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IN THE HIGH COURT OF DELHI AT NEW DELHI

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CRL.A. 139/2015

Reserved on: 12th February, 2018

Decided on: 6th March, 2018

ROHIT @ RAHUL

..... Appellant

Through: Mr. Prakash Gautam, Mr. Sachin
Gautam, Advocates.

versus

STATE OF NCT OF DELHI

..... Respondent

Through: Ms. Radhika Kolluru, APP

AND

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CRL.A. 1541/2014 & CrI.M.A.6882/2017

SUNIL

..... Appellant

Through: Mr. K. Singhal, Mr. Prasanna,
Advocates.

versus

STATE OF NCT OF DELHI

..... 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 22nd August, 2014 passed by the learned Additional Sessions Judge –II (North-

West) ('ASJ'), Rohini Courts, Delhi in Sessions Case No.85/2013 arising out of FIR No.278/2011 registered at Police Station ('PS') Adarsh Nagar convicting Rudramani @ Rukmani @ Guderia @ Rohit (Accused No.1 – 'A-1') and both the Appellants Rohit Kumar @ Rahul ('A-2') and Sunil ('A-3') for the offences under Sections 392/34 and 302/34 of the Indian Penal Code ('IPC'). By the same judgment A-1 was additionally held guilty of the offence under Section 392 read with Section 397 and Section 302/34 IPC as well as Sections 25, 54 and 59 of the Arms Act.

2. These two appeals by A-2 and A-3 are also directed against the order on sentence dated 3rd September, 2014 of the trial Court whereby each of the Appellants i.e. A-2 and A-3 were sentenced for the offence under Section 302 IPC to rigorous imprisonment ('RI') for life with a fine of Rs.1 lakh and in default of payment of fine to undergo simple imprisonment ('SI') for a period of six months; and for the offence under Section 392 IPC to undergo RI for ten years with a fine of Rs.5,000/- and in default of payment of fine to undergo SI for one month. Both the sentences were directed to run concurrently.

3. At the outset, it must be mentioned that as far as A-1 is concerned, in his appeal, a Division Bench of this Court has by an order dated 20th October 2016 in his appeal (Crl. A. No. 374 of 2015) held that he was a juvenile as on the date of commission of the offence and was entitled to the benefit of Juvenile Justice (Care and Protection of Children) Act, 2000 (JJ Act). His appeal was, therefore, separated from the present two appeals – one by A-2

Rohit (Crl. Appeal No.139/2015) and the other by A-3 Sunil (Crl. Appeal No.1541/2014).

Case of the prosecution

4. The case of the prosecution is that a PCR call was received from one Mohd. Moazzam (PW-3) having mobile number 9990639518 at around 10.30 pm on 15th October, 2011 to the effect that four boys were stealing from certain persons below the Adarsh Nagar Metro station. The precise message as noted in the PCR read: “*yahan par chaar log jo kucch logo ko loot rahe hai caller ne bataya ki yeh 15 minutes pehle kee baat hai.*” This information was reduced to writing as DD No.89B (Ex.PW24/A) at PS Adarsh Nagar and sent to Sub Inspector (SI) Afaq Ahmed (PW-24) who along with constable (Ct.) Pradeep (PW-9) went to the spot i.e. near Adarsh Nagar Metro Station towards Indira Nagar Market.

5. There PW-24 met Head Constable (‘HC’) Himmat Singh (PW-23) who informed him that the injured had been shifted to the BJRM Hospital in the PCR van. According to PW-23, he had reached the spot at around 10/10.15 pm and remained there till 11/11.15 pm but was unable to find any eye witness. After the PCR came to the spot, they realized, after checking his bag, that the injured person was a constable in Delhi Police.

Medical evidence

6. At the BJRM Hospital, Dr. Ajit Tripathi examined the injured and declared him brought dead in the MLC (Ex.PW30/A). The signatures of Dr. Ajit Tripathi were identified by Dr. Gopal Krishna (PW-30).

7. Subsequently, the post-mortem of the deceased was performed by Dr. Bhim Singh (PW-29), who noticed the following external injuries:

“1. Incised stab wound 3.2cm x 0.8 cm x cavity deep, left side of chest in the seventh intercoastal space, situated 12cm below and lateral from left nipple, lower angle of wound was obtuse, upper angle was acute, wound was obliquely placed.

2. Incised wound 3cm x 0.2cm x 20.4 cm was present middle of forehead.”

8. On internal examination, PW-29 noted:

“Head and neck: all the organs were intact, brain was pale.

Chest:- Chest wall shows cut mark through and through in the seventh intercoastal space, wound travels slightly upwards cutting the outer surface of left ventricle of heart, through and through, total length was approximately 15cm. Chest cavity and pericardial was full of blood about 1.5 liters. Blood was fluid and clotted. Other organs were pale.”

9. The opinion as regards the cause of death was haemorrhagic shock consequent upon stab injury No.1 which was held to be sufficient to cause death in the ordinary course of nature. The post-mortem was performed on 16th October, 2011 itself at 12.10 pm and the approximate time of death was stated to be 13/14 hours prior thereto.

Investigation

10. At the hospital, PW-24 met HC Nanhe Lal Mishra (PW-12) who handed over to PW-24 the personal belongings of the deceased, which included a Nokia mobile phone, a black bag of Donex make in which there was a cap and uniform, belt and I-card of Delhi Police with the name ‘Constable

Harkesh Meena' written on it. It also had a brown colour shawl, a light blue colour towel and Rs.13 in cash. PW-12 also handed over to PW-24 a sealed parcel with the seal of MS, BJRM Hospital containing the shirt of the deceased.

11. PW-24 then returned to the spot and found that Inspector Binod Kumar Singh (PW-28) had already reached there. The crime team also reached and photographed the spot. At the BJRM Hospital mortuary, the relatives of the deceased identified the deceased and were then handed over the body. In the meanwhile, the *rukka* had been prepared and an FIR was registered and handed over to the Investigating Officer (IO) i.e. PW-28.

