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IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment Reserved On : 04.07.2019
Judgment Pronounced On : 21.08.2019

CRL.A.909/2001

SUNDER LAL

.... Appellant

versus

STATE

.... Respondent

Advocates who appeared in this case:

For the Appellant : Mr. Akshay Chandra, Advocate

For the Respondent : Ms. Radhika Kolluru, APP

CORAM:

HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

HON'BLE MR. JUSTICE BRIJESH SETHI

J U D G M E N T

SIDDHARTH MRIDUL, J.

1. The present appeal instituted under the provision of section 374(2) of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.P.C') assails the judgment dated 21.9.2001 and the order on sentence dated 24.9.2001, rendered by learned Additional Sessions Judge, Tis Hazari, Delhi, in Session Case No. 121/1997, titled as '*State vs. Munna & Ors*', emanating from F.I.R No. 222/1997 under section 302/34 of the Indian Penal Code, 1860 (hereinafter referred to

as 'IPC') registered at Police Station Jahangirpuri; whereby the appellant, Sunder Lal, was convicted for the offence under Section 302 IPC read with Section 34 IPC and sentenced to undergo imprisonment for life along with a fine of Rs. 2000/-. In default of the payment of fine, the appellant has been sentenced to further undergo a further rigorous imprisonment of 2 months. The benefit of section 428, Cr.P.C, has been granted to the appellant.

2. The case of the prosecution as elaborated by the learned Trial Court is briefly encapsulated as follow: -

“ On 23.4.97 wireless operator gave an information that lady constable Prabha had given wireless message that knife was inflicted on one person in juuggies at A-1 Block, Jahangir Puri, Shiva Marker, Mangal Bazar Road. The same was recorded as DD No. 60B. The said information was conveyed to Inspector and inspector reached at the spot viz opposite A-1 Market near jhuggi. He found HC Govind Singh and constable Dhiraj present at the spot and one person whose name and address was known as Pardeep Kumar S/o Narain Dss aged about 35 years in dead condition. On inspection of dead body there was sign of injury and blood clot with sharp edged weapon on the left side of body and injury and clot of blood on the right side ear of the body and blood was oozing from on both the said injuries. The deceased was wearing pant of kathai colour, underwear (Katch) of blue colour. There was torn baniyan and without chappal in his legs/ there was one leg of cot towards head of the dead body. The head of the dead body was towards southern side and legs were on northern side. Smt. Munni Devi was present at the spot and her statement was recorded. In her statement Smt. Munni Devi stated that at about 8 P.M. on 23.4.97 she was sitting on cot in front of her jhuggi, her son Ajit aged 8 years and Dalip aged 10 years were coming from Mangal Bazar road. After seeing Jagran when they reached at jhuggi near park in front of A-1 market her neighbor Rashid S/o Munna @ Total

had caught hold her son Dalip and started beating him. She stood up and tried to rescue her son. In the meantime, Rani W/o Munna also came and caught hold her hairs and started quarrelling with her. After hearing noise of the quarrel her husband Pardeep Kumar also reached there and Munna @ Total also came and they started quarrelling, during quarrel with them, Munna called Anwar and Sunder and went to his jhuggi and came with a churi in his hand and Sunder came with leg of cot and told that they will finish Pardeep. Anwar and Rani W/o Munna and her son Rashid gripped her husband Pardeep Kumar and Munna @ Total inflicted knife blow on the chest of her husband Pardeep Kumar and also inflicted on the head on her right side of her husband and Sunder attacked with leg of cot on her husband Pardeep Kumar as a result of which her husband became in pool of blood and fell down and Sunder left the spot, after leaving the leg of cot there. Said other person also left the spot. Her husband Pardeep Kumar expired at the spot. Rani W/o Munna, Rashid S/o Munna, Anwar, Sunder and Munna @ Total had caused the death of her husband Pardeep Kumar. On the basis of said statement of Smt. Munni Devi a ruqqa was prepared and sent to the police station for registration of F.I.R and on inspection of the dead body said inspector investigated the matter and got the site photographed. Site plan was prepared and the exhibits were taken into possession from the spot. The post mortem was conducted on the dead body of Pardeep Kumar and after post mortem dead body was handed over to his heirs on 24.4.97. All the accused Munna, Anwar and Sunder were arrested. Munna @ Total made a disclosure statement and got recovered a knife and a case u/s 27/25/54/59 Arms Act was registered. Accused Anwar and Sunder Lal made disclosure statement and all the three accused pointed out the spot. The statement of witnesses were recorded and opinion of doctor was obtained. The exhibits were sent to office of F.S.L. the proceedings U/s 82/83 Cr.P.C. against Rani and Rashid were conducted. The names of accused Rani and Rashid were mentioned in column No. 2. After completion of investigation challan U/s 302/34 IPC and 25/27/54/59 Arms Act was prepared and filed before concerned Metropolitan Magistrate.”

