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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment reserved on: 12th September, 2019
Judgment pronounced on: 6th November, 2019

+ CRL.A. 379/2019 & CrI.M.(BAIL) 574/2019

AKASH @ BHOLE Appellant

Through: Ms.Ritu Gauba, Advocate.
versus

STATE (GOVT OF NCT OF DELHI) Respondent

Through: Ms.Aashaa Tiwari, APP for the State. SI
Vijay Kumar, PS Sadar Bazar

+ CRL.A. 619/2019 & CrI.M.(BAIL) 851/2019

MANOJ Appellant

Through: Dr.Mohd. Nasir, with Mr.Tabrez and
Mr.Junid Alam, Advocates.
versus

STATE Respondent

Through: Ms.Aashaa Tiwari, APP for the State. SI
Vijay Kumar, PS Sadar Bazar.

+ CRL.A. 642/2019 & CrI.M.(BAIL) 897/2019

MANOJ @ KALE Appellant

Through: Mr.Adit S. Pujari with Ms.Tusharika
Mattoo, Mr. Chaitanya Sundriyal and
Mr. Viren Bansal, Advocates (DHCLSC)

versus

THE STATE Respondent

Through: Ms.Aashaa Tiwari, APP for the State. SI
Vijay Kumar, PS Sadar Bazar.

+ **CRL.A. 606/2019 & Crl.M.(BAIL) 834/2019**

RAHUL Appellant
Through: Mr. Adit S. Pujari with Ms. Tusharika
Mattoo, Mr. Chaitanya Sundriyal and Mr.
Viren Bansal, Advocates (DHCLSC)
versus
STATE Respondent
Through: Ms.Aashaa Tiwari, APP for the State. SI
Vijay Kumar, PS Sadar Bazar.

+ **CRL.A. 610/2019 & Crl.M. (BAIL) 838/2019**

ARJUN Appellant
Through: Ms.Kavita Jha, Advocate
versus
STATE Respondent
Through: Ms.Aashaa Tiwari, APP for the State. SI
Vijay Kumar, PS Sadar Bazar.

+ **CRL.A. 775/2019 & Crl.M.(BAIL) 1177/2019**

NANDU Appellant
Through: Mr. B. Badrinath, Advocate (DHCLSC)
versus
STATE Respondent
Through: Ms.Aashaa Tiwari, APP for the State. SI
Vijay Kumar, PS Sadar Bazar.

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

SANGITA DHINGRA SEHGAL, J

1. Present appeals are directed against a common judgment dated 23.02.2019 and order on sentence dated 13.03.2019 passed by the learned Additional Sessions Judge-02, (Central) District, Delhi in sessions case No. 28377/2016 arising out of FIR No. 81/2010

registered under Sections 302/34 of the Indian Penal Code, 1860 (hereinafter referred to as ‘IPC’) at Police Station Sadar Bazar, Delhi whereby the learned Sessions Judge found the appellants guilty and sentenced them as follows:

“I, accordingly, sentence all the convicts namely Manoj S/o Ashok, Rahul, Akash @ Bhole, Arjun @ Monu, Nandu and Manoj @ Kale to undergo rigorous imprisonment for life (each) and fine of Rs. 25,000/- each for the offence punishable u/s. 302/34 IPC, in default thereof SI for three months each.

I further sentence convict Manoj @ Kale to undergo rigorous imprisonment for 7 years and fine of Rs. 10,000/- for the offence punishable u/s. 174 IPC, in default thereof SI for three months.

Both the sentences qua convict Manoj @ Kale to run concurrently. Benefit of section 428 Cr. P.C. shall be given to all the convicts.”

2. Brief facts of the case, as noticed by the learned Trial Court, are as under:-

“The case of the prosecution in brief is that on 28.04.2010 at about 11.00 pm on the roof of house No. 2222 Basti Julahan, Sadar Bazar third floor within the jurisdiction of PS Sadar Bazar, accused Manoj @ Kale, Manoj S/o Ashok, Rahul, Aakash @ Bhole, Arjun @ Sonu and Nandu in furtherance of common intention committed murder of Pradeep by intentionally causing skin and muscle deep wounds on him by means of Chura (knife). All the accused persons thereby committed offence punishable under Section 302 read with Section 34 of the Indian Penal Code (in short IPC). Accused

Manoj @ Kale also committed offence u/s 174-A IPC.

According to the prosecution accused persons natured grudge against deceased Pradeep as he was having illicit relations with the wife of accused Nandu @ Ram Kishore. Further according to the prosecution accused Rahul and deceased had a quarrel two days prior to the incident and the matter was settled in the police station. According to the prosecution all accused entered into conspiracy to kill the deceased. Further according to the prosecution on the date of incident at about 10.30 pm – 11.00 pm, PW-6/complainant Dharmbir father of deceased heard the cries of deceased “Papa bachao bachao” from the spot i.e. roof of house of his neighbour Kirti and when he reached the spot he saw accused Manoj @ Kale had caught hold the head of deceased, whereas accused Manoj s/o Ashok had caught hold of the shoulder of deceased, accused Akash and Arjun caught hold his legs and accused Nandu and Rahul had repeatedly stabbed him. Accused Sachin (JCL) was heard exhorting ‘sale ka kaam tamam kar do aaj’. All the accused thereafter ran away from the spot. PW-10 Raj Rani the aunt of deceased had rushed to PS Sadar Bazar and on the way saw a police vehicle outside the PS, she informed the police. Police accompanied her to the spot. PW-13 Ct. Manoj who was working as operator with SHO, PS Sadar Bazar had met PW-10/Raj Rani at about 11.15 pm on 28.04.2010 when he and the driver of the vehicle no. DL-1CJ-3457 were going to Sadar Bazar Baratooti she told them about the incident. PW-10 led them to the gali where they saw PW-6/complainant and PW-11 Sunil Kumar (brother-in-law of deceased) bringing the deceased downstairs. PW13 had removed

deceased to Hindu Rao Hospital where he was declared brought dead.

Further according to the prosecution DD No. 42/A of the incident was assigned to PW-17/SI Sukhdev Singh at about 11.25 pm for investigation. PW-17/SI Sukhdev Singh alongwith PW-18 HC Ram Dutt reached the spot i.e., roof of house No. 222, Basti Julahan, Sadar Bazar, Delhi, he found blood stains on the staircase from ground floor upto third floor, blood in large quantity was found at the spot, one water bottle one chappal were also found at the spot. No eye witness was found. Further, according to the prosecution PW-17/SI Sukhdev Singh on coming to know that deceased was removed to the hospital reached the Hindu Rao Hospital alongwith PW-18/HC Ram Dutt and collected MLC of injured Pradeep @ Deru who was declared brought dead. PW-17 SI Sukhdev Singh met PW-6 Dharmbir father of deceased Ct.Manoj/PW-13 who had brought the injured to the hospital present. PW-17/SI Sukhdev Singh had recorded the statement of complainant/PW-6 and prepared rukka Ex.PW17/A and sent Ct.Manoj/PW-13 to the police station for registration of the case. The further investigation was thereafter assigned to PW-23/IO ACP Vir Singh.

IO/ACP Veer Singh stated that on the intervening night of 28/29-04.2010 he received a call from PS regarding murder. He accordingly reached Hindu Rao Hospital where he met PW-17/SI Sukhdev Singh and PW-14/Ct.Ved Prakash who were already present there. PW-17/SI Sukhdev Singh handed over to him 2 sealed pullandas containing the jeans and shirt of deceased. PW-23 further stated that he then went to the spot with PW-14/Ct. Ved Prakash and PW-17/SI Sukhdev Singh where

he met PW-18/HC Ram Dutt and PW-19/Inspector Pramod Gupta (Inspector Investigations). The crime team had already inspected the spot and left. PW-19/Inspector Pramod Gupta handed over to him the report of crime team. PW-23/IO Veer Singh Tyagi had lifted blood, blood stained earth, earth control, empty plastic bottle having blood stains, one empty packet of red and white cigarette and seized and same vide seizure memo Ex.PW7/B. He also seized one black colour blood stained slippers on which Adidas was written from the spot and took it into possession vide memo Ex.PW6/B. The seal after use was given to PW-17 SI Sukhdev. PW-23/IO also stated that after post-mortem the doctor handed over to him a sealed envelope bearing seal of Mortuary Hindu Rao Hospital containing blood sample and underwear of deceased and sample seal. IO/PW-23 stated he prepared site plan at the instance of complainant/PW-6. PW-23/IO also deposed that he had searched for accused but they could not be traced.

Further according to the prosecution on receipt of secret information by PW23/IO accused Manoj, S/o Ashok was apprehended and arrested. On interrogation accused Manoj confessed that on 28.04.2011 on coming to know that Pradeep was present at the spot i.e., the roof of the house no.2222 all the accused reached there and stabbed him. Accused Manoj disclosed that he and co-accused Rahul, Manoj @ Kale, Akash and Arjun had caught hold of deceased and Nandu had repeatedly stabbed him. Accused Rahul disclosed that he had sustained injury in the incident. Sachin (JCL) also received / sustained injuries on his left leg. Accused Manoj led the police to the spot i.e., H.No.2222, Basti Julahan and pointed out the place i.e. terrace of house at his instance

on which pointing out memo Ex.PW17/G was prepared. Thereafter on the information of secret informer accused Sachin (JCL) and Rahul were apprehended. On interrogation accused Rahul made disclosure statement Ex.PW11/D. Pursuant to disclosure statement of accused Rahul the police party IO/PW23, PW17/SI Sukhdev, PW-18/HC Ram Dutt proceeded to the location disclosed by him i.e. Slaughter house alongwith eye-witness PW-11 from where he got recovered one blood stained knife. The knife was seized vide seizure memo Ex.PW11/F. Accused Rahul also pointed out the place of incident vide pointing out memo Ex.PW17/G.

IO/PW-23 further stated that accused Akash was apprehended on information received from secret informer on 05.05.2010, during interrogation accused Akash also made disclosure statement Ex.PW17/J and pointed out the place of incident vide pointing out memo Ex.PW17/K. Thereafter accused Arjun and Nandu were apprehended at the instance of secret informer on 12.05.2010, both of them made disclosure statements Ex.PW20/C and Ex.PW20/G and pointing out the place of incident Ex.PW20/D and Ex.PW20/H were prepared at their instance. As accused Manoj @ Kale was absconding he was declared PO on 11.03.2011. Supplementary charge sheet was filed against him pursuant to his arrest. The seized articles were sent to Chemical Analyzer for analysis. The report of Chemical Analyzer Ex.PX1 and Ex.PX2 shows that human blood was detected on the weapon of offence, blood stained cemented material, pants, shirt, plastic bottle, underwear of deceased and blood stained gauge cloth piece which remained unexplained by accused persons.”

3. After the completion of the investigation, a charge sheet was filed. Cognizance of the offences was taken against the accused persons. Charge was framed against all the accused persons for the offences punishable under Section 302 read with Section 34 of the IPC to which all the accused pleaded not guilty and claimed trial. Accused Manoj @ Kale was also charged for the offence punishable under Section 174-A IPC.
4. In order to bring home the guilt of the accused persons, the prosecution examined 23 witnesses in all. Statements of the accused persons were recorded under Section 313 of Cr.P.C wherein they reiterated their innocence, denied the allegations of the prosecution and stated that they had been falsely implicated in the present case by the complainant and his other family members with ulterior motive.
5. After appreciating and considering the rival contentions of the parties and scrutinizing the evidence, the learned Trial Court held all the accused persons guilty and convicted them for the charged offences.

**JOINT ARGUMENTS RAISED ON BEHALF OF THE APPELLANTS
AKASH @ BHOLE, MANOJ @ ASHOK AND ARJUN**

6. Learned counsel appearing on behalf of the appellants Akash @ Bhole, Manoj @ Ashok and Arjun contended that PW-6 (father of the deceased), PW-10 (aunt of the deceased), and PW-11 (brother-in-law of deceased) were not witnesses to the incident but were introduced by the Investigating Officer to falsely implicate the appellants; that the alleged eye-witnesses, are interested and partisan witnesses whose testimonies cannot be relied upon; that the

testimonies of the aforesaid prosecution witnesses are unreliable being contradictory, inconsistent and improved upon.

7. Learned counsel for the appellants further contended that the learned Trial Court failed to take note of the fact that the place of the occurrence being the terrace of House No. 2222, Basti Julhan, Sadar Bazar, Delhi was a three storied house and the only way to reach the terrace of the said house was through the staircase hence there was no occasion for PW-6 (father of the deceased), PW-10 (aunt of the deceased), and PW-11 (brother-in-law of deceased) to witness the alleged act; that the plea of the prosecution that on hearing the cries of the deceased, PW-6 (father of the deceased), PW-10 (aunt of the deceased) and PW-11 (brother-in-law of deceased) witnessed the incident from the tin-sheet on the wooden khokha (*hereinafter referred to as 'Khokha'*) of the house of PW-6 (father of the deceased), was an afterthought as in the initial site plan prepared by the Investigating Officer no ladder was shown in the site plan and without a ladder it was not possible to scale the wall between the house of PW-6 and place of occurrence. Moreover, as per the testimonies of the prosecution witness the height between the tin-sheet on the wooden khokha of the house of PW-6 and the terrace of the House No. 2222, Basti Julhan, Sadar Bazar, Delhi where the crime occurred is 5-6 feet high and there was no occasion for PW-6 (father of the deceased), PW-10 (aunt of the deceased), and PW-11 (brother-in-law of deceased) to witness the alleged incident.
8. Learned counsel for the appellants further contended that there was no light at the place of the occurrence and as such PW-6 (father of

the deceased), PW-10 (aunt of the deceased), and PW-11 (brother-in-law of deceased) could not have witnessed the alleged offence.

9. Learned counsel for the appellants further contended that it is evident from the conduct of PW-6 (father of the deceased) that he was not present at the spot and the incident was not witnessed by him because if he had witnessed the incident, he would have definitely intervened and taken his son to the hospital.
10. The next contention raised by the learned counsel for the appellant is that an accused cannot be convicted only on the basis of alleged weapon of offence having been recovered pursuant to the disclosure statement. He further contended that although the appellant is alleged to have made a disclosure statement pointing out the weapon of offence(knife) but the said pointing out memo did not fall within the purview of Section 27 of the Indian Evidence Act and is not admissible in the eyes of law as the same does not find support from the scientific evidence.
11. Learned Counsel for the appellants further contended that the recovery of knife is not admissible in the eyes of law as no genuine and sincere efforts were made by the Investigating Officer to authenticate the recovery in the presence of an Independent/Public witness.
12. Learned counsel for the appellants further contended that the learned Trial Court failed to consider that no independent witnesses were examined though there were many tenants in the House No. 2222, Basti Julhan, Sadar Bazar, Delhi where the alleged incident took place.

