Om Prakash Vs. State

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Court : Delhi

Decided On : Aug-30-2013

Judge : G. S. Sistani

Appellant : Om Prakash

Respondent : State

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI Judgment Reserved on :

29. h July, 2013 Judgment Pronounced on :

30. h August, 2013 % + CRL.A. 410/2010 OM PRAKASH ..... Appellant Through : Ms.Saahila Lamba, Adv. versus STATE Through : .....Respondent Ms.Richa Kapoor, Additional Public Prosecutor for the State. CORAM: HON'BLE MR. JUSTICE G.S.SISTANI HON'BLE MR. JUSTICE G.P. MITTAL G. S. SISTANI, J.

1. Present appeal challenges the judgment dated 17th February 2009 and order on sentence dated 19th February 2009. The facts of the case unfold as under.

2. As per the prosecution on 25th November 2004 life of a 16 months old girl named Bulbul came to an end as she was thrown against a wall by her own father, the appellant herein. Police Station Anand Parbat was informed of the incident on 25th November 2004 at 5:36 PM by the PCR. The information was recorded by DD No.17A, a copy thereof was handed over to ASI Subedeen who proceeded to

the spot of the incident i.e. RC-111, Rajasthan Colony, Baba Farid Puri, Anand Parbat. On reaching the spot it was found that one Bittoo was sitting with the body of a small girl child in his lap. The mother of the child Geeta made a statement before the police that she was residing at the said address along with her daughter and Bittoo as she had a matrimonial discord with her husband Om Prakash. On the previous night i.e. 24.11.2004 the appellant had come to the house drunk and picked up a quarrel with her, asked her to restrain herself from living with Bittoo. One Hira @ Jhoola was also present who intervened in the matter. He was hit by the appellant on his head. On seeing that Hira had received injuries, Om Prakash i.e. the appellant ran away. On the fateful day, appellant again came to the house of Geeta at around 11:15 AM along with one Pradeep and started quarreling with her for the same reason that he would not tolerate her living with Bittoo. During the quarrel the appellant picked up her daughter and struck her head against a wall and then threw her on the ground. Seeing her bleeding from the mouth he ran away. Geeta lay down along with her daughter and slept and it was only around 4:30 PM she realized that the condition of her daughter was bad. She left her daughter Bulbul with Bittoo and went to one Tittoo who arranged for some money. On her return she found that police had arrived and her daughter had expired. ASI Subedeen sent a rukka from the spot on the basis of Geetas statement and got the FIR registered at Police Station Anand Parbat.

3. Crime team was called. ASI Subedeen found articles including utensils scattered on the floor along with broken glass pieces and 6 empty quarter bottles of liquor. Photographs were taken by the crime team. The appellant was arrested on 26th November 2004. Autopsy was conducted on the body of Bulbul where it was opined that the death has been caused due to head injury. 16 witnesses were examined by the prosecution.

4. Learned counsel for the appellant submits that the prosecution has failed to prove its case beyond reasonable doubt, the Trial Court has passed its judgment on conjectures and surmises, and the same is not supported with any legally admissible principles of law. Counsel further contends that the Trial Court failed to appreciate that no reliance could have been placed on the testimony of the prosecution witnesses as they are interested witnesses. The Trial Court has

wrongly relied on the evidence of PW-7 Bittoo as he was not present at the spot nor he was an eyewitness. Counsel submits that the incident took place at 11:15 AM in the morning and till 4:30 PM no medical aid was provided to the victim and thus the appellant cannot be made responsible for the lapses on the part of the mother of the child. It is further contended that the story of the prosecution cannot be believed as there is gross delay in informing the police since the incident took place at 11:15 in the morning; the police was informed only at 5:35 in the evening. Counsel next contends that the Trial Court has failed to appreciate the evidence of Beena PW-3 who has deposed that the daughter was sitting in the lap of the husband and further stated that the room was taken on rent for Geeta and her husband and since the child was in the lap of Bittoo, he was responsible for the death of the child. Counsel also submits that there are contradictions in the evidence of various witnesses. According to PW-8 the blood was lying scattered when he visited the room whereas according to PW-7 he had wiped the blood from the floor. Counsel further submits in the alternative that at best the prosecution has been able to make out a case of culpable homicide not amounting to murder, the case of the prosecution does not fall under any of the class of Section 300 IPC. Reliance is placed by the learned counsel on para 5 of the decision rendered by a Division Bench of this Court in the case of Ashok Kumar v. State (NCT of Delhi) Crl.Appeal No.577/2005. Counsel relies on this judgment to show that although serious injuries were caused on the victim but it was held by the Division Bench that it was a case of culpable homicide not amounting to murder. Reliance is placed on para 35 and 36 which read as under:35. A perusal of the FIR shows that the origin of the incident was a sudden quarrel. How did it all start? As recorded in the first information report, the deceased wanted his separate share in the property which was opposed to by the other brothers. This had become a source of irritation. Two days prior, the deceased had got stopped the renovation work. In the intervening night when the incident took place, the deceased was sitting on the floor. The appellant came there (unarmed) and enquired as to why was the deceased creating hurdles in the reconstruction of the property. The deceased retorted and misbehaved. What words were actually spoken and in what manner the deceased misbehaved with the appellant has not been expounded. The complaint further records that after the deceased misbehaved and retorted, the

