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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment reserved on: 19th November, 2019
Judgment pronounced on: 6th January, 2020

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CRL.A. 778/2019

KRISHNA & ANR.

..... Appellant

Through: Ms.Ritu Gauba, Advocate.

versus

STATE (GOVT OF NCT OF DELHI)

..... Respondent

Through: Ms.Aashaa Tiwari, APP for the State. SI
Mr. Zeeshan Hashmi, Advocate with
Mohd. Adil, Advocate for Complainant

WITH

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CRL.A. 882/2019

CHAMAN

..... Appellant

Through: Ms. Kavita Jha, Advocate.

versus

STATE

..... Respondent

Through: Ms.Aashaa Tiwari, APP for the State. SI
Mr. Zeeshan Hashmi, Advocate with
Mohd. Adil, Advocate for Complainant.

AND

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CRL.A. 924/2019

SWARN KANTA

..... Appellant

Through: Mr.Adit S. Pujari with Ms.Tusharika
Mattoo, and Mr. Viren Bansal, Advocates

versus

THE STATE

..... Respondent

Through: Ms.Aashaa Tiwari, APP for the State. SI
Mr. Zeeshan Hashmi, Advocate with
Mohd. Adil, Advocate for Complainant.

AND

+ CRL.A. 961/2019

RAJ KUMAR

..... Appellant

Through: Mr. S.B. Dandapani, Advocate.

versus

STATE

..... Respondent

Through: Ms.Aashaa Tiwari, APP for the State. SI
Mr. Zeeshan Hashmi, Advocate with
Mohd. Adil, Advocate for Complainant.

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

J U D G M E N T

SANGITA DHINGRA SEHGAL, J

1. Present appeals are directed against a common judgment dated 20.05.2019 and order on sentence dated 25.05.2019 passed by the learned Additional Sessions Judge-02, West District, Delhi in Sessions Case No. 56627/2016 arising out of FIR No. 280/2012 registered at Police Station Khyala, Delhi under Sections 302/34 of the Indian Penal Code, 1860 (hereinafter referred to as 'IPC') whereby the appellants were convicted and were sentenced to rigorous imprisonment for life alongwith a fine of Rs.5,000/-, in default of payment of fine to further undergo rigorous imprisonment for a period of three months.

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

“Accused Krishna, Swarn Kanta, Puran Chand, Chaman and Raj Kumar were put on trial for the allegations against them that all the accused persons in furtherance of their common intention committed the murder of one Vijay Arora by pouring kerosene oil upon him lighting him on fire and putting him inside the shop and then putting the shutter of the shop down thereby they were charged for offence punishable under section 302/34 IPC.

The brief facts arising out of the present case are that on receipt of DD No. 12A dated 16.11.2012, IO Inspector R.K. Ojha alongwith HC Phool Chand and PSI Anoop reached at the spot i.e. Shop No. 147-148, Guru Nanak Market, Khyala where the shutter of the shop was open on the west direction in the corner of the said shop, one person in burnt condition was found dead and inside the shop as well as outside the shop, some oil smelling like kerosene oil was found spiller all over there. One person namely Saurabh Arora s/o the deceased Vijay Arora met them and the IO made enquiries from him and recorded his statement wherein he alleged that his father Vijay Arora was running spare parts shop at Shop No. 147-148, Guru Nanak Market, Khyala and in front of the said shop, Puran @ Karan had placed earthen pots (matke) for sale. His father had complained against it to the MCD and MCD removed his earthen pots. On the night of 15.11.2012, Krishna, Puran, Raj, Chaman and Kanta had again placed the earthen pots in front of the shop. In the morning on 16.11.2012 at about 8.20 am, when his father came there to open his shop, he asked them to remove them. Thereafter, Krishan and Puran caught hold of his father and Chaman and Kanta poured oil over him and Raj lit fire and thereafter, put the shutter of

the shop down. The shop also caught fire. When he rushed to the shop, then these people stopped him. Krishna, Puran, Raj, Chaman and Kanta had in a planned manner killed his father by setting him on fire. He also stated that these people had earlier also quarrel with his father. Thereafter, on the basis of this statement, Insp. R.K. Ojha prepared rukka and got the FIR registered U/S 302.34 IPC through HC Phool Chand. During investigation, IO called the Crime Team at the spot which inspected the site and prepared its report CMT/SOC No. 1124 dated 16.11.2012 and submitted to IO. Thereafter, IO prepared the site plan, exhibits were lifted from the spot of the crime and seized. Expert team from FSL Rohini also called at the spot which inspected the site and prepared its report Vide No. 2012/SOC/153/CHEM No. 31/12 dated 28.12.2.102 (sic). The post mortem on the body of deceased was got conducted and thereafter, body was handed over to his relatives. As per the PM report, the cause of death is due to asphyxia cause by inhalation of suffocating/irrespirable gases into respiratory passage subsequent to burning of kerosene, body and other neighbouring objects into place of occurrence (closed space) i.e room/shop as alleged history available. After the post mortem, the exhibits were seized and taken into possession by the IO. The clothes worn by the deceased were handed over by the complainant which were seized and taken into police possession. Exhibits were sent to FSL Rohini. Statement of one Satya Prakash Gupta was recorded u/s 161 Cr.P.C. Efforts were made to arrest the accused persons. On 22.11.2012, accused Krishna and Swarn Kanta were apprehended and detailed interrogation was made from them. During interrogation, it was revealed that accused Krishna and deceased were having good relations between them and because of this, deceased had allowed

accused Krishna to place earthen pots in front of his shop but gradually, because of their relations, family life of deceased got disturbed, due to which their relationship got bitter and deceased wanted to remove the earthen pots of Krishna and because of this reason, they used to have frequent quarrels. In this regard, police complaint was also lodged. Subsequently, Krishna removed here earthen pots but on 16.11.2012, in a pre planned manner, all the accused persons killed the deceased.

On 09.01.2013, accused Puran Prasad, Chaman Lal and Raj Kumar surrendered before the court and after seeking permission, all three accused persons were interrogated, arrested and their disclosure statements were recorded. Their disclosure statements also corroborated the version given by accused Krishna and Swarn Kanta on the same lines. IO obtained one day PC remand of the accused persons in order to recover the clothes worn by them on the date of incident, however, they disclosed that the said clothes were thrown in the drain (ganda Nala) and hence same could not be recovered. Scaled site plan of the crime spot was got prepared by draftsman.”

3. To bring home the guilt of the accused persons, the prosecution has examined 25 witnesses in all. The incriminating evidence and circumstances were put to the Appellants during their statement recorded under Section 313 of Cr.P.C wherein they claimed to have been falsely implicated in the present case and examined one witness in their defence.
4. 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.

5. Learned counsel for the Appellants opened their submissions by contending that the impugned judgment dated 20.05.2019 is based on conjectures and surmises and the same is against the facts and the settled proposition of law.
6. They further contended that the learned Trial Court has ignored and omitted the material evidence and has disregarded the cogent evidence in favour of the appellants and has failed to appreciate the basic issue, as to how the appellants have been held to be the actual perpetrators of the crime even though there is no evidence on record to establish that the appellants were involved in the commission of the alleged offence.
7. Learned counsel for the Appellants further contended that the learned Trial Court erred in relying on the testimony of PW-10 Saurabh Arora (*Son of the Deceased*) who is a planted witness and there are major contradictions and discrepancies in his testimony. Moreover, his evidence cannot be exclusively considered as trustworthy and reliable because he was closely related to the deceased and is an interested witness, with a very strong possibility of him being tutored. To substantiate their arguments, learned Counsel for the Appellants relied upon the case of ***Hasan Murtuza v. State of Haryana*** reported in **2002 3 SCC 1**; ***State of Uttar Pradesh v. Om Pal & ors*** reported in **2018 SCC OnLine SC 325**; ***Abdul Razak and ors v. State of Karnataka*** reported in **2015 6 SCC 282**.
8. Learned Counsel for the Appellants, further contended that initial statement (Ex.PW10/A) made by PW-10 Saurabh Arora (*Son of the deceased*) is inadmissible as the same is hit by the bar under Section 162 Cr.P.C. It was further submitted that the investigation in the

present case had commenced on the basis of the first PCR call made at 8.24.36 am which should have been treated as the primary source for registration of the FIR instead of the initial statement (Ex.PW10/A) of PW-10 Saurabh Arora recorded at 11.35 am.

9. Learned Counsel for the Appellants further argued that the police is required to carry out a fair and thorough investigation and collect favorable and unfavorable evidence against a suspect, but in the instant case there are serious discrepancies in the investigation conducted by the police which go to the root of the matter and the learned Trial Court erred in ignoring the effect of the defective investigation. Learned counsel while highlighting the lacunae in the investigation pointed out: -

- That the prosecution has heavily relied on the testimony of PW-10 Saurabh Arora (*Son of the deceased*) for falsely implicating the appellants in the commission of the alleged offence and has completely ignored the version of the DW-1 (*Mohd. Salauddin Ansari*). The investigating officer has wrongly projected a case of suicide into a case of murder because as per the testimony of the aforesaid Defence Witness the deceased had a suicidal tendency due to the matrimonial discord with his wife.
- Further, as per the testimony of DW-1 (*Mohd. Salauddin Ansari*) the deceased had stated to his wife that '*today I will finish all the root cause of the quarrels*' right before he immolated himself, however being an important-link witness, the wife of the deceased was not produced as defence witness

nor were her call detail records secured by the investigating officer.

