

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

Judgment reserved on: 24.04.2018

% **Judgment delivered on: 16.07.2018**

+ **CRL.A. 1587/2013**

FAYAZ AHMED Appellant

Through: Mr. Anvesh Madhukar, Advocate for
the Appellant.

versus

STATE NCT OF DELHI Respondent

Through: Ms.Aasha Tiwari, APP for the State
with Insp Naresh Kumar and SI
Surender Kumar, PS Mayapuri.

WITH

+ **CRL.A. 1596/2013**

AMIT CHAUHAN Appellant

Through: Mr.S.B. Dandapani Advocate for
appellant.

versus

STATE (NCT OF DELHI) Respondent

Through: Ms.Aasha Tiwari, APP for the State
with Insp Naresh Kumar and SI
Surender Kumar, PS Mayapuri.

AND

+ **CRL.A. 1645/2013**

RAJ KUMAR

..... Appellant

Through: Mr..K. Singhal, Advocate for the
appellant.

versus

STATE (NCT OF DELHI)

..... Respondent

Through: Ms.Aasha Tiwari, APP for the State
with Insp Naresh Kumar and SI
Surender Kumar, PS Mayapuri.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MR. JUSTICE P.S.TEJI

JUDGMENT

P.S. TEJI, J.

1. The present appeals have been filed by the appellants, namely, Fayaz Ahmed (Crl.A. 1587/2013), Raj Kumar (Crl.A. 1645/2013) and Amit Chauhan (Crl.A. 1596/2013) under Section 374(2) Cr.P.C., against the common judgment of conviction dated 28.09.2013 vide which, they have been convicted for the offences punishable under Section 302/392 read with Section 34 IPC and section 397 I.P.C., and under Section 25/27 of the Arms Act. Vide common order on sentence dated 30.09.2013, all the appellants have been sentenced to undergo life imprisonment and fine of Rs.3000/- each and in default of fine, they have been ordered to further undergo simple imprisonment for a period of 3 months for the offence punishable under

Section 302/34 I.P.C.; to undergo rigorous imprisonment for seven years and fine of Rs.2,000/- each, in default of payment of fine to further undergo simple imprisonment for two months for the offence punishable under Section 392/34 IPC.; to undergo rigorous imprisonment for one year and fine of Rs.500/- each, in default of payment of fine to further undergo simple imprisonment for one month for the offence punishable under Section 25 of the Arms Act; to undergo rigorous imprisonment for three years and fine of Rs.1,000/- each, in default of payment of fine to further undergo simple imprisonment for one month for the offence punishable under Section 27 of the Arms Act; and to undergo rigorous imprisonment for seven years for the offence punishable under Section 397 IPC.

2. The case of the prosecution is that on 11.09.2007, an information was received by SI Kashmiri Lal at 3.37AM vide DD No. 7A, that at factory C-274 Mayapuri Phase 2, about 3-4 persons had stabbed a person in his stomach. Upon getting this information, SI Kashmiri Lal and Ct. Mukesh went to the place of incident, where they got to know that the injured was removed to DDU hospital. SI Kashmiri Lal left Ct. Mukesh at the place of incident for its safety, and he himself went to DDU hospital. On reaching the hospital, SI Kashmiri Lal found one injured Nagender s/o Dhaneshwar Yadav, r/o C-274 Backside Phase 2 Mayapuri. The doctor declared him 'unfit' for statement. Thereafter, SI Kashmiri Lal went to the surgery ward where he found one Sh Surinder Prashad Mehto PW12 and got his statement recorded. In his statement, he stated that he has been living at his given address for the last two and a half years, and he works as a helper at C-274 Mayapuri. He stated that he, along with Nagender and Rupender, used to do

their duty from 9 a.m. to 9 p.m. at the factory. On the intervening night of 10/11.09.2007, at about 02:30 a.m., some people started to bang the gates of the factory and when the gates were opened, four persons armed with weapons barged inside. Among these people, one was tall and the rest were of average height, between the age bracket of 25-30 years. They came inside and threatened the victim, SP Mehta, Rupinder to switch off the machine, to which they agreed. They further threatened the victims to not make noise or raise an alarm, else they will be killed. Two of the boys kept standing inside and the other two boys removed Aluminium slabs in an auto, stationed outside the factory. When Nagender protested, one of the boys stabbed him in his stomach and injured him. Thereafter, the boys fled from the scene after bolting the doors of the said premises from outside. After sometime, the gate was got opened somehow and Surinder Prashad Mehto went out and informed the owner about the incident. The owner and his son reached the place of incident and Joginder Singh made a call at no.100 and injured Nagender was removed to DDU hospital in a car. Surinder Prashad Mehto further stated that he can identify the said four boys, if produced before him.

3. The said statement of Surinder Prashad Mehto was endorsed and SI Kashmiri Lal prepared a rukka vide Ex. PW12/A and the FIR u/s 394/397 IPC was registered vide Ex. PW4/B. The case was registered and was assigned to Insp.Virender Singh. Insp Virender Singh went to the place of incident and prepared a rough site plan at the instance of the complainant, and the crime team was also summoned. The blood stained earth control was lifted and sealed and seized. Upon reaching DDU hospital, the IO/

Insp.Virender Singh came to know that the injured Nagender was declared dead. Pursuant to this, Section 396 IPC was also added. Postmortem of the deceased was conducted on 13.09.2007 at the DDU hospital and the sealed parcels were got deposited with the MHC(M) by the autopsy surgeon. Thereafter, the dead body was handed over to the relatives of the deceased.

4. During further investigation, upon getting an information through a secret informer, Insp. Virender Singh along with the police party reached Daya Basti railway station on 17.09.2007, and apprehended and arrested the accused Fayaz Ahmed and Amit Chauhan. On their disclosure statements, the other accused persons Raj Kumar and Mohd. Illiyas were apprehended near Delhi Cantt. Railway Station. On the disclosure statement of the accused persons, the case property- Aluminum Slabs were got recovered from the jhuggi of the accused Kalu, which were sealed in different parcels. The accused Kalu, Nadeem and Afsar Ali were thereafter arrested, as they were keeping the looted property. In the further course of investigation, the accused persons Fayaz Ahmed and Mohd. Illiyas got the weapons of offence;(i) sword Ex.PW24/C; (ii) Iron rod Ex.PW24/D recovered.

