

Arvind Kumar Vs. State

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Court : Delhi

Decided On : Mar-19-2014

Judge : Sunita Gupta

Appellant : Arvind Kumar

Respondent : State

Advocate for Pet/Ap. : Ms. Dimple Vivek

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI Date of Decision:

19. h March, 2014 + CRL.A. 923/2011 ARVIND KUMAR Through: Appellant Ms. Dimple Vivek, Advocate versus STATE + Through: Respondent Ms. Richa Kapoor, Additional Public Prosecutor Through: Appellant Sh. Pramod Kumar Dubey, Advocate CRL.A. 927/2011 ROHIT TYAGI versus STATE Through: Respondent Ms. Richa Kapoor, Additional Public Prosecutor % CORAM: HON'BLE MR. JUSTICE KAILASH GAMBHIR HONBLE MS. JUSTICE SUNITA GUPTA

JUDGMENT

: SUNITA GUPTA, J.

1. Challenge in these appeals is to the judgment dated 2 nd May, 2011 and order on sentence dated 7th May, 2011 passed by learned Additional Sessions Judge, North, Delhi in Sessions Case No.78/2010 arising out of FIR No.111/2009, PS

Timarpur whereby both the appellants were convicted u/s 302/34 IPC and were sentenced to undergo imprisonment for life and were directed to pay a sum of Rs.1 lac each as fine, in default of payment of fine, to undergo simple imprisonment for three years. The amount of fine, if deposited, was to be paid to the parents of the deceased. The convicts were granted benefit of Section 428 of the Code of Criminal Procedure.

2. The factual matrix of the case, succinctly stated, is as follows:- 3. On 28th June, 2009 PW12 Yashpal was returning from his duty from Wazirabad on his motorcycle. At about 11:00 pm. when he reached near CNG petrol pump in Gali No.6, he saw a man lying in an unconscious state with his face towards earth. He informed police on 100 number from his mobile No.9313191140 on the basis of which DD No.31A, Ex.A4 was recorded. On receipt of this DD No.31A PW23 ASI Om Prakash along with PW7 Constable Shubh Karan reached Gali No.6 near CNG pump where they found one male dead body and brother of the deceased Ram Daresh. Statement of Ram Daresh, Ex.PW6/A was recorded on which endorsement Ex.PW23/A was made and rukka was sent through Constable Subh Karan for registration of the case. PW9 ASI Nihala Rama recorded FIR Ex.PW9/A. Thereafter, the investigation was carried out by PW13 SHO Inspector Rampal Singh who called the crime team at the spot. PW14 SI Braham Singh, In-charge, Crime Team reached the spot along with the crime team and inspected the site. After inspection of the site, he gave his report Ex.PW13/A. PW21 Head Constable Naresh took 19 photographs, Ex.PW21/B/1-19. Two blood stained stones, three pieces of helmet lying on the spot, earth control and blood stained earth were seized vide different seizure memos. The dead body was sent to mortuary, Subzi Mandi through Constable Subh Karan for post-mortem. Search for the accused was made.

4. It is further the case of prosecution that on 29th June, 2009, on the basis of secret information, accused Arvind was apprehended near CNG Station, Outer Ring Road. He was arrested vide arrest memo Ex.PW13/D. He made a disclosure statement Ex.PW13/F in which he named his brother Kuldeep and Rohit Tyagi @ Kalu also to be involved in the incident. He led the police party to the place of incident and pointed out the place of incident vide pointing out memo Ex.PW13/G.

5. On 30th June, 2009, on the basis of secret information, accused Rohit Tyagi was apprehended from Gali No.8, Wazirabad, Delhi. He was arrested vide memo Ex.PW13/J.

