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IN THE HIGH COURT OF DELHI AT NEW DELHI

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CRL.A.754/2003

Reserved on: 9th August, 2018

Decided on: 23rd August, 2018

MADAN PAL

.....Appellant

Through: Ms. Ritu Gauba, Advocate.

versus

STATE

....Respondent

Through: Mr. Hirein Sharma, APP for
the State

**CORAM: JUSTICE S. MURALIDHAR
JUSTICE VINOD GOEL**

J U D G M E N T

Dr. S. Muralidhar, J.:

1.This appeal is directed against the judgment dated 27th September 2003 passed by the learned Additional Sessions Judge, Delhi (hereinafter 'trial Court') in SC No.35/1998 arising out of FIR No.419/1997 registered at PS Nabi Karim whereby the Appellant herein was convicted for the offence under Section 302 IPC. It also seeks to assail the order on sentence dated 30th September 2003 whereby he was sentenced to undergo imprisonment for life and to pay a fine of Rs.5,000/-; and in default of payment of fine, to undergo rigorous imprisonment for one year.

2. It must be noted at the outset that by an order dated 13th January 2004, the sentence of the Appellant was suspended, subject to terms. It was noted in the order that the Appellant had been in jail since 5th September 1997 and had not availed any interim bail/parole.

3. It also requires to be noticed at the outset that the Appellant – Madan Pal (Accused No. 3: ‘A-3’) was sent up for trial along with three other co-accused, viz. Rajesh Kumar @ Chunna (A-1), Vinod Kumar (A-2), and Sharda (A-3), the wife of A-2. They were charged with having murdered Jai Kishan (‘deceased’) in furtherance of their common intention at H.No.6464, Gali Hanuman Mandir, Nabi Karim at 9:40 pm on 23rd October 1997 and thereby committing the offence punishable under Section 302/34 IPC. By the impugned judgment, the trial Court while acquitting A-1, A-2 and A-4, convicted only the present Appellant for the aforementioned offence.

The killing of the deceased

4. The case of the prosecution is that the deceased returned to his house at around at around 9:30 pm on 23rd October 1997 and told his wife Sunaina (PW-6) that Deepak (DW-3) had borrowed Rs.100/- from him and that when the deceased asked for the sum to be repaid, DW-3 refused. The deceased was stated to have asked PW-6 to accompany him to the house of DW-3, who happened to be the nephew of Sharda (A-4).

5. The further case of the prosecution is that the deceased, along with PW-6, reached the house of A-4 within ten minutes. They demanded the money from Vinod (A-2), the husband of A-4. Upon this, the present Appellant (A-3) and Rajesh Kumar @ Chunna (A-1) abused the deceased and threatened him that if he did not leave, he would be killed.

6. Thereafter, A-1 caught the hair of the deceased, while the present Appellant (A-3) caught hold of his hand and dragged him into the *gali*. It is stated that A-2 also caught hold of the hands of the deceased while A-4 got

hold of his foot. It is then stated that A-2 exhorted A-3 (the present Appellant) to finish the deceased, upon which A-3 took out the knife from the right dub of his pant and gave three blows on the neck of the deceased, another under his arm, and one below his chest.

7. Upon seeing this, PW-6 raised an alarm. Her *nand* Laxmi (not examined) and Kamlesh (PW-7) rushed to the spot upon hearing the noise. A-4 was stated to have smeared her hands from the blood oozing from the deceased and put that hand with force on the back of the neck of PW-6 stating that this was the reward for demanding Rs.100/-. Thereafter, all the accused left the spot.

8. The further case of the prosecution is that Laxmi took the deceased in a TSR to the hospital while PW-6 along with PW-7 went to the PS to lodge a report. Thereafter, both of them reached the hospital.

9. At the spot, the investigating officer ('IO') Inspector M.S. Dwivedi (PW-16) is said to have recorded the statement of PW-6 (Ex.PW-13/C) and prepared the *rukka* (Ex.PW-3/A) on the basis of which an FIR was registered under Section 302 IPC.