5. On 19.09.2007, accused Amit Chauhan led the police party and got the weapon of offence-a knife Ex.PW20/A recovered.

6. A police party was formed headed by ASI Harpal Singh, and they went to the village of the accused person Raj Kumar r/o Village Gothia, Post Manakpur, Distt. Gonda, UP and the accused Raj Kumar led the police party and got recovered the knife ExPW6/A, which was used in the commission of dacoity. Accused Raj Kumar led the police party on 22.09.2007, and got

recovered blood stained clothes (Ex.PW6/D) which he was wearing on the date of incident. He also got recovered two rickshaws/handcarts Ex.PW6/E in presence of ASI Harpal Singh. An application was moved by SI Kashmiri Lal on 22.09.2007 to conduct the TIP of the accused persons. The witnesses Surinder Prashad Mehto, Pankaj Bahadur and Ravinder Kumar, during TIP, successfully identified accused Mohd. Illiyas and Amit Chauhan on 25.09.2007. The IO moved an application for TIP qua accused Raj Kumar. Accused Fayaz Ahmed and Raj Kumar, however, refused to participate in the TIP. The seized parcels were sent to FSL Rohini. Accused Habiba, during the course of investigation, could not be traced. NBWs were issued against him, which could not be executed. Charge Sheet for the offence u/s 396/397 IPC was filed thereafter.

7. Charge under section 412, 396 and 397 IPC, and under Section 25/27 of the Arms Act was framed against the accused persons to which they pleaded not guilty and claimed trial. To prove its case, the prosecution examined 30 witnesses, including the eye witnesses PW9-Ravinder Kumar Yadav,– PW12 Surinder Prasad Mehto, and PW13 Suresh Bahadur.

8. After completion of prosecution evidence, statements of the accused persons under Section 313 Cr.P.C. were recorded in which they claimed innocence and denied the entire case of the prosecution. Accused persons did not examine any defence witness.

9. On appreciation of evidence and material brought on record, the trial court convicted the appellants for the offences under Sections 302/34,

392/34 and 397 IPC, and under Section 25/27 of the Arms Act. Feeling aggrieved of the same, the appellants have preferred the instant appeals.

10. Learned counsel for the appellant– Amit Chauhan has argued that PW28-Sh.Kuldeep Narayan, who has conducted the TIP proceedings, has deposed that PW9 had failed to identify the appellant. Learned counsel has argued that as per the deposition of PW12, Ravinder was not present at the time of the incident. Mr. Dandapani has argued that PW13 had deposed that he had not seen the faces of the accused persons, thus the presence of accused Amit Chauhan is not proved. Learned counsel further submitted that conviction under Section 302/34 IPC is not made out for the reasons that there is no evidence to prove as to which of the accused gave the fatal knife injury to the deceased.

11. Learned counsel for the appellant– Raj Kumar has argued that the manner of arrest of the accused and the recovery of knife & clothes of accused Raj Kumar are suspect, inasmuch, as, it is alleged that the clothes were recovered from Delhi, but as per seizure memo ExPW 6/D, the same were recovered from a village. The recovery of stolen articles is also in doubt, as there are contradictions regarding the vehicle used to carry the same; the persons occupying the vehicle, and; its place of recovery. As per the FSL report, no reaction of any blood was found on the clothes of the appellant. Learned counsel further argued that the entry in the Malkhana Register regarding the recovery of knife, as alleged, is doubtful since it is of the same day, though the recovery was made from village Gothiya, Gonda, U.P. and even the said knife was not shown to the doctor to get his opinion to corroborate the same with the injuries on the person of the deceased. Mr.

Singhal argues that the accused refused to join the TIP proceedings as he was earlier shown to the witnesses and there was delay in conducting the same. Therefore, it was justified on his part to refuse to participate in the same. Learned counsel further submitted that there are contradictions in the statement of PW9. He submitted that at one place PW9 stated that 10 persons came on the day of the incident, but in his cross examination by Ld. APP, PW9 changed his version that only 4 persons came. PW24 says that no other vehicle was used to recover the property. Learned counsel argued that PW9 also admitted that he was shown the accused outside the Court, and that leading questions were put to PW9 which could not have been done. Learned counsel further submitted that there is no witness who had stated that they had seen any of the accused stabbing the deceased. He further submitted that PW26 said that he did not enter the jhuggi from where the recovery of alleged articles was effected. Even it has not been explained why PW3-son of the owner of the factory did not speak about the recovery from the jhuggi. Learned counsel also submitted that Section 27 of the Evidence Act is not attracted in the present case as the police was already aware of the jhuggi.

12. In support of the above contentions, Ld. counsel for the appellant has placed reliance on **Vijayan v. State of Kerala**, (1999) 3 SCC 54, wherein it was observed that identification of the accused in court many years after the occurrence cannot be accepted. In **Ramesh v. State of Karnataka**, (2009) 15 SCC 35, it was observed that the identification of the accused at the trial for the first time, is from its very nature, inherently of a weak character. In the case of **Iqbal and Anr. v. State of UP**, (2015) 6 SCC 623 it was observed

