

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

*Judgment reserved on: November 25<sup>th</sup>, 2017*  
*Judgment pronounced on: February 19<sup>th</sup>, 2018*

**+ CRL.A. 1151/2016**

VIKAS ..... Appellant  
Through: Mr. M. L. Yadav, Adv.

versus

STATE ..... Respondent  
Through: Mr. Rajat Katyal, APP

**+ CRL.A. 104/2017**

NEERAJ@KARAN ..... Appellant  
Through: Ms. Inderjeet Sidhu, (DHCLSC)

versus

STATE ..... Respondent  
Through: Mr. Rajat Katyal, APP

**+ CRL.A. 82/2017**

SONU@MATKA ..... Appellant  
Through: Ms. Inderjeet Sidhu, (DHCLSC)

versus

STATE ..... Respondent  
Through: Mr. Rajat Katyal, APP

**CORAM:**

**HON'BLE MR. JUSTICE S. P. GARG**

**HON'BLE MR. JUSTICE C. HARI SHANKAR**

**JUDGMENT**

%

**C. HARI SHANKAR, J.**

1. The appellants, before us, were convicted, by the learned Additional Sessions Judge, Karkardooma (hereinafter referred to as “the learned ASJ”), *vide* judgment dated 16<sup>th</sup> July 2016, for offences punishable under Sections 302/34, 307/34 and 396 of the Indian Penal Code (hereinafter referred to as “IPC”), and were consequently sentenced, *vide* order dated 27<sup>th</sup> July 2016. The particulars of their convictions and sentence may be set out thus:

(i) Neeraj was convicted under Sections 302 read with Section 34, Section 307 read with Section 34, Section 396 and Section 397 of the IPC. He was sentenced, (a) to rigorous imprisonment for life, and fine of Rs. 5,000/, with default sentence of one year RI, under Section (“u/s”) 307 r/w 34 IPC and (b) to rigorous imprisonment for life, and fine of Rs. 5,000/, with default sentence of one year RI, u/s 396 r/w 397 IPC.

(ii) Sonu was convicted u/S 302 r/w 34, 307 r/w 34 and 396 IPC. He was sentenced, (a) to rigorous imprisonment for life, and fine of Rs. 5,000/, with default sentence of one year RI, under Section (“u/s”) 302 r/w 34 IPC and (b) to rigorous imprisonment for life, and fine of Rs. 5,000/, with default sentence of one year RI, u/s 396 IPC.

(iii) Vikas's conviction and sentence were identical to Sonu's. He, too, was convicted u/s 302 r/w 34, 307 r/w 34 and 396 IPC, and was sentenced (a) to rigorous imprisonment for life, and fine of Rs. 5,000/, with default sentence of one year RI, u/s 307 r/w 34 IPC and (b) to rigorous imprisonment for life, and fine of Rs. 5,000/, with default sentence of one year RI, u/S 396 IPC.

The learned ASJ further observed that, in view of the fact that the appellants were being sentenced u/s 396 IPC, there was no need to pass a separate sentence on them u/s 302 r/w 34 IPC.

2. The appellants have moved this court, by way of appeals, against the judgment, dated 16<sup>th</sup> July 2016, and sentence order dated 27<sup>th</sup> July 2016, of the learned ASJ.

**Case of the prosecution:**

3. The case of the prosecution, as set out in the charge sheet, dated 9<sup>th</sup> June 2009, read with the documents exhibited in the case, may be set out as under.

4. On 16<sup>th</sup> March 2009, Duty Officer HC Hoshiyar Singh (PW-3) had informed, *vide* DD No 24A (Ex. PW-3/A), that a telephone call had been received, with the caller stating: "*Gazipur Shamshan Ghat par mere bhai ko chaku maar diya*". The information was given to SI Harpal Singh (PW-12) for necessary action. Following thereupon,

Inspector Mahender Kumar (PW-31) reached the “*Shamshan Ghat*” with HC Rajesh Kumar (PW-29), Ct. Yogender (PW-13) and Ct. Javed (PW-20), where they were informed that two persons, who had suffered knife wounds, had been taken to the hospital in the PCR van, and that the condition of one of the two was critical, for which the other had called the PCR, from the mobile phone of the store keeper, near the cremation ground. Thereupon, the said team reached LBS Hospital, where they were informed, of the situation, by SI Harpal Singh (PW-12), who also handed over, to them, MLC No 1647/09 (Ex. PW-1/A), of the deceased Jitender and MLC No. 1648/09 (Ex. PW-1/B) of the injured Mool Chand (PW-4), along with samples, sealed with the seal of the hospital.

5. The MLC of Jitender (Ex. PW-1/A), prepared by Dr. Shalini Gupta (PW-1) at 3 PM on 16<sup>th</sup> March 2009, stated that the patient had been brought dead, and that he had suffered an “incised wound right side chest upper part 3 x 1 cm”. The MLC of Mool Chand (PW-4) (Ex. PW-1/B) stated that he was “conscious, oriented”, his general condition was “fair”, and that he had a “lacerated wound 0.5 cm x 0.5 cm. plus swelling in left thigh middle 1/3<sup>rd</sup>”. The nature of his injury was noted as “simple blunt”.

6. The charge sheet further stated that the deceased Jitender had a knife wound at the centre of his chest, and blood was also found on the trouser worn by him. The investigating team, accompanied by Mool Chand (PW-4), thereafter, visited the spot where the incident

had taken place. A safety thread of a mobile phone, with blood marks, as well as a key ring, were found there and seized vide seizure memo exhibited as PW-4/C. The crime team also reached the spot.

7. The statement of Mool Chand (PW-4) was recorded, under Section 161 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "the Cr.P.C."). He stated that (i) on 16<sup>th</sup> March 2009, he, along with his nephew Jitender (i.e. the deceased) had proceeded from his village to Gazipur Dairy Farm to buy a cow, (ii) he was carrying Rs.3,000/-, and Jitender was carrying Rs.7,000/- (iii) at around 2 P.M., while they were walking on the road, near the cremation ground, four boys, around 20-30 years of age, emerged from behind the wall and surrounded them, out of which two brandished knives and the other two held the arms of Jitender and himself from behind, (iv) the knife-wielding boys asked them to hand over everything in their possession, (v) when they tried to resist, one of the boys, using a knife inflicted a fatal wound, on the chest of Jitender, which started bleeding, (vi) the other boy attempted to stab him, i.e. Mool Chand; (vii) however, he managed to escape with an injury on his left thigh, (viii) thereafter, the assailants fled with their money and mobile phones, (ix) he carried Jitender to the nearby cremation ground, from where he dialed 100 using the mobile phone of the cremation ground store keeper, and (x) the Police, thereafter, arrived and took them to hospital, where Jitender was declared brought dead. The statement was signed by Mool Chand in vernacular and attested by Inspector Mahender Kumar (PW-31).

8. As the aforementioned facts, and the statement of Mool Chand (PW-4), disclosed commission of offences under Sections 302, 307, 397 and 394 read with Section 34 IPC, Inspector Mahender Kumar (PW-31) reached the police station with Constable Javed (PW-20) where an FIR (Ex. PW-2/A) was registered under the said provisions. Site plan (Ex. PW-19/A) was prepared, and photographs, of the spot of occurrence, were taken. A mobile safety thread, and a key ring, found at the spot, were seized *vide* seizure memo exhibited as Ex. PW-4/C.

9. The statement of Suraj Pal (PW-8), said to be an eye witness to the occurrence, was also recorded under Section 161 of Cr.P.C. on 16<sup>th</sup> March 2009. He vouchsafed the version of the incident as explained by Mool Chand (PW-4) in his Section 161 statement except for the fact that he referred to five assailants, not four. The statement of Suraj Pal may be loosely translated, from the vernacular, as under:

“I state that I have given the above address and am in private service. Today i.e. on 16.3.09, at about 2 PM, when I was riding my motorcycle, on the way to visit my friend’s house in Kheda Colony, on the road behind Gazipur Khatta, I saw, near the Khatta, 5 boys, about 20 to 25 years of age, wheatish in complexion and of medium height, belabouring two men. Three boys had surrounded and held the said two men from the rear and the remaining two boys attacked them with knives from the front. I accelerated my motorcycle and fled from there in fear. I did not find any policeman, or police vehicle, on the way; therefore, I was unable to inform the police. Now, when I was returning, I saw you. I stopped and asked you, and learnt, from you, that one of the two men who had been stabbed had died. I then told you that I had seen the incident with my own eyes and could identify all the five boys if they were brought before me. You questioned me and took my statement. I have read it. It is correct.”

**10.** A statement in vernacular, under Section 161 of the Cr.P.C., was also taken from Brijesh (PW-6, the Store Keeper at the Shamshan Ghat), by I/O Mahender Kumar (PW-31) on 16<sup>th</sup> March 2009 and was marked 'X-1' by the learned ASJ, wherein it was stated that (i) on 16<sup>th</sup> March 2009, at 2.30 P.M, two youths, covered in blood, came to his shop, (ii) one of them said that they had been brutally assaulted by four boys, using knives, (iii) the said boys robbed them of their mobile phone and Rs.10,000/-, (iv) they asked him to telephone the police, whereupon he dialed No.100 and gave the phone to them, (v) one of the youths, thereupon, explained what had transpired with them, (vi) a few minutes later, the PCR vehicle reached there, and immediately took the two injured youths to the hospital, (vii) of the two youths, the condition of one was very serious and he appeared to be unconscious, and (viii) immediately thereafter, Insp. Mahender Kumar (PW-31) arrived with his staff and made inquiries from him i.e. Brijesh Tiwari (PW-6), whereafter Insp. Mahender Kumar (PW-31) also left with his staff for the hospital. He vouchsafed to having read his statement and to the correctness thereof.

**11.** A supplementary statement was also taken from Mool Chand (PW-4), on the same day i.e, 16<sup>th</sup> March 2009, in which he modified his earlier version of the incident by saying that the number of assailants, were, in fact, five and not four.

**12.** In view of the statements, by Mool Chand (PW-4) as well as Suraj Pal (PW-8), to the effect that there were five persons who had

attacked Mool Chand and Jitender, the charge under Section 394/34 IPC was converted to Section 396, IPC, viz. “dacoity with murder”.

**13.** On 17<sup>th</sup> March 2009, after handing over the dead body of Jitender to his father Kunwar Pal, Inspector Narender Singh (PW-21) prepared the inquest papers, Post-mortem report (Ex. PW-7/A) was obtained from Dr. Arvind Kumar (PW-7).

**14.** The post-mortem report, prepared by Dr. Arvind Kumar (PW-7), Jr. Specialist, Department of Forensic Medicine, LBS Hospital, reads thus:

“Alleged H/O stab injury on 16/3/09 for which he was taken to LBS Hospital where he was declared brought dead vide MLC No. 1647/09 dated 16/3/09 at 3:00 p.m.

#### **VI. EXTERNAL GENERAL APPEARANCE**

Dead body of young adult, male, wearing pant, underwear, pair of socks and shoes. Red colour Kalawa present over right wrist and black colour thread (Tagdi) present over coin region.

Tattoo mark ‘J.S. Tomar’ present over right forearm. Blood stain present over clothes. Clothes are removed and preserved.

#### **IX. EXTERNAL EXAMINATION**

Incised stab wound flesh, of size 6.6cm x 0.4 cm and cavity deep present over right side of chest, obliquely placed. Upper angle of wound is acute and lower angle is blunt. Upper angle is 4 cm away from midline while lower angle is 1 cm away from midline. Wound is 9cm below clavicle. Direction of wound is inward, upward, and backward. Entered the right chest cavity after cutting third and fourth ribs at

costochondral junction. The right chest cavity full of blood and blood clots. At bronchus, pulmonary vessels, of right side are cut at hilum. Nick present over descending aorta. Total depth of wound is about 10.3 cm. right lung collapsed. Extravasation of blood was present in soft tissues around the hilum and around descending aorta. Left lung is pale. At lower lobe of right lung through and through wound is present.

#### **OPINION**

Haemorrhagic shock due to ante mortem injury to right lung and its vessels produced by single cage sharp cutting stabbing weapons.”

**15.** On 18<sup>th</sup> March 2009, acting on secret information, one of the assailants (who, being a juvenile, is referred to hereinafter as “J-1”) was arrested and, from his possession the Nokia 3500 mobile phone, belonging to the deceased Jitender, was recovered.

**16.** On the basis of the information given by J-1, Sonu was arrested on 19<sup>th</sup> March 2009, from Noida. The Nokia 1650 mobile phone, belonging to Mool Chand, was recovered from his possession and seized *vide* seizure memo exhibited as Ex. PW-15/C.

**17.** J-1 and Sonu were produced before the learned Metropolitan Magistrate (hereinafter referred to as “the learned MM”) in the Karkardooma Court and remanded to judicial custody. The date for their Test Identification Parade (TIP) was fixed as 26<sup>th</sup> March 2009. On the said date, Mool Chand (PW-4) clearly identified J-1 and Sonu,

and recording to that effect was made by the learned MM on the TIP proceedings. (Ex. PW-16/A, Ex. PW-16/C)

**18.** The remaining three assailants i.e. J-2, Neeraj @ Karan and Vikas were arrested on 30<sup>th</sup> March 2009 under Sections 41(1) of the Cr.P.C. and were presented before the learned MM, on 02<sup>nd</sup> April 2009 and formally arrested. They were remanded to judicial custody, and the date for their TIP was fixed as 23<sup>rd</sup> April 2009. The said three accused refused to undergo TIP; however, they were correctly identified, in the E.D. lock up by Mool Chand (PW-4), when he had come to the Karkardooma, Distt. Court on 4<sup>th</sup> April 2009, for some other work. A statement of Mool Chand, to the said effect, was recorded. He further identified them in the Court during trial, as would be clear from the recitals hereinafter.