12. It is only on 17th October, 2011 that PW-28 called PW-3 who had first made the call on the 100 number to report the crime he had witnessed. In his statement PW-3 stated that on 15th October, 2011 at around 10 pm, he left GTK Hospital on his motorcycle after meeting one of his relatives and was on his way towards Mukherjee Nagar. He reached a red light at Adarsh Nagar ahead of the Metro Station and upon encountering a traffic jam, stopped the bike by the side of the road near the exit gate of the metro station. At that time, when he heard some noise and turned, he noticed three boys hitting another boy and trying to push him to the ground and the boy who was being attacked was struggling to free himself. One of the three boys then pulled out a knife and stabbed him on the head and the left side of the chest after which the victim fell down; then cut his pocket and pulled out his purse. PW-3 stated that of the other two boys who had not used the knife, one was holding the victim by the neck and the other by his waist. All

three of them then ran away. According to PW-3, he was shocked to see the incident, but since the traffic light turned green, he moved along with the traffic. When he moved a little ahead and reached near Mukherjee Nagar, his conscience did not permit him to keep quiet and therefore he made a call to 100 number and reported about the incident.

Arrest of the accused and recoveries

13. Inspector Virender Kadyan (PW-31) took over the investigation on 19th October, 2011. He was the SHO at PS Adarsh Nagar. He stated that at 1.30 pm on 19th October 2011, he received secret information that the accused wanted in the present case would come outside *sabzi mandi* out gate towards Majlis Park at around 3 pm. He then constituted a raiding party after due information was passed on to senior police officers. According to him, some of them took positions towards Service Lane, Panchwati adjacent to GT Road, opposite the out gate of *subzi mandi* whereas some other members of the raiding party took positions near the NDPL Power House. At 3.15 pm, one boy coming from the out gate of Majlis Park side was apprehended on the pointing out of the secret informer. He was apprehended by ASI Parmod Kumar (not examined) and HC Naresh Kumar (PW-26). Upon interrogation, he disclosed his name as Rudramani (A-1). On his personal search, a mobile phone of make MTS was found.

14. A-1 is supposed to thereafter have led the police to the spot of the incident and also to Bhama Shah park where in a service lane adjoining GT road near MTNL box he pointed out to a large number of broken brick pieces lying on one corner of the service lane. From there A-1 got recovered

a knife on which PW-31 found some dried blood stains and mud. The knife was of 30.9 cm length. Of this the wooden handle of about 12.6 cm and the blade was of iron measuring 18.3 cm. The knife was then seized.

15. A-1 then offered that he could get the other co-accused apprehended. He is supposed to have led the police to Bairagi Mohalla, Bhalswa Dairy to house No.A-681-682. He pointed out to a boy emerging as Sunil (A-3) who was overpowered and interrogated. From his personal search one mobile phone of make SAMSUNG was found. A-3 then led the police inside his house and from the *parchati* got recovered one brown colour purse with the word GUCCI written and informed them that it was the purse belonging to the deceased. The purse was found to contain the I-card of the deceased of his training period, photocopy of the original I-card, pay slip of April, 2011, receipt of mobile, two passport size photographs, original mark sheet of Rajasthan University and a handwritten slip. This purse was then seized.

16. A-3 happened to be the uncle of A-1. The police party were then led by A-1 to the *parchati* in the same house. A-1 got recovered cash of Rs.280/- and disclosed that this was the amount robbed from the deceased which fell to his share. That was put in a sealed envelope. The site plan of the place of these recoveries was prepared and it was Ex.PW31/A.

17. According to PW-31, both A-1 and A-3 offered to get apprehended Rohit (A-2) and led the police party to the Haiderpur *jhuggies*. While they were crossing the Badli bus stand, both A-1 and A-3 pointed out towards a boy standing at the bus stand as A-2 who was then apprehended. His disclosure statement was recorded. His personal search revealed an original

driving license of the deceased and the cash of Rs.660/- which A-2 disclosed was the amount robbed from the deceased which fell to his share. The personal search of A-2 also revealed a mobile phone, a metro card and receipt of a gym.

18. According to PW-31, all three accused were kept in muffled faces. He obtained a one day PC remand on 20th October, 2011. On that day, A-1 and A-3 again led police to A-681-682, Bairagi Mohalla, Bhalaswa Dairy for getting recovered the clothes that they were wearing on the day of the crime. A-2 also led the police to his own house in the *jhuggi* for getting his clothes recovered that he was wearing on the date of the incident. Their respective houses were closed on that day and so no recoveries could be effected.

19. On 21st October, 2011, A-1 and A-3 again took the police to their house at Bairagi Mohalla. This time, the house was found open. First, A-3 produced a white shirt which was kept on his bed which he was supposedly wearing on the date of the incident and also claimed that the pant that he was wearing at the time was the same he was wearing on the day of the incident, after which PW-31 got him to change and seized both articles. A-1 then got recovered a shirt hanging on a rope in his room which had white and brown checks with the word 'wanted' written on the back and similarly claimed that the pant that he was wearing at the time was the same as on the day of the incident. A-2 took the police to his *jhuggi* which 'was open but shut with a latch from outside' and got recovered a black colour T-shirt hanging on a *khunti* behind the door. All three accused purportedly disclosed that they had

washed their clothes after the incident, but a few spots were still visible on those clothes and therefore they were seized.

20. On 24th October, 2011, PW-31 filed an application for getting the test identification parade ('TIP') conducted of all three accused. This was marked to the Link Metropolitan Magistrate ('Link MM') in the Rohini District Courts for conducting the TIP on 3rd November, 2011. On that date, however, A-1 and A-2 refused to participate in the TIP proceedings. On 5th November, 2011, the TIP of A-3 was fixed but he too refused to participate.