that evidence of identification of the miscreants in the test identification parade is not a substantive evidence and conviction cannot be based solely on the identity of the dacoits by the witnesses in the test identification parade. On same aspect, judgments in the case of **State of Maharashtra v. Syed Umar Sayed Abbas and ors.**, (2016) 4 SCC 735, and **Kanan and Ors. v. State of Kerala**, (1979) 3 SCC 319, have been relied upon. In **Afzal Sha @ Suraj Ali v. State**, Crl.A. No. 781 of 2011 decided by this Court on 03.11.2014, it was observed that the common intention shared by all the accused was to not only to commit robbery but even use reasonable force to commit the robbery and escape. The common intention was to use the knife to scare or cause an injury, if necessary, to complete the robbery. The conviction of the appellants was converted from 302 IPC to 304-II IPC. **Nafees @ Bhura v. State (NCT of Delhi)**, 2014 (1) JCC 529 has been relied upon on the same aspect. Next judgment relied upon is **Umesh Kumar v. State**, 2017 SCC Online 11490, wherein the conviction of the appellant was set aside in view of the fact that the public witnesses turned hostile and did not support the case of the prosecution. In **Man Preet Singh and Anr. v. State**, 2004 (72) DRJ 28 (DB), it was observed that it is imperative for the prosecution to connect the injuries with the weapon used. Reliance is placed upon **Kuldip Singh and Ors. v. State of Delhi**, 2004 (12) SCC 528, to press the contention that mere recovery of stolen articles cannot be made the basis for conviction.

13. Learned counsel on behalf of the appellant– Fayaz Ahmad argued that so far as the recovery of sword is concerned, it was not proved to have been used to commit the offence and that there is no recovery of any relevant

articles at the instance of the appellant. Learned counsel argued that PW9-Ravinder Kumar Yadav turned hostile, and had not supported the case of the prosecution. Learned counsel further submitted that in TIP proceedings, PW9 did not identify the accused-Fayaz Ahmad. He submits that accused Mohd. Illyas and Kallu have been acquitted, and the present appellant is similarly placed as accused Mohd. Illyas. Learned counsel further submitted that the trial court has relied upon the judgment in the case of **Rafiq Ahmad @ Rafi Vs. State of Uttar Pradesh**, (2011) 3 SCC (Cri) 498, but the same is distinguishable from the facts of the present case, as there is no evidence that any of the accused had stabbed the deceased.

14. Per contra, Ms.Aasha Tiwari, learned APP for the State argued that rukka was prepared on the statement of Surendra Prasad Mehto (PW12). The TIP proceedings show that the witness Suresh Bahadur did not identify accused Amit Chauhan, but accused Amit Chauhan was identified by PW9-Ravinder. She further submitted that the place of incident is not in dispute, and even the recovery of stolen articles was affected at the instance of the accused persons. Learned counsel argued that there is sufficient evidence in the form of testimony of public witnesses which duly proves the case of the prosecution that, it was the appellants who committed robbery in the premises of PW3 and, during the said robbery, they committed the murder of the deceased. Learned counsel argued that it is also established that at the time of robbery, the appellants were armed with deadly weapon i.e. sword/knives and they used the same at the time of robbery. Lastly, Ms. Tiwari contended that there is no illegality in the impugned judgment of conviction.

15. We have heard learned counsels for the parties, examined the evidence on record and given our thoughtful consideration to the matter.

16. The case of the prosecution is that on the day of incident the appellants along with their associate committed robbery at the factory premises of PW3 and at that time, they were armed with deadly weapons. It is alleged against them that at the time of robbery, when they faced resistance from the deceased Nagender, he was stabbed in the abdomen. Thereafter, the accused persons fled the spot with the robbed articles. To prove its case, the prosecution has examined PW12 Surender Prasad Mehto who is also the complainant of the present case. On his statement FIR was registered. In his statement, PW12 stated that in September 2007, he was working in a factory at Maya Puri. One Nagender and Rupender were also working there. His duty hours were from 9 p.m. to 9 a.m. At about 02:30 a.m., three appellant's and Mohd. Illiyas (acquitted) entered in the factory having knives and swords in their hands. PW12 identified all the appellants in the Court as the robbers. The accused persons got the machines switched off, and thereafter two of them started beating the victims and other two accused started loading the slabs of aluminum in a cart. Accused persons threatened to kill PW12, if he raised alarm. His associate Nagender tried to stop the accused persons from committing the robbery, but the accused persons assaulted him in his stomach with a knife. The accused persons thereafter fled from the spot along with the robbed articles, and bolted the gate of the factory from outside. Thereafter, they raised alarm and the watchman PW13 of the area opened the door from outside. PW12 informed his owner on telephone and police was called and the police came at the

factory. Nagender was taken to DDU hospital and PW12 also went there. His statement Ex.PW12/A was recorded.

17. In his cross-examination, PW12 has stated that Suresh Bahadur was the watchman at that time. He admitted that the factory used to be operational 24 hours. He stated that two of the four accused persons were armed with knives and swords. He could not say as to who was having the knife, and who was having the sword. He was near the machine when Nagender was assaulted by the accused persons. There was only one cart on which the aluminium slabs were kept. He denied that the accused persons were earlier working in the same factory. He further stated that he had seen the accused persons in Tihar jail after the incident. He denied that the police had shown him the accused persons in the police station before he went to Tihar jail. He denied that on that night they had deliberately left the factory gate open or that they themselves got the factory robbed, or that when Nagender opposed, they had attacked him with knife. Though, PW12 stated that the police officials read over the facts of the case and told him to depose as per his wishes, but he clarified that he had given his statement as per the incident and the police officials merely refreshed his memory.

18. Learned counsel for the appellants argued that the testimony of PW12 is not reliable for the reasons that whatever he deposed before the trial court was stated to him by the police officials, and he even identified the accused persons at the pointing out of the police officials. Therefore, the testimony of PW12 is not reliable with regard to taking place of occurrence and the identity of the appellants.

19. We do not find any force in this contention of the appellants. Though, it is apparent that PW12 stated that he was told the facts of the case and accused persons were shown to him outside the court before his testimony was recorded by the trial court, but he clarified that he deposed exactly as the incident had happened, and the police officials merely refreshed his memory. Thus, he ruled out the possibility of being tutored by the police officials. So far as the identity of the appellants is concerned, PW12 has duly identified the appellants as the robbers and the assailants of the deceased. PW12 did not know the accused from before. They are strangers to him. He has no reason to falsely implicate the accused, and let the real culprits get away.