Post-mortem was conducted by PW5 Dr. Akash Jhanjee. Accused Arvind got recovered motor cycle of red colour bearing No.DL1SR5961 from the parking of Tis Hazari Courts opposite State Bank of India which was seized vide seizure memo Ex.PW13/H. An application for conducting TIP Proceedings of accused Rohit Tyagi @ Kalu was moved, however, accused Rohit Tyagi refused to take part in TIP Proceedings before Sh. Tarun Yogesh, learned Metropolitan Magistrate. During the course of investigation, opinion of the concerned doctor was obtained regarding weapon of offence. Exhibits were sent to FSL. After completing investigation, charge sheet was submitted against Arvind and Rohit Tyagi @ Kalu. However, co-accused Kuldeep could not be arrested.

6. At the trial, prosecution examined as many as 23 witnesses in support of its case. Both the appellants in their statement recorded under Section 313 Cr.P.C. pleaded their innocence and alleged false implication in this case. According to Arvind, deceased Gopal had taken a water motor from his house. He lodged a complaint against the deceased. As such, in order to take revenge from him, the wife of deceased falsely implicated him in this case. Appellant Arvind examined two defence witnesses in support of his case. The appellant Rohit Tyagi pleaded innocence and alleged his false implication in this case being a friend of Arvind. According to him, he was not present at the spot at the time of incident as he was present in his shop of readymade clothes near Chauhan Dairy, Burari.

7. Considering the evidence and the material brought on record, the learned Additional Sessions Judge came to hold that the prosecution had been able to establish the charge u/s 302/34 IPC against the appellants and, accordingly, convicted them for the said offence and sentenced as mentioned above. The Trial Court came to the conclusion that the charge framed against the appellants stood proved. Accordingly, the Court pronounced them guilty and sentenced as mentioned above.

8. Being dissatisfied with the judgment of conviction and the order of sentence, both the accused persons have preferred separate appeals.

9. We have heard Ms. Dimple Vivek, Advocate for the appellant Arvind, Sh. Pramod Kumar Dubey, Advocate for Rohit Tyagi and Ms. Richa Kapoor, learned Additional Public Prosecutor for State and have perused the record.

10. It is submitted by learned counsel for the appellant Arvind that the case of prosecution is based on the testimony of PW3 Maina and PW6 Ram Daresh, both of whom are close relatives of deceased being wife and brother respectively, as such, no reliance can be placed on their testimony. It was further submitted that their presence at the spot is highly doubtful. Reference was made to the testimony of PW12 Yashpal who was the first person to inform the police regarding a man lying in unconscious state near CNG Pump in gali No.6 and to his cross-examination where he deposed that he did not see anybody weeping or crying near the dead body. Reference was also made to the testimony of PW23 ASI Om Prakash who deposed that he did not see the wife of the deceased at any point of time nor recorded her statement. No other family member of the deceased was present at the spot when he along with Constable reached the spot. Furthermore, as per the prosecution, the FIR was recorded on the statement of Ram Daresh wherein he had specified the name of Arvind, however, the crime team report and the death report which were prepared thereafter does not mention the name of the appellant Arvind or any other person. Even the copy of the FIR was sent to the Metropolitan Magistrate at 10:00 am on 29th June, 2009, therefore, possibility of false implication of the accused at a later stage cannot be ruled out. In the initial statement, Ram Daresh had also stated that his brother was hit by concrete stone but in his deposition before the Court he has denied this fact. The crime team report as well as the death report is totally silent about the presence of helmet at the crime scene.

11. Learned counsel further submits that PW1 Nand Lal Sahni, real brother of the deceased has deposed that on information from PW6 regarding the brawl, he reached the spot along with his brother and his father, however, father has not been examined by the prosecution. On the other hand, PW2 Geeta Devi, mother

of the deceased deposed that some persons came on motorcycle and informed that somebody was beating Gopal and later on Ram Daresh came and gave the same information. The persons who had come on motorcycle were the first persons to witness the incident and, as such, were the best witnesses to testify being independent witnesses, however, they have not been examined. Moreover, according to her, on receipt of information, she along with her son Nandlal reached the spot. According to both these witnesses Maina @ Anju was present at the spot and was weeping but the statement of both these witnesses are contradicted by PW12 Yashpal and PW23 ASI Om Prakash who do not depose about the presence of Maina at the spot.

