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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 22nd May 2018

Decided on: 31st May 2018

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CRL.A. 1043/2013

SUNDER PASWAN & ORS

.....Appellants

Through: Mr. Dhan Mohan, Ms. Tanu
Bakshi Mishra, Mr. Ravi
Mishra and Ms. Harkamal Jeet
Kaur, Advocates.

versus

STATE NCT OF DELHI

....Respondent

Through: Mr. Amit Chadha, APP for the
State

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CRL.A. 1328/2014

LAL BABU @ SANJAY

.....Appellant

Through: Mr. Dhan Mohan, Ms. Tanu
Bakshi Mishra, Mr. Ravi
Mishra and Ms. Harkamal Jeet
Kaur, Advocates.

versus

STATE NCT OF DELHI

....Respondent

Through: Mr. Amit Chadha, APP for the
State

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

J U D G M E N T

Dr. S. Muralidhar, J.:

1. These two appeals are directed against the common impugned judgment dated 3rd April 2013 passed by learned Additional Sessions Judge-II (North-

West), Rohini Courts, Delhi in Sessions Case No.38/2011 arising out of FIR No.115/2011 registered at PS Shalimar Bagh convicting the three Appellants herein, i.e. Sunder Paswan (A1), Lal Babu @ Sanjay (A2) and Devender @ Bedu (A3), as follows:

- (i) All three Appellants were convicted of the offence under Section 302/34 IPC.
- (ii) A1 and A2 were convicted for the offences under Section 394 read with Sections 397/34 IPC.
- (iii) A2 was convicted for the offence under Section 394/34 IPC.
- (iv) A1 was further held guilty for the offences under Section 25/27/54/59 Arms Act.

2. These appeals are also directed against the order on sentence dated 16th April 2013 whereby the Appellants were sentenced in the following manner with a direction that sentences were to run concurrently:

- (i) For the offence under Section 302/34 IPC, all three Appellants were sentenced to rigorous imprisonment (RI) for life along with fine of Rs.50,000/- and in default of payment of fine, to further undergo simple imprisonment (SI) for six months. It was further directed that the fine amount, if recovered, shall be given to the family of the deceased Buddhi Lal as compensation under Section 357 Cr PC.
- (ii) For the offence under Section 397/34 IPC, A1 and A3 were sentenced to RI for a period of seven years along with fine of Rs.5,000/- and in default of payment of fine, to further undergo SI for one week.
- (iii) For the offence under Section 394 IPC, A2 was sentenced to RI for a period of five years along with fine of Rs.5,000/- and in default of

payment of fine, to further undergo SI for one week.

- (iv) For the offence under Section 25/27/54/59 Arms Act, A1 was sentenced to RI for a period of five years along with fine of Rs.5,000/- and in default of payment of fine, to further undergo SI for one week.

3. Crl. Appeal No.1043/2013 has been filed by A1 and A3 jointly while Crl. Appeal No.1328/2014 has been filed by A2.

Charges

4. The first charge against the three accused was that at around 10 pm on 30th March 2011, at C & D Block, Outer Gate, near Badli Mor, Shalimar Bagh, in furtherance of their common intention, they committed the robbery of a mobile phone of make 'Spice S-525' and voluntarily caused hurt to the deceased Buddhi Lal and thereby committed an offence punishable under Sections 394/34 IPC.

5. The second charge was that all of them, in furtherance of their common intention, murdered the deceased by inflicting knife blows - including two on his chest - while committing the aforesaid robbery and thereby committed an offence punishable under Section 302/34 IPC. Separate charges under Section 397 IPC were framed against A1 and A3 for using a deadly weapon (knife) at the time of committing the robbery. A1 was also charged under Section 25/27/54/59 Arms Act.

Initial PCR call

6. Head Constable Sangeeta (PW11) received a Police Control Room ('PCR') call at around 10:23 pm on 30th March 2011 while posted in Shift-A

at the Police Headquarters ('HQ') as a Channel Operator about a murder having taken place ("*khoon ho gaya hai*") at C & D Block, Shalimar Bagh near Badli Mor, Gate No.4.

7. Meanwhile, Head Constable Pawan Kumar (PW5), who was posted as Duty Officer at PS Shalimar Bagh, received a PCR call at around 10:35 pm on 30th March 2011 regarding the same incident from a wireless operator through intercom and was noted down by him as DD No.32A. This was entrusted to Sub-Inspector Parveen Kumar (PW39). He along with Constable Pawan (PW36) proceeded to the spot in front of C & D Block, Haiderpur where they found blood scattered on the ground. The *chowkidar* present there informed PW39 that beat Constable Ram Phal (PW34) had earlier come there and taken the victim to the BJRM Hospital.

