

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

% Reserved on: 6th December, 2022
Decided on: 22nd March, 2023

+ **CRL.A. 1028/2017**

VINOD ALIAS KAKE Appellant

Represented by: Ms. Aishwarya Rao & Ms. Mansi
Rao, Advocates.

versus

STATE Respondent

Represented by: Mr. Prithu Garg, APP for the State
(through VC).

+ **CRL.A. 630/2017**

VICKY ALIAS GOBIND Appellant

Represented by: Mr. M.L. Yadav, Advocate for
Mr. Mukesh Kalia, Adv.

versus

THE STATE NCT OF DELHI Respondent

Represented by: Mr. Prithu Garg, APP for the State
(through VC).

+ **CRL.A. 762/2017**

CHANDER PRAKASH ALIAS PAPPU Appellant

Represented by: Mr. Siddharth Yadav, Advocate.

versus

STATE (NCT OF DELHI) Respondent

Represented by: Mr. Prithu Garg, APP for the State
(through VC).

+

CRL.A. 792/2017

ANIL

..... Appellant

Represented by: Ms. Maulshree Pathak, Advocate.

versus

STATE (NCT OF DELHI)

..... Respondent

Represented by: Mr. Prithu Garg, APP for the State
(through VC).

+

CRL.A. 905/2017

VIJAY ALIAS NAUTY

..... Appellant

Represented by: Mr. Ajit Kumar, Ms. Nikita Sharma,
Ms. Nutan Kumari and Ms. Neha
Kapoor, Advs.

versus

THE STATE NCT OF DELHI

..... Respondent

Represented by: Mr. Prithu Garg, APP for the State
(through VC).

+

CRL.A. 1094/2017

MAHESH

..... Appellant

Represented by: Mr. Bipin Kumar Jha and Ms. Komal
Jha, Advs.

versus

STATE NCT OF DELHI

..... Respondent

Represented by: Mr. Prithu Garg, APP for the State
(through VC).

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

HON'BLE MS. JUSTICE POONAM A. BAMBA

MUKTA GUPTA, J.

1. By way of these appeals the appellants Vinod @ Kake, Vicky @ Gobind, Chander Prakash @ Pappu, Anil, Vijay @ Nauty and Mahesh challenge the common judgment of the learned Trial Court dated 7th June, 2017, wherein the appellants were convicted for murder of Sonu @ Bhola (deceased); and the order on sentence dated 8th June, 2017 by which the appellants were directed to undergo imprisonment for life along with fine of ₹10,000/- each, in default whereof, rigorous imprisonment for six months for offence punishable under Section 302/34 of Indian Penal Code, 1860 (IPC). Appellant Vinod @ Kake was also convicted for offence punishable under Section 27 Arms Act, 1959 and was directed to undergo rigorous imprisonment for seven years along with fine of ₹5,000/-, in default whereof, rigorous imprisonment for three months. Appellant Chander Prakash @ Pappu was also convicted for offence punishable under Section 201 IPC and directed to undergo rigorous imprisonment for seven years along with fine of ₹5,000/-, in default whereof, rigorous imprisonment for three months. Accused Prakash Passi was acquitted for offence punishable under Section 216 IPC.

2. In nutshell, case of the prosecution is that on 27th November, 2010 an information was received by the police vide DD No.46A (Ex.PW-8/A) regarding firing incident near Kendriya Vidyalaya, Kali Basti near Kura Khatta in front of Hastsal Village. SI Shiv Dutt Jamini (PW-15) along with Ct. Rajender (PW-7) reached the spot and found blood along with one empty cartridge lying at the spot. As the injured had already been taken to DDU Hospital, he went to the hospital. At the hospital, SI Shiv Dutt (PW-15) found that one Sonu, son of Sh. Rajpal was admitted at the hospital with

history of gunshot injury who was declared “brought dead”. At the hospital, SI Shiv Dutt (PW-15) met Sunny (PW-19), brother of the deceased and his friend Bunty (PW-3). He recorded the statement of Sunny who informed that the family of appellant Vijay @ Nauty had an old enmity with his family and that on an earlier occasion as well a quarrel had taken place between the members of his family and the family members of appellant Vijay @ Nauty. Sunny further informed that the deceased were going to drop his friend Bunty at Peepal Chowk, Hastal Village and at about 8.30 PM, the appellants came at the spot. Ranjit @ Rahul, Vicky @ Ganja, Vicky, Mahesh and Anil caught the deceased from behind while Vijay @ Nauty and Chander Prakash @ Pappu fired bullets at the deceased. Bunty and Sunny managed to escape towards Hastal Village, and after sometime when the assailants left, he and Bunty came back at the spot and took the deceased to DDU Hospital. On this statement of Sunny, FIR No.385/2010 dated 27th November, 2010 under Sections 302/34 IPC read with Section 27 Arms Act was registered at PS Uttam Nagar. The investigation of the case was taken over by Inspector Jai Kishan (PW-30) who prepared the site plan (Ex.PW-30/A) and the crime team was called at the spot. The dead body was sent for post-mortem examination on 28th November, 2010 at DDU Hospital.

3. Dr.B.N. Mishra (PW-26) conducted the post-mortem examination. He tendered his report (Ex.PW-26/A) noting the following injuries and opined:

“EXTERNAL EXAMINATION : External Injuries :-

1. *Incised wound appearing like laceration present just above the right eyebrow with clean cut margins and appearing hardly*

triangular shape of size 2.5cm x 1.2cm x muscles deep with base covered by reddish colour blood clot.

2. *Incised wound present on the right eye lid of size 2x0.8cm x deep to whole thickness of eyelid with clean cut margins with base covered by reddish colour blood clot.*

3. *Wound of entry present on the upper middle and left sided on the chest adjacent to lateral border of body of sternum. The wound appeared circular in shape with having inverted margin and surrounded by a rim of abraded collar of thickness 2mm at upper and lateral area while lower area bears 4mm in thickness which causes abraded collar appears oval in shape. A tattooed area of 6cm in diameter circular shaped surrounds the wound of entry with greyish brown in colour with partial infiltration of partly burnt gun powders into the epidermal layer with partial burning of skin and hair and singed out which could not wiped out by scrubbing. The diameter of wound of entry measured 0.5cm and located 8cm from left nipple, 26cm from the umbilicus and 10cm on internal notch. The oozing of blood present from the wound. On exploration of the wound the tract of the missile (bullet) directed back wards and slightly backwards and reached upto the anterior surface of body of ninth thoracic vertebra and impacted upon it. During the course of travelling of bullet the left auricle of the heart pierced through and through with making a tear of size 0.5cm x 0.4cm with massive collection of blood into the pericardial sac and adjacent area with dark reddish in colour. The bullet recovered from the area impacted (T-9 vertebra) which was jacketed and cylindrical in shape, made of brass like material and lead like nose. The total length of bullet measured 3cm and 0.6cm in diameter at its basal part. No any wound of exit present on the body.*