- Moreover, the Investigating Agency has failed to examine the person who had made the second call from mobile number 9268317784, stating that '*A person is trying to immolate himself by pouring kerosene oil at Shop No. 147-148, Guru Nanak market, Khyala*' and for causing prejudice to the appellants the prosecution has deliberately not examined Satya Prakash Gupta (*Pradhan of Market*).
- Further, as per the version of the prosecution, the site plan was prepared by the investigating agency at the instance of PW-10 Saurabh Arora (*Son of the deceased*), however the same does not bear his signature and the Investigating Agency has failed to secure the fingerprints and the CCTV footage from the place of incident and no endeavour was made to procure the Call Detail Records and the Cell ID Location of the deceased.
- As per the version of the prosecution, a large number of people had gathered at the place of the incident and had attempted to set the house of the appellants (*Krishna, Puran, Chaman, and Rajkumar*) on fire. However, despite a large crowd being present at the place of incident, no independent witness was examined by the investigating agency.
- Further, the version of the investigating agency had left a glaring loop hole in the investigation as it was not certain whether the deceased was burnt with kerosene or Mobil Oil.

More so, no kerosene oil was detected from the seized exhibits, as per the FSL report.

10. In support of their contention, learned counsel for the Appellant relied upon the case of ***Hemraj & ors vs State of Haryana*** reported in ***AIR 2005 SC 2110***; ***State of UP vs. Bhagwant Kishori Joshi*** reported in ***AIR 1964 SC 221***; ***TN Antony vs State of Kerela & ors*** reported in ***2001 SCC Cri 1048***; ***Superintendent of Police, CBI & ors vs Tapan Kumar Singh*** reported in ***2003 SCC Cri 1305***; ***Deo Pujan Thakur vs State of Bihar*** reported in ***2005 Cri LJ 1263***; ***Santa Singh vs State of Punjab*** reported in ***AIR 1956 SC 526***; ***Jagdish Narain and Anr vs State of UP*** reported in ***(1996) 8 SCC 199***.
11. Learned counsel for the Appellants further submitted that neither does the medical & scientific evidence prove that the alleged incident was homicidal, suicidal or accidental in nature nor does it find support from the testimony of the doctor, who had conducted the post-mortem of the deceased. To substantiate their arguments, learned counsel for the appellants relied upon the case of ***Pavan Kumar Parasnath Trivani vs State of Gujarat*** reported in ***1999 SCC Cri 352***; ***Mulakhraj and ors vs Satish Kumar & ors*** reported in ***1992 SCC Cri 482***; ***Arvind Singh vs State of Bihar*** reported in ***2001 SCC Cri 1148***; ***Bhim Singh vs State of Haryana*** reported in ***2003 SCC Cri 1469***.
12. Learned Counsel for the appellants further contended that the prosecution had failed to prove that the accused persons shared a common intention or motive to commit the alleged offence and hence they would not fall within the purview of the offence punishable under Section 34 of IPC. It was further submitted that the learned Trial Court

failed to appreciate the fact that placing of matkas on a patri in front of the deceased's shop was a trivial reason to commit the murder of the deceased; as such the prosecution has miserably failed to prove the motive for commission of the alleged offence. In support of their contention, learned counsel for the Appellant relied upon the case of ***Dalip Singh & Anr v. State of Punjab*** reported in ***AIR 1953 SC 364***.

13. Learned Counsel for the Appellants has lastly urged that the trial court has failed to properly appreciate the facts and circumstances of the case; hence, the impugned judgment is liable to be set aside.
14. 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 the medical/scientific evidence are corroborative in nature and the prosecution has been able to prove its case beyond reasonable doubt.
15. Ms. Tiwari further submitted that the testimonies of prosecution witnesses are corroborating and trustworthy and have established the incident without any iota of doubt, describing the detailed role played by each appellant in the commission of the alleged crime. She further submitted that the testimony of PW-10 Saurabh Arora is consistent and corroborative in nature and minor contradictions and discrepancies which have arisen in his testimony can be ignored, due to lapse of time or due to mental disposition such as shock and horror at the time of the incident. To substantiate her arguments, learned APP for State relied

upon the case of *Masalti v. State of Uttar Pradesh* reported in *AIR 1965 SC 202*; *Mano v. State of Tamil Nadu* reported in **2007 13 SCC 795**; *Rana Pratap and ors v. State of Haryana* reported in *AIR 1983 SC 680*.

16. Learned APP for the State further submitted that the first telephonic message which was made immediately after the alleged incident to the police cannot be treated as the basis of FIR as the same was solely made for the reason to get the police officials at the scene of crime and the aforesaid cryptic telephonic message received by the police agency will not constitute the basis of registration of FIR. To substantiate her arguments, learned APP for the State relied upon the case of *Sidhartha Vashisht @ Manu Sharma v. State (NCT of Delhi)* reported in *AIR 2010 SC 2352*.
17. Learned APP for State further submitted that the medical/scientific evidence is corroborating the version of the prosecution as it is evidently established from the post mortem report (Ex.PW10/A) that the deceased was burnt alive and further as per the FSL report kerosene oil was detected from the exhibits seized from the place of incident, which evidently supports the version of the prosecution that kerosene oil was used to burn the deceased.
18. 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. She further submitted that though Satya Prakash Gupta (*Pradhan of Market*) was not examined as a prosecution witness, yet the same has not caused any prejudice to

the appellants, because overwhelming evidence is available on record, the failure to examine material or independent witness is not always fatal to the case of prosecution. To substantiate her arguments, learned APP for State relied upon the case of *Rohtash Kumar v. State of Haryana* reported in (2013) 14 SCC 434; *Takhaji Hiraji v. Thakore Kubersing Chamansingh & Ors.* reported in (2001) 6 SCC 145.

19. Based on these submissions Counsel for the State urged that this Court should not interfere with the well-reasoned judgment passed by the learned Trial Court convicting the appellants for the alleged offence.
20. 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.

Cryptic Telephonic Message

21. Learned counsel for the appellants, during the course of arguments had contended that initial statement(Ex.PW10/A) made by PW-10 Saurabh Arora(*Son of the deceased*) is inadmissible being hit by the legal bar under Section 162 Cr.P.C. It was further submitted that the investigation in the present case had commenced on the basis of the first PCR call made at 8.24.36 am and the same should be treated as the primary source for registration of FIR and not the initial statement (Ex.PW10/A) of PW-10 Saurabh Arora recorded at 11.35am.
22. The Hon'ble Apex Court in plethora of judgments has held that a cryptic telephonic message cannot be treated as the basis of First Information Report under the Code of Criminal Procedure and the same is made solely for the reason of getting the police to the scene of

crime. The Hon'ble Apex Court in the case of *State Of A.P vs V.V. Panduranga Rao* reported in **2009 15 SCC 211** has held as under: -

“9. Learned counsel for the appellant State submitted that the reasons recorded by the High Court to direct acquittal are not sustainable in law. It is stated that the message purported to have been given over telephone was a cryptic one and, therefore, cannot be treated as an FIR. Learned counsel for the respondent supported the judgment of the High Court.

10. Certain facts have been rightly noted by the High Court. Where the information is only one which required the police to move to the place of occurrence and as a matter of fact the detailed statement was recorded after going to the place of occurrence, the said statement is to be treated as FIR. But where some cryptic or anonymous oral message which did not in terms clearly specify a cognizable offence cannot be treated as FIR. The mere fact that the information was the first in point of time does not by itself clothe it with the character of FIR. The matter has to be considered in the background of Sections 154 and 162 of the Code of Criminal Procedure, 1973 (in short “the Code”). A cryptic telephonic message of a cognizable offence received by the police agency would not constitute an FIR.

11. “7. ... The object and purpose of giving [a] telephonic message is not to lodge the first information report, but to request the officer in charge of the police station to reach the place of occurrence. On the other hand, if the information given on telephone is not cryptic and on the basis of that information, the officer-in-charge, is prima facie satisfied about the commission of a cognizable offence and he proceeds from the police station after recording such information, to investigate such

offence then any statement made by any person in respect of the said offence including details about the participants, shall be deemed to be a statement made by a person to the police officer 'in the course of an investigation' covered by Section 162 of the Code. That statement cannot be treated as first information report. [To put it differently] any telephonic information about the commission of a cognizable offence irrespective of the nature and details of such information cannot be treated as first information report." [Ed.: As observed in *Ramsinh Bavaji Jadeja v. State of Gujarat*, (1994) 2 SCC 685, p. 689, para 7.]

23. Further the Apex Court in the case of *Manu Sharma v. State (NCT of Delhi)* reported in (2010) 6 SCC 1 has held as under:-

“102. It was further contended by the learned Senior Counsel for the appellant-accused that PW 2 Shyan Munshi's statement could not be looked into as the same is hit by Section 162 CrPC and on the other hand the defence seeks to rely on his testimony. In support of the above claim, the learned Senior Counsel for the appellant relying upon the judgments of this Court in State of U.P. v. Bhagwant Kishore Joshi [AIR 1964 SC 221 : (1964) 1 Cri LJ 140] and King Emperor v. Khwaja Nazir Ahmad [(1943-44) 71 IA 203 : AIR 1945 PC 18] contended that investigation of an offence can start either on information or otherwise and that the receipt and recording of FIR is not a condition precedent to the setting in motion of criminal investigation.

103. Placing reliance upon the said judgments, it has been further argued by the learned Senior Counsel for the appellant that in the present case the three cryptic telephonic messages received by the police at around 2.20 a.m. on 30-4-1999 should be treated as FIR upon which the investigation started

and, therefore, the statement of PW 2 recorded by the police later on around 3.40 a.m. could not be treated as FIR but a statement under Section 162 CrPC.

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105. The judgment in Khwaja Nazir Ahmad [(1943-44) 71 IA 203: AIR 1945 PC 18] is also distinguishable as the law laid down in the said case does not concern the issue involved in the present case. Cryptic telephonic messages could not be treated as FIR as their object only is to get the police to the scene of offence and not to register the FIR. The said intention can also be clearly culled out from a bare reading of Section 154 of the Criminal Procedure Code which states that the information, if given orally, should be reduced in writing, read over to the informant, signed by the informant and a copy of the same be given free of cost to the informant. In the case on hand, the object of persons sending the telephonic messages including PW 70 Rohit Bal was only to bring the police to the scene of offence and not to register the FIR.