20. The other eye witness in the present case is PW9 Ravinder Kumar Yadav, who deposed that around two and a half or three years ago, he was working in a factory at Mayapuri. On the day of incident, he was deputed on duty from 9 p.m. to 9 a.m. along with PW12 and Nagender (deceased). Both of them were also present in the factory and working with him. He further stated that at about 3 a.m., when they were working, the gate of the factory was closed but not bolted. Suddenly, about 10 persons forcibly came into the factory and they started giving beatings to them. He further stated that one of them was having a sword and the others were having wooden sticks and iron rods. One of the accused persons was also in possession of a knife. Nagender sustained injury with knife in his stomach caused by the assailants. PW9 also stated the accused persons had robbed the aluminum slabs and fled from the spot after bolting the gate of the factory from outside. Some watchman of the area opened the gate from outside. They informed

the owner of the factory who came there and took Nagender to hospital. Police recorded the statement of PW9. This witness was declared hostile by the prosecution and during cross-examination by the learned APP for the State, he admitted having stated to the police that the tall boy was having sword in his hand, while the shorter boys were having knives. He admitted that two boys came inside the factory and started picking up the aluminium slabs. He identified the appellants as the same persons who came to the factory on the fateful night, assaulted them, stabbed Nagender and stole the aluminium slabs.

21. During cross-examination on behalf of the appellants, PW9 stated that one of the accused was having sword and three were having knives. The assailants remained in the factory for about 10-15 minutes. He denied that he identified the accused persons on the asking of the APP for the State. He clarified that he identified the accused persons of his own. He denied that police told him that the accused persons were the assailants. He stated that he identified the accused persons in the police station as the assailants and robbers. He denied that he himself and Surender had assaulted Nagender or that they had stolen goods from the factory, or that because of this, they did not inform the police. He admitted that Nagender was alive till the time the door was opened by the watchman. He denied that the accused persons were not the same persons who had assaulted them on that day, stabbed Nagender and robbed the factory.

22. Learned counsel for the appellants have raised doubt on the testimony of PW9 also. They have argued that there are material contradictions in the testimony of PW9 regarding (i) the robbers being 10- as stated by him in his

examination-in-chief; (ii) non-identification of the appellants, and; (iii) no specific role attributed to each of them. It is further submitted that the testimony of PW9 is not reliable, as he identified the appellants on a leading question asked by the Prosecutor which was not allowed.

23. To deal with these contentions, we have gone through the entire testimony of PW9 and we are of the view that, though there are certain contradictions in his testimony, but the same have been clarified by him during the course of his cross-examination. During cross-examination by the learned APP for the State, PW9 stated that four robbers came inside the factory on the day of the incident. Merely because PW-9 had stated at one stage, that there were ten persons, and had stated subsequently that there were only four persons who came to commit the robbery, is no reason to disbelieve his statement qua the accused. The incident took place in the dead of the night and in the commotion, the said witness may not have correctly assessed the number of persons who had come to commit the robbery.

24. PW9 also stated that one was having sword, while the other three were having knives in their hand. He specifically stated that the accused persons assaulted them and stabbed Nagender in his stomach with a knife. He also stated that the accused persons committed the robbery of aluminium slabs from the factory. He identified all the accused persons in the Court. Though, it is apparent that he had identified the accused persons on the asking of a question by the learned APP, at the same time, he stated "*I did not identify the accused persons only because they were pointed out by Ld. Addl.PP. I can identify them myself.*" It is important to note that the

testimony of PW9 was recorded on 01.12.2010 i.e., 3 years and 3 months after the date of the incident. It was natural for his memory to fade. However, on being pointed out by the Ld. APP, his memory got recalled and he confidently and categorically identified the accused. This statement of PW9 shows the truthfulness and reliability of the witness, which clearly established the identity of the accused persons and there is no force in the contention of the appellants that PW9 identified the appellants only on a leading question put by the APP. Like PW12, PW9 had no reason to falsely implicate the accused and let the real culprits get away.

25. The other key witness in the present case is Suresh Bahadur (PW13). He deposed that he was employed as a watchman in the industrial area of Mayapuri- the place of incident, and his shift for his duty was from 7:30 p.m. to 10:30 a.m. On the said night, PW13 was patrolling in the street where he had an encounter with some boys and upon enquiring about their identity, one of them assaulted PW13 by using a sword, due to which PW13 sustained injury on his right shoulder. Thereafter PW13 ran away from the said street. After some time he went to the place of incident where he saw the owner of the factory and his son present there and one of the labour was also present in an injured state. The injured labour was removed to DDU hospital.

26. From the testimony of PW13, though the identity of the appellants has not been established, but it is established that the robbery was committed in the factory premises on the said fateful night and one person i.e. Nagender, was injured in the said incident.

27. As per the testimonies of PW9 and PW12, it is duly established that the appellants -Fayaz Ahmed, Amit Chauhan and Raj Kumar were present at the spot on the day of incident and they were armed with deadly weapons and had assaulted PW9 and PW12, and the deceased. The accused persons after entering the said premises of the factory extended threats to PW9, PW12 and the deceased Nagender to not raise an alarm and started to commit robbery of the aluminum slabs. It is further established that upon the protest of Nagender to the robbing of the aluminum slabs from the place of incident, he was stabbed in his stomach/abdomen and he thereafter succumbed to the injury. The testimonies of the above witnesses also duly established their presence at the spot at the time of commission of the offence. Therefore, the above testimonies establish the commission of robbery and murder.

28. PW17 Dr. L.C. Gupta was posted at DDU hospital along with Dr. Anita Jha who had conducted the Post Mortem examination on the body of the deceased. PW17 deposed that the deceased was brought to the casualty of the hospital at about 03:50 a.m. on 11.09.2007 in a conscious and an oriented state. He was treated surgically and finally declared dead at 08:45am on the same day. On examination of the deceased, the following ante-mortem injuries were noticed:

- i. Stitched dissected wound of 5cm length, having three black coloured thread stitched at its midline of hand and on further dissection underneath sub scalp and sub periosteal hematoma was detected out in an area of 7cmX2cm. It was reddish in colour.