3. Upon completion of investigation, charge-sheet was filed for the offences punishable under section 302/34 IPC and 25/27/54/59 Arms Act, 1959 and charges were framed against the appellant under sections 302 read with 34 IPC. The appellant pleaded not guilty and claimed trial.

4. To establish the case against the appellant, the prosecution examined 17 witnesses at trial.

5. The statement of the appellant under section 313 Cr.P.C. was recorded, wherein he denied the case of the prosecution and stated that he was lifted from his house and falsely implicated in the case. The appellant did not lead any defence evidence in his support.

6. Broadly speaking, the Trial court convicted the appellant (along with his co-accused, Munna) on the statement of the eye witnesses, Smt Munni Devi (hereinafter referred to as 'PW-1') and Dalip (hereinafter referred to as 'PW-4') coupled with the circumstantial evidence of post mortem report and the report of the Forensic Science Laboratory (hereinafter referred to as 'the FSL').

7. Mr. Akshay Chandra, learned counsel on behalf of the appellant, asseverated the innocence of the appellant and that the appellant was falsely implicated in the present case. He assails the

impugned judgment of the Trial court on the following grounds:

- a. That the trial court erred in convicting the appellant by relying on the testimonies of PW-1 & PW-4, in as much as, their testimonies were at variance with the medical evidence in the present case;
- b. That there is a contradiction in the statement of PW-1 as she stated in her testimony in court that Munna exhorted that '*Pradeep ka kaam tamaam kar dete hai*', however, in her complaint given to the police [Ex.PW1/A], she stated that Sunder gave such exhortation;
- c. That there were improvements in the evidence of PW-4 in his testimony in court, which were not stated by him to the police in his statement under section 161 Cr.P.C., to following extent:
 - i. that Rani (wife of the co-accused) held the hair of his mother, PW-1,
 - ii. that Munna stated to Anwar and Sunder that let us finish-off Pradeep (*Pradeep ka aaj kaam tamam kar dete hain*),
 - iii. that Sunder had struck Pradeep in the head with the

leg of the cot;

- d. That PW-1 & PW-4 being the wife of the deceased and the son of the deceased, respectively, were interested witnesses and as such their testimonies could not be considered trustworthy and reliable;
- e. That the motive to commit the present offence was not proved in the Trial court as only PW-1 alleged the same and no other independent witness or evidence was adduced to establish motive to commit the present offence;
- f. That no finding was given by the doctor in the post mortem report that, the deceased was hit in the head with the leg of the cot and as such, the appellant could not have been said to have caused the death of the deceased in absence of such finding;
- g. That common intention under section 34 IPC could not be attributed to the appellant, in the absence of a finding of injury on head of the deceased and that the only act attributed against him was of being called to the spot and going to bring the leg of the cot;

h. That in the testimony of PW-10, the doctor who conducted the post mortem of the deceased, it was stated that the cause of death was Cardiac Temponade (heart failure consequent to injury no. 2) and that in the of post mortem report it was opined that “Skull Bones” and “Base of Skull” were found intact and that therefore, the appellant could not have said to have caused the death of the appellant by striking him on the head with the leg of the cot.

All the above circumstances, it is asserted, render the impugned judgment of the Trial court liable to be set aside, *qua* the appellant.

8. To drive home his argument on the unreliability of the prosecution witnesses, learned counsel on behalf of the appellant relied on the judgment of the Hon’ble Supreme Court of India in **Thaman Kumar v. State**, reported as **2003 6 SCC 380** wherein it was observed that:

“The conflict between oral testimony and medical evidence can be of varied dimensions and shapes. There may be a case where there is total absence of injuries which are normally caused by a particular weapon. There is another category where though the injuries found on the victim are of the type which are possible by the weapon of assault, but the size and dimension of the injuries do not exactly tally with the size and dimension of the weapon. The third category can be where the injuries found on the victim are such which are normally caused by the

weapon of assault but they are not found on that portion of the body where they are deposed to have been caused by the eye-witnesses. The same kind of inference cannot be drawn in the three categories of apparent conflict in oral and medical evidence enumerated above. In the first category it may legitimately be inferred that the oral evidence regarding assault having been made from a particular weapon is not truthful.”