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107. Learned Senior Counsel for the appellant also relied upon the judgment of the Gujarat High Court in Mehr Vajsi Deva v. State of Gujarat [AIR 1965 Guj 143] . A perusal of the said judgment shows that the details of the offence given by the telephonic message in the said judgment clearly described that “one man was assaulted by means of an axe at Sudama Chowk”, on the other hand, in the case on hand the telephonic message did not give any details of the offence or accused and the same was a vague information. The said judgment should be read per incuriam in view of a plethora of judgments of this Court wherein it has categorically held that cryptic telephonic messages

not giving the particulars of the offence or accused are bereft of any details made to the police only for the purpose of getting the police at the scene of offence and not for the purpose of registering an FIR.

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109. It was further pointed out by the defence that Ext. P 12-A wherein three PCR calls were recorded is the real FIR and the statement of PW 2 which was taken during investigation and got signed by him is not the FIR and is thus to be treated as a statement recorded under Section 161 CrPC and is hit by the bar under Section 162 CrPC. This argument is unacceptable since as observed in the earlier paragraph the telephone call from PW 70 was too cryptic to amount to an FIR.

110. At this juncture, it is useful to refer to the decision of this Court in State of U.P. v. P.A. Madhu [(1984) 4 SCC 83 : 1984 SCC (Cri) 598] , wherein this Court has not accepted a similar argument and held as under: (SCC pp. 84-87, paras 5 & 11)

“5. To begin with, it appears that there was some dispute about the dearness allowance claim of the labour from the management which was referred to the Industrial Tribunal. The respondent, who was the Secretary of the Union, was looking after the case on behalf of the workers, while PWs 5 and 7 were the officers appearing on behalf of the management before the Tribunal. The deceased, S.J. Sirgaonkar, was Deputy Personnel Manager of the Bombay Branch of M/s Hindustan Construction Company. He was shot dead by the respondent after he (deceased), along with the other officers of the management, had come out of the Tribunal's office at Meerut after filing their written statements. Thereafter one of the eyewitnesses, S.K. Gui (PW 7) asked someone to

give a telephone call to the police station, which was nearby, on receipt of which the police arrived at the spot, seized the pistol and took the accused and some of the witnesses to the police station where a formal FIR was registered. The panchnama was prepared and other formalities were, however, done at the spot.

11. Durga Das, DW 1 who was admittedly at the scene of the occurrence has stated that as the shooting started, PW 7 had given a telephonic message to the police station. The High Court by an implied process of reasoning has observed that if PW 7 had given the telephonic message he would have mentioned the name of the assailant because he was a full-fledged eyewitness but since his name had not been mentioned it is the strongest possible circumstance to discredit the prosecution case. We are, however, unable to agree with this somewhat involved reasoning of the High Court. In fact, DW 1 merely says that Gui telephoned to the police station about the firing and said something in English. The High Court seems to have presumed that from this the irresistible inference to be drawn is that Gui did not mention the name of the assailant of the deceased and on this ground alone the prosecution must fail. This argument is based on a serious error. In the first place, the telephonic message was an extremely cryptic one and could not be regarded as an FIR in any sense of the term. Secondly, assuming that Gui had given the telephonic message in utter chaos and confusion when shots after shots were being fired at the deceased, there was no occasion for Gui to have narrated the entire story of the occurrence. In fact, in his evidence Gui has denied that he personally telephoned the police but he stated that

he asked somebody to telephone the police which appears to be both logical and natural. Moreover, such a cryptic information on telephone has been held by this Court to be of no value at all. In Tapinder Singh v. State of Punjab [(1970) 2 SCC 113 : 1970 SCC (Cri) 328] this Court in identical circumstances observed thus: (SCC p. 117, para 4)

'4. ... The telephone message was received by Hari Singh, ASI Police Station, City Kotwali at 5.35 p.m. on 8-9-1969. The person conveying the information did not disclose his identity, nor did he give any other particulars and all that is said to have been conveyed was that firing had taken place at the taxi stand, Ludhiana. This was, of course, recorded in the daily diary of the police station by the police officer responding to the telephone call. But prima facie this cryptic and anonymous oral message which did not in terms clearly specify a cognizable offence cannot be treated as first information report. The mere fact that this information was the first in point of time does not by itself clothe it with the character of first information report.' ”

Similar views have been expressed in Tapinder Singh v. State of Punjab [(1970) 2 SCC 113 : 1970 SCC (Cri) 328] , Damodar v. State of Rajasthan [(2004) 12 SCC 336 : 2004 SCC (Cri) Supp 265] and Ramsinh Bavaji Jadeja v. State of Gujarat [(1994) 2 SCC 685 : 1994 SCC (Cri) 609] .

III. *It was argued and highlighted that since PW 2 Shyan Munshi has been confronted with his signed statement i.e. Exts. PW 2-A and B, the whole evidence goes in light of Zahiruddin v. Emperor [AIR 1947 PC 75] . Apart from the above decision reliance has further been*

Baburao Devaskar v. State of Maharashtra [(2007) 13 SCC 501 : (2009) 1 SCC (Cri) 212] , that a cryptic message given on telephone by somebody who does not disclose his identity may not satisfy the requirement of Section 154 of the Code of Criminal Procedure.

115. In view of the above discussion, the three telephonic messages received by the police around 2.25 a.m. on 30-4-1999 did not constitute the FIR under Section 154 of the Code and the statement of Shyan Munshi, PW 2 was rightly registered as the FIR.”

24. The aforesaid judgments were followed by the Apex Court in the case of *Yanob Sheikh v. State of West Bengal* reported in (2013) 6 SCC 428. The relevant para's is reproduced as under:

*“10. In *Manu Sharma v. State (NCT of Delhi)* [(2010) 6 SCC 1 : (2010) 2 SCC (Cri) 1385] , a Bench of this Court took the view that cryptic telephone messages could not be treated as FIRs as their object is only to get the police to the scene of offence and not to register the FIR. The said intention can also be clearly culled out from the bare reading of Section 154 of the Code which states that the information if given orally should be reduced to writing, read over to the informant, signed by the informant and a copy of the same be given to him free of cost. Similar view was also expressed by a Bench of this Court in *State of A.P. v. V.V. Panduranga Rao* [(2009) 15 SCC 211 : (2010) 2 SCC (Cri) 394] , where the Court observed as under: (*V.V. Panduranga Rao case* [(2009) 15 SCC 211 : (2010) 2 SCC (Cri) 394] , SCC p. 213, para 10)*

“10. Certain facts have been rightly noted by the High Court. Where the information is only one which required the police to move to the place of

occurrence and as a matter of fact the detailed statement was recorded after going to the place of occurrence, the said statement is to be treated as FIR. But where some cryptic or anonymous oral message which did not in terms clearly specify a cognizable offence cannot be treated as FIR. The mere fact that the information was the first in point of time does not by itself clothe it with the character of FIR. The matter has to be considered in the background of Sections 154 and 162 of the Code of Criminal Procedure, 1973 (in short 'the Code'). A cryptic telephonic message of a cognizable offence received by the police agency would not constitute an FIR."

11. Thus, the purpose of telephone call by PW 6, when admittedly he gave no details, leading to the recording of entry, Ext. 7, would not constitute the first information report as contemplated under Section 154 of the Code. The reliance placed by the learned counsel appearing for the appellant upon the provisions of Section 162 of the Code, is thus, not well-founded. Even in *Ravishwar Manjhi v. State of Jharkhand* [(2008) 16 SCC 561 : (2010) 4 SCC (Cri) 50], another Bench of this Court took the view that: (SCC p. 571, para 32)

"32. ... We are not oblivious of the fact that a mere information received on phone by a police officer without any details as regards the identity of the accused or the nature of injuries caused to the victims as well as the name of the culprits may not be treated as FIR, but had the same been produced, the nature of information received by the police officer would have been clear."

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14. In light of the above settled principle, we are unable to accept that Ext. 1/3 was a second FIR with regard to the same occurrence with similar details

and was hit by Section 162 of the Code. On the contrary, Ext. 7 was not a first information report upon its proper construction in law **but was a mere telephonic information inviting the police to the place of occurrence. Thus, we have no hesitation in rejecting this contention raised on behalf of the appellant.**

25. In the present case the police machinery was set into motion when on 16.11.2012 at about 8:24 am, PCR Control Room, PHQ, ITO received a call informing that “*Ek Admi Apne Upar Kerosene Ka Oil Dal Raha Hai*”. The said PCR form (Ex.PW24/A) has been proved by PW-24 HC Anil, who deposed that:

“On 16.11.2012, I was posted in PCR Control Room PHQ ITO. On that day, a call was received at 8:24 am in which the caller stated that “Ek Admi Apne Upar Kerosene Ka oil Dal Raha Hain” I had pass on the above said information on power 14, Power 15 and Tiger 48 and it was also passed on the concerned West Distt. The PCR form is Ex PW24/A.”

26. Subsequent thereto PW-9 HC Phool Chand received an information at 08:30 am from the Police Control Room, that “*a person has poured kerosene oil upon him in Shop No. 147, 148 near the Bus stand of 830 at Chhoti Sabzi Mandi*” and the same was registered as DD No. 12A (**Ex.PW-9/A**) at Police Station Khyala. English Translation of the relevant portion of DD No. 12A (**Ex.PW-9/A**) registered at Police Station Khyala is reproduced herein below: -

“The Duty Officer

*Information received through PCR Call and
departure*

Time: 08:30 AM

At this time, it is entered that W-50 operator has informed through telephonic call to the effect 'that Ct. Devesh No. 3652/PCR has informed that a person has poured Kerosin oil upon him in Shop No. 147, 148 near the Bus Stand of 830 at Chhoti Sabzi Mandi -9210848821'

The information so received from the PCR, was entered into the Roznamcha and a copy of the report after having being separated was handed over to HC Phool Chand No. 325/W for initiating proper action who alongwith PSI(?) Anoop Kumar left for the spot. The circumstances were apprised to the SHO who also left for the spot alongwith the accompanying staff, while seeing the gravity of the matter through Government vehicle no. DL1CJ-7405.