12. Attacking the testimony of PW3 Maina, it was further submitted that she was informed by Ram Daresh that some boys were beating the deceased. However, at that time, names of the appellants were not disclosed to her. Furthermore, according to her, when she saw the accused persons beating the deceased, she tried to save her husband but was pushed away by the appellants due to which she sustained injuries. However, she neither disclosed this fact to the police officials nor was she medically examined. She had further stated that the deceased had fallen down and appellant Arvind had lifted a big concrete stone and hit the same on his head. The above story projected by this witness is not in consonance with the medical evidence as PW5 Dr. Akash Jhanjee, in cross-examination has admitted that identity of the face could be lost if smashing is done by concrete stone whereas face of the deceased was intact. In addition, according to her, while lifting the deceased, her clothes as well as that of other witnesses were smeared with blood, however, blood stained clothes of any of the family members were not seized by the police. Furthermore, she had stated that the Doctor had reached the spot and tried to save the deceased but the entire report under Section 173 Cr.P.C. is silent about the medical examination of the deceased by the doctor at the spot. Although, she was having a mobile phone on the date of incident, however, she did not bother to inform either 100 number or the family members regarding the incident. As such, her presence at the spot is doubtful.

13. Challenging the testimony of PW6 Ram Daresh, it was submitted that according to him, he saw Arvind hitting helmet on the head of the deceased, as a

result of which deceased fell down. He is the real brother of the deceased. It is surprising that instead of coming to the rescue of the deceased, he would run towards his house. His act was quite unnatural and unwarranted raising doubt about his presence at the spot and witnessing the incident. Furthermore, he admitted that the place was dark and as such, his witnessing the incident and identifying the accused persons in the absence of light creates doubt upon the version of the complainant about the involvement of the appellants. According to him, his house comes first on the way to the house of Maina @ Anju from his factory, as such, his deposition that he went to the house of in-laws of the deceased and thereafter to his house seems doubtful. Furthermore, according to him, he had witnessed the incident at 10:30 pm. According to PW23 ASI Om Prakash, he reached the spot at about 11:15-11:20 pm, and thereafter PW6 reached the spot. However, during that period, no one from the family members of the deceased reached the spot nor informed the police. As such, presence and witnessing the incident as alleged is doubtful.

14. Moreover, both PW3 as well as PW6 have admitted the previous enmity between the appellant Arvind and the deceased. That being so, appellant was falsely implicated in this case. The impugned order deserves to be set aside. Reliance was placed on Harjinder Singh @ Bhola vs. State of Punjab, AIR 2004 SC3962 Hem Raj vs. State of Haryana, (2005) 10 SCC614 Badri vs. State of Rajasthan, AIR 1976 SC560 Bhimmappa Jinnappa vs. State of Karnataka, AIR 1993 SC1469 and Mukhtiar Singh vs. State of Punjab, AIR 1996 SC836. Learned Additional Public Prosecutor for the State, on the other hand, contended that the case is based on direct eye witness account of PW3 and PW6. Their testimony are corroborated by police officials and PW1 and PW2. The FIR was promptly recorded. There was enmity between accused Arvind and deceased. Accused Rohit Tyagi was named by PW3 prior to his arrest on 29th June, 2009 itself. PW3 has specified the role of each of the accused. Medical evidence corroborates oral testimony of PW6 and PW3. Recovery of motorcycle is incriminating against accused Arvind. Impugned order does not suffer from any infirmity as such, appeals deserve to be dismissed.