MLC of the deceased

8. Leaving behind PW36 to guard the spot, PW39 proceeded to BJRM Hospital. Upon reaching there, he came to know that the injured had been shifted to the Trauma Centre. The medico-legal certificate ('MLC') of the deceased prepared at the BJRM Hospital showed that a person of unknown name had been brought by PW34 at around 10:35 pm. He was semi-conscious and responded to pain stimulus but was not responding to the vocal stimulus. There was a stab injury on the right chest wall laterally below the armpit. A noting at 10:40 pm was to the effect that he was unfit for statement. A reference was made to the Trauma Centre. At around 3:25 am on 31st March 2011, the deceased expired at the Sushruta Trauma Centre, as is reflected in the death certificate (Ex.PW18/A).

9. Meanwhile, PW39 returned to the spot. The crime team reached there and a photographer also reached there. PW39 prepared the *tehrir* at the spot and sent it to the PS for registration of the FIR. He also lifted the earth control and bloodstained earth and sealed the samples.

Medical evidence

10. The post-mortem examination of the deceased was conducted by Dr. Bhim Singh (PW13) along with Dr. Ankita Dey (Senior Resident) of the BJRM Hospital on 6th April 2011. The external examination revealed three incised wounds – one over the left chest; another on the right side of the chest; and a third organ deep over the right side of the chest 9 cm below the right nipple. The opinion was that the death was on account of septicaemia consequent upon the stab wound, i.e. injury no.3. All injuries were said to have been caused by a single sharp-edged weapon. Injury no.3 was held to be sufficient to cause death in the ordinary course of nature.

11. Subsequently, on 18th April 2011, Inspector Puran Chand (PW42) produced before PW13 a single edged silver colour metallic knife. PW13 opined that the injury nos.1, 2 and 3 could have been caused by the said weapon.

Investigation

12. For nearly a week after the incident, there was hardly any clue available as regards the possible culprits. According to PW39, on the intervening night of 6th/7th April 2011, he along with Inspector Puran Chand (PW42), Sub-Inspector Anil Kumar (PW38), HC Harish, HC Umed Pal, PW34 and

Constable Pradeep went to the railway line near the C & D Block, Shalimar Bagh on foot where they found two boys sitting on a cement platform near the junction box. According to PW39, upon seeing the police team, the said boys started running in different directions. One boy started running towards the C & D Block and was apprehended by PW39 and HC Harish. The other boy was caught by Sub-Inspector Anil Kumar (PW38) and Constable Pradeep.

13. The two boys were brought near the police gypsy and interrogated. They disclosed their names as Sunder Paswan (A1) and Lal Babu (A2). On being subjected to search, one knife, two mobile phones and cash of around Rs.2,000/- was recovered from the possession of A1, who disclosed the involvement of A2 as well. From the possession of A2, a local mobile phone was recovered. All these items were sealed.

14. On 2nd April 2011, PW42 had prepared a team for identifying the dead body and hue and cry notices were issued. On 5th April 2011, Hanuman (PW26), Babloo (PW27) and Kanhayya Lal (PW28) came to the PS to enquire about the deceased. They informed PW42 that the deceased was having a mobile phone bearing number ending '8416' and a tiffin box with him. He had left for work on 30th March 2011 but had not returned. On the following day, the dead body was identified by the aforementioned Hanuman (PW26) and Kanhayya Lal (PW28) as being of the deceased Buddhi Lal. After conclusion of the post-mortem examination, the dead body was handed over to them.

15. Meanwhile, PW42 collected the CDRs of the aforementioned mobile

number and came to know the IMEI number of the phone and sent it to the service provider for tracing the phone. Based on the information that the number was in active use and on receipt of the address of the person using it, PW42 along with HC Harish and PW36 reached the house of one Anand Kumar Tiwari but he was not found there. A call was made to mobile number ending '7478' which was being used by Anand Kumar at that time. The call was picked up by Hemlata Tiwari (PW22) who informed PW42 that she had used the mobile phone of the deceased but it was taken away by A2.

16. In the night on 6th April 2011, PW42 is supposed to have received secret information that A1 and A2 along with A3 were coming near the railway flyover and he immediately formed a raiding party. The two guards of the C & D Block, namely Farakat Ali (PW29) and Amit Giri (PW30) were included in the raiding party. These two guards had purportedly witnessed the incident on the night of 30th March 2011 at 10 pm.