**19.** On information given by Neeraj and J-2, in their disclosure statements recorded on 2<sup>nd</sup> April 2009, the dagger and knife used in the crime, were found hidden in the ground (soil) behind the veterinary hospital at Ghazipur, and seized on 5<sup>th</sup> April 2009 (Ex. PW-13/J).

**20.** Subsequently, J-2 and Neeraj were first remanded to police custody, whereafter they were presented before the learned MM who remanded them to judicial custody.

**21.** On 08<sup>th</sup> May 2009, a “subsequent opinion” (Ex. PW-7/C) was obtained from Dr. Arvind Kumar (PW-7), to the effect that the injury

on the chest of deceased Jitender could have been caused by the knife seized from Neeraj.

22. The charge sheet concluded by stating that J-1 and J-2, being juveniles, were being separately proceeded against, before the learned Juvenile Justice Board-II, and the charge sheet, in respect of the other three accused in the crime, viz. Neeraj, Sonu and Vikas, was being filed before the learned MM.

23. Consequent to filing thereof, copies of the charge sheet were supplied, by the learned MM, to the appellants. Thereafter, after compliance with the provisions of Section 207 of the Cr.P.C., the case was committed to the Court of Sessions.

24. *Vide* order dated 09<sup>th</sup> October 2009, the learned ASJ framed charges against Neeraj, Sonu and Vikas under Sections 302/34, 307/34, 397/34 and 412/34 of the IPC.

**Evidence:**

25. The prosecution examined 32 witnesses (PWs). The evidence of the relevant witnesses may be briefly dealt with as under:

- (i) PW-1, Dr. Shalini Gupta, CMO, LBS Hospital, deposed, in her examination-in-chief, on 30<sup>th</sup> November 2009, that, on 16<sup>th</sup> March 2009, she had examined the body of Jitender as well

as Mool Chand. She stated that, while Jitender was brought dead, Mool Chand was referred to 'SR Surgery for further treatment.' In cross examination, she acknowledged that she had prepared the MLCs of deceased Jitender and that of the Mool Chand (PW-4), exhibited as Ex. PW-1/A and Ex. PW-1/B respectively, and that she had mentioned "simple blunt" on the MLC of Mool Chand because his wounds were lacerated. She also clarified that, as she had stated, in the MLC, that Mool Chand was conscious and oriented, he was, consequently, also fit to give his statement.

(ii) PW-3, HC Hoshiyar Singh, who was working as Duty Officer from 8 AM to 4PM at PS Kalyanpuri on 16<sup>th</sup> March 2009, deposed, in his examination-in-chief on 16<sup>th</sup> March 2010, regarding receipt of information, from the PCR at 2.41 PM on the said date and regarding the events that transpired thereafter. Nothing substantial was elicited in his cross examination.

(iii) PW-4, Mool Chand deposed, in his examination-in-chief on 16<sup>th</sup> March 2010, that (a) on 16<sup>th</sup> March, 2009, Jitender and he had left his house for Ghazipur dairy farm, to purchase a cow, (b) he was carrying Rs. 3000/–, and Jitender was carrying Rs. 7000/–, (c) they were also carrying mobile phones, his being a Nokia 1650 phone with a safety thread, and Jitender's a Nokia 3500 phone, (d) while walking towards Ghazipur Dairy Farm, via Khattewala Road, at about 2 PM, two persons came

out from behind the wall of the *Nallah* towards the *Shamshan Ghat* side, carrying knives, (e) one caught hold of Jitender and the other inflicted knife blows on his person, (f) they were both present in the court that day, and he could identify both of them, (g) in the meanwhile, three more boys came from behind; one of them caught hold of him and the other boy stabbed him, but he caught his hand and, in the process, sustained an injury on his left thigh, (h) the fifth boy, took out money from the pocket of Jitender, (i) the accused persons asked them to hand over all their belongings, and attacked them when they resisted, (j) Jitender and he started bleeding, owing to the injuries sustained by them, (k) the accused persons stole their cash and their mobile phones and ran away, (l) he, thereafter, lifted Jitender and took him towards the main road, where, using the mobile phone of the store keeper at the *Shamshan Ghat*, he dialed 100, (m) the Police, thereupon, arrived and took them to hospital, (n) Jitender was declared brought dead, whereas he was given treatment, (o) his statement was recorded by the Police, and exhibited as Ex. PW-4/A, (p) from the hospital, the police brought him to the spot of occurrence, where the crime team took photographs, (q) at the spot, the safety thread of his mobile phone, and one key ring of Jitender, were found, (r) sample soil, with blood stains, was also seized by the I/O from the spot, (s) his, i.e. Mool Chand's bloodstained clothes were also seized and another pair of clothes given to him for wearing, (t) he had initially told the police that there were four assailants, but later

told them that there were five, (u) he participated in the search for the accused persons, but in vain, (v) the IO recorded the statement and prepared site plan, at his instance, on the spot, and (w) on 26<sup>th</sup> March 2009, he participated, with the IO, in judicial TIP, in which he identified J-1 and Sonu. During his further examination-in-chief, on 10<sup>th</sup> May, 2010, PW-4 proved the TIP proceedings relating to J-1 and to Sonu, which were exhibited as Ex PW-4/D and PW-4/E respectively. He further testified that, on 4<sup>th</sup> April, 2009, he had seen the remaining three accused at Karkardooma Court and that he had informed the IO, whom he met on the ground floor, of the said fact. He correctly identified Neeraj and Vikas, who were present in court. He further identified the two Nokia phones allegedly stolen by the accused as well as the key ring stated to belong to deceased Jitender. The said phones and key ring were exhibited as Ex P-1 to P-3. He also identified the clothes that he had been wearing, which were also exhibited. (Ex. PW-4/B)

(iv) In his cross examination, which took place on 10<sup>th</sup> May 2010, PW-4 Mool Chand deposed that his first statement was recorded by the police on 16<sup>th</sup> March 2009 at the spot of occurrence. He was further cross-examined on 21<sup>st</sup> November, 2015 where he deposed that his second statement was recorded by the police on the same day, i.e, on 16<sup>th</sup> March 2009. A suggestion was put, to him, that his statement, which was dated 16<sup>th</sup> March 2009, was actually recorded on 17<sup>th</sup> March, 2009, for

which his attention was invited to the fact that, on the third line of his statement, the figure “7” had been overwritten as “6”. Relying on the said suggestion, it was further suggested that, he i.e. Mool Chand had not, in fact, witnessed any incident on 16<sup>th</sup> March, 2009 at all. While accepting the fact of over writing of the figure “6” by “7” in the third line of his statement, PW-4 Mool Chand categorically denied the suggestion that his Section 161 statement had, in fact, been recorded on 17<sup>th</sup> March, 2009 and deliberately ante-dated. He also attributed the fact of having initially referred to four assailants and, later, to five assailants, to fear and nervousness while making the initial statement (Ex.PW-4/A). He reiterated the fact that inquiries had been made, from him, by Insp. Mahender Kumar (PW-31) in the Hospital.

(v) PW-6, Brijesh Tiwari, when examined, in chief, on 06<sup>th</sup> April 2010, deposed that, (a) about a year back at 2.30 to 3.00 P.M, one person wearing blood stained clothes had come to him and asked him for help, stating that some persons had snatched money from his brother, (b) he asked him for his mobile phone so that he could call 100, (c) he i.e. Brijesh Tiwari, handed over his mobile phone to the said person, who dialed 100, (d) the police team came to the shop, talked to that person and took them to the hospital and (e) his i.e. Brijesh Tiwari’s statement were recorded by the police. In cross examination, Brijesh Tiwari (PW-6) denied having made the statement, dated 16<sup>th</sup>

March 2009, marked 'X-1' and referred to in para 10 (*ibid*). He also denied having ever said that two persons had come to him on 16<sup>th</sup> March 2009. He denied the suggestion that he had changed his story, to one person instead of two persons, deliberately in order to give benefit to the accused and that he was intentionally suppressing the fact of involvement of two persons. In cross examination, by counsel for Neeraj, Brijesh Tiwari (PW-6) stated that it was the unknown person, who had come for his help, who had talked to the PCR, using his, i.e. Brijesh's phone, and not Brijesh himself.

(vi) PW-7, Dr. Arvind Kumar, who had signed the post mortem report of the deceased Jitender, proved, in his examination-in-chief on 20<sup>th</sup> July 2010, his post mortem report. The relevant portion of his examination-in-chief may be reproduced as under:

"On dated 16.03.2009, I was posted as Junior Specialist at LBS Hospital, Khichripur. On that day, Insp. Mahender Kumar of PS Kalyanpuri gave me request to conduct postmortem on the body of Jitender Kumar s/o Sh. Kunwar Pal Singh, 25 years old, male with alleged history of stab injury.

On general observation, I found a dead body of a young adult male wearing pant, underwear, pair of socks and shoes. Rigor mortis was present all over the body. Hypostasis was present over the back and fixed.

*On external examination, I found a incised stab wound fresh size 6.6 cm x 0.4 cm x cavity deep was present over right side of chest, obliquely placed. Upper angle of the wound was acute and lower angle*

*was blunt. Upper angle was 4 cm away from midline while lower one was 1 cm away from midline. Wound was 9 cm below clavicle. Direction of the wound was inward, upward and backward, entered the right chest cavity after cutting third and fourth ribs at costochondral junction. Right chest cavity was full of blood and blood clots. Bronchus, pulmonary vessels of right side were cut at hilum. Nick was present over descending aorta. Total depth of the wound was 10.3 cm, right lung was collapsed. Extravasation of blood was present in soft tissue around hilum, right side and around descending aorta. Left lung was pale. At lower lobe of right lung through and through wound was present.*

On internal examination, internal visceral organs were pale. Injuries over lungs as described above.

After postmortem examination, I opined that time since death was about 18-24 hours and cause of death was *haemorrhagic shock due to ante mortem injury to right lung and its vessels produced by single edged sharp cutting/stabbing*. The postmortem report is in my hand which is Ex.PW7/A bearing my signature at point A.

On dated 06.05.2009, an application for subsequent opinion in above said case along with a sealed parcel was given to me by Insp. Mahender Kumar of PS Kalyanpuri. On 08.05.2009, I examined the sealed parcel which was containing one knife having wooden handle. One edge of knife was sharp and other was blunt. *Blade of knife was 28.6 cm long and knife was heavy. At 10.3 cm length of blade, width at point was 6.2 cm.* The diagram and description of the weapon was prepared on separate sheet which is Ex.PW7/B bearing my signature at point A. **After going through postmortem report and examination of weapon, I opined that injury no. 1 present in my PM report Ex.PW7/A could be caused by weapon**

**under examination (knife). The subsequent opinion is in my hand which is Ex.PW7/C bearing my signature at point A.**

C.Q.: Whether the nature of injury was sufficient in the ordinary course of nature?

Ans: Injury No. 1 was sufficient to cause death in ordinary course of nature.”

(Emphasis supplied)

(vii) In cross examination, PW-7 stated that the body had been given to him for post mortem at 10.50 A.M. He denied the suggestion that the injury suffered by him was not sufficient to cause death.

(viii) PW-8, Suraj Pal, purportedly an eye witness to the incident, stated, in his examination-in-chief on 30<sup>th</sup> September 2010 that (a) on 13<sup>th</sup> March, 2009 at about 1:45 PM, he had seen five persons at the road near the Khatta robbing two other persons, (b) one of the robbers had a knife in his hand, and (c) two of the robbers had “apprehended” the two persons who were being robbed, whereas the other two were conducting their search. He stated that he had, thereafter left the spot out of fear, and had not seen the robbers inflicting knife injuries on the two victims. He testified to having been informed of the death of Jitender, by the police, on his way back and, thereupon, having described the incident to them. According to him, the robbers were of wheatish complexion, aged 20 to 25 years. One of

them was heavily built whereas the remaining 3-4 were thin. On being shown the accused, who were present in the Court, Suraj Pal asserted, twice, that none of the robbers, whom he had seen on 13<sup>th</sup> March, 2009 was present in the Court. In view of the fact that he appeared to be resiling from his earlier statement, the learned APP for the State requested for permission to cross examine Suraj Pal, which was allowed. In his cross-examination, Suraj Pal clarified that the date of incident was 16<sup>th</sup> March 2009 and that he had inadvertently referred to the incident as having taken place on 13<sup>th</sup> March 2009. Despite having been shown his statement, allegedly recorded under Section 161 of the Cr.P.C. on 5<sup>th</sup> April 2009, he denied having stated that two of the robbers had inflicted knife blows on the two persons being robbed. He, however, admitted to having identified J-2 and Neeraj at the Police Station on 5<sup>th</sup> April 2009. On a suggestion being put, to him, that the accused person standing in the dock was Neeraj, and was the same person whom he had identified on 5<sup>th</sup> April 2009 in the Police Station, he immediately answered in the affirmative and then volunteered that he could not pay attention towards the accused as there was a crowd in the court and another matter was being heard. Similarly, he identified the other two accused persons standing in the dock as Sonu and the Vikas, who had committed the alleged offence with Neeraj, and stated that he had not been able to identify them earlier due to the presence of a crowd in the court.