16. The star witnesses of the prosecution are PW3 Maina @ Anju, wife of the deceased and PW6 Ram Daresh, brother of the deceased. PW3 Maina @ Anju unfolded that she got married to deceased Gopal on 4th November, 2008. It was an inter caste marriage. Her matrimonial home is situated at Jhuggi No.1, Gali No.1, Wazirabad Village, Delhi. Accused Arvind and his younger brother Kuldeep were residing in a house situated in Gali No.6 and accused Kalu @ Rohit Tyagi was residing in Gali No.8, Village Wazirabad, Delhi. Three months prior to her marriage with Gopal, there was a quarrel between her late husband on the one hand and accused Arvind, his brother Kuldeep and their mother on the other hand and her husband was beaten at that time. The quarrel had taken place in her presence and she had intervened to pacify them. On second or third day of her marriage, accused Arvind along with his associates had set on fire her jhuggi, i.e., Jhuggi No.1, Gali No.1, Wazirabad. One or one and a half month prior to the incident, she along with her husband started residing at her parental house as the accommodation in her matrimonial home was insufficient. She further deposed that on 28 th June, 2009, she was present at her parental home. Her husband came to her house and after about 5 or 10 minutes he left. At about 10:30 10:45 pm, she heard a noise and came out of the house. Meanwhile her brother-in-law Ram Daresh came running to her and told her that some boys were beating her husband Gopal. When she reached in the street in front of Gupta General Store, she saw accused Arvind, Kalu @ Rohit Tyagi and Kuldeep beating her husband. She tried to save her husband but accused persons pushed her away and she fell down. She raised an alarm. Her husband also fell down. Accused Arvind lifted a big concrete stone and struck the same on the head of her husband. People started gathering there. Thereupon, all the three accused persons ran away on a motorcycle No.DL1SR5961 belonging to Arvind. When accused Arvind was beating her husband with stone, accused Rohit Tyagi and Kuldeep caught her husband from both sides.

17. PW6 Ram Daresh, brother of the deceased has deposed that on 28th June, 2009, after finishing his job at 10:30 pm, he was coming back home. When he reached gali No.6, Wazirabad, he saw accused Arvind and his associates sitting on a motorcycle. His brother Gopal was coming from a bidi shop after taking some edible item. When Gopal reached near gali No.6, accused Arvind asked his

associate Kalu to push away Gopal. He further exhorted his other associate to beat Gopal. There were 5-6 persons with accused Arvind. He saw accused Arvind hitting helmet on the head of his brother Gopal who fell on the road. He immediately rushed to the in-laws house of his brother which was at a little distance from the place of incident and informed the wife of his brother that a quarrel was going on between Gopal and Arvind and then he rushed to his house to inform his brother and mother. When he came back at the spot, he found the body of Gopal lying on the spot and at that time, accused Arvind and other associates were not present. Somebody informed the police who arrived at the spot and recorded his statement Ex.PW6/A which bears his thumb impression at point A. Dead body of his brother was taken to mortuary. He further deposed that the helmet with which his brother was beaten by the accused persons was broken in the process of beating. He identified the helmet Ex.P1 to be the same with which accused persons beat Gopal. He further deposed regarding a quarrel between Gopal and Arvind and threat administered by Arvind to Gopal prior to this incident. However, he went on stating that he did not see accused persons hitting his brother with stones lying in the gali on his head. He heard accused Arvind asking his associates to catch hold of his brother who had fallen in gali.

18. It is not the dispute that PW3 Maina @ Anju is the wife of the deceased while PW6 Ram Daresh is his real brother. However, relationship itself is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the Court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible.

19. In Ashok Kumar Chaudhary vs. State of Bihar, 2008 CrL.L.J.

3030, Hon'ble Supreme Court while dealing with the question of creditworthiness of the evidence of relatives of the victim, after review of several decisions on the issue, including Dalip Singh vs. State of Bihar, 1954 SCR145 Masalti vs. State of U.P., (1964) 8 SCR133 and Rizan & Anr. vs. State of Chhatisgarh, 2003 1 AD (S.C.) 637 = 2003 CrL. LJ1226 held that relationship per se does not affect the

credibility of a witness. Merely because a witness happens to be a relative of the victim of the crime, he/she cannot be characterized as an 'interested witness. It was further observed that the term interested postulates that the person concerned has some direct or indirect interest in seeing that the accused is somehow or the other convicted either because he had some animus with the accused or for some other oblique motive.