9. *Per contra*, Ms. Radhika Kolluru, Learned Additional Public Prosecutor appearing on behalf of the State, assiduously supported the impugned judgment of the trial court, and asserted that the statements of PW-1 & PW-4 were creditworthy, reliable and as such, minor variations in their statements could not discredit them. Ms. Kolluru also pointed out that, both being injured eye witnesses, their statements have a higher sanctity in law.

10. It is further submitted on behalf of the State that, the appellant was convicted by the Trial court under section 302 read with section 34 IPC; hence, the role of the appellant could not be seen in isolation, but has to be examined in light of the acts and conduct of the other accused persons, as well as his own.

11. We have heard counsel appearing on behalf of the parties and perused the evidence on record.

12. To effectively adjudicate the present appeal, it is incumbent upon us to reproduce the entire testimony of PW-1 & PW-4, both of

whom were injured eye-witnesses in the instant case, before the trial court. The testimony of PW-1 is as follows:

“श्रीमती मुन्नी देवी w/o प्रदीप कुमार r/o Jhuggi A1 मार्केट जहांगीर पूरी दिल्ली ससपथ

प्रदीप कुमार मेरा घर वाला था 23.4.97 को मैं अपने घर के बाहर चारपाई पर अपनी झुग्गी के सामने बैठी थी रात के 8 बजे का समय था (Eight PM) मेरे लड़के दलीप व अजीत जागरण देखने गए हुए थे | जागरण मेरी झुग्गी के नजदीक हो रहा था | मेरे लड़के आठ बजे रात के करीब वापिस आए | मुलजिम मुन्ना हाजिर अदालत के लड़के रासीद ने मेरे लड़के से झगड़ा करा वह मुन्ना की झुग्गी के पास थे रासीद ने मेरे लड़के दलीप का मारा | मैं वहाँ पहुँची कर बीच बचाओ करा | मुन्ना की घरवाली रानी भी वहाँ आ गई उसने मेरे बाल खिंचे | मेरे साथ झगड़ा करा | मेरी आवाज सुन कर मेरा आदमी प्रदीप वहाँ आ गया उसके बाद मुन्ना हाजिर अदालत भी वहाँ मौके पर आ गया व उसने भी हमें मारना शुरू कर दिया | मुन्ना ने अनवर व सुंदर को आवाज दी वह भी मौके पर आ गया मुन्ना बोला की आज प्रदीप का काम तमाम कर दो मुन्ना अपनी झुग्गी में गया वह चूरी लेकर आया | मू० सुंदर चारपाई का पावा लाया | अनवर रासीद व रानी ने मेरे आदमी को पकड़ लिया व मुन्ना न मेरे आदमी की छुरी छाती व सिर पर मारा व सुंदर मू० ने मेरे पति के सिर पर चारपाई का पावा मारा जिसके लगते ही मेरा आदमी फिर गया | सब मू० वहाँ से भाग गए | मैं पुलिस स्टेशन गई | पुलिस मौके पर आई | चारपाई का पावा मौके पर छोड़ गए | मैंने मौके पर पुलिस को शिकायत लिखाई exhibit/A मेरे दस्खत हैं | मैं मुलजिम मुन्ना व मू० सुंदर हाजिर अदालत के शनाखत करती हूँ | यह वही शक्स है जिन्होंने मेरे आदमी को मारा | मैं मू० रानी वह रासीद को भी जानती हूँ क्योंकि वह मेरे पड़ोस में रहते थे |

Xxxx by Sh V K Jain Con for accused

जागरण मेरी झुग्गी से 100-150 कदम की दूरी पर हो रहा था | झगड़ा 10-20 मिनट तक चला | जब झगड़ा हुआ मोहल्ले के कई लोग मौजूद था किसी ने भी हमें न बचाया मेरे पति का चारपाई का पावा से एक बार मारा व छुरी दो बार मारी | उस समय मुलजिम मुन्ना के भाई बगेरा भी रहते थे | Public के ऐसे किसी आदमी का नाम न बता सकती हूँ जो मौके वार दात के समय मौजूद थे | मैं पुलिस स्टेशन पैदल गई थी | 10-15 मिनट में वहाँ पहुँच गई |