Scribed by HC/DO

HC Rahbeer Singh No. 442/W"

27. On receipt of DD No. 12A (Ex.PW-9/A), Head Constable Phool Chand along with PW-16 SI Anoop Kumar went to the place of incident and met with PW-10 Saurabh Arora (*Son of the deceased*). Relevant portion from the testimony of PW-9 HC Phool Chand is reproduced herein below:-

*"On 16.11.2012, I was posted at PS Khyala and on that day on receipt of call no. 12 A Ex.PW9/A I along with PSI anoop and SHO at about 8.30 am went to shop no. 1470148, near 830 bus stand, Guru Nanak Market, Khyala. **On reaching there we found one person was lying dead in burn condition in the shop and there was smell of kerosene oil/ mobil oil. Even the oil was also spotted. One Saurabh Arora met us***

there who identified the dead body as Vijay Arora. SHO recorded the statement of Saurabh Arora. IO/SHO prepared Rukka and handed over the same to me. I went to PS got lodged the FIR and returned to the spot at about 1.00pm with the copy of FIR and original rukka and handed over the same to SHO.”

28. Relevant portion from the testimony of PW-16 SI Anoop Kumar is reproduced herein below:-

“On 16.11.2012, I was posted at PS Khyala as Probational Sub-Inspector. On that day at about 8.30 am, a call vide DD no. 12A Ex. PW-9/A was received at PS Khyala and the same was marked to HC Phool Chand who was on emergency duty. SHO Insp. R.K. Ojha was also briefed about the said DD.

Thereafter, I alongwith Insp. R.K. Ojha and HC Phool Chand reached at the spot i.e. shop no. 147-148, Guru Nanak Market, Khayal, Delhi. On reaching over there, we found that shutter of the said shop was opened and one dead body in burnt condition was lying inside the said shop and smell of kerosene oil was also coming out from the dead body. Some substance like Mobil oil was spread over inside and outside of the said shop and smell of kerosene oil was also there in said mobil oil.

One person namely Sh. Saurabh Arora who is complainant in the present case, met us there. Ins. R.K. Ojha made inquiry from said person and recorded his statement. Same is already Ex.PW-10/A. Insp. R.K. Ojha also made endorsement on the said statement and thereafter he gave the rukka to HC Phool Chand and sent him to PS for registration of the FIR. After about one hour, HC Phool Chand came from PS after registration of the FIR in the present case and gave the rukka and FIR to Insp. R.K. Ojha whom the investigation was entrusted.”

29. Corroborating the version of the aforesaid police witnesses, PW-17 ACP RK Ojha has deposed that: -

*“On 16.11.2012, I was posted as SHO PS khayala. On that day at about 8.30 am, a call was received at PS vide DD no. 12A and the same was marked to HC Phool Chand as he was on emergency duty. The matter was brought into my notice and thereafter I alongwith HC Phool Chand, PSI Anoop reached the spot i.e. shop no. 147-148, Guru Nanak Market, Khyala near bus stand of route no. 830. **On reaching there, I found a male dead body in burnt condition inside the shop near shutter. There was liquid like mobil oil spread inside and outside the shop. A smell like kerosene oil was coming from the said mobil oil like liquid.***

One Saurabh Arora also met us and told that the deceased was his father namely Sh. Vijay Arora. I recorded his statement and same is already Ex.PW-10/A, bearing my signatures at point B and signatures of Saurabh at point A. I made an endorsement at point “D to D” on statement Ex.PW-3/B, bearing my signatures at point ‘C’. I gave the rukka to HC Phool Chand and sent him to PS for registration of the FIR. HC Phool Chand returned to the spot after about 1-1 ½ hour and gave me copy of FIR and original rukka.”

30. Perusal of the aforesaid testimony reveals that the initial statement of PW-10 Saurabh Arora (*Son of the deceased*) was recorded by PW-17 RK Ojha, subsequent to which the Rukka was prepared and the same was handed over to Head Constable Phool Chand for registration of FIR. Relevant portion from the initial statement (Ex.PW10/A) made

by PW-10 Saurabh Arora (Son of the deceased) and Rukka (Ex.PW1/B) is reproduced herein below:-

“Saurabh Arora S/o Vijay Arora Age 22 years, R/o T-137, Vishnu Garden, Khyala, Delhi, Ph. 9717360071 made the following statement:

“I reside at the above mentioned address and am appointed on the post of JE in the BSES. My father Vijay Arora runs a spare part shop bearing No. 147 – 148 at Khyala, Gurunanak Market. One Pooran alias Karan had hung pitchers in front of our shop. My father had made a complaint to the MCD in the said regard and the MCD had removed the pitchers. On the night of 15.11.12 Krishna, Pooran, Raj, Chaman and Kanta had again hung the pitchers in front of our shop. Today on 16.11.12, at about 8:20 am when my father came over there to open the shop and saw pitchers in front of the shop, he asked them to remove those. Whereupon, Krishna and Pooran secured my father and Chaman and Kanta poured oil on him and Raj set him afire and lowered down the shutter of the shop as a result whereof, the shop was also set afire. When I rushed towards the shop, the said person stopped me. Krishan, Pooran, Chaman, Raj and Kanta have committed the murder of my father in a well planned manner after setting him afire. The aforesaid persons had earlier picked up a quarrel with my father many a times. Legal action may please be initiated against them. I have heard the statement and it is correct.”

*Sd/- S. Arora
(In English)
16.11.12*

*Attested:
Sd/- Illegible*

16.11.12
SHO Khyala

To
The Duty Officer
PS Khyala

Sir,

It is officially submitted that on receipt of DD No. 12 A, I, the Inspector along with the accompanying Head Constable Phool Chand No. 325/W and SI Anoop Kumar reached the place of occurrence i.e. Shop No. 147-148, Gurunanak Market, Khyala where the shutter of the shop was found opened and a person was found lying dead in burnt condition in a corner towards the west direction besides shutter of the shop. Oil like Mobil oil was scattered in and outside the shop from where smell like kerosene oil was emanating. A person who disclosed his name and address as Saurabh Arora S/o Vijay Arora, Aged 22 years, R/o R-137, Vishnu Garden, Khyala met me over there at the spot and whatever he narrated was recorded by me. The circumstances prevailing over the spot and the contents of the aforesaid statement disclose the commission of an offence punishable under Section 302/34 IPC. The Crime Team may be deputed at the spot. I, the inspector, am busy commencing investigation at the spot. The information in the said regard may be sent through the special messenger. HC Phool Chand, No. 325/W has been sent to the Police Station for the purpose of registration of case (FIR).

Date and time of Occurrence: 16.11.12 at about 8:20 AM

*Place of occurrence: Shop No. 147-1148 Gurunanak
Market, Khyala, Delhi*

Date and time of despatch of

Writing:

16.11.12 at 11:15 AM

Sd/- Illegible

16.11.12

SHO

*PS Khyala
Case (FIR) No. 280/12 dated 16.11.12 U/Ss. 302/34
IPC PS Khayala vide DD No. 14 A dated 16.11.12 at
11:35 AM PS Khyala*

*Sd/- Rajbeer
(In English)
HC Rajbir Singh
No 442/W
PS Khyala
PIS No. 28930299
16.11.12”*

31. From the perusal of the facts of the present case, four PCR calls were made i.e., firstly at 8.24.36 am informing that “*Caller Keh raha hain Ek Admi Apne Upar Kerosene Ka Oil Dal Raha Hai*”, secondly at 8.27.17 am informing that “*Aadmi ne apna gate band karke aag lga li hain*”, thirdly at 8.28.48 am informing that “*Caller Keh raha hain Ek Admi Apne Upar Kerosene Ka Oil Dal Raha Hai*” and fourthly at 8.32.17 am informing that “*Ek Admi ne aag laga li hai*”.
32. The aforesaid PCR calls were received before the recording of statement of PW-10 Saurabh Arora (Ex.PW10/A) and the same were cryptic and anonymous in nature which were not sufficient to form the basis of registration of First Information Report. The statement of PW-10 Saurabh Arora detailing the commission of crime falls under the purview of complete information which cannot be overlooked. The Investigating officer being satisfied with the statement given by PW-10 Saurabh Arora was well within its authority to initiate the investigation against the appellants coupled with the facts that all the four call which were earlier made were cryptic and anonymous.

33. Further, as far as the inadmissibility of the statement made by PW-10 Saurabh Arora is concerned, we rely on the following decision of the Hon'ble Apex Court in the case of ***Manu Sharma*** (supra) wherein the Apex Court in similar circumstances held that the signed statement recorded under Section 161 Cr. P.C. is not hit by the bar under Section 162 Cr. P.C.:-

“109. It was further pointed out by the defence that Ext. P 12-A wherein three PCR calls were recorded is the real FIR and the statement of PW 2 which was taken during investigation and got signed by him is not the FIR and is thus to be treated as a statement recorded under Section 161 CrPC and is hit by the bar under Section 162 CrPC. This argument is unacceptable since as observed in the earlier paragraph the telephone call from PW 70 was too cryptic to amount to an FIR.”

34. In view of the above discussion, the argument raised by the learned counsel for the appellants in relation to inadmissibility of statement of PW-10, Saurabh Arora forming the basis of registration of First Information Report holds no ground.

Credibility Of Material Prosecution Witness

35. During the course of arguments it was strongly urged that the testimony of PW-10 Saurabh Arora (*Son of the Deceased*) cannot be exclusively relied on as trustworthy and reliable because he was closely related to the deceased and was categorized as an interested witness and was planted by the prosecution to falsely implicate the appellants in the commission of the alleged offence.