- ii. Incised stitched wound of elliptical shape with three stitches present at right side sub costal area just above umbilicus and 2cm lateral to the midline. Dried blood was present over it.
- iii. Stitched incised wound was present in midline of abdomen extending from Xiphisternum to pubic symphysis. It was 27cm in length and having 16 black colour stitches and 4 tension sutures. It was surgically made incised wound which was stitched layer by layer. On opening of the abdomen and chest, incised wound of eleptical shape was found vertically in inferior vena cava at just below the side of sub diphragmatic area where a gauge piece packing was also present with local collection of blood and blood clot.
- iv. Head-brain matter was pale and its vessels were dilated and engorged.
- v. Neck- was NAD (no abnormality detected)
- vi. Chest- both lungs were pale and all chambers of the heart were empty
- vii. Abdomen- abdominal cavity was full with blood and blood clots. Incised rent (wound) was present over the greater curvature of stomach, or viscerae were pale. Rest was NAD (no abnormality detected)

29. As per the opinion of PW17, the cause of death was opined as internal hemorrhagic shock resulting from stab injury caused by sharp

weapon to the deceased at upper abdominal area leading into perforation of inferior vena cava, which was sufficient to cause death in ordinary course of nature. He proved the postmortem report as Ex.PW17/A. PW17 in his cross-examination also deposed that even if he was treated at the site of incident immediately after the infliction of injury, he may or may not have survived as in this case major blood vessels had been injured and the wound was quite big which was sufficient to drain out the whole blood of the body within a few minutes.

30. From the testimony of PW17 and the postmortem report Ex.PW17/A of the deceased, it is conclusively established beyond any reasonable doubt that the death of the deceased– Nagender was a homicidal death, and not a natural death. The cause of the death was the injury to the abdominal area of the deceased and if the report Ex.PW17/A is read jointly with the testimony of PW9 and PW12, it is duly proved that the appellants caused said injury to the deceased which proved fatal.

31. Ld. Counsel for Raj Kumar has argued that it is imperative for the prosecution to connect the injuries with the weapon used. In this regard, reliance has been placed by Mr. Singhal on the decision of this Court in **Man Preet Singh** (supra). In our view, the said reliance is misplaced for several reasons. Firstly, **Man Preet Singh** (supra) is a case of circumstantial evidence. As opposed to that, there are eye witnesses in the present case, namely, PW-9 and PW-12. PW-13 is also an eye witness to the accused being in the area at the relevant time. Secondly, in **Man Preet Singh** (supra), the alleged weapon of offence was available at the time of the conduct of the postmortem of the deceased. In the present case, the

postmortem was conducted on 13.09.2007, whereas the knife was recovered only on 21.09.2007. Thirdly, in **Man Preet Singh** (supra), the recovered knife could not be linked to the injury, since the expert had opined that the injury was inflicted by a double edged weapon which the recovered weapon was not. This submission of Mr. Singhal is, therefore, rejected.

32. Learned counsel for the appellants have contended that the public witness (PW-20) has not identified the accused persons in the TIP proceedings and even turned hostile to the case of the prosecution, and that the identification of the appellants first time before the Court, cannot be made basis to convict them.

33. The appellant Amit Chauhan was identified by the public witness PW9 during TIP proceedings, but accused Raj Kumar and Fayaz Ahmad refused to participate in the TIP proceedings. It is specifically deposed by PW9 and PW12 that they had seen these two accused in the police station and identified them to be the culprits. Even during their testimony before the trial court, they identified all the appellants as the robbers and perpetrators of the crime. We are of the opinion that the submission that the accused persons were identified for the first time in the Court is without any basis and of no consequence.

34. The next contention of the appellants is that recovery of stolen articles alone is not sufficient to base the conviction. It is true that conviction of an accused cannot be made solely on the recovery of stolen articles, and the same is required to be further corroborated by other evidence. The present case is not the case of mere recovery of robbed articles only. In the instant

case, the public witnesses PW9 and PW12 have categorically deposed against the appellants and identified them to be the robbers and the assailants of the deceased, which resulted in his death. So far as reliance placed by the trial court on the judgment in the case of **Rafiq Ahmed** (supra) is concerned, it is evident from the evidence adduced by the prosecution that the public witnesses have specifically deposed that the accused persons assaulted the deceased with a knife. Though, no name of the particular assailant/ accused has been mentioned by the public witnesses—as to who had caused fatal injuries to the deceased, but they have deposed in single breath that the accused persons assaulted the deceased with a knife which was the ultimate cause of his death. The appellants were charged under Section 302 IPC with the aid of Section 34 IPC, and we do not find any merit in the submission that identification of the actual assailant was imperative, since act of any one, made all others liable by virtue of Section 34 IPC. Pertinently, the offence took place in the dead of the night. In the commotion- when the accused came with arms, the actual assailant may not have been seen while inflicting the injury. That does not mean that all the accused- who were categorically identified by the eye-witness viz. PW9 and PW12, can get away.

35. So far as the recovery of knife at the instance of accused Raj Kumar is concerned, PW10 Const Bali Ram Singh Kushwa- who at the relevant time was posted in PS Mankapur, District Gonda, UP, deposed that on 21.09.2007, he had joined the investigation with one ASI of Delhi Police along with SO Shishupal Singh. PW10 further stated that the accused Raj Kumar was in the custody of SO. PW10 along with Shishupal Singh,

accused Raj Kumar and other police officials went to village Gothia, Kalainia, PS Mankapur. SO Shishupal was joined by one Nanku as a public witness in the investigation. On reaching the spot, accused Raj Kumar led PW10 and other police officials to a kacha house which was situated opposite his house. Accused Raj Kumar then got recovered one knife from the kacha house which was kept on a wooden shelf. A sketch was prepared of the knife by the ASI of Delhi Police vide Ex PW6/C. On producing the said knife in the court before the witness, the witness identified it as Ex.P4. In the cross examination of PW10, he deposed that accused Raj Kumar voluntarily led PW10 and the police staff to the kacha house and took out the knife from the wooden shelf.