appellant got enraged and abused the deceased, who picked up a coca cola bottle lying on the room and this provoked a counter reaction from the appellant, who picked up a spade and gave blows from the handle of the spade on to the left temple of the deceased.

36. It is apparent that everything happened upon a sudden quarrel. It is not the case of the prosecution that the appellant came to the house armed with a spade. There is no pre-meditation. Exception 4 to Section 300 IPC is clearly attracted. The illuminating observations of the Supreme Court noted herein above highlighting the facets of Exception 4 to Section 300 are clearly attracted.

5. Per contra counsel for the State submits that the prosecution has been able to establish the guilt of the appellant. The evidence of PW-7 who is an eye-witness is truthful. The rukka was prepared on the basis of statement made by the mother of the deceased. It is further submitted that the case of the appellant is fully covered under Section 300 (Thirdly) and Illustration-C. It is further submitted that the case of Ashok Kumar (supra) is not applicable to the facts of the present case as it would show that in that case the victim was hit with the handle of the spade and not the spade. Action was not premeditated in nature and the incident occurred on account of a quarrel which erupted between the brothers. While relying on the report of the doctor Ms.Kapoor, learned APP submits that the injury was sufficient to cause death of the child and thus the stand taken by the appellant that no medical aid was provided to the victim would not be available to the appellant. It is also contended that neither it is the case of the defence that no medical aid was provided nor any argument was raised on the question of delay and moreover the case of the prosecution would be covered under Section 299 (Exception 2).

6. Before the rival submissions of the parties can be considered we deem it appropriate to reproduce the evidence of PW-7 who is the star witness of the prosecution being the eye-witness and PW-2 who is also a material witness. The evidence reads as under:PW-7, Statement of Bittoo, s/o Sh. Mulk Raj, aged 31 years, r/o House not T-181, Baljeet Nagar, Patel Nagar, Delhi. I knew Geeta W/o Om Prakash about 3-4 months prior to the incident. Geeta was friendly with me and was in love with me. Geeta had a daughter aged about 1 years. Geeta was

wife of accused Om Prakash present in the court today (correctly identified). Geeta used to tell me that her husband Om Prakash did not provide her expenses for daily needs and he was also not treating her well. On 23/11/2004, Geeta came to me along with her daughter and told me that she had left Om Prakash and she wanted to live with me and she had also taken one room on rent. I along with Geeta and her daughter went to House not RC 111.Rajasthan Colony, Baba Farid Puri and I stayed with Geeta on that day. On 24/11/2004, when I, Geeta and her daughter Bulbul and another person Heera @ Jhulla were present in the house, then at about 11.00-11.15 pm in the night, accused Om Prakash came there. He had consumed liquor. Accused Om Prakash started abusing and said that he would not allow Geeta to live with me but Geeta insisted that she wanted to live with me. Geeta refused to go with accused Om Prakash. Accused Om Prakash started to beat Geeta and then Heera intervened to save Geeta. On this, accused hit Heera by one wooden Madhani (curd beater) on his head. Blood came out from the injury of Heera and on seeing the blood, accused ran away from the spot. I provided some first aid to Heera and Heera did not go to any hospital. Next day, on 25/11/1994, I, Geeta and her daughter Bulbul were present in the house. At about 11:15 AM day, accused Om Prakash again came there with another boy Pradeep and started abusing and quarreling. Seeing the quarrel taking place, Pradeep left from the room. Accused again said to Geeta that he would not allow her to live with me but Geeta insisted to live with me. On this, accused Om Prakash said that he wanted to finish his daughter Bulbul. Firstly, accused Om Prakash hit on the back of his daughter Bulbul with one broken quarter bottle. Bulbul started weeping. On this, accused Om Prakash picked up Bulbul and threw her against the wall. On this, blood came out from the mouth of Bulbul. Accused again picked up Bulbul and threw her on the floor forcibly. Thereafter, accused Om Prakash fled away from the spot. I provided first aid to Bulbul and wiped the blood from the floor and from her injuries. At about 4:30 PM, condition of Bulbul deteriorated. Geeta left the house to arrange the money for the treatment of Bulbul from her brother and left behind Bulbul with me. I was sitting outside the house with Bulbul in my lap on a cot. After sometime, I had realized that the body of Bulbul became motionless and cold. So I realized that she died. Several persons from the neighbourhood collected there. Police also came there. Geeta also came