4. *Wound of entry (bullet) present on the right hypochondrial region of the abdomen, 3cm below from the lower border of the right side of the ribs. This appeared oval in shape and measured 3cm x 2cm with bevelling margin on right side and obliquely placed. The margins were abraded of thickness 0.2mm to 0.4mm and inverted. The area around the wound of the entry extensively tattooed in scattered form with grayish brown in colour with partial infiltration of partly burnt gun powders into the epidermal layer with partial burning of skin and hair and singed out which could not wiped out by scrubbing. The wound located 7cm from*

umbilicus, 21cm from right nipple and 10cm from right iliac crest. On exploration of the wound the tract of the missile (bullet) directed backwards and medial towards the vertebral column and reached upto to the second lumbar vertebra. During the course of travelling of the bullet the loops of small intestine and mesentery pierced out at many places with partial penetration of body of second lumbar vertebra. The peritoneal cavity filled by liquid clotted blood about 200ml with bruised area adjacent to struck area of the visceral organs. The bullet recovered from the area impacted (L-2 vertebra) which was jacketed and cylindrical in shape, made of brass like material and lead like nose. The total length of bullet measured 3cm and 0.6cm in diameter at its basal part. No any wound of exit present on the body.

5. An incised wound of size 3.5cm x 1cm x muscles deeps with bevelling margin present on the left side of the back over the medical border of left scapula with regular margins and reddish in colour. (The cut marks detected in the cloths are consistent to this incised wound).

OPINION:

1. **TIME SINCE DEATH:** Approx 17-18 hours prior to post mortem examination.
2. The cause of death is due to cardiogenic shock consequent upon tearing of heart (left auricle) caused by gun shot injury and the same injury was sufficient to cause instant death in ordinary course of nature.
3. On the basis of nature of wound of entry tattooing and burning of surround tissue along with tearing pattern of clothes (at affected area) it is suggestive clothes worn by deceased I am in opinion of that the firearm was fired close to victim (deceased) with slight angulations and distance would be less than 10cm-15cm.
4. The external injuries no.1, 2 & 5 was caused by pointed sharp edged weapon like knife etc.
5. All injuries are antemortem in nature and same of duration.
6. Manner of death is Homicide.
7. The x-ray films of head, chest and abdomen 3 in numbers which bears the picture of bullet (except x-ray head) which were taken before commencement of autopsy in order to detection of bullets on the body of the deceased. All three x-ray films were handed over to the concerned I.O. with inquest papers. ”

4. Thereafter, on 22nd December, 2010, appellants Mahesh and Vinod @ Kake surrendered before learned Metropolitan Magistrate and Prakash Passi was arrested by the police under Section 216 of IPC for providing shelter to accused Vijay @ Nauty, Vicky @ Ganja and Rahul. Charge-sheet was filed against Mahesh, Vinod @ Kake and Prakash Passi on 18th March, 2011. Accused Anil surrendered before the Court on 5th April, 2011 and Vicky @ Gobind on 26th April, 2011, and charge-sheet qua both these accused persons was filed on 4th May, 2011. Accused Vijay @ Nauty, Chander Prakash @ Pappu, Ranjit @ Rahul and Nagender @ Vicky were declared proclaimed offenders on 24th August, 2011. However, accused Chander Prakash @ Pappu and Vijay @ Nauty were arrested on 26th November, 2012 and a separate supplementary charge-sheet against these two accused were filed on 21st August, 2013. Accordingly, accused Mahesh, Vinod @ Kake, Anil and Vicky @ Gobind were charged for offences punishable under Section 302/34 IPC and Vinod @ Kake was also charged for offence punishable under Sections 25 and 27 Arms Act. Accused Chander Prakash @ Pappu was charged for offences punishable under Sections 302/34 IPC along with Sections 201 and 174A IPC. Accused Parkash @ Passi was charged for offence under section 216 IPC. Appellant Vijay @ Nauty was charged for offence punishable under Section 302/34 IPC as also for offence under Section 174A of the IPC.

5. To establish its case, the prosecution examined 30 witnesses including the eye-witnesses Sunny and Bunty and on the other hand defence evidence in form of one witness was also led.

6. The appellants assail the impugned judgment primarily on the ground that the prosecution story relies upon the two eye-witnesses to the incident

namely Bunty and Sunny, the presence of both of whom is doubtful at the spot, and hence their testimonies are unreliable. It was contended that both the witnesses turned hostile and did not support the case of the prosecution. Sunny did not even name the appellants in the information recorded vide DD No. 77B made to the police, and thus, it was contended that Sunny and Bunty had no clue regarding the involvement of the appellants in the said incident. It was further contended that Bunty in his testimony stated that he had not seen the assailants because of darkness and even otherwise, if Bunty was present at the spot, he neither raised any alarm nor tried to save the deceased nor made a call to the police at number 100, despite having a mobile phone with him. Furthermore, as per the FSL Report (Ex.PW-17/B), the blood detected on the clothes of PW-3 and PW-19 did not match with that of the deceased.

7. Appellant Vinod @ Kake assails the impugned judgment on the ground that as per DD No.46A (Ex.PW-8/A), there were only four assailants on two motorcycles, and as per DD No.77B (Ex.PW-8/B) recorded at the instance of Sunny (PW-19), there is neither any mention of number of assailants nor name of the assailants. In another DD No.80B (Ex.PW-8/C) recorded on the information of duty Ct. Dhanchand at DDU Hospital, there is no mention of any assailants at all. It was further contended that as per the rukka recorded on the statement of Sunny, there is no mention of infliction of any knife blows by the appellants. Even as per the post-mortem report (Ex.PW-26/A) as also MLC (Ex.PW-4/A), there is no injury on the neck or the back of the deceased. Furthermore, MLC (Ex.PW-4/A) records that the deceased was brought by ACP Dr.G. Ram Gopal however, the said ACP was never examined as a witness by the prosecution. Ct.Kulvir (PW-2)

who was the first person to meet the alleged eye-witnesses did not depose that these witnesses disclosed the names of the assailants to him. These facts clearly indicate that the alleged eye-witnesses knew nothing about the incident. It was further contended that the knife recovered from Vinod @ Kake could not be connected to the appellant as no chance prints were taken from the knife, and therefore, the said knife cannot be connected to the alleged incident. For this reason also, testimonies of Bunty and Sunny are not trustworthy and are unreliable. Accordingly, the appellant Vinod @ Kake deserves to be acquitted.