Post mortem

10. The deceased was brought dead to the hospital. His post-mortem examination was conducted on 24th October 1997 at 2:20 pm by Dr. Sarvesh Tandon (PW-14). The following external injuries were noticed on the dead body of the deceased by PW-14:

- “1. Incised wound 1.6 x 0.5 cm size in supra-external notch vertical and 0.4 cm deep.

2. Incised wound 1.8 x 0.5 cm size over right sterno clavicular joint, superficial going obliquely towards medial side towards injury no.1, 0.3 cm deep.
3. Stab wound 2 x 0.5 cm size. Margins clear cut. Upper angle more acute, obliquely placed over front of upper part of right side of chest in mid clavicular line about 3 cm deep.
4. Stab wound 2.3 x 0.7 cm size vertical chest cavity deep, margins clear cut, upper angle more acute, over-right side lower chest 13 cm from mid-line and 6 cm below and out of right nipple.
5. Stab wound 2.5 x 1 cm size in anterior auxiliary fold of right axila going medially and obliquely 4 cm into muscle fibres. Margins clean cut and upper angle more acute.
6. Abrasion: 4 cm x 2.5 cm size over the inner side of upper line third of left forearm. Red and fresh.
7. Abrasion: 2 x 1 cm size over left side of chest in posterior axillary line 8 cm below left axila.
8. Abrasion: 6 x 1 cm size over the left buttock, fresh.”

11. The cause of death was opined to be haemorrhage and shock as a result of stab injuries to the lung and the heart. Injury nos.3, 4, and 5 were said to have been caused by a sharp-edged penetrating weapon; injury nos.1 and 2 by a sharp-cutting weapon; and injury nos.6, 7, and 8 were blunt force injuries. It was further opined that injury no.4 was sufficient to cause death in the ordinary course of nature.

Investigation, arrests, and seizures

12. PW-16 stated that at around 10:20 pm on 23rd October 1997, a call was received at PS Nabi Karim about a quarrel having taken place at Gali Hanuman Mandir. The DD was handed over to ASI Vijender Kumar (PW-13) who reached the spot and found that the injured had already been taken to the hospital. PW-16 then reached the Lady Harding Hospital where,

apart from PW-13, PW-6, PW-7 and Laxmi met him. As already noticed, the deceased had been brought dead. After taking into possession the sealed parcel handed over to him at the hospital, and after leaving PW-13 to guard the dead body, PW-16, along with PWs 6, 7 and Laxmi, came back to the spot and prepared the site plan (Ex. PW-16/A) on the pointing out of PW-6.

13. The crime team was also called there. A sample of the blood lying in front of H.No.6464, Gali Hanuman Mandir was also taken. These were converted into parcels and sealed. The bloodstained earth control was also taken from the place of the incident and sealed. PW-6 handed over a lady's suit which contained a palm impression with blood and this was converted into a *pulanda*. Laxmi, the sister of the deceased, also handed over the bloodstained suit which was sealed.

14. After the post-mortem, the dead body was handed over to the relatives. It is then stated that PW-16 searched for the accused persons on 27th October 1997 and at around 2 pm, he apprehended A-1 near the bus stand at Paharganj on the basis of "secret information" and on the pointing out of the "secret informer". He was interrogated and then arrested. No recoveries were effected from his person.

15. On 5th November 1997, the remaining accused, viz. A-2, A-3, and A-4, were arrested "from near the MCD Office, Qutub Road, Nabi Karim" again on the information of and pointing out by a "secret informer". The present Appellant, Madan Pal @ Kake (A-3), apparently disclosed that he could get the knife used in the commission of the offence recovered from the right corner of his bed in his house at Gali Hanuman Mandir, Nabi Karim. It was

so recovered and converted into a *pulanda* and sealed. A scaled site plan was thereafter prepared by Inspector Davender Singh (PW-9A). The case property was sent to FSL, Malviya Nagar.

16. As regards the FSL report, while blood was detected on all the exhibits, including the knife, the report of the serological analysis confirmed that the blood on the knife was of 'AB' group, which purportedly was the blood group of the deceased.

