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

% *Judgment delivered on: 15.05.2019*

+ **Crl. A. 183/2013**

PANKAJ @ DABBU

.... Appellant

Through: Mr. Rishabh Kaushik, Advocate.

versus

STATE OF DELHI

....Respondent

Through: Mr. Ravi Nayak, APP with Inspector
Satvir Singh, SHO, P.S. South Rohini.

CORAM:

HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

HON'BLE MR. JUSTICE NAJMI WAZIRI

NAJMI WAZIRI, J

1. This appeal under section 374(2) of the Code of Criminal Procedure, 1973, (Cr.P.C.) impugns the judgment dated 17.11.2012 & order on sentence dated 24.11.2012, passed by the Additional Session Judge, Dwarka Courts, New Delhi whereby the appellant has been convicted for the offences punishable under sections 302 r/w 34 and 201 of the Indian Penal Code, 1860 (IPC) and accordingly, has been sentenced to undergo imprisonment for life along with fine of Rs. 10,000/-, in default of payment of which, SI for a period of 6 months, for the offence punishable under section 302/34 IPC, and RI for a period of 5 years and fine of Rs. 2000/- in default to undergo SI for 2 months for offence punishable under section 201 IPC. The sentences have been directed to run concurrently while granting benefit of section 428 Cr.P.C. to the appellant.

2. The case of the prosecution is that, on 04.05.2010 at about 11.10 PM, DD No. 59A was received at PS Dabri, wherein it was stated that the dead body of Dharmender s/o Shri Lal Ji Shah, was lying at Mata Chanan Devi Hospital, who, in terms of MLC no. 2406/10, was stabbed and declared as brought dead. On this information, Inspector Satvir Singh (Investigating Officer PW-18) along with Ct Laxman (PW-16) and Ct Naresh Kumar (PW-11) reached Mata Chanan Devi Hospital, where the brother of Dharmender (the deceased), PW-1 Rajesh was present. Statement of PW-1 Rajesh was recorded by the police, wherein PW-1 stated that he, along with his family, resides at A-240, Mahavir Enclave, Part-II, Delhi and is in the business of selling vegetables and that his elder brother Dharmender (since deceased), also helped him in the same. On 04.05.2010, he had installed his vegetable cart in Mangal Bazaar, Gali No. 13, Mahavir Enclave and his brother Dharmender (since deceased) was also present there. At about 10.00-10.15 pm, three boys, including the appellant, came to his shop and started eating some tomatoes from the cart. His brother, Dharmender, objected to the same and demanded money but the appellant started quarreling with his brother. At the complainant's (PW-1) instance, the matter was compromised and the appellant-accused along with the co-accused left. The complainant also sent his brother Dharmender back to the house, fearing that the appellant and other co-accused may come after him again. However, the appellant, along with other co-accused, apprehended the deceased from a little distance and started beating him. The complainant immediately rushed to the spot; he saw that the appellant was stabbing his brother with a knife and the other co-accused were beating up his brother. The appellant along with the co-accused fled from the spot after some people gathered there.

3. On the basis of the statement of PW-1, Inspector Satvir Singh (PW-18) prepared a rukka, on the basis of which FIR no. 116/2010 under section 302/34 IPC was registered against the appellant and other co-accused, at PS Dabri. During investigation, an offence under section 201 IPC was added by the police. The Chargesheet against the appellant was filed under section 302 r/w 34 and section 201 IPC. The other co-accused were found to be minors and therefore, were sent to the Juvenile Justice Board for further proceedings. The learned Trial Court framed charges under section 302 r/w 34 and section 201 IPC against the appellant, to which the appellant pleaded not guilty and claimed trial.