थाने जाने से पहले मैंने telephone 100 न 0 पर करा | मेरा ब्यान पुलिस ने मौके पर लिखा था | मेरे ब्यान पुलिस ने थाने में न लिखा | पुलिस वाले वाक्य के आधे घंटे से पहले आगए मैं आज court मे सुबह 10 बजे आ गई थी यह गलत है की पुलिस ने मुझे आज क्या ब्यान देना है वह समझाया था | पुलिस ने मुझसे पूछ ताछ की पुलिस ने और क्या कारवाई की मैं न बता सकती हूँ | मेरे सामने दलीप मेरे लड़के को दो चाटें रासीद ने मारे इस वाक्ये से 15-20 दिन पहले हमारा सुंदर से झगड़ा हुआ था खुद कहा तब उसने मुझे धम्की दी थी की व मेरे आदमी को दो महीने में मार देंगे | हमने सुंदर के माँ बाप को शिकायत की थी और पुलिस में शिकायत न की थी यह गलत है की मेरे सामने कोई झगड़ा न हुआ यह गलत है मैं झूठी गवाही दे रही हूँ | यह गलत है की मूO मौके पर मौजूद न थे |”

13. The testimony of PW-4 is as follows:

“दलीप S/O प्रमोद age 13 years r/o झुग्गी A-1 Market जहाँगीर पूरी दिल्ली ससपथ

मुझे पता है की मैं अदालत में गवाही देने आया हूँ मैं सातवीं कक्षा में पढ़ता हूँ |

The witness is able to give answer to question let his statement be recorded on oath मैं जो कहूँगा सच्च बोलूँगा

ससपथ

23.4.07 को मैं रात के 8 बजे मंगल बाज़ार में जागरण देख कर अपने घर की तरफ जा रहा था | मैं Mother Dairy के पास था रानी की लड़की व कुछ और बच्चे आ रहे थे मेरे हाथ रानी की लड़की के लग गया रानी की लड़की ने मुझे गाली दी | मैंने उसे गाली देने के लिए मना करा उसने अपने भाई रासीद को आवाज दी रासीद वहां आ गया | रासीद मुझे मारने लगा मेरी मम्मी मुझे छुड़ाने के लिए आई मेरी मम्मी मुझे छुड़ा रही थी तभी रानी वहाँ आ गई | रानी मेरी मम्मी से लड़ाई करने लगी | रानी ने मेरी मम्मी के बाल पकड़ लिए | इतने में मेरे पिता जी वहां आ गए | मूO मुन्ना हाज़िर अदालत भी आ गया मुन्ना मेरे पिता जी से लड़ने लग गया | मुन्ना अपने घर गया व अनवर व सुंदर से कहा की प्रदीप का आज काम तमाम कर देते हैं | मुन्ना चाकू लेकर आया सुंदर के पास चारपाई का पावा था | अनवर भी मौजूद था | रासीद व रानी भी मौजूद थे | मेरे पिता को रानी, रानी के लड़के रासीद व अनवर ने पकड़ लिया | मुन्ना

ने मेरे पिता की छाती पर सिर पर चाकू मारा | सुंदर ने मेरे पिता के सिर पर चारपाई का पावा मारा मेरे पिता के खून बहने लगा फिर वह गिर गए | मैं मूO सुंदर हाजिर अदालत के शनाख्त करता हूँ |