17. As per the statement made by PW30 to the police under Section 161 Cr PC on 31st March 2011 (Ex.PW30/PX-1), on the night in question, he was doing his rounds of C & D Block when he reached the booth near the Outer Gate where PW29 was present at around 10 pm. When they heard a sudden commotion and loud voices from outside the gate, they headed outside armed with *lathis* when, to the right of the gate, they saw three boys beating up a man. In the course of the scuffle they stabbed the man. When PWs 29 and 30 called out to them, the three assailants, two of whom were armed with knives, ran towards the *chowkidar*. Being scared for their safety,

PWs 29 and 30 fled back towards the guards' booth. He then states that PW34 came to the spot and took the injured victim to the hospital in a TSR. PW29 made an identical statement under Section 161 Cr PC on the same date (Ex.PW29/PX-1). Both these statements were made to Sub-Inspector Parveen Kumar (PW39).

18. On the night of the raid being led by PW42, further statements of these two witnesses were recorded under Section 161 Cr PC dated 7th April 2011. In his statement to the police (Ex.PW29/PX-6), after narrating the circumstances of the arrest of A1 and A2, PW29 goes on to identify the boys who had been arrested as the ones who, along with a third accomplice, had assaulted and stabbed the victim on 30th March 2011. He goes on to state that when he and PW30 had approached the scene armed with *lathis*, the three of them (the two boys arrested along with the third accomplice) had run towards them. Seeing that two of them were armed with knives, PWs 29 and 30 had fled towards the colony out of fear for their safety. He goes on to state that the two arrested boys have identified themselves as Sunder Paswan (A1) and Lal Babu (A2) respectively. He further states that from the personal search of A1, a knife was found which had been sealed in a cloth *pulanda*. PW30 made an identical statement on the same date (Ex.PW30/PX-2).

19. The other witness who spoke to the police was Rajiv Kumar (PW25) whose statement under Section 161 Cr PC (Ex.PW25/DA) was recorded on 10th April 2011. He claimed to be engaged in the business of property dealing in Rohini and was a resident of C & D Block, Shalimar Bagh. He

stated that at around 10 pm on 30th March 2011, he alighted from a bus at the bus stand at Badli and was proceeding towards his house on foot. According to him, when he reached the service lane near C & D Block, he noticed that three persons had caught hold of another and were forcing the person caught to lie on the ground. One person was holding a knife in his hand whereas the other was holding a *kirpan* like long knife.

20. According to PW25, he shouted and two guards, i.e. Farakat Ali (PW29) and Amit Giri (PW30), reached there. When he asked PWs 29 and 30 to save the victim, they approached the scuffle but the assailants challenged the guards with their knives. Both PWs 29 and 30 ran away and the three assailants escaped. PW25 then called Satish Singhal (PW32), a resident of the society. Both PWs 25 and 32 reached the gate of the society. They noticed that the victim had walked 30-40 ft and had fallen on the rail tracks and was bleeding profusely. In the meanwhile, a PCR van and a beat Constable reached there and took the injured from there. Later, PW25 purportedly identified A1 to A3 in the Court and stated that A1 was holding a knife and A3 was holding a long knife.

21. A curious development in the present case was that a complaint was received on 7th April 2011, i.e. the very day on which A1 and A2 had been arrested, from one Ramesh (PW33) about an incident that had happened with him on 30th March 2011, i.e. on the same day the killing of Buddhi Lal happened. PW33 stated that on 30th March 2011 when he was going to ease himself and had crossed the railway line at Badli Bypass, three persons came from behind. Two of them pushed him and he fell down. The third person

put a knife on his throat, inflicted injuries and snatched his mobile phone and Rs.3,500/- that he was carrying. PW33 had fallen into the *nala* (drain) but somehow managed to extricate himself and returned home. His family members took him to BJRM Hospital. The FIR was in fact registered at PS SP Badli as FIR No.141/2011.

22. Incidentally, the very three accused in the present case, i.e. A1 to A3, were the accused in the trial of the criminal case arising out of the said FIR No.141/2011. By a judgment dated 23rd November 2012, i.e. even before the judgment in the present case, the three accused persons were acquitted of all charges in that case. Interestingly, in that case, PW33 did not identify these accused as the accused who had robbed him of his mobile phone whereas in the present case, he has purportedly done so.

Trial

23. At the end of investigation, a charge sheet was filed and by orders dated 1st September 2011, charges were framed initially against A1 and A2 in the manner indicated hereinabove. Additionally, A1 was charged with the offence under Section 397 IPC and Sections 25/27/54/59 of the Arms Act. Subsequently, after his arrest, by a separate order dated 31st October 2011, A3 was also charged for having committed the offences under Section 397 and Section 302/34 IPC.

24. On behalf of the prosecution, forty-two witnesses were examined. When the incriminating circumstances were put to each of the accused under Section 313 Cr PC, they denied them. Each of them claimed to have been falsely implicated. Both A1 and A2 stated that they had nothing to do with

the incident and that nothing had been recovered from either of them. Likewise, A3 also stated that he had been falsely implicated and nothing had been recovered from him or at his instance.