4. To establish its case, the prosecution examined as many as 18 witnesses. PW-1 (Rajesh Shah) the complainant and brother of the deceased, apart from giving oral account of the incident, proved his statement given to the police in the hospital as Ex PW-1/A. PW-1 also proved the seizure memo ExPW-1/B in respect of seizure of earth material from the crime scene and EX PW-1/E in respect of seizure of his blood stained clothes by the IO. He also proved the Arrest memo & Search Memo of the appellant which are Ex.PW-1/C & Ex.PW-1/D respectively. PW-1 proved the Identification Memo Ex.PW-1/F of the dead body to be his deceased brother and also proved the disclosure statement of appellant accused as Ex.PW-1/G. PW-1 also identified, in the Court, various articles seized by the police during investigation i.e. his own blood stained clothes, blood stained clothes of the deceased and material collected from the crime scene, as Ex. P-1 to Ex. P-8. Apart from PW-1, PW-2 (Gopal Jha) and PW-7 (Manoj) were also examined by prosecution as eye witnesses, who gave an oral account of the incident in their deposition in the Court. PW-3 (Lalji Shah) Father of the deceased deposed about the

identification of deceased and proved the statement of Rajesh Shah-Ex.PW-3/A to this effect. PW-4 (Dr. Manoj Kumar) proved the MLC and OPD Card of the deceased Dharmender as Ex.PW-4/A and Ex.PW-4/B respectively. PW-5 (Ct. Arun Kumar) deposed that he, being a member of the mobile crime team, reached the place of incidence on 04.05.2010 and took 14 photographs of the crime scene and proved photographs as Ex. PW5/A1 to A9 and negatives as Ex.PW5/D1 to D14. PW-6 (HC Chhote Lal) deposed about handing over of the copies of the FIR to area M.M. and senior police officers. PW-8 (Dr. Santosh Kumar) deposed about conducting the postmortem of the deceased on 05.05.2010 and proved the Postmortem Report as Ex. PW8/A. He also deposed that in his opinion, the cause of the death of the deceased was hemorrhagic shock subsequent to multiple stab injuries by pointed sharp weapon, and out of these injuries, the injury over the axilla (external injury no. 7) and injury over chest (external injury no. 1 and 4) and injury of the lungs corresponding to injury no. 1 and 4 were sufficient to cause death individually as well as collectively. PW-9 (ASI Attar Singh) proved the crime scene report as Ex. PW9/C. PW-10 (Ct. Jai Prakash) proved the Seizure Memo Ex. PW10/A vide which two pulandas and two sample seals handed over by Doctor to the police were taken into possession. PW-11 (Ct. Naresh Kumar) deposed about reaching Mata Chanan Devi Hospital, along with IO Satvir Singh (PW-18) and Ct. Laxman (PW-16) after receiving DD No. 59A and his staying at the mortuary for protecting the dead body. PW-12 (Ct. Hardeep Singh) proved the detailed scaled site plan prepared by him as Ex. PW-12/A. PW-13 (Head Constable Kailash Chand) deposed about deposition of exhibit with him by IO Akhilesh Bajpai and IO Satvir Singh, while he was working as MHC(M) at P.S. Dabri on 05.05.2010 and 07.05.2010 and also deposed about

sending these exhibits to FSL Rohini through Ct. Rajesh (PW-17) on 21.6.2010 and proved the relevant entries in the Register as Ex.PW13/A and PW13/B. PW-14 SI Akhilesh Bajpai proved the postmortem and inquest paper as Ex.14/A to 14/C and also proved Identification Memo of the body of the deceased as Ex.PW3/A and Seizure Memo Ex. PW10/A. PW-15 (ASI Deen Dayal) deposed about the registration of an FIR by him and proved the copy of FIR as Ex PW15/A and his endorsement on rukka as Ex.PW15/B. PW-16 (Ct. Laxman Singh) deposed that on 04/05.05.2010, he along with IO Satvir Singh (PW-18) and Ct Naresh (PW-11) went to Mata Chanan Devi Hospital and also deposed about various proceedings undertaken by the police from that point. He proved the Seizure Memo as Ex. PW1/B. Arrest and Personal Search Memo of appellant-Pankaj as Ex. PW1/C and Ex. PW1/D respectively and sealed parcels handed over by the Doctor to him, seized vide Seizure Memo as Ex. PW16/A. He also proved the blood stained earth, blood stained pant and shirt of the complainant Rajesh (PW-1) as Ex.PW P-1, P-2 and P-3. PW-17 (Ct. Rajesh Kumar) deposed about collecting the sealed parcels and depositing the same to FSL, Rohini on 21.06.2010. PW-18 (Inspector Satvir Singh), who was the Investigating Officer in this case, deposed about various things done by him to collect evidence and proved various documents prepared/collected by him during investigation.