Xxx by Sh V K Jain Adv

मैं वहां से अपने चाचा के घर चला गया था | जब मैं अपने चाचा के साथ आधे घण्टे बाद आया तो पुलिस मौजूद थी पुलिस ने मेरे से पूछ ताछ की थी | पुलिस ने थाना में मेरे से पूछ ताछ की थी | अगले दिन को भी मैं थाने अगले दिन गया था दिन में गया था | मैं थाने में आधे घण्टे रहा | मैं उससे अगले रोज भी थाने गया था | उस दिन मुझसे कोई पूछताछ न की | 25.4.97 को मेरे कोई ब्यान न हुए | मैंने पुलिस के मेरी माँ के बाल पकड़ने की बताई थी confronted with the statement mark A of the witness where it is not recorded | यह भी पुलिस को बताया था की दलीप का काम तमाम कर देते हैं confronted with mark A statement where it is not recorded. पुलिस को बताया था की मू O सुंदर ने मेरे पिता जी के सिर पर चारपाई का पावा मारा confronted with mar A where not recorded | मेरे साथ मेरी दादी आई है यह गलत है की मेरी दादी ने मुझे मुलजिमों को दिखाया है | झगड़ा करीब आधे घंटे तक चला | जहां झगड़ा हुआ था वहाँ से हमारी झुग्गी का एक मिनट का रास्ता है | यह सही है की जब झगड़ा हुआ आस पास के लोग इक्कठे हो गए थे | 10-20 आदमी इक्कठे हो गए थे | मुझे नी पता पुलिस ने उनके ब्यान लिखे | यह गलत है की मूO मौके पर मौजूद न थे | यह गलत है की कोई झगड़ा न हुआ यह गलत है की मूO हाजिर अदालत ने मेरे पिता को चाकू वह चारपाई के पावा से न मारा | यह गलत है की मैं अपनी माँ के कहने पर झूठी गवाही दे रहा हूँ |”

14. From a holistic and conjoint reading of the above testimonies which are credible and trustworthy and have not been shaken in cross examination, it is evident that both PW-1 & PW-4 have categorically testified that the appellant came to the spot on being called by Munna (co-accused) and exhorted that, “*Pradeep ka aaj kaam tamam kar dete*

hain”. It is also unequivocally testified that subsequent to the above exhortation, the appellant went and brought the leg of the cot, struck the deceased on his head, consequent upon which, the deceased collapsed on the spot.

15. Both, PW-1 & PW-4, are injured eye witnesses. The testimony of an injured eye witness is kept on a higher pedestal and is accorded a special status in law as held by the Hon’ble Apex Court in **Abdul Sayeed vs. State of Madhya Pradesh**, reported as (2010) 10 SCC 254, reproduced as follows:

“The law on the point can be summarized to the effect that the testimony of the injured witness is accorded a special status in law. This is as a consequence of the fact that the injury to the witness is an in-built guarantee of his presence at the scene of the crime and because the witness will not want to let his actual assailant go unpunished merely to falsely implicate a third party for the commission of the offence. Thus, the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies therein.”

16. So far as the argument of existence of contradictions in the testimony of PW-1, as well as the improvement in the testimony of PW-4 vis-à-vis his statement under section 161 Cr.P.C is concerned, it is well established by the Hon’ble Supreme Court of India, in a catena of decisions, that, minor discrepancies in the evidence of the eyewitnesses do not shake their trustworthiness. [Ref: **Balvir Singh v.**

State of Madhya Pradesh reported as (2019 (4) Scale 631)].

17. The further argument made by the counsel on behalf of the appellant that PW-1 & PW-4, being the wife of the deceased and son of the deceased, respectively, are interested witnesses, does not appeal to us. There is a clear distinction in law between a related witness and an interested witness. The Hon'ble Supreme Court of India in *Md. Rojali Ali v. The State of Assam* reported as AIR 2019 SC 1128 held:

“10. As regards the contention that all the eye-witnesses are close relatives of the deceased, it is by now well-settled that a related witness cannot be said to be an ‘interested’ witness merely by virtue of being a relative of the victim. This Court has elucidated the difference between ‘interested’ and ‘related’ witnesses in a plethora of cases, stating that a witness may be called interested only when he or she derives some benefit from the result of a litigation, which in the context of a criminal case would mean that the witness has a direct or indirect interest in seeing the accused punished due to prior enmity or other reasons, and thus has a motive to falsely implicate the accused (for instance, see *State of Rajasthan v. Kalki*, (1981) 2 SCC 752; *Amit v. State of Uttar Pradesh*, (2012) 4 SCC 107; and *Gangabhavani v. Rayapati Venkat Reddy*, (2013) 15 SCC 298). Recently, this difference was reiterated in *Ganapathi v. State of Tamil Nadu*, (2018) 5 SCC 549, in the following terms, by referring to the three-Judge bench decision in *State of Rajasthan v. Kalki* (supra):

“14. “Related” is not equivalent to “interested”. A witness may be called “interested” only when he or she derives some benefit from the result of a litigation; in the decree in a civil case, or in seeing an accused person punished. A witness who is a natural one and is the only possible eye witness in the circumstances of a case cannot be said to be “interested” ...”