Trial

17. This was a case of direct evidence and the prosecution examined a total of 16 PWs. Each of the accused denied the incriminating circumstances when put to them under Section 313 Cr PC. Relevant to the present appeal, as far as A-3 is concerned, he too denied the circumstances and claimed that he was falsely implicated. He pointed out that their relations with the family of the complainant were strained and that is why he had been falsely implicated.

Defence evidence

18. The defence examined five witnesses. Ct. Jagdish Kumar (DW-1) was examined to prove that the deceased was an accused in FIR No.240/1994 which pertained to offences committed under the Gambling Act.

19. The confusion as to the address where the offence occurred was highlighted in the evidence of Vidya (DW-2), who stated that she was residing at H.No.6464/2, Gali Hanuman Mandir for the last 40 years. According to her, H.No.6464/1 was occupied by Kamlesh (PW-7), the sister of deceased Jai Kishan. She pointed out that the *gali* on which her house was

situated was about “2 to 2½ feet wide” and that there was no street light. She stated that on the day of occurrence, it was dark and many people were present and shouting.

20. While DW-2 stated that she could identify the assailants if shown to her, she denied that PW-6, PW-7, and Laxmi were present at the relevant time. According to her, “they had returned at about 10 pm when police came”. DW-2 further stated that she knew all the accused present in the Court but “none of them was present near the spot at the time of occurrence”. DW-2 was categorical that none of the accused had assaulted the deceased. In her cross-examination, DW-2 admitted that she never contacted the police to tell them about the occurrence or having seen the assailants. According to her, the real name of wife of the deceased was Shobha. DW-2 claimed that she did not know what relation PW-6 had with the deceased. DW-2 denied the suggestion that the deceased had also married PW-6 and was living with her. She denied the suggestion that she was not present at the time of the incident.

21. Deepak (DW-3) was the nephew of Sharda (A-4). He claimed that he had never seen the deceased and had no monetary dealings with him. He claimed never to have lived with A-4. It will be recalled that, according to the prosecution, this was the main trigger for the assault. In his cross-examination, DW-3 denied having borrowed Rs.100/- from the deceased on 23rd October 1997 promising to return it after 2 to 3 hours. He also denied the deceased having gone with PW-6 to the house of A-4 requesting help to recover the aforementioned amount from DW-3.

22. A Lower Divisional Clerk from the Office of the Chief Electoral Officer, Kashmere Gate was examined as DW-4. He confirmed that in the electoral roll, the address of the deceased was noted as H.No.6464, Gali Chirimaran, Ram Nagar. DW-4 also deposed that Shobha, the wife of Jai Kishan, was also registered as a voter from the same address. A suggestion was given to him in his cross-examination that the correct name of the voter was not Shobha but Sunaina, but he could not confirm this. While acknowledging that complaints are received against mistakes in the electoral roll, he also volunteered that “so many mistakes are not committed”.

23. What emerges from the collective reading of the depositions of DWs 2, 3, and 4 is as under:

- (i) There was no confirmation that PW-6 was in fact the wife of the deceased.
- (ii) It was uncertain whether PW-6, PW-7, and Laxmi were in fact present at the time of the occurrence.
- (iii) The address of the deceased may have been H.No.6464, Gali Chirimaran, but clearly that was not the place where he was stabbed. The charge in this regard was certainly defective.
- (iv) There was no effective cross-examination of the DWs to discredit their testimonies.

24. It may be useful to recall at this stage the legal position as regards defence witnesses as was explained in *Dudh Nath Pandey v. State of U.P.* **AIR 1981 SC 911** as under:

“Defence witnesses are entitled to equal treatment with those of the prosecution. And, Courts ought to overcome their

traditional, instinctive disbelief in defence witnesses. Quite often, they tell lies but so do the prosecution witnesses.”

Scrutiny of interested eye-witness testimony

25. The prosecution sought to project this as a case of direct evidence with there being at least three eye witnesses to the occurrence, viz. PWs 6 and 7 and Laxmi (not examined). PW-6 was projected as the wife of the deceased, although this fact itself could not be established beyond reasonable doubt. PW-7 was the sister of the deceased. Clearly, therefore, both were related to the deceased and their testimony has to be viewed from this perspective.