5. The statement of the appellant-accused was recorded under section 313 Cr.P.C. by the learned Trial Court wherein, he stated that he had been falsely implicated and arrested by the police; that he did not know the deceased or his brother and that on the day of his arrest, he had gone to the house of his maternal grandmother and that he was falsely apprehended therefrom.

6. The learned counsel for the appellant has challenged the impugned

judgment on the grounds: (i) that there are glaring inconsistencies in the testimonies of PW-1, PW-2, PW-11, PW-16 and PW-18, which go to the root of the case and are therefore, are fatal to the prosecution case; (ii) that the testimonies of PW-1 and PW-2 reveal that they are not eye witnesses and are interested or stock witnesses and have been planted by the police; (iii) that as per the prosecution story, the site of the alleged incident was crowded and admittedly, there were many independent public eye-witnesses to the incident, despite that, the police chose not to examine any independent public witness and no explanation was given for non-examination of such witnesses; (iv) that the police have falsified and improved upon their records so as to implicate the accused; (v) that there is no recovery of the weapon of offence from the appellant; (vi) and lastly that there is absence of any motive on the part of appellant to commit the crime.

7. Apropos the first ground of challenge, various inconsistencies pointed out by the learned counsel of the appellant in the testimonies of the PW-1, PW-2, PW-11, PW-16 and PW-18 are as below:

i) PW-1, the brother of the deceased, has deposed that when he reached the site of incident, the appellant along with other co-accused was beating his brother (since deceased), whereas PW-2, who is claimed to be an eye witnesses by the prosecution, deposed that PW-1 reached the spot only after the deceased fell down and after PW-2 had arranged for an auto-rikshaw to ferry the deceased to the hospital.

ii) PW-1 and PW-2 had categorically stated, in their cross examination that there was adequate lighting on the road at the time of the incident, whereas PW-16, in his cross examination, has specifically deposed that there was no street light at the spot and that the IO had arranged for a torch.

iii) PW-16 in his cross examination had stated that *“before the arrest of the appellant, the complainant (PW-1) had not told the name and address of one of the assailants”*, which is contradictory to what was noted in the FIR recorded prior to the arrest of the accused, in which the name of a co-accused is specifically mentioned.

iv) PW-2 in his cross examination had specifically stated that *“after the police left the spot, I left for my home. It may be around 11 PM”* which is contradictory to the statement of PW-16 and PW-18 who had stated in their cross examination that they had reached the spot of the incident at around 1.30 AM and 12.55 AM, respectively. Furthermore, PW-11 had stated in his cross-examination that they reached Mata Chanan Devi Hospital, where the statement of PW-1 was recorded, at about 12.15 AM, which is in contradiction to the statement of PW-18, who had stated that he had received information at about 11.10 PM and reached the hospital in 15-20 minutes, as the distance between Police Station and Hospital is about 1 km.

v) PW-1 in his statement before the police has stated that the distance between his cart and the place of occurrence was 50-60 paces whereas in his cross examination he stated that the distance between the two places was 50-60 lagga.

vi) Apropos the arrest of the appellant, PW-1 had deposed that someone informed him that the appellant is present in Gali No. 8, upon which the police apprehended the appellant. Whereas PW-16 deposed that they went to Gali No. 8 after hearing some noise and then PW-1 pointed towards the appellant upon which the police apprehended the appellant. Narrating a different version, PW-18 had stated that they reached the site from where the appellant was arrested upon hearing some noise from Gali No. 8, where the appellant

was surrounded by police persons and thereafter PW-1 identified the appellant.

8. The learned Trial Court in the impugned judgment recorded that apropos the inconsistency at point (i) above, it is true that PW-2 in his cross examination had stated that PW-1 reached the spot after the deceased fell on the road and after PW-2 arranged for auto i.e. PW-2. But this witness immediately thereafter made a correction and said *“I saw Rajesh when injured was to be taken in the auto but I cannot tell when he reached at the spot.”* Therefore, the aforesaid statement of PW-2 clarifies the inconsistencies pointed out by the appellant.