36. There is no legal impediment in convicting a person on the basis of the sole testimony of a single witness. It is the quality and not the quantity of evidence which is necessary for proving or disproving a fact. The legal system has laid emphasis on the value, weight and quality of evidence rather than on quantity, multiplicity or plurality of witnesses. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy or otherwise.
37. The Apex Court in ***Veer Singh & Ors. Vs State of UP*** reported in **(2014) 2 SCC 455**, has observed that:

"21. The legal system has laid emphasis on value, weight and quality of evidence rather than on quantity, multiplicity or plurality of witnesses. It is not the number of witnesses but quality of their evidence which is important as there is no requirement under the law of evidence that any particular number of witnesses is to be examined to prove/disprove a fact. The evidence must be weighed and not counted. It is quality and not quantity which determines the adequacy of evidence as has been provided under Section 134 of the Evidence Act. As a general rule the court can and may act on the testimony of a single witness provided he is wholly reliable. (Vide Vadivelu Thevar v. State of Madras [AIR 1957 SC 614 : 1957 Cri LJ 1000], Kunju v. State of T.N. [(2008) 2 SCC 151: (2008) 1 SCC (Cri) 331 : AIR 2008 SC 1381], Bipin Kumar Mondal v. State of W.B. [(2010) 12 SCC 91: (2011) 2 SCC (Cri) 150: AIR 2010 SC 3638], Mahesh v. State of M.P. [(2011) 9 SCC 626: (2011) 3 SCC (Cri) 783], Prithipal Singh v. State of Punjab [(2012) 1 SCC 10: (2012) 1 SCC (Cri) 1], Kishan Chand v. State of Haryana [(2013) 2 SCC 502 : (2013) 2 SCC (Cri) 807 : JT (2013) 1 SC 222]

and Gulam Sarbar v. State of Jharkhand [(2014)3 SCC 401 : (2013) 12 Scale 504].)”

(emphasis supplied)

38. In view of the settled law, we shall now examine whether the evidence adduced by the prosecution, more particularly the testimony of Saurabh Arora (*son of the deceased*), is cogent, trustworthy and can be relied upon. Saurabh Arora (*son of the deceased*) stepped into the witness box as PW-10 and deposed that:

*“I am working as J.E. in BSES Rajdhani Power Ltd. My father Vijay Arora was running shop of spare parts at Shop No. 147-148 Guru Nanak Market Khayala. **Accused Krishna, Puran, Chaman and Raj Kumar had placed Matkas in front of our said shops.** My father had made complaint in this regard with MCD. Officials of MCD got removed Matkas from in front of our shop.*

*On the intervening night of 15/16.11.2012 **accused Krishna, Puran, Chaman, Raj Kumar and Kanta had again placed Matkas in front of our said shops.** On 16.11.2012 at about 8.00 am when my father reached at our shops in order to open the shops and he asked the accused persons to remove the Matkas from in front of said shops. **Accused Krishna and Puran caught hold my father and accused Chaman and Kanta poured oil upon my father and accused Raj lit fire upon my father and shut down the shutter of the shop. My father as well as the shop caught fire due to above said reason.** When I rushed towards the shops the accused persons caught hold me and restrained me to reach the shops in order to save my father. **Accused Chaman also tried to pour oil upon me. The above said accused persons caused death of my father by committing the above said act. The accused persons had also quarreled with my father prior to the above said incident. I do***

not know who informed to the police. My statement is Ex PW10/A was recorded by the police bearing my signatures at point A.”

39. During his cross-examination PW-10 Saurabh Arora deposed as under:-

“xxxx xxxx xxxx xxxx
It is wrong to suggest that my father was not running his business from Shop No. 147-148. It is wrong to suggest that my father was running his business from Shop No. 16-17. It is wrong to suggest that accused persons did not pour oil on the person of my deceased father. It is wrong to suggest that the bone of contention namely the Matkas are being placed in front of Shop No. 16-17. It is wrong to suggest that the copy of complaint in respect of those Matkas never handed over to the police. It is wrong to suggest that I am not the real son of deceased Vijay. I have joined the BSES about five years back. It is wrong to suggest that the relation between my father and my mother were not cordial. It is wrong to suggest that at the time of incident there was no motor parts in the shops. It is wrong to suggest that shop no. 147-148 was neither used by my father for business or for storage. It is wrong to suggest that due to soured relations with my mother, my father was running in depression.

xxxx xxxx xxxx xxxx
I reached on the spot at about 8.00AM in the morning. I remained at the spot till 11/11.30AM. I reached at the spot alone. Number of Police officials had reached the spot, however, I cannot tell the exact number of the same. I cannot tell the exact time as to when the police officials have reached the spot. Vol. They had reached at the spot after sometime. Police had obtained my signatures on 2-3 papers. It is wrong to suggest that the police got my signatures on blank papers. Vol. My statement was recorded on it. It is

wrong to suggest that no site plan was prepared by the police in my presence. Vol. I have given the basic informations before the same was made.

xxxx xxxx xxxx xxxx

When I opened the shutter of my shop, at that time my father had expired. It is wrong to suggest that I did not shout or raise any voice with regard to saving of life of my father.

xxxx xxxx xxxx xxxx

It is correct that I had tried to save my father (deceased) from the accused person. I was restraint by the accused persons when I tried to save my father. The distance between me and my father was approximately 7 to 8 ft. It is wrong to suggest that I was not present at the spot at the time of incident. The accused person set fired of my father in the shop No. 147-148.

xxxx xxxx xxxx xxxx

Two person caught hold of my father and another two poured oil on him and one person namely raj Kumar lit fire. It is correct that my father was burnt in front of my eyes. The shutter was open at that time ”

40. From a perusal of the aforesaid testimony, it is evidently established that the testimony of PW-10 Saurabh Arora (*son of the deceased*) is trustworthy, credible and the witness withstood the test of cross-examination. Perusal of the testimony clearly depicts that he has witnessed the incident and all the accused persons were actively involved in the commission of the alleged offence and had poured oil on the deceased and had set him on fire. Perusal of the aforesaid testimony also reveals that when the deceased had arrived at his shop in the morning of 16.11.2012 at about 8.20 am, various earthen pots were lying in front of his shop and the deceased had asked the

appellants-accused to remove them. However, despite his continuous request, the appellants-accused did not remove the earthen pots and thereafter the appellants-accused Krishna and Puran caught hold of the deceased and appellant-accused Chaman and Swarn Kanta poured oil over him and appellant-accused Raj Kumar set him on fire. Perusal of the aforesaid testimony also reveals that the appellants-accused in furtherance of their common intention and preconcert committed the alleged offence as the accused persons had also previously quarrelled with the deceased prior to the above alleged incident.

41. Learned counsel for the appellants doubting the credibility of PW-10 Saurabh Arora(*Son of the deceased*) contended that it would be highly improbable that the son of the deceased despite being present at the spot, allowed the appellants to set the deceased on fire without raising an alarm which clearly shows that he is a planted witness.
42. In this regard, the testimony of PW-10 Saurabh Arora (*Son of the deceased*) reveals that **“accused Krishna and Puran caught hold my father and accused Chaman and Kanta poured oil upon my father and accused Raj lit fire upon my father and shut down the shutter of the shop. My father as well as the shop caught fire due to above said reason. When I rushed towards the shops the accused persons caught hold me and restrained me to reach the shops in order to save my father.”** Further during his cross examination, he deposed that **‘when I opened the shutter of my shop, at that time my father had expired. It is wrong to suggest that I did not shout or raise any voice with regard to saving of life of my father’**.

43. In view of the deposition of PW-10 Saurabh Arora (*son of the deceased*) in relation to the efforts made by him to save his father, we have no reason to disbelieve the case of prosecution. Further the presence of PW-10 Saurabh Arora (*Son of the deceased*) at the spot was established with the testimony of PW-16 SI Anoop Kumar who deposed that ‘*One person namely Sh. Saurabh Arora who is complainant in the present case, met us there. Insp. R.K. Ohja made enquiry from said person and recorded his statement.*’ The presence of PW-10 Saurabh Arora (*Son of the deceased*) was further established by the testimony of PW-17 ACP RK Ojha who deposed that ‘*I also taken into possession the cloths stained with oil of Saurabh Arora given by him to me. I made the parcel of the same and sealed them with the seal of PC and seized them vide seizure memo Ex. PW-9/D bearing my signature at point B.*’
44. Moreover, as far as the stand taken by learned counsel for the appellants, that PW-10 Saurabh Arora (*son of the deceased*) is an interested witness and was closely related to the deceased and his evidence cannot be exclusively relied on as being trustworthy and reliable, is not a credible ground to discard his testimony completely. In ***Yogesh Singh v. Mahabeer Singh*** reported in (2017) 11 SCC 195, the Supreme Court had held with respect to the evidence of interested witnesses and the germane portion of the judgment is extracted below:

*“24. On the issue of **appreciation of evidence of interested witnesses**, Dalip Singh v. State of Punjab [Dalip Singh v. State of Punjab, AIR 1953 SC 364 : 1954 SCR 145 : 1953 Cri LJ 1465] is one of the*

earliest cases on the point. In that case, it was held as follows: (AIR p. 366, para 26)

*“26. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. **Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person.** It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, **but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth.**”*

25. Similarly, in *Piara Singh v. State of Punjab* [*Piara Singh v. State of Punjab*, (1977) 4 SCC 452 : 1977 SCC (Cri) 614], this Court held: (SCC p. 455, para 4)

“4. ... It is well settled that the evidence of interested or inimical witnesses is to be scrutinised with care but cannot be rejected merely on the ground of being a partisan evidence. If on a perusal of the evidence the Court is satisfied that the evidence is creditworthy there is no bar in the Court relying on the said evidence.”

26. In *Hari Obula Reddy v. State of A.P.* [*Hari Obula Reddy v. State of A.P.*, (1981) 3 SCC 675 : 1981 SCC (Cri) 795], a three-Judge Bench of this Court observed: (SCC pp. 683-84, para 13)

“13. ... it is well settled that interested evidence is not necessarily unreliable evidence. Even partisanship by itself is not a valid ground for discrediting or rejecting sworn testimony. Nor can it be laid down as an invariable rule that

interested evidence can never form the basis of conviction unless corroborated to a material extent in material particulars by independent evidence. All that is necessary is that the evidence of interested witnesses should be subjected to careful scrutiny and accepted with caution. If on such scrutiny, the interested testimony is found to be intrinsically reliable or inherently probable, it may, by itself, be sufficient, in the circumstances of the particular case, to base a conviction thereon."