8. It was contended on behalf of appellant Vicky @ Gobind that in addition to the unreliability of the alleged eye-witnesses Sunny and Bunty, the prosecution even failed to prove the factum of enmity between the parties. There are discrepancies between the number of people involved in the commission of the alleged offence because as per the statement of Sunny (PW-19) recorded at the hospital, four persons had fired upon one person, but on the contrary, the case of the prosecution has been that six persons caught hold the deceased and two persons fired upon the deceased and a third person gave knife blows. Despite, PW-3 and PW-19 being allegedly present at the spot, one Rajkumar Solanki (PW-5) made the first call to the police at 8.51 PM recorded vide DD No.46A. Moreover, Sunny (PW-19) made a call at number 100 at about 9.35 PM vide DD No.77B informing that “someone” had fired upon his brother/deceased. Bunty (PW-3) neither disclosed the name of the assailants to the doctor in the hospital nor to the duty constable at DDU Hospital. Even the documents that were sent including the brief facts by the IO at the time of sending the body for post-mortem examination, does not mention about presence of any eye-

witness to the incident. It was further contended that the alleged incident took place at a dark place and there was no light at the spot, and reliance was placed upon the scaled site plan (Ex.PW-29/A). It was submitted that neither any electric pole nor the presence and position of the alleged eye-witnesses were shown in the said site plan. It was further contended that the recovery of motorcycle bearing No. DL 3S BC 1195 was effected after five months of the incident, i.e. on 26th April, 2011, and the prosecution failed to connect the said bike to the incident or that it was actually used in the commission of the offence. Further, SI Shiv Dutt Jamini (PW-15) even failed to identify the accused persons in the Court.

9. It was contended on behalf of appellant Chander Prakash @ Pappu that he was arrested after a period of two and half years and neither of the two eye-witnesses, PW-3 and PW-19, were able to identify him. Further, no recovery whatsoever was effected from Chander Prakash and therefore, in the absence of identification and recovery from the appellant, the impugned judgment be set aside and the appellant be acquitted.

10. It was contended on behalf of appellant Anil that the CDR or the location of the mobile phones of Bunty (PW-3), Sunny (PW-19), the deceased and the accused persons could have been a vital link in establishing their presence at the spot at the time of incident, however, the same was never brought on record and thus, an adverse inference must be drawn against the prosecution for failing to present such crucial piece of evidence. It was contended that although it was the case of the prosecution that one motorcycle bearing registration No. DL 4S AS 9740 registered in the name of father-in-law of the appellant Anil was recovered at his instance (Ex.PW-16/D) which was allegedly used during the commission of offence,

however, the prosecution had failed to establish any connecting link between the said bike and the alleged crime committed. Reliance was placed on the decision in (2018) 16 SCC 161 Navaneethakrishnan vs. State to contend that mere recovery of object under Section 27 of the Indian Evidence Act, 1872 cannot lead to an adverse inference against the accused unless a connecting link between the crime and object recovered is established. None of the witnesses cited by the prosecution had given any description of the motorcycles used, and the father-in-law of the appellant to whom the bike belonged was also not cited as a witness to explain the circumstances under which his bike was used by the appellant. As per the prosecution, knife used in the commission of offence was recovered at the instance of co-accused Vinod (Ex.PW-15/L), however, it was contended that the said knife was sent for forensic examination on 27th December, 2010 and as per the serological report (Ex.PW-17/B), blood of the deceased was not detected on the said knife. Later on 3rd March, 2011 the said knife was sent for DNA testing (Ex.PW-20/A) as per which blood of the deceased was detected on the said knife. It was, therefore, pointed out that the knife being kept in malkhana for about three months before being sent for DNA testing, the possibility of tampering cannot be ruled out and reliance was placed upon the decision reported as 2022 SCC OnLine SC 1532 Rahul vs. State (NCT of Delhi).

11. The impugned judgment was assailed on behalf of appellant Vijay @ Nauty on the grounds that the conduct of Bunty (PW-3) and Sunny (PW-19) was not normal in simply standing near the place of incident and watching the appellants pulling out pistol from underneath their shirt and firing at the deceased and not making any effort to save the deceased. Both the eye-

witnesses Bunty (PW-3) and Sunny (PW-19), being the close friend and brother of the deceased respectively, as such are interested witnesses and their testimony cannot be accepted as it is and the same would require corroboration by the independent witnesses. Reliance was placed on the decisions in AIR 2022 SC 3765 *Khema @ Khem Chandra vs. State of Uttar Pradesh* and AIR 1965 SC 328 *Darya Singh and Ors. vs. State of Punjab*. It was further contended that the story of the prosecution is in contradiction with the first information received by the police vide DD No. 46A wherein it was recorded that four people on two motorcycles had killed a person, but the case of the prosecution was that eight people had come on three motorcycles and had stabbed and fired gunshots on the deceased. It was further contended that Bunty (PW-3) was present and readily available at the hospital and also at the time of the initial investigation, despite which, his statement was not recorded until the early hours of next day which casts doubt on him being an eye-witness. It was further contended that it was an admitted position that there was a previous animosity among the families of the deceased and the appellants, and therefore, the possibility of false implication by the alleged eye-witnesses cannot be ruled out. Furthermore, despite the place of incident being a busy street and a residential colony, no efforts whatsoever were made by the prosecution to record the statement of public/independent witnesses which casts doubt on the fairness of the investigation in the present case. The position of the alleged eye-witnesses PW-3 and PW-19 can neither be made out from the rough site plan (Ex.PW-30/A) nor from the scaled site plan (Ex.PW-29/A) which again casts aspersions on the statements of PW-3 and PW-19, if they had in fact seen the appellants firing shots at the deceased. As per the scaled site plan

(Ex.PW-29/A), the position of the empty cartridge had been shown to be at a distance of 200 centimeters from the place where the dead body was found which is contradictory to the post-mortem report (Ex.PW-26/A) as per which the distance from which the shot was fired on the deceased was opined to be less than 10-15 centimeters. Furthermore, as per PW-1, one empty cartridge was recovered from the spot but as per the statement of the eye-witnesses PW-3 and PW-19 as well as the post-mortem report two gunshot injuries were present on the body of the deceased, and no explanation as to the absence of one empty cartridge has been brought on record. The one empty cartridge which was recovered was also not sent for FSL examination to match the same with the bullets recovered from the body of the deceased and the alleged weapon was also not recovered, and all these circumstances cumulatively point that no such incident ever took place and the entire scene is concocted and framed against the appellants. No TIP was conducted qua the two motorcycles recovered from the appellants and no effort was made to recover the alleged third bike. Furthermore, all the seized parcels were sent to FSL belatedly on 27th December, 2010 that is, after a delay of almost one month after the date of incident. Furthermore, reliance was placed on the decision in 2000 CriLJ 4090 Radha Kishan vs. State wherein it was held that if the FSL form is not made and submitted with the malkhana then the possibility of tampering with the seals of samples sent to CFSL and tampering with the sealed samples cannot be ruled out and in the present case, there is no reference of the FSL form in the road certificate (EX.PW-13/C and Ex.PW-13/D) and even the seal of the IO was never deposited in the malkhana and thus, possibility of tempering cannot be ruled out. In totality of the circumstances as elaborated above, it

was contended that the prosecution having failed to establish its case beyond reasonable doubt, eye-witnesses turning hostile and absence of any other direct evidence leads to failure of the prosecution to establish the chain of circumstances and thus the impugned judgment be set aside and the appellant be acquitted.