(ix) In his cross-examination, by learned counsel for the accused, Suraj Pal clarified that his statement had been recorded, by the Police, only on 16<sup>th</sup> March, 2009. He further stated that he had witnessed the incident of robbery on 16<sup>th</sup> March 2009, from a distance of half a kilometer. He also stated that, on the said date, the statement of Mool Chand (PW-4) was recorded first and his statement was recorded later by Insp. Mahender Kumar (PW-31). In his further cross-examination by defence counsel, PW-8 Suraj Pal again stated, that on that date, he could not identify all the accused persons. The suggestion, that he had identified the accused during cross-examination by the APP without understanding the question, was denied. In his further cross examination by counsel for Sonu and the present appellant, Suraj Pal stated he had seen the incident of robbery from his motorcycle while driving at 25 to 30 kmph. He also denied having made any call to the PCR, from the telephone available at the house of his friend Ravi, whom he had gone to visit. He further deposed that Mool Chand's statement was not recorded in his presence.

(x) Suraj Pal was re-examined by the learned APP, who confronted him with his contradictory depositions on the issue of identification of the accused persons. It was pointed out, to Suraj Pal, that, during his cross-examination by the learned APP, he had correctly identified all the accused persons, explaining that he had been unable to do so during his

examination-in-chief owing to the presence of a crowd in the Court, whereas, in his cross-examination by counsel for accused, he had stated that he was not in a position to identify the accused. He was, therefore, requested to clarify which of his statements were correct. He stood by the statement made by him during his cross-examination by defence counsel, to the effect that he could not identify the accused persons. He sought to justify his earlier statement, to the learned APP, that he had managed to identify them, by saying that his eyesight was weak, and he could not, therefore, see the persons properly.

(xi) The evidence of PW-12, SI Harpal, recorded on 16<sup>th</sup> July 2012, was significant only to the extent that it acknowledged the fact of recording of the statement of Mool Chand (PW-9) by Inspector Mahender Kumar (PW-31), and of his i.e. SI Harpal's having recorded the disclosure statement of Neeraj, J-2 and Vikas, in the police chowki of the Karkardooma Court on 2<sup>nd</sup> April 2009.

(xii) PW-13, Constable Yogender Kumar, in his examination-in-chief conducted on 07<sup>th</sup> July 2011, deposed that the deceased Jitender had an injury in the middle of his chest, caused by a sharp edged weapon, as well as blood stains on his pant. PW-13 was recalled, for further examination-in-chief, on 25<sup>th</sup> August 2011, when he deposed regarding the recording of disclosure statement of J-1 and of the interception and arrest of

Sonu on the basis of information provided by J-1. Further examination-in-chief of PW-13 was conducted on 12<sup>th</sup> April, 2012, when he testified to the recovery of a mobile phone from Sonu, and to the recording of his disclosure statement, as well as his confession, on being confronted with J-1, that the mobile phone recovered from him was one of the two mobile phones that had been stolen, by him, along with Neeraj, J-1 and J-2, three to four days earlier, after the incident of stabbing. He also deposed that, on 5<sup>th</sup> April 2009, he, along with HC Rajesh (PW-29) and Ct Amrik (PW-25) went, to the spot of occurrence, with Neeraj and J-2, who pointed out the place of incident, *vide* Memos exhibited as Ex PW-13/G and Ex PW-13/H. He also deposed that, thereafter, Neeraj and J-2 took them to the spot where they had dumped the chopper and knife, from where Neeraj recovered the said weapons, stating that they were the weapons of offence. He stated that sketches of the two weapons had been made (exhibited as Ex. PW-13/I and Ex. PW-13/K), and that they were seized *vide* Seizure Memos exhibited as Ex PW-13/J and Ex PW-13/L. He also deposed that his own statement had been recorded by the IO, and that Neeraj, Sonu and Vikas were present in the court.

(xiii) PW-13 was further recalled for examination-in-chief on 4<sup>th</sup> October 2012, when he identified the mobile phones recovered from J-1 and Sonu, as well as the chopper and knife recovered at the instance of Neeraj and J-2 when they were

exhibited. He also deposed, *inter alia*, that there was a long cut of two/ three inches on the shirt of the deceased Jitender.

(xiv) In his further cross-examination on 01<sup>st</sup> March 2013, PW-13 Yogender Kumar clarified that Brijesh Tiwari (PW-6) had met them at 3 PM, and that his statement had not been recorded by the IO (i.e. PW-13's) in his presence. He further reiterated the fact that the deceased Jitender, as well as Mool Chand (PW-4) had one injury each, the former having been injured on his chest. He further stated that Sonu had been arrested at 5 AM on 19<sup>th</sup> March 2009. The suggestion that Sonu and J-1 had not made any disclosure statements was denied. He also deposed that the chopper had a sharp blade on one side, and that no fingerprints had been taken from the knife or from the chopper. The suggestion that the knife and chopper were planted on Neeraj and J-2 was denied.

(xv) PW-15, HC Shri Bhagwan, deposed, in his examination-in-chief, on 7<sup>th</sup> July 2011, that, on the night between 18<sup>th</sup> and 19<sup>th</sup> March, 2009, he had been informed, regarding the aforementioned incident, by Insp. Mahender Kumar (PW-31), HC Rajesh Kumar (PW-29) and Ct. Yogender (PW-13), and had joined the investigation with them. He also testified to their having apprehended Sonu, at the instance of J-1, and to the recovery of the Nokia 1650 mobile phone from Sonu and to his subsequent arrest *vide* arrest memo exhibited as Ex.PW-15/A

read with the deposition of Ct. Yogender Kumar (PW-13) in his cross examination and the examination-in-chief of Head Constable Shri Bagwan (PW-15), testifying to such arrest. The seizure memo of the mobile recovered from Sonu was exhibited as Ex. PW-15/C. He further stated that Sonu had made a disclosure statement, which was exhibited as Ex PW-15/E read with examination in chief of HC Shri Bagwan (PW-15), who testified to the making of the statement. He correctly identified Sonu, who was present in the court.

(xvi) In cross examination, PW-15 HC Shri Bhagwan confirmed that the disclosure statement of Sonu had been recorded at about 5 AM.

(xvii) PW-16, Ms. Sunaina Sharma, learned MM, was examined, in chief, on 8<sup>th</sup> December, 2011, when she confirmed having conducted the TIP of Sonu and J-1 on 26<sup>th</sup> March 2009, and to their having been correctly identified by the witnesses. She was not cross-examined.

(xviii) PW-17, V.K.Gulia, learned MM, was also examined, in chief, on 8<sup>th</sup> December, 2011, when he confirmed the statements, explanations, refusals, etc. which were exhibited. He was not cross-examined.

(xix) PW-18, ASI Ram Tirath was examined, in chief, on 27<sup>th</sup> February 2012, when he confirmed the apprehending of Neeraj, J-2 and Vikas on 30<sup>th</sup> March, 2009 under Section 41(1) of the Cr.PC., their interrogation, and the recording of disclosure statements made by them. It was further asserted, by him, that the incident had been recorded at PS Kalyanpuri vide FIR 51/09. He further testified to the arrest of the said three accused, and the recording of their disclosure statement, as well as his own statement on 1<sup>st</sup> April, 2009. He also stated that Neeraj and Vikas had been correctly identified by the witness in the court.

(xx) In cross examination, PW-18 denied the suggestion that the accused did not give any disclosure statement on 16<sup>th</sup> March 2009.

(xxi) PW-20, Ct. Mohd. Javed was examined, in chief, on 16<sup>th</sup> July 2012. He confirmed having gone to the *Shamshan Ghat* at about 3 PM on 16 March 2009, having met Brijesh Tiwari (PW-6) there, as well as to having been informed, by Brijesh Tiwari, regarding the incident of stabbing and the subsequent taking away, by the Police, of the victim, to the hospital. He further deposed regarding the subsequent events that transpired in the hospital, already referred to hereinabove. He further stated that Insp. Mahender Kumar (PW-31) had recorded the statement of Mool Chand (PW-4) and that, after preparing

*rukka*, he was sent to the Police Station for registration of FIR. He stated that, on reaching the police station, he handed over the *rukka* to HC Basti Ram (PW-2), who made enquiries and got the FIR registered. He stated that, thereafter, he returned to the spot of occurrence with the FIR, which he handed over to Insp. Mahender Kumar (PW-31), and that, thereafter, photographs were taken, samples resumed etc. He confirmed that his statement had, thereafter, been recorded by the IO, and further stated that, later, on 2<sup>nd</sup> April, 2009, Neeraj, J-2 and Vikas had been produced before the learned MM, Karkardooma, where they were interrogated and arrested, and their disclosure statements recorded. In his further examination-in-chief, on 1<sup>st</sup> March 2013, PW-20, Ct. Mohd. Javed, identified the bunch of keys which had been seized from the spot of occurrence (exhibited as Ex P-4/C collectively), the clothes of Mool Chand (PW-4) (exhibited as Ex. P-4/B), the safety thread of the mobile phone of Mool Chand, and the blood stained earth recovered from the spot of occurrence. Nothing substantial was elicited, from him, in cross examination.

(xxii) PW-21, Insp. Narender Singh, in his examination-in-chief on 25<sup>th</sup> March 2013, confirmed that, on 30<sup>th</sup> March 2009, he, along with ASI Ram Tirath (PW-18) and Ct. Gajender, had apprehended and interrogated three boys, who confessed to having committed robbery, at Kalyan Puri, on 16<sup>th</sup> March 2009 and that, on enquiry, it was revealed that they were wanted in

FIR 51/09. He further stated that he arrested the accused under Section 41(1) of the Cr.P.C. and recorded their disclosure statements, which were exhibited as Ex. PW-23/A to C. He further stated that the said accused had been produced, before the learned MM, on the next date, i.e. 31<sup>st</sup> March, 2009 and that, on 1<sup>st</sup> April 2009, Insp. Mahender Singh (PW-31) had recorded his statement.

(xxiii) In cross-examination, PW-21 confirmed that personal search of J-2, Neeraj and Vikas was conducted on the spot on 1<sup>st</sup> April 2009, but that nothing was recovered therefrom. He also confirmed that their disclosure statements were recorded on the spot.

(xxiv) PW-23, Ct. Hemender was examined, in chief, on 25<sup>th</sup> September, 2014. He confirmed that, on 30<sup>th</sup> March 2009, he, alongwith SI Narender Kumar (PW-21) and ASI Ram Tirath and Ct. Gajender had over powered three boys who, on enquiry, disclosed their names to be Neeraj, J-2 and Vikas. He correctly identified Neeraj and Vikas, who were present in court. He further confirmed that, on inquiry, the said three accused had disclosed the incident of robbery and stabbing, on 16<sup>th</sup> March 2009, in the process whereof they had looted Mool Chand (PW-4) and the deceased Jitender. He further confirmed that, on enquiry, it had been ascertained that FIR No. 51/09 u/s 302/307/397/396 IPC was already registered against the said

accused at PS Kalyanpuri and that SI Narender (PW21) arrested the three accused u/s 41(1)(a) of the Cr.P.C. He also confirmed that, on inquiry, the accused confessed their guilt, and gave disclosure statements, as already stated hereinabove. In cross-examination, he confirmed that the disclosure statements of the said accused had been recorded at PS Majnu Ka Tila. The suggestion that the accused had not made any disclosure statements was denied.

(xxv) PW-24, Ct. Pradeep Kumar, in his examination-in-chief, conducted on 13<sup>th</sup> January 2015, confirmed having deposited the sealed samples in the Forensic Science Laboratory (FSL) Rohini and handed over the receipt of acknowledgment, thereof, to the MHC (M).

(xxvi) PW-25, Ct. Amrik Singh, during his examination-in-chief, on 13<sup>th</sup> January 2015, confirmed that he joined the inspection alongwith Insp. Mahender Singh (PW-31), HC Rajesh (PW-29) and Ct. Yogender (PW-13), who were led, by Neeraj and J-2, to the place of occurrence of the crime, as well as to the place where the weapons had been hidden. He further deposed regarding the recovery of the weapons of offence, after they were dug out by Neeraj and J-2. He confirmed that the chopper had a handle 12.5cms long and was itself 41 cms in length and 28.5cms in width, with the blade itself being 6.3cms wide. Similarly, the length of the knife was confirmed as 30

cms, with blade 19.5 cms, and handle 10.5 cms in length. The width of the blade of the knife was stated to be 4.8cms. He identified the chopper and knife, which were shown to him in court, as being the ones recovered at the instance of Neeraj and J-2. In cross-examination by the learned *amicus curiae*, PW-25 clarified that blood was visible on the chopper and knife, which were rusted.

(xxvii) PW-26, HC Sherpal Singh, PW-27 Ct. Jitender and PW-28 Ct. Ramender Singh, correctly identified Neeraj, Vikas and J-2. Nothing further, of substance, emerges from their depositions.

(xxviii) PW-29, HC Rajesh was examined, in chief, on 14<sup>th</sup> January 2015. He confirmed having proceeded, with Inspector Mahender Kumar (PW-31), Ct. Javed (PW-20) and Ct. Yogender (PW13), on 16<sup>th</sup> March 2009, to the store at the *Shamshan Ghat* and to having met the store keeper Brijesh Tiwari (PW-6), who informed them that the injured assaulted persons had been taken to hospital in the PCR van. He also recited the happenings at the hospital, consequent to their reaching there, being handed over the MLC by SI Harpal Singh (PW-12), and described the particulars of the injuries suffered by the deceased Jitender and Mool Chand, as well as the clothes worn by them. He also went on to refer to their having proceeded back to the site of occurrence with Mool Chand,

recovery of the mobile safety thread and bunch of keys therefrom, as also to the recording of the statement of Mool Chand by the IO, who thereafter, prepared the *rukka* and handed over the same to Ct. Javed and proceeded to the Police Station for getting the case registered. He referred to the seizure of the items found there, along with the clothes of Mool Chand, as also to having met Suraj Pal and the recording of his statement by the IO. Recording of the supplementary statement of Mool Chand, by the IO, on the next morning, was also referred to by him. He also went on to depose regarding the proceedings on 17<sup>th</sup> and 18<sup>th</sup> March 2009, which have already been described hereinabove. He also referred to the arrest of J-1 and Sonu and the disclosure statements given by them. He went on to refer to the proceedings on 02<sup>nd</sup> April 2009 at the Karkardooma Court, where Neeraj, J-1 and Vikas were produced before the learned MM and were formally arrested by him. He referred to their disclosure statements as well as to the identification of the items of offence and other items seized from the spot of occurrence. In cross-examination by learned *amicus curiae* appearing for the accused, he confirmed the above facts, including the recording of statements of J-2 and Sonu.