20. In *Namdeo vs. State of Maharashtra*, 2007 III AD (S.C.) 717 = 2007 CrL LJ1819 Hon'ble Supreme Court held that a close relative cannot be characterised as an interested witness. The only rule of caution in this regard is that the evidence of such witness must be scrutinised carefully. If on such scrutiny, his evidence is found to be reliable, inherently probable and wholly trustworthy, conviction can be based even on the 'sole' testimony of such witness.

21. We may also refer with profit to the decision in *Dalip Singh vs. State of Punjab*, 1954 SCR145 wherein Honble Judge Vivian Bose speaking for the Court, observed as follows:

A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge alongwith the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalisation. Each case must be judged on its own facts. Our observations are only made to combat what is often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts.

"We are unable to agree with the learned Judges of the High Court that the testimony of the two eyewitnesses required 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 *Rameshwar vs. State of Rajasthan*, 1952 Crl.L.J.

547. We find, however, that it unfortunately still persists, if not in the judgements of the courts, at any rate in the arguments of counsel.

22. Thus, though the relative witnesses cannot in every case be termed as 'interested witnesses', even with respect to the 'interested witnesses', the Hon'ble Supreme Court in the case of *State of Maharashtra vs. Ahmed Shaikh Babajan*, (2009) 14 SCC267 observed as under:

Interested evidence is not necessarily unreliable evidence. Even partisanship by itself is not a valid ground for discrediting or rejecting sworn testimony. Nor can it be laid down as an invariable rule that interested evidence can never form the basis of conviction unless corroborated to a material extent in material particulars by independent evidence. All that is necessary is that the evidence of the interested witnesses should be subjected to careful scrutiny and accepted with caution. If on such scrutiny, the interested testimony is found to be intrinsically reliable or inherently probable, it may, by itself, be sufficient, in the circumstances of the particular case, to base a conviction thereon. Although in the matter of appreciation of evidence, no hard and fast rule can be laid down, yet, in most cases, in evaluating the evidence of an interested or even a partisan witness it is useful as a first step to focus attention on the question, whether the presence of the witness at the scene of the crime at the material time was probable. If so, whether the substratum of the story narrated by the witness, being consistent with the other evidence on record, the natural course of human events, the surrounding circumstances and inherent probabilities of the case, is such which will carry conviction with a prudent person. If the answer to these questions be in the affirmative, and the evidence of the witness appears to the court to be almost flawless and free from suspicion, it may accept it, without seeking corroboration from any other source.

23. The view was reiterated in Hari vs. State of Maharashtra, (2009) 3 SCC (CrI.) 1254; Mano Dutt & Anr. vs. State of UP, (2012) 2 SCC (CrI.) 226 and Mookkiah and Anr. vs. State, (2013) 2 SCC 89. 24. Tested on the anvil and touchstone of the aforesaid principles, we find that the mere fact that PW3 Maina and PW6 Ram Daresh are close relatives of the deceased is not sufficient to affect their credibility. In fact, they being close relatives would not allow the real culprit to go scot free and make allegations against the accused persons to falsely implicate them in such a heinous crime.