back and Bulbul was taken to DDU Hospital where doctor also declared that she was dead. Accused Om Prakash had killed Bulbul by striking her against the wall and floor. Police had recorded my statement. Postmortem was conducted on the body of the Bulbul at the DDU Hospital. I had identified her dead body. My statement in this regard is Ex.PW-7/A which bears my signatures at point A1. xxxxxxxx by Mohd.Akram, Amicus Curiae for accused. Geeta was known to me for the last about 3-4 months only before the day of incident. Firstly, I met Geeta when her daughter was not well and she asked me to remove her daughter to some doctor in my TSR because at that time I was driving a TSR. It is correct that thereafter we started meeting with each other. I had not seen myself but only heard that Geeta used to take some intoxication pill. It is correct that I was having physical relations with Geeta. I do not know from where Geeta had come on 23/11/2004 but at that time I was standing at TSR stand in Baba Farid Puri. I have studied upto 7th class. On 24/11/2004, accused Om Prakash had come alone. We had not consumed liquor but Om Prakash was already under the influence of liquor. It is correct that accused Om Prakash had not consumed liquor at RC 111.Farid Puri, Rajasthan Colony, Delhi on 24/11/2004. It is correct that quarrel took place of the accused with Pardeep @ Jhula because Pardeep @ Jhula tried to intervene in the matter as accused Om Prakash was bent upon to beat Geeta. It is correct that Pardeep @ Jhula was not removed to any hospital because he had sustained very minor injuries, hence first aid was provided to him. As the accused Om Prakash had fled away from the spot on 24/11/2004, hence intimation to the police was not given. It is correct that Pardeep @ Jhula also left the house and I remained present in the said house with Geeta in the night. It is correct that the room was taken on rent by me and Geeta collectively. Pardeep @ Jhula was not residing with us in the said room. Pardeep @ Jhula is my friend. Another Pardeep who came with accused Om Prakash on 25/11/2004 was not known to me prior to that day. Name of the said person was told to me by Geeta as Pardeep. As the girl Bulbul was not looking much injured, hence police was not informed at that time. It is correct that Bulbul was not removed to hospital. It is correct that I and Geeta remained present in the said room till 4:00 PM. There were no pieces of broken glass in the room on 25/11/2004 till accused Om Prakash came in the room with one Pardeep. It is incorrect to suggest that accused Om Prakash has been falsely

implicated in this case by me and Geeta. It is incorrect to suggest that I am deposing falsely. Police came at the spot after about 15-20 minutes from 4:30 pm. My statement was recorded by the police till 9:30 PM at RC 111.Rajasthan Colony, Baba Farid Puri, Delhi. Thereafter no other statement of mine was recorded by the police. Even after the incident, I resided with Geeta. Geeta died in the night while she was sleeping with me as she had taken some pills because she was under the shock of death of her daughter. I informed about the death of Geeta to the police. My statement might have been recorded by the police regarding death of Geeta. I cannot produce any such statement before the Court. It is incorrect to suggest that I am deposing falsely. PW-2 I am an electrician. I know accused Om Prakash, present in the court, as he lived in Shadipur village, where I was born. On 25.11.2004 I was going to Patel Nagar to buy clothes as marriage of my niece was nearing. I was going on my two wheeler scooter. At about 11.00 AM accused Om Prakash met me in Patel Nager on the main road. On inquiry, I told Om Prakash that I was going to Patel Nagar, on which accused requested me to give him a lift and drop at Farid Puri. I took Om Prakash with me on a scooter and dropped him at Farid Puri. Om Prakash requested me to wait for a minute, so that he can come back and return with me. Then accused Om Prakash went inside a gali and I waited for about five minutes for him but Om Prakash did not return. I went inside the gali and I saw Om Prakash arguing with Geeta, whom I had seen with him on earlier occasions also in Shadipur Village. Om Prakash and Geeta were having heated arguments and were using abusing (sic. abusive) language. Seeing this I thought that Om Prakash may take time in returning, so I returned back. I had seen one small child in the lap of Geeta and at that time that child was weeping. I had seen one more person in the room at the door of which Om Prakash and Geeta were quarreling but I did not know that man and I did not know his name as well.