36. PW18-Nanku Prasad Gupta is the public witness to the recovery of knife at the instance of accused Raj Kumar. Learned counsel for the appellants submitted that the testimony of PW18 is not reliable, as he had not supported the case of the prosecution and turned hostile. Though, it is apparent that PW18 had not supported the case of the prosecution and had turned hostile, but it is settled law that the entire testimony of a hostile witness cannot be discarded merely on the point that he had not supported the case of the prosecution on some aspects. The testimony of such a witness may be relied upon on the aspects on which he supported the case of the prosecution, which are otherwise corroborated. Reference may be made to ***Bhajju alias Karan Singh v. State of Madhya Pradesh***, (2012) 4 SCC 327, wherein the Supreme Court has observed:

“35. Now, we shall discuss the effect of hostile witnesses as well as the worth of the defence put forward on behalf of the appellant-accused. Normally, when a witness deposes contrary

to the stand of the prosecution and his own statement recorded under Section 161 CrPC, the prosecutor, with the permission of the court, can pray to the court for declaring that witness hostile and for granting leave to cross-examine the said witness. If such a permission is granted by the court then the witness is subjected to cross-examination by the prosecutor as well as an opportunity is provided to the defence to cross-examine such witnesses, if he so desires. In other words, there is a limited examination-in-chief, cross-examination by the prosecutor and cross-examination by the counsel for the accused. It is admissible to use the examination-in-chief as well as the cross-examination of the said witness insofar as it supports the case of the prosecution.

36. It is settled law that the evidence of hostile witnesses can also be relied upon by the prosecution to the extent to which it supports the prosecution version of the incident. The evidence of such witnesses cannot be treated as washed off the records, it remains admissible in trial and there is no legal bar to base the conviction of the accused upon such testimony, if corroborated by other reliable evidence. Section 154 of the Evidence Act enables the court, in its discretion, to permit the person, who calls a witness, to put any question to him which might be put in cross-examination by the adverse party.

37. The view that the evidence of the witness who has been called and cross-examined by the party with the leave of the court, cannot be believed or disbelieved in part and has to be excluded altogether, is not the correct exposition of law. The courts may rely upon so much of the testimony which supports the case of the prosecution and is corroborated by other evidence. It is also now a settled canon of criminal jurisprudence that the part which has been allowed to be cross-examined can also be relied upon by the prosecution. These principles have been encompassed in the judgments of this Court in the following cases:

(a) Koli Lakhmanbhai Chanabhai v. State of Gujarat [(1999) 8 SCC 624 : 2000 SCC (Cri) 13] ,

(b) Prithi v. State of Haryana [(2010) 8 SCC 536 : (2010) 3 SCC (Cri) 960] ,
(c) Manu Sharma v. State (NCT of Delhi) [(2010) 6 SCC 1 : (2010) 2 SCC (Cri) 1385] and
(d) Ramkrushna v. State of Maharashtra [(2007) 13 SCC 525 : (2009) 2 SCC (Cri) 427]” .

37. As per the testimony of PW18, he stated that he was a tea vendor and a resident of Village Gothiya, Post Office Mallipur, District Gonda, U.P. One day, when he was present at his shop, Delhi police and local police of PS Mankapur, District Gonda came to his shop along with one Raj Kumar, resident of village Gothiya. He identified his signatures on the documents Ex.PW6/A (seizure memo of knife) and Ex.PW6/C (sketch of knife). This part of the testimony of PW18 duly establishes the recovery of knife Ex.P4 at the instance of the accused Raj Kumar inasmuch, as, PW18 admitted that accused Raj Kumar was brought to Village Gothiya, Gonda by Delhi Police; local police was also present; and he signed the seizure memo Ex.PW6/A and sketch Ex.PW6/C of the knife. We may also observe that PW-10 Const. Bali Ram Singh Kushwa is an independent witness. He is not a member of the Delhi Police force, and was, therefore, completely detached from the case. His testimony is entitled to credence like that of any independent public witness.

38. So far as the doubt raised by Mr. Singhal regarding the deposit of the knife in the malkhana on the date of its recovery is concerned, we find no merit in the same. It was not suggested to the concerned prosecution witnesses that the knife could not have been brought to Delhi and deposited in the malkhana on the day of its seizure i.e. 21.09.2007.

39. So far as the recovery of knife on the disclosure of the accused Amit Chauhan and the sword at the instance of Fayaz Ahmad is concerned, in our view, the same has been duly established. As per the statement of PW21 Ct. Dev Kumar, he was posted at PS Mayapuri as a constable on 19.09.2007. PW21 along with PW26, PW19, PW27, PW24 and accused Amit Chauhan went to Rewari Railway line near jhuggi. The accused, Amit Chauhan had led PW21 and other police officials to the railway line and got one knife recovered after digging the land. IO seized the recovered knife (vide Ex.PW20/A) and also prepared a sketch of the knife and got it sealed in a parcel. Thereafter, the IO deposited the case property with MHC(M) after they returned to the police station. PW24 stated that he, along with Faiyaz and Illiyas and other police officials went to the Rewari railway line. The accused Faiyaz Ahmad got recovered one sword from a pit which was near the Rewari railway line. The said sword was converted into pullanda after due measurement and was seized by the IO. The seizure memo of the sword is Ex.PW24/C. The sealed articles which was containing one sword was shown to the witness who identified the same to be recovered at the instance of accused Fayaz Ahmad vide Ex.PY-1.

40. The above testimonies of the prosecution witnesses duly establishes that the knives and the sword used by the appellants to commit robbery, and the knife used to commit the offence of murder were recovered at the instance of the accused persons, further proving the prosecution's case.