11. In criminal cases, it is often the case that the offence is witnessed by a close relative of the victim, whose presence on the scene of the

offence would be natural. The evidence of such a witness cannot automatically be discarded by labelling the witness as interested. Indeed, one of the earliest statements with respect to interested witnesses in criminal cases was made by this Court in *Dalip Singh v. State of Punjab*, 1954 SCR 145, wherein this Court observed:

“26. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person...”

12. In case of a related witness, the Court may not treat his or her testimony as inherently tainted, and needs to ensure only that the evidence is inherently reliable, probable, cogent and consistent. We may refer to the observations of this Court in *Jayabalan v. Union Territory of Pondicherry*, (2010) 1 SCC 199:

“23. We are of the considered view that in cases where the Court is called upon to deal with the evidence of the interested witnesses, the approach of the Court while appreciating the evidence of such witnesses must not be pedantic. The Court must be cautious in “appreciating and accepting the evidence given by the interested witnesses but the Court must not be suspicious of such evidence. The primary endeavour of the Court must be to look for consistency. The evidence of a witness cannot be ignored or thrown out solely because it comes from the mouth of a person who is closely related to the victim.”

In light of the above and on a minute and purposeful reading of their testimony, PW-1 & PW-4 cannot be termed as interested witnesses, nor can their testimony be discarded on that premise.

18. In respect of non-establishment of Motive, it has been held by the Hon’ble Supreme Court of India that motive, is not a *sine qua non*,

in particular when there is trustworthy direct evidence regarding commission of a crime. It is relevant to point out the judgment in **Bipin Kumar Mondal v. State of West Bengal** reported as (2010) 12

SCC 91:

“19. It is settled legal proposition that even if the absence of motive as alleged is accepted that is of no consequence and pales into insignificance when direct evidence establishes the crime. Therefore, in case there is direct trustworthy evidence of witnesses as to commission of an offence, the motive part loses its significance. Therefore, if the genesis of the motive of the occurrence is not proved, the ocular testimony of the witnesses as to the occurrence could not be discarded only by the reason of the absence of motive, if otherwise the evidence is worthy of reliance. (Vide Hari Shankar v. State of U.P, (1996) 9 SCC 40; Bikau Pandey and Ors. v. State of Bihar, (2003) 12 SCC 616; and Abu Thakir and Ors. v. State of Tamil Nadu, (2010) 5 SCC 91).

20. In a case relating to circumstantial evidence, motive does assume great importance, but to say that the absence of motive would dislodge the entire prosecution story is giving this one factor an importance which is not due. Motive is in the mind of the accused and can seldom be fathomed with any degree of accuracy.(Vide Ujagar Singh v. State of Punjab, (2007) 13 SCC 90).”

19. It is rather noted that PW-1, in her cross-examination, attributed motive to the appellant by stating that roughly 15 – 20 days prior to the present incident, a quarrel had taken place with the appellant, wherein he had threatened to kill the husband of PW-1 (the deceased) in two months.

20. We therefore observe that the argument with respect to non-

proving of motive, must also fail in the light of the direct evidence elaborated herein before.

21. Coming to the aspect of medical evidence and the role of the accused, it is relevant to examine the post mortem report coupled with the testimony of Dr. K.L. Sharma, PW-10, the doctor who conducted the post mortem on the body of the deceased, as well as the factum that, the appellant acted in furtherance of common intention under section 34 IPC, along with the co-accused.

22. In the post mortem report, the relevant opinion is as follows:

“External Injuries:

1. ...
2. ...
3. Small semilunar abrasion over right side middle of neck 1 c.m.
- 4. Leniar abrasion vertical over left side axillary fold in front of it 1 c.m. length.**

Internal Injuries:

Head:

- a) Scalp tissue: cut in whole thickness upto right temporal muscle.**

...

OPINION:

-Cause of death is cardiac tamponade consequent to injury No.2, rapidly following injury.

-All injuries were antemortem in nature and are inflicted by other party.

-Injury No. 2 was sufficient to cause death in the ordinary course of nature rapidly.

-Injury No. 1 & 2 are caused by sharp, penetrating cutting weapon which is flat and straight weapon. Injury No. 2 & 4 have been caused during scuffle, with other party.”

23. During the testimony of PW-10 in court, the seal of the FSL, which contained the paya of the cot [Ex. P2], was opened and put specifically to her, to which she stated that Injury No. 4 as mentioned in the post mortem report, could be caused by the paya [Ex. P2]. It is also mentioned in the post mortem report that injury No. 2 & 4 were caused during the scuffle. Therefore, the blow by the leg of the cot has been connected with the injury inflicted upon the deceased during the scuffle.