21. According to PW-31, on 18th November, 2011 while the accused were being produced in judicial custody for extension of remand, PW-3 came to the Court and identified all of them as the assailants whom he had seen on the date of the incident. PW-31 then recorded the statement of PW-3 and relieved him.

22. On 22nd December 2011, PW-31 went to the spot along with Inspector Vinod Kumar Singh (PW-28) and SI Manohar Lal (PW-8) and on the pointing out of PW-28, the scaled site plan was prepared.

23. The CDRs of the various mobile phones recovered from the accused as well as of that of PW-3 were obtained. PCR forms i.e. Ex.PW16/C, PW17/C, PW18/C, PW18/F and PW18/I were also collected.

Charges

24. On the completion of the investigation, a charge-sheet was filed. By the order dated 17th March, 2012, charges were framed against the three accused

for the aforementioned offences with separate charges against A-1, as already noted hereinbefore.

25. It appears that a supplementary charge sheet was filed on 14th August 2013 after the DNA report was received along with the report of the physics division and biology division of the FSL. It shows that the 'O' group (blood group of the deceased) was detected on the exhibits lifted from the spot as well as on the clothes of the deceased whereas the grouping of the other exhibits, including the pants and shirts of the three accused could not be ascertained.

26. As regards the report of the physics division of the FSL, the cut marks on the shirt and *baniyan* (vest) of the deceased (Ex.7 and 9b) were examined physically and under magnification. The cut edges were found to be sharp. Significantly, no cut marks were noticed on the pants of the deceased to prove that his wallet was stolen by cutting the pocket with the knife.

27. As regards the DNA report, the DNA profile from the source of exhibit 12 (knife) and exhibit 15b (one full sleeve shirt of Rudramani, A-1) was similar with the DNA profile from the source of the Exhibit 10 (blood gauze sample of deceased). No DNA profile could however be isolated from the source of exhibit 16 (T shirt of the Rohit, A-2).

28. 34 prosecution witnesses (PWs) were examined. It is significant to note at this stage that 25 PWs were examined on a single day i.e. 12th August 2013. These were, PWs 7 to 30 and 32. These included the official witnesses

but also certain public witnesses, the doctor who conducted the post-mortem as well as the IO. This Court will comment on this aspect at a later stage.

29. The prosecution evidence was concluded initially on 24th September 2013. Thereafter an application was filed on behalf of A-1 under Section 7A of the JJ Act for determination of his age. The matter was then adjourned to 21st October 2013.

Defence of A-2 and A-3

30. The statements of the three accused were recorded on 21st October 2013 under Section 313 Cr PC. As these appeals have been filed by A-2 and A-3, it is not necessary to refer to the statement of A-1. As far as A-2 is concerned, while denying the circumstances against him, he stated that he had been falsely implicated and that he had been lifted from Subzi Mandi Market, Haiderpur on 19th October 2011. A-2 further stated that nothing had been recovered at his instance and he did not make any disclosure statement as alleged.

31. As far as A-3, Sunil, is concerned, he too denied the circumstances against him and claimed to have been falsely implicated after being arrested from Madhuban Chowk on 18th October 2011. He too stated that he did not make any disclosure statement and nothing had been recovered from his possession.

Proceedings of 22nd August 2014

32. The record of proceedings before the trial Court shows that hearing with regard to the age of A-1 continued for several dates. When the matter was

listed on 11th August 2014, the APP filed an application to recall SI Afaq Ahmed (PW-24), HC Naresh Kumar (PW-26) and Inspector Virender Kadyan (PW-31) and on this application while issuing notice, the matter was fixed for 22nd August 2014. The trial Court, in the interests of justice, allowed the said application on 22nd August 2014. These three witnesses were examined on that date and again discharged. According to the learned trial Judge, since no new additional incriminating evidence had come on record and only corrections were made in the exhibits numbers, no additional statement under Section 313 Cr PC was required to be recorded.

33. On the very same day, i.e., 22nd August 2014 the trial Court at 4 pm pronounced the impugned judgment running into 224 pages. It is significant that right on top of the judgment, it is stated “date on which the orders were reserved: 22nd August 2014, the date on which judgment pronounced: 22nd August 2014.” It is simply inconceivable that on a single day i.e. 22nd August 2014, after allowing the application of the prosecution and after recording the additional evidence, the learned trial Judge could have dictated a 224-page judgment, corrected the draft and pronounced it at 4 pm on that very date.

34. As already noted, the two Appellants were convicted by the judgment dated 22nd August 2014. The order on sentence was passed on 3rd September 2014 in the manner indicated hereinabove.

35. This Court has heard the submissions of Mr. Prakash Gautam, learned counsel for A-2, the Appellant in Criminal Appeal No. 139 of 2015 and Mr.

K. Singhal, learned counsel for A-3, the Appellant in Criminal Appeal No. 1541 of 2014. Ms. Radhika Kolluru, learned APP appeared for the State in both appeals.

Impugned judgment of the trial Court

36. In the impugned judgment, the trial Court concluded as under:

(i) The contradictions and discrepancies in the testimonies of the police witnesses and the eye-witness were immaterial and did not affect the probative value of their testimonies.

(ii) The sole eye-witness (PW-3) had no history of any dispute with the accused persons. There was no reason for him to falsely implicate them. His evidence was trustworthy and corroborated by the forensic and medical evidence.

(iii) The recovery of the belongings of the deceased from the three accused independently lent credence to the oral testimony of PW-3. The CDR of the mobile phone used by PW-3 established that he made a call at 100 at 10.24.02 pm on 15th October 2011 which lasted for 107 seconds while his location was in the area of North Campus, i.e. around the spot of the incident. The CDRs of A-1 to A-3 also confirmed their locations in the area around the spot where the crime took place.

(iv) The CDR of the phone of Deepak Kumar (PW-19) used by A-1 showed that A-1, A-2 and A-3 were known to each other and have been communicating each other.