7. We also deem it appropriate to reproduce the evidence of PW-3, who was the land-lady who had given one room on rent to Geeta. The same reads as under: PW-3 Duli Chand is my uncle residing in front of my house having two rooms. On 10.11.2004 my uncle Duli Chand went to Rajasthan and handed over the keys of the room to me and asked me to give one room on rent. On 23.11.2004 I gave one room to Geeta at the rate of Rs.300/- per month on rent and Geeta started residing

with alongwith her husband and a female child. In the night intervening 24/25.11.2004 I heard the noise of quarrel. I inquired them as to what is happening. Geeta told me that there was a quarrel with her husband. I saw one person running from the gali. One more person was following that person and he had perhaps a bandage on his head. On 25.11.2004 at about 11.00 AM, I had gone to the school of my son. When I was locking my house I heard the voice of Geeta saying TU LADKI KO MAT MAAR TERI LADKI HAI TU LE JAA and I saw one person from the back wearing cream colour sweater. At about 4.30 PM I returned from the school of my son and asked Geeta to vacate the room, on which Geeta told that she will take Rs.600/- to vacate the room. At that time, her husband was sitting with the girl child in his lap and he told that the girl has expired. Thereafter people collected there. One neighbour Vijay Laxmi informed the police and thereafter I came to my room. Next day police came to me with a sweater. On seeing the sweater, Geeta told that it is the same sweater which that person was wearing. I had not seen any accused with the police at that time. At this stage Addl. PP submits that witness is suppressing the truth and he wants to cross-examine him. Heard allowed. XXXXX by Addl. PP of State It is correct that police had made inquiries from me and recorded my statement. It is correct that name of girl child was Bulbul and the person who was residing with Geeta was Bitto. It is incorrect to suggest that on 26.11.2004 police came with accused Om Prakash, present in the court. Volunteer on that police had shown me only sweater. It is correct that that sweater was seized by police. It is correct that police prepared pullanda of the sweater and sealed the same with the seal of RPS and seized vide seizure memo Ex.PW-3/A, which I signed at point A. I can identify that sweater if shown to me. (At this stage one sealed pullanda sealed with seal of RPS is opened). Sweater is taken out which the witness identifies as the same which was seized by the police and identified by Geeta as the same which was worn by the accused on 25.11.2004. It is incorrect to suggest that I am deliberately not identifying the accused. It is incorrect to suggest that on 26.11.2004 accused Om Prakash had come to the spot wearing the sweater Ex.P-2. Volunteer I had only seen the sweater Ex.P2, which was identified by Geeta and seized by the police. It is incorrect to suggest that I am deliberately suppressing some of the material facts to save the accused.

8. The post-mortem was conducted on the child by Dr.L.K.Baruah of DDU Hospital. PW-1 has deposed as under:On 26.11.2004 at 1:50 PM I conducted post-mortem examination on the dead body of deceased Bulbul, female aged about 16 months sent by Inspector Madan Mohan of PS Anand Parbat. On examination of the dead body, I observed following injuries. (1) Multiple vertically placed scratches present on the back side of the body, out of them 12 number could be counted. The individual length of the scratches varies from 9 to 16 cm in length and 0.1 to 0.2 cm in width. This injury was skin to muscle deep. (2) Contusion over left side of forehead, size 4 x 3 cm, placed 0.5 cm above the left eye brow and reddish in colour. (3) Defused contused areas on the right side of forehead extending from mid line to tragus of the right ear and from above eye lid to frontal hair line. (4) Contusion over left occipital parietal area and 5 cm above the left ear, size 2.5 cm x 1.5 cm. INTERNAL EXAMINATION On examination of the head, I observed defused massive blood clot underneath whole of the scalp. I had also observed one fracture line extending from right parital bone upto occipital bone, length being 18 cm. On examination of brain, it showed defused blood clot and contusion of the brain on right parital area. I have also drawn sketch of the fracture line of the head in the original post-mortem report. On examination of chest and abdomen, nothing abnormally could be detected. All the injuries mentioned in my report were ante mortem in nature. Injury to the back could be possibly by hard pointing object. The contused areas with underlying fracture of bone and brain injury was possible by blunt object-hit or against hard object. Death was due to coma/head injury. Time since death was about one day. My post-mortem report is Ex.PW-1/A, which is in my own handwriting and bears my signature at point A. Before conducting post-mortem examination, I received an application from SHO Anand Parbat for conducting post-mortem examination on the dead body of Bulbul along with eight other papers, which were duly initially and numbered by me and handed over to police along with post-mortem report. An application dated 30.11.2004 by Inspector Madan Gopal SHO Anand Parbat was received by me on 4.12.2004 for opinion regarding scratches observed on the body of deceased Bulbul at the time of post-mortem examination. I had also received one sealed packet sealed with seal of MG, said to have contained one weapon used for inflicting injuries on the body of Bulbul. After opening the pocket,