9. Apropos the inconsistency at point (ii) above, the reading of the entire testimony of PW-1, PW-2 and PW-16 alongwith the proven facts on record, will reveal that PW-1 and PW-2 have mentioned about the presence of adequate lighting on the road at the time of incident, around 9 or 10 pm on 04.05.2010, when the market place was still open and there were many other vendors and persons around. Whereas PW-16 has mentioned in his statement that there was no street light at the spot when the IO was conducting the proceedings and as per the record, the IO reached the spot around 01.00 AM on 05.05.2010. Therefore, in all probability the market had shut by then and therefore, there was no light at that time. Hence, no inconsistency arises in the statement of the witnesses on this count, as they had deposed about presence/absence of light at different points of time.

10. Apropos the inconsistency mentioned at point (iii) though the evidence of PW-16 reveals that he had stated in his cross examination that the complainant PW-1 did not tell the name and address of the assailants prior to the arrest of appellant Pankaj, but the Trial Court stated that this statement of PW-16 could not be used for assailing the testimony of eye witnesses and facts

brought on record in documentary form i.e. Ex.PW1/A and the FIR clearly establishes the fact that PW-1, at the very first instance, revealed the name of two of the assailants in his statement to the police i.e. Ex.PW1/A and the appellant was arrested thereafter.

11. As far as inconsistencies pointed out by the learned counsel for the appellant/accused at points (iv), (v) and (vi) are concerned, in view of the learned Trial Court, these inconsistencies are trivial in nature, are bound to occur due to normal errors of observation or the lapse of memory on account of passage of time and therefore, cannot raise doubt over the consistent, cogent and reliable testimonies of eye witnesses coupled with medical evidence and other facts proved by way of undisputed documents on record.

12. Apropos the second ground of challenge, the learned counsel for the appellant argues that PW-1 is not an eye-witness to the incident and he, being the brother of the deceased, is an interested witness. To buttress his contention, the learned counsel for the appellant submits that being the brother of the deceased, had PW-1 been an eye-witnesses to the incident, he could have tried to save his brother when the appellant along with co-accused were allegedly beating the deceased; the explanation, given by PW-1 in his cross-examination for not having done so was that he did try to save his brother by raising a hue and cry but he was not in a position to save his brother due to fear for his life, limb and liberty. This Court too is not convinced by the argument of the learned counsel of the appellant because, firstly, in view of the Court, the presence of PW-1 at the place of incident was natural as he too was engaged in the sale of vegetables close to the spot of incident. Secondly, the testimony of PW-1 has been consistent, cogent and reliable and has remained unrebutted after due cross-examination at the instance of appellant-accused. In the present

case, PW-1 saw his brother being beaten up by the appellant and other co-accused. The appellant was incessantly stabbing PW-1's brother, which, as per MLC and PMR, is clear by the presence of as many as 8 clean incised wound on the body of the deceased, while the other two co-accused were beating up the deceased.

13. Furthermore, the learned counsel for the appellant has also argued that since PW-1 and PW-2 are near relatives/friends of the deceased, therefore, they are interested witnesses and hence their testimonies cannot be relied upon to hold the accused guilty. The learned Trial Court in the impugned judgment has dealt with the argument of the appellant/accused extensively and observed that:

*“..... 37. The contention of the counsel for the defence is that PW-1 is the brother of the deceased and PW-2 is the good friend of PW-1 and also known to the deceased as well as PW-1. So PW-1 and PW-2 are interested witnesses and their evidence need corroboration and without corroboration conviction cannot be sustained. But said contention appears to be attractive but the same is fallacious and is hereby rejected as it is settled law that all the eye witnesses cannot be interested witnesses as a witness who is relative of the deceased or a victim of the crime cannot be characterised as interested. The term interested postulate that the witness has some direct or indirect interest in having the accused somehow or another convict due to enmity or some other motive. In **Rameshwar Kalyan Singh v. State of Rajasthan, 1952 SCR 377;AIR 1952 SC 54**, their Lordships observed that it was a fallacy common to many criminal cases and in spite of endeavours to dispel, “it unfortunately persists, if not in the judgements of the courts, at any rate in the arguments of counsel”. It was further observed that:*

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 which to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom witness has a grudge alongwith the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth.