25. As regards the submission that the conduct and behaviour of PW6 Ram Daresh was quite unnatural, inasmuch as, even after witnessing that his real brother is being assaulted by the accused persons, he did not try to intervene or save his brother instead he ran away from the spot and, as such, his witnessing the incident is highly doubtful, same is without any merit. This conduct itself is not sufficient to disbelieve his testimony, inasmuch as, reaction of every person differs and there is no set rule of reaction. In State of Gujarat vs. Bharwad Jakshibhai Nagribhai & Ors., 1990 CrI.LJ2531 also the conduct of the eye witness running away from the place of incident was taken to be unnatural by the learned Trial Court by observing that if such an incident had actually taken place, the eye witness would have intervened and tried to save his uncle and would not have run away. However, it was observed by the High Court that where the eye witness to the incident of fatal assault was related to the deceased and was also doing business along with the deceased, his presence with deceased at the time of incident, which took place when both of them were going home after closing their business premises was most natural. Evidence of such eyewitness cannot be discarded merely on the ground that he ran away from the place of incident. It is difficult to decide how a witness would react in a situation where his relative is assaulted. Every witness reacts in his own way. Merely because he ran away to keep himself from the spot, it would not mean that his conduct is unnatural. There are no set rules of reaction and, therefore, to discard the evidence of the witness on the ground that he has not reacted in any particular manner is to appreciate evidence in a wholly unrealistic and unimaginative way.

26. Similar view was taken by Honble Supreme Court in Rana Partap vs. State of Haryana, (1983) 3 SCC327 where it was observed as under:

20. Yet another reason given by the learned Sessions Judge to doubt the presence of the witnesses was that their conduct in not going to the rescue of the deceased when he was in the clutches of the assailants was unnatural. We must say that the comment is most unreal. Every person who witnesses a murder reacts in his own way. Some are stunned, become speechless and stand rooted to the spot. Some become hysteric and start wailing. Some start shouting for help. Others run away to keep themselves as far removed from the spot as possible. Yet others rush to the rescue of the victim, even going to the extent of counter-attacking the assailants. Every one reacts in his own special way. There is no set rule of natural reaction. To discard the evidence of witnesses on the ground that he did not react in any particular manner is to appreciate evidence in a wholly unrealistic and unimaginative way.

27. Therefore, the mere fact that the witness on seeing the incident ran away to inform his family members does not cast any doubt regarding his presence at the spot and witnessing the incident. Moreover, his testimony in this regard finds corroboration from other material available on record.

28. PW1 Nandlal Sahni is another brother of deceased. He has deposed that on 28.06.2009, at about 10.30 p.m., he was present at his house along with his mother, father and sister. His brother Ram Daresh came running to the jhuggi and informed that a quarrel was going on between his brother on one side and Arvind, Kuldeep and some of their friends. He requested them to reach the spot immediately. As such, he along with his brother and father went to the spot at Gali No.6, Wazirabad Village and saw his brother Gopal lying in a pool of blood, in dead condition. To the same effect is the testimony of PW2, Geeta Devi, mother of deceased, who also rushed to the spot on receiving information from some person who came on motorcycle and thereafter from Ram Daresh. She found her son Gopal in a pool of blood in dead condition. PW3 Maina corroborated the version of PW6 Ram Daresh. According to her, due to insufficiency of accommodation, she along with her husband Gopal was living at her parents house in Gali No.6,

Wazirabad. On 28th June, 2009, at about 10.30/10.45 p.m, she heard a noise and came out of the house. Meanwhile, her brother-in-law Ram Daresh came running to her and informed that some boys were beating Gopal, as such she reached the spot and saw accused Arvind lifting a big stone made of concrete and striking the same on the head of her husband. As such, all the witnesses reached the spot only on getting the information from PW6 Ram Daresh.