I found one broken glass bottle in the same. The scratches observed on the body of deceased Bulbul were possible by broken glass pieces contained in that parcel and I gave my opinion on application which is Ex.PW-1/B. The broken bottle glass pieces were re-sealed with seal of LKB and handed over to the IO. Another application dated 27.1.2005 was received by me on the same day moved by IO Inspector Madan Gopal seeking opinion whether head injuries on the dead body of Bulbul could have been caused by striking against a wall and after going through the record, I opined that injuries suffered by deceased Bulbul on her head could have been caused by striking her head on the wall and in my opinion the head injuries sustained by Bulbul were sufficient in ordinary course of nature to cause her death and my opinion to this effect is Ex.PW-1/C (At this stage a parcel duly sealed with seal of LKB is opened). The broken piece of glass bottle are the same which were contained in the parcel produced by IO before me along with application dated 30.11.2004 on the basis of which I had given by opinion. The pieces are collectively Ex.P-1. xxxxx by accused Nil opportunity given.

9. The presence of the appellant at the spot of the incident on the fateful day has not been denied yet stands duly established by the evidence of PW-2 as well, who has deposed that he knew the appellant as he lived in the same village where he was born. On 25th November 2004 he was going to Patel Nagar to buy clothes as the marriage of her niece was near. The appellant met him at Patel Nagar at about 11:00 AM. He gave appellant a lift on the scooter and dropped him at Faridpuri. The appellant had requested him to wait for a minute so that he could came back and return with him. Om Prakash had gone inside the gali. He waited for about five minutes for Om Prakash but since he did not return he went inside the gali and saw Om Prakash arguing with Geeta whom he recognized as he had seen her on earlier occasions in the village. Both husband and wife were having a heated argument and were using abusive language. He decided to return. He saw a small child in the lap of Geeta who was weeping and another person was also present in the room. This witness was not cross examined by the defence.

10. PW-3 Beena has also deposed that on 25th November 2004 at about 11:00 AM she had heard the voice of Geeta saying Tu ladki ko mat maar teri ladki hai tu le ja. She had seen one person from the back wearing a cream colour sweater.

Although this witness was cross- examined by the Public Prosecutor she identified the sweater but she did not identify the appellant. The evidence of PW-2 and PW-7 clearly establish the presence of the appellant at the spot of the incident on the fateful day. The heated argument between Geeta and the appellant find corroboration from the evidence of PW-2 Pradeep, evidence of PW-3 Beena as also the eye-witness account of PW-7 Bittoo. In the testimony of PW-7, he has stated that even on 24th November 2004 the appellant had visited the house at Baba Farid Puri between 11:00 to 11:15 am under the influence of liquor. Geeta had refused to go with the appellant. He had started beating Geeta and when Heera @ Jhula who was present, the appellant hit Heera with a wooden Madhani on head. It has also been deposed by PW-7 that the appellant had hit on the back of his daughter with a broken quarter bottle. The child started weeping. On this the appellant picked up the child and threw her against wall. Blood came out from her mouth. The appellant again picked up the child and threw her again forcibly and thereafter he fled from the spot.

11. Counsel for the appellant has submitted that no medical aid was provided to the child and further the police report was made as late as at 5:35 pm in the evening.

12. The evidence of PW-7 by which he described that the appellant had hit the child with an empty bottle and thereafter slammed her against the wall and then on the floor find due corroboration from the observations made on the dead body which have been reproduced above. PW-1 has deposed that the injury to the back could possibly be due to hard pointing object. PW-7 has deposed that the appellant has hit the child with an empty bottle. The injuries on the head also find corroboration from the evidence of PW-1. It may be noticed that after making the statement to the police Geeta, the mother of the deceased child committed suicide the same night. Thus, her statement cannot be relied upon. PW-6 HC Ram Niwas has also deposed that on 25th November 2004 he received a telephone that one person has killed his son and who was lying dead in room not RC-111, Baba Farid Puri, Rajasthan Colony.

13. The first submission made by counsel for the appellant is that no reliance can be placed on the evidence of the PW-7 and PW-2, as they are interested witnesses. Counsel also submits that the mother of the child was residing with Bittoo, PW-7 and, thus, he was an interested witness.