However, we are not attempting any sweeping generalisation. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts.

38. *In Darya Singh & Ors. vs State of Punjab (1964) 3 SCR 397; AIR 1965 SC 328, it has been observed that:*

There can be no doubt that in a murder case when evidence is given by near relatives of the victim and the murder is alleged to have been committed by the enemy of the family, criminal courts must examine the evidence of the interested witnesses, like the relatives of the victim, very carefully. But a person may be interested in the victim, being his relation or otherwise, and may not necessarily be hostile to the accused. In that case, the fact that the witness was related to the victim or was his friend, may not necessarily introduce any infirmity in his evidence. But where the witness is a close relation of the victim and is shown to share the victim's hostility to his assailant, that

naturally makes it necessary for the criminal court to examine the evidence given by such witness very carefully and scrutinise all the infirmities in that evidence before deciding to act upon it. In dealing with such evidence, courts naturally begin with the enquiry as to whether the said witnesses were chance witnesses or whether they were really present on the scene of the offence.

39. *It may be noted that relationship is not a factor to effect the credibility of a witness. It is more often than not that a relationship would not conceal actual culprit and make allegations against innocent persons. Foundation has to be laid if plea of false implications is made and in such case, the court has to adopt a careful approach and analyse.*

40. *From conjoint reading of the statement of PW-1 and PW-2, the only irresistible conclusion can be drawn that PW-1 and PW-2 are not interested witnesses and their testimonies are natural one and trustworthy and reliance can be safely placed on such testimonies. Even the testimony of PW-7 who has turned hostile has supported the prosecution story to the extent that deceased was lying in a pool of blood and he has also identified the accused who was apprehended by the public persons as they were telling that deceased was stabbed by accused Pankaj @ Dabbu. Therefore, the presence of the deceased and apprehension of the accused by the public persons is proved by the testimony of these three witnesses who testified regarding the presence of accused at the scene of incident.*

14. The aforesaid contention of the learned counsel for the appellant also does not find favour of this Court since the evidence of PW-1 and PW-2 reveal that the oral account of the incident, as witnessed by them, has gone unrebutted and their testimony appears to be trustworthy and credible, and the Supreme Court in a catena of judgments has held that just being a mere

relative of the victim/deceased does not render an otherwise reliable and trustworthy witness in the category of interested witness

15. This court finds support for its aforesaid view from the law on appreciation of discrepancies in the testimonies of eye witnesses, discussed by the Supreme Court in ***Gangabhavani vs. Rayapati Venkat Reddy and Ors.*** (2013) 15 SCC 298 as under:-

"9. In State of U.P. v. Naresh (2011) 4 SCC 324, this Court after considering a large number of its earlier judgments held: In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about the truthfulness of the witness and other witnesses also make material improvement while deposing in the court, such evidence cannot be safe to rely upon. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety. The court has to form its opinion about the credibility of the witness and record a finding as to whether his deposition inspires confidence.

Exaggerations per se do not render the evidence brittle. But it can be one of the factors to test credibility of the prosecution version, when the entire evidence is put in a crucible for being tested on the touchstone of credibility.

Therefore, mere marginal variations in the statements of a witness cannot be dubbed as improvements as the same may be elaborations of the statement made by the witness earlier. The omissions which amount to contradictions in material particulars i.e. go to the root of the case/materially affect the trial or core of the prosecution's case, render the testimony of the witness liable to be discredited.

A similar view has been reiterated by this Court in Tehsildar Singh and Anr. v. State of U.P. AIR 1959 SC 1012; Pudhu Raja and Anr. v. State, Rep. by Inspector of Police JT 2012 (9) SC 252; and Lal Bahadur v. State (NCT of Delhi) (2013) 4 SCC 557).