12. It was contended on behalf of appellant Mahesh that nothing incriminating was recovered from his possession and that he himself surrendered before the learned Metropolitan Magistrate on 22nd December, 2010. The alleged eye-witnesses PW-3 and PW-19 were residing in the same locality and already knew the accused persons and therefore, the identification before the court would not be sufficient. It was contended that the appellant had been falsely implicated due to previous enmity as also admitted by Bunty (PW-3) and Sunny (PW-19). It was further contended that the appellant Mahesh was convicted with the aid of Section 34 of IPC however, the prosecution failed to establish any common intention/pre-planning or prior meeting of minds.

13. On the other hand, learned APP for the State submitted that the impugned judgment of the learned Trial Court is based on proper appreciation of facts and evidences and thus, the same be upheld and the present appeals be dismissed. It was contended that Bunty (PW-3) and Sunny (PW-19) were the eye-witnesses to the case and the deposition of PW-3 is consistent with his statement to the police (Ex.PW-3/DA) and there is no variation in the roles of the accused persons. It was contended that there are only minor discrepancies in his statement which can be attributed to the passage of over one year between the date of the incident and the date of recording his testimony in the Court. PW-3 supported the prosecution's

case in his examination and cross-examination, but turned hostile only when he was called for further examination after arrest of Vijay @ Nauty and Chander Prakash @ Pappu. It was further contended that PW-19 turned hostile and though he identified the accused persons correctly he stated that the accused persons had not murdered the deceased. It was contended that the fact that both the eye-witnesses turned hostile on 3rd January, 2014 shows that they were won over by the accused persons during trial however, it is a settled position of law that the testimony of a hostile witness must not be discarded in its entirety and those portions of the testimony which supports the prosecution case has to be read and considered and reliance was placed on the decision reported as (2012) 4 SCC 722 Govindaraju vs. State and (2012) 11 SCC 181 Bable vs. State of Chhattisgarh. It was further contended that Bunty (PW-3) had initially supported the prosecution's case which finds corroboration by other evidences and there is nothing on record to suggest any previous enmity between the accused persons and Bunty (PW-3). The non-identification of Vijay @ Nauty and Chander Prakash @ Pappu by PW-3 does not affect the prosecution's case when both these appellants were previously known to PW-3 and were categorically named by him in his statement to the police as well as during initial testimony in the Court. It was further contended that the DD No.46A was registered pursuant to a PCR call made by Raj Kumar Solanki (PW-5) whose office was located near the spot after noticing a huge crowd and the same was forwarded to HC Kamal Singh (PW-8) and as neither PW-5 nor PW-8 had witnessed the incident, mentioning of "four attackers" in the said DD No.46A is immaterial. It was further contended that Deepak (PW-9) supported the case of the prosecution and corroborated the initial portions of

the testimony of PW-3. Deepak (PW-9) deposed to have given his motorcycle to PW-3 and PW-19 for taking the deceased to the hospital and also stated that his motorcycle was stained with blood when it was returned to him. Ct. Kulvir (PW-2) also stated that on the date of the incident, the police gypsy of ACP Dr. Ram Gopal Naik was stopped by PW-3 and PW-19 near Maharaja Surajmal Institute, Janakpuri and they requested him to take the deceased to the hospital, and thus, the testimony of PW-9 and PW-2 lends credence to the prosecution's case. One *buttondar* knife recovered at the instance of appellant Vinod @ Kake from the bushes inside the wall of the drain on the southern side of Vikas Puri Bridge stained with blood was proved by SI Shiv Dutt Jamini (PW-15) and IO (PW-30). It was further contended that the non-recovery of pistol used in the present offence is not fatal to the case of prosecution as the two gunshot injuries were attributed to Vijay @ Nauty and Chander Prakash @ Pappu, both of whom were initially declared as proclaimed offenders and were arrested on 22nd May, 2013, that is, after almost two years of the date of incident and thus they had sufficient time to dispose of their weapons. Reliance was placed on the decision in (2021) 7 SCC 188 Rakesh vs. State of UP. Further, as per the post-mortem report, the time since death was opined as approximately 17-18 hours prior to the examination which was conducted on 28th November, 2010 at about 1.30 to 2.45 PM and accordingly, the approximate time of death would be 7.30 to 8.30 PM on 27th November, 2010 which matches with the alleged time of incident as deposed by Bunty (PW-3). As per the subsequent opinion (Ex.PW-26/B), the injuries on the body of the deceased were opined to be consistent to the knife produced, and even the blood found on the knife recovered from Vinod @ Kake matched with that of the deceased. It was

contended that all the facts and circumstances taken together unerringly point towards the common intention of the appellant to attack the deceased with lethal weapons so as to cause death. Reliance was placed on the decision in (2014) 2 DLT (Cri.) 907 (DB) Mukesh Singh vs. State (NCT of Delhi).

14. Having heard the parties at length and perusing the record, the following evidence emerges.

15. Bunt (PW-3) deposed that on 27th November, 2010, at about 8.30 PM, he alongwith his friends deceased and Sunny was going to Hastal Village at his house to drop him and near the Khatta at the corner of the Kali Basti, two motorcycles stopped in front of them and within two minutes a third motorcycle also came. Nauty and Pappu were sitting on one motorcycle and three persons namely Kake, Mahesh and Anil were sitting on second motorcycle and three other persons namely Vicky @ Gobind, Vicky @ Ganja and Rahul were sitting on the third motorcycle. All these eight person stopped in front of them and said “*aaj tumhe maja chakhate hain tumhe hamare khilaf thane me complaint likhai hai*”. Accused Kake caught Sonu and stabbed him from behind with a knife at his neck and forehead several times. Thereafter, accused Pappu took out a pistol from under his shirt and fired upon Sonu in his stomach. Accused Nauty also took out a pistol from under his shirt and fired at Sonu in his chest. Rest of the five accused persons had caught Sonu during this entire incident and thereafter, Sonu fell on the road. He and Sunny tried to save themselves and ran towards Hastal Village. He and Sunny returned at the place where Sonu had fallen after about five minutes and saw that a huge crowd had gathered around Sonu. He and Sunny sought help of one Deepak who gave his