(xxix) PW-31, Insp. Mahender Kumar was subjected to detailed examination-in-chief and cross-examination, starting on 05<sup>th</sup> May 2015. To the extent it is relevant, PW-31 stated, in examination-in-chief, which took place on 05<sup>th</sup> May 2015 and

06<sup>th</sup> June 2015 that (a) on 16<sup>th</sup> March 2009, he had gone, with HC Rajesh (PW-29), Ct. Javed (PW-20) and Ct. Yogender (PW-13) to the *Shamshan Ghat*, Gazipur where the store keeper Brijesh Tiwari (PW-6), informed them regarding the injuries that had been inflicted on Jitender and Mool Chand and the fact that they had been taken to hospital, by the PCR, (b) in the hospital, he met SI Harpal who handed him the MLC of the deceased Jitender and Mool Chand as also a parcel containing blood stained clothes of Jitender, (c) he, thereafter, inspected the dead body of Jitender and found a stab wound on his chest, (d) he proceeded, later, with Mool Chand, and his staff to the *Shamshan Ghat*, Ghazipur, from where a mobile safety strip, bunch of keys and blood stained earth were recovered, (e) he, thereafter, recorded the statement of Mool Chand on the basis whereof, he prepared *rukka* (Ex. PW31/B), which was sent, through Ct. Javed (PW-20) to the police station for registration of FIR, (f) after registration of the case, Ct. Javed (PW-20) returned to the spot with the computerized copy of the FIR (Ex PW2/A), (g) the clothes worn by Mool Chand were also taken into custody and sealed, (h) in the meantime, Suraj Pal came there on a motorcycle and informed that he was an eye witness to the incident, whereafter his statement under Section 161 of the Cr.PC was recorded by him, i.e. Insp. Mahender Singh, (i) as Suraj Pal disclosed that there were five assailants, Sections 396/397 IPC were added in the case, (j) the case property/exhibits were later deposited with MHC(M), (k) on the

next date i.e. 17<sup>th</sup> March 2009, he went to the mortuary of LBS hospital where he prepared the inquest papers and got the dead body of Jitender identified by his relatives, (l) the postmortem of the dead body was conducted, (m) on the next date i.e. 18<sup>th</sup> March 2009, acting on secret information, he, along with his staff, reached near the toilet block at Kalyanpuri, where they apprehended one person, who was revealed to be J-1, from whom one Nokia 3500 was recovered, (n) (J-1 confessed that he had murdered Jitender and injured Mool Chand with the help of Sonu, J-2, Neeraj and Vikas), (o) J-1 was thereafter arrested by him and his personal search was conducted, (p) disclosure statement of J-1 (Ex.PW-13/D) was recorded, (q) on the basis of information given by J-1 in his disclosure statement, he along with HC Shri Bhagwan (PW-15) went to Kondli Village, and thereafter, to Noida, where they apprehended Sonu and interrogated him, (r) one Nokia 1650 mobile phone was recovered from Sonu, who was arrested by him (i.e. Insp. Mahender Kumar), (s) Sonu confessed to having murdered Jitender and injured Mool Chand with his associates, (t) a detailed disclosure statement of Sonu, (Ex.PW-15/E) was recorded by him, (u) on 23<sup>rd</sup> March 2009, he moved an application before the learned MM for fixing the date of TIP whereon the learned MM fixed the date for TIP proceedings as 26<sup>th</sup> March 2009, (v) on the said date, Mool Chand correctly identified J-1 and Sonu, which was recorded in the TIP proceedings, (w) on 31<sup>st</sup> March 2009, he received information

that Neeraj, J-2 and Vikas had been arrested under Section 41(1)(a) Cr.PC., by PS Civil Lines, (x) he, thereafter, moved an application for production warrants of the said three accused persons in the concerned Court where they were produced, (y) on 02<sup>nd</sup> April 2009, J-2, Neeraj and Vikas were produced before the learned MM Karkardooma Court, (z) SI Harpal Singh (PW-12), attended the Court on the said date, along with HC Rajesh (PW-29) and Ct. Javed (PW-20), (aa) SI Harpal (PW12) interrogated and arrested J-2, Neeraj and Vikas, (ab) their disclosure statements were recorded and they were remanded to JC, (ac) on his (i.e. Mahender Singh's) application, the said three accused were later remanded to JC, (ad) on the next date i.e. 05<sup>th</sup> April 2009, J-2 and Neeraj led him, along with HC Rajesh (PW-29), Ct. Yogender (PW-13) and Ct. Amrik Singh (PW-25) to the place of incident, as well as the place where the weapons of offence were concealed, (ae) from the said spot, one chopper of length 41 cms with blade length 28.5 cms and one knife of length 31 cms with blade length 19.5 cms and handle 10.5 cms, were recovered and sketches made thereof, (af) statements of the witnesses were recorded by him, (ag) on the next date, the said two accused persons i.e. Neeraj and J-2 were remanded to JC by the concerned Court, (ah) though the date of TIP was fixed for Neeraj, J-2 and Vikas, they refused to participate therein, (ai) during investigation, he collected the post mortem report and relevant medical papers including the MLC of deceased Jitender and Mool Chand, (aj) on the basis of

the application (Ex. PW-31/M), moved by him, a subsequent opinion was obtained from the autopsy surgeon after examining the weapon of offence, which was exhibited as Ex. PW7/C, (ak) subsequently, the charge sheets of J-1 and J-2 were prepared and submitted before the learned Juvenile Court, (al) the sealed samples were sent on 25<sup>th</sup> May 2009 by the MHC(M) to the FSL Rohini, (am) after recording of statements of the witnesses and completion of investigation, challan was prepared and filed, (an) the FSL report and serological report, both dated 29<sup>th</sup> October 2009, were exhibited as Ex. PW31/N and Ex PW31/O, (ao) he 'correctly' identified Sonu and Neeraj who were present in the Court, (ap) he also identified the key bunch, mobile threads, mobile phone, clothes worn by Mool Chand and earth and road material recovered from the site of occurrence of the crime, from the samples, as returned by the FSL, and (aq) the chopper and the knife were identified by him as being the ones which were recovered Neeraj and J-2 respectively.

(xxx) In his cross-examination by learned *amicus curiae* on 08<sup>th</sup> September 2015, Insp. Mahender Kumar (PW-31) stated that he had recorded the statement of Mool Chand (PW-4) at the spot of occurrence and had written the *rukka* by 4 PM, and that he had also recorded the statement of Suraj Pal (PW- 8), at about 6 PM. He denied the suggestion that J-1 and Sonu did not make any disclosure statements, or that their signatures had been obtained on blank papers. He reiterated the fact that, on 02<sup>nd</sup> April 2009, disclosure statements of J-2, Neeraj and Vikas

were recorded by SI Harpal Singh (PW-12) after making their formal arrest, and he further stated, in cross-examination, that he had taken out the knife from under the ground at the instance of the accused persons.

**26.** All the five accused i.e. Neeraj, Sonu, the two juveniles and Vikas, in their statements recorded under Section 313 of the Cr.P.C., either baldly denied all allegations put to them, or professed complete ignorance. As such, it is not necessary to go into the exact particulars of the said statements.

**27.** Three defence witnesses, i.e. Om Prakash (DW-1), Vinod Kumar (DW-2) and Smt. Angoori (DW-3) were cited by Vikas, Neeraj and Sonu respectively.

**28.** DW-1 Om Prakash, who was presented by Vikas as his defence witness, testified, in his examination-in-chief, that Vikas was his son-in-law and had married his daughter on 01<sup>st</sup> March 2009, and that he had taken Vikas and his daughter to Aligarh on 10<sup>th</sup> March 2009, where they remained till 20<sup>th</sup> March 2009. He asserted that Vikas had been falsely implicated in this matter. In cross-examination by learned APP, DW-1 denied the suggestion that, on 16<sup>th</sup> March 2009, Vikas was present at the main road behind Gazipur or had involved himself in the alleged offence of robbery and murder. However, he confirmed that he had not made any complaint to any authority regarding the false implication of Vikas, and that he had disclosed the

said fact for the first time before the learned ASJ. He also accepted that he had no proof to show that, on 16<sup>th</sup> March 2009 at 2 PM, Vikas was in Aligarh. In his further cross-examination on 29<sup>th</sup> March 2006, DW-1 Om Prakash produced the invitation card and photographs pertaining to the marriage of Vikas with his daughter Amita, and denied the suggestion that they were fabricated. He reiterated that he had no documentary proof of the presence of Vikas at Aligarh on 16<sup>th</sup> March 2009 at 2 PM.

**29.** DW-2 Vinod Kumar, who was cited by Neeraj as his defence witness, stated, in his examination-in-chief on 09<sup>th</sup> March 2006, that he was the neighbor of Neeraj and that he had been falsely implicated in the matter. In his cross-examination by learned APP, he admitted that he did not know the whereabouts of Neeraj at 2 PM on 16<sup>th</sup> March 2009, and that he had not made any complaint to the authorities regarding the false implication of Neeraj, which he was alleging, for the first time, before the learned ASJ.

**30.** DW-3 Smt. Angoori, who was cited by Sonu as his defence witness, stated, in her examination-in-chief on 09<sup>th</sup> March 2016, that she was the mother of Sonu and that her son had been lifted by the police authorities at about 9 PM on 17<sup>th</sup> March 2016, and that he had been falsely implicated. In cross-examination by learned APP, she admitted that she had not made any complaint to any authority regarding the alleged false implication of her son and had only visited

the Police Station. She asserted that, on 16<sup>th</sup> March 2009 at 2 PM, Sonu was with her at her house preparing for the function to be held at the house, of her daughter, and that it was wrong to suggest that he was, at the said time and date, present at the main road behind Gazipur, or that he had committed any offence of robbery or murder.

**31.** The disclosure statements of the accused were recorded twice, first by PW-21 Insp. Narender Kumar on 30<sup>th</sup> March 2009 and, later, by PW-12 SI Harpal Singh on 2<sup>nd</sup> April, 2009. The fact of the said disclosure statements having been given by Neeraj and Vikas was also confirmed from PW-23 Ct. Hemender, in the course of recording of his evidence during trial. Further, PW-31 Insp. Mahender Kumar, in his examination-in-chief, deposed that, acting on secret information, he managed to trace J-1 and recover the Nokia 3500 mobile phone, belonging to the deceased Jitender, from him, and thereafter, on the basis of information provided by J-1, to have been able to trace and apprehend Sonu, from whom he recovered the Nokia 1650 mobile phone belonging to Mool Chand.

**32.** On 5<sup>th</sup> April, 2009, acting on the information received by the accused, Inspector Mahender Kumar (PW-31), led by Neeraj and J-2 had, along with HC Rajesh (PW-29), Ct. Yogender (PW13) and Ct. Amrik Singh (PW-25) went to the place of incident, as well as the place where the weapons of offence were concealed, and, from the said site, the weapons of offence were actually recovered (Ex.PW-13/L)

**Submissions made before the learned ASJ and the impugned judgment**

33. Before the learned ASJ, learned APP, appearing for the prosecution, relied entirely on the testimony of PW-4 Mool Chand which, he argued, was completely reliable and concluded the case against the accused. He contended that, from the evidence of PW-4 and other witnesses, the charge against the accused stood proved.

34. Learned *amicus curiae*, appearing for the accused, emphasized, *per contra*, the apparent contradictions and discrepancies in the testimonies given by various witnesses at different points of time. He also relied on DD No 24-A, which stated that the brother of the caller had been stabbed, whereas, in fact, the deceased Jitender was the nephew of Mool Chand. This contradiction, in his submission, rendered the evidence of PW-4 Mool Chand unreliable. He also contended that the attack, on PW-4, having allegedly been by use of a knife, the injury to him could not have been “simple blunt”, as stated in the MLC of PW-4. Reliance was also placed, by learned *amicus curiae*, before the learned ASJ, on the fact that PW-6 Brijesh Tiwari and PW-8 Suraj Pal had turned hostile. He also relied on the overwriting, on the date as mentioned in the Section 161 statement of PW-4 Mool Chand, in which “7” had been over written with “6”. He further submitted that recovery of the chopper had not been proved at all, especially as there was no public witness to the said recovery. In

the circumstances, the learned *amicus curiae* submitted, before the learned ASJ, that the prosecution had failed to discharge the burden, cast on it, to prove that the offence had been committed by the accused.

**35.** The learned ASJ, however, upheld the case of the prosecution and rejected the version put forth by the defence, reasoning as under:

(i) The evidence of an injured witness was entitled to greater respect and weightage under the law, as held in, *inter alia*, ***Jarnail Singh vs State of Punjab, (2009) 9 SCC 719, Balraje @ Trimbak vs State of Maharashtra, (2010) 6 SCC 673*** and ***Abdul Sayed vs state of Madhya Pradesh, (2010) 10 SCC 259***.