10. Thus, it is evident that in case there are minor contradictions in the depositions of the witnesses the same are bound to be ignored as the same cannot be dubbed as improvements and it is likely to be so as the statement in the court is recorded after an inordinate delay. In case the contradictions are so material that the same go to the root of the case, materially affect the trial or core of the prosecution case, the court has to form its opinion about the credibility of the witnesses and find out as to whether their depositions inspire confidence."

16. If the facts of the present case are scrutinized in light of the aforesaid legal principle, this Court finds PW-1 and PW-2 to be natural eye witnesses to the incident and their testimonies appear to be trustworthy and credible, Further, both PW-1 and PW-2, in their cross-examination, clearly denied the suggestion of any prior animosity between them or their family with the appellant and the appellant also failed to bring any material on record to show that these witnesses shared any inimical relations with the appellant prior to the aforesaid incident.

17. Another contention raised by counsel for the appellant accused is that the prosecution witnesses have admitted the presence of many other public witnesses at the time and place of occurrence but the police has failed to record the statement of any other independent public witness and that even no explanation has been rendered by the prosecution for not bringing any other public witnesses on record. Firstly, in this case PW-2 is an independent public witness and except the fact that PW-1 was known to him prior to the incident, as revealed by this witness during cross-examination, nothing has come on record to show any relationship or friendship between PW-2, PW-1 or the

deceased. This acquaintance of PW-2 with PW-1 also appears to be natural as their testimonies reveal that they used to sell vegetables in the same market and were residents of the same neighbourhood; PW-2 has deposed to the same in his examination-in-chief. Therefore, no inference of friendship or relationship can be drawn by mere prior acquaintance of PW-2 with PW-1.

18. Therefore, the submission of the learned counsel of the appellant that the police did not question any independent witnesses and no explanation was given by the prosecution for the same, was extended to be rejected in the facts of the case. Otherwise also, it is an established position of law that where the testimony of eye witnesses and other relevant evidence on record, are cogent and trustworthy, the lack of any independent public witness is not fatal to the case of the prosecution.

19. The learned counsel for the appellant also argues that the police has falsified and improved upon its record so as to falsely implicate the accused in this case. To support his argument the counsel submits that the prosecution's star witness, PW-2 in his cross examination has deposed that his statement was recorded on 05.05.2010 by the police but the statement on record shows the same to be recorded on 07.05.2010. Although the counsel for the appellant vehemently argued that the appellant has been secured by the prosecution falsely but has failed to impute any such reason or purpose and also failed to bring on record any such fact so as to show that the police or prosecution was inimical to the appellant and therefore had fabricated or falsified the record to implicate the appellant.

20. Another argument advanced by the learned counsel for the appellant is that there was no recovery of the weapon of offence from the present appellant

and therefore he cannot be held guilty of the impugned offence. In this context, the learned Trial Court noted that:

44. *From the testimony of these witnesses i.e. ocular testimony as well as medical testimony, it can be safely held that the deceased died of stab injuries which were given by the accused by sharing common intention with his co-accused. In view of the corroborated ocular version with medical version regarding the course of events resulting into the murder of the deceased by stab injuries and accused has destroyed the evidence i.e. weapon of offence by handing over the same to his co-accused who, in turn, had thrown the said knife in the drain. Now question remains whether a weapon relating to offence is not recovered, in that case, whether an accused can be convicted or not. Recovery of the offence depends upon the function of the investigating agency. It may not be possible in every case to recover the weapon of offence, but when from other circumstances, the court comes to a conclusion that it is the accused who committed the offence, not any other person, then non recovery of weapon used while committing offence would not be a vital one to doubt the prosecution story. By this time, it is also settled law that defect in investigation would not wholly brushed aside the case of the prosecution when other evidences are available. In this regard, I found support from Crl.A. No. 15/07 passed by Guwahati High Court (Agartala Bench) Monoranjan Sarkar v. State of Tripura wherein it has been observed from para no. 37 and 38 as follows:*

37. *Now question remains when a weapon relating to offence is not recovered, in that case, whether an accused can be convicted or not. Recovery of the offence depends upon on the function of the investigating agency. It may not be possible in every case to recover the weapon, but when from other circumstances, a Court comes to a conclusion that it is the accused only who committed the offence, not any other*

person, then non-recovery of weapon used while committing offence would not be a vital one.