13. Learned Counsel for the appellants further argued that, it is the duty of the investigating agency to investigate fairly and thoroughly and collect the entire evidence whether favourable or unfavourable. However, in the present case, there are serious discrepancies in the investigation which go to the root of the matter, leading to the conclusion that the appellants have been falsely implicated in the present case.
14. Learned counsel for the appellants further argued that appellants Akash @ Bhole, Manoj @ Ashok, Arjun had no motive or common intention with other appellants to commit the crime, since they had never met or had any personal enmity with the deceased as such there is no evidence to sustain the charge under Section 34 IPC against the appellants Akash @ Bhole, Manoj @ Ashok and Arjun.
15. Learned Counsel for the appellants have lastly urged that the trial court had failed to properly appreciate the facts and circumstances of the case; hence, the impugned judgment is liable to be set aside.

ARGUMENTS ON BEHALF OF MANOJ S/O ASHOK

16. Learned counsel for the appellant/Manoj S/o Ashok adopted the arguments advanced on behalf of appellants Akash@Bhole and Arjun and further argued that the prosecution failed to produce the blood stained clothes of PW-6 and PW-11 which were handed over to the investigating agency, as is evident from the testimonies of PW-6 and PW-11. Moreover, the arrest of the appellant Manoj S/o Ashok is not proved beyond reasonable doubt as the prosecution witnesses have given contradictory versions in this context.

ARGUMENTS ON BEHALF OF RAHUL & MANOJ @ KALE

17. In addition to the arguments advanced on behalf of appellants Akash@Bhole, Manoj @ Ashok and Arjun, Mr. Adit S Pujari, learned counsel for the appellant/Rahul and Manoj @ Kale argued that the learned Trial Court has ignored and omitted the material available and disregarded the cogent evidence in favour of the appellants and have failed to appreciate the basic issue that there is no direct evidence on record to establish the involvement of the appellant/Rahul & appellant/Manoj@Kale in the commission of the alleged offence.
18. He further contended that the police mechanism in the present case was set in motion after registration of DD No.42A (Ex.PW5/A) and DD No. 43A (Ex.PW5/B) on receipt of the information from telephone number 92899375618 & 9211379946, but the investigation agency made no endeavor to ascertain the identity of the caller nor any attempt was made to place on the record the call detail records of the aforesaid numbers.
19. Learned Counsel for the appellants further contended that the learned Trial Court failed to consider the testimony of DW-1, Smt. Brij Bala in its correct perspective which proves that the appellant/ Manoj @ Kale was not present at the scene of the crime, at the time of commission of the alleged offence and was on duty at M.C. Primary School, 13A Block, Karol Bagh, New Delhi from 3:00 pm of 28.04.2010 to 8:00 am of 29.04.2010 relying upon the attendance register (Ex.DW-1/A) of the aforesaid school produced by the DW1-Brij Bala.

20. Learned counsel further argued that as per the story set up by the prosecution that the appellants had motive to commit the alleged offence, as there were illicit relations between the deceased and Usha (W/o Nandu@ Ram Kishore and M/o Sachin) and the name of Usha (wife of appellant/Nandu @ Ram Kishore) was mentioned in the Rukka (*Ex.PW6/A*); however no endeavor were made by the investigating Agency to record the statement of Usha and produce her as a prosecution witness in the trial court.
21. He further argued that the present case was a blind murder case without a single piece of evidence on record to suggest that the appellant/Manoj@Kale and appellant/Rahul were hand in glove and committed the aforesaid offence. It was further emphasized that the prosecution had introduced a frivolous story against the appellants and have falsely implicated them.

ARGUMENTS ON BEHALF OF APPELLANT/NANDU

22. Mr. Badrinath learned counsel for the appellant Nandu opened his submissions and submitted that there was delay of 2 hours 50 minutes in recording the *rukka*, which proves that FIR was registered against the appellants by falsely implicating them after due consultation and deliberation by the Investigating Officer casting serious doubts on the story set up by the prosecution.
23. Learned counsel further contended that the medical evidence finds no corroboration with the ocular evidence, as according to the post mortem report the deceased had received injuries on the back portion

of his body, which is contrary to the injuries mentioned by the prosecution witnesses.

CONTENTIONS ON BEHALF OF THE APP

24. Ms. Aashaa Tiwari, learned APP for State, on the other hand, strongly refuted the submissions made by the counsel for the appellants and submitted that as the impugned judgment is based on proper appreciation of the facts and evidence adduced by the prosecution, no interference in the impugned judgment is called for by this Court; that the testimonies of prosecution witnesses and medical/scientific evidence are corroborative in nature and the prosecution has been able to prove its case beyond reasonable doubt.
25. She further submitted that the prosecution has relied upon recovery of knife (*Ex. PW-11/F*) which was recovered on the pointing out of the appellant/Rahul in the presence of PW-23, (ACP Vir Singh) and PW-17 (SI Sukhdev Singh). She further submitted that there is no cogent reason to disbelieve the abovementioned recovery on the ground that the same was not done in the presence of any independent witness. To substantiate her arguments, learned APP for the State relied upon the case of *State vs. Navjot Sandhu @ Afsan Guru* reported in *(2005)11 SCC 600*.
26. Ms. Tiwari further submitted that the testimonies of prosecution witnesses are corroborated and trustworthy and have established the factum of the incident without any iota of doubt, describing the role played by each appellant in the commission of the alleged crime. To substantiate her arguments, learned APP for State relied upon the

case of *Suresh & Anr vs State of UP* reported in (2001) 3 SCC 673; *Mukesh & Anr vs State (NCT of Delhi)* reported in (2017) 6 SCC 1.

27. As far as the plea of sufficient light at the place of incident is concerned, learned APP for the State argued that the prosecution witnesses have proved the existence of source of light without any doubt. She further contended that the light was coming from the neighbouring houses, from the street light as well as from the iron grill installed on the roof of the house where the incident took place. Moreover, it was a full moon night making it effortless for PW-6 and PW-11 to identify the appellants. She further submitted that there is no inconsistency as to the persons who took the deceased to the Bara Hindu Rao Hospital, as all the prosecution witnesses have deposed on the same line.
28. Ms. Aashaa Tiwari, learned APP for State further submitted that the testimonies of the eye witnesses are consistent and corroborative in nature and minor contradictions and discrepancies which have arisen in the testimonies of the prosecution witnesses are ignorable and do not go to the root of the case. To substantiate her arguments, learned APP for State relied upon the case of *State of UP vs Masalti*, reported in *AIR 1965 SC 202*; *Rana Pratap & ors vs State of Haryana* reported in *1983 Crl LJ 1272* and *Mritunjoy Biswas vs Pranab @Kutibiswas & anr* reported in *2013 12 SCC 796*.
29. Learned APP for the State further contended that the scaled site plan (*Ex PW6/D5*) evidently shows the ladder which was used by PW-6 and PW-11 to climb over the boundary wall and they both had witnessed the incident, moreover, it is possible for the witnesses to

have jumped over the boundary wall from the given height without using a ladder also. She further submitted that there is no doubt as to the arrest of the appellants which have been duly corroborated by the police witnesses. To substantiate her arguments, learned APP for State relied upon the case of *Hema vs State through Insp. Of Police Madras* reported in *2013 10 SCC 192* and *C. Munniappan & ors vs State of Tamil Nadu* reported in *2010 3 SCC CRI 1402*.

30. Learned counsel for the State further contended that certain errors were made by the Investigating Agency during Investigation, however, those errors or omissions do not affect the outcome of the case and no benefit can be extended to the accused for such defects, which lead to their acquittal.
31. Based on these submissions Counsel for the State urged that this Court may not interfere with the well-reasoned judgment passed by the learned Trial Court convicting the appellants for the alleged offence.
32. We have heard the learned counsel for the parties and have also perused the material placed on record including the record of the trial court.

**CREDIBILITY OF MATERIAL WITNESSES/HEIGHT
OF THE BOUNDARY WALL/PRESENCE OF THE
ACCUSED AT THE SPOT/ LIGHT AT THE PLACE OF
INCIDENT**

33. Learned counsel for the appellants vehemently argued that as per the case of the prosecution, on hearing the cries of the deceased, PW-6

(father of the deceased), PW-10 (aunt of the deceased), and PW-11 (brother-in-law of the deceased) witnessed the incident from the tin-sheet on the wooden khokha of the house of PW-6 (father of the deceased) however, the same is an afterthought as in the initial site plan prepared by the Investigating Officer no ladder was shown in the site plan and it was not possible to scale from second floor/terrace of the house of the PW-6 to tin-shed on the wooden khokha of the said house without the help of a ladder. Moreover, as per the testimonies of the prosecution witness the height between the tin-shed on the wooden khokha of the house of PW-6 and the terrace of the House No. 2222, Basti Julhan, Sadar Bazar, Delhi where the alleged offence took place is 5-6 feet and as such there was no possibility for PW-6 (father of the deceased), PW-10 (aunt of the deceased), and PW-11 (brother-in-law of deceased) to witness the alleged incident.

34. In this context, it is relevant to examine the testimonies of the material prosecution witnesses i.e. PW-6 (father of the deceased), PW-10 (aunt of the deceased), PW-11 (brother-in-law of deceased) and PW-8 (SI Manohar Lal) and PW-23 (ACP Vir Singh, Investigating Officer). PW-6 (father of the deceased) in his deposition has stated that he has witnessed the incident and the height of the boundary wall from his *Khokha* is about 4-5 feet. The relevant portion highlighting this fact has been reproduced as under:

*“I have three daughters and had one son Pradeep (deceased). My son Pradeep after taking meal went to the roof of my neighbour for walking. I alongwith my son in law Sunil were on the roof of our house. **At about***

10.30-11.00 p.m. I heard the voice of my son Pradeep “Papa Bachao Bachao”. I alongwith my son in law Sunil went to the roof of our neighbour where I saw Manoj @ Kale had caught hold my son from the side of his head. My son’s shoulder was caught by Manoj @ Kale. Akash and Arjun had caught the legs of my son Pradeep. Nandu and Rahul were stabbing my son Pradeep. Sachin who is a son of Nandu was exhorting by saying “Sale ka kaam tamam kar do aaj.” Thereafter all of them ran from there and they got down from the staircase. I alongwith my son in law Sunil lifted the body of my son Pradeep and we got down from the roof. Thereafter my sister went to the police station and one PCR van came to the spot. My son was removed in the said PCR van and my nephew Vijay and my son in law Sunil accompanied them. I took auto and reached at the hospital at Bara Hindu Rao.....”

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The witness is shown photographs EX PW-6/D1 to D4 to which he admits to be correct. It is correct that in photographs EXPW-6/D1, mark-DA showing my house and mark-DB is Kirti’s house. It is incorrect to suggest that in photograph EX. PW-6/D2, the height of the yellow colour wall is marked as Mark-DC is about 8ft. (Vol. the height of this wall is about 5ft). It is incorrect to suggest that in photograph EX.PW-6/D3, the height of the yellow colour wall marked as Mark-DD is about 8ft. It is correct that there is no staircase for going to Kirti’s roof from my roof.

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I reached to the roof i.e. place of incident with the help of wooden ladder. Wooden ladder was already lying there. The ladder was movable. The height of ladder was around 5 feet. The distance between my roof to the roof of the place of occurrence is about 5 to 6 feet.

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The height of the wall is about three and half feet from the roof of my khokha. It is wrong to suggest that the height of the wall is 26 feet from the roof of my khokha. It is wrong to suggest that no person can scale the wall of Kirti's house except from using the stairs of Kirti's house.

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Q: I put it to you by showing the photograph Ex.PW-6/D-3 what was the height of the boundary wall in this photograph from the roof where the incident took place.

A: The height of the boundary wall might be 3-3 ½ feet from the roof where the incident took place. It is wrong to suggest that the height of this wall is about 8-9 feet from the roof where the incident took place.

Q: I put it to you what was the height in between roof of your Khoka and the roof of Kirti's house?

A: There is a difference of 3 ½ feet from the roof of my Khoka and the roof of Kirti's house as shown in photograph Ex.PW-6/D-3."

35. PW-11 (brother in law of the deceased) in relation to witnessing the incident and height of the boundary wall has deposed as under: -

"....My father in law Dharamvir, woke me up suddenly. He told me that he heard the voice of quarrel from the roof. I followed my father in law and from varandah where I was sleeping. We reached at the roof of the house of my father in law and from there, we used wooden staircase to reach the khoka which was built at the roof of my father-in-law. When we reached on the top of wooden khoka, we saw to the adjacent roof from the boundary wall that Rahul & Nandu, were stabbing my brother-in-law/sala Pradeep @ Deru with knife. And Manoj @ Kale & Manoj, had caught hold Pradeep @ Deru, from his head. Aakash and Arjun

caught hold Pradeep @ Deru , from his leags. Sachin, was saying that SALE KA KAAM TAMAM KAR DO. We raised a noise BACHAO BACHAO, after hearing our voice, they all ran away one by one from the staircase of that house..... ”

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It is incorrect to suggest that the wall between the house of my in-laws and the place of occurrence is not less than 10 feet. Volunteer, height of wall was upto my neck and my height would be about 5 and 5 ½ feet.

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I could see the floor of the third floor of the house of Kirti from where I was standing. The floor where the deceased was lying was made of cement. I could see the same as there was sufficient light coming from the iron Jaal.

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I saw the alleged occurrence from the roof top (Khoka) of my father in law. When all the accused had left, I alongwith my father in law reached the place of occurrence after jumping the wall.

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36. PW-10 (aunt of the deceased) during her examination in chief has deposed as under:-

“....At the same time, I also heard the voice of son-in-law Sunil. I came outside my house and saw upward, I saw my brother Dharamvir, was climbing over the wall of a roof. I reached at the roof of my house, my house is adjacent to the house of my brother. When I reached at the roof of house of my brother, I used the wooden staircase to reach the place where my brother had jumped. I also reached at the place where my brother and my son-in-law Sunil, was present. It was the roof of Kasturi Lal where Dharamvir and Sunil, had reached. I saw my

nephew Pradeep @ Deru, was lying in a pool of blood on the roof of Kasturi Lal. I started crying and went downstairs from the staircase of Kasturi Lal and reached at the ground. I rushed to PS Sadar Bazar. Outside the PS, there was one police vehicle, I told to the police that I saw my nephew Pradeep @Deru, lying in a pool of blood on the roof of Kasturi Lal. Police accompanied me and we reached at the said roof. Before the police official reached at the said roof, my nephew Pradeep @ Deru, was brought in the gali by my brother Dharamvir and my son Vijay. The police vehicle took my nephew Pradeep @ Deru, to the hospital along with Dharamvir and Vijay. Doctor in the hospital checked Pradeep @ Deru and declared him dead. **Before that when I firstly reached at the said roof where my brother Dharamvir and son-in-law Sunil, was present, I saw Pradeep @ Deru, was lying in a pool of blood on the roof and I saw Nandu, Arjun, Manoj, Manoj @ Kale, Rahul and Aakash, were running from the staircase of Kasturi Lal, one by one.** All these accused are present in the Court today (the witness correctly identifies each accused by pointing out by name.)

XXXX XXXX XXXX XXXX”

37. PW-23 (ACP Vir Singh, Investigating Officer) during his cross examination deposed as under:-

“.....I inspected the site and prepared the site plan Ex. PW-6/D4 at the instance of complainant Dharmabir, which bears my attestation at point X. The complainant had met us in Hindu Rao Hospital and from there accompanied us to the spot.....