(v) the medical evidence corroborated PW-3 about three assailants inflicting knife injuries on the head and chest of the deceased after which they cut his pocket with the same knife, removed his purse and ran away.

(vi) The biological report confirmed the presence of human blood on the clothes of the A-1, A-2 and A-3. The DNA Fingerprinting report confirmed the presence of the alleles of the deceased on the knife and clothes of A-1.

A fundamental error

37. In para 157 of the impugned judgment, the trial Court set out a table with four columns, viz., Serial No. (Column No. 1) , Name of the accused (Column No. 2), Disclosure made by the accused admissible in evidence under Section 27 of the Evidence Act and not hit by Section 25 of Evidence Act (Column No. 3) and discoveries/recoveries and witness to the same (Column No. 4).

38. Although Column No. 3 is titled 'Disclosure admissible in evidence and not hit by Section 25 of the IEA', the Court finds that in respect of both A-2 and A-3, the learned trial Judge has proceeded to include portions of their purported disclosure statements which are in fact hit by Section 25 of the IEA. For e.g., as regards A-3, Column No.3 includes his purported disclosure that A-2 also met them at Azadpur *subzi mandi* and then they all planned that A-2 would catch hold of the neck of the victim, A-3 would catch hold of the victim from the rear and A-1 would commit the robbery on the point of knife. It also includes his purported disclosure that when the victim passed near them, A-2 caught the neck, A-3 caught hold of him from his waist and A-1 tried to commit robbery on the point of knife, and further

when the victim put up a stiff resistance, on the exhortation of A-2 and A-3, A-1 gave a blow on the forehead of the victim from the rough surface of the knife. Even after this, the victim continued resisting the attack and so, A-1 stabbed him and cut out his purse from his pocket. They then shared the cash in the purse.

39. While Column No. 3 in respect of A-2 also sets out the admissible portion of the disclosure viz., that A-2 offered to get recovered the knife used by A-1 and the articles of the deceased and his own clothes, Column No.3 also unfortunately includes portions of the disclosure of A-2 which contains self-incriminating statements that are clearly inadmissible in terms of Section 25 of the IEA.

40. Again as far as A-3 is concerned, the inadmissible portions of his statement have been extracted in full in Column No.3. This is a basic and fundamental error. Statements of the accused hit by Section 25 IEA are not only inadmissible and not to be relied upon, but importantly should not have been extracted in the judgment and should not have entered the frame of consideration of the evidence by the learned trial Judge.

41. This is not the first time this particular learned ASJ has committed such a fundamental error. Only recently in its judgment dated 26th February 2018 in Criminal Appeal Nos. 997 of 2015 (*Sunil @ Raghu v. State*) this Court had the occasion to comment on this error while setting aside another of the learned ASJ's judgments as under:

“51. At this stage the Court would like to dwell on a serious lapse in the impugned judgment of the trial Court in recounting the

circumstances, which according to the trial Court were established by the prosecution. In para 147 of the impugned judgment (internal page 126) the learned ASJ notes one of the circumstances proved as follows:

"That the accused Sonu was interrogated by the Investigating Officer during which the accused disclosed his involvement in killing of the deceased Salman."

52. Plainly the learned trial Judge overlooked Section 25 of the Indian Evidence Act and failed to realise that such a disclosure by A-2 to the IO was inadmissible in evidence. It should not have even entered the frame of consideration by the trial Judge of the evidence in a criminal case. This is a basic and fundamental error."

42. Again while setting aside another judgment of the same learned trial Judge this Court by judgment dated 28th February 2018 in Crl. A. No. 1310 of 2014 (*Surender @Dheeraj v. State*) and connected appeals noted as under:

"81. At this point, it should be noticed that in para 235 of the judgment, the trial Court has, in a tabular form, set out four columns - serial number, name of the accused, their "disclosure made by the accused admissible in evidence under Section 27 of the Evidence Act and not hit by Section 25 of the Evidence Act" and lastly, "discoveries/recoveries (witness to the same)".

82. Against the name of A-4, the trial Court has in the third column set out virtually the entire statement of A-4 including "the accused disclosed that he had given the pistol and four live cartridges to Shrikant @ Appu on hire for 15 days for Rs.2,000/-...." and "Appu had returned the pistol and informed him that he had shot a fire from this pistol and robbed a Honda City Car from the victim" and further about the accused having disclosed that A-3 "informed him about the incident of having shot the victim". In fact, none of these statements as set out by the trial Court is admissible in evidence. It is surprising that the actual admissible portion of his disclosure, viz., that he could take the police party to the place where he had kept the pistol and

would have helped them recover the pistol has not even been set out in the third column. This is too glaring an error to be overlooked. It is such a basic and fundamental error that this Court is inclined to term it as a perverse conclusion reached by the trial Court that the disclosure statement of A-4 as extracted by the trial Court in para 235 of the impugned judgment is admissible in evidence and that could form the basis for holding that the very first link in the chain of circumstances regarding A-3 having taken a pistol from A-4 on payment of Rs.2,000/- for the purposes of commission of the crime, and his returning the pistol thereafter to A-4, stood proved.”

Too many PWs examined on the same day

43. As has been repeatedly done by the same learned ASJ, who is the author of the impugned judgment, in the past, she has in the present case examined as many as 25 PWs on a single day i.e. 12th August 2013. This Court has had to interfere to set right the miscarriage of justice on earlier occasions as well.

44. In its judgment in *Sunil @ Raghu v. State* (*supra*), while setting aside another judgment of this very learned ASJ, and where again 22 PWs were examined on a single day, this Court observed:

“25. This Court has had occasion in the past to decry this manner of conducting a criminal trial by the very same learned ASJ. In fact, this Bench has in the past few months had occasion to review a number of judgments of this particular learned ASJ and finds that in similar cases involving very serious offences punishable with the death sentence or life imprisonment, this learned ASJ fixes a single date for the entire prosecution evidence, within a month or two of the framing of charges. This results in defence counsel, who invariably are amicus curiae, insufficient time to prepare the defence after consulting the accused, some of whom may be in jail. When on a single day the learned ASJ records the evidence of an unusually large number of PWs, and these could include public witnesses, formal witnesses,

expert witnesses and the IO, the defence counsel does not get the requisite time to prepare and ask meaningful questions in cross-examination.”