38. By this time, it is also settled by the Apex Court that defect in investigation would not wholly brushed aside the case of the prosecution when other evidences are available. It is evident from the record that the blood stained earth was recovered from the place where dead body was found i.e. the courtyard of P.W.10.

21. This Court concurs with the learned Trial Court and holds that in the fact and circumstances of this case, non-recovery of weapon of offence is not fatal to the case of the prosecution.

22. The learned counsel for the appellant has also submitted that there is absence of motive on the part of the appellant to commit the alleged act and therefore, the appellant the benefit of doubt should enure to the appellant. Firstly, it is a settled position of law that though motive is a relevant factor, it is not an essential ingredient for any offence under criminal law and therefore, in a case like the present one, which is based upon cogent and reliable ocular evidence, the absence of motive does not affect the case of the prosecution. Otherwise also, in this context, the testimonies of eye witnesses PW-1 and PW-2 clearly show that a quarrel had taken place between the deceased and appellant and the other co-accused previously and due to the intervention of PW-1 the appellant and other co-accused left the place but threatened the deceased of dire consequences and within five to ten minutes of the aforesaid incident, the accused, along with the other co-accused, caught hold of the deceased and inflicted fatal injuries on the deceased. Therefore, in the aforesaid factual matrix, in view of the Court, the quarrel which took place

immediately prior to the incident of killing of the deceased at the hands of the accused, clearly establishes a motive.

23. The last contention raised by the appellant accused is that if at all, the accused is found to be guilty of stabbing the deceased and inflicting fatal injuries on his person leading to the death of the deceased, even then, the case of prosecution only reveals that there was no prior animosity between the appellant and the deceased and that the incident took place due to a sudden fight on the spot, without pre-meditation, therefore, the case of the appellant comes under exception 4 to section 300 of IPC and therefore, at most the appellant can be held guilty under section 304 for culpable homicide not amounting to murder, and not under section 302 IPC. The learned counsel for the appellant relies upon the judgment of a Division Bench of this court passed in *Avinash Sharma @ Nandi Vs State* CRL.A 456/2000 and *Amar Singh Vs State* CRL.A.556/2000. As per the counsel for appellant, the Division Bench of this High Court in the aforesaid case, in similar facts and circumstances, changed the conviction of the accused persons from 302 IPC to 304 IPC, by holding that the deceased was killed during sudden fight without any pre-meditation. This Court is not persuaded by this argument either as the facts and circumstances of this case and the aforementioned cases are not similar. In the aforesaid case, on a sudden quarrel, the accused therein inflicted fatal injuries to the deceased and in that case, the eye-witness had partial view of the incident and hence was not able to recount the full sequence of events and therefore, in *Amar Singh* the Division Bench changed the conviction of appellant from section 302 IPC to section 304 IPC.

24. What emerges from the preceding discussion is that the evidence given by eye-witnesses, PW-1 and PW-2 is consistent and has remained unrebutted; that the inconsistencies pointed out by the appellant are either against proven record, or are trivial in nature; that the Supreme Court, in a catena of judgments, has held that proximity of relationship of a witness to the victim/deceased does not make him an interested witness and therefore, cannot discredit the oral testimony of an otherwise cogent and natural eye witness; that non-recovery of weapon of offence is not an adequate ground in itself to disbelieve the case of the prosecution, where the testimonies of eye-witnesses are reliable and trustworthy and lastly, that the quarrel between the deceased and appellant prior to the occurrence of the incident imputes motive to the appellant to commit the alleged offence and also shows premeditation on behalf of the appellant.

25. In view of the above, the Court finds no reason to interfere with the impugned judgment and order. Therefore, there is no merit in the appeal and it is accordingly dismissed.

NAJMI WAZIRI, J

SIDDHARTH MRIDUL, J

MAY 15, 2019