26. The law in relation to the eye witness testimony of the related witnesses is fairly well-settled. In *Darya Singh v. State of Punjab (1964) 3 SCR 397*, the Supreme Court held:

“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 to 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.”

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

“We are of the considered view that in cases 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.”

28. The legal position was succinctly summarised in ***Raju v. State of Tamil Nadu AIR 2013 SC 983*** thus:

“.....we are concerned with four categories of witnesses - a third party disinterested and unrelated witness (such as a bystander or passer-by); a third party interested witness (such as a trap witness); a related and therefore an interested witness (such as the wife of the victim) having an interest in seeing that the accused is punished; a related and therefore an interested witness (such as the wife or brother of the victim) having an interest in seeing the accused punished and also having some enmity with the accused. 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.”

29. While the Court is, therefore, not to view related witnesses with suspicion merely because of their relationship with the victim, the Court must seek corroboration on material particulars and be satisfied as to the truthfulness and reliability of their depositions.

Site plans do not corroborate version of PW-6

30. In this background, if one first peruses the testimony of PW-6, it is seen that she accompanied the deceased to the house of Deepak (DW-3) and in that process, reached the house of A-4, his aunt. As per her testimony, when the deceased demanded from A-2 (A-4’s husband) that the sum borrowed by DW-3 be repaid, A-1 and A-3 (A-4’s son) were also present and all three of them began abusing the deceased and asked him to leave.

31. In light of this testimony, it becomes necessary to understand the precise locations of the houses of the deceased, the PWs and the accused. The only documents that are of any assistance to the Court in this regard are the site plans, i.e. the un-scaled site plan (Ex.PW-16/A) and the scaled site plan (Ex.PW-9/A). The un-scaled site plan, it may be recalled, was purportedly drawn up by PW-16 on the basis of what was told to him by PW-6 on 24th October 1997, i.e. the day after the incident. Unfortunately, this plan is of little help. Five spots are marked therein i.e. bearing letters ‘A’ to ‘E’. ‘A’ highlights the place in the *gali* in front of H.No.6464/2 where the murder took place. ‘B’ to ‘E’ are shown at various points around ‘A’ and are simply

described as the places where the blood was found.

32. It is surprising that despite this site plan being drawn up on the basis of the statement of PW-6, the houses of the deceased and the assailants are not shown. While DW-2, the resident of House No.6464/2, was examined by the defence, no attempt was made by the prosecution to examine this person. She in her deposition stated that at the time of the occurrence, it was dark and many people were present and shouting. Likewise, the houses of PW-7 and Laxmi are not shown in this site plan. It is for the prosecution to explain why such a shoddy site plan was drawn up which is of no use to anyone, least of all this Court. It cannot be countenanced that after recording the statements of the three purported eye witnesses, the IO would not indicate in the unscaled site plan where the said eye witnesses resided and from where they saw the incident as it was happening. In cases such as the present one, the precise location of each eye witness is a vital fact which could not have been overlooked by the IO.

33. The scaled site plan does no better. It raises more questions than it answers. This scaled site plan was drawn up several months later on 7th January 1998 by PW-9A. From his deposition, it is clear that PW-9 drew it up on 31st December 1997, i.e. two months after the occurrence after taking rough notes and measurements “on pointing out of Smt. Sunaina, Smt. Laxmi and Kamlesh”. The scaled site plan gives the address of the house in front of which the murder took place as H.No.6464 and not H.No.6464/2 which was the address noted in the un-scaled site plan.

34. From the deposition of DW-2, it is apparent that this area is congested

with the *gali* in which the crime purportedly took place being just 2 to 2½ feet wide. Clearly there were a number of houses with different door numbers. In such a scenario, it was imperative for the IO to have drawn up a proper site plan which showed where the houses of the eye witnesses and the accused.