XXXX XXXX XXXX XXXX

.....When I visited at the spot, there was light. As far as I remember, the boundary wall of the terrace, i.e. spot was approximately 3-4 feet on that day, though it

was not measured by me. We went to terrace through stairs but one could easily climbed the boundary wall from the side of Dharamvir's house. I did not get any photograph of the site or of the boundary wall as it was already got done by Inspector Pramod Gupta. I do not recognize the photographs of spot as the same were not taken on my instructions. I do not remember whether the height of boundary wall of terrace i.e. spot was about 8-9 feet. Anyone can come on the terrace i.e spot by jumping the boundary wall from the khoka on the terrace on the house of Dharamvir....."

38. Apart from the testimonies of aforesaid witnesses, it is also relevant to examine the testimony of PW-8 (SI Manohar Lal) who had prepared the scaled site plan (*Exhibit PW6/D-5*). PW-8 (SI Manohar Lal) deposed as under:-

".....There, the complainant Dharamveer, also called by SI Darshan Lal and on the pointing out of complainant, I inspect the spot and prepared rough notes of the spot. On the basis of rough notes, I prepared scaled site plan which is already exhibited as Ex. PW-6/D-5 which bears my signature at point A. After preparing the scaled site plan, I destroyed the rough notes and the site plan was handed over to the IO. My statement was recorded by the IO."

39. During his cross-examination the PW-8 (SI Manohar Lal) deposed as under:-

*"xxxx xxxx xxxx xxxx
The height of the house where the incident took place was higher by 140 centimeter i.e. 4 feet and 8 inches. It is correct that the roof of the house of the deceased was made of tin shed covered with tarpal. There was a*

wooden ladder to go from the second floor to the top floor of the house of deceased. It was a temporary wooden ladder. I has shown the stairs in the scaled site plan at point A but I have not mentioned the stairs in my marginal notes recorded on the scaled site plan. I cannot tell whether any person can climb or descend from the roof of the deceased which was made of tin shed. I had gone to the house of deceased from the gali. It is wrong to suggest that no person can go from the roof of third floor to the roof of the house of deceased. I did not opt to use the way to go from the roof of third floor to the house of the deceased as it was not a thorough way and it was risky too. There were pakka stairs made for going from ground to second floor but however, there was a wooden ladder to go to the roof from the second floor. It is wrong to suggest that there was no wooden ladder or that had it been there, I would have mentioned in the references, i.e., marginal notes mentioned at point B. I did not climb on the tin shed but however, I climbed upto the second floor only. It is wrong to suggest that I did not climb on the tin shed as there was no way to reach on the tin shed. There was a parapet (fore-wall) of the height of 163 cm where the alleged incident took place. It is correct if a person wants to descend from the parapet wall to the roof of the third floor where the incident took place, the distance was 163 cm. I do not remember where there was any stair or ladder for descending from the parapet wall to floor where the incident took place. One can jump from the parapet wall to the floor where the incident took place. It is wrong to suggest that if there would have been any ladder or any pakka stair, I would have mentioned the same in the my scaled plan..... ”

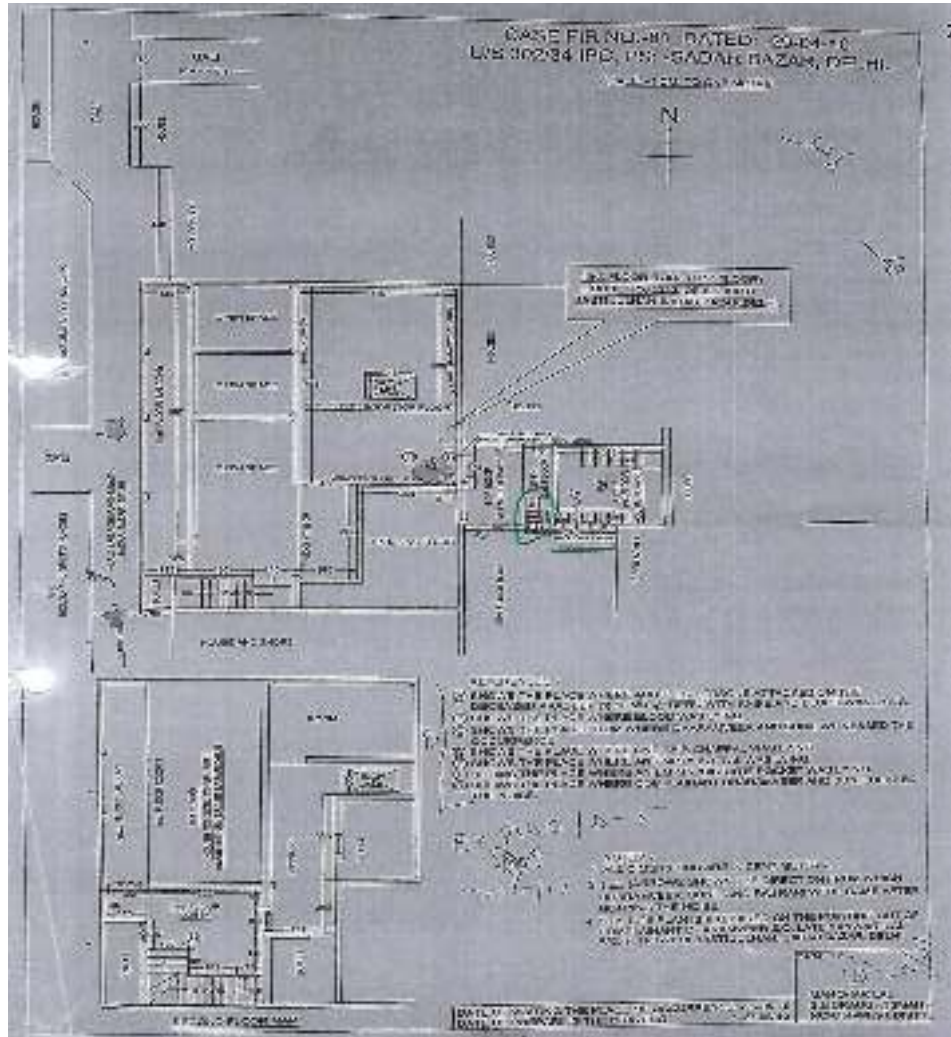
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xxxx

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xxxx”

40. The scaled plan prepared by PW-8 (SI Manohar Lal) has been reproduced as under:-



41. The conjoint reading of the aforesaid testimonies reflects that, PW-6 (father of the deceased) deposed that ***‘I heard the voice of my son Pradeep “Papa Bachao Bachao”. I alongwith my son in law Sunil went to the roof of neighbour where I saw Manoj @ Kale had caught hold my son from the side of his head. My son’s shoulder was caught by Manoj @ Kale. Akash and Arjun had caught the legs of my son Pradeep. Nandu and Rahul were stabbing my son***

Pradeep. Sachin who is a son of Nandu was exhorting by saying “Sale ka kaam tamam kar do aaj.” There after all of them ran from there and they got down from the staircase. I alongwith my son in law Sunil lifted the body of my son Pradeep and we got down from the roof. PW-11(brother in law of the deceased) i.e. son-in-law of the PW-6, corroborated the testimony of the PW-6 and deposed that ‘When we reached on the top of wooden khoka, we saw to the adjacent roof from the boundary wall that Rahul & Nandu, were stabbing my brother-in-law/sala Pradeep @ Deru with knife. And Manoj @ Kale & Manoj, had caught hold Pradeep @ Deru, from his head. Aakash and Arjun caught hold Pradeep @ Deru, from his legs. Sachin, was saying that SALE KA KAAM TAMAM KAR DO. We raised a noise BACHAO BACHAO, after hearing our voice, they all ran away one by one from the staircase of that house’. Both the witnesses maintained their stand during their rigorous cross-examination on the fact that they witnessed the alleged incident and have categorically attributed specific role to each of the appellants. PW-10 (Raj Rani) also claimed that she had witnessed the incident and had also seen the accused persons running down from the stairs after stabbing the deceased. However, the testimony of PW-10 (Raj Rani) is in contradiction with the testimony of PW-6 and PW-11. According to PW-6 and PW-11 the accused persons ran from the spot after they raised an alarm and there was no reference of PW-10 in their testimonies witnessing the incident alongwith them at the time of commission of crime. It becomes imperative that PW-10 (aunt of the deceased) has not witnessed the incident, though her

scaling the wall and reaching the spot cannot be negated. Returning to the testimonies of PW-6 and PW-11, both of them deposed that they witnessed the incident from the Khoka situated on the second floor/roof of the house of PW-6 which they scaled while using the ladder which was always available on the second floor/roof of the house of PW-6. Learned counsel laboured hard to contend that there was no ladder available on the second floor/roof of the house of PW-6 and also that even while standing on the Khoka situated on the second floor/roof of the house of PW-6, no one can witness the incident on the terrace of House No. 2222, Basti Julhan, Sadar Bazar, Delhi. In this context, we find that PW-6 (father of the deceased) deposed that 'I reached to the roof i.e. place of incident with the help of wooden ladder. Wooden ladder was already lying there. The ladder was movable. The height of ladder was around 5 feet. The distance between my roof to the roof of the place of occurrence is about 5 to 6 feet.' PW-11 (brother in law of the deceased) in relation to existence of ladder deposed that 'We reached at the roof of the house of my father in law and from there, we used wooden staircase to reach the khoka which was built at the roof of my father-in-law.' XXXX 'I saw the alleged occurrence from the roof top (Khoka) of my father in law. When all the accused had left, I alongwith my father in law reached the place of occurrence after jumping the wall.'. He further deposed that 'It is incorrect to suggest that the wall between the house of my in-laws and the place of occurrence is not less than 10 feet. Volunteer, height of wall was upto my neck and my height would be about 5 and 5 ½ feet.' PW-23

(ACP Vir Singh, Investigating Officer) corroborates the version of the PW-6 and PW-11 in relation to existence of the ladder on the second floor/roof of the house of the PW-6 and also confirms that one can witness the incident from the wooden *Khoka* on the house of PW-6 and deposed that 'As far as I remember, the boundary wall of the terrace, i.e. spot was approximately 3-4 feet on that day, though it was not measured by me.'. A conjoint reading of these witnesses affirms that there was a wooden ladder on the second floor/roof of the house of PW-6 which was used to scale the wooden *Khokha* from the roof of PW-6. It has also emerged from these testimonies that the height of the boundary wall of House No. 2222, Basti Julhan, Sadar Bazar, Delhi was 4-5 feet and one can witness the incident at House No. 2222, Basti Julhan, Sadar Bazar, Delhi standing from the wooden *Khokha* on the house of the PW-6. In the context of height of the boundary wall of the House No. 2222, Basti Julhan, Sadar Bazar, Delhi, the testimony of PW-8 (SI Manohar Lal) is of paramount importance as he prepared the scaled site plan (*Ex. PW6/D5*) and further confirms that there was a wooden ladder on the second floor/roof of the house of PW-6 and further confirms the height of the boundary wall of house of 2222, Basti Julan, Sadar Bazar as 4 feet and 8 inch which can be scaled by anyone standing on the *Khokha* of house of PW-6. PW-8 deposed that 'The height of the house where the incident took place was higher by 140 centimeter i.e. 4 feet and 8 inches. He further deposed that 'It is wrong to suggest that no person can go from the roof of third floor to the roof of the house of deceased.'

42. In view of the above discussion, we find that PW-6 (father of the deceased) and PW-11 (brother in law of the deceased) have witnessed the incident and they have reached the wooden khokha on the house PW-6 by using the wooden ladder which was lying on the second floor/roof of the house of PW-6 from where they have witnessed the commission of the crime by the appellants. Hence argument raised by the appellants that PW-6 (*father of the deceased*) and PW-11 (*brother in law of the deceased*) are planted witnesses holds no ground.
43. Learned counsel for the appellants vehemently contended that the testimonies of PW-6 (father of the deceased), PW-10 (aunt of the deceased), and PW-11 (brother-in-law of deceased) are contradictory to each other and there are various inconsistencies and improvements which make the version of these prosecution witnesses unreliable. As discussed above, we have discredited the testimony of the PW-10 (aunt of the deceased) as an eye witness. No doubt there are certain minor contractions and improvements in the testimonies of PW-6 (father of the deceased) and PW-11 (brother-in-law of the deceased) but the same does not go to the root of the matter and does not affect the case of the prosecution as the testimonies of both these witnesses alongwith the testimonies of the other key witnesses inspire confidence. It is well settled in law that the minor discrepancies are not to be given undue emphasis and the evidence is to be considered from the point of view of trustworthiness. The Hon'ble Supreme

Court of India in the case of ***Mritunjoy Biswas Vs. Pranab @ Kuti Biswas and Anr.***, reported at (2013) 12 SCC 796, has held as under:

*“28. As is evincible, the High Court has also taken note of certain omissions and discrepancies treating them to be material omissions and irreconcilable discrepancies. It is well settled in law that the minor discrepancies are not to be given undue emphasis and the evidence is to be considered from the point of view of trustworthiness. The test is whether the same inspires confidence in the mind of the Court. If the evidence is incredible and cannot be accepted by the test of prudence, then it may create a dent in the prosecution version. If an omission or discrepancy goes to the root of the matter and ushers in incongruities, the defense can take advantage of such inconsistencies. The omission should create a serious doubt about the truthfulness or creditworthiness of a witness. It is only the serious contradictions and omissions which materially affect the case of the prosecution but not every contradiction or omission (See *Leela Ram vs. State of Haryana and another, Rammi alias Rameshwar v. State of M.P. and Shyamal Ghosh v. State of West Bengal*).*

(emphasis supplied)

44. In the present case nothing has been brought on record to prove that the evidence of the prosecution witnesses cannot be believed or they have falsely implicated the Appellants due to some personal vengeance at the instance of the prosecution. In all criminal cases, minor discrepancies are bound to occur in the depositions of the witnesses, due to common errors in observations, namely, error of memory due to lapse of time or due to mental disposition such as shock and horror at the time of the incident. Hence, the argument of the counsel for the Appellants to disbelieve the testimonies of PW-6

(father of the deceased) and PW-11(brother-in-law of the deceased) on the ground of contradictions holds no ground.