41. So far as the recovery of stolen articles is concerned, PW24 HC Vishal deposed that on 17.09.2007, he was posted at PS Mayapuri, and had joined the investigation along with Insp.Virender, SI Kashmiri Lal, HC

Rohtash, HC Bhona Ram, Const Rajender, Const Ram Chander and Const Naresh. Upon getting secret information from a secret informer, Insp. Virender was informed that the suspects of this case would be available at railway station Daya Basti. Pursuant to this, Insp. Virender briefed them and they went to the police station. Two boys were apprehended. On interrogating them, their names were revealed as Fayaz Ahmed and Amit Chauhan. They both further informed Insp. Virender that two of their associates could be apprehended from Delhi Cantonment Railway Station. PW24 and the police party along with the two accused persons went to Delhi Cantonment railway station and, at the instance of accused Fayaz Ahmad and Amit Chauhan, the other two accused persons were apprehended. On interrogation they revealed their names as Raj Kumar and Mohd. Illiyas.

42. PW24 further deposed that he again joined the investigation on 18.09.2007 and took all the four accused persons to Jhuggi No.B-1009, Kanchan Basti, near Rewari Railway Line. On reaching there, all the four accused persons entered the said jhuggi where the articles were lying and informed the IO that the robbed articles were kept there. The articles kept there were 42-43 aluminum slabs, one bag containing brake shoes and one bag containing aluminum dye in fish shape. There were about 360 brake shoes in number and the dye of the fish shape were 750 in number after counting. While the counting was done, a crowd of 5-6 people had assembled outside the jhuggi. One of those persons gathered outside the jhuggi had purchased the robbed articles from the accused persons on 11.09.2007. The I.O., after getting this knowledge given to him by one of the

accused persons, apprehended the person who had bought the articles from them along with two other persons.

43. The statement of PW-24 that no vehicle was used to recover the property is a minor abrasion and does not go to the root of the matter. The fact remains that the recovery had been affected of the stolen articles which were a large number of aluminium slabs, aluminium brake shoes and aluminium small fans. These articles could not have been procured of the shelf from the open market and were typical in nature. Their presence in the jhuggi of the accused Raj Kumar has not been explained by him.

44. PW30-Insp. Virender Singh also deposed that after the arrest of the accused persons, on 18.09.2007, accused persons took the police party to Jhuggi area, near Rewari Railway line in the area of PS Mayapuri and pointed towards a jhuggi and from that jhuggi, at their instance, the case property i.e. 43 aluminium plates, 327 aluminium brake shoes and 755 aluminium small fans were recovered and the same were seized.

45. It is not the case of the prosecution that PW-3 i.e. the son of the owner of the property went to the jhuggi for the purpose of recovery. It is evident from his statement that he identified the recovered articles at the police station. Therefore, he has rightly not spoken of the recovery of the articles at the jhuggi.

46. PW26-SI Kashmiri Lal corroborated the testimony of PW30 to the effect that recovery of stolen articles was affected at the instance of the accused persons. The contention that, merely because PW-26 has not stated that he entered the jhuggi from where the recovery of articles was affected,

is neither here nor there. It was not essential for every member of the police party to enter the jhuggi at the same time. The I.O. PW30- Insp. Virender Singh along with SI Kashmiri Lal, HC Vishal, HC Rohtash, Ct. Rajinder, Ct. Ram Chander and Ct. Naresh of the police party went to the jhuggi with the four accused where the articles were identified by the accused and recovered by the police party. There is nothing to disbelieve the testimony of these witnesses.

47. We do not agree with this submission of learned counsel for the appellant Raj Kumar that section 27 of the Evidence Act is not attracted, since the police was aware of the jhuggi. Being aware of the location of the jhuggi is one thing, and being aware of what is kept inside the jhuggi is a different thing. The recovered articles are a large number of aluminium slabs, aluminium brake shoes and aluminium small fans, which could not have been taken and planted in the jhuggi by the police without the same being discovered. No reason for the planting of said articles in the jhuggi of the accused, and for false implication of the accused, has been brought forth. The submission is, therefore, rejected.

48. So far as the recovery of clothes from accused Raj Kumar is concerned, PW6-ASI Harpal Singh deposed that on 22.09.2007, accused Raj Kumar led the police party towards bushes situated near railway line, Delhi Cantonment and got recovered his T-shirt and pant, which were seized vide seizure memo Ex.PW6/D. He also got recovered two cycle rickshaws from near Suachalaya Sabzi Mandi, Khazan Basti which were used in the commission of offence for carrying the luggage and the same were seized vide memo Ex.PW6/C.

49. On this aspect, the testimony of PW-6 is not believable for several reasons. Firstly, Ex. PW-6/D – the seizure memo of clothes of the accused Raj Kumar shows that the recovery was made from village Gothiya, Gonda. However, PW-6 says that the said recovery was from the bushes situated near railway line in Delhi Cantonment. Secondly, there is no report by the FSL that the blood group of the blood found on the recovered clothes was that of the deceased. Thus, the recovery of the blood stained clothes from the accused Raj Kumar is doubtful, and cannot be relied upon by the prosecution.

50. The next contention of the accused is that no adverse inference can be drawn against the accused Raj Kumar and Fayaz Ahmed for their refusal to join TIP proceedings. Pertinently, accused Raj Kumar and Fayaz Ahmed did not participate in the TIP proceedings on the ground that they were already shown to the witnesses. They have not probalised this justification. The fact remains that both the accused were duly identified by the eye witnesses (PW9 and PW12) during their testimony as robbers and assailants. We may reproduce the relevant extract from the testimony of PW-9 on this aspect:

“.... It is wrong to suggest that I have identified the accused persons as the assailants of that night only at the asking of Ld. Addl. PP. It is correct that Addl. PP had pointed out the accused persons to me before asking whether they are the same persons or not.

Court Question: Is it correct that you had identified the accused persons as the assailants only because they were pointed out to you by Ld. Addl. PP or do you identify them yourself?

Ans. I did not identify the accused persons only because they were pointed out by Ld. Addl. PP. I can identify them myself.