Defence witnesses

25. Four defence witnesses were examined. Siya Ram (DW1) was the employer of A1. He deposed that A1 had been employed as his driver for one year before the date of the incident. According to him, on 6th April 2011, at around 9-9:30 pm, A1 completed his duty and returned home. Since the relatives of DW1 urgently needed to go to New Delhi Railway Station, he went to the house of A1 for hiring the car. Upon reaching there, he found three police officials present. He then took the vehicle and drove it back himself and went to the Railway Station with his relatives. Later on, DW1 came to know from the parents of A1 that A1 has been arrested in some false case. According to DW1, A1 had a very good character and was not involved in any fight.

26. DW1 was cross-examined by the APP and stated that he was doing the work of fixing tiles and is an original resident of Morena, Madhya Pradesh. He was residing in a *jhuggi* constructed on government land. He owned an Omni Van. He had not brought the documents of the van to the Court. According to him, he was earning around Rs.8,000-9,000/- per month from fixing of tiles and paid A1 Rs.7,000/- per month as salary. He stated that A1 was plying his vehicle only for one year but there were no documents to prove that. He denied the suggestion that he and A1 were involved in illegal activities and that he was trying to protect A1 from penal consequences in

this case. He also did not inform any senior police officer regarding the false implication of A1.

27. Lallan Paswan (DW2) was a rickshaw puller by profession. According to him, A2 was his neighbour. He noticed police officials drag A2 from his house. He disclosed that A2 was a labourer and belongs to a poor family and was working in a *masala* factory. He knew him for the past 8-10 years. He deposed that A2 had clean antecedents and was not involved in any criminal case.

28. In his cross-examination by the APP, DW2 disclosed that he was an original resident of Samastipur, Bihar where A2 also resided. However, A2 was not related to him but was his neighbour for the past 8-10 years. He stated that four men in plain clothes took A2 away. He came to know that they were policemen because he heard others say so. He did not ask for their identity cards. He volunteered that while A2 was being taken away, there were four more police officials already sitting in the vehicle. While he was not aware of the facts of the case or if A2 was ever involved in the present case, he only wanted to say that A2 was of good moral character. He disclosed that he did not go to any senior officer about A2's false implication.

29. While recording the testimony of DW-2, the trial Court noted that A2 was involved in another case of dacoity, i.e. the aforementioned FIR No.141/2011, and that DW2 has deposed for him in that case as well. His deposition in the present case was recorded on 29th November 2012 and less than a month later, the trial Court adjudicating the case arising out of the

said FIR No.141/2011 acquitted A2 along with A1 and A3 in that case. For some reason, the trial Court in the present case did not notice this fact when it pronounced judgment a few months later on 3rd April 2013.

30. Lallan Devi (DW3) is the mother of A2. She worked as a housemaid in the nearby locality. When she returned from work on the date of his arrest, she noticed a huge crowd in front of her house and then came to know that A2 had been picked up by the police. In her cross-examination, she confirmed that A2 was totally illiterate and was working in the *masala* factory for the last 5 years. A2 used to leave by 8 am and return by 7 pm. There were no holidays except for a half day on Sunday every week. She went to PS Shalimar Bagh but did not find her son. She did not complain to the police. She was not aware of A1 and also did not know whether A1 knew A2.

31. The last defence witness was Sandeep Kumar (DW4). He confirmed that on 25th June 2011, at around 6-6:30 pm, 4-5 police officials from PS Shalimar Bagh had come to the house of A3 and took him away with them. On enquiry made by the parents of A3, they informed that he was being taken away for inquiries and would be freed after inquiry. In his cross-examination, DW4 disclosed that he was a driver by profession. He was residing at the address given by him for the last 15-16 years and A3 was his neighbour living two streets away. He stated how when the police officials had parked their vehicle and inquired about the house of A3, he had followed them. He, however, could not give their names. According to him, it only took 2-3 minutes for the officials to reach the house of A3. He knew

the *bhabhi* of A3 and, therefore, came to depose in the Court.

Impugned judgment of the trial Court

32. In the impugned judgment dated 3rd April 2013, the trial Court came to the following conclusions:

- (i) PW25 was a credible witness. He had witnessed the incident himself and was also able to identify the three accused in the Court.
- (ii) PW25's deposition was corroborated by PW32, the President of the Resident Welfare Association of C & D Block, Shalimar Bagh, and by Constable Ram Phal (PW34).
- (iii) There was no history of animosity between PW25 and the accused. There was sufficient light in the area and there were no material contradictions in the testimony of PW25 which was corroborated by the other public witnesses mentioned. It stood, therefore, confirmed that at the time of incident, A1 and A3 were holding knives.
- (iv) The medical evidence of PW17 also proved that the deceased had been admitted in a semi-conscious condition with injuries on the chest and arms. PW13 who performed the post-mortem examination confirmed that the death was homicidal.
- (v) PW19 proved that the mobile phone was sent to him for examination in three pieces and he proved his report (Ex.PW19/A). The biological and serological report of the FSL was proved by PW20. By the said report, it stood proved that human blood was detected on the shirt of the deceased (Ex.1), cotton wool swab (Ex.3 and Ex.5), concrete material (Ex.6). Human blood on the shirt was of 'AB' group. The report confirmed that blood was detected on the tiffin box (Ex.1a) and