45. In its decision in *Sunil @ Raghu v. State* (*supra*), this Court referred to the earlier decisions in *Sanjay Kumar Valmiki v. State* 2014 III AD (Del) 505, in which the same learned ASJ examined 17 PWs on the same day and this Court had to set aside that judgment. It also referred to the decision dated 6th February 2018 in CrI.A.835/2014 (*Manoj v. State*), where again this Court set aside another judgment of the same learned ASJ in a case where 22 PWs were examined on the same day i.e. 21st May 2013. This Court in *Sunil @ Raghu v. State* (*supra*) where again 22 PWs were examined on the same day further observed:

“28. In a trial involving offences punishable with imprisonment for life or death, where there are independent witnesses apart from the formal witnesses and the main witnesses to the investigation, the trial Court must ensure that sufficient time is granted to the defence, especially if they are legal aid counsel for their cross-examination. Although the mandate in the Cr PC is to conduct the trial on a day to day basis, it would be an extreme proposition that the entire prosecution evidence is recorded on a single day in such cases involving grave offences. While it is necessary for the trial Court to be vigilant against defence tactics that might seek to unreasonably postpone the trial and use the interregnum to win over witnesses, it would be an over-reaction to have the entire prosecution evidence of as many as 22 witnesses recorded on a single day. In a case where the defendants face charges that are punishable with the death sentence and particularly where they are represented by legal aid counsel, the trial Court should exercise some caution as well as restraint to ensure that the counsel has sufficient time to prepare for the cross-examination. It must be realised, that counsel may have to consult the accused who is represented before putting specific questions to a

witness. This requires some time and privacy and cannot be expected to happen in the court room in front of the judge.”

46. In the present case, the 25 PWs examined on the same day i.e. 12th August 2013 included the eye witness i.e. PW-3, the investigating officer, the forensic expert, the doctor who performed the post-mortem and formal witnesses. It hardly needs pointing out that defence counsel need sufficient time gap, not being unreasonably long, to prepare for the cross-examination of the key witnesses.

47. The occasions where this very ASJ has committed such grave errors of procedure resulting in miscarriage of justice have been far too many to be condoned. It bears repetition that the right of an accused to a fair hearing may be vitiated by an "overhasty, stage-managed, tailored and partisan trial". The more serious the crime the greater the need to ensure that there is no compromise whatsoever on fair trial procedures. Otherwise the constitutional guarantee enshrined in Article 21 of a just, fair and reasonable procedure established by law, would be rendered illusory. The zeal of a trial Judge to ensure speedy justice should not defeat the constitutional guarantee of a fair trial, particularly in cases involving serious charges punishable with death or life sentence.

Invoking Section 296 Cr PC

48. Another strange aspect of the matter is that the trial Court has in respect of the following nine PWs accepted their affidavits by way of examination-in-chief since they were thought to be merely formal witnesses. This was presumably done, under Section 296 Cr PC, to cut short the time in

recording their evidence. However, as rightly pointed out by Mr. Singhal, 8 of these 9 PWs were in fact not mere formal witnesses. In a tabular column he has pointed out as under:

Name of the witness	Relevancy qua the allegations	Why they are not formal
PW-7 HC Radhey Shyam	Witness to deposition of recovery of alleged exhibits to Malkhana and depositing the same with FSL	The witness is important as the entire case of prosecution is dependent on the alleged recovery of articles including the personal belongings of the deceased which would dent the story of robbery
PW-8 Insp. Manohar Lal	Witness to the site plan	The witness is not at all a formal witness at least in the circumstances of the present case as the position of the alleged eye witness could be ascertained from this witness only.
PW-9 Ct. Pradeep Kumar	Witness to the seizure of exhibits	The witness is important as the entire case of the prosecution is dependent on the alleged recovery of articles including the personal belongings of the deceased which would dent the story of robbery.
PW-10 HC Praveen Kumar	Witness to Duty Roster	To ask as to what time the deceased left the duties at P.S. Narela – to ascertain the correct timings also.
PW-11 Ct. Ramesh	Photographer of Crime Scene	Important to throw light on the aspect of distance of Adarsh Nagar Metro Station,

Chander			Street Light, Red Light etc.
PW-12 Nanhe Mishra	HC Lal	Witness who was handed over the exhibits/articles of deceased by the doctor	Very important to show that the purse of deceased was later on planted upon the accused persons.
PW-13 Parshu Ram	Ct.	Formal Witness	Formal Witness
PW-14 M.D. Meena	St.	Crime Team Expert	Important as Crime Team was to lift the chance prints/finger prints and also important witness to the site of incident.
PW-23 Himmat Singh	HC	Witness to the recovery of exhibits from the crime scene	Important witness in respect of spot, accessibility of public to the spot etc.

49. Section 296 Cr PC which permits evidence of formal character to be placed on affidavit reads as under:

“296. Evidence of formal character on affidavit.

(1) The evidence of any person whose evidence is of a formal character may be given by affidavit and may, subject to all just exceptions, be read in evidence in any inquiry, trial or other proceeding under this Code.

(2) The Court may, if it thinks fit, and shall, on the application of the prosecution or the accused, summon and examine any such person as to the facts contained in his affidavit.”

50. Having examined their depositions carefully, the Court is inclined to agree with learned counsel for A-3 that eight of the above nine witnesses

were not really of a formal nature. The trial Court appears to have resorted to Section 296 Cr PC and accepted the affidavits of the said 8 PWs on the premise that it would avoid wastage of time. However, before adopting such procedure, the trial Court ought to have examined whether in fact the said PWs were of formal nature.