27. Again, *in Ramashish Rai v. Jagdish Singh* [Ramashish Rai v. Jagdish Singh, (2005) 10 SCC 498 : 2005 SCC (Cri) 1611] , the following observations were made by this Court: (SCC p. 501, para 7)

"7. ... The requirement of law is that the testimony of inimical witnesses has to be considered with caution. If otherwise the witnesses are true and reliable their testimony cannot be thrown out on the threshold by branding them as inimical witnesses. By now, it is well-settled principle of law that enmity is a double-edged sword. It can be a ground for false implication. It also can be a ground for assault. Therefore, a duty is cast upon the court to examine the testimony of inimical witnesses with due caution and diligence."

28. A survey of the judicial pronouncements of this Court on this point leads to the inescapable conclusion that *the evidence of a closely related witness is required to be carefully scrutinised and appreciated before any conclusion is made to rest upon it, regarding the convict/accused in a given case. Thus, the evidence cannot be disbelieved merely on the ground that the witnesses are related to each other or to the deceased. In case the evidence has a ring of truth to it, is cogent, credible and*

trustworthy, it can, and certainly should, be relied upon. (See Anil Rai v. State of Bihar [Anil Rai v. State of Bihar, (2001) 7 SCC 318 : 2001 SCC (Cri) 1009] , State of U.P. v. Jagdeo [State of U.P. v. Jagdeo, (2003) 1 SCC 456 : 2003 SCC (Cri) 351] , Bhagaloo Lodh v. State of U.P. [Bhagaloo Lodh v. State of U.P., (2011) 13 SCC 206 : (2012) 1 SCC (Cri) 813] , Dahari v. State of U.P. [Dahari v. State of U.P., (2012) 10 SCC 256 : (2013) 1 SCC (Cri) 22] , Raju v. State of T.N. [Raju v. State of T.N., (2012) 12 SCC 701 : (2012) 4 SCC (Cri) 184] , Gangabhavani v. Rayapati Venkat Reddy [Gangabhavani v. Rayapati Venkat Reddy, (2013) 15 SCC 298 : (2014) 6 SCC (Cri) 182] and Jodhan v. State of M.P. [Jodhan v. State of M.P., (2015) 11 SCC 52 : (2015) 4 SCC (Cri) 275])”
(emphasis supplied)

45. Keeping in view the facts of the present case and applying the principles laid down by the Apex court nothing has been brought on record to prove that the evidence of PW-10 Saurabh Arora (*Son of the deceased*) cannot be believed and relied upon or he has falsely implicated the appellants due to some personal vengeance or has implicated them in the present case at the instance of the prosecution. Therefore, the aforesaid testimony cannot be rejected on the mere ground of his relationship with the deceased because relationship by itself is not a sufficient ground to discard the evidence of the witness and specify it as inappropriate for credence.
46. Further, the Court, after going through the entire evidence must form an opinion about the credibility of the witnesses and otherwise also, in all criminal cases, normal discrepancies are bound to occur in the depositions of the witnesses due to normal errors of observation,

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. In case of *Mritunjoy Biswas Vs. Pranab @ Kuti Biswas and Anr.*, reported at (2013) 12 SCC 796 the Hon'ble Apex Court 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)

47. Learned counsel for the Appellants had further contended that the prosecution has wrongly projected the present case and the trial court erred in relying on the testimony of PW-10 Saurabh Arora (*Son of the deceased*) completely negating the version of DW-1 (*Mohd. Salauddin Ansari*). The Learned Trial Court in the impugned judgment while not relying on the version of the DW-1 (*Mohd. Salauddin Ansari*) and

convicting the appellants for the offence punishable under Section 302/34 IPC gave its reasoning, which is reproduced herein below: -

“84. I have carefully scrutinized the testimony of DW-1 Mohd Salauddin Ansari. DW-1 has narrated the entire incident in his testimony in an elaborate manner. He has deposed that deceased Vijay made a call to his wife on mobile phone by saying on mobile “Today I will finish all the root cause of the quarrels, from today onwards you would not come there (shops)”. After that, the deceased Vijay Arora went to the shop No. 147-148. He opened the shutter of the said shop and went inside the shop and shut down the shutter. After five minutes from the said shop smoke started coming out. Accused Krishna was standing in front of her shop/house. Accused Krishna made a call at 100 number. PCR Van came at the spot.”

85. In his cross examination, he has admitted that he had stood surety of accused Krishna and that he was having good relations with the accused persons. He has further admitted that one cannot see anything of shop no. 16-17 while sitting at his shop. He has also admitted that there is a gali between his shop and shop no. 147-148.

86. From his deposition as well as on perusal of site plan Ex.PW17/A, it becomes doubtful that DW-1 could hear the deceased what he said on mobile phone to his wife before the alleged incident took place. He has admitted that there was a gali in between his shop and the shop of deceased where the incident took place. Therefore, it is highly doubtful that he could witness the entire incident. His testimony becomes even more doubtful due to the fact that when he had heard the deceased talking to his wife, he must have acted and after seeing the smoke coming out of the shutter, he must have rushed to save him. However, it is even more surprising that he did not even make a call to the police and asked accused Krishna to make call. It is a

matter of common sense that in the event of any emergency, one does his best to rescue other even if that person is not known to him. In the instant case, he knew the deceased very well and was his neighbour and instead of helping out to him, he remained as a mute spectator which casts shadow on his testimony and as such, I am of the considered opinion that he is a planted/interested witness examined by the accused persons to depose in their favour and as such, his testimony because of full of doubts, cannot be relied at all.”

48. Consequently, this Court is in agreement with the finding of the Trial Court, as the perusal of the above extracted findings clearly and unequivocally lead to one inescapable conclusion that the version of DW-1 (*Mohd. Salauddin Ansari*) is surrounded by suspicion and casts a shadow of doubt, which evidently makes it unsafe to rely upon.
49. Thus, in the present case nothing has been brought on record to prove that the evidence of PW-10 Saurabh Arora(*Son of the deceased*) cannot be believed and relied upon or they have falsely implicated the Appellants due to some personal vengeance or have implicated the Appellants in the present case at the instance of the prosecution. Hence, the argument of the counsel for the Appellants with regard to PW-10 Saurabh Arora been categorized as interested witnesses with the sole prospective of the prosecution to falsely implicate the appellants in the commission of the alleged offence holds no ground.

Medical & Scientific Evidence

50. At this stage, it is relevant to examine whether the medical evidence adduced by the prosecution finds support from the testimony of the

prosecution witnesses. Dr. B.N. Mishra, Medical Officer-cum-Medico legal Expert and Criminologist Department Of Forensic Medicine, DDU Hospital, conducted the post-mortem of the deceased and proved the report as (Ex.PW10/A) wherein he opined that “*cause of death was due to asphyxia caused by inhalation of suffocating gases into the respiratory passage subsequent to burning of kerosene*”. The relevant portion from his testimony is reproduced as under:-

“On 16.11.2012 I was posted as above. On that day I had conducted the post mortem examination on body of deceased Vijay Arora S/o Late K.L. Arora aged 50 years male. The body was sent by Inspector R.K. Ojha for post mortem examination. On examination of the body I had observed that the body was 100 per cent burnt out, superficial to deep in nature. After completion of post mortem examination I had opined that the cause of death was due to asphyxia caused by inhalation of suffocating / irreparable gases into the respiratory passage subsequent to burning of kerosene, body and other neighbouring objects into place of occurrence(closes space) i.e. room/shop as alleged history available. My detailed report is Ex PW10/A which bears my signatures at point A on each four running pages.”

51. Relevant portion from the Post Mortem Report of the deceased reads as under:-

GENERAL EXAMINATION

- ***Rigor mortis: Thermal stiffness present all over the body and exhibited state of pugilistic.***
- ***Post Mortem Staining: Absent due to burn injury.***
- ***Condition of eyes: Both eyes closed with highly congested conjunctivae and burnt out lashes.***

- *Mouth/Tongue: Partially opened with tongue protruded and partly burnt out.*
- *All hairs of the body i.e. scalp, eye brow, eye lashes, pubic hair either burnt out or singed out.*
- *The smell of kerosene emitted from the body and remnants of clothing.*
- *Whole body blackened and charred out.*

EXTERNAL EXAMINATION: External Injuries

100% deep to superficial thermal burn injury present all over the body with multiple blister formation at different parts containing serous fluid. The right lower limb and trunk part exhibits line of redness at different locations while rest part of the body shows post mortem burn in appearance. The muscle components on the right thigh partly burnt out and exposed. There are multiple thermal rupture of muscles present on the different part of the body with exposed underlined fat tissue.

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OPINION:

1. *TIME SINCE DEATH: is consistent to time of incident (i.e. 08:30 AM dated 16.11.2012)*
2. *The cause of death is due to asphyxia caused by inhalation of suffocating / irrespirable gases into respiratory passage subsequent to burning of kerosene, body and other neighbouring objects into place of occurrence (closed space) i.e. room / shop as alleged history available.*
3. *Manner of death shall be concluded after receipt of FSL reports of preserved samples however in this stage there is nothing to suggest that person (deceased) would not has been burnt alive by manner alleged, as the autopsy findings are suggestive of that the few of burn injuries are ante mortem in nature and rest of (maximum parts) burn injuries are appearing post mortem in nature.*

4. The deposition of soot particles into all level of respiratory passage supports that person was alive before setting of fire upon him.”