14. As per the evidence of PW-2, he knew Om Prakash, appellant as he lived in Shadipur village where he was born. It is the appellant, who had approached him on 25.11.2004 for a lift on his scooter. There is nothing on record to suggest that PW-2 had any enmity with the appellant, moreover, in case of enmity, if any, the appellant would not have asked him for a lift on the scooter. Thus the PW-2 cannot be termed as an interested witness.

15. Before dealing with the submissions made by the counsel for the appellant that PW-7, Bittoo is an interested witness and thus his evidence cannot be relied upon, it would be useful to discuss the law laid down by the Apex Court with regard to placing reliance on evidence of witnesses, who are interested or partisan. In the case of Masalte Vs. State of Uttar Pradesh, reported at AIR 196.Supreme Court 202, the Apex Court has held as under:

14. Crl.Appeal No.410/2010 Mr.Sawhney has then argued that where witnesses giving evidence in a murder trial like the present are shown to belong to the faction of victims, their evidence should not be accepted, because they are prone to involve falsely members of the rival faction out of enmity and partisan feeling. There is no doubt that when a criminal court has to appreciate evidence given by witnesses who are partisan or interested, it has to be very careful in weighing such evidence. Whether or not there are discrepancies in the evidence; whether or not evidence strikes the court as genuine whether or not the story disclosed by the evidence is probable, are all matters which must be taken into account. But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested Page 16 of 27 witnesses; Often enough, where factions prevail in villages and murders are committed as a result of enmity between such factions, criminal courts have to deal with evidence of a partisan type. The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to, failure

of justice. No hard and fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct.

16. Similar view has also been expressed in the case of State of Punjab Vs. Karnail Singh, reported at AIR 200.(90) Supreme Court 3613:8. We may also observe that the ground that the witnesses being close relatives and consequently being partisan witnesses, should not be relied upon, has no substance. This theory was repelled by this Court as early as in Dalip Singh and others v. The State of Punjab (AIR 195.SC

364) in which surprise was expressed over the impression which prevailed in the minds of the Members of the Bar that relatives were not independent witnesses. Speaking through Vivian Bose, J.

it was observed:We are unable to agree with the learned Judges of the High Court that the testimony of the two eyewitnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rule. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this Court endeavoured to dispel in Rajasthan', (AIR 195.SC 5.at p.59). We find, however, that it unfortunately still persists, if not in the judgments of the Courts, at any rate in the arguments of counsel.

9. Again in Masalti and others v. The State of U.P. (AIR 196.SC

202) this Court observed : (pp. 209-210 para 14): But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses..... The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard and fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected

because it is partisan cannot be accepted as correct.

10. To the same effect is the decision in State of Punjab v. Jagbir Singh, (AIR 197.SC 2407.and Lehna v. State of Haryana, (2002 (3) SCC 76). As observed by this Court in State of Rajasthan V. Smt. Kalki and another, (AIR 198.SC 1390), normal discrepancies in evidence are those who ae due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence and those are always there, however, honest and truthful a witness may be. Material discrepancies are those who are not normal, and not expected of a normal person. Courts have to lable the category to which a discrepancy may be categorized. While normal discrepancies do so. These aspects were highlighted in Krishna Mochi and others v. State of Bihar etc. (JT 200.(4) SC 186).

17. This view has again been reiterated in the case of State of NCT of Delhi Vs. Rani Kant Sharma & Ors., reported at 2007 (3) JT 501.relevant portion is reproduced below:11. In some cases persons may not like to come and depose as witnesses and in some other cases the prosecution may carry the impression that their evidence would not help it as there is likelihood of partisan approach so far as one of the parties is concerned. In such a case mere non-examination would not affect the prosecution version. But at the same time if the relatives or interested witnesses are examined, the court has a duty to analyse the evidence with deeper scrutiny and then come to a conclusion as to whether it has a ring of truth or there is reason for holding that the evidence was biased. Whenever a plea is taken that the witness is partisan or had any hostility towards the accused, foundation for the same has to be laid. If the materials show that there is partisan approach, as indicated above, the court has to analyse the evidence with care and caution. Additionally, the accused persons always have the option of examining the left out persons as defence witnesses.

18. In Dalip Singh and Ors. v. The State of Punjab it has been laid down as under:A witness is normally to be a 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 relation 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. However, we are not attempting any sweeping generalization. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rue. Each case must be limited to and be governed by its own facts.

19. The above decision has since been followed in Guli Chand and Ors. v. State of Rajasthan in which Vadivelu Thevar v. State of Madras was also relied upon.