Prolixity

51. The Court finds that many of the judgments of the same learned trial Judge are unnecessarily prolix. In the instant case, despite the impugned judgment running into 224 pages, there is no real analysis of the evidence. It is not the length of the judgment that matters but its quality. The reasoning in a trial Court judgment must be discernible. It must explain why one set of arguments are more convincing than the other. Why one conclusion is more logical than another. Rhetoric cannot be a substitute for reason.

52. As already noticed, this 224 page judgment of the trial Court is supposed to have been reserved and then dictated and pronounced on the same day, i.e., 22nd August 2014 which is simply impossible to believe considering that on that very day in the forenoon (presumably) the learned ASJ allowed an application of the prosecution and recorded the additional evidence of four PWs.

Not a case for re-trial

53. Having noticed the procedural and substantive legal errors that appear to have vitiated the trial, the Court now proceeds to the merits of the impugned judgment. In cases of this nature, where an appellate Court finds that there

are incurable legal errors vitiating the trial, there are two courses available to the Court, in terms of Section 386 Cr PC. One option is to set aside the impugned judgment of the trial Court and send the matter back to it for a re-trial. While exercising that option, the appellate Court would have to be conscious of the time factor and most importantly the interests of justice. If sending the matter for a re-trial would not subserve the interests of justice, considering that on the basis of the evidence gathered, no useful purpose would be served, the appellate Court might not opt for that course. The second option then available to the appellate Court is to examine the evidence on merits itself.

54. In the present case, the incident has occurred in the year 2011. To send the matter back for a re-trial would delay the final resolution of the case. The prosecution has already placed on record all the evidence it has. Both Appellants have already served around six years of their sentence. In the circumstances, the better course would be for this Court to examine the matter on merits rather than remand it for a fresh trial.

Analysis of the evidence of PW-3

55. Turning now to the actual analysis of the evidence, first the Court proposes to discuss the testimony of PW-3, the lone eye-witness. PW-3 was purportedly on his motorcycle when he was proceeding on 15th October 2011 towards Mukherjee Nagar at around 10 pm. When he reached near the Adarsh Nagar Metro Station towards the side of Azadpur, there was a red light and a traffic jam. He states that he stopped his motorcycle by the side of the road near the red light. According to him, he was present “near the exit gate of Adarsh Nagar Metro Station.” He then heard some noise on

which he turned back to see what had happened. He noticed that three boys, in the age group of about 25 years had caught hold of one person who was trying to release himself from the clutches of those boys. One boy had caught hold of his neck, a second boy held him from the waist and the third having a knife inflicted the first knife blow on his head and thereafter on the left side of his chest. Thereafter the boys removed the purse from the pocket of the pants worn by the victim after cutting his pocket and then ran away. In the meanwhile, the traffic light changed to green and PW-3 moved ahead on his motorcycle. He stopped after some distance and called the police at 100 number from his mobile number 9990639518 at 10:24 pm.

56. A copy of the PCR form which has for some reason not been exhibited shows that the call was made at 10:24:54 pm. The caller gave his address as Batla House, Jamia Nagar. He indicated the spot as “*Adrash Nagar Metro Station ke neeche*”. The exact information was “*yahan par chaar log jo kucch logo ko loot rahe hai caller ne bataya ki yeh 15 minutes pehle ke baat hai.*” Therefore, the information was only about four people stealing something and not about anyone being stabbed, much less about three boys catching hold of a person and one of them stabbing him twice, i.e. once on the head and the second time on the chest.

57. The second strange feature is that PW-3 gave his address as Batla House. If that were true, then at 10 pm in the night, after going to the hospital to see the new born baby of his sister it seems unlikely that he could have been present near or heading towards Azadpur side. But perhaps to overcome this confusion, PW-3 offered an explanation that his address was in fact at

Mukherjee Nagar which is where he was headed and that in his Customer Application Form (CAF) for the mobile connection, he gave the address of a friend at Batla House.

58. The PCR Form shows the address of PW-3 at Batla House. This is the information that he himself gave the police. When asked for an explanation for giving a false address he stated as under:

“At the of obtaining mobile connection on my ID of U.P. address, the shopkeeper asked me to furnish some local address of Delhi, therefore, I gave the address of my friend of D-35, Lane No. 1, Batla House, Okhla, New Delhi.”

59. The CDR of the mobile phone of PW-3 further shows that at 10:12 pm on 15th October 2011, he had spoken to someone on his mobile phone while he was in Gujrawala Town. When he made the call to the police at 10:24:04 pm on 15th October 2011, he was at the north campus. While he could confirm the route taken by him, it shows that he was still in Okhla Vihar at 11:04 pm and he was already heading towards Okhla Village near Jamia at 11:38 pm and reached Batla House at 11:53 pm. This contradicts his plea that he was heading to Mukherjee Nagar or that his address was at Mukherjee Nagar. What he failed to explain is that after making the call from the north campus at 10:24 pm, how was he in Okhla Vihar at 10:28 pm in the opposite direction? Clearly therefore, he turned around his motorcycle to go back to his house at Batla House. This raises serious doubts about whether as claimed by him, he lived in Mukherjee Nagar and whether he had even witnessed the incident first hand while travelling from GTK

Hospital towards Mukherjee Nagar. Whether he was in fact on the Azadpur side is also, therefore, in doubt.

60. The rough site plan prepared by Inspector Binod Kumar Singh (PW-28) was exhibited as PW-28/A. This was prepared on 16th October 2011 at a time when the statement of PW-3 had not been recorded by the police. Although his mobile number was mentioned in the PCR form, he was not contacted till 17th October 2011. This rough site plan shows that there is a footpath on which there is a light. It has two alphabets: 'A' where the dead body was lying and which also showed some blood, and 'B' on the footpath itself where blood spots in three groups were lying. There was no indication of any traffic light in this rough site plan.