29. Further, police machinery was set in motion on receipt of information given by PW12 Yashpal at about 11:00 pm regarding a man lying unconscious near CNG Petrol Pump in gali No.6, Wazirabad on the basis of which DD No.31A was recorded at 11:02 pm. Immediately thereafter, ASI Om Prakash along with Constable Shubh Karan reached the spot where he met Ramdaresh and recorded his statement, Ex.PW6/A, inter alia, to the effect that at about 10:30 pm after finishing his work he was returning from his factory to his jhuggi via Jagatpuri Village, main road. When he reached gali No.6, Wazirabad at about 10:45 pm, he saw one boy named Arvind, resident of Gali No.6, Wazirabad who, earlier also, had a quarrel with his younger brother Gopal and had threatened to kill him about one month ago and he was well known to him from before, was beating his brother Gopal. Two of the associates of Arvind were standing near a red colour motorcycle. Arvind took helmet from them and hit on the head of his brother, as a result of which, he fell in the street. Arvind asked his associates to catch hold of his brother. Thereupon, both the boys caught hold of his brother. Arvind picked up pieces of concrete stone lying in the street and hit on the head and face of his brother. He got scared and rushed to inform his family members. Thereafter, he returned back along with his mother and younger brother Nand Lal Sahni. Crowd had collected there. Anju @ Maina, wife of his brother Gopal had already reached the spot and was weeping. He found that his brother Gopal was lying dead and Arvind and his associates had run away from the spot along with their motorcycle. This statement culminated in registration of FIR at 12:50 am on 29th June, 2009. Under the circumstances, without any loss of time, minute details of the entire incident including the name of Arvind who was well known to the witness from before, was given by PW6, Ram Daresh to the police.

30. Early reporting of the occurrence by informant with all vivid details gives an assurance regarding truth of the version. In the case of *Jai Prakash Singh vs. State of Bihar*, (2012) 4 SCC379 it was observed as under:

The FIR in criminal case is a vital and valuable piece of evidence though may not be substantive piece of evidence. The object of insisting upon prompt lodging of the FIR in respect of the commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of actual culprits and the part played by them as well as the names of eyewitnesses present at the scene of occurrence. If there is a delay in lodging the FIR, it loses the advantage of spontaneity, danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of large number of consultations/deliberations. Undoubtedly, the promptness in lodging the FIR is an assurance regarding truth of the informant's version. A promptly lodged FIR reflects the first hand account of what has actually happened, and who was responsible for the offence in question.

31. As such, registration of FIR on the statement of this witness immediately after the incident lends assurance to his presence at the spot and witnessing the incident.

32. Although it is true that in the earlier statement made by Ram Daresh to the police, Ex.PW6/A which forms the basis of registration of the FIR, he has stated that besides hitting his brother by helmet, accused Arvind with the help of his associates, had also hit him with pieces of concrete stone after lifting the same from the spot, however, when he appeared in the witness box, he denied having seen the accused persons hitting his brother with stones on his head. This, at best, can be termed to be a variation in the testimony of the witness but that by itself is not sufficient to brush aside his entire testimony.

33. Dealing with this aspect of the matter, Jagmohan Reddy, J.

speaking for Honble Supreme Court in *Sohrab v. State of Madhya Pradesh*, 1972 CrL.L.J1302at p.1305: AIR 1972 SC2020at p.2024 observed:

Honble Supreme Court has held that falsus in uno falsus in omnibus is not a sound rule for the reason that hardly one comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggeration, embroideries or embellishments. In most cases, the witnesses when asked about details venture to give some answer, not necessarily true or relevant for fear that their evidence may not be accepted in respect of the main incident which they have witnessed but that is not to say that their evidence as to the salient features of the case after cautious scrutiny cannot be considered.

34. Substantially similar view was taken by Honble Apex Court in Krishna Mochi & Ors. vs. State of Bihar, (2002) 6 SCC 81 wherein it was observed as under:

If a whole body of the testimony is to be rejected because the witness was evidently speaking an untruth in some aspect, it is to be feared that administration of criminal justice would come to a dead stop. Witnesses just cannot help in giving embroidery to a story, however true in the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of acceptance, and merely because in some respects the Court considers the same to be insufficient for placing reliance on the testimony of a witness, it does not necessarily follow as a matter of law that it must be disregarded in all respect as well. The evidence has to be satisfied with care. One hardly comes across a witness, whose evidence does not contain a grain of untruth or at any rate exaggeration, embroidery or embellishments. An attempt has to be made to separate the grain from the chaff.

At the other place, it was observed:- Thus, in criminal trial a prosecutor is faced with so many odds. The Court while appreciating the evidence should not lose sight of these realities of life and cannot afford to take an unrealistic approach by sitting in