45. The other contention of the appellants is that there was no light at the spot of the incident which makes it highly improbable for the prosecution witnesses to have seen the appellants committing the alleged crime.
46. In this context, we find from the record that, PW-6 (father of the deceased) during his testimony has deposed that 'there was no light on the place of occurrence but the light was coming from the neighbours'. PW-6 (father of the deceased) further deposed that 'There was a light at the roof of Kirti which was coming out of Iron Grill as shown in photograph Ex. PW-6/D-3 and light was also coming from the house which was adjacent with the house of kirti.'
47. PW-10 (aunt of the deceased) in her cross-examination by Mr. Ashok Taneja has deposed that 'It is correct that there was no electricity light installed at the roof of the building where the alleged incident of murder took place but there was street light.'
48. PW-11 (brother-in-law of the deceased) in his testimony has deposed that 'Volunteer, there was electricity coming from an iron grill at the roof and light was coming from that iron grill also. Again said, light was coming from nearby houses at the place of occurrence but there was no bulb or tube light at the place of occurrence'. It is relevant to point out that the date i.e. 28.04.2010, on which the incident took place, was a full moon night. The presence of natural light at the place of incident makes it plausible for the witnesses to have actually witnessed the incident. Further, it is imperative to note that the

Supreme Court time and again has emphasized that it is possible in full moonlight to identify the accused. The Hon'ble Supreme Court in the case of ***Karnail Singh and Ors. vs. State of Punjab*** reported in ***AIR 1971 SC 2119***, has held as under:

“On the night between 28th and 29th July 1969, there was the full moon. On the night of occurrence the moon was up at about 9-35 P. M. and about the time of occurrence there was bright moon-light Moreover, the accused persons were all known to the eye-witnesses which makes problem of identification much easier. The peepal tree or its shadow also did not then cause obstruction to the vision. The contention of the appellants that in moonlight visibility does not go beyond about 36 feet on a full moon-light is met by the fact that there were quite a few electric lights in the vicinity of the spot. We do not think there is any substance in the argument that light was not sufficient.”

49. Reference can also be made to ***Israr vs. State of U.P.*** reported in ***AIR 2005 SC 249*** wherein the Apex Court has held as under:

“19. Coming to the plea relating to non-probability of identification, the evidence of PW-3 is very relevant. He has stated that the occurrence took place at the time of isha prayers which are concluded at about 9.30 p.m. There was light of the moon as well as of the neighboring houses and the electric poles in the lane. The date of occurrence was 11th day of Lunar month and the place of occurrence is near the mosque as well as many houses close by. Therefore, identification was possible. Further a known person can be identified from a distance even without much light. The evidence of PW-3 has also been corroborated by the evidence of others. Evidence of PWs 3 to 5 proves that identification was possible.”

50. Hence, it is evident from the record, that on 28.04.2010, it was a full moon night, moreover there was street light and light was also coming from the nearby houses. Additionally, the appellants were known to PW-6 (father of the deceased) and PW-11 (brother-in-law of the deceased) and were not strangers or unknown to PW-6 and PW-11, which made the identification of the appellants easier. Hence the argument raised by counsel for the appellants that PW-6 and PW-11 could not have witnessed the incident is without force.

RECOVERY OF KNIFE

51. Learned counsel for the Appellant laboured hard to bring forth that the recovery of knife made pursuant to the disclosure statement of the appellant/Rahul is not admissible in the eyes of law and the same was planted in order to falsely implicate the appellants.
52. It is apparent on record that pursuant to the disclosure statement of appellant/Rahul (*Ex. PW-11/D*) and subsequent pointing out, the alleged weapon of the offence (knife) was recovered from a slaughter house. According to Section 25 of the Indian Evidence Act 1860, no credence can be placed upon the confession made by the accused, which reads as under:

“25. Confession to police officer not to be proved
No confession made to a police officer shall be proved as against a person accused of any offence.”

53. However, Section 27 of the Indian Evidence Act is in the nature of a proviso or an exception which partially lifts the prohibition imposed by Section 25 and reads as under:

“Section 27 of the Indian Evidence Act:

27. How much of information received from accused may be proved.--Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.”

54. In the light of Section 27 of the Indian Evidence Act, 1872 whatever information is given by the accused in consequence of which a fact is discovered only that would be admissible in the evidence, regardless of the fact that such information amounts to confession or not. The basic idea embedded under Section 27 of the Evidence Act is the doctrine of confirmation by the subsequent events. The doctrine is founded on the principle that if any fact is discovered in a search made on the strength of any information obtained from an accused; such a discovery is true and admissible. *The information might be confessional or non-inculpatory in nature, but if it results in discovery of a fact it becomes reliable information.*
55. Further, the Division Bench of this Court in ***Rakesh Kumar Jha vs. State of NCT of Delhi (2013) 1 DLT (Cri) 79*** has extensively dealt with the admissibility of the confession made by the accused to the police. Relevant portion is reproduced hereunder:

“5. Before we proceed further, we need to decide to what extent confession made by the Appellant, recorded under DD Entry No. 11A, or the alleged extra judicial confession to Srinivas Kumar (PW-20) is admissible. On record, Appellant’s case is that he made no extra judicial confession to PW-20, over the telephone. However, statement of PW-20 needs to be deliberated upon only if

we hold that Sections 25 and 26 of the Evidence Act do not prohibit or bar admission of the alleged extra judicial confession.

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7. In *AghnooNagesia v. State of Bihar AIR 1966 SC 119*, the accused had himself gone to the police station and lodged a report, which was in the form of a confession. The principal question which arose was whether the said statement, or any portion thereof, was admissible in evidence. The Supreme Court reproduced the entire First Information Report and divided it into 18 parts. Sections 24 to 30 of the Evidence Act were elucidated upon and explained. **The term “confession” was interpreted to mean a statement made by an accused suggesting that he had committed the crime. Confession is an admission made by the person who admits the offence or substantially all the facts which constitute the offence. It is a statement made by a person suggesting that he has committed a crime. Whether a statement which is partly self-exculpatory amounts to a confession or not, is a question which need be examined in the present appeal. It was observed that although a confession may consist of several parts, and some parts may not relate to actual commission of offence, but some may relate to the motive, the cooperation, the opportunity, the provocation, the weapon used, the intention, concealment of the weapon and the subsequent conduct of the accused. Elucidating upon the scope and whether the bar of Sections 25 and 26 of the Evidence Act will apply to such statements, it was held as under:-**

"15. If proof of the confession is excluded by any provision of law such as s. 24, s. 25 and s. 26 of the Evidence Act, the entire confessional statement in all its parts including the admissions of minor incriminating facts must also be excluded, unless proof of it is permitted by some other section such as s. 27 of the Evidence Act.

Little substance and content would be left in Sections 24, 25 and 26 if proof of admissions of incriminating facts in a confessional statement is permitted.

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18. A little reflection will show that the expression "confession" in Sections 24 to 30 refers to the confessional statement as a whole including not only the admissions of the offence but also all other admissions of incriminating facts related to the offence. Section 27 partially lifts the ban imposed by Sections 24, 25 and 26 in respect of so much of the information whether it amounts to a confession or not, as relates distinctly to the fact discovered in consequence of the information, if the other conditions of the section are satisfied. Section 27 distinctly contemplates that information leading to a discovery may be a part of the confession of the accused and thus, fall within the purview of Sections 24, 25 and 26. Section 27 thus shows that a confessional statement admitting the offence may contain additional information as part of the confession. Again, s. 30 permits the Court to take into consideration against a co-accused a confession of another accused affecting not only him but the other co-accused. Section 30 thus shows that matters affecting other persons may form part of the confession.

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*8. Accordingly, the statement recorded in the First Information Report was admissible, in respect of the identity of the accused as the maker of the same i.e. his name, address and other details and the fact that he had come to the police station to make the report, which was recorded and read over to him. **The other portions of the statement recorded in the First Information Report were not admissible, save and except the portions which***

come within the purview of Section 27 of the Evidence Act. Therefore, the other portions had to be excluded.

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13. In *Bheru Singh v. State of Rajasthan* (1994) 2 SCC 467, there are some observations which purport that the motive recorded in the self-implicating First Information Report are admissible and not hit by Section 25 of the Evidence Act, as they do not amount to confession of committing any crime. However, as clarified by a Division Bench of this Court in ***Mukesh v. State Crl. Appeal No. 615/2008*** decided on 4.5.2010, in ***AghnooNagesia* (supra)** three Judges of the Supreme Court have firmly held that confession not only includes admission of the offence but also other admissions of incriminating facts relating to the offence. Motive, therefore, has to be excluded.

14. Read in this manner, we have to completely ignore and discard the extra judicial confession allegedly made to PW-20 on telephone, on 14th May, 2006 at 1.15 -1.20 P.M., i.e. after the Appellant had gone to Police Station, Lajpat Nagar and DD entry No. 11A (Ex. PW1/A) was recorded at 1.00 P.M. The alleged extra judicial confession to PW-20 is hit by Section 26 of the Evidence Act. DD entry No. 11-A (Ex. PW1/A) is admissible to the limited extent that it discloses identity of the Appellant, address and details of the maker of the First Information Report. **This portion is admissible under Section 8 of the Evidence Act. Other portions of DD entry 11A have to be excluded, except the portion(s) which comes under the purview of Section 27 of the Evidence Act. This portion, noticed below, will consist of Appellant's statement that dead body of Suman Rai was lying in flat No. E-20, First Floor, Gautam Nagar, New Delhi, and the knife used and blood stained clothes of the accused were lying in the same flat.**

15. Head Constable RaghbirPrasad(PW-1) was the duty officer at the Police Station, Lajpat Nagar and had first interaction with the accused, at Police Station,

Lajpat Nagar, where he had recorded his confessional statement, vide DD entry No. 11A(Ex. PW1/A). The DD entry reads as:

"I reside at 50 E, First Floor, Gautam Nagar, New Delhi in the Flat of Smt. Suman Roy and loved her. I came to know about her illicit relations with some other persons, on which some hot arguments took place between us. As a result whereof I became furious and today at about 8:00 o'clock in the morning I finished her by giving knife blows. I had kept the blood stained knife and clothes at the locale itself. I have locked the flat and the key of the flat is in my possession. I have come here at Lajpat Nagar Police Station to inform you, because I knew about the Lajpat Nagar Police Station only. (The underlined portion of the DD entry is admissible)"

(emphasis supplied)

56. In view of the law discussed above, it is clear that, Section 27 of the Indian Evidence Act, 1872 is applicable, if confessional statement leads to discovery of some new facts. It is further not in dispute that a fact discovered on information furnished by an accused in his disclosure statement is a relevant fact and is admissible in evidence if something new is discovered or recovered from the accused which was not within the knowledge of the police before recording the disclosure statement of the accused (Ref: Kamal Kishore Vs. State (Delhi Administration), (1997) 2 Crimes 169 (Del)).
57. From the perusal of the record, we find that the prosecution in the present case has relied upon recovery of the knife at the instance of Appellant/Rahul. The version of the prosecution is supported by the testimony of PW-23 (ACP Vir Singh), PW-17 (Retired SI Sukhdev

Singh) and PW-11 (brother in law of the deceased). PW-23 (ACP Vir Singh) stepped into the witness box and deposed that:

*“...On interrogation, accused Rahul gave disclosure statement which was recorded by me vide disclosure statement already Ex.PW 11/D which bears my attestation at point Z and signed by accused Rahul at point Y. **In pursuance to his disclosure statement, accused Rahul led us to slaughter house and got recovered one blood stained knife beneath the stone piece near the broken wall of the slaughter house.** The said knife was measured with the help of scale and its sketch already Ex.PW11/E was prepared on a plain paper, same bears my attestation at point Z and accused signed at point Y. The recovered knife was converted into cloth pullanda sealed with the seal of VST and thereafter taken into possession vide pointing out cum seizure memo already Ex.PW11/F which bears my attestation at point Z and accused signed at point Y...”*

58. PW-17 (Retired SI Sukhdev Singh) stepped into the witness box and deposed that:

“...At around 7.25pm, aforesaid accused persons were apprehended on the pointing out of informer. Arrest memo and personal search memo of the accused Rahul was prepared. . Arrest memo of accused Rahul is already Ex.PW11/B which bears my signature at point B and personal search memo of accused is Ex.PW11/C....

***As per the disclosure of accused Rahul, he got recovered one knife from beneath a stone piece inside the slaughter house’s broken wall.** The said knife was having blood stain mark. The sketch of the said knife was prepared by IO and*

same is already Ex.PW11/E which bears my signature at point A. The said knife was seized through a sealed pullanda. Seizure memo of the same is already Ex.PW11/F which bears my signature at point B.”

59. PW-11 (brother in law of the deceased) stepped into the witness box and deposed that:

“...He also disclosed that he had hidden the knife used by him in the commission of offence in tabela under the stone beneath the broken wall. Accused led us to the place where he had hidden the said knife and he took out the knife used in the commission of offence. He handed over the same to the police who wrapped the same in a piece of cloth which was covered into pullanda which was sealed with the seal of VST. Police prepared pointing out and seizure memo of the knife and the sketch of the same was prepared. The sketch of knife is Ex.PW11/E which bears my signature at point A and seizure memo of the same is Ex.PW11/F bearing my signature at point A. Accused led us to the place of occurrence and pointed out the place of occurrence and the pointing out memo is Ex..PW11/G bearing my signature at point A.”

60. Conjoint reading of the aforementioned testimonies of the prosecution witnesses reveal that the bloodstained knife was recovered pursuant to the disclosure statement of the appellant/Rahul from the slaughter house (*beneath the stone piece near the broken wall*), which was seized vide seizure memo (*Ex.PW11/F*) and the sketch of the knife was prepared (*Ex.PW11/E*).

61. Learned counsel for the appellants extensively argued that the recovery of knife which was effected in the presence of police officers is not reliable, as no genuine and sincere efforts were made by the investigating officer to authenticate the recovery with the presence of an independent witness.
62. In relation to recovery of articles at the instance of the accused, the Apex Court in a catena of judgments has held that the recovery and the pointing out memo which directly link the alleged weapon with the commission of the alleged offence is relevant and is admissible in the eyes of law. While dealing with such a case, the Hon'ble Supreme Court of India in the case of ***Debapriya Pal vs. State of West Bengal*** reported at (2017) 11 SCC 31 has held as under: -

“10. ...Under Section 27 of the Evidence Act only so much of recovery, as a result of the disclosure statement, which directly pertains to the commission of crime is relevant. Otherwise, such an evidence is barred Under Section 25 of the Evidence Act. Recovery of laptop does not have any bearing. It is neither the weapon of crime nor it has any cause of connection with the commission of crime. The law on this aspect is succinctly said in the case "Jaffar Hussain Dastagir v. State of Maharashtra: (1969) 2 SCC 872 in the following manner:

*5. Under Section 25 of the Evidence Act no confession made by an Accused to a police officer can be admitted in evidence against him. An exception to this is however provided by Section 26 which makes a confessional statement made before a Magistrate admissible in evidence against an Accused notwithstanding the fact that he was in the custody of the police when he made the incriminating statement. **Section 27 is a***

proviso to Section 26 and makes admissible so much of the statement of the Accused which leads to the discovery of a fact deposed to by him and connected with the crime, irrespective of the question whether it is confessional or otherwise. The essential ingredient of the Section is that the information given by the Accused must lead to the discovery of the fact which is the direct outcome of such information. Secondly, only such portion of the information given as is distinctly connected with the said recovery is admissible against the accused. Thirdly, the discovery of the fact must relate to the commission of some offence.”