61. Next we come to the scaled site plan Ex.PW-8/A which was prepared on 23rd December 2011 i.e. more than two months after the incident by which time the statement of eye-witness has already been recorded. This was drawn up by SI Manohar Lal (PW-8). In his examination-in-chief he states that at the instance of PW-28 he drew it up. What is strange is that even in the scaled site plan there is no indication of the following:

- (i) The position of the traffic light
- (ii) The exact place where the PW-3 was waiting for the traffic light to change from red to green while sitting on his motorcycle
- (iii) The place from where he turned and noticed the incident.

62. There are only three alphabets in the scaled site plan. 'A' is the footpath which shows where the deceased was lying in a dead condition and blood was also lying. 'B' was the place where the blood stains were lying. 'A' and

‘B’, therefore, corresponds to A and B in the rough site plan. ‘C’ is the point where a street light was located. In other words, in the scaled site plan the position of PW-3 is not indicated. This is indeed a serious lapse in the investigation for which there is no satisfactory explanation.

63. The learned APP sought to suggest that the traffic light must have been further down the road in which case PW-3 would have to turn his head to the left amidst all the traffic in order to look at what was happening behind him. Even for him to have noticed what was occurring clearly from that distance amidst traffic must have been very tough.

64. In this context, PW-3’s evidence must be carefully perused. In his cross-examination by learned counsel for A-1, he stated that at the time of the incident, he was residing at House No. 862, Mukherjee Nagar, Delhi. However, in the PCR form he gave his address as Batla House. It must be recalled that PW-3 left the hospital at about 10 pm and took the straight route and reached the red light in front of the exit gate of the hospital, which took him about 10 minutes. He states that the distance between the red light, where he was standing and the place of occurrence was hardly 10 to 15 meters. He states that that place was similar to the shape of triangle, i.e., “position of my bike, exit place of metro station and the place of incident.” However, a close perusal of the scaled site plan does not indicate any such triangular shape.

65. It is seen from the scaled site plan that if PW-3 was waiting on his motorcycle near the footpath in front of the red light he could not have been in the triangle position with the exit gate and the place where the attack was

happening. The Court is unable to agree with the trial Court that this triangular position spoken of by the witness is clearly depicted in the scaled site plan. In fact, it is not. This only shows that the trial Court has actually not paid attention to the fact that the scaled site plan does not bear out what this witness is saying.

66. The further aspect is that PW-3 says “I was standing behind a truck at the red light, that is why I have no idea about the number of vehicles held up in the traffic jam. Mostly vehicles were truck in the jam at that time.” He further states that he was present on the left side of the road and his legs were on the footpath and that footpath was having a height of about two or three feet from the road and nobody could have run over his bike on the footpath where he was standing.

67. In that kind of a position, for this witness to be able to turn back to see what was happening from a distance of 15 metres is a bit strange. However, he confidently stated that A-1 was stabbing the deceased wearing “white and brown coloured checked shirt and black coloured pants.” A-2 was wearing “black shirt” and A-3 was wearing “light coloured like whitish pants and shirt.” It is next to impossible that PW-3 noticed all of this in the brief interlude when he was waiting at the traffic signal. While the call made by him to the police is confirmed by the CDR, it is not possible to believe this witness when he was able to give so many details about the incident in the Court despite the fact that the only information he gave to the PCR was that somebody was being robbed by four persons.

68. Further, the CDR showed that PW-3 had spoken to someone at 10:12 pm whilst in Gujranwala town and then made the call to the PCR from north campus at 10:28:04 pm. The distance between the two areas is considerable and if he was waiting at the Adarsh Nagar Metro Station traffic light, he could not have been waiting for a long time since he had reached the north campus by 10:24 pm. In that brief spell, whilst he waited at the traffic light in between lorries, for him to turn back over his left shoulder and view the incident so clearly and distinctly must have been impossible. He states that he got afraid and did not call anyone from the trucks because the accused were armed but that was not what he conveyed to the police control room when he gave the call.

69. PW-3 also claimed that he had photographs of the metro line and that he took photographs from his mobile camera which were still with him but that he did not disclose this fact to the police.

70. The conclusion of the above analysis of the evidence of PW-3 is that it is not entirely convincing as being that of a truthful and reliable witness. Even if one were to separate the grain from the chaff, what one is left with is only that PW-3 witnessed one person being attacked by 4 persons for the purposes of robbery and not that PW-3 actually saw the events as described by the prosecution involving the present accused. In other words, it would be unsafe to return a finding of guilt only on the basis of the evidence of PW-3. It requires corroboration from other materials which are not forthcoming.

The CDRs of the accused

71. The CDR of A-1 shows that at 9:50 pm he was at Majlis Park and at 10:24 pm he was at Azadpur when calls were made between him and A-3. There are earlier calls between him and A-2 and A-3 on earlier dates in the area of Majlis Park, Adarsh Nagar. With A-1 and A-3 being related, that is not strange. Also their addresses are in the same area. As far as CDR of A-3 is concerned, his location at 9:49 pm on 15th October 2011 was at Sarai Pepal Thala and at 10:22 pm at Subzi Mandi. Whether he could have covered that distance in this short time when there was traffic and he was on foot is extremely doubtful. What it does indicate is that they were not together at either 9:49 or 10:24 pm. This by itself does not prove that they were together near the Adarsh Nagar Metro Station at the purported time of occurrence of the crime.