human blood on the tiffin bag (Ex.1b). The trial Court, therefore, held that the forensic evidence was compatible with the prosecution case and this corroborated the testimonies of PWs 25, 29 and 30.

- (vi) Discussing the evidence of PW24 in whose brush factory the deceased was working at Bhalaswa Dairy, the trial Court concluded that it had been duly proved that the deceased who was employed there left the factory at 8 pm on 30th March 2011 and did not return. His testimony was corroborated by Hanuman (PW26), the cousin brother of the deceased, and the other relatives, Babloo (PW27), the son of the *mausi* of the deceased, and Kanhayya Lal (PW28), the brother-in-law of the deceased. Even while they were going to the PS, some ladies in the area told them about police posters and then they went to identify the dead body. They confirmed that when he left, the deceased was in possession of a mobile phone of Spice make.
- (vii) PW27 also informed the police that he had given his own mobile number ending '8416' to the deceased since the SIM card of the deceased was not working. Later, the IO obtained the IMEI number of the said mobile phone, kept it on surveillance and noticed that it had been used by someone. The details of the phone numbers used in the said mobile set, the IMEI number of which was found, were obtained and it was found that the mobile number ending '7478' was operated in the mobile phone and this number had been issued in the name of Anand Kumar Tiwari who, when contacted, confirmed that it had been used by his wife Hemlata Tiwari (PW22). PW22 in turn disclosed to the police that she had purchased the phone from A2 for a sum of Rs.300/-. A2 was working with her in the same factory but

after two days demanded the mobile set back and after two days, A2 told her that the mobile set had been broken.

- (viii) The fact that PW22 was working with A2 was confirmed by Ashok Aggarwal (PW35) who was running the business of spices under the name and style of SDS at Haiderpur. He identified A2 in the Court. According to him, A2 had taken an advance of Rs.5,000/- out of which he had deducted Rs.4,000/- from the salary of A2 and Rs.1,000/- was to be adjusted from the salary of the succeeding month.
- (ix) The trial Court then examined the evidence of Sanjeev Lakra (PW14), Alternate Nodal Officer of Reliance Communication Ltd., who had brought the record pertaining to mobile number ending '8416' issued in the name of PW27, the cousin brother of the deceased. Pawan Singh (PW15) was the Nodal Officer of Idea Cellular who proved the records of mobile number ending '7478' issued in the name of the husband of PW22. PW15 also proved the record pertaining to the mobile number ending '7230' issued in the name of Dhanu Paswan, father of A2. Some other mobile phones were also proved by them. Israr Babu (PW16) was the Nodal Officer from Vodafone proving the other mobile number issued in the name of Dhanu Paswan.
- (x) The trial Court then concluded from an analysis of the evidence that the admissible portions of the disclosures made by the accused corroborated the evidence of the prosecution as regards A1 and A2 and it stood proved that they were involved in robbing the victim while the mobile phone of the victim was taken by A2. The tiffin bag along with tiffin box had been taken by A3. On return of the mobile

phone by PW22 to A2, he broke the same in the presence of his neighbour Gautam (PW23) and, thereafter, asked PW23 to throw the pieces in the *nala*. This was independently confirmed by PW23. The place where the mobile phone was thrown by PW23 was not in the knowledge of the police officials and it was A2 who led them to PW23. He too, in turn, pointed to the place where he had thrown the mobile phone.

- (xi) Likewise, even for A3, the recovery of the cloth bag containing the tiffin box under the flyover railway bridge which contains blood stains was only within the knowledge of A3. The FSL report confirmed the presence of blood on the said cloth bag and tiffin box.
- (xii) The DWs examined on behalf of the accused were not believable and were interested witnesses. They were not credible witnesses.
- (xiii) The trial Court then discussed how the accused had committed the two crimes on 30th March 2011, i.e. the one under consideration in the present case and the other in FIR No.141/2011 registered at PS SP Badli. Pertinently, such observations were made without reference to the judgment of acquittal delivered in the case arising out of the aforementioned FIR No.141/2011.

