood group of the deceased was treated as an additional circumstance to prove that the deceased was stabbed by A-1. However, as rightly pointed out on behalf of A-1, with the blood group of A-1 not having been ascertained, this circumstance by itself could not connect A-1 to the crime. However, this was brushed aside by the trial Court by stating "it is true but nonetheless, it is an additional circumstance which corroborates eye account of occurrence...." This is highly unsatisfactory way of dealing with the submission. More serious is the fact that when A-1 surrendered a week after the occurrence, he is supposed to have been wearing the same blood stained shirt. This was highly improbable. Again this has not been satisfactorily dealt with by the trial Court. Why would A-1 by wandering about in the blood stained shirt even one week after the occurrence, has been totally

failed to be explained by the prosecution.

58. In the present case, the testimonies of the three interested eye witnesses, PWs 8, 10 and 13 do not satisfy the twin requirements of truthfulness and reliability. They cannot be said to be consistent with each other as well. Being interested witnesses, their evidence also fails the test of independent corroboration by the medical and other evidence which have been discussed hereinbefore. It would be unsafe to rely on their testimony to bring home the guilt of the accused.

Conclusion

59. For the aforementioned reasons, the Court set aside the impugned judgment dated 7th July 2000 and the order of sentence dated 8th July 2000 of the trial Court. This Court acquits the Appellants of the offences with which they were charged.

60. The bail bonds and surety bonds of the Appellants stand discharged. They shall comply with the requirements of Section 437A Cr PC. The appeals are allowed in the above terms.

61. The trial Court record be returned forthwith together with a certified copy of this judgment.

S. MURALIDHAR, J.

I.S. MEHTA, J.

JANUARY 29, 2018

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