20. It is seen that it has been consistently held by the Apex Court that the Courts must be cautious and careful while weighing the evidence given by witnesses, who are partisan or interested. However, the evidence of such witnesses should not be mechanically discarded. Applying the aforesaid principles laid down by the Apex Court to the facts of the present case and after closely examining the evidence of PW-7, we find the evidence of PW-7 to be trustworthy, truthful and reliable and stands duly corroborated with the evidence of PW-2 and the post mortem report of the child as proved by Dr.L.K.Baruah (PW-1) of DDU Hospital. According to PW-7 on 24.11.2004, Om Prakash had visited their room; he was under the influence of liquor and he was abusing Geeta. He thereafter started beating Geeta and when Heera @ Jhulla, who was present there intervened to save Geeta, the appellant hit Heera with one wooden Madhani (curd beater). On seeing blood oozing from the head of the Heera, appellant ran away from the spot and only returned on the following day at 11:15 a.m. with Pradeep (PW-2), and started abusing and quarreling with Geeta. Appellant had said that he would finish the daughter, Bulbul. He hit his daughter on her back with one broken quarter bottle and when Bulbul started weeping the appellant took her up and threw her against the wall, when blood started oozing from the mouth of Bulbul, he again took her up and threw her on the floor forcibly; and thereafter he fled from the spot. The evidence of PW-7 is corroborated by the evidence of PW-2, who had given a lift at the

request of the appellant to him. He had seen appellant arguing with Geeta, whom he recognized. The arguments were heated and he was using abusive language; he had also seen small child in the lap of Geeta and at that time the child was weeping. He had also noticed one more person in the room, but he did not know that person.

21. By the evidence of PW-2 and PW-7, the presence of the appellant at the spot is duly established and proved. It is also established that he was quarreling with Geeta and the child was crying. PW-3 had also deposed that in the night intervening 24th and 25th November, 2004 she heard noise of quarrel. Geeta had informed her that there was a quarrel with her husband. On 24.11.2004 at about 11:00 a.m. when she was locking her house, she heard the voice of Geetay saying Tu Ladki Ko Mat Maar Teri Ladki Hai Tu Le Jaa. Although she had not identified the appellant, this witness was also cross-examined by the counsel for the State. This portion of her evidence is reliable. The presence of the appellant at the spot on the fateful day in the morning and the evidence of PW-7 which is duly supported by the evidence of PW-2 and PW-3, would show that the appellant was hitting his daughter and that is why PW-3 had heard Geeta saying Tu Ladki Ko Mat Maar Teri Ladki Hai Tu Le Jaa. The medical evidence placed on record, the port-mortem and the evidence of PW-I, which is reproduced above conclusively proves that the child was killed in the manner, as deposed by the eye witness.

22. It has also been submitted before us that the story of the prosecution cannot be believed, as there is great delay in informing the Police, since the incident took place on 11:15 in the morning and the police was only informed in 5:35 evening. We find no force in this submission for the reasons that after the incident both the mother and the child had slept and the mother who was an illiterate lady and committed suicide on the same night could not predict the situation to be so alarming and only around 4:30 she realized that the condition of her daughter is bad. She left the child with Bittoo and went to one Tittoo to arrange for some money.

23. Having regard to the fact that the mother was illiterate, mother and the child belong to a very poor segment of the society with no guidance of any nature, the

delay in lodging the FIR cannot be termed to be fatal in the facts of this case. Moreover, she had decided to stay with Bittoo and not with her husband, which factor had also been in her mind for not informing the police.

24. Ms.Lamba, counsel for the appellant has also argued that the case of the prosecution does not fall under any of the clause of Section 300 IPC, but would be covered by exception 4, as no weapon was used in the offence. The offence was not pre-meditated and was a result of quarrel between the appellant and his wife Geeta. Strong reliance has been placed on the judgment of Ashok Kumar (Supra).

25. We have examined the judgment of Ashok Kumar (Supra). The facts of the aforesaid case are not applicable to the present case. In the case of Ashok Kumar (Supra), the court has noticed on the basis of FIR which was recorded that the origin of the incident was a sudden quarrel and separate share in the property was the cause of the quarrel. There were exchange of hot words; the appellant in the said matter abused the deceased, who picked up a Coka Cola bottle lying in the room, which provoked a counter reaction from the appellant, who in turn picked up a spade and gave blows from the handle of the spade on the left temple of the deceased. The court observed that exception 4 to Section 300 IPC would be attracted.

26. In the case of Ashok Kumar (Supra), the appellant, who picked up a spade did not give blows from the spade, but only used the handle, which would be an extremely relevant factor to reach a conclusion that the attempt was not made to cause the death. Moreover, as is evident upon reading of the judgment the action was not pre-meditated and the quarrel was sudden in nature.