motorcycle to them for taking Sonu to hospital. Sunny drove the motorcycle and Bunty put Sonu between him and Sunny. On reaching Suraj Mal College at Janakpuri, one police gypsy was seen coming from Vikaspuri side and he requested the driver of the gypsy to take Sonu to DDU Hospital as his condition was serious. He and Sunny put Sonu in the police gypsy and he sat with Sonu in the gypsy and Sunny followed on the motorcycle. Sonu was declared brought dead at the hospital and in the meanwhile, police reached the hospital. Thereafter, he and Sunny showed the police the place of occurrence and blood-stained clothes were handed over to police which were duly seized vide Ex.PW-3/D. In his cross-examination, he stated that his house was at a distance of about 1 km from the place of incident and that there was light on the way leading to his residence. He further stated that after the incident, he and Sunny fled from the spot to save their life and had crossed about 100 meters, but came back to the spot when accused persons ran away. He stated that he ran away from the spot after two fires were shot and both these fires were shot in quick succession. He further stated that on seeing the deceased falling on the road, the accused persons followed him and Sunny, but the accused persons lost them and thereafter, he and Sunny returned to the spot and saw a huge crowd gathered around Sonu. He stated that accused Mahesh and Vijay @ Nauty were having inimical terms with Sonu @ Bhola. When accused Chander Prakash and Vijay @ Nauty were arrested Bunty (PW-3) failed to identify them on which he was declared hostile. In his further cross-examination, he stated that he had made his statement in Court under the pressure of police and that there was darkness at the spot and that he had not seen the assailants at the spot. He further

stated that eight to ten persons had come on motorcycles and that he was unaware as to who had fired at Sonu.

16. Sunny (PW-19) in his examination before the Court stated that on 27th November, 2010 his friend Bunty visited him at his house and at about 9.00 PM he was going to drop Bunty when his brother/deceased was also with them. On reaching Hastal road, about ten persons on four motorcycles came there and two-three persons took out pistol and ran away after firing at Sonu. He and Bunty ran away from the spot to save themselves and on seeing a motorcycle whose rider was known to them, they stopped the motorcycle and drove the motorcycle with Bunty holding his brother/deceased Sonu on the motorcycle at the pillion rider seat and took him to DDU Hospital, but on the way near Suraj Mal Institute, they spotted a police gypsy to whom they requested to take his brother/deceased to the hospital. At the hospital, his brother/deceased was declared brought dead. He handed over his blood- stained clothes to the police which were seized (Ex.PW-15/B). He further stated that police did not do anything in his presence, and thereafter he was declared hostile. In his cross-examination, he denied that his family and the family of Vijay @ Nauty had any enmity and resiled from his statement made to the police. He identified the dead body of his brother at the DDU Hospital mortuary and stated that after the post-mortem the body was handed over to him (Ex.PW-30/C and Ex.PW-30/D). He further stated that although he knew all the accused persons but stated that the accused persons were not the same persons who had murdered his brother/deceased.

17. Deepak (PW-9) deposed that on the day of incident at about 8-8.30 PM, he was going with his ailing daughter to get her medicine on his

motorcycle No.DL 7S 5439 and near the Khatta at the corner of Hastal Village, Kali Basti, he saw a huge crowd there and on stopping his motorcycle, Sunny suddenly came to him and asked for his motorcycle to take his brother Sonu to the hospital as someone had fired on his brother. He gave his bike to Sunny and the deceased was held by Vicky on the motorcycle. Sunny returned his motorcycle on the next day at about 7.-7.30 AM when he was informed by Sunny that Sonu had died. However, later he stated that the name of the boy holding Sonu was Bunty and that earlier he had forgotten the correct name of that person. In his cross-examination, he stated that his motorcycle was stained with blood when returned to him but the same was not seized by the police.

18. Raj Kumar Solanki (PW-5) stated that on 27th November, 2010 at about 8.30 PM he was at his office at Shop No.4, Guru Lala Nath Mandir, Village Hastal, when he saw a crowd gathered outside his office and on going out, he saw one person lying in an injured condition near Kali Basti Khatta. He made the first call to the police at number 100.

19. Pappu (PW-10) stated that the deceased was his nephew and that on 28th November, 2010, he went to the mortuary at DDU Hospital with his other nephew Sunny and identified the body of the deceased (Ex.PW-10/A).

20. SI Shiv Dutt Jamini (PW-15) deposed that on 27th November, 2010 at about 8.55 PM, DD No.46A was received at PS Uttam Nagar regarding shooting of a person by four persons. He along with Ct. Rajender reached the spot near Central School, opposite Hastal Village, Kali Basti, Uttam Nagar where he found one empty cartridge case and one sport shoe. He got to know that the injured had been taken to the hospital, and on reaching DDU Hospital, he collected the MLC of the deceased wherein the doctor

had observed a gunshot injury and had declared him brought dead. At the hospital he recorded the statement of Sunny and came back at the spot with Sunny and Bunty. He prepared the rukka and got the FIR registered after which SHO Inspector Jai Kishan Gautam took over the investigation. In his cross-examination, he stated that no chance prints were taken of the knife recovered from the grass on the bushes and there was no rust on the knife. He also stated that the spot from where the knife was recovered was an open space but hidden in the bushes and that the bushes were not frequently visited by the public, however, it was not photographed.

21. ACP Jai Kishan Gautam (PW-30) was the investigating officer in the present case who stated that on the day of incident he was posted at the SHO at PS Uttam Nagar. After registration of FIR, under Sections 302/34 IPC and Sections 27/54/59 Arms Act, he took up the investigation and prepared the site plan (Ex.PW-30/A) at the instance of Sunny. The crime scene was inspected by the crime team and one cartridge case and one right foot sport shoe of the deceased were found at the spot, both of which were seized. Blood, blood- stained concrete and earth control along with the blood of the deceased were lifted from the spot (Ex.PW-3/C). Blood-stained T-shirt and khakhi jacket of Sunny were seized (Ex.PW-15/B). Blood-stained cloth of Bunty i.e. one half sleeve shirt, one *matiala* colour sweater were seized (Ex.PW-3/D). On the next day i.e. 28th November, 2010, the sealed parcels were deposited in the malkhana and he went to DDU Hospital where the dead body was identified by Sunny and Pappu and after the post-mortem the dead body was handed over to Sunny (Ex.PW-30/D). Thereafter, the clothes of the deceased, two metallic bullets found in his body and the sample blood of the deceased were seized (Ex.PW-15/C) and were