(emphasis supplied)

63. During the course of argument, an apprehension was expressed by the learned counsel for the appellants that as per the story of the prosecution, Appellant/Rahul & Appellant/Nandu were armed with separate knives while inflicting injuries on the deceased, wherein the prosecution is totally silent on the recovery of the second knife, hence fatal to the case of the State.
64. Dealing with a similar issue the Hon'ble Apex Court very recently in the case of ***Prabhash Kumar Singh vs. State of Bihar*** reported at ***2019 SCC Online SC 1236*** has held that the version of prosecution cannot be disbelieved merely because the weapon of assault was not recovered. The germane portion of the judgment is extracted below:

“12. In such circumstances, we do not find any reason to interfere with the judgment of the High Court. As there is clear eyewitness account of the incident and none of the two eyewitnesses could be shaken during cross examination and they had stuck to their collection of the facts relating to the incident, the mere fact that the weapon of assault or the bullet was not recovered cannot

demolish the prosecution case. The appeal is accordingly dismissed and the judgment and order of Trial Court sustained by the High Court is confirmed.”

65. There is no good reason for this Court to disbelieve the said recoveries merely because the recovery witnesses PW-23 (ACP Vir Singh), PW-17 (Retired SI Sukhdev Singh) happen to be police officers. In this context, we rely on the case of **Baldev Singh vs. State of Haryana** reported as (2015) 17 SCC 554, wherein the Hon’ble Supreme Court held as follows: -

*“10. There is no legal proposition that evidence of police officials unless supported by independent evidence is unworthy of acceptance. **Evidence of police witnesses cannot be discarded merely on the ground that they belong to police force and interested in the investigation and their desire to see the success of the case.** Prudence however requires that the evidence of police officials who are interested in the outcome of the result of the case needs to be carefully scrutinised and independently appreciated. **Mere fact that they are police officials does not by itself give rise to any doubt about their creditworthiness.***

*11. Observing that no infirmity is attached to the testimony of police officials merely because they belong to police force and that conviction can be based on the testimony of police officials in **Girja Prasad v. State of M.P., (2007) 7 SCC 625**, it was held as under:-*

“25. In our judgment, the above proposition does not lay down correct law on the point. It is well settled that credibility of witness has to be tested on the touchstone of truthfulness and trustworthiness. It is quite possible that in a given case, a Court of law may not base conviction solely on the evidence of the complainant or a

*police official but it is not the law that police witnesses should not be relied upon and their evidence cannot be accepted unless it is corroborated in material particulars by other independent evidence. The presumption that every person acts honestly applies as much in favour of a police official as any other person. **No infirmity attaches to the testimony of police officials merely because they belong to police force. There is no rule of law which lays down that no conviction can be recorded on the testimony of police officials even if such evidence is otherwise reliable and trustworthy. The rule of prudence may require more careful scrutiny of their evidence.** But, if the Court is convinced that what was stated by a witness has a ring of truth, conviction can be based on such evidence.*

26. It is not necessary to refer to various decisions on the point. We may, however, state that before more than half-a-century, in **Aher Raja Khima v. State of Saurashtra AIR 1956 SC 217**, Venkatarama Ayyar, J. stated:

“40. ... The presumption that a person acts honestly applies as much in favour of a police officer as of other persons, and it is not judicial approach to distrust and suspect him without good grounds therefore. Such an attitude could do neither credit to the magistracy nor good to the public. It can only run down the prestige of the police administration.”

27. In **Tahir v. State (Delhi) (1996) 3 SCC 338**, dealing with a similar question, Dr A.S. Anand, J. (as His Lordship then was) stated:

‘6. ... Where the evidence of the police officials, after careful scrutiny, inspires confidence and is found to be trustworthy and reliable, it can form the basis of conviction

and the absence of some independent witness of the locality to lend corroboration to their evidence, does not in any way affect the creditworthiness of the prosecution case.”
(emphasis added)

66. The aforesaid principle was reiterated by the Hon’ble Apex Court in a very recent judgment titled as ***Kripal Singh v. the State of Rajasthan*** reported in **(2019) 5 SCC 646**. The germane portion of the judgment is extracted below:

*“17. The submission of the learned senior counsel for the Appellant that recovery has not been proved by any independent witness is of no substance for the reason that in the absence of independent witness to support the recovery in substance cannot be ignored unless proved to the contrary. **There is no such legal proposition that the evidence of police officials unless supported by independent witness is unworthy of acceptance or the evidence of police officials can be out rightly disregarded.**”*

(emphasis supplied)

67. We are thus of the opinion that in the instant case, non-joining of any public witness at the time of recovery of knife is not a sufficient ground to doubt the truthfulness of the testimonies of the police witnesses on the above aspect or discard their evidence completely as the testimonies of the police witnesses inspires confidence.
68. Keeping in view the facts of the present case and applying the principles laid down by the Hon’ble Apex Court as well as on the basis of corroborative testimonies of the material police witnesses, we find no cogent reason to disbelieve the recoveries made by the Investigating team at the instance of the appellant/Rahul. The

testimonies of the prosecution witnesses in relation to the recoveries made pursuant to the disclosure statement are consistent, trustworthy and corroborative; as such the ground raised by learned counsel for the Appellants in relation to the non-recovery of second knife and the inadmissibility of the recovery of knife made at the instance of the Appellant/Rahul holds no ground.

DEFECTIVE INVESTIGATION

69. Another argument raised by learned counsel for the appellants is that the investigating agency failed to conduct a fair and transparent investigation, as prescribed under the Code of Criminal Procedure. Learned counsel has pointed out following discrepancies in the investigation:

- a) That the police mechanism in the present case was set in motion on registration of DD No.42A (*Ex.PW5/A*) and DD No. 43A (*Ex.PW5/B*), on receipt of the information from telephone number 92899375618 & 9211379946, but the investigating agency made no endeavor to ascertain the identity of the caller and no attempt was made to place on the record the call detail records of the aforesaid numbers.
- b) That no crime team was called to the spot for obtaining the chance prints, from the place of incident on 28.04.2010 and from the materials objects (*empty water bottle, the cigarette packet*) recovered from the spot.
- c) That appellant/Rahul & appellant/Nandu were armed with separate knives and only one knife was recovered whereas no effort was made to recover the second knife

- d) That the place of incident is a densely populated area and despite the fact that there were 50-60 tenants living in the building, none of the independent witnesses joined the investigation.
- e) That the FIR is embellished and registered after an unexplained delay of 2 Hours 50 Minutes to falsely implicate the appellants.
- f) That the investigating agency failed to seize the clothes of PW-6 Dharamvir (*father of the deceased*) and PW-11 Sunil Kumar (*brother in law of deceased*) stained with the blood of the deceased while they were carrying his dead body down from the roof.
- g) That neither site plan of the place of recovery was prepared nor perceptible efforts were made by the investigating officer to validate the recoveries with the presence of an Independent/Public witness.
- h) That the prosecution set up a story that the deceased had illicit relations with wife of appellant/Nandu and mother of Juvenile Sachin, which eventually accelerated the aforesaid incident but the prosecution failed to make her part of the investigation though the said facts had been narrated in the Rukka Ex.PW6/A.

70. In this context, we find that a fair investigation is a *sine qua non* of Article 21 of the Constitution of India, wherein an investigation has to be unbiased, and without any prejudice for or against the accused because if the same is partial and unfair then the whole

criminal justice system will be at stake and the same will erode the confidence of the common citizen. To discuss the law with regard to defective investigation, reliance can be placed on *State of Karnataka v. K. Yarappa Reddy* reported in **1999 8 SCC 715** wherein, Supreme Court considered the similar question of defective investigation and observed that criminal justice should not be made a casualty for the wrongs committed by the investigating officers. Supreme Court, in Paragraph 19, held as follows:

*“19. But can the above finding (that the station house diary is not genuine) have any inevitable bearing on the other evidence in this case? If the other evidence, on scrutiny, is found credible and acceptable, should the Court be influenced by the machinations demonstrated by the Investigating Officer in conducting investigation or in preparing the records so unscrupulously. **It can be a guiding principle that as investigation is not the solitary area for judicial scrutiny in a criminal trial, the conclusion of the Court in the case cannot be allowed to depend solely on the probity of investigation. It is well-nigh settled that even if the investigation is illegal or even suspicious the rest of the evidence must be scrutinised independently of the impact of it. Otherwise the criminal trial will plummet to the level of the investigating officers ruling the roost. The Court must have predominance and pre-eminence in criminal trials over the action taken by the investigation officers. Criminal Justice should not be made a casualty for the wrongs committed by the investigating officers in the case. In other words, if the Court is convinced that the testimony of a witness to the occurrence is true the Court is free to act on it albeit the investigating officer's suspicious role in the case.**”*

(emphasis supplied)

71. The Apex Court in the case of ***Ram Bali v. State of Uttar Pradesh*** reported in (2004) 10 SCC 598, reiterating the judgment of ***Karnel Singh v. State of M.P*** reported in (1995) 5 SCC 518 had observed as under: -

*“in case of defective investigation the Court has to be circumspect while evaluating the evidence. **But it would not be right in acquitting an accused person solely on account of the defect**; to do so would tantamount to playing into the hands of the investigation officer if the investigation is designedly defective”*

(emphasis supplied)

72. As a general principle, it can be stated that error, illegality or defect in investigation cannot have any impact unless miscarriage of justice is brought about or serious prejudice is caused to the accused. If the prosecution case is established by the evidence adduced, any failure or omission on the part of the Investigating Officer cannot render the case of the prosecution doubtful. If direct evidence is credible then failure, defect or negligence in investigation cannot adversely affect the prosecution case, though the Court should be circumspect while evaluating the evidence. In the present case, as discussed above, we have accepted the testimony of the PW-6 (father of the deceased) and PW-11 (brother in law of the deceased) being the eye witnesses, hence, the plea of the counsel for the Appellants seeking benefit of doubt to the appellants on the ground of defective investigation, is bereft of any merit and declined.

PLEA OF ALIBI

73. Learned Counsel for the appellant/Manoj @ Kale contended that the defence has been able to place on record the Attendance Register (Ex.DW-1/A) disclosing the presence of the appellant/Manoj @ Kale in the School at the relevant time but the learned Trial Court failed to consider the testimony of DW-1 Smt.Brij Bala in its correct perspective.
74. Undoubtedly, when a plea of alibi is set up, the burden is on the accused to lend credence to the defence and the same has to be tested like any other testimony, always keeping in mind that a person is presumed innocent until he or she is found guilty.
75. Enumerating the essence of a plea of alibi, it was observed by Hon'ble Apex Court in ***Dudh Nath Pandey v. State of U.P.*** reported in ***AIR 1981 SC 911*** that:

"The plea of alibi postulates the physical impossibility of the presence of the accused at the scene of offence by reason of his presence at another place. The plea can therefore succeed only if it is shown that the accused was so far away at the relevant time that he could not be present at the place where the crime was committed."

76. This was more elaborately explained in ***Binay Kumar Singh v. State of Bihar*** reported in ***AIR 1997 SC 322*** by the Hon'ble Apex Court in the following words:

"We must bear in mind that an alibi is not an exception (special or general) envisaged in the Indian Penal Code or any other law. It is only a rule of evidence recognised in Section 11 of the Evidence Act that facts which are inconsistent with the fact in issue are relevant." Illustration (a) given under

Section 11 of the Evidence Act is then partially reproduced in the decision, but it is fully reproduced below: "The question is whether A committed a crime at Calcutta on a certain date; the fact that on that date, A was at Lahore is relevant. The fact that, near the time when the crime was committed, A was at a distance from the place where it was committed, which would render it highly improbable, though not impossible, that he committed it, is relevant."

*This Court then went on to say, "The Latin word alibi means "elsewhere" and that word is used for convenience when an accused takes recourse to a defence line that when the occurrence took place he was so far away from the place of occurrence that it is extremely improbable that he would have participated in the crime. It is a basic law that in a criminal case, in which the accused is alleged to have inflicted physical injury to another person, the burden is on the prosecution to prove that the accused was present at the scene and has participated in the crime. **The burden would not be lessened by the mere fact that the accused has adopted the defence of alibi.**"*

77. The plea of the accused in such cases needs to be considered only when the burden has been discharged by the prosecution satisfactorily. But once the prosecution succeeds in discharging the burden, it is incumbent on the accused, who adopts the plea of alibi, to prove it with absolute certainty so as to exclude the possibility of his presence at the place of occurrence. When the presence of the accused at the scene of occurrence has been established satisfactorily

by the prosecution through reliable evidence, normally the court would be slow to believe any counter-evidence to the effect that he was elsewhere when the occurrence happened.

78. But if the evidence adduced by the accused is of such a quality and of such a standard that the court may entertain some reasonable doubt regarding his presence at the scene of crime, then the accused would, no doubt, be entitled to the benefit of reasonable doubt. It follows, therefore, that strict proof is required for establishing the plea of alibi and this view has been reiterated by the Hon'ble Apex Court in *Jayantibhai Bhenkarbhai v. State of Gujarat* reported in *AIR 2002 SC 3569*.
79. On the standard of proof, *Dudh Nath Pandey (supra)* goes a step further and seeks to bury the ghost of disbelief that shadows alibi witnesses, in the following words: "Defence witnesses are entitled to equal treatment with those of the prosecution and, courts ought to overcome their traditional, instinctive disbelief in defence witnesses. Quite often, they tell lies but so do the prosecution witnesses." Keeping in view facts of the case and applying the principles laid down by the Hon'ble Apex Court, the statement of the defence witness is to be analyzed on the same pedestal as any other prosecution witness.
80. Applying the aforesaid test, it is relevant to examine the testimony of defence witness produced by the appellant. The appellant got examined DW-1 Brij Bala in his defence who deposed that:

“I am posted in MC Primary School, WEA, Chaina Market, Karol Bagh, New Delhi as school incharge. MC primary school, Sat Nagar, Karol Bagh, Delhi merged with MC Primary School, WEA, Chaina Market, Karol Bagh, New Delhi in the year 2008. Today I have brought the attendance register from May, 2006 to June, 2012 of MC Primary School, WEA, Chaina Market, Karol Bagh, New Delhi and the attendance register from March, 2008 to September, 2012 of MC primary School, sat Nagar, Karol Bagh, Delhi. The copy of entry in register of MC Primary School, WEA, Chaina Market, Karol Bagh, New Delhi of the month of April, 2010 is Ex. DW1/A (OSR). The copy of entry in register of MC Primary school, Sat Nagar, Delhi of the month of April, 2010 is Ex DW/B (OSR).”