33. The trial Court proceeded to convict the Appellants and sentence them in the manner indicated hereinbefore.

34. This Court has heard the submissions of Mr. Dhan Mohan, the learned counsel appearing on behalf of the Appellants, and Mr. Amit Chadha, the learned APP for the State.

PW25 not a reliable witness

35. At the outset, the Court would first like to comment on the fact that the star witness of the prosecution appears to be PW25 who is purportedly an eye witness to the incident. What the trial Court has not noticed is that his statement was not recorded by the police until 10th April 2011, i.e. more than 10 days after the incident, which is extremely unusual. The supplementary statement was recorded on 21st June 2011. It will be recalled that the police in fact had no leads whatsoever. If indeed, PW25 had witnessed this incident in the manner described then there would be no reason why he would not come to the police immediately. He did not make any PCR call to the police which is highly unusual. He has claimed in the trial Court that the PCR came to the spot and “the injured was shifted in the vehicle in my presence.”

36. PW25 was first confronted on the aspect of the name of the beat Constable who shifted the body of the deceased victim. In his deposition, he stated, “It is correct that I have not stated the name of the beat Constable to the police who came at the spot.” However, in his previous statement, he had mentioned the name of Constable Ram Phal (PW34). Secondly, in the Court, he stated, “I had not stated to the IO that the injured was shifted in a TSR.” In this regard, he was confronted with his previous statement (Ex.PW25/DA) where it was so recorded.

37. PW25 admitted that he did not make a call to the police on the 100 number and it was PW32 who made the call. His explanation for not going to the police appears to be a weak one [“I was ill and I was not in a position to go to the (police station) and thereafter, on my request, they came to my

house for recording the statement”]. His other improvement was that he stated in Court that he had previously stated to the police that the three assailants had forced the victim to lie on the ground. He was confronted with his previous statement where it was not so recorded.

38. At this juncture, it would be pertinent to note the Supreme Court’s observations on the conduct of eye-witnesses. In *Harbans Lal v. State of Punjab (1996) 2 SCC 350*, the Supreme Court was considering the reliability of the ocular testimony of two purported eye-witnesses who claimed to have witnessed the killing of the deceased therein. In evaluating their testimonies, the Court opined:

“Thus, these two witnesses deposed about two stages of the occurrence they had seen through the window. Their evidence appears to be rather artificial. These two witnesses appear to us to be got up witnesses. They saw a gruesome murder being committed with their own eyes and yet for reasons best known to them, they did not raise any alarm but went their way and did not disclose about the occurrence to anyone, not only that evening but even till the third day after the occurrence. Their conduct was thus, most unnatural. This creates a serious doubt about their credit worthiness.”

39. Further, in its decision in *Badam Singh v. State of MP (2003) 12 SCC 792* the following observations were made:

“The mere fact that the witnesses are consistent in what they say is not a sure guarantee of their truthfulness. The witnesses are subjected to cross-examination to bring out facts which may persuade a Court to hold, that though consistent, their evidence is not acceptable for any other reason. If the Court comes to the conclusion that the conduct of the witnesses is such that it renders the case of the prosecution doubtful or incredible, or that their presence at the place of occurrence as eye witnesses is

suspect, the Court may reject their evidence.”

40. The conduct of PW25 does not appear to be that of an eye witness to a murder. PW25 not going to the police at all for about 10 days and his statement not being recorded until then gives rise to grave doubts as to whether at all he was present at the spot during the assault on the deceased victim. It is pertinent to note that the trial Court has not taken note of this discrepancy in its judgment. Furthermore, PW25 was a complete stranger to the accused. It was necessary for the police to have got the identity of the accused fixed through him by conducting a test identification parade (‘TIP’). In the absence of such a TIP, the identification by this eye witness of the accused for the first time in Court raises grave doubts.

PWs 29 and 30 turn hostile

41. PWs 29 and 30 turned hostile during the trial and have not corroborated the deposition of PW25. Before delving into an analysis of their testimonies, it is necessary to highlight the following observation of the Supreme Court in ***Bhajju @ Karan Singh v. State of MP (2012) 4 SCC 327***:

“...the court will always have to take a very cautious decision while referring to the statements of such witnesses who turn hostile or go back from their earlier statements recorded, particularly, under Section 164 of the Code of Criminal Procedure. What value should be attached and how much reliance can be placed on such statement is a matter to be examined by the Courts with reference to the facts of a given case.”

42. PW29 admits the statement made by him to the police on 31st March 2011 (Ex.PW29/PX-1) except for the portion A to A1 which

concerned the description of the knife held by one of the persons. He also admits as correct that he had told the police that when they saw that the assailants were armed with knives, he and PW30 “got extremely scared and ran back to our guard room.” He further admitted stating to the police that of the three assailants, the one armed with the knife had tied his handkerchief like a *patka* around his head and was around 5 ft in height. He also admits to stating that the second assailant who had a knife in his hand was short statured but denies stating that he was of brown colour. He further admitted stating to the police that the third assailant was around 5 ft 5 inches in height and was of a dusky complexion. He further states that all of them were of average build.