35. In all, 11 spots have been marked on the scaled site plan denoted by letters 'A' to 'K'. 'A' to 'C' are marked just outside the house of the deceased. 'B' denotes the sport where the dispute between the four accused and the deceased started while 'C' shows the position of PW-6 at the time of the incident. The narration for 'A' reads: "shows the place of lighted electric bulb". Oddly enough, although the case of the prosecution is that the deceased and PW-6 went to the house of A-4, the said house has not been indicated on this site plan. It is from the said house that the deceased was purportedly dragged to the *gali* but the direction in which he was dragged is not shown.

36. Furthermore, PW-6 stated her address to be H.No.6466, Gali Hanuman Mandir but this address has not been shown on either site plan. Also, the location of the light denoted by 'A' is shown for the first time in the scaled site plan. It is not clear whether this light is in the house or in the *gali*. In ***State of Madhya Pradesh v. Puran (2003) 12 SCC 485***, the Supreme Court held that the failure to mention the existence of the tube light in the site plan created a doubt as to the possibility of there being sufficient light for identification. It will be recalled that in the present case, in the un-scaled site plan, the presence of any lamp near the place of stabbing is not indicated. It will be recalled that Vidya (DW-2), a resident of H.No.6464/2 (which is the

number of the house in front of which the stabbing took place) stated that on the day of the occurrence, it was dark and many people present who were shouting.

37. The other surprising aspect is that 'E' and 'G', which denote the locations of PW-7 and Laxmi from where they witnessed the incident, are situated at the opposite end of the *gali* to where the murder purportedly took place. PW-7 gave her address as H.No.6466, Gali Hanuman Mandir which is the same address as PW-6 and yet, the place where PW-6 was when the altercation took place i.e. next to the house of the deceased is at the opposite end of the *gali* at a considerable distance from where PW-7 was. The address of the houses where 'E' and 'G' (locations of PW-7 and Laxmi) are shown on the site plan is not indicated. Even if these letters indicate spots situated in the *gali*, it is not known how PW-7 and Laxmi reached there.

38. 'D' denotes the spot where the deceased was stabbed and four spots are indicated around it, viz. 'H' to 'K'. 'H' denotes the location of a lighted electric bulb (shown for the first time in the scaled site plan) while 'I' to 'K' denote the spots where blood was found. 'F', which is also situated in the vicinity of 'D', denotes the position of PW-6 from where she witnessed the stabbing of the deceased.

39. The scaled site plan, therefore, does not help the Court understand as to where the houses of PWs 6 and 7 were precisely located and in what direction the deceased was purportedly dragged by the four accused. It must be recalled that there were four accused and the position of these accused were not specifically shown except by the letter 'B' in the scaled site plan

which states that this is where the dispute started between the accused and the deceased. Therefore, even the scaled site plan is not helpful in understanding as to where the houses of the accused were located and whether, in fact, the place where the dispute started was the house of A-4.

Defective charge due to insufficient investigation

40. There is merit in the contention of the learned counsel for the Appellant that the charge itself has a very serious defect. The charge against the Appellant is that the four co-accused had murdered the deceased by stabbing in front of H.No.6464, Gali Hanuman Mandir. However, the un-scaled site plan notes the address of the house in front of which the stabbing occurred as H.No.6464/2. This change in the address noted in the scaled site plan is not satisfactorily explained by the prosecution.

41. PW-16 has been cross-examined on this aspect. The following answers were given by him and are most unconvincing:

“I do not remember orally the width of the gali in which the occurrence had taken place. (Vol. It is mentioned in the site-plan). Many people were present at the place of occurrence when I reached there. [The occurrence had taken place in front of house no. 6464 gali Hanuman wali. I did not make any enquiry about the owner of the house because the incident had taken place in the gali. And it was already late in the night. I had made enquiries from the neighbourhood about the incident but none came forward to tell me anything. I did not take any action any of those person. I do not know who was the owner of the house no.6464.”

(.....)

“I do not remember correctly if the site-plan was prepared after receipt of copy of rukka and FIR but it was almost simultaneously. I have seen the site plan Ex.P.W.16/A prepared by me and it is correct

that in the same house of accused persons had not been pointed out. It is correct that in the site plan Ex.PW.16/A I had not mentioned as to on whose instance it was prepared. The correct number of the house in front of which the occurrence took place is 6464. It has many portions and that is why in the site plan Ex.PW. 16/A the number of the house is mentioned as 6464/2. I do not know how many portion house no. 6464 has and therefore I cannot specify in front of which the occurrence had taken place.”