After the incident I had seen the accused persons in the police station also. They were in custody of police at that time. It is wrong to suggest that police had told me that they were the assailants. I was called in the police station for my statement. It is wrong to suggest that I had seen the accused persons in the police station on the day when my statement u/s. 161 Cr PC Mark X was recorded by the police. I was called in the police station after two days of incident. Only my permanent address was taken by police on that day when I was called in the police station and that day I had seen the accused persons in police station. Police had asked me whether the persons in custody of police were actually the assailants or not and I had identified them i.e. the accused persons as the assailants and robbers. I had seen one of the accused persons who is wearing white shirt today (witness has pointed towards accused Raj Kr.) in police station on that day. Thereafter once I was again called by police and taken to Tihar Jail.

Court Ques. What had happened in Tihar Jail?

Ans. Many persons were made to stand in one line and out of those persons I had identified the accused persons”.

51. The testimony of PW-9 is completely natural and believable. There was no reason for him to falsely implicate these accused persons. He did not know them from before. In view of the identification and attribution of role of the accused by PW9 and PW12, and the refusal by these accused to join the TIP proceedings, in our view, an adverse inference can and should be drawn against these accused. Their refusal to participate in the TIP proceedings is a pointer to their guilt in the commission of the offence.

52. Learned counsel for the accused Fayaz Ahmad has also contended to the effect that he is entitled for acquittal, as he is similarly placed with co-

accused Mohd. Illiyas who has already been acquitted by the trial court. We do not find any force in this contention of the accused Fayaz for the reason that PW12-Surender Prasad Mehto and PW9-Ravinder Kumar duly identified the accused Fayaz as one of the robbers and the assailants in the Court. Unlike Mohd. Illiyas, the appellant Fayaz Ahmed did not participate in the TIP proceedings. In the TIP proceedings of Mohd. Illiyas, he was not identified by PW-9 or PW-12. He was identified by PW-13. But PW-13 is not a witness to the commission of the offence inside the factory premises. He was a chawkidar outside the factory. No role has been assigned to Mohd. Illiyas by PW-9 or PW-12. Even the recovery of the stolen property is not attributed solely to Mohd. Illiyas.

53. So far as the contention of the appellants that there are several flaws in the investigation with regard to manner of arrest of the appellants; recovery of robbed articles, recovery of weapons of offence, and; deposit of articles in the malkhana are concerned, we are of the view that the same are not material since they do not go to the root of the matter, and the said contentions do not cut ice, in view of the testimony of eye witnesses PW9 and PW12 to the effect that the appellants were robbers and assailants. PW9 and PW12 have duly identified the appellants as the robbers, and they have deposed that they have assaulted the deceased Nagender in his stomach, which resulted into his death.

54. The last contention of the counsel for the appellants is that no case under Section 302 IPC is made out and, at the most, a case under Section 304 Part-II IPC is made out as there was no intention of the appellants to commit the murder. Learned Counsel argued that the intention of the

appellants was to commit the robbery, and as the deceased came in the way of commission of robbery, he was stabbed. It is submitted that the appellants had no intention to commit the murder of the deceased and it was just a spontaneous development which led to stabbing of the deceased, which resulted into his death.

55. It is a settled law that intention and knowledge to do a certain act has to be gathered from the facts and circumstances brought on record. The instant case is a case of direct eye witness evidence, and not of circumstantial evidence. The eye witnesses (PW9 & PW12) have specifically deposed against the appellants that on the day of the incident, they all were armed with deadly weapons i.e. one was armed with a sword and other accused persons were armed with knives. Both these witnesses have deposed that when deceased Nagender tried to resist the robbery being committed by the appellants, he was stabbed with a knife in his abdomen and as per the postmortem report, the injury sustained in the abdomen of the deceased was the cause of his death. It is also a settled preposition of law that while ascertaining intention and knowledge to commit an offence, the Court is required to see the type of weapon used, nature of injury caused, blows given to the injured and the severity of such blows, to reach to a conclusion whether it is a case of murder, or culpable homicide not amounting to murder. In the instant case, as per the deposition of PW9 and PW12, all the appellants came armed with deadly weapons at the time of committing the offence. As per postmortem report Ex.PW17/A of the deceased, the deceased had sustained three incised wounds on his body and the severity of the blow caused to his abdomen was such that it resulted into

not only the cutting of the abdomen area, but perforation of inferior vena cava. The measurement of the said wound was 27 cm in length. PW17- who conducted the postmortem specifically stated that the patient may or may not have survived, as in the present case, major blood vessel had been injured and the wound was quite big which was sufficient to drain out the whole blood of the body within a few minutes. So, in these circumstances, we are of the view that the appellants had the intention and knowledge in committing murder of the deceased, and they cannot seek resort to Section 304 IPC. The prosecution has been able to establish its case against the appellants that they committed the robbery, and when they were resisted by the deceased, they have committed the murder of the deceased. Thus, the present case falls within the meaning of 'murder' as defined in Section 300 IPC, and punishable under Section 302 IPC.

56. In view of the above discussion, we do not find any merit in the present appeals. The prosecution has successfully established its case against the appellants that they have committed the robbery in the factory premises of PW3 on the day of the incident. The prosecution has also established beyond reasonable doubt that the appellants in furtherance of their common intention, committed the murder of the deceased. It has also been established beyond reasonable doubt that at the time of commission of robbery, the appellants were armed with deadly weapons and they used the same while committing the robbery, so as to cover the case within the four corners of Sections 302/392/34 IPC, 397 IPC and under Sections 25/27 of the Arms Act. The appellants have failed to make out any case in support of their appeals.

57. Consequently, the judgment of conviction and order on sentence passed by the trial court are upheld as we find no illegality or infirmity in the same. The conviction and sentence awarded to the appellants is hereby sustained.

58. The instant appeals are accordingly dismissed.

(P.S. TEJI)
JUDGE

(VIPIN SANGHI)
JUDGE

JULY 16, 2018