deposited at malkhana. On 22nd December, 2010, Vinod @ Kake and Mahesh surrendered at Court at Tis Hazari after which they were arrested (Ex.PW-15/F1 and Ex.PW-15/F respectively) and their disclosure statement were recorded (Ex. PW-15/D and Ex.PW-15/E respectively). Accused Vinod @ Kake led the police team to a *pulia* near Vikas Puri and got recovered one *buttondar* knife from the bushes inside the wall of Nala on the Southern side of the said *pulia*. The blade of the said knife was stained with blood and the knife was found in an open condition which was seized vide Ex.PW-15/L and subsequent opinion was sought from the doctor who conducted the post-mortem. On 5th April, 2011, accused Anil surrendered in the Court at Tis Hazari who was arrested (Ex.PW-16/A) and his disclosure statement (Ex.PW-16/C) was recorded, in pursuance of which, motorcycle bearing registration No.DL 4S AS 9740 was recovered from RZ -19, Brahmpuri, Sagarpur from in front of house of his in-laws vide seizure memo Ex.PW-16/D and his father-in-law Shyam Lal produced the photocopy of RC of the said motorcycle. On 26th April, 2011, accused Vicky @ Gobind was arrested (Ex.PW-16/F) and his disclosure statement (Ex.PW-16/H) was recorded in pursuance whereof, motorcycle bearing No.DL 3S BC 1195 was recovered from H. No.C-41, South Ex., Part-I of his in-laws and seized vide Ex.PW-16/J which was identified by Sunny. Remaining accused were declared proclaimed offenders, but later on accused Chander Prakash @ Pappu and Vijay @ Nauty were arrested by the Crime Branch and their charge-sheet was filed by the Crime Branch. Two accused persons Nagender @ Vicky @ Ganja and Ranjeet Kumar Singh @ Rahul could not be arrested. In his cross-examination, he stated that no

chance prints were present on the knife as the same was recovered after a gap of about one month.

22. Ct. Kulvir (PW-2) deposed that on the day of incident at about 9.15 PM, he was present along with ACP Dr. G. Ram Gopal Naik in his government gypsy and while passing through Maharaja Suraj Mal Institute at Janakpuri, two persons namely Sunny and Bunty on motorcycle bearing registration No.DL 7S 5439 requested the driver of the gypsy to stop and help them in taking the third person with them namely Sonu @ Bhola, who had received bullet injury to the hospital. After putting Sonu in the gypsy, Bunty sat along with them in the gypsy and Sunny drove on his motorcycle following them to the DDU Hospital. At the hospital, Sonu was declared brought dead. In his cross-examination, he stated that he did not inform to any police official of PS Uttam Nagar and that neither there was any blood in the gypsy nor on his clothes. The ACP was not present when the injured was declared dead.

23. HC Kamal Singh (PW-8) deposed that on 27th November, 2010 at about 8.51 PM, he received an information from PCR regarding firing upon a person by four persons on two motorcycles at the corner of Kali Basti, Central School, Hastal Road, Uttam Nagar which was recorded by him vide DD No.46A (Ex.PW-8/A). On the same day at about 9.35 PM, he received an information from lady Ct. Anita of PCR that from Jhuggi No.253, Transit Camp, Hastal, Uttam Nagar, brother of the informant had been shot which was recorded vide DD No.77B (Ex.PW-8/B). Further, at about 10.05 PM, another information was received from duty constable at DDU Hospital regarding admission of one Sonu son of Rajpal who was declared brought dead which was recorded by him vide DD No.80B

(Ex.PW-8/C). Thereafter, at about 11.55 PM Ct. Rajender brought a rukka sent by SI Shiv Dutt Jamini on the basis of which FIR No.385/2010 was registered (Ex.PW-8/D).

24. A.K. Shrivastava (PW-20) conducted the DNA examination on two parcels, i.e. a gauze cloth and a knife, and tendered his report (Ex.PW-20/A). As per the report, the DNA isolated from the metallic knife was found to match with the DNA profile generated from the gauze cloth piece of deceased.

25. In their respective statements under Section 313 Cr.P.C., appellants Vinod @ Kake, Vicky @ Gobind, Chander Prakash @ Pappu, Anil, Vijay @ Nauty and Mahesh stated that they were innocent and were falsely implicated in the present case.

26. Rahul Vohra (DW-1) deposed that on the day of incident at about 7.00 PM, he made a call to accused Vicky and met Vicky at his house for giving his Santro on rent. He remained at the house of Vicky for about two hours and left after having dinner with him at about 9.00 PM. In his cross-examination, he stated that Vicky's house was at a distance of about half kilometers from his own house and that he had never visited Vicky's house except on the said date.

27. The issue that needs consideration in the present appeals is whether reliance can be placed on the testimony of an eye-witness who has turned hostile. In the decision reported as (1991) 3 SCC 627 Khuji @ Surendra Tiwari vs. State of Madhya Pradesh, Hon'ble Supreme Court held:

"6. We have given our anxious consideration to the submissions made by the learned counsel for the contesting parties. The fact that an incident of the type alleged by the prosecution occurred on May 20, 1978 at about 8.20 p.m. is not

seriously disputed nor is the location of the incident doubted. The evidence of PW 3 Kishan Lal and PW 4 Ramesh came to be rejected by the trial court because they were declared hostile to the prosecution by the learned Public Prosecutor as they refused to identify the appellant and his companions in the dock as the assailants of the deceased. But counsel for the State is right when he submits that the evidence of a witness, declared hostile, is not wholly effaced from the record and that part of the evidence which is otherwise acceptable can be acted upon. It seems to be well settled by the decisions of this Court — Bhagwan Singh v. State of Haryana [(1976) 1 SCC 389 : 1976 SCC (Cri) 7 : (1976) 2 SCR 921] , Rabindra Kumar Dey v. State of Orissa [(1976) 4 SCC 233 : 1976 SCC (Cri) 566: AIR 1977 SC 170] and Syad Akbar v. State of Karnataka [(1980) 1 SCC 30 : 1980 SCC (Cri) 59 : (1980) 1 SCR 95] — that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent their version is found to be dependable on a careful scrutiny thereof. In the present case the evidence of the aforesaid two eye-witnesses was challenged by the prosecution in cross-examination because they refused to name the accused in the dock as the assailants of the deceased. We are in agreement with the submission of the learned counsel for the State that the trial court made no effort to scrutinise the evidence of these two witnesses even in regard to the factum of the incident. On a careful consideration of their evidence it becomes crystal clear that PW 4 had accompanied the deceased in PW 3's rickshaw to the place of incident. In the incident that occurred at the location pointed out by the prosecution, PW 4 sustained an injury. His presence in the company of the deceased at the place of occurrence, therefore, cannot be doubted. Immediately after the incident within less than an hour thereof PW 4 went to the police station and lodged the first information report. It is true that the first information report is not substantive evidence but the fact remains that immediately after the incident and before there was any extraneous intervention PW 4 went to the police station and narrated the incident. The first information report is a detailed document and it is not possible to believe that the investigating officer imagined