43. PW29 was declared hostile on the point of identity of the three accused. He stated that since it was very dark at the time of the incident, he could not see the faces properly. He denied that the documents which bore his signatures regarding the arrest and personal search of A1 and A2 were prepared at the spot. He stated that he had signed those documents in the PS. He also denied having identified A3 in the Rohini Court on 23rd July 2011. He admitted that the family members of the accused had come to his residence but he volunteered that they had only told him to tell the correct facts.

44. Strangely, this part of the evidence of PW29 having turned hostile has not even been discussed by the trial Court. Likewise, the other security guard (PW30) has also turned hostile. In his deposition, PW30 states that when he and PW29 reached the gate, they did not find anyone except the

injured victim. He states that he immediately called the 100 number from his mobile number ending '8590'.

45. A perusal of the PCR form (Ex.PW11/A) reveals that it was PW30 who had called the police, which fact is confirmed by PW32 as well. He denied the statement purportedly made by him to the police (Ex.PW30/PX-1). He, however, did confirm that PW25 did come there at around 10 pm and had shouted after seeing the incident. He further declined to identify the accused in the trial Court.

PWs 32 and 34 not eye witnesses

46. Turning to the evidence of PW32, it is plain that he was himself not present when the incident took place. He came at a stage when the injured had already been taken away to the hospital by Constable Ram Phal (PW34). He only knew what PW25 had told him. Again, his statement was not recorded by the police until 10th April 2011, i.e. more than 10 days thereafter.

47. This delay in recording the statements of PWs 25 and 32 who were supposed to have remained at the spot at the time of the incident or soon thereafter has not at all been satisfactorily explained by the prosecution.

48. PW34 also is not an eye witness to the incident. When he reached there, he noticed PWs 29 and 30 coming from inside the colony. He only talks about taking the injured to the BJRM hospital in a TSR. Interestingly, he does not mention the presence of PW25 at all. If PW25 was indeed shouting for help, it is strange that PW34 would not notice him. What is also strange

is that PW34 himself did not call the 100 number.

49. The conclusions one draws from the above evidence discussed are as under:

- (i) The conduct of PW25 in not ringing up the police himself and not, at any stage, till 10th April 2011, going to the police to talk about the incident that he witnessed, is very strange. Likewise PW32, who is supposed to have reached the spot on the calling of PW25, also does not appear to have contacted the police till they themselves contacted him on 10th April 2011. The conduct of these two witnesses is, therefore, strange.
- (ii) The two witnesses who are supposed to have been present when the incident was taking place, i.e. the security guards PWs 29 and 30, have not supported the prosecution case at all. PW29 does talk of three boys attacking the deceased and both he and PW30 have confirmed the presence of PW25 at spot. However, they have declined to identify the three accused.
- (iii) The failure to conduct the TIP for the purposes of PW25 identifying the three accused has not been satisfactorily explained by the prosecution. While in every case it may not be necessary to hold the TIP, in the present case, the dock identification of the accused for the first time in the Court by PW25 in the absence of such TIP cannot be held to be reliable or safe. PW25 does not come across as a natural witness to the occurrence. Even the testimonies of PWs 32 and 34 are not helpful as they were not themselves eye witnesses to the occurrence.

50. The Court is, therefore, unable to concur with the trial Court that PW25 is a reliable witness and the conviction of the accused can be based on his testimony.

No corroboration

51. In the first place, it is required to be noticed that as far as the charge under Section 302/34 IPC is concerned, except the recoveries of the knives at the instance of the accused, there is no other circumstance that connects them with that crime. There were no bloodstained clothes recovered from any of the three accused. The FSL reports only talk of the bloodstains on the clothes of the deceased. There were no bloodstains even on the knives recovered. No fingerprints were lifted from the handle of the knife to match those of the accused.

52. While the medical evidence does show that the death was homicidal, the testimony of PW13 who conducted the post-mortem examination is not helpful since according to him, the fatal injuries were caused by 'a single sharp edged weapon' whereas the case of the prosecution is that two knives were used, one by A1 and the other by A2. Therefore, even this part of the evidence is not helpful to the prosecution.