42. While a defective charge need not *per se* be fatal to the case of the prosecution, here it points to the extremely casual manner in which the prosecution has approached the task before it. It also points to the utterly shoddy investigation. It is inexcusable that the defect in the charge was allowed to remain uncorrected and no efforts were made to unearth the facts regarding the correct addresses of the deceased and the accused.

43. Even the trigger for the incident, i.e. DW-3 having borrowed Rs.100/- from the deceased, was poorly investigated. This is clear from following answers given by PW-16 in his cross-examination:

“I could not find any witness in whose presence Deepak had taken Rs.100 from deceased. I do not know if Deepak was resident of A-146 Nabi Kareem and not of Hanuman Gali. I had not collected any document and oral evidence to show that Deepak was nephew of Sharda. I do not make any enquiry from parents of Deepak.”

Unconvincing recovery of the weapon of offence

44. One important piece of evidence which purportedly links the present Appellant to the occurrence was the knife. This was purportedly got recovered by the Appellant. However, the following answers given in this regard by PW-16 in his cross-examination does not show that this was proved by any believable evidence:

“The knife was recovered on 5-11-97. The arrival entry was made at P.S. when I reached there after arrest of three accused. Departure entry was also made when I left P.S. for recovery of knife. I had not file copy of any such DD on record. I cannot tell the DD nos. also. It is incorrect that no knife was recovered and that entire writing work was fabricated at P.S. itself. The knife was recovered from house no. 6468 at about 10/10.30 p.m. I do not remember how many stories that house had. That house had a boundary wall and main gate was found closed but it was not locked. The knife was recovered from ground floor of that house from inside a room which was already open. None was present in that house. I had not collected any documentary proof that house no.6468 was owned by accused Madan. It is incorrect that I had never had gone to house no.6468 and no knife was recovered from there. It is incorrect that the room from where recovery was allegedly made was not in possession of accused Madan and his family. It is correct that there were many tenants in that house. They were many in their separate portion. I had not recorded statement of any of the tenants of Madan Lal because none agreed to it. I had not prepared site plan of the place from where knife was recovered. The knife was not shown to the doctor conducted post-mortem to obtain his opinion about the weapon. It is incorrect that the opinion was not taken from the doctor because the knife was planted on the accused.”

45. How the trial Court could have possibly proceeded on the basis that the recovery of the knife at the instance of present Appellant was proved, in light of the above answers, is indeed a mystery.

Unreliable testimony of PWs 6

46. Coming to the testimonies of PWs 6 and 7 themselves, the procedure adopted vis-à-vis PW-6, as noted by the trial Court in the transcript itself on 8th May 2000 is telling. It reads as under:

“Today witness is present in court. She is ill, Witness has appeared in court several time as is apparent from record,

witness also submits that her statement may be recorded today as she is pressurised and harassed. Statement of Sunaina Devi was first recorded on 9/9/98. His further examination was deferred at request of Id. APP, She was further examined on 30/1/99. On that date also Id. counsel for accused Sharda, Madan and Vinod requested for date on ground that he has been engaged on that day alone. Cross examination of this witness was further deferred till next date, Witness came again on 24/5/99 and her cross examination was to be done on that day but Id. counsels for accused did not appear and therefore, witness was cross examined by court as court is competent to put question to any witness in any form at any time u/s 165 of Evidence Act and court performs its duty accordingly. When witness was put Question by court Id. counsel for all accused except Rajesh appeared and witness was cross examined at length. Opportunity was given on that day to accused Rajesh but he did not avail. Later on Id. counsel for accused Rajesh moved application to recall Sunaina u/s 311 Cr PC and accordingly after hearing parties she was ordered to be summoned for 9/12/99 vide order dated 26/11/99. On 9/12/99 witness was present but she stated that she was not feeling well that day and her examination was deferred to 18/1/2000. On 18/1/2000 witness was not present as she allegedly gave birth to a child. This witness again appeared on 16/2/2000. The P/O of court was on leave and she was bound down. Again witness appeared today. As per law all witnesses present must be examined same day. I see no reason not to examine witness today in light of above facts and circumstances of case and observation of court regarding Id. Counsel.”