24. The testimony of PW-10 along with the fact that the head skin was cut up to right temporal muscle area, shows the intent of the appellant, as well as the nature of the injury inflicted upon the deceased, at the relevant time.

25. The intent is also unambiguous, in light of the fact that both PW-1 & PW-4 have testified that the co-accused Munna, stabbed the deceased with the knife, and the appellant struck the deceased once with the leg of the cot, which was brought by him subsequent to the exhortation.

26. The appellant, along with his co-accused, were also convicted under section 302 read with section 34 IPC, for their common

intention in the present crime. The act of the accused of striking the deceased with the leg of the cot, contemporaneous with the co-accused stabbing the accused with the knife, clearly demonstrate the intent and role of the accused in the present crime.

27. We also refer to the observations of the Hon'ble Supreme Court of India in *Palakom Abdul Rahiman v. The Station House Officer Badiadka Police Station* reported as AIR 2019 SC 1891, wherein the effect of a conviction under section 302 read with section 34 IPC, has been observed as follows:

“The application of principles enunciated in Section 34 Indian Penal Code, when an Accused is convicted Under Section 302 read with Section 34 Indian Penal Code, in law means that the Accused is liable for the act which caused death of the deceased in the same manner as if it was done by him alone. As was observed by this Court in Chinta Pulla Reddy and others case (supra), Section 34 is applicable even if no injury has been caused by the particular Accused himself.”

28. The judgment of the Supreme court of *Thaman Kumar v. State (Supra)*, cited by the counsel for the appellant, as a corollary, does not come to the aid of the appellant, as we do not find any substantial variation between the medical evidence and ocular evidence, as examined by us above. Even otherwise, it is settled law that unless the oral evidence is totally irreconcilable with the medical evidence, it has primacy. [Ref: *Abdul Sayeed (Supra)*]

29. We therefore hold that, in light of the medical evidence, statements of PW-1, PW-4 and PW-10 and the common intention of the appellant with the co-accused, under section 34 IPC, clearly demonstrate the guilt of the accused in commission of the present crime.

30. As a last alternative argument, learned counsel for the appellant made a plea on behalf of the appellant that, the appellant's conviction may be converted from one of conviction under section 302 to that of section 304 IPC.

31. We are not inclined to accept the same. The Appellant acted consequent upon the exhortation given by his co-accused, to kill the deceased, subsequent to which, he went and brought the leg of the cot and struck the deceased on his head with it. The appellant stands convicted not only for his act, but also in light of the contemporaneous acts of his co-accused. He has acted in furtherance of common intention along with his co-accused and the intent to cause death of the deceased is clear.

32. In the present circumstances the case of the appellant, we observe, do not fall under any of the exceptions provided under section 300 IPC, and the conviction of the appellant under section 302 IPC,

resultantly, cannot be converted to that of Section 304 IPC.

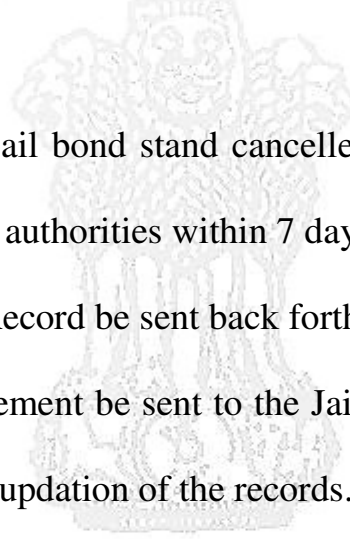
33. We consequently, find ourselves in agreement with the findings returned by the trial court, which in our considered view, do not warrant any interference or modification.

34. Therefore, the judgment dated 21.9.2001 and the order on sentence dated 24.9.2001, respectively, are upheld and the present appeal is accordingly dismissed. However, there shall be no order as to costs.

35. The appellant's bail bond stand cancelled and he is directed to surrender before the jail authorities within 7 days.

36. The Trial Court Record be sent back forthwith.

37. Copy of the judgement be sent to the Jail Superintendent, Tihar Jail and also be sent for updation of the records.


सत्यमेव जयते **SIDDHARTH MRIDUL**
(JUDGE)

BRIJESH SETHI
(JUDGE)

AUGUST 21, 2018
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