52. After examining the testimony of Dr. B.N. Mishra and the post mortem report (Ex.PW10/A), it is observed that deceased had died subsequent to burning from kerosene oil as various burn injuries were ante-mortem and certain were post-mortem in nature. Moreover, the soot particles detected in the respiratory passage of the deceased corroborated the version of the prosecution that the deceased was alive before he was set on fire by the appellants-accused.
53. Further, it is relevant to highlight that, PW-19 Sh. Santosh Tripathi, Sr, Scientific Officer Chemistry, FSL Rohini was called at the place of incident on 19.11.2012. He had prepared a detailed report (Ex.PW19/A) and had opined “*that there was incidence of burning inside Shop No. 147/148, Khyala, Delhi*”. The relevant portion from his testimony is reproduced as under:-

“On 19.11.2012, I was posted as Sr. Scientific Officer (Chemistry) at FSL Rohini. On that day, I along with Sh. S.S. Badwal, SSO Physics and team of Crime reached at Guru Nanak Market Shop NO. 147-148, Khyala, Delhi and inspected the spot and prepared my detailed report Ex. PW19/A bearing my signatures at point A and opined that there was incidence of burning inside the above mentioned shop adjacent to the metallic shutters.”

54. Relevant portion of crime scene visit report No. 2012/SOC-153/CHEM No. 31/12 (Ex.PW.19/A) is reproduced below:

“The undersigned along with the team members thoroughly examined the scene of crime at Gurunanak

Market, Shop No. 147-148, Khyala, Delhi on Dt. 19.11.2012 and the following observations were made:

- 1) The above-mentioned shop had two metallic shutters and was found to have metallic spare parts, empty plastic canes, wooden planks, motor vehicle batteries, wooden metallic boxes, a wooden cupboard, metal pipes, folding bed and set of blankets inside the shops.*
- 2) Burnt and charred ash debris were found on the floor of the adjacent to the metallic shutters.*
- 3) Some plastic canes were found with sign of burning.*
- 4) Some motor vehicle batteries were found with the sign of burning.*
- 5) There was mobil oil like material found on the floor insides the shop.***
- 6) One wooden cupboard was found partially burnt at the bottom.*
- 7) One wooden box was found partially burnt and blackened adjacent to the metallic shutters.*
- 8) Right side metallic shutter was found with the sign of burning.*
- 9) One electric switch box with connecting wire were also found in burnt & melted condition.*

From the above observations it is opined that there was incidence of burning inside the above mentioned shop adjacent to the metallic shutters. I.O. was advised to collect the exhibit and forward to the laboratory for further chemical analysis for the presence of inflammable substance, if any.”

55. A conjoint reading of the aforesaid testimony and the crime scene visit report reveals that the following exhibits were forwarded to the forensic laboratory for chemical analysis:-

<i>No. of Parcels /Exhibits</i>	<i>No. of Seals & seal impression</i>	<i>Description of parcels/exhibits</i>
<i>Parcel-1</i>	<i>Four seals of “P.C.”</i>	<i>One sealed cloth parcel stated to be containing ‘cloths of complaint Saurabh Arora’.it was found to contain exhibit ‘1’</i>
<i>Exhibit- ‘1’</i>		<i>Some unburnt cloth material (one full sleeved warmer & one light brown coloured knicker).</i>
<i>Parcel-2</i>	<i>One seal of ‘P.C.’</i>	<i>One sealed plastic container stated to be ‘oiled piece of cotton’. It was found to contain exhibit ‘2’ kept in a polythene bag.</i>
<i>Exhibit- ‘2’</i>		<i>Some black coloured deposits sticking on a piece of cotton swab</i>
<i>Parcel-3</i>	<i>One seal of “P.C.”</i>	<i>One sealed plastic container stated to be ‘earth control’. It was found to contain exhibit ‘3’</i>
<i>Exhibit- ‘3’</i>		<i>Some greyish black coloured coarse & powdery material.</i>
<i>Parcel-4</i>	<i>One seal of “P.C.”</i>	<i>One sealed plastic container stated to be earth lifted near dead body’. It was found to contain exhibit ‘4’</i>
<i>Exhibit- ‘4’</i>		<i>Some black coloured burnt debris (pieces of metal few coins concrete & plastic pieces etc)</i>
<i>Parcel-5</i>	<i>One seal of “P.C.”</i>	<i>One sealed plastic container stated to be containing one pair</i>

		<i>Kolhapur sleeper (chappal) and spectacles. It was found to contain exhibit '5'</i>
<i>Exhibit- '5'</i>		<i>A pair of sleepers & one spectacle.</i>
<i>Parcel-6</i>	<i>One seal of "P.C."</i>	<i>One sealed plastic can stated to be containing plastic can with small quantity of mobil oil; It was found to contain exhibit '6'</i>
<i>Exhibit- "6"</i>		<i>Some black coloured thick liquid, volume approx. 2 it</i>
<i>Parcel-7</i>	<i>One seal of "DFMT DDU HOSPITAL"</i>	<i>One sealed white polythene labelled as PMR No. 1510/12 dated 16.11.2012 stated to be containing 'burnt remnants taken from wall floor'. it was found to contain exhibit '8'</i>
<i>Exhibit- '7'</i>		<i>Some partially burnt cloth pieces.</i>
<i>Parcel-8</i>	<i>One seal of 'Y.P'</i>	<i>One sealed plastic container stated to be containing 'burnt remnants taken from wall floor'. It was found to contain exhibit '8'</i>
<i>Exhibit- "8"</i>		<i>Some partially burnt debris(metal pieces. Pieces of wood piece of burnt cloth, etc.)</i>
<i>Parcel-9</i>	<i>One seal of 'Y.P'</i>	<i>One sealed plastic jar stated to be containing earth control from wall floor. It was found to contain exhibit '9'</i>
<i>Exhibit- "9"</i>		<i>Some partially burnt</i>

		<i>debris. (metal parts, concrete pieces, etc.)</i>
<i>Parcel-10</i>	<i>One seal of “DFMT DDU HOSPITAL”</i>	<i>One sealed small glass jar labelled as PMR No. 1510/12 dated 16.11.12 stated to be containing blood sample of Vijay Arora. It was found to contain exhibit ‘10’</i>
<i>Exhibit - ‘10’</i>		<i>Blood sample volume approx. 15 ml</i>

56. The result of analysis of the FSL report No. 2012/C-8661 dated 29.01.2014 was concluded with the following opinion and the relevant portion is reproduced below:

RESULTS OF EXAMINATION REPORT

On chemical, Microscopic, GC and GC-HS examination,

(i) Exhibits ‘1’, ‘2’, ‘4’, ‘6’, ‘7’ & ‘8’ were found to contain residue of kerosene.

(ii) Petrol, Kerosene, Diesel and their residue could not be detected in exhibits; ‘3’, ‘5’ & ‘9’

(iii) Ethyl alcohol and carbon monoxide could not be detected in exhibit ‘10’

57. Perusal of the FSL report evidently establishes the fact that the residue of kerosene was found in Exhibit-1 (*Some unburnt cloth material (one full sleeved warmer & one light brown coloured knicker)*), Exhibit-2 (*Some black coloured deposits sticking on a piece of cotton swab*), Exhibit-4 (*Some black coloured burnt debris (pieces of metal few coins concrete & plastic pieces etc)*), Exhibit-6 (*Some black coloured thick liquid, volume approx. 2 lt*), Exhibit-7 (*Some partially burnt cloth pieces*) & Exhibit-8 (*Some partially burnt debris(metal pieces.*

Pieces of wood, piece of burnt cloth, etc) and no residue of mobil oil was detected on any of the aforesaid exhibits.

58. Hence, in view of the postmortem report of the deceased and the FSL report detailed above, it is established that the medical evidence corroborates the version of the prosecution and thus the prosecution has discharged its onus to prove the fact that the deceased was burnt alive by kerosene oil.

Defective Investigation

59. Another argument raised by the Appellants is that the police while conducting the investigation failed to follow the procedure prescribed under the Code of Criminal Procedure and further contended that the investigating agency failed to conduct a fair and transparent investigation.
60. 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 *Manu Sharma v. State (NCT of Delhi)* reported in (2010) 6 SCC 1. Germane portion of the judgment is extracted below:

“197. In the Indian criminal jurisprudence, the accused is placed in a somewhat advantageous position than under different jurisprudence of some of the countries in the world. The criminal justice administration system in India places human rights and dignity for human life at

a much higher pedestal. In our jurisprudence an accused is presumed to be innocent till proved guilty, the alleged accused is entitled to fairness and true investigation and fair trial and the prosecution is expected to play balanced role in the trial of a crime. The investigation should be judicious, fair, transparent and expeditious to ensure compliance with the basic rule of law. These are the fundamental canons of our criminal jurisprudence and they are quite in conformity with the constitutional mandate contained in Articles 20 and 21 of the Constitution of India.

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199. It is not only the responsibility of the investigating agency but as well as that of the courts to ensure that investigation is fair and does not in any way hamper the freedom of an individual except in accordance with law. Equally enforceable canon of the criminal law is that the high responsibility lies upon the investigating agency not to conduct an investigation in tainted and unfair manner. The investigation should not prima facie be indicative of a biased mind and every effort should be made to bring the guilty to law as nobody stands above law de hors his position and influence in the society

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201. Historically but consistently the view of this Court has been that an investigation must be fair and effective, must proceed in proper direction in consonance with the ingredients of the offence and not in haphazard manner. In some cases besides investigation being effective the accused may have to prove miscarriage of justice but once it is shown the accused would be entitled to definite benefit in accordance with law. The investigation should be conducted in a manner so as to draw a just balance between citizen's right under Articles 19 and 21 and expansive power of the police to make investigation. These well-established principles have been stated by this Court in Sasi

Thomas v. State [(2006) 12 SCC 421 : (2007) 2 SCC (Cri) 72] , State (Inspector of Police) v. Surya Sankaram Karri [(2006) 7 SCC 172 : (2006) 3 SCC (Cri) 225] and T.T. Antony v. State of Kerala [(2001) 6 SCC 181 : 2001 SCC (Cri) 1048].