47. PW-6 was clear in her cross-examination that “the knife was recovered in her presence and I saw that knife”. Yet the memo of seizure of the knife has only the address of Laxmi and not that of Sunaina (PW-6). She further stated that “photos of my husband lying at the spot were also taken including photos of blood etc”. This Court has perused the photos placed on the record (Ex.P-5 to P-8) and notes that these are only photographs of the blood and

there is no photograph showing the dead body. Why such photos of the dead body were not placed on record is, therefore, not clear. There appears to be more than what emerges from the record.

48. PW-7 is purportedly the *nand* of PW-6 and in her cross-examination, she states that she resided “in House No.6466 whereas my *nand* resides in House No.6464. I cannot say if House No.6466 has been recorded in my police statement. I disclosed correct house number and mistake may have been committed by the police”. She further states that “my house and that of my *nand* are in the same *gali* and exits of both houses are in two different directions, but both houses adjoin each other”. This is not what emerges from even the scaled site plan. The fact that PW-6 was totally scared is also unbelievable. In her complaint (Ex.PW-13/C), PW-6 has given her residence as H.No.6467 whereas in the electoral roll it is H.No.6464 and in her testimony before the Court, it is shown as H.No.6466. The Court, therefore, is unable to be persuaded that PW-6 is speaking the entire truth and that she can be safely relied upon to bring home the guilt of the accused.

49. It must also be recalled here that it is the evidence of PW-6 which was also relied upon by the prosecution to bring home the guilt of the co-accused, i.e. A-1, A-2 and A-4, and yet, this witness has been disbelieved by the trial Court as regards those co-accused and they have accordingly been acquitted and their acquittal has not even been challenged by the prosecution. This is the additional factor that weakens the case of the prosecution.

PW-7 unreliable too

50. Turning now to PW-7, she made very serious improvements in her deposition in Court in her cross-examination as under:

“Police recorded my statement after one day of incident. I stated in my stt. before the police that Deepak took Rs.100/- and on demand he refused to pay back. (Confronted with mark ‘A’ where it is not so recorded).. I also told police that Sharda is Bua of Deepak. (Confronted with mark ‘A’ where it is not so recorded). I also stated to the police that Vinod exhorted Madan to finish my brother with knife. (Confronted with mark ‘A’ where it is not so recorded). I also stated before police that blood was taken from the place of incidence with the help of cotton and was put in sisi. (Confronted with mark ‘A’). I also told police that the pullandas were sealed at the spot. (Confronted with mark ‘8A’). I also disclosed before police that the site plan was prepared at the instance of my bhabhi and myself.”

51. There also seems to be a complicated relationship on the side of the complainants, as is evident from the following answers given by PW-7:

“It is incorrect to suggest that my bhabhi Sunaina was not married to my deceased brother. However I did not participate in the marriage. The marriage was solemnized at Bihar. My family members and relatives did not joined that marriage. It is incorrect that my bhabhi Sunaina is pregnant now and she has married another person after incident. The sisters of Sunaina was residing with Jai kishen earlier and my brother was residing with sister of Sunaina treating her as wife. The sister of Sunaina used to live at G.B. Road. Sometime she used to meet my brother. It is incorrect to suggest that my deceased brother was commission agent at G.B. Road. My brother did not show any photographs as proof of marriage to us. It is incorrect suggest that Sunaina was not married with my brother Vol. Sunaina's sister brought her after getting her marriage with my brother. Sunaina is now residing with my elder brother Ram Krishan and Sunaina is pregnant due to her relation with my

elder brother. Ram Krishan is married but his wife did not reside with my brother.”

52. The above answers depict the complexity of the relationships between the parties. Further, the police does not appear to have investigated the case on these vital aspects as thoroughly as it should have.