those details and prepared the document Ex. P-3. The detailed narration about the incident in the first information report goes to show that the subsequent attempt of PW 4 to disown the document, while admitting his signature thereon, is a shift for reasons best known to PW 4. We are, therefore, not prepared to accept the criticism that the version regarding the incident is the result of some fertile thinking on the part of the investigating officer. We are satisfied, beyond any manner of doubt, that PW 4 had gone to the police station and had lodged the first information report. To the extent he has been contradicted with the facts stated in the first information report shows that he has tried to resile from his earlier version regarding the incident. So also the presence of PW 3 at the scene of occurrence cannot be doubted once the presence of PW 4 is accepted. The trial court did not go so far as to say that both these witnesses were not present at the scene of occurrence or that PW 4 was not injured in the incident but refused to look into their evidence treating their evidence as non-est on their being declared hostile by the prosecution. We think that the approach of the trial court insofar as the evidence of these two witnesses is concerned, is legally unacceptable. The High Court has not endeavoured to assess their evidence since it thought that the conviction of the appellant could be sustained on the evidence of PW 1 Komal Chand. We are satisfied on a close scrutiny of the evidence of the aforesaid two eye-witnesses, PWs 3 and 4, that the deceased and PW 4 came to the place of occurrence in the rickshaw pulled by PW 3. On reaching the spot where the incident occurred they were surrounded by certain persons who were lying in wait and a murderous assault was launched on them. The first to receive the injury was PW 4. When they gauged the intention of their assailants they jumped out of the rickshaw and both ran in different directions. The appellant first tried to chase PW 4 but later he turned to the deceased as he was informed by one of his companions Gopal that the person he was pursuing was not Gulab. Therefore, from the evidence of these two eye-witnesses the fact that the deceased and PW 4 came to the place of occurrence in the rickshaw of PW 3 is established. So also the fact that on their reaching the place of occurrence they were surrounded by some persons and an assault was launched on them in which PW 4 received an injury and Gulab died is clearly established. The only area where they have not

supported the prosecution and have resiled from their earlier statements is regarding the identity of the assailants. We will deal with that part of the evidence a little later but the fact remains that the deceased had received three injuries as narrated by PW 12 Dr Nagpal, to which he succumbed on the spot. Once these facts are accepted as proved, the only question which really survives for consideration is whether the appellant was an assailant of the deceased.

7. That brings us to the evidence of PW 1 Komal Chand. Komal Chand's evidence was not accepted by the trial court on the ground that he was not a natural witness and was only a chance witness. PW 1 explained his presence by stating that he had gone to the market to purchase vegetables and while he was returning therefrom on foot with his cycle in hand he heard a commotion and saw the incident from a short distance. Being a resident of Suji Mohalla, the place of occurrence was clearly in the vicinity thereof and, therefore, his presence at the market place could not be considered to be unnatural. It is not unnatural for working people to purchase vegetables at that hour and, therefore, his explanation regarding his presence cannot be ruled out as false. The sketch map prepared by PW 11 Gaiser Prasad shows that he had seen the incident from a short distance of hardly 22 feet although PW 1 says he saw it from the square. Since the incident occurred at a public place with a lamppost nearby, the possibility of his having identified the assailants could not be ruled out. The examination-in-chief of this witness was recorded on November 16, 1976 when he identified all the assailants by name. He stated that he knew the six accused persons in court and they were the persons who had surrounded the rickshaw and launched an assault on PW 4 and the deceased Gulab. Of them Gopal struck PW 4 with a chain. He also stated that the appellant Khujji and his companions Gudda and Parsu were armed with knives and when Khujji tried to assault PW 4 with a knife, Gopal shouted 'Khujji that man is not Gulab'. Thereupon Khujji and his companions ran after the deceased Gulab, overtook him and the appellant, Parsu and Gudda assaulted Gulab with their weapons. Gudda struck Gulab from the front on his chest, Parsu stabbed him on the side of the stomach while Ram Kishan and Gopal held him and the appellant attacked him from behind with a knife whereupon Gulab staggered

shouting 'save save' and fell in front of the house of advocate Chintaman Sahu. Thereafter all the six persons ran away. His cross-examination commenced on December 15, 1978. In his cross-examination he stated that the appellant Khujji and Gudda had their backs towards him and hence he could not see their faces while he could identify the remaining four persons. He stated that he had inferred that the other two persons were the appellant and Gudda. On the basis of this statement Mr Lalit submitted that the evidence regarding the identity of the appellant is rendered highly doubtful and it would be hazardous to convict the appellant solely on the basis of identification by such a wavering witness. The High Court came to the conclusion and, in our opinion rightly, that during the one month period that elapsed since the recording of his examination-in-chief something transpired which made him shift his evidence on the question of identity to help the appellant. We are satisfied on a reading of his entire evidence that his statement in cross-examination on the question of identity of the appellant and his companion is a clear attempt to wriggle out of what he had stated earlier in his examination-in-chief. Since the incident occurred at a public place, it is reasonable to infer that the street lights illuminated the place sufficiently to enable this witness to identify the assailants. We have, therefore, no hesitation in concluding that he had ample opportunity to identify the assailants of Gulab, his presence at the scene of occurrence is not unnatural nor is his statement that he had come to purchase vegetables unacceptable. We do not find any material contradictions in his evidence to doubt his testimony. He is a totally independent witness who had no cause to give false evidence against the appellant and his companions. We are, therefore, not impressed by the reasons which weighed with the trial court for rejecting his evidence. We agree with the High Court that his evidence is acceptable regarding the time, place and manner of the incident as well as the identity of the assailants.

(emphasis supplied)

28. In 2021 SCC OnLine SC 1131 *Hari & Anr. vs. State of Uttar Pradesh*, it was held:

“24. No reliance can be placed on the evidence of the eyewitness PW-1 Shanti who has turned hostile, according to the Appellants. Rejecting this contention, the High Court was of the opinion that the evidence of PW1 cannot be eschewed from consideration only on the ground that they turned hostile. The relevant portion of their testimony was rightly relied upon by the High Court after recording the compelling reasons prompting the 12 prosecution witnesses, including PW1, to turn hostile.

25. ...

26. It is well settled that the evidence of prosecution witnesses cannot be rejected in toto merely because the prosecution chose to treat them as hostile and cross examined them. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent that their version is found to be dependable on a careful scrutiny thereof. It is for the Judge of fact to consider in each case whether as a result of such cross-examination and contradiction, the witness stands thoroughly discredited or can still be believed in regard to a part of his testimony. If the Judge finds that in the process, the credit of the witness has not been completely shaken, he may, after reading and considering the evidence of the witness, as a whole, with due caution and care, accept, in the light of the other evidence on the record, that part of testimony which he finds to be creditworthy and act upon it.