53. The blood on the tiffin box and tiffin bag is confirmed to be human blood but not that of the deceased. In his cross-examination, PW42 admits that such tiffin boxes and bags are easily available. He has no explanation as to why fingerprints were not lifted from the tiffin box. He recalled that this tiffin box was recovered on 25th June 2011 after the arrest of A3. Why nearly three months after the incident, such a tiffin box would still be hidden

away and got recovered by A3 is beyond comprehension. The tiffin bag is not even so valuable that it would be hidden or even stolen in the first place. This entire part of the evidence of the prosecution, therefore, deserves rejection. The net result is that neither the medical nor the forensic evidence actually corroborates the eye witnesses' testimony in the present case.

Mobile phone

54. The other circumstance heavily relied upon is the recovery of the mobile phone which was broken into three pieces. One important piece of the evidence is that A2 is supposed to have sold this mobile phone to PW22 for Rs.300/- and then taken it back from her two days later. For some reason, when PW22 was examined, this mobile phone which was purportedly recovered on the pointing out of Gautam (PW23) was not shown to PW22. In other words, she was not asked if the said mobile phone was the one which was sold to her by A2. This is a serious lapse considering that the testimony of PW22 was very important to the prosecution. Unless the stolen mobile phone was connected with A2, his involvement with the crime could not have been established since there is no other incriminating piece of evidence at all as far as he is concerned. Even in this case, the failure to hold the TIP is not properly explained.

55. In his previous statement to the police under Section 161 Cr PC, PW25 does talk of the accused with the face covered by cloth and this is an important aspect which has been lost sight of. The prosecution has gone through an elaborate process of trying to prove that the mobile phone broken in three parts belonged to the deceased and was recovered from and at the

instance of A2. While the part of the evidence about that mobile phone having been given by PW24 to the deceased may have been proved, the evidence of PW23 about asking him to break the mobile into three parts and throw it in a *nala* is not very convincing. The Court is, therefore, unable to concur with the trial Court that the recovery of the mobile phone at the instance of A2 has been convincingly proved by the prosecution.

56. Perhaps the most serious error committed by the trial Court was in proceeding on the basis that these three accused stood implicated in another incident on the same day involving PW33. Apart from failing to note that these three accused had been acquitted in the trial arising out of the FIR No.141/2011 registered at PS SP Badli by the judgment dated 23rd November 2012, the trial Court also did not notice that PW33, the complainant in that case, failed to identify these three accused in that trial and somehow could identify them in the present case although he was nowhere involved in the present case as complainant or in any other capacity. This made PW33 himself a wholly unreliable witness for the purposes of the present case.

Due weightage to be given to defence evidence

57. It is in the above background that the defence witnesses required serious consideration by the trial Court. In ***Munshi Prasad v. State of Bihar (2002) 1 SCC 351***, the Supreme Court made the following observation about the appreciation of the evidence of defence witnesses:

“...we wish to clarify that the evidence tendered by the defence witnesses cannot always be termed to be a tainted one by reason of the factum of the witnesses being examined by the defence.

The defence witnesses are entitled to equal respect and treatment as that of the prosecution. The issue of credibility and the trustworthiness ought also to be attributed to the defence witnesses at par with that of the prosecution - a lapse on the part of the defence witness cannot be differentiated and be treated differently than that of the prosecutors' witnesses."

58. The Supreme Court further opined in *Dudh Nath Pandey v. State of UP (1981) 2 SCC 816* that the Court should avoid the error of attributing motives to defence witnesses "merely because they were examined by the defence. Defence witnesses are entitled to equal treatment with those of the prosecution. And, Courts ought to overcome their traditional, instinctive disbelief in defence witnesses". In a similar vein, in its decision in *State of UP v. Babu Ram (2000) 4 SCC 515*, the Supreme Court observed:

"Depositions of witnesses, whether they are examined on the prosecution side or defence side or as court witnesses, are oral evidence in the case and hence the scrutiny thereof shall be without any predilection or bias. No witness is entitled to get better treatment merely because he was examined as a prosecution witness or even as a court witness. It is judicial scrutiny which is warranted in respect of the depositions of all witnesses for which different yardsticks cannot be prescribed as for those different categories of witnesses."

59. In the present case, however, the trial Court simply brushed aside the defence witnesses as being interested witnesses. A careful perusal of the testimonies of the defence witnesses shows that it is entirely probable that the accused were arrested from their respective residences and not in the manner indicated by the prosecution. In the considered view of the Court, the defence evidence in the present case could not have been ignored by the trial Court.

Conclusion

60. For all of the aforementioned reasons, the Court is not satisfied that the prosecution has been able to prove the guilt of A1, A2 and A3 beyond reasonable doubt for the offences with which they were charged. A1 to A3 are accordingly acquitted of the offences with which they were charged. The impugned judgment of the trial Court and the order on sentence are hereby set aside.

61. The appeals are allowed and the applications disposed of in the above terms. The accused are set at liberty unless wanted in some other case. They 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.

I.S. MEHTA, J.

MAY 31, 2018

rd/anb