27. Counsel for the appellant has placed reliance on another decision of the Division Bench of this court in the case of Om Prakash Vs. State Crl.A.No.190/1999 and more particularly on paragraphs 8 to 12 which read as under:

8. The only issue which we need to discuss would be whether the appellant would be entitled to Exception-IV to Section 300 IPC, which states that culpable homicide is not murder if it is committed without pre-meditation in a sudden fight in the heat

of passion and without the offender having taken undue advantage or acted in a cruel or unusual manner.

9. As per the explanation to the Exception, it is immaterial in such cases as to which party offered the provocation or committed the first assault.

10. The jurisprudence behind the philosophy of the afore-noted Exception is that where unexpected events cloud a mans sober reason and urges him to deeds which he would not otherwise do, the criminality of the act is lowered; and not that it is to be taken that the man has committed no offence. The act would still be an offence, but of a lower degree.

11. The post-mortem report of the deceased would reveal that the knife was struck 7 times, notwithstanding the blade of knife being merely 8, the blows were not hard struck evidenced by the fact that though serious, except for two injuries no other serious injury was caused to any internal organ except the colon and unfortunately for the deceased it was septicemia which caused the death. Now, it is the 7 blows which have to be taken into account to decide whether it could be said that the appellant acted with cruelty or an unusual manner or took undue advantage. Would the appellant lose the benefit of the Exception in question? 12. Highlighting that the deceased died after 3 days of the incident and the immediate cause of death was septicemia, but noting that only 2 injuries were opined to be sufficient to cause death in the ordinary course of nature, we note the decision of the Supreme Court reported as AIR 198.SC 109.Surender Kumar vs. UT of Chandigarh where 3 injuries were inflicted causing death as also the decision of a Division Bench of this Court reported as 2009 (2) JCC 89.Mahender vs. State, where injuries were 8, the weapon was a brick and the fatal injuries were 5 as also the decision of another Division Bench of this Court reported as 2011 (3) JCC 199.Jagtar Singh vs. State, where again the injuries were multiple, the conviction was sustained for the offence of culpable homicide not amounting to murder; thus we bring the curtains down by partially allowing the appeal.

28. We are afraid that the aforesaid judgment relied upon by counsel for the appellant would not help the case of the appellant, as in the present case a one year and four months child was brutally murdered.

29. In the present case the appellant had visited the house of Geeta a day earlier. He was abusive; and was quarreling with his wife and in fact he had even attacked her. In the present case the appellant even started to beat Geeta and when Heera intervened, he hit Heera with wooden Madhani (curd beater) and Heera started bleeding. This incident took place around 11:15 in the night of 24th November. The appellant returned the following day at 11:00 a.m; he hit an empty bottle on the back of his daughter, who was just one year and four months in age, which is proved by the post-mortem report; as if this was not enough, the appellant picked up the child and threw her against the wall, when blood oozing out of her mouth, he attacked her again and threw her on the floor forcibly and fled away from the spot.

30. To take advantage of exception 4 to Section 300 of the IPC, the appellant must show that the murder was committed without premeditation; in a sudden fight and in a heat of passion and upon sudden quarrel. In this case the appellant had approached the Geeta, a day earlier after heated arguments and used abusive language and started beating Geeta. The person, who was present, when intervened in the matter he was also struck on the head by a wooden patra which left him bleeding and the appellant ran away from the spot and only re-appeared the next morning between 11 and 11:15 a.m.. The quarrel was in continuation of the quarrel which he left mid-way a night earlier. The fight was not a sudden, nor was the quarrel sudden and moreover the appellant acted in a most cruel and in unusual manner, thus the exception 4 to Section 300 cannot come to the aid and rescue of the appellant. We also find that the case of the appellant would be fully covered by illustration (C). Illustration (a) to the exceptions to Section 300 reads as under: (a) A, under the influence of passion excited by a provocation given by Z, intentionally kills Y, Zs child. This is murder, in as much as the provocation was not given by the child, and the death of the child was not caused by accident or misfortune in doing an act caused by the provocation.

31. Hitting the head of a small child of about one year and four months on the wall and when blood came out from her mouth, the appellant again picked up the child and threw her again forcibly and thereafter he fled from the spot, would be sufficient to cause death in the ordinary course of nature. We are of the view that

the case of the appellant would not be covered by exception 4 to Section 300 IPC on the basis for the reason aforesaid. We have no reason to differ from the view expressed by the learned trial court, the appeal is without any merit and the same is dismissed. G.S.SISTANI, J G.P. MITTAL, J AUGUST 30 2013 ssn