(ii) Minor contradictions and discrepancies did not result in weakening the case of the prosecution, as held in ***A. Shankar vs state of Karnataka, (2011) 6 SCC 279***.

(iii) Though there were certain differences, in the version of the incident, as explained by PW-4 Mool Chand, in his Section 161 statement (Ex PW-4/A), as compared to his deposition in cross examination, these contradictions were not so major as to justify discarding of his testimony. PW-4 had specified the roles of each of the accused, stating, particularly, that it was Neeraj who had inflicted the fatal knife/topper blow upon the deceased Jitender, Sonu who had caught hold of the deceased while the said blow was being inflicted, J-2 who had tried to kill him while J-1 held him from the back and that Vikas had taken money out of the pocket of the deceased Jitender. Further, the

discrepancies and contradictions, if any, were also attributable to the immense shock and fear which PW-4 must have been experiencing at the time of recording of his statement by the police.

(iv) The fact that Brijesh Tiwari's call to 100 was made from his mobile phone stood proved. The testimony of ASI Jamaluddin (PW-10), the PCR official, showed that there were two injured persons at the store and that both of them had been taken to hospital. The fact that PW-4 and the deceased were victims of the offence, thereby, stood proved. Further, as PW-4 and the deceased Jitender were contemporaneously examined at the hospital, the presence of PW-4 at the scene of the crime could not be doubted. PW-4 had also explained his having initially attributed the act to four, and later to five, assailants, to fear and nervousness.

(v) The overwriting on the Section 161 statement of PW-4 did not result in discrediting the same. The statement had been written by the I/O, and not by PW-4 himself. No question had been put, to the IO (PW-31), regarding the overwriting.

(vi) The attempt to wish away the involvement of PW-4, on the ground that the injury suffered by him had been noted as "simple blunt" in his MLC (Ex PW-1/B), had been explained by the concerned Doctor (PW-1), who clarified that she had referred to the injury as "simple blunt" on the basis of the type of the wound, which was lacerated. If the blunt side of the knife injured the victim, the type of wound could well be lacerated.

Reliance was also placed, in this context, on *State of UP v Hari Chand, (2009) 13 SCC 542*, which ruled that, unless oral evidence was totally irreconcilable with medical evidence, it had primacy. The medical evidence and oral evidence could not be said to be totally irreconcilable in the present case.

(vii) The fact that DD No. 24-A referred to the caller having said that this “brother” had been killed, rather than his “nephew”, did not result in a conclusion that the incident had not taken place at all. The mental condition of PW-4 had to be borne in mind, in this connection.

(viii) There was no reason for PW-4 to spare the actual culprits and falsely implicate any of the accused, as he had no enmity with any of them.

(ix) As the incident had taken place in broad daylight, the identification, by PW-4, of the assailants, could not be doubted.

(x) The FSL report (Ex PW-31/N), and the serological report (Ex PW-31/O) proved that blood had been detected on most of the exhibits, and that it was human blood.

(xi) The testimony of PW-4 was, therefore, truthful and reliable. In any event, there could be no doubt about the fact that five boys had surrounded PW-4 and the deceased Jitender, looted them, killed Jitender and caused injuries to PW-4.

(xii) Moreover, PW-8 also supported PW-4, though he had been declared hostile. Reliance was placed on the judgment in *Rohtash Kumar vs State of Haryana, (2013) 14 SCC 434*, to hold that the testimony of a hostile witness could also be relied

upon, if found credible. The fact that, in cross-examination, PW-8 stated that he could not identify the accused, was obviously because he had been won over by them.

(xiii) The injury suffered by the deceased had been confirmed, by the subsequent opinion of Dr. Arvind Kumar (PW-7) as sufficient to cause death. The said opinion clearly stated that the injury, on the chest of the deceased Jitender, could have been inflicted by the chopper recovered at the instance of Neeraj. The post-mortem report (Ex PW-7/A) also stated that the death of Jitender was due to “haemorrhagic shock due to ante mortem injury to right lung and its vessels produced by single edged sharp cutting/stabbing weapon”.

(xiv) The attempt of the defence, to cast doubt on the recovery of the chopper at the instance of Neeraj, was also unsustainable, as:

(a) PW-31 Insp. Mahender Kumar, PW-13 Ct. Yogender Kumar, PW-25 Amrik Singh and PW-29 HC Rajesh had all deposed about the recovery of the chopper at the instance of Neeraj pursuant to disclosure statement Ex PW-12/D,

(b) the chopper had been recovered, on 5<sup>th</sup> April 2009, from a place at some distance from the scene of the crime, near a wall of the Veterinary Hospital, and was dug out of the ground,

(c) cross examination of PW-13 Ct. Yogender Kumar had disclosed that (i) they had reached the *Shamshan Ghat* on 5<sup>th</sup> April 2009 at 3/3:35 PM, (ii) their Gypsy had stopped around 200 m from the spot, (iii) the knife was not rusted, (iv) the weapons were not visible on the ground, (v) PW-13 could not notice blood on the knife or chopper as there was mud on them and (vi) no fingerprints were taken,

(d) cross-examination of PW-25 Ct. Amrik Singh had disclosed that the IO had requested some public persons to join the proceedings but that none had agreed, the IO had dug out the sand with his own hands, the chopper and knife were lying horizontally in the sand about 2-3 inches deep, there was sand on these weapons when they were taken out, the weapons were rusted, blood was seen on the weapons and sketches were prepared at about 1 PM,

(e) cross examination of PW-29 HC Rajesh disclosed that the vehicle had been stopped 300 m from the spot, the chopper was recovered first, there was sand and garbage on the chopper, there were some spots on it which appeared to be blood spots, the chopper was rusted and was not wrapped in any cloth and that he had prepared sketches of the chopper and knife at the directions of the IO,

(f) cross-examination of PW-31 Insp. Mahender Kumar revealed that there were sand marks and blood marks on the weapons, some sand was present on the blade and that he had taken out the knives from under the ground at the instance of the accused,

(g) there was nothing, therefore, in the cross-examination of the concerned officials, which could help the accused; some minor contradictions regarding the time of reaching the *Shamshan Ghat*, and the presence/absence of blood spots did not make the recovery of the weapons doubtful, and

(h) non-joining of public witnesses was of no consequence, as held in *Ram Swaroop vs State, (2013) 14 SCC 235*.

(xv) In the circumstances, it was held that the recovery of the chopper, and the fact that it was the weapon by which the fatal blow was administered to the deceased Jitender, stood proved.

(xvi) The two accused Neeraj, and Vikas having refused to participate in the TIP, were identified, by PW-4, Mool Chand, for the first time in the Court on 4<sup>th</sup> April 2009. In view of the refusal, by the accused, to participate in the TIP, they could not object to such identification. Reliance was placed, for the said purpose, on *Munna vs State, 106 (2003) DLT 592 (SC)*.

(xvii) The evidence of the defence witnesses did not exculpate any of the accused in any manner.

(xviii) The incident of robbery of the deceased Jitender and Mool Chand, and the murder of Jitender, thereby, stood proved. The involvement of the five accused, and their particular roles in the incident, also stood established.

**36.** Proceeding, thereafter, to the question of the offences which could be said to have been committed by each of the accused, the learned ASJ held thus:

(i) The fact of Jitender having died a homicidal death, and of Neeraj being the perpetrator of the fatal injury, using a chopper, stood proved. The chopper was 41.4 cm in total length, with its blade being 28.6 cm long and 6.3 cm wide. The injury was inflicted on the chest of Jitender, and had been opined to be sufficient, in the ordinary course of nature, to cause death. The five accused had surrounded Jitender with the intention of robbing him and, when he resisted, Neeraj inflicted the fatal wound on him. The wound had been inflicted with such force that it injured the right lung and the vessels. The case of Neeraj, therefore, squarely fell under Section 300 of the IPC, and did not attract any of the exceptions mentioned in Section 300. It was, therefore, a clear case of murder.

(ii) The invocation, against Sonu and Vikas, of Section 34 of the IPC, was also upheld by the learned ASJ. The circumstances invoked, by the learned ASJ, for the said

purpose, in the case of Sonu, were the fact that he knew that Neeraj was carrying a chopper, and that he had held the deceased Jitender when Neeraj inflicted the fatal chopper blow. These facts, it was held, were sufficient to indicate common intention, of Sonu, with Neeraj, to murder Jitender. Insofar as Vikas is concerned, the learned ASJ upheld the invocation, against him, of Section 34 of the IPC, on the ground that (a) his presence at the scene of the crime was established, (b) it could not be said that he had no knowledge that a person would be killed while committing robbery, (c) the fact that Neeraj was carrying a chopper was within his knowledge, (d) common intention to kill the deceased Jitender was, therefore, attributable to all the accused, including Vikas, (e) the fact that he had taken money out of pocket of the deceased Jitender indicated his participation and common intention and (f) no advantage could be gained, by him, by the fact that he had emerged, with the two juvenile offenders, later, as it was a single transaction.

(iii) In view of the fact that the five persons had conjointly robbed the victims, dacoity stood committed and, in the course of commission of such dacoity, one of the victims had been killed. The offence under Section 396 IPC was, therefore, clearly made out against all the accused.

(iv) In view of the above, the need to convict the accused under Section 412/34 IPC was not felt.

37. *Vide* subsequent order, dated 27<sup>th</sup> July 2016, the learned ASJ returned common findings, in respect of all the three accused, i.e. Neeraj, Sonu and Vikas. The learned ASJ held that, while, undoubtedly, the three accused were young, belonged to poor families, and were victims of circumstances, resulting in their first conviction, these circumstances, when weighed against the fact that five persons had killed one person just to rob his money and belongings, injured another with the same objective, and that their acts had ruined the family of the deceased, wiping out the only earning family member, and that the killing of deceased was entirely unnecessary, as they could have easily taken his money and belongings without taking his life, were insufficient to spare the appellants from the offence of rigorous imprisonment for life, though the case did not warrant imposition of death penalty. He, therefore, sentenced the appellants in the terms already noted in para 1 *supra*, further observing that the two sentences of rigorous imprisonment for life would, in the case of each appellant, run concurrently.

38. The appellants are in appeal, before us, thereagainst.

**Analysis and Findings:**

39. We have taken pains to set out the evidence in the case, hereinabove, in such exhaustive detail only so that the factual ground may be cleared at the outset. We have no doubt, whatsoever, regarding the events that took place on the fateful afternoon of 16<sup>th</sup> March 2009, and we entirely agree with the findings of the learned

ASJ in that regard. To us, it is apparent that, when Mool Chand and the deceased Jitender were walking towards Ghazipur Dairy Farm, they were waylaid by the five accused, i.e. Neeraj, Sonu, the two juveniles J-1 and J-2 and Vikas. The fact that Neeraj and Sonu may have initially accosted them and Vikas and the two juveniles may have entered the scene a few minutes thereafter, in our opinion, does not make any difference to their culpability or to the legal consequences of the events that followed. It is clear that the knife assault on Jitender, by Neeraj, took place when Jitender and Mool Chand tried to resist the attempt at robbery being committed upon them. Sonu then held the arms of Jitender while Neeraj inflicted, on the right side of his chest, the blow using the chopper. Almost immediately thereafter, Mool Chand was also assaulted, when J-1 held his hands and J-2 attempted to stab him, which Mool Chand, fortunately, evaded, resulting in an injury on his left thigh. Similarly, the role of Vikas clearly appears to have been limited to the extent of purloining money from the pockets of Jitender and Mool Chand.

**40.** Though the learned ASJ has, in the impugned judgment, recounted most of the evidence that would support the above factual narrative, a brief re-appraisal thereof would not be out of place. The fact of Jitender and Mool Chand having been assaulted by Neeraj, Sonu, the two juveniles and Vikas stands established by several undisputable facts in the case. The wounds sustained by Jitender and Mool Chand stand proved by their MLC's (Ex.PW-1/A) and (Ex.PW1/B) as well as the evidence of Dr. Shalini Gupta (PW-1), who

had prepared the said MLCs, as also by the evidence of PW-13 Ct Yogender Kumar. Mool Chand (PW-4) recounted all the events, in expansive detail, in his statement, dated 16<sup>th</sup> March 2009, recorded under Section 161 of the Cr. P.C (Ex. PW-4/A). We are not inclined to attach much importance to the overwriting of “7”, towards the beginning of the said statement by “6”, for the two reasons correctly adduced by the learned ASJ, i.e. firstly, that the statement had been written not by Mool Chand but by Insp. Mahender Kumar (PW-31), who was never questioned in this regard and secondly, that the said over-writing did not, in any manner, detract from the overall effect of the statement, which was otherwise sufficiently clear in all material particulars. In this connection, we also endorse the reliance, by the learned ASJ, on various judicial authorities, which hold that the statement of an injured witness is entitled to additional weight and credence. [Refer *Jarnail Singh vs State of Punjab*, (2009) 9 SCC 719, *Balraje @ Trimbak vs State of Maharashtra*, (2010) 6 SCC 673 and *Abdul Sayed vs State of Madhya Pradesh*, (2010) 10 SCC 259.] Moreover, the fact that the IO (PW-31) had recorded the statement of Mool Chand on 16<sup>th</sup> March, 2009 at the place of the incident, was also confirmed by the examination-in-chief of PW-12 (SI Harpal), which, too, withstood cross-examination. SI Harpal also proved the recording, by him, of the disclosure statements of Neeraj, J-2 and Vikas, in the police chowki of the Karkardooma Court on 2<sup>nd</sup> April 2009. The robbery of Jitender and Mool Chand, and the killing of Jitender, in the course thereof, by Neeraj, also stand established by the discovery of the safety thread of the mobile phone, which belonged to