81. During cross-examination DW-1 Brij Bala deposed as under:-

“It is correct that I was not posted in the said school in the year as school incharge, however, I was teacher in the said school at that time. I do not know accused Manoj Kumar. I have not seen the accused ever in the school. It is correct that I do not used to keep the record of the arrival and departure of 4th class employee of the school in the year, 2010. Principal used to keep the record. It is correct that I cannot identify signature of the accused. It is correct that as per DW1/A the signature purported to be of Manoj appears on dated 29.4.2010 and on 30/4/2010 and not on 28.4.2010. It is correct that I have not seen the accused Manoj on 28.4.2010 in the school. It is correct that in case an employee leaves the school without informing the authorities, I am not aware regarding the same. The timing of our school is from 07:45am to 01:15pm for the teachers and students. I do not remember the exact timings of the school in the year, 2010, however, the school used to be closed

during that period in afternoon itself. After the school hours we do not stay in the school”

82. From the perusal of the aforesaid testimony, it is evident that the facts enumerated by DW-1 Brij Bala do not corroborate with the version of Appellant/Manoj @ Kale. The defence witness clearly negates the presence of the appellant at M.C. Primary School and has categorically deposed in her cross-examination that ***“I do not know accused Manoj Kumar. I have not seen the accused ever in the school”***. The testimony of the defence witness clearly demolishes the version of the Appellant/Manoj@Kale that he was on his official duty from 3pm of 28.04.2010 to 8am of 29.04.2010 at M.C. Primary School, at the relevant time.
83. Moreover, accused Manoj in his statement recorded under Section 313 Cr.P.C did not take the defence that he was present in the school. Therefore, the plea taken by him appears to be an afterthought and is an additional circumstance against him.
84. Further, the Hon'ble Apex Court in ***Mukesh v. State (NCT of Delhi)*** reported in ***(2017) 6 SCC 1***, has held that the accused would not be entitled to the benefit of reasonable doubt when his/her presence at the scene of crime has been satisfactorily established by the prosecution and the court would be slow to believe any counter-evidence to that effect. The germane portion of the judgment is extracted below:

“Acceptability of the plea of alibi

247. Presently, we shall deal with the plea of alibi as the same has been advanced with immense conviction. It is well settled in law that when a plea of alibi is

taken by an accused, the burden is upon him to establish the same by positive evidence after the onus as regards the presence on the spot is established by the prosecution. In this context, we may usefully reproduce a few paragraphs from Binay Kumar Singh v. State of Bihar [Binay Kumar Singh v. State of Bihar, (1997) 1 SCC 283 : 1997 SCC (Cri) 333] : (SCC p. 293, paras 22-23)

“22. We must bear in mind that an alibi is not an exception (special or general) envisaged in the Penal Code, 1860 or any other law. It is only a rule of evidence recognised in Section 11 of the Evidence Act that facts which are inconsistent with the fact in issue are relevant. Illustration (a) given under the provision is worth reproducing in this context:

‘(a) The question is whether A committed a crime at Calcutta on a certain date. The fact that, on that date, A was at Lahore is relevant.’

23. The Latin word alibi means “elsewhere” and that word is used for convenience when an accused takes recourse to a defence line that when the occurrence took place he was so far away from the place of occurrence that it is extremely improbable that he would have participated in the crime. It is a basic law that in a criminal case, in which the accused is alleged to have inflicted physical injury to another person, the burden is on the prosecution to prove that the accused was present at the scene and has participated in the crime. The burden would not be lessened by the mere fact that the accused has adopted the defence of alibi. The plea of the accused in such cases need be considered only when the burden has been discharged by the prosecution satisfactorily. But once the prosecution succeeds in discharging the burden it is incumbent on the accused, who adopts the plea of alibi, to prove it with absolute certainty so as to exclude the possibility of his presence at the place of occurrence. When the presence of the accused at the

*scene of occurrence has been established satisfactorily by the prosecution through reliable evidence, normally the court would be slow to believe any counter-evidence to the effect that he was elsewhere when the occurrence happened. But if the evidence adduced by the accused is of such a quality and of such a standard that the court may entertain some reasonable doubt regarding his presence at the scene when the occurrence took place, the accused would, no doubt, be entitled to the benefit of that reasonable doubt. For that purpose, it would be a sound proposition to be laid down that, in such circumstances, the burden on the accused is rather heavy. **It follows, therefore, that strict proof is required for establishing the plea of alibi.** ...”*

(emphasis supplied)

The said principle has been reiterated in Gurpreet Singh v. State of Haryana [Gurpreet Singh v. State of Haryana, (2002) 8 SCC 18 : 2003 SCC (Cri) 186] , Sk. Sattar v. State of Maharashtra [Sk. Sattar v. State of Maharashtra, (2010) 8 SCC 430 : (2010) 3 SCC (Cri) 906] , Jitender Kumar v. State of Haryana [Jitender Kumar v. State of Haryana, (2012) 6 SCC 204 : (2012) 3 SCC (Cri) 67] and Vijay Pal [Vijay Pal v. State (Govt. of NCT of Delhi), (2015) 4 SCC 749 : (2015) 2 SCC (Cri) 733] .”

85. Keeping in view the facts of the present case and applying the principles laid down by the Hon’ble Apex Court as well as on the basis of testimony of the defence witnesses, we find no cogent reason to believe the version of the Appellant/Manoj @ Kale that he was not present at the alleged place of incident and was on his official duty in the School. Hence, the argument advanced by the learned counsel for the appellant raising plea of alibi, is rejected.

MOTIVE

86. During the course of argument, an apprehension was expressed by the learned counsel for the Appellants that motive is of paramount importance and absence of motive, in a case of direct or circumstantial evidence is critical to the version of the prosecution. It was further emphasized that as per the version of the prosecution, appellant/Nandu @ Ram Kishore, had a motive to commit the alleged offence, as there was illicit relation between the deceased and his wife Usha, but the prosecution failed to bring any substantial evidence on record to prove the same.
87. 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 trustworthy evidence of witnesses as to commission of an offence, the motive part loses its significance. However, if the genesis of the motive of the occurrence is not proved but the evidence is worthy of reliance, the testimony of the witness as to the occurrence could not be discarded only by the reason of the absence of motive.
88. There is no such principle or rule of law that where the prosecution fails to prove the motive for commission of the crime, it must necessarily result in acquittal of the accused. Our view is fortified by the law laid down by the Hon'ble Apex Court in ***Sardul Singh v. State of Haryana*** reported in ***AIR 2002 SC 3462*** wherein the Hon'ble Apex Court held that the motive which is not always capable of precise proof, if proved, may only lend additional support to

strengthen the probability of commission of the offence by the person accused, but the absence of proof does not *ipso facto* warrant an acquittal.

89. While dealing with a similar issue, the Hon'ble Supreme Court in ***State of U.P. v. Kishanpal and Ors.*** reported in (2008) 16 SCC 73 held as under

“.....The motive may be considered as a circumstance which is relevant for assessing the evidence but if the evidence is clear and unambiguous and the circumstances prove the guilt of the accused, the same is not weakened even if the motive is not a very strong one. It is also settled law that the motive loses all its importance in a case where direct evidence of eyewitnesses is available, because even if there may be a very strong motive for the accused persons to commit a particular crime, they cannot be convicted if the evidence of eyewitnesses is not convincing. In the same way, even if there may not be an apparent motive but if the evidence of the eyewitnesses is clear and reliable, the absence or inadequacy of motive cannot stand in the way of conviction...”

90. Further, with regard to the importance of establishing motive, the Hon'ble Supreme Court in a recent judgment titled as ***Khurshid Ahmed Vs State Of Jammu And Kashmir*** reported in 2018 7 SCC 429, has held that the motive is a double edged weapon and the same loses its importance when there are direct and reliable evidence available on record. Relevant part from the aforesaid judgment is extracted below:

“18. Another argument advanced is that there was no motive to commit the offence and in the absence of strong motive, the appellant cannot be held guilty under

Section 302 IPC. In the present case, motive can be traced from the evidences produced by the prosecution with regard to the prior incident that took place between the deceased and accused in connection with payment of money over a transaction where the accused stood as a guarantor. Because of the earlier scuffle, the subsequent incident has occurred in which the accused hit the deceased with an iron rod due to which the deceased lost his life. It is appropriate to observe that in Halsbury's Laws of England, 3rd Edn., with regard to "motive", it is stated that "the prosecution may prove, but it is not bound to prove the motive for a crime". "Motive" is an emotion which compels the person to do a particular act. But in all the cases, it will be very difficult for the prosecution to prove the real motive. Motive is a double-edged weapon when there is a direct and reliable evidence available on record, motive loses its importance. In a case of circumstantial evidence, motive assumes greater importance than in the case of direct evidence. In a case of direct and compelling evidence, even assuming that no motive is attributed, still the prosecution version has to be examined.

19. As regards to the importance of existence of motive in a criminal case, here it is worthwhile to look at the ratio laid down by this Court in Shivaji Genu Mohite v. State of Maharashtra [Shivaji Genu Mohite v. State of Maharashtra, (1973) 3 SCC 219 : 1973 SCC (Cri) 214 : AIR 1973 SC 55] : (SCC pp. 224-25, para 12)

"12. ... In case the prosecution is not able to discover an impelling motive, that could not reflect upon the credibility of a witness proved to be a reliable eyewitness. Evidence as to motive would, no doubt, go a long way in cases wholly dependent on circumstantial evidence. Such evidence would

form one of the links in the chain of circumstantial evidence in such a case. But that would not be so in cases where there are eyewitnesses of credibility, though even in such cases if a motive is properly proved, such proof would strengthen the prosecution case and fortify the court in its ultimate conclusion. But that does not mean that if a motive is not established the evidence of an eyewitness is rendered untrustworthy.”

X X X
28. *In view of the above discussion, we are of the considered view that the direct oral evidence available on record coupled with the medical evidence, points at the guilt of the accused and not proving the motive for commission of the offence lost its significance in the facts of the case.”*

91. Herein, it is relevant to highlight that the present case is based on direct evidence and proof of motive will be an additional corroborative piece of evidence but the inability of the prosecution to establish motive is not always fatal to the case of the prosecution and does not render any benefit to the accused persons.

MEDICAL & SCIENTIFIC EVIDENCE

92. PW-1 (Dr. C.B Dabas) HOD, Forensic Medicine, Hindu Rao Hospital, Delhi conducted the post-mortem of the deceased and proved the report (*Ex.PW1/A*) wherein he opined that “*death in this case was due to hemorrhage and shock subsequent to injuries*”. The relevant portion from his testimony is as under:-

“On 29.4.2010 I conducted postmortem examination on the body of deceased Pradeep @ Deru aged about 20 years male. The body was brought by HC Ram Dutt of Police Station Bazar alongwith the inquest papers and request for postmortem examination by

IO. The dead body was identified by Dharambir and Sunil. There was history of being stabbed during quarrel.

On examination I observed following external injuries on the body of deceased:

- 1. Multiple incised wounds (13 in number) present over left parieto occipital region, frontal region of scalp, forehead, nose (3 injuries), lips (2 injuries),- cheek right side, chin (2 injuries), left mandible (2 injuries) of various sizes. The wounds were skin deep.*
- 2. Multiple superficial incised wounds (09 in number) present over outer aspect of right arm, elbow, forearm and back of wrist (2) of various sizes.*
- 3. Incised wounds (2 in number) over front and inner aspect elbow of different sizes. The wounds were superficial.*
- 4. Superficial linear incised wounds (2 in number) over palmar aspect of right ring and little fingers and on back of right middle and ring fingers of different sizes.*
- 5. Incised wounds over front of left elbow skin deep.*
- 6. Two incised wounds present on front and back part of left shoulder of different sizes wounds were skin deep.*

Injuries no-1 to 12 were incise wounds on the various parts of the body. Injuries no. 13,14,15, & 16 were stab wounds on the various parts of the body. Injury no-17 was also incise wounds on the chest.

Injury no-18,19,20,21,22,23, & 24 were stab wound on the various parts of the body. Injury no-25 was incise wound on front of abdomen. Details of these injuries have been described in my postmortem report EX. PW-1/A, which bears my signature at point-A.

On internal examination- there was about 400 gm semi digested food material were present in the stomach. Liver showed cuts on right lobe.

There were fracture on 2nd, 4th, 8th and 9th rib of right side of chest and 4th & 5th rib of left side of the chest. Plural cavity was full of blood. Both lungs had multiple cuts and left lung was collapsed. The diaphragm also showed cuts. There were incise wounds on the scalp.

I preserved the underwear and blood sample of the deceased and sealed them with the seals of 'FM HRH' and handed over to the I.O.

OPINION: -

Death in this case was due to haemorrhage and shock subsequent to injures. The injures no.1 to 25 had been caused by sharp edged weapon and are collectively sufficient to cause death in ordinary course of nature. All the injures are ante mortem and time since death is approximately 13-4 hours. The Postmortem Report is already EX.PW-1/A, bearing my signature under the opinion at point-1.

On 4/6/2010 Inspector V.S. Tyagi, the IO of the case forwarded the sealed parcel containing the weapon of offence i.e. knife and the original postmortem report for opinion whether the injures on the person of the deceased Pradeep @ Deru could have been caused by this weapon.

I opened the parcel and it was found contained one knife wrapped in a white paper sheet and prepared diagrammatic sketch of this knife on the back of my report. Sketch of knife is EX. PW-1/B which bear my signature at point-A.

On the basis of examination of this knife and perusal of injures mentioned in the postmortem report of the deceased, it was opined that injures no-1 to 25 appear to have been caused by a sharp-edged weapon like this knife. The Diagrammatic sketch of which is EX.

PW-1/B. The weapon of offence was re-sealed with the seals of 'FM HRH; and handed over to the IO alongwith original postmortem report.

My opinion in this regard is EX. PW-1/C, bear my signature at point-A."