72. As far as A-2 is concerned, he was supposed to be using a mobile phone issued in the name of one Naveen Kumar. A-2's location on 15th October 2011 at 9:17 pm is at Bholla and at 11:25 pm is at Sanjay Nagar. The evidence in regard to Naveen Kumar is strange. It has been admitted by the police that they could not find him. This emerged in the final charge sheet. The election identity card of Naveen Kumar gives his address as Village Bharola. The consumer application form also gives the same address, and yet they could not find this person and did not produce him as a witness. The benefit in this regard must enure to A-2 since the mobile phone of this person is said to be attributed to A-2 without him being in fact examined. Therefore, no reliance could have been placed on the CDRs of this mobile phone which was not even in the name of A-2 and certainly no inference

could be drawn from the said CDR against A-3 without examining Naveen Kumar and ascertaining that his mobile phone was in fact used by A-2. Consequently, the Court is unable to agree with the trial Court that all the above evidence fixes the position of A-2 and A-3 at the spot.

FSL reports

73. Turning now to the reports of the FSL, it is plain that the blood group on the clothes of A-2 and A-3 did not match with the blood group of the deceased. Merely because it was human blood would not connect them to the crime. The DNA Finger Print report also showed that no profile could be generated from the stains on the clothes of A-2 and A-3. A perusal of the report (Ex.PW-3/A) shows that DNA could not be amplified from the source Ex.-14A and 14B being the pant and shirt of A-3 and 15A being the jeans of A-1. Only the blood on the shirt of A-1 was said to belong to the group of the DNA from the source of the blood gauze of the deceased. Therefore, even the forensic evidence did not connect A-2 and A-3 with the crime.

74. Another significant aspect which was completely overlooked by the trial Court is that when the pants of the deceased were sent to the FSL, no mention was made of any cutting noticed on the said pants. If indeed a knife was used to cut the cloth of the pant, then that cutting should have been noticed but it was not. Even the post mortem report (Ex.PW-29/A) does not indicate that the pant of the deceased was found cut.

Recoveries of articles of the deceased

75. The recoveries of articles from the houses of A-1, A-2 and A-3 also do not inspire confidence. A-1 and A-2 were related as uncle and nephew.

They both lived at the same address, yet the recoveries are shown separately and on separate occasions which is inexplicable.

76. The site plan drawn up of the place from where the recovery was made, raises more questions than it provides answers. This is a rough site plan (Ex.PW-31/A) in which merely the location of the house is indicated with the letter 'B'. Surely, the purse must have been in some place inside that house. That, however, is not indicated. The rough site plan is therefore, most unhelpful and prepared without any application of mind.

Recovery of mobile phone doubtful

77. As regards the proof of robbery, it is pointed out that the purse of the deceased was available at the hospital at the time of his post mortem and therefore it ruled out the possibility of it being recovered at the instance of either A-2 or A-3. In his deposition, SI Asfaq (PW-24) admitted in his examination-in-chief on 12th August 2013 that purse of the deceased was handed over by the doctor and it is marked as Ex.P1. In the second round of examination of this witness, one year later on 22nd August 2014, he did a somersault and claimed that he had not said so. This could not have been termed by the trial Court as correction of a mere typographical error. There was very minimal cross-examination on this important aspect.

78. The Court questions and answers on 22nd August 2014 to this witness is revealing and is reproduced as under:

“Court question:

In your testimony dated 12.08.2013 you had identified a brown purse Ex. P1 as the one which was handed over to you by the doctor at BJRM hospital In your entire testimony you had not mentioned that

this purse was also one of the articles handed over to you nor the seizure memo Ex.PW24/A mentions about this purse. Now I am asking you to clarify whether this purse Ex.Pl was handed over to you by the doctor if yes, than why it does not find mentioned in the seizure memo prepared by you and in the testimony.

Ans.

No, this purse was not handed over to me by the doctor. The doctor/autopsy surgeon had only handed over to me a sealed pullanda. The articles in the open condition which were one mobile phone make Nokia, one black bag with the words DONEX written on the same, the bag contained one uniform of Delhi police, one brown coloured shawl, one light blue towel, one pair of socks, Rs 13 A cash, one belt of Delhi police, one cap of Delhi police and one I card of Delhi police with the name Ct. Harkesh Meena with PIS No. 28102841. I clarify that no purse of brown was present in the bag so handed over to me by HC Nanhe Lai Mishra. I clarify that in the court I only see the bag and the contents and it is the bag which has been mentioned by mistake as Purse. I can identify the said articles again.”

79. The trial Court has in its proceedings of 22nd August 2014 (which was also the date of the impugned judgment) termed the above change as a mere typographical error. This conclusion is totally inexplicable.

80. The contents of the purse also creates doubts about its recovery. For e.g., a mark sheet of the degree course pursued by the deceased of some earlier year and a host of other documents were stated to have been in the purse. This again is not convincing.

81. Even the recovery of the blood stained shirt of A-3 raises serious doubt. They went to his *jhuggi* on 19th October 2011 and yet the shirt was not recovered on that date. When they went again on 21st October 2011, the shirt was able to be recovered.

82. The Court is therefore, not convinced that the prosecution has proved the case against both the accused beyond reasonable doubt. The case of the prosecution hinged essentially on the eye witness testimony of PW-3 which as already pointed by this Court is unreliable. Even if the entire evidence of PW-3 is kept out, the other evidence put forth by the prosecution do not conclusively point to the guilt of A-2 and A-3.

Conclusion

83. For all the aforementioned reasons, the Court grants benefit of doubt to the Appellants and acquits them of the offences under Section 392 IPC read with Section 397 and Section 302/ 34 of the IPC as well as Section 24, 27, 54 and 57 of the Arms Act.

84. The impugned judgment dated 22nd August 2014 of the trial Court and the order on sentence dated 31st August 2014 are hereby set aside. The bail bonds and surety bonds furnished by the Appellants are discharged. They will comply with the requirement of Section 437A Cr PC to the satisfaction of the trial Court at the earliest.

85. The appeals are accordingly allowed, with no orders as to costs. Pending application is also disposed of. The trial Court record be returned together with a certified copy of this judgment.

S. MURALIDHAR, J.

I.S. MEHTA, J.

MARCH 06, 2018/anb