Mool Chand (PW-4), and key ring belonging to deceased Jitender, found at the spot of occurrence which had blood marks on them, which stand proved by the Seizure Memo, dated 16<sup>th</sup> March 2009 (Ex PW-4/C) read with the evidence of Inspector Rajesh (PW-11), Ct. Mohd. Javed (PW-20) and Insp. Mahinder Kumar (PW-31). The fact that PW-4 Mool Chand was injured, and that the deceased Jitender had suffered a grievous knife wound in the chest, rendering him unconscious, was also vouchsafed by the statement, dated 16<sup>th</sup> April 2009, of Brijesh Tiwari (PW-6) recorded under Section 161 of the Cr.P.C, read with the cross examination of Ct. Yogender Kumar (PW13) to the effect that the said statement had been recorded by Insp. Mahender Kumar (PW-31). Though it is true that PW-6 Brijesh Tiwari later turned hostile, during the recording of his evidence before the learned ASJ, and stated that he had never given the statement on 16<sup>th</sup> April, 2009, no credence, in our opinion, can be given to the said resiling, by PW-6, in view of the fact that the recording, of his statement, by the IO (PW-31) was vouchsafed by Ct. Yogender Kumar (PW-13) (in his cross-examination on 4<sup>th</sup> October 2013), and in the examination-in-chief of SI Harpal Singh (PW-12) on 7<sup>th</sup> March 2011, Ct. Mohd. Javed (PW-20) on 16<sup>th</sup> July 2012 and HC Rajesh (PW-29) on 14<sup>th</sup> January 2015 respectively. The post mortem report (Ex. PW7/A) prepared by Dr. Arvind Kumar (PW-7), clearly recorded the presence, on deceased Jitender's body, of a deep incised stab wound of 6.6x0.4 cms, over the right side of his chest, read with the "subsequent opinion" dated 08<sup>th</sup> May 2009 (Ex.PW-7/C), obtained from Dr. Arvind Kumar (PW-7), which clarified that the knife seized

from Neeraj could have caused the said injury. The mobile phones stolen from Jitender and Mool Chand were subsequently recovered from J-1 (vide Seizure Memo dated 18<sup>th</sup> March 2009 exhibited as Ex PW-13/B) and from Sonu (vide Seizure Memo dated 19<sup>th</sup> March 2009 exhibited as Ex PW-15/C) respectively. The said seizures/recoveries were proved by Ct. Yogender Kumar (PW-13), HC Shri Bhagwan (PW-15) and Ct. Mohd. Javed (PW-20), and their deposition, in examination-in-chief, to the said effect, also withstood cross-examination. On the basis of the disclosure statement of J-1, Sonu was arrested, on 19<sup>th</sup> March 2009, from Noida, *vide* Arrest Memo exhibited as Ex. PW-15/A. The recording of disclosure statement, by J-1, and the subsequent arrest of Sonu on the basis of the information provided by J-1, were also confirmed by PW-13 in his cross-examination. Sonu and J-1 were identified, by Mool Chand, in the TIPs held on 26<sup>th</sup> March 2009, the proceedings of which were exhibited as Ex. PW-4/E (with the identification proceedings exhibited as Ex. PW-16/C and Ex. PW-4/D, which were proved by PW-16 Ms. Sunaina Sharma, the learned MM. Sonu was also correctly identified, in court, by PW-15 HC Shri Bhagwan, during recording of his evidence on 7<sup>th</sup> July 2011. The remaining three accused, i.e. J-2, Neeraj and Vikas, were identified by PW-4 Mool Chand in the ED lock-up at the Karkardooma Court on 4<sup>th</sup> April, 2009, as corroborated by the evidence of the IO Mahender Kumar (PW-31). The reason cited, in the TIP proceedings of Neeraj (Ex PW-17/G-I), Vikas (Ex PW-17/D-F) and J-2 (Ex PW-17/A-C) for refusing to participate in the TIP was that their faces had been shown to Mool Chand in the Police

Station. However, there is nothing, in the evidence on record, to substantiate this, and we express our concurrence with the finding of the learned ASJ to the said effect. It has been held, in ***Ram Nath v State, 2015 (13) SCALE 762***, that, where the accused unjustifiably refuses to participate in the TIP, his identification, subsequently, by the witness, cannot be challenged, and his identity has to be regarded as established. The weapons of offence, i.e. the chopper and knife, were recovered from the soil behind the Veterinary Hospital, at the instance of Neeraj and J-2, the memos regarding recovery and pointing out whereof, being exhibited as Ex. PW-13/J and PW-13/L, and proved by PW-13 Ct. Yogender Kumar, in his examination-in-chief, dated 12<sup>th</sup> of April 2012 and 4<sup>th</sup> October 2012. The said deposition, too, withstood cross-examination. The recovery of the weapon of offence, by the team of PW-13 Ct. Yogender Kumar, HC Rajesh (PW-29) and Ct. Amrik (PW-25), from the place pointed out by Neeraj and J-2, also stood confirmed by the evidence recorded of PW-13, PW-25 and PW-29. These depositions, too, could not be disturbed in cross-examination. The fact of Sonu having made a disclosure statement, exhibited as Ex PW-15/E, was also confirmed by PW-15 HC Shri Bhagwan who, in cross examination, further clarified that the said statement had been recorded at about 5 AM. The apprehending of Neeraj, J-2 and Vikas, on 30<sup>th</sup> March 2009, their interrogation, and the disclosure statements made by them, was also confirmed by PW-18 ASI Ram Tirath and PW-20 Ct. Mohd. Javed, in their examinations-in-chief on 27<sup>th</sup> February 2012 and 16<sup>th</sup> July 2012 respectively. The suggestion, to the contrary, made to them in cross-

examination, was denied by PW-18 as well as PW-20. He also confirmed that Mool Chand had identified J-1 and Sonu in the TIP proceedings on 26<sup>th</sup> March 2009, and that, on 31<sup>st</sup> March 2009, he had received information regarding the apprehension and arrest, of Neeraj, J-2 and Vikas under Section 41(1)(a) of the Cr.P.C., by Police Station Civil Lines. He further testified that, on 5<sup>th</sup> April, 2009, Neeraj and J-2 had led him, along with HC Rajesh (PW-29), Ct. Yogender (PW13) and Ct. Amrik Singh (PW-25) to the place of incident, as well as the place where the weapons of offence were concealed, and that from the said site, the weapons of offence were actually recovered. He further confirmed having obtained the “subsequent opinion” from Dr. Arvind Kumar, pursuant to collection of the post mortem report. That apart, the FSL report (Ex. PW-31/N) and the serological report (Ex.PW-31/O) were correctly held, by the learned ASJ, to conclusively link the weapons to the deceased Jitender and Mool Chand, and also stood proved by PW-31.

**41.** The above material, read with the factors taken into account by the learned ASJ and enumerated in para 34 *ibid*, in our view, are more than sufficient to establish the fact that, on 16<sup>th</sup> March 2009, Jitender and Mool Chand were ambushed by Neeraj, Sonu, Vikas and the two juveniles, and robbed of their mobile phones and the cash contained in their pockets, in the course of which Mool Chand sustained a simple injury on his thigh and Jitender lost his life. A holistic appreciation of all the evidence referred to hereinabove can lead to no other conclusion, at least so far as the occurrence of the robbery of Mool

Chand and Jitender and killing of Jitender and the involvement, therein, of the five assailants, is concerned.

**42.** An impassioned plea has been made, before us, by learned counsel for the appellants, to the effect that the evidence, on the basis of which they have been dragged into the offence, were totally insufficient to sustain the case against them. Learned counsel for Vikas insists, additionally, that he was a stranger to the occurrence and impresses, on us, in this regard, the fact that Mool Chand (PW-4) initially referred to there being only four assailants and, later, amended his statement to increase the number of assailants to five. The fact that the only other eye witness to the incident, Suraj Pal (PW-8) turned hostile, is also emphasized, in this connection. Barring these two witnesses, it is sought to be contended, there is no other evidence to link the appellants to the crime.

**43.** It is undoubtedly true that PW-4 Mool Chand, in his first statement, referred to there being four assailants and, in his second statement, referred to the number of assailants as five. It is also true that PW-8 Suraj Pal turned hostile during trial. Even so, we are unable to convince ourselves that these facts could exculpate any of the appellants entirely of their involvement in the offence. We have to bear in mind the fact that both the statements of PW-4 Mool Chand were recorded on the date of occurrence of the offence, i.e 16<sup>th</sup> March 2009. There is every likelihood of a person, whose statement was

recorded immediately following the occurrence, and who has himself been an eyewitness to the gory spectacle, in the course of which a close relative was killed, and injuries were sustained by him, to lose his composure and, consequently, to be unable to remember the minute details of the occurrence. Furthermore, it is not as if the second statement of Mool Chand was recorded much after the first, so that, in the intervening period, he decided consciously to change his version. Both statements were recorded on the same day i.e., 16<sup>th</sup> March 2009 and we find both statements on the record of the learned ASJ. Though it appears that the latter statement was not specifically exhibited, the fact of its being recorded, as well as the contents thereof, stand supported by the examination-in-chief of Mool Chand on 21<sup>st</sup> November 2015, before the learned ASJ in which, too, specific roles were ascribed to each of the appellants before us.

**44.** We also find that Suraj Pal (PW-8), the other eyewitness to the incident, has referred to five assailants, in his Section 161 statement dated 16<sup>th</sup> March 2009. Even though he subsequently turned hostile during trial, it is significant to note that PW-8 Suraj Pal never retracted his statement that there were five assailants. His hostility, vis-a-vis his earlier statement, was only to the extent of his refusal to recognize the accused in the court. The evidence of Suraj Pal, too, therefore, indicates that the number of assailants were not four, but five.

45. We may also note, in the above context, that the fact of two statements having been recorded, from Mool Chand, on 16<sup>th</sup> March 2009, also stands vouchsafed by the deposition of PW-29 HC Rajesh in his examination-in-chief on 14<sup>th</sup> January 2015, before the learned ASJ, though there may be mild discrepancies regarding the dates when the two statements were recorded.

46. In view of the above evidence, we are convinced that, despite possible minor contradictions in the depositions and statements here and there, the robbery of deceased Jitender and Mool Chand on 16<sup>th</sup> March 2009, by Neeraj, Sonu, the two juveniles and Vikas, and the killing of deceased Jitender by Neeraj in the course thereof stands convincingly proved. We, therefore, uphold the finding of the learned ASJ to that effect.

47. Before parting with our evaluation of the facts, we deem it appropriate to address the issue of the “hostility” of PW-6 Brijesh Tiwari and PW-8 Suraj Pal.

48. We are not required to stray afar, in search of the law on hostile witnesses, as an incisive examination, of the issue, is to be found in the recent decision of the Supreme Court in ***Ramesh v State of Haryana, (2017) 1 SCC 529***, authored by Sikri, J (on behalf of himself and Ashok Bhushan, J.). After entering certain telling comments on the menace of witnesses – at times, injured witnesses – turning hostile, the Supreme Court has reproduced the following

passages, from *State v Sanjeev Nanda*, (2012) 8 SCC 450, which encapsulate the legal position on the point:

“99. Witness turning hostile is a major disturbing factor faced by the criminal courts in India. Reasons are many for the witnesses turning hostile, but of late, we see, especially in high profile cases, there is a regularity in the witnesses turning hostile, either due to monetary consideration or by other tempting offers which undermine the entire criminal justice system and people carry the impression that the mighty and powerful can always get away from the clutches of law, thereby eroding people's faith in the system.

100. This Court in *State of U.P. v. Ramesh Prasad Misra*, (1996) 10 SCC 360 held that it is equally settled law that *the evidence of a hostile witness could not be totally rejected, if spoken in favour of the prosecution or the accused, but it can be subjected to closest scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence may be accepted*. In *K. Anbazhagan v. Supt. of Police*, (2004) 3 SCC 767 : 2004 SCC (Cri) 882, this Court held that *if a court finds that in the process the credit of the witness has not been completely shaken, he may after reading and considering the evidence of the witness as a whole, with due caution, accept, in the light of the evidence on the record that part of his testimony which it finds to be creditworthy and act upon it. This is exactly what was done in the instant case by both the trial court and the High Court [Sanjeev Nanda v. State, 2009 SCC Online Del 2039 : (2009) 160 DLT 775] and they found the accused guilty*.

101. We cannot, however, close our eyes to the disturbing fact in the instant case where even the injured witness, who was present on the spot, turned hostile. This Court in *Manu Sharma v. State (NCT of Delhi)*, (2010) 6 SCC 1 : (2010) 2 SCC (Cri) 1385 and in *Zahira Habibullah Sheikh (5) v. State of Gujarat*, (2006) 3 SCC 374 : (2006) 2 SCC (Cri) 8 had highlighted the glaring defects in the system like non-recording of the statements correctly by the police and the retraction of the statements by the prosecution witness due

to intimidation, inducement and other methods of manipulation. *Courts, however, cannot shut their eyes to the reality. If a witness becomes hostile to subvert the judicial process, the court shall not stand as a mute spectator and every effort should be made to bring home the truth. Criminal judicial system cannot be overturned by those gullible witnesses who act under pressure, inducement or intimidation.* Further, Section 193 IPC imposes punishment for giving false evidence but is seldom invoked.” (Emphasis supplied)

49. Insofar as PW-6 Brijesh Tiwari is concerned, the only difference between the statement, recorded from him under Section 161 of the Cr. P.C., and his examination during trial, was that, in the former, he had testified that on 16<sup>th</sup> March 2009 two persons had come to him, asking for help, whereas, in his examination-in-chief, he said that one person had come to him. The evidence of PW-6 was recorded a year and one month after the date of occurrence of the crime, on 6<sup>th</sup> April 2010. Except for the reference to the number of persons who had come to him for help, there is no other dissonance, between his evidence, as recorded during trial, and his statement recorded under Section 161 of the Cr.P.C. That two persons, i.e. the deceased Jitender and Mool Chand, were wounded in the incident, stands sufficiently established by other evidence; we need not, therefore, burden this judgment by psychoanalyzing PW-6, and ironing out the creases in his deposition. Applying the principles laid down in *Sanjeev Nanda (supra)*, as relied upon in *Ramesh (supra)*, we may safely rely on the remainder of his examination recorded during trial, which vouchsafes the case against the accused.