93. Post Mortem Report of the deceased reads as under:-

HINDU RAO HOSPITAL, DELHI
(Deptt. Of Forensic Medicine)

POST MORTEM EXAMINATION

P. M. No. HRH/39/10

Conducted by Dr. C. B. Dabas

Case (FIR) No.81/10/ U/s 302/34 IPC

P.S. Sadar Bazar

Date & Time: 29.04.10 at 12.30 PM

Body brought by: H/Ct. Ram Dutt-296/N

Name: Pradeep @ Deru Age 20 yrs. Sex Male

Father's Name: Sh. Dharam Vir

Address: 2019, Basti Jhullan, Sadar Bazar, Delhi

Date & Time of Admission brought Dead on 28/04/10 at 11.30 PM

Date & Time of Death -----

*Casualty No./CR No. Cy 163003
3278/10*

M. L. C.

Body Identified by: (1) Dharam Vir s/o Late Sh. Banwari Lal-Father

(2) Sunil s/o Man Singh-Brother-in-law

Alleged History : of being stabbed during quarrel brought to hospital where he was declared Brought Dead on 28.04.10 at 11.30 PM (one blue jeans and shirt sealed by CMO)

External Examination: Body identified Clothes: One Right green underwear only:

(1) Identification marks (in unidentified bodies/clothing's)

(2) Height 158 cm. Weight 57 kg. Built Average

Condition of Body

1. Rigor Mortis: Present

2. Post Mortem Staining: Present on back parts except contact pt

3. Eyes closed/open: Closed Cornea: Hazy Conjunctiva: Pale

4. Natural orifices (Nose, Mouth, Ear, Vagina, Anus)- n. ad

5. External Injuries

- (1) Multiple Linear incised wounds (13 in number) present over (L) (-sic-) region, Frontal region of scalp, forehead, Nose (3) Lips (2), Cheek (R) side, chin (2) (L) mandible (2), measuring 3 x 0.4 cm, 5 x 1 cm, 5 x 0.8 cm, 4 x 0.5cm, 2.5 x 1 cm, 3cm x 1.5 cm, 3cm x 2 cm; 1.5 x 0.5 cm, 2cm x 0.5cm, 2cm x 0.5 cm, 4cm x 1cm, 1 x 0.5 cm, 1x 0.5 cm, respectively. The margins of the wounds are clear cut and skin deep.*
- (2) Multiple superficial incised wounds (09 in number) located on outer aspect of ® arm, elbow and forearm and back of wrist (2), measuring 4 x 2 cm, 3 x 1.5 cm, 4 x 2 cm, 5 x 2.5 cm, 3.5 x 1.5 cm, 9 x 4 cm, 4 x 1.5 cm, 3.5 x 2 cm and 4 x 1.5 cm respectively the margins of the wounds are clear and are skin and muscle deep.*
- (3) Incised wounds (02 in number) located over front and inner aspect of (R) elbow measuring 3 x 1.5 cm, and 4 x 2 cm respectively. The wounds are superficial and margins are clear cut.*
- (4) Superficial linear incised wounds (02 in number) over palmar aspect of (R) ring and little fingers horizontally placed, measuring 1 x 0.5 cm each. There are (02) incised wounds on back of (R) middle and ring finger, measuring 1 x 0.5 cm each. Margins are clear cut.*
- (5) One incised wound, 2.5 x 1.0 cm over front of (L) elbow, skin deep.*
- (6) Two incised wounds located on front and back parts of (L) shoulder measuring 4 x 2 cm and 3 x 1. 5 cm respectively. Wounds are skin deep/ (-sic-)*
- (7) One incised , 3 cm x 1 cm on outer aspect of (L) wrist.*

- (8) *One incised 3 x 1.5 cm located (l) buttock on lower part, horizontally placed, wound is muscle deep.*
- (9) *One incised deep 4 x 2 cm located on outer upper of (-sic-) of (R) buttock wound is muscle deep.*
- (10) *Multiple incised wounds (03 in number) on front and left lateral aspect, measuring 6 x 0.5 cm, 7 x 1 cm, 2 x 2 cm, respectively. Wounds are horizontally placed (-six-)*
- (11) *One incised wound 2.5 x 1.5 cm x skin deep, located over outer part of (R) chest, 9 cm below axilla and 15 cm outer and post of (R) nipple. Margins are clear cut.*
- (12) *One incised wound 4 cm x 2 cm located on outer front part of (R) chest, 12 cm below (R) nipple and 11 cm outer to mid line and 105 cm above (R) heel. Wound is much deep, margins are clear cut.*
- (13) *One stab wound 4 cm x 2 cm x ? depth located over outer aspect of (R) chest 16 cm outer to mid line, 107 cm above (R) heel, the wound is placed vertically, the upper angle is round and lower angle is acute, margins are clear cut.*
- (14) *One stab wound 4 cm x 2 cm x ? depth located on outer aspect of (R) chest behind injury M(13), 15 cm below axillary fold, and 108 cm above (R) heel upper angle is round and lower angle is acute, margins are clear cut.*
- (15) *Stab wound 4 cm x 2 cm x ? depth located on (R) side front of chest just below clavicle 10 cm outer to mid line and 127 cm above (R) heel wound is vertically placed with upper angle being round and lower angle acute. Margins are clear cut.*
- (16) *Stab wound 4 x 1.3 cm x ? depth, located on (R) side front of chest, 3.5 cm above (R) nipple and 126 cm above (R) heel, horizontally placed, outer angle acute and medial angle is round. Margins are clear cut.*
- (17) *Incised wound (02 in number) over right side chest over ant. Axillary fold measuring 8 cm x 2 cm and 2.5 x 1 cm respectively. Margins are clear cut and skin deep.*

- (18) *One stab wound 4.5 cm x 1.3 cm x ? depth over right side chest on front aspect, 4 cm outer to mid line, 7 cm below (R) clavicle upper inner angle is acute and outer angle is round. Located 124 cm above (R) heel.*
- (19) *One stab wound 4 cm x 2 cm x ? depth over right side chest front of chest, 3 cm outer to mid line, 6 cm below and inner to (R) nipple 122 cm above (R) heel, upper angle is acute and lower angle is round.*
- (20) *Stab wound 4 cm x 1.3 cm x ? depth over (L) side front of chest in upper part 2.0 cm outer to mid line 130 cm above (L) heel, horizontally placed, outer angle being round and inner angle being acute.*
- (21) *Stab wound 4.2 x 2 cm x ? depth obliquely placed on (L) side front of chest, just below injury No. (20) 5 cm outer to mid line, 129 cm above (L) heel, upper angle is round and lower angle is round.*
- (22) *One incised wound 3 x 1.5 cm over front of (L) chest over lying outer axillary fold.*
- (23) *Stab wound 4 x 2 cm x ? depth over middle front of (L) chest, 3 cm outer to mid line and 6 cm below (L) nipple, 102 cm above (L) heel, upper angle is round, lower angle is acute.*
- (24) *Stab wound 8 x 2 cm x ? depth located over front of chest epigastric region of abdomen & adjoining (-sic-) in mid line, lower angle is acute and upper angle is round. 116 cm (R) heel.*
- (25) *Incised wound 3 x 2 cm, muscle deep on front of abdomen, in mid line 12 cm above (-sic-) and 102 cm above left heel.*

Tracks of injuries: On deeper desertion and exploration, it is observed that:

Injury No.1 (-sic-): *It has cut through 8th rib on (R) side and penetrated through (R) (-sic-) and perforated through & through lower lobe of (R) lung in lower part, depth of the wound is 8.0 cm, direction being from right to left and downwards.*

Injury No. 14: *It has cut through 9th rib on (R) side of chest and then penetrated the diaphragm and entered into posterior*

superior surface of liver (R) lobe and ended here. Depth of the wound is 9.0 cm, direction being from behind to front and downwards.

Injury No.15: *The wound has entered the chest cavity after cutting through 2nd rib of (R) chest and ended in upper lobe of (L) lung. Depth of the wound is 7.0 cm, direction being from front to behind and downwards.*

Injury No.16: *The injury has entered the chest cavity through 2nd inter (-sic-) space and ended in (R) pleural cavity. Total depth is 5.0 cm and direction being from front to behind and downwards.*

Injury No.18: *The injury has cut into the chest muscles, obliquely and has not entered the chest cavity, direction being from front to behind and downwards.*

Injury No.19: *It has cut through 4th rib on (R) side chest and entered the chest cavity and penetrated into upper lobe of (R) lung, total depth is 8.0 cm. direction being from front to behind and downwards.*

Injury No.20: *It has entered the chest cavity after cutting through 2nd inter (-sic-) space on (L) side and penetrated into upper lobe of (L) lung, depth is 7.0 cm. direction being from front to behind.*

Injury No.21: *It has entered the chest cavity after cutting through 4th inter (-sic-) space on (L) side and ended in upper lobe of (L) lung, depth is 7.2 cm. direction being from front to behind.*

Injury No.23: *It has cut through (L) side 6th rib and entered the (-sic-) and penetrated the lower part of lower lobe of (L) lung, depth is 8.0 cm, direction being from front to behind and downwards.*

Injury No.24: *It has cut through abdominal muscles and penetrated the diaphragm and ended in medial and superior*

surface of liver and ended her. Depth is 8.0 cm, direction being from left to right and downwards.

Remaining injuries are incised wounds and skin to muscle deep.

X

xx

Opinion: *Death in this case due to haemorrhage & shock consequent to injuries. The injuries 1 to 25 have been caused by sharp edged weapon and are collectively sufficient to cause death in ordinary course of nature. Injuries are ante mortem and recent. Time since death is approximately 13 to 14 hours.*

Sd/- (illegible)

Dr. C. B. Dabas

M. D.

HOD Forensic Medicine

Hindu Rao Hospital, Delhi”

94. After examining the testimony of PW-1 (Dr. C.B Dabas) and the post mortem report (***Ex.PW1/A***), it is observed that deceased died due to hemorrhage and shock and injuries no. 1 to 25 appeared to have been caused by a sharp edged weapon and were collectively sufficient to cause death in the ordinary course of nature.
95. Herein, it is relevant to highlight that as per the post mortem report injuries were also inflicted on the (*arms, elbow, forearm, back of wrist, fingers*) right and left hands of the deceased. The medical analysis draws a constructive approach and corroborates with the version of the prosecution witnesses that *Manoj @ Kale had caught hold the head of deceased, whereas accused Manoj s/o Ashok had caught hold of the shoulder of deceased, accused Akash and Arjun*

caught hold his legs and accused Nandu and Rahul had repeatedly stabbed him and Accused Sachin (JCL) was exhorting 'sale ka kaam tamam kar do aaj', leading to the suggestion that the hands of the deceased were free and during the assault the deceased had resisted the attack, resulting in thrusting of the aforesaid injuries on his arms, elbow and fingers.

96. Perusal of the aforesaid testimony also reveals that the Investigating Officer PW-23 (ACP Vir Singh) had forwarded a sealed parcel containing the weapon of offence (knife) and the original post-mortem report for the expert opinion that whether the injuries on the deceased could have been caused by said weapon . Relevant portion of the 'Opinion regarding the weapon of offence' (*Ex.PW1/C*) is reproduced herein below:-

“Subject: Subsequent opinion regarding weapon of offence in above said case (FIR)

Inspector V. S. Tyagi, I.O. of the case forwarded a sealed parcel bearing 4 intact seals of V. S. T. containing weapon of offence i.e. knife allegedly used to inflict injuries on the person of the deceased Pradeep @ Deru whose post mortem examination was conducted vide PM Report No.HRH/39/10 noon 29.04.2010. The sealed cloth parcel bears the label “Case FIR No.81/10 dated 29.04.10 /s 302/34 IPC PS Sadar Bazar Sd/- Inspector V. S. Tyagi SHO SB. Dt. (-sic-)

‘Chaaku (Chhura)-(Knife)

On opening the parcel, it is found to contain one ‘Knife’ wrapped in a white paper sheet. A diagrammatic Sketch of the knife has been prepared overleaf.

Opinion: On the basis of examination of this knife and perusal of injuries, mentioned in above said PM Report of the deceased, it is opined that injury No.1 to 25 appeared to have been caused by a sharp edged weapon like this knife, a diagrammatic sketch of which has been prepared overleaf and signed by me. The weapon of offence resealed with seal of 'PMHRH' and handed over to IO alongwith original PM report.

*Sd/- (illegible)
Dr. C. B. Dabas
M.D.
HOD Forensic Medicine
Hindu Rao Hospital, Delhi"*

97. Perusal of the aforesaid Opinion reveals that PW-1 (Dr. C.B Dabas) opined that injuries no. 1 to 25 appear to have been caused by a sharp-edged weapon like knife and proved his opinion as **Ex.PW1/C**. Further the weapon of offence (knife) was sent to forensic science laboratory for analysis wherein it was opined that blood was detected on exhibit '6' (*One weapon of offence having brown stains, described as 'knife'*). Relevant portion of FSL.2010/B-2544(**Ex.PX1**) is reproduced below:

RESULTS OF ANALYSIS

1. **Blood was detected on exhibits '1', '2', '4', '6', '7', '8', '9' and '10'.**
2. **Blood could not be detected on exhibits '3' and '5'.**
3. **Report of serological analysis in original in attached herewith.**

98. Relevant portion of Serological report (*Ex.PX2*) reads as under:-

<i>Exhibits</i>	<i>Species of Origin</i>	<i>ABO Grouping/Remarks</i>
<i>'1' Blood stained gauze cloth piece</i>	<i>Human</i>	<i>'B' group</i>
<i>'2' Blood stained cemented material</i>	<i>Human</i>	<i>No reaction</i>
<i>'3' Earth Control</i>	<i>No reaction</i>	<i>---</i>
<i>'4' Plastic Bottle</i>	<i>Human</i>	<i>No reaction</i>
<i>'6' weapon of offence'</i>	<i>Human</i>	<i>No reaction</i>
<i>'7' Pants</i>	<i>Human</i>	<i>B' group</i>
<i>'8' Shirt</i>	<i>No reaction</i>	<i>----</i>
<i>'9' Blood stained gauze cloth piece</i>	<i>Human</i>	<i>B' group</i>
<i>'10' underwear</i>	<i>Human</i>	<i>B' group</i>

99. Consequently, from the perusal of the FSL Report, it is evident that the blood stains found on the weapon of offence were those of human blood, however, the serological report does not provide a conclusive finding connecting the blood of the deceased on the weapon of offence. Attention of this court was directed towards the decision rendered in *Khujji @ Surendra Tiwari V. State of Madhya Pradesh* reported at *AIR 1991 SC 1853* wherein the Hon'ble Apex Court held that the absence of determination of blood group on the weapon of offence is of no significance and is not always fatal to the case of the prosecution. The germane portion of the judgment is extracted below:

“10. Mr. Lalit, however, argued that since the report of the serologist does not determine the blood group of the stains on the weapon and the pant of the

appellant, the mere find of human blood on these two articles is of no consequence, whatsoever. In support of this contention he placed strong reliance on the decisions of this Court in *Kansa Behera v. State of Orissa*, [1987] 3 SCC 480 and *Surinder Singh v. State of Punjab*, [1989] Suppl. 2 SCC 21. In the first mentioned case the conviction was sought to be sustained on three circumstances, namely, (i) the appellant and the deceased were last seen together; (ii) a dhoti and a shirt recovered from the possession of the appellant were found to be stained with human blood; and (iii) the appellant had made an extra-judicial confession to two witnesses when arrested. There was no dispute in regard to the first circumstance and the third circumstance was held not satisfactorily proved. In this backdrop the question for consideration was whether the first and the second circumstances were sufficient to convict the appellant. This Court, therefore, observed that a few small bloodstains could be of the appellant himself and in the absence of evidence regarding blood group it cannot conclusively connect the bloodstain is with the blood of the deceased. In these circumstances this Court refused to draw any inference of guilt on the basis of the said circumstance since it was not 'conclusive' evidence. This Court, however, did not go so far as to say that such a circumstance does not even provide a link in the chain of circumstances on which the prosecution can place reliance. In the second case also this Court did not consider the evidence regarding the find of human blood on the knife sufficient to convict the appellant in the absence of determination of blood group since the evidence of PW 2 was found to be uninspiring and there was no other circumstance to connect him with the crime. **In this case we have the direct testimony of PW 1 Komal Chand, besides the testimony of PWs 3 and 4 which we have considered earlier. The find of**

human blood on the weapon and the pant of the appellant lends corroboration to the testimony of PW 1 Komal Chand when he states that he had seen the appellant inflicting a knife blow on the deceased. The appellant has not explained the presence of human blood on these two articles. We are, therefore, of the opinion that the aforesaid two decisions turned on the peculiar facts of each case and they do not lay down a general proposition that in the absence of determination of blood group the find of human blood on the weapon or garment of the accused is of no consequence. We, therefore, see no substance in this contention urged by Mr. Lalit.”