53. PW-7 also states that “the houses of Jai Kishan, Laxmi and ours situated in different gali” whereas that is not what emerges in the scaled site plan. She admits that she did not disclose the names of the assailants to the police. Her answers in this regard read thus:

“I accompanied my bhabhi Sunaina to police station. I did not disclose named of the assailants in the police station vol. after informing the police we went to hospital. We met Doctor in the hospital. We disclosed before Doctor the names of assailants. Police reached there simultaneously on our arrival to hospital. We accompanied police to hospital in same vehicle. I did not tell the names of the accused on way to hospital from P.Station.”

54. PW-7, therefore, does not inspire much confidence and her testimony has also not been corroborated in material particulars by the other evidence on record. As in the case of PW-6, the evidence of PW-7 is common to all the accused, and yet she has been disbelieved by the trial Court vis-à-vis the co-accused who have been acquitted by the trial Court. Therefore, this also further weakens the case of the prosecution *qua* the present Appellant.

Inconsistent evaluation of witness testimonies

55. The trial Court, in its judgment, has provided rather weak reasoning for the acquittals of the other co-accused. This is despite the fact that PWs 6 and 7 deposed as to the specific roles of the accused in the alleged attack. It

surmised that when A-2 exhorted A-3 to kill the deceased, there was nothing to show that he knew that the present Appellant, i.e. A-3, was actually carrying a knife. As for A-4, the trial Court has reasoned that the act of putting her bloodstained hands on the back of PW-6 was subsequent to the actual killing and it was again surmised that A-4 “might have heaved a sigh of relief when Jai Kishan was stabbed for some personal reasons which has not come on record”. Interestingly, no reasons at all have been noted by the trial Court for its decision to acquit A-1.

56. Another factor to be noted is that the weapon of offence viz., the knife was not shown to the doctor who conducted the post mortem for his opinion whether the injuries on the dead body could be caused by it. In this context, the following observations of the Supreme Court in *Kartarey v. State of U.P. (1976) 1 SCC 172*, which received reiteration in *Ishwar Singh v. State of U.P. (1976) SCC (Crl) 629*, are relevant:

“We take this opportunity of emphasising the importance of eliciting the opinion of the medical witness, who had examined the injuries of the victim, more specifically on this point, for the proper administration of justice, particularly in a case where injuries found are forensically of the same species, e.g. stab wounds, and the problem before the Court is whether all or any of those injuries could be caused with one or more than one weapon. It is the duty of the prosecution, and no less of the Court, to see that the alleged weapon of the offence, if available, is shown to the medical witness and his opinion invited as to whether all or any of the injuries on the victim could be caused with that weapon. Failure to do so may, sometimes, cause aberration in the course of justice.”

Possibility of false implication not ruled out

57. DD No.39A lodged at PS Nabi Karim at 10:20 pm was by one woman

who could not disclose much and simply stated that a quarrel had taken place in H.No.6464. DD No.41A notes that the deceased had been brought dead by his sister Laxmi who brought him after the quarrel. This Laxmi was not examined at all. Then we have, at 12:10 am on 24th October 1997, the statement of PW-6 naming four assailants on the basis of which a formal complaint was lodged. Therefore, there is merit in the contention that the four accused were named nearly three hours after the incident by the complainant at the behest of the police.

Conclusion

58. For the above reasons, this Court concludes that it would be unsafe to find the Appellant guilty on the unreliable and uncorroborated testimonies of PWs 6 and 7. The Appellant, therefore, is entitled to the benefit of doubt.

59. Resultantly, the impugned judgment dated 27th September 2003 and the consequent order on sentence dated 30th September 2003 of the trial Court *qua* the Appellant are hereby set aside. The Appellant is acquitted of the offence under Section 302/34 IPC. The appeal is allowed. The bail bonds and surety bonds furnished by the Appellant stand discharged. He will fulfil the requirement of Section 437A Cr PC to the satisfaction of the trial Court at the earliest. The trial Court record be returned forthwith together with a certified copy of this judgment.

S. MURALIDHAR, J.

VINOD GOEL J.

AUGUST 23, 2018
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