**50.** Suraj Pal (PW-8), on the other hand, did a double-flip, even during the recording of his evidence. His examination-in-chief was conducted on 30<sup>th</sup> September 2010. In the said deposition, he clearly described the assailants, but refused to recognize the accused, who were present in the court. In cross-examination by the learned APP (as allowed by the learned ASJ), he denied having stated that two of the assailants had inflicted knife blows on the persons being robbed, but admitted to having identified J-2 and Neeraj, on 5<sup>th</sup> April 2009, at the Police Station. He also identified Neeraj, who was in court. Having done so, he sought to explain his refusal to recognize him, during his examination-in-chief, on the ground that there was a crowd in the court. He also identified Sonu and Vikas, who were in court, and, in their case as well, sought to attribute his earlier refusal to identify them, to the crowd in the court. In his cross-examination by learned counsel appearing for the accused, PW-8 Suraj Pal again stated that he could not identify the accused persons, but, at the same time, denied the suggestion that he had identified the accused, during cross-examination by the learned APP, without understanding the question. He, therefore, sought to adopt an ambivalent attitude, on the issue, during cross-examination by learned counsel for the accused. Having deposed thus, in re-examination by the learned APP, PW-8 Suraj Pal stood by the stand adopted by him in cross-examination, stating that he could not identify the accused persons, on the ground of weak eyesight. To say the least, we are of the opinion that this statement, by PW-8 Suraj Pal, is patently false, and that he had apparently been won over. We castigate this in the strongest terms,

and direct initiation of proceedings, against PW-8 Suraj Pal, under Section 193 of the IPC, as recommended in *Sanjeev Nanda (supra)*.

**51.** Having said that, in view of the chameleon-like stance adopted by PW-8 Suraj Pal, it would not be appropriate for us to rely on his identification of the accused. He has, however, been consistent on the fact that there were five assailants, and we, therefore, have relied on his statement only to that extent.

**52.** Before proceeding to examine the culpability of the appellants before us, in the conspectus of the facts and findings recorded hereinabove, it would be worthwhile to reproduce Sections 34, 300, 307 and 396 of the IPC, thus:

**“34. Acts done by several persons in furtherance of common intention.**—When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.

**300. Murder.**—Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or—

(Secondly) —If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or—

(Thirdly) —If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or—

(Fourthly) —If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and

commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

**307. Attempt to murder**—Whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and if hurt is caused to any person by such act, the offender shall be liable either to 1[imprisonment for life], or to such punishment as is hereinbefore mentioned. Attempts by life convicts.—2[When any person offending under this section is under sentence of 1[imprisonment for life], he may, if hurt is caused, be punished with death.]

**396. Dacoity with murder.**—If any one of five or more persons, who are conjointly committing dacoity, commits murder in so committing dacoity, every one of those persons shall be punished with death, or imprisonment for life, or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine”.

**53.** An immediate feature of Section 396 of the IPC, which strikes one at first reading thereof, is that it is a self-contained provision. In other words, contributory liability, thereunder, does not depend, in order to stand erect, on the crutches of any other provision. The provision creates vicarious liability sans *mens rea*, and is, to that extent, *sui generis* in nature. Section 396, in its plain terms applies to every situation in which five or more persons commit dacoity and, in the course of the commission of such dacoity, *any one* of the said persons, commits murder. All five persons, thereby, become liable, by statutory prescription, to the offence of “dacoity with murder”, and expose themselves to the punishment stipulated in the said provision.

54. The three important indicia, for Section 396 to apply, plainly, are that (i) one of the persons must commit *murder*, i.e. his act must amount to “murder” within the meaning of Section 300 of the IPC, (ii) the said person must be one of the five or more persons who have joined together to commit dacoity and (iii) the murder must be committed in the course of commission of such dacoity.

55. If these conditions are fulfilled, then Section 396 would kick in and blight all the other persons, involved in the act of dacoity, even if none of them was even aware that murder was about to be committed. In other words, so far as the remaining persons are concerned, all that the prosecution is required to prove, in order for Section 396 of the IPC to apply, is their intention to commit dacoity. Neither intention, nor knowledge, that murder would be committed in the course of the commission of such dacoity, is required to be proved to exist in the contemplation of any of the said other persons. [Refer ***Manmeet Singh v State of Punjab (2015) 7 SCC 167***] All persons must, therefore, possess the *mens rea* to commit dacoity, but the *actus reus* of murder, as well as the requisite *mens rea*, therefor, may be attributable only to one of the said persons. They would all nevertheless, be exposed to the rigour of Section 396. The provision is, therefore, *sui generis*, in that it seeks to hold persons liable for an offence never even intended by them.

56. In that sense, Sections 396 and 34 of the IPC are mutually incompatible. Section 34 of the IPC, by its very title, covers “acts

*done by other persons* in furtherance of common intention”. It proceeds to refer expressly to “a criminal act *done by other persons* in furtherance of the common intention of all”. In such a situation, each of the persons is made liable by the said persons “for *that act*”. In other words, if, under Section 34, more than one person are to be mulcted with the offence of having committed “dacoity with *murder*” it would have to be shown that the act of “dacoity with *murder*” is done by all the persons and that all the persons had a common intention to commit dacoity with *murder*. The possibility of their having to commit murder, in the course of committing dacoity must, therefore, be shown to have been in the contemplation of all the said persons. In such a situation, Section 34 would make each of such persons liable for committing dacoity with murder. The clear distinction between Sections 34 and 396 is, therefore, that, while Section 396 makes all persons liable for the offence of dacoity with *murder* even though murder is actually committed only by one of the said “dacoits”, and may not even have been in the contemplation, much less knowledge, of any of the others, Section 34 renders the persons liable for any offence only if *all the persons* shared a common intention to commit the offence of dacoity with murder, and the offence was committed by *all of them together*.

**57.** Therefore, Section 34 of the Act, could never apply to any of the appellants to whom the intention to commit murder could not be attributed; consequently, such an accused could never be convicted under Section 302 read with Section 34. We rely, with advantage, on

the following passage, from *Jai Bhagwan v State of Haryana, (1999) 3 SCC 102*, on which the learned ASJ, too, has placed reliance (in para 121 of the impugned judgement):

“To apply Section 34 IPC apart from the fact that there should be two or more accused, two factors must be established: (i) common intention and (ii) participation of the accused in the commission of an offence. If a common intention is proved but no overt act is attributed to the individual accused, Section 34 will be attracted as essentially it involves vicarious liability *but if participation of the accused in the crime is proved and a common intention is absent, Section 34 cannot be invoked*. In every case, it is not possible to have direct evidence of a common intention. It has to be inferred from the facts and circumstances of each case.”

(Emphasis supplied)

Even without proof of intention to commit murder, however, Vikas could still be convicted under Section 396, if it were proved that he, and his four other accomplices, intended to commit dacoity of Jitender and Mool Chand and, in the course of such dacoity, any one of the said accomplices committed murder, even if none of the others had any idea that such murder was either contemplated or about to take place.

**58.** Examining the complicity and culpability of the individual appellants, in the light of the facts and the law stated hereinabove, we find no reason, whatsoever, to differ with the findings of the learned ASJ, insofar as they concern Neeraj and Sonu. Neeraj, who inflicted the fatal blow, was consciously carrying a chopper, and, equally consciously, and deliberately, stabbed Jitender when he attempted to resist his assailants. “Murder” is defined in Section 300 of the IPC

which already stands reproduced hereinabove; the definition states that, except in the cases excepted thereafter, culpable homicide would amount to murder, if the act, by which death is caused is done with the intention of causing death, or with the intention of causing such bodily injury as the offender knows to be likely to cause death, or with the intention of causing bodily injury, and the bodily injury if inflicted is sufficient in the ordinary course of nature to cause death or if the person committing the act knows that it is so eminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death and, nevertheless, commits the said act without contemplating the risk thereof. We need not advert to the exceptions as contained in Section 300 which already stand reproduced hereinabove. Suffice it to state that, the present case plainly does not attract any of the said exceptions.

59. “Culpable homicide” is defined, in Section 299 of the IPC, thus:

**“299. Culpable homicide.**—Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.”

60. Viewing the facts of the present case in the light of the definitions of “culpable homicide” and “murder” as contained in Sections 299 and 300 of the IPC, it is transparently obvious that the killing of Jitender by Neeraj, would amount to “murder”. Even if one were to extend, to Neeraj, the benefit of doubt regarding any intention of killing Jitender, he undoubtedly had the intention of causing bodily

injury to Jitender, when he struck him with a knife, and given the dimensions of the knife, the depth of the injury and the extensive internal bodily damage that had resulted from the blow (as established by the postmortem report exhibited as Ex. PW-7/A and by the “subsequent opinion” by Dr. Arvind Kumar exhibited as Ex. PW-7/C), it cannot be denied that he would have had the knowledge that the injury intended to be inflicted by him was likely to cause death of Jitender. That the injury was sufficient in ordinary course to cause death, also stands borne out by the postmortem report and reiterated by Dr. Arvind Kumar (PW-7) during his examination in chief on 20<sup>th</sup> July 2010, which was maintained by him in cross examination. The learned ASJ has correctly observed that the nature of the injury suffered by Jitender as a result of the blow, and the extensive internal damage caused thereby, clearly indicated that the blow was inflicted with the conscious intention of murdering Jitender – even if, possibly, such intention developed at the spur of the moment. The ferocity of the stab, as inflicted by Neeraj, was far in excess of that required merely to repulse the resistance being put up by unarmed Jitender. The intention to do away with Jitender, once and for all was, therefore, writ large on the face of the murderous assault, by Neeraj, using the chopper in his possession. In our opinion, therefore, the killing of Jitender by Neeraj would clarify as “murder” under both clauses “thirdly” as well as “fourthly” of Section 300 of the IPC, and the learned ASJ has, therefore, in our opinion, rightly convicted Neeraj under Section 302, 396 and 397 of the IPC.

**61.** We are equally unable to find fault with the learned ASJ's findings, qua Sonu. We may state, in this respect, that we are unable to convince ourselves to concur with the finding, of the learned ASJ, that "the fact of Neeraj carrying knife and chopper was in the knowledge of other offenders". This finding, in our opinion, does not have any evidentiary legs to stand on. There is precious little, in the present case, to indicate that any of the assailants, except Neeraj and J-2, were aware of the fact that they, i.e. Neeraj and J-2 were carrying a knife and a chopper. At the same time, there is no denying the fact that, at and immediately prior to the inflicting, by Neeraj, of the fatal blow, using his chopper, on Jitender's chest, Sonu was conscious and well aware of the possibility – and, indeed, the probability – thereof. The most damning circumstance, insofar as Sonu is concerned, in our view, was the fact that he held the hands of Jitender, so as to immobilize him, while Neeraj stabbed him. Concert, between Neeraj and Sonu – again, possibly, arising at the spur of the moment – is, therefore, apparent. The entrapment, by Sonu, of Jitender, by holding his hands, was obviously to enable Neeraj to stab Jitender without effective resistance on the latter's part. It is impossible, therefore, to distinguish between the roles of Neeraj and Sonu, insofar as the murderous assault, on Jitender, and the infliction, therein, of the fatal stab wound, was concerned. We, therefore, unhesitatingly approve the decision, of the learned ASJ, to convict Sonu, along with Neeraj, under Sections 302 read with 34 of the IPC, as also under Section 396 thereof.

**62.** Apropos Vikas, however, we are unable to approve the findings of the learned ASJ. While examining the culpability of Vikas, it has, at the very outset, to be borne in mind that, even as per the prosecution, the only physical act committed by Vikas, by way of contribution to the offence of “dacoity and murder” committed by him along with his four other associates, was by way of removal of money from the pockets of the deceased Jitender and Mool Chand.

**63.** How far does this act damn him?

**64.** In the context of the present case, applying the above reasoning to Vikas, it would be possible to convict Vikas under Section 307 read with Section 34 IPC only if it can be shown that Neeraj, Sonu, Vikas and the two juveniles *together* committed the act of robbery and, together, attempted to *murder* him, and that all of them shared a common intention to commit the act of robbery *and to attempt his murder*. In other words, it would be necessary, in order for conviction under Section 307 read with Section 34 IPC to sustain, for the prosecution to establish that all the five persons intended not only to commit dacoity, but also to murder.