100. Further, the Hon'ble Apex Court in the case of *R. Shaji v. State of Kerala* reported in (2013) 14 SCC 266 has held as under: -

“31. A failure by the serologist to detect the origin of the blood due to disintegration of the serum does not mean that the blood stuck on the axe could not have been human blood at all. Sometimes it is possible, either because the stain is insufficient in itself, or due to hematological changes and plasmatic coagulation, that a serologist may fail to detect the origin of the blood in question. However, in such a case, unless the doubt is of a reasonable dimension which a judicially conscientious mind may entertain with some objectivity, no benefit can be claimed by the accused in this regard. Once the recovery is made in pursuance of a disclosure statement made by the accused, the matching or non-matching of blood group(s) loses significance.”

101. The aforesaid judgments were followed by the Hon'ble Apex Court in a very case of *Balwan Singh vs. The State of Chhattisgarh and*

Anr. Reported in **(2019) 7 SCC 781**. The relevant paras are reproduced as under:

*“12. The cases discussed above highlight the burden that the prosecution would ordinarily have to discharge, depending on the other facts and circumstances of the case, for the evidence relating to recovery to be considered against the accused. **At the same time, as mentioned above, we are conscious of the fact that it may not always be possible to inextricably link the bloodstains on the items seized in recovery to the blood of the deceased, due to the possibility of disintegration of bloodstains on account of the time-lapse in carrying out the recovery.** For this reason, in **Prabhu Dayal v. State of Rajasthan, (2018) 8 SCC 127**, where one of us (Mohan M. Shantanagoudar J.) had the occasion to author the judgment, this Court, relying on Teja Ram (supra), had held **that the failure to determine the blood group of the bloodstains collected from the scene of offence would not prove fatal to the case of the prosecution.** In **Prabhu Dayal case (supra)**, although the FSL report could not determine the blood group of the bloodstains on account of disintegration, the report clearly disclosed that the bloodstains were of human origin, and the chain of circumstantial evidence was completed by the testimonies of the other witnesses as well as the reports submitted by the Ballistic Expert and the Forensic Science Laboratory regarding the weapon used to commit murder.*

*13. From the aforementioned discussion, we can summarise that if the recovery of bloodstained articles is proved beyond reasonable doubt by the prosecution, and if the investigation was not found to be tainted, **then it may be sufficient if the prosecution shows that the blood found on the articles is of human origin though, even though the***

blood group is not proved because of disintegration of blood. The Court will have to come to the conclusion based on the facts and circumstances of each case, and there cannot be any fixed formula that the prosecution has to prove, or need not prove, that the blood groups match.”

102. In view of the ratio of the judgments cited above, as well as on the basis of material available on record, it is established, that the doctors who had conducted the postmortem of the deceased and the FSL report in the present case, corroborate the version of the prosecution witnesses and establishes the fact that weapon of offence (*knife*) which was recovered pursuant to the disclosure statement of Appellant/Rahul was used to kill the deceased by the appellants.

COMMON INTENTION ‘UNDER SECTION 34 OF THE INDIAN PENAL CODE’

103. Learned counsel for the appellants argued that the prosecution failed to prove that the appellants shared common intention to commit the alleged offence and hence, they can not be held guilty for the offence punishable under Section 34 IPC.
104. Before delving into the merits of the case, we deem it appropriate to discuss the relevant provisions which are involved in the present case. Section 34 of the IPC reads as under:

“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.”

105. To bring an offence within the ambit of Section 34 IPC, the following factors are necessary to be present there:
- (1) The criminal act (consisting of a series of acts) should have been done, not by one person, but more than one person.
 - (2) Doing of every such individual act cumulatively resulting in the commission of criminal offence should have been in furtherance of the common intention of all such persons.
106. Therefore, in order to constitute an offence under Section 34 IPC, the accused is to be fastened with liability on the strength of Section 34 IPC, that they should have done some act which has nexus with the offence. Such an act need not be very substantial. It is enough that the act is only for guarding the scene for facilitating the crime. The distinction between a “*common intention*” and a “*similar intention*” which is real and substantial, is also not to be lost sight of. The common intention implies a prearranged plan or a plan developed on the spur of the moment. Such common intention which is developed on the spur of the moment is different from the similar intention actuated by a number of persons at the same time.
107. In other words, the act need not necessarily be overt, even if it is only a covert act, it is sufficient, provided such a covert act is proved to have been done by the co-accused in furtherance of the common intention. Even an omission can, in certain circumstances, amount to an act. So, the act mentioned in Section 34 IPC need not be an overt

act, even an illegal omission to do a certain act in a certain situation can amount to an act.

108. The Apex Court in the case of *Suresh & anr V. State of UP* reported in **2001 3 SCC 673**, has held as under: -

“37. However, in view of the importance of the matter, insofar as the interpretation of Section 34 of the Indian Penal Code is concerned, we have chosen to express our views in the light of consistent legal approach on the subject throughout the period of judicial pronouncements. For the applicability of Section 34 to a co-accused, who is proved to have common intention, it is not the requirement of law that he should have actually done something to incur the criminal liability with the aid of this section. It is now well settled that no overt act is necessary to attract the applicability of Section 34 for a co-accused who is otherwise proved to be sharing common intention with the ultimate act done by any one of the accused sharing such intention.

38. Section 34 of the Indian Penal Code recognizes the principle of vicarious liability in criminal jurisprudence. It makes a person liable for action of an offence not committed by him but by another person with whom he shared the common intention. It is a rule of evidence and does not create a substantive offence. The section gives statutory recognition to the commonsense principle that if more than two persons intentionally do a thing jointly, it is just the same as if each of them had done it individually. There is no gainsaying that a common intention presupposes prior concert, which requires a prearranged plan of the accused participating in an offence. Such preconcert or preplanning may develop on the spot or during the course of commission of the offence but the crucial test is that such plan must precede the act constituting an

offence. Common intention can be formed previously or in the course of occurrence and on the spur of the moment. The existence of a common intention is a question of fact in each case to be proved mainly as a matter of inference from the circumstances of the case.

39. The dominant feature for attracting Section 34 of the Indian Penal Code (hereinafter referred to as “the Code”) is the element of participation in absence resulting in the ultimate “criminal act”. The “act” referred to in the later part of Section 34 means the ultimate criminal act with which the accused is charged of sharing the common intention. The accused is, therefore, made responsible for the ultimate criminal act done by several persons in furtherance of the common intention of all. The section does not envisage the separate act by all the accused persons for becoming responsible for the ultimate criminal act. If such an interpretation is accepted, the purpose of Section 34 shall be rendered infructuous.”

109. The aforesaid judgment was followed by the Apex Court in the case of *Asif Khan v. State of Maharashtra & Anr* reported in **2019 5 SCC**

210. The relevant paras are reproduced as under:

19. The test for applicability of Section 34 in a fact situation of an offence has been clearly and categorically laid down by this Court. Section 34 IPC provides as follows:

“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.”

20. The judgment of the Privy Council in Mahbub Shah v. King Emperor [Mahbub Shah v. King Emperor, 1945 SCC OnLine PC 5 : (1944-45) 72 IA 148 : AIR 1945 PC

118] has elaborately considered the ingredients under Section 34 and the said judgment of the Privy Council has been relied on and approved by this Court time and again. **The Privy Council in the above case laid down that under Section 34, the essence of that liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention.** In para 13, the following has been laid down:

“13. In 1870, it was amended by the insertion of the words “in furtherance of the common intention of all” after the word “persons” and before the word “each,” so as to make the object of the section clear. Section 34 lays down a principle of joint liability in the doing of a criminal act. The section does not say “the common intentions of all” nor does it say “an intention common to all”. Under the section, the essence of that liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. To invoke the aid of Section 34 successfully, it must be shown that the criminal act complained against was done by one of the accused persons in the furtherance of the common intention of all; if this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone. This being the principle, it is clear to their Lordships that common intention within the meaning of the section implies a pre-arranged plan, and to convict the accused of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan. As has been often observed, it is difficult if not impossible to procure direct evidence to prove the intention of an individual; in most cases it has to be inferred from his act or conduct or other relevant circumstances of the case.”

21. In Pandurang v. State of Hyderabad [Pandurang v. State of Hyderabad, AIR 1955 SC 216 : 1955 Cri LJ 572] , Vivian Bose, J., speaking for the Bench considered the

ingredients of Section 34 and relying on the Privy Council judgment in *Mahbub Shah v. King Emperor* [*Mahbub Shah v. King Emperor*, 1945 SCC OnLine PC 5 : (1944-45) 72 IA 148 : AIR 1945 PC 118] laid down the following in paras 31 to 33: (*Pandurang case* [*Pandurang v. State of Hyderabad*, AIR 1955 SC 216 : 1955 Cri LJ 572] , AIR pp. 221-22)

*“31. As we have just said, the witnesses arrived at a time when the beating was already in progress. They knew nothing about what went before. We are not satisfied that Tukaram is proved to have done anything except be present, and even if it he accepted that Nilia aimed a blow at Ramchander's thigh he was so half-hearted about it that it did not even hit him; and in Pandurang's case, though armed with a lethal weapon, he did no more than inflict a comparatively light head injury. **It is true they all ran away when the eyewitnesses arrived and later absconded, but there is nothing to indicate that they ran away together as a body, or that they met afterwards.** Rasikabai says that the “accused” raised their axes and sticks and threatened her when she called out to them, but that again is an all-embracing statement which we are not prepared to take literally in the absence of further particulars. People do not ordinarily act in unison like a Greek chorus and, quite apart from dishonesty, this is a favourite device with witnesses who are either not mentally alert or are mentally lazy and are given to loose thinking. They are often apt to say “all” even when they only saw “some” because they are too lazy, mentally, to differentiate. **Unless therefore a witness particularises when there are a number of accused it is ordinarily unsafe to accept omnibus inclusions like this at their face value. We are unable to deduce any prior arrangement to murder from these facts.***

32. Now in the case of Section 34 we think it is well established that a common intention presupposes prior concert. It requires a pre-arranged plan because before a man can be vicariously convicted

for the criminal act of another, the act must have been done in furtherance of the common intention of them all: Mahbub Shah v. King Emperor [Mahbub Shah v. King Emperor, 1945 SCC OnLine PC 5 : (1944-45) 72 IA 148 : AIR 1945 PC 118] . Accordingly there must have been a prior meeting of minds. Several persons can simultaneously attack a man and each can have the same intention, namely the intention to kill, and each can individually inflict a separate fatal blow and yet none would have the common intention required by the section because there was no prior meeting of minds to form a pre-arranged plan. In a case like that, each would be individually liable for whatever injury he caused but none could be vicariously convicted for the act of any of the others; and if the prosecution cannot prove that his separate blow was a fatal one he cannot be convicted of the murder however clearly an intention to kill could be proved in his case: Barendra Kumar Ghosh v. King Emperor [Barendra Kumar Ghosh v. King Emperor, 1924 SCC OnLine PC 49 : (1924-25) 52 IA 40] and Mahbub Shah v. King Emperor [Mahbub Shah v. King Emperor, 1945 SCC OnLine PC 5 : (1944-45) 72 IA 148 : AIR 1945 PC 118] . As their Lordships say in the latter case, ‘the partition which divides their bounds is often very thin: nevertheless, the distinction is real and substantial, and if overlooked will result in miscarriage of justice’.

33. The plan need not be elaborate, nor is a long interval of time required. It could arise and be formed suddenly, as for example when one man calls on bystanders to help him kill a given individual and they, either by their words or their acts, indicate their assent to him and join him in the assault. There is then the necessary meeting of the minds. There is a pre-arranged plan however hastily formed and rudely conceived. But pre-arrangement there must be and premeditated concert. It is not enough, as in the latter Privy Council case, to have the same intention independently of each other e.g.

the intention to rescue another and, if necessary, to kill those who oppose.

22. *The Constitution Bench of this Court in Mohan Singh and Anr. Vs. State of Punjab, AIR 1963 SC 174 had again reiterated the ingredients of Section 34. Constitution Bench has also relied on and approved the Privy Council judgment in Mehbub Shah Vs. Emperor (supra) noticing the essential constituents of vicarious liability under Section 34, Justice Gajendragadkar speaking for the Bench laid down following in Paragraph No.13:-*

“13.....The essential constituent of the vicarious criminal liability prescribed by Section 34 is the existence of common intention. If the common intention in question animates the accused persons and if the said common intention leads to the commission of the criminal offence charged, each of the persons sharing the common intention is constructively liable for the criminal act done by one of them. Just as the combination of persons sharing the same common object is one of the features of an unlawful assembly, so the existence of a combination of persons sharing the same common intention is one of the features of Section 34. In some ways the two sections are similar and in some cases they may overlap. But, nevertheless, the common intention which is the basis of Section 34 is different from the common object which is the basis of the composition of an unlawful assembly. Common intention denotes action-in-concert and necessarily postulates the existence of a prearranged plan and that must mean a prior meeting of minds. It would be noticed that cases to which Section 34 can be applied disclose an element of participation in action on the part of all the accused persons. The acts may be different; may vary in their character, but they are all actuated by the same common intention. It is now well settled that the common intention required by Section 34 is different from the same intention or similar intention. As has been observed by the Privy Council

in Mahbub Shah v. King-Emperor⁴ common intention within the meaning of Section 34 implies a pre-arranged plan, and to convict the accused of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the prearranged plan and that the inference of common intention should never be reached unless it is a necessary inference deducible from the circumstances of the case”

110. In view of the legal position laid down in the judgments cited above, as well as on the basis of evidence borne out from the previous part of the judgment, it is established that all the appellants in furtherance of their common intention with each other, were actively involved in the commission of the alleged offence. Hence, the argument raised by learned counsel for the appellants that there was no common intention under Section 34 IPC among the appellants to commit the alleged offence holds no ground.

CONCLUSION

111. In our view, in the instant appeals before us, coupled with the law laid down by the Apex Court unerringly lead to one conclusion and that is the guilt of the appellants. Accordingly, in the background of such a scenario, we are of the view that the prosecution has succeeded in establishing its case through oral evidence of the eye witnesses, which were found to be creditworthy and reliable and also consistent with the testimonies of other material witnesses, that the appellants in furtherance of their common intention committed the murder of the deceased.

112. Hence, the prosecution has been able to prove its case beyond all reasonable doubts and we find no infirmity in the judgment passed by the learned Trial Court and we see no cogent reason to interfere with the same. The conviction of the appellants under section 302/34 of the Indian Penal Code is upheld. The appellants are stated to be in Judicial Custody. Let them serve their sentence.
113. Accordingly, the appeals are dismissed
114. Trial Court Record be returned along with a copy of this order.
115. A copy of this order be also sent to Superintendent of Jail, Tihar Jail Delhi.

Crl.M.(BAIL) 574/2019 in CRL.A. 379/2019,
Crl.M.(BAIL) 851/2019 in CRL.A. 619/2019,
Crl.M.(BAIL) 897/2019 in CRL.A. 642/2019,
Crl.M.(BAIL) 834/2019 in CRL.A. 606/2019,
Crl.M.(BAIL) 838/2019 in CRL.A. 610/2019 and
Crl.M.(BAIL) 1177/2019 in CRL.A. 775/2019

1. In view of the above order passed in the appeals, the present applications are rendered infructuous.
2. Applications stand disposed off.

SANGITA DHINGRA SEHGAL, J.

MANMOHAN, J.

NOVEMBER 6, 2019

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