202. In Nirmal Singh Kahlon v. State of Punjab [(2009) 1 SCC 441 : (2009) 1 SCC (Cri) 523] this Court specifically stated that a concept of fair investigation and fair trial are concomitant to preservation of the fundamental right of the accused under Article 21 of the Constitution of India. We have referred to this concept of judicious and fair investigation as the right of the accused to fair defence emerges from this concept itself. The accused is not subjected to harassment, his right to defence is not unduly hampered and what he is entitled to receive in accordance with law is not denied to him contrary to law.”

(emphasis supplied)

61. Further, a coordinate Bench of this Court in ***Dinesh Singh Panwar & Ors. Vs. State N.C.T. of Delhi*** reported in **2019 SCC OnLine Del 9549** has held as under:-

“56. The next submission made by the counsel for the appellants was that in case PW5 was an eye witness to the incident and had taken the deceased to the hospital in a Maruti car driven by PW9 Manender, there would have been blood on his clothes. However, his clothes were not taken into possession by the police and not sent for examination.

57. This submission of the learned counsel for the appellants is also liable to be rejected. Even though the blood stained clothes of PW5 and 9 were not seized but their evidence establishes their presence at the place of the incident. It is settled law that faulty investigation cannot come in the way of dispensing justice. Investigating Officer may have faulted in not collecting the blood stained clothes of the eyewitnesses, but the benefit of defective investigation cannot accrue

to the accused persons. We need not burden this opinion with judicial pronouncements in this regard; suffice to mention that one may usefully refer to Sathi Prasad vs. The State of U.P. reported at AIR 1973 SC 448, State of U.P. v. Anil Singh reported at 1988 Supp SCC 686 (paragraph 17), Mohan Singh v. State of Madhya Pradesh, reported at (1999) 2 SCC 428 (paragraph 11), Dhanaj Singh alias Shera & Ors. Vs. State of Punjab reported at (2004) 3 SCC 654 (paragraphs 5 and 8), State of UP v Krishna Master, reported at (2010) 12 SCC 324 (paragraph 15).”

(emphasis supplied)

62. The Supreme Court in *Ram Bali vs. State of U.P.* reported in (2004)

10 SCC 598 has also held as under:-

12. The investigation was also stated to be defective since the gun was not sent for forensic test. In the case of a defective investigation the court has to be circumspect in 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 investigating officer if the investigation is designedly defective. (See Karnel Singh v. State of M.P. [(1995) 5 SCC 518 : 1995 SCC (Cri) 977])

13. In Paras Yadav v. State of Bihar [(1999) 2 SCC 126 : 1999 SCC (Cri) 104] it was held that if the lapse or omission is committed by the investigating agency or because of negligence there had been defective investigation the prosecution evidence is required to be examined dehors such omissions carefully to find out whether the said evidence is reliable or not and to what extent, such lapse affected the object of finding out the truth. The contaminated conduct of officials alone should not stand in the way of evaluating the evidence by the courts in finding out the truth, if the materials on record are otherwise credible and truthful; otherwise the designed mischief at the instance of biased or

interested investigator would be perpetuated and justice would be denied to the complainant party, and in the process to the community at large.

14. As was observed in Ram Bihari Yadav v. State of Bihar [(1998) 4 SCC 517 : 1998 SCC (Cri) 1085] if primacy is given to such designed or negligent investigation, to the omission or lapses by perfunctory investigation or omissions, the faith and confidence of the people would be shaken not only in the law enforcing agency but also in the administration of justice. The view was again reiterated in Amar Singh v. Balwinder Singh [(2003) 2 SCC 518 : 2003 SCC (Cri) 641] . As noted in Amar Singh case [(2003) 2 SCC 518 : 2003 SCC (Cri) 641] it would have been certainly better if the firearms were sent to the Forensic Test Laboratory for comparison. But the report of the ballistic expert would merely be in the nature of an expert opinion without any conclusiveness attached to it. When the direct testimony of the eyewitnesses corroborated by the medical evidence fully establishes the prosecution version, failure or omission or negligence on the part of the IO cannot affect the credibility of the prosecution version.”

(emphasis supplied)

63. In view of the legal principles set out above, if the prosecution case is established by the evidence adduced then any failure or omission on the part of the Investigating Officer pales into insignificance when ocular testimony is found credible and cogent and 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. 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, though the Court should be circumspect while evaluating the evidence. In the present case, as discussed above, we have accepted the testimony of PW-10 Saurabh Arora being the eye witness, 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.

Motive

64. Learned counsel for the appellants further contended that the learned Trial Court failed to appreciate the fact that placing of matkas on a patri in front of the deceased shop was too trivial a reason to commit the murder of the deceased and the prosecution had miserably failed to prove the motive for commission of the alleged offence
65. It is settled legal proposition that motive is a relevant factor in all criminal cases whether based on the testimony of eye witnesses or circumstantial evidence. The question in this regard is whether the prosecution must fail because it failed to prove the motive or even whether inability to prove motive would weaken the prosecution to any perceptible limit. No doubt, if the prosecution proves the existence of a motive it would be well and good for it, particularly in a case depending on circumstantial evidence, for, such motive could then be counted as one of the circumstances. But when it is a case of direct evidence, even if the absence of motive as alleged is accepted that is of no consequence when overwhelming evidence are already available on record. While dealing with a similar issue, the Hon'ble Supreme Court

in the case of *Yogesh Singh v. Mahabeer Singh* reported in (2017) 11 SCC 195 has held as under:-

“46. It has next been contended by the learned counsel for the respondents that there was no immediate motive with the respondents to commit the murder of the deceased. However, the trial court found that there was sufficient motive with the accused persons to commit the murder of the deceased since the deceased had defeated accused Harcharan in the Pradhan elections, thus putting an end to his position as Pradhan for the last 28-30 years. The long nursed feeling of hatred and the simmering enmity between the family of the deceased and the accused persons most likely manifested itself in the outburst of anger resulting in the murder of the deceased. We are not required to express any opinion on this point in the light of the evidence adduced by the direct witnesses to the incident. It is a settled legal proposition that even if the absence of motive, as alleged, is accepted that is of no consequence and pales into insignificance when direct evidence establishes the crime. Therefore, in case there is direct trustworthy evidence of the witnesses as to commission of an offence, motive loses its significance. Therefore, if the genesis of the motive of the occurrence is not proved, the ocular testimony of the witnesses as to the occurrence could not be discarded only on the ground of absence of motive, if otherwise the evidence is worthy of reliance. (Hari Shanker v. State of U.P. [Hari Shanker v. State of U.P., (1996) 9 SCC 40 : 1996 SCC (Cri) 913] , Bikau Pandey v. State of Bihar [Bikau Pandey v. State of Bihar, (2003) 12 SCC 616 : 2004 SCC (Cri) Supp 535] , State of U.P. v. Kishanpal [State of U.P. v. Kishanpal, (2008) 16 SCC 73 : (2010) 4 SCC (Cri) 182] , Abu Thakir v. State of T.N. [Abu Thakir v. State of T.N., (2010) 5 SCC 91 : (2010) 2 SCC (Cri) 1258] and Bipin Kumar Mondal v. State of

W.B. [Bipin Kumar Mondal v. State of W.B., (2010) 12 SCC 91 : (2011) 2 SCC (Cri) 150])”

(emphasis supplied)

66. 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 is 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.”

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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.”

(emphasis supplied)

67. Herein, it is relevant to highlight that the present case is based on direct evidence and proof of motive has been established by the

prosecution which will be treated as an additional corroborative piece of evidence.

Common Intention ‘Under Section 34 of The Indian Penal Code’

68. Learned counsel for the accused persons argued that the prosecution failed to prove that the accused persons shared a common intention to commit the alleged offence and hence, they can't be held guilty for the offence punishable under Section 34 IPC.
69. 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.”

70. 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.
71. The theory of common intention is based on the principle of joint liability in the doing of a criminal act and the distinctive feature of the section is the element of participation in action and the liability of one person for an offence committed by another in the course of criminal

act perpetrated by several persons. Direct evidence with regard to common intention is rarely available and in order to bring home the charge of common intention, the prosecution has to establish by evidence, whether the case is based on direct or circumstantial evidence, that there was plan or meeting of minds of all the accused persons to commit the offence, be it pre-arranged or on the spur of the moment; but it must necessarily be before the commission of the crime.

72. Therefore, in order to constitute an offence under Section 34 IPC, the prosecution must be able to demonstrate that the criminal act complained of against the accused persons was done by one of the accused in furtherance of a common intention of all the accused persons and the common intention implies a pre-arranged plan that has to be inferred from the act or conduct of other relevant circumstances of the case.
73. The ambit of Section 34 IPC has been dwelled upon at length by the Supreme Court in *Suresh and Anr. vs. State of UP* reported in (2001) 3 SCC 673, wherein it was held as follows:-

“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.”

(emphasis supplied)

74. 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”

(emphasis supplied)

75. Keeping in view the facts of the present case and applying the principles laid down by the Hon’ble Apex Court, it is established that common intention necessitates prior concert which will make the accused persons responsible for the ultimate criminal act done by several persons. Further, on the basis of evidence borne out from the previous part of the judgment, it is substantiated that all the accused persons in furtherance of their common intention 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

76. In our view, in the instant facts before us, coupled with the law laid down by the Apex Court unerringly leads 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 medical and scientific evidence, that the appellants in furtherance of their common intention committed the murder of the deceased.
77. The prosecution having proved its case beyond all reasonable doubt, we find no infirmity in the judgment passed by the learned Trial Court and 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. Accordingly, the appeals are dismissed.
78. Appellant/Swarn Kanta is directed to surrender within four weeks before the Trial Court. Bail Bonds are cancelled and sureties stand discharged.
79. Copy of the order be communicated to the Trial Court as well as to the Jail Superintendent, Tihar Jail.
80. Trial Court record be sent back along with a copy of this order.

SANGITA DHINGRA SEHGAL, J.

MANMOHAN, J.

JANUARY 6, 2020 /SU