**65.** Once this legal position, statutorily emerging from Sections 300, 307, 34 and 396 of the IPC is understood, it becomes clear that there is no question of convicting Vikas under Section 307 read with Section 34 of the IPC, far less under Section 302 read with Section 34, as there is no evidence, whatsoever, to indicate that Vikas was

intending to commit murder, or even aware of the fact that Neeraj would, or even could, commit murder. As we have already opined hereinabove, the intention to commit murder, in the present case, appears to have arisen at the spur of the moment, when Jitender attempted to resist the assault upon him and, at that time, the participants in the murderous attack were only Neeraj and Sonu, with Neeraj inflicting the fatal blow and Sonu obviating the chance of any resistance from Jitender by holding his arms. We are of the opinion that the extent to which Vikas participated in the assault does not satisfy the strict standard of proof required to impute, to Vikas, the intention to commit murder of Jitender. Per sequitur, Vikas could not be held guilty of committing the act of attempted murder of Jitender, which would be the *sine qua non* to commit him under Section 307 read with Section 34 of the IPC. There is nothing to indicate that Vikas, at least, had the knowledge that Neeraj was carrying a knife/chopper or that he meant to use it to kill deceased Jitender. There is no evidence of any of the assailants – including Neeraj – having had any *premeditated intention* to kill Jitender. The facts do not justify drawing of the conclusion that any of the five accused, including Neeraj had, *initially*, the intention of killing Jitender. Interestingly, even the disclosure statements of the accused – apart from the fact that reliance thereon would appear to be proscribed by Section 24 of the Indian Evidence Act, 1872 – state, in one voice, that the plan, as conceived “behind the wall”, was to *scare* the two wayfarers using the knives; there is no reference to any intention to wound them, much less kill them. While, however, the facts of the

case indicate that intention, to kill Jitender – or, at least, knowledge of the fact that Jitender was likely to die as a result of the chopper blow administered by Neeraj – can definitely be imputed to Neeraj and Sonu, *being the active contributors to the act of infliction of the said blow*, we feel that it would not be justified to hold that Vikas, too, was part of a concerted attempt to kill Jitender. We also note, in this connection, that the evidence as recorded and referred to hereinabove, does not conclusively indicate the presence of Vikas *at the time of infliction of the stabbing, by Neeraj of Jitender*; there is a definite possibility of his having emerged on the scene only during the infliction of the said blow. Vikas cannot be attributed with any part in facilitating the commission of murder of Jitender by Neeraj and Sonu, by any overt act whatsoever. Neither is there any evidence to indicate that Vikas exhorted his associates to commit the murder of Jitender. Significantly, Vikas was not armed with any weapon. The possibility of invoking Section 302, or Section 307, read with Section 34, therefore stands rules out, insofar as Vikas is concerned.

**66.** In that view of the matter, we are not inclined to hold that Vikas can be attributed the requisite intention to kill Neeraj as would justify his conviction under Section 302, or Section 307, read with Section 34 of the IPC.

**67.** Coming, now, to Section 396 of the IPC, it appears clear none of the accused, including Vikas, can escape the rigour of said provision.

68. As already noted hereinabove, three ingredients comprise Section 396 of the IPC i.e. (i) that five or more persons conjointly commit dacoity, (ii) that any one of the said persons commits murder and (iii) that such murder is committed in so committing dacoity. It is only if all the three ingredients are simultaneously satisfied, that the offence could justifiably be brought within the umbrella of Section 396.

69. The first ingredient to be satisfied is that, all the five accused in the present case i.e. Neeraj, Sonu, the two juveniles and Vikas before us, had to have been engaged in conjointly committing dacoity.

70. “Dacoity”, “robbery” and “theft” are defined under sections 391, 390 and 378 of the IPC in the following terms:

**“391. Dacoity.**—When five or more persons conjointly commit or attempt to commit a robbery, or where the whole number of persons conjointly committing or attempting to commit a robbery, and persons present and aiding such commission or attempt, amount to five or more, every person so committing, attempting or aiding, is said to commit “dacoity”.”

71. “Robbery” is defined, rather peculiarly, in Section 390, thus:

**“390. Robbery.**—In all robbery there is either theft or extortion.

**When theft is robbery.**—Theft is “robbery” if, in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender, for that end voluntarily causes or

attempts to cause to any person death or hurt or wrongful restraint, or fear of instant death or of instant hurt, or of instant wrongful restraint.

**When extortion is robbery.**—Extortion is “robbery” if the offender, at the time of committing the extortion, is in the presence of the person put in fear, and commits the extortion by putting that person in fear of instant death, of instant hurt, or of instant wrongful restraint to that person or to some other person, and, by so putting in fear, induces the person so put in fear then and there to deliver up the thing extorted.

*Explanation.*—The offender is said to be present if he is sufficiently near to put the other person in fear of instant death, of instant hurt, or of instant wrongful restraint.”

**72.** That takes us, next, to “theft”, which is defined, in Section 378 of the IPC, in the following terms:

**“378. Theft.**—Whoever, intending to take dishonestly any moveable property out of the possession of any person without that person’s consent, moves that property in order to such taking, is said to commit theft.

*Explanation 1.*—A thing so long as it is attached to the earth, not being movable property, is not the subject of theft; but it becomes capable of being the subject of theft as soon as it is severed from the earth.

*Explanation 2.*—A moving effected by the same act which affects the severance may be a theft.

*Explanation 3.*—A person is said to cause a thing to move by removing an obstacle which prevented it from moving or by separating it from any other thing, as well as by actually moving it.

*Explanation 4.*—A person, who by any means causes an animal to move, is said to move that animal, and to move everything which, in consequence of the motion so caused, is moved by that animal.

*Explanation 5.*—The consent mentioned in the definition may be express or implied, and may be given either by the person in possession, or by any person having for that purpose authority either express or implied.”

**73.** A juxtaposed reading of Sections 391, 390 and 378 of the IPC reveals that (i) “theft” refers to moving of movable property, out of the possession of a person in order to dishonestly take the said property, with intention to do so and without that person’s consent, (ii) “theft” amounts to “robbery”, if in order to commit the theft, the offender voluntarily causes, or attempts to cause, to any person, death or hurt or wrongful restraint of, or fear of instant death or instant hurt or instant wrongful restraint, (iii) robbery amounts to “dacoity” when it is conjointly committed, or attempted to be committed, by five or more persons in which case each such person is said to commit “dacoity”. In other words, the distinction between “robbery” and “dacoity” is only numerical; robbery, when committed by five or more persons, amounts to dacoity.

**74.** Without going into the specifics, it is clear, by viewing the facts obtaining in the present case, in conjunction with the statutory definition of “dacoity” as contained in Section 391 of the IPC, that the robbery of Jitender and Mool Chand by the five accused, amounts to “dacoity” and that, therefore, all the five accused conjointly committed dacoity. The first ingredient of Section 396, therefore, stands satisfied.

**75.** Further, it has already been held, hereinabove, that Neeraj and Sonu, unquestionably and undoubtedly, were guilty of committing the “murder” of Jitender and shared the common intention to do so.

**76.** Two of the three ingredients of Section 396, thereby, stand satisfied. The only ingredient that remains to be satisfied is that of the murder of Jitender by Neeraj and Sonu having been committed in committing the dacoity – which we may justifiably expand as “in the course of committing dacoity”. The facts, as illustrated hereinabove, make it plainly obvious that the murder, of the deceased Jitender, by Neeraj and Sonu, took place in the commission of the dacoity, as a necessary eventuality, in view of the resistance put up by Jitender.

**77.** All the three requisite ingredients of Section 396 of the IPC thus standing satisfied, we uphold the decision, of the learned ASJ, to convict the appellants under the said provision.

**78.** In the case of Vikas, however, there is yet another factor which informs our decision to restrict the liability, of Vikas, to Section 396, and not to extend it to Section 302, of the IPC, read with Section 34 thereof. The legislature, in its full wisdom, has chosen to provide for a distinct offence of “dacoity with murder” under Section 396 of the IPC, in the full awareness of the existence of Section 302 read with Section 34 of the IPC. The rationale behind carving out a separate offence, in Section 396, has to be recognized and respected, and it would be impermissible to interpret Section 396 in such a way as to

obliterate the distinction between Section 396 and Section 302 read with 34 of the IPC. The importance of maintaining this distinction is underscored by the fact that Section 396 provides for a lesser punishment than the minimum punishment provided under Section 302, inasmuch as, the minimum punishment that can be awarded is imprisonment for life, whereas Section 396 also permits awarding punishment of ten years of rigorous imprisonment. Where the legislature has consciously engrafted, in the statute, two distinct provisions which create distinct offences with distinct punishments, the provisions cannot be so interpreted as to efface the distance between them. It is only, therefore, where murder, which qualifies under one of the four situations enlisted under Section 300, is committed by several persons with the intention to commit murder, that Section 302 can be invoked with the aid of Section 34. Whereas in the present case, Vikas cannot be attributed either the requisite intention or the requisite knowledge, as would render his role participatory, in the murder of Jitender, he can, be punished under Section 396. If, in a case such as that of Vikas, Section 302 read with Section 34 is to be invoked, the distinction between Section 396 and Section 302 read with 34 would stand obliterated. We have to bear in mind the reality that, whenever five or more persons commit dacoity and one of them commits murder in the course of such commission of dacoity, the possibility of the acts of the others rendering the commission of murder possible, definitely exists. In our view, it is only where a co-assailant, who consciously participates in the commission of the murder, who can be punished under Section 302

read with Section 34 of the IPC. In any event, the act of Vikas, whose role was limited to purloining of cash from the pockets of Jitender and Mool Chand, cannot justifiably invite the wrath of Section 302 read with 34.

**79.** We, however, uphold his conviction under Section 396 of the IPC. As we have already opined hereinabove, Section 396, being a self contained provision, there is no need for us to invoke Section 34; rather, the invocation of Section 34, along with Section 396, appears *ex facie* to be disharmonious. The conviction of Vikas under Section 396 of the IPC, thereby, stands maintained by us.

**80.** The only issue remaining to be considered is that of sentence. The learned ASJ imposed, on each of the appellants, the maximum sentence (barring death) contemplated by the provisions whereunder he convicted them, i.e. rigorous imprisonment for life. It is obvious that, where, for a single offence, a statutory provision prescribes different degrees of punishment, the punishment to be awarded would depend on the involvement of the offender, and the seriousness and degree of the offence committed by him. While it is true that, each of the five accused, i.e. Neeraj, Sonu, the two juveniles and Vikas may be guilty of committing “dacoity with murder” within the meaning of Section 396, liability, under Section 302, read with Section 34, of the IPC, can be attributed only to Neeraj and Sonu, and not to Vikas, as already opined hereinabove. Given the murderous nature of the

chopper blow inflicted, by Neeraj, on Jitender, and the participatory role played by Sonu in immobilizing Jitender when the said blow was inflicted by Neeraj, we see no reason, whatsoever, to interfere with the sentence awarded, by the learned ASJ, on Neeraj and Sonu.

**81.** In the case of Vikas, however, the charge sheet only holds him guilty of removing cash from the pockets of the deceased Jitender and Mool Chand. His culpability is, as already held hereinabove, limited to Section 396 of the IPC. It appears to us grossly inequitable and unjust to award, to Vikas, in these circumstances, the sentence of rigorous imprisonment for life which, except for death, is the maximum punishment contemplated by Section 396 of the IPC. Awarding life imprisonment to Vikas would place him on the same pedestal as an offender who had committed first degree murder which, in our view, would be grossly disproportionate. That punishment should be proportionate to the crime committed is axiomatic in law. (Refer: *Vasanta Sampat Dupare v. State of Maharashtra* (2017) 6 SCC 631; *Neeru Yadav v. State of U.P.*, (2016) 15 SCC 422; *Nanda Gopalan v. State of Kerala*, (2015) 11 SCC 137; *Purushottam Dashrath Borate v. State of Maharashtra*, (2015) 6 SCC 652; *Ravinder Singh v. State of Haryana*, (2015) 11 SCC 588; *Santosh Kumar Singh v. State of Madhya Pradesh*, (2014) 12 SCC 650; *Salil Bali v. Union of India*, (2013) 7 SCC 705; *OMA@ Om Prakash v. State of Tamil Nadu*, (2013) 3 SCC 440)

82. Additionally, as already held by us hereinabove, there is nothing to involve Vikas with any intention to stab Jitender or Mool Chand, or even with the knowledge that such assault was likely to take place. He played no role in the infliction of the fatal blow on Jitender, or in “preparing the ground”, as it were, for such assault (as did Sonu). It appears on the face of it, that Vikas was only involving himself in the incident in order to make quick money possibly owing to poverty. These facts, seen in juxtaposition with the admitted position that Vikas is a young man of 30 years of age, of indigent means, with a dependent wife, a two year old son and five unmarried sisters, we are of the opinion that these circumstances “mitigate” his guilt, and armour him against imposition of the maximum penalty of rigorous imprisonment for life. We also bear in mind, in this context, the fact that Vikas does not appear to be a habitual offender, or incorrigibly predisposed towards crime.

### **Conclusion**

83. For all the above reasons, we dispose of these appeals in the following terms:

- (i) Crl. Appeal 104/2017 filed by Neeraj is dismissed.
- (ii) Crl. Appeal 82/2017 filed by Sonu @ Matka is dismissed.

(iii) Crl. Appeal 1151/2016 filed by Vikas is allowed in part. The conviction, of Vikas, under Sections 302/34 IPC and 307/34 IPC, is set aside. His conviction under Section 396 IPC is, however, affirmed. The sentence awarded to Vikas is reduced to 10 years' rigorous imprisonment, with fine of Rs 5000/-; default sentence being one month, simple imprisonment.

(iv) The appellants, who are in custody, shall serve the remainder of the sentences, as awarded by the learned ASJ, and as affirmed/modified hereinabove.

(v) We also direct initiation of proceedings, under Section 193 of the IPC, against Suraj Pal, as observed by us in para 50 (*supra*).

**84.** These appeals stand disposed of in the above terms. Trial Court record be sent back with copy of the judgment. Intimation be sent to Superintendent Jail.

**C. HARI SHANKAR**  
(JUDGE)

**S.P. GARG**  
(JUDGE)

**FEBRUARY 19<sup>th</sup> 2018**  
neelam