27. Even if the witnesses have turned hostile, their evidence can be accepted, if they are natural and independent witnesses and have no reason to falsely implicate the accused. In Mrinal Das v. State of Tripura this Court observed that credible evidence even of a hostile witnesses can form the basis for conviction in a criminal trial.

28. ...

29. Right to testify in Courts in a free and fair manner without any pressure and threat whatsoever is under serious attack today. If one is unable to testify in Courts due to threats or other pressures, then it is a clear violation of Article 19(1)(a) and Article 21 of the Constitution. Right to life guaranteed to the people of this country also includes in its fold the right to live in a society which is free from crime and fear and the right of witnesses to testify in Courts without fear or pressure. It needs to be emphasised that one of the main reasons for witnesses to turn

hostile is that they are not accorded appropriate protection by the State. It is a harsh reality, particularly, in those cases where the accused persons/criminals are tried for heinous offences, or where the accused persons are influential persons or in a dominating position that they make attempts to terrorise or intimidate the witnesses because of which these witnesses either avoid coming to Courts or refrain from deposing truthfully. This unfortunate situation prevails because of the reason that the State has not undertaken any protective measures to ensure the safety of these witnesses, commonly known as “witness protection”.

29. As noted above, PW-19 had turned hostile. Sunny (PW-19), the eye-witness had corroborated the version of Bunty (PW-3) in material particulars, however, he failed to name the accused. Further, Bunty who was examined as PW-3 in his examination-in-chief and cross-examination on behalf of other accused supported the case of the prosecution fully, however, when his cross-examination was conducted on behalf of Vinod @ Kake, Vijay @ Nauty, Chander Prakash @ Pappu on 3rd February, 2014, when examination of Sunny was also recorded for the first time, they turned hostile. It may be noted that Vijay @ Nauty and Chander Prakash @ Pappu, the two main assailants, who allegedly fired the shots could not be arrested, were declared proclaimed offenders and arrested only on 26th November, 2012. Bunty (PW-3), who is the brother of the deceased in his examination-in-chief conducted on 19th January, 2012 and cross-examination on 6th March, 2012, 4th July, 2012 and 3rd October, 2012, fully supported the case of the prosecution, however, when he entered appearance on 3rd January, 2014, after the arrest of Vijay @ Nauty and Chander Prakash @ Pappu, he stated that he could not identify them.

30. As noted above, in his examination-in-chief conducted on 19th January, 2012, Bunty clearly stated that when he along with his friend Sonu

@ Bhola and his brother Sunny were going to drop Bunty (him), and reached near the corner of Kali Basti, where garbage is collected (Khatta), two motorcycles stopped in front of them and within two minutes third motorcycle also stopped. Two persons namely Nauty and Pappu were sitting on one motorcycle and three persons namely Kake, Mahesh and Anil were sitting on the second motorcycle and three persons namely Vicky @ Gobind, Vicky @ Ganja and Rahul were sitting on the third motorcycle. Since by then Kake, Mahesh, Anil, Vicky @ Govind were arrested, he duly identified them. He clearly deposed about the exhortation made and that first of all Vinod @ Kake caught hold of Sonu and stabbed him from behind with a knife in his neck portion and forehead several times. Pappu took out a pistol from under his shirt and fired upon Sonu in his stomach and Nauty also took out a pistol from under his shirt and fired upon Sonu on his chest. Rest of the five accused had caught hold of Sonu during this incident. Sonu fell down on the road after receiving the injuries. Despite extensive cross-examination, version of Bunty could not be discredited in his cross-examination by all the accused persons except Chander Prakash @ Pappu and Vijay @ Nauty who had not been arrested till then. His version is further corroborated in material particulars by Sunny (PW-19) who was the real brother of the deceased who was examined on 3rd January, 2014 for the first time, however, he failed to name the accused. Deposition of Bunty is further corroborated by the version of Deepak (PW-9), whose motorcycle was taken by Bunty and Sunny, who put Sonu (deceased) on his motorcycle and took him to the hospital. On the way, they also found a police gypsy in which he was taken to the hospital. Their version is corroborated by Ct. Kulvir (PW-2), who deposed that on the day of incident at about 9.15 PM he

was present in the government Gypsy when two persons namely Sunny and Bunty, who were on the motorcycle, requested the driver of Gypsy to stop and help them in taking the third person namely Sonu @ Bhola, who received bullet injuries, to the hospital. The MLC of Sonu (Ex.PW-4/A) whereby he was declared “brought dead” noted that he was brought to the hospital at 9.40 PM by ACP Dr.G. Ram Gopal Naik, Ct. Kulvir and Bunty, the neighbour, thereby showing the presence of Bunty at the spot to be able to take the deceased to the hospital.

31. It is further well established that if the testimony of the eye-witness is cogent and convincing merely because there is no recovery of weapon of offence, i.e. the two pistols used for commission of offence of firing, the same would not dent the case of the prosecution. In the present case, one of the knives by which stab injuries were inflicted has been recovered at the instance of Vinod @ Kake on which an opinion was sought from the post-mortem doctor who opined that the stab injuries were possible by the said weapon as also the FSL report which shows blood of the deceased on the said knife. FSL report opining that the blood of the deceased was found on the knife is being assailed on the count that the specimens were sent to the FSL belatedly. It may be noted that the seals on the samples were found intact as per the sample seals on the FSL Form, when the samples were received at the FSL. Mr. A.K. Shrivastava, the expert, has given the details in his report as to how comparison was conducted and the method adopted based whereon it was opined that on the metallic knife, i.e. Ex.-2 alleles which matched the alleles on the gauze cloth piece of the deceased were accounted. The delay in sending the samples have not resulted in

putrefaction and no suggestion has given to the concerned police officer that due to the delay caused there was any tampering in the samples.

32. Evidence of Buntty (PW-3) and Sunny (PW-19) is assailed by the appellants stating that their conduct was unnatural as they ran away when the accused allegedly fired shots. It may be noted that the case of the prosecution is that after the other accused caught hold of the deceased Sonu, Chander Prakash and Vijay @ Nauty inflicted gun shot injuries and that too from a very close range in quick succession which version, that is, 'it was from a very close range' stands fortified by the report of the post-mortem doctor. At that stage when firing was started, the conduct of the two eye-witnesses in running away and hiding for sometime and immediately on the accused running away coming to the rescue of Sonu cannot be said to be unnatural as self-preservation is the first instinct of any human being.

33. Considering the evidence led by the prosecution as discussed above, this Court finds that the same proves beyond reasonable doubt the guilt of the appellants.

34. Appeals are accordingly dismissed.

35. Judgment be uploaded on the website of this Court and copy of the same be sent to the Superintendent, Jail for updation of record and intimation to the appellants.

(MUKTA GUPTA)
JUDGE

(POONAM A. BAMBA)
JUDGE

MARCH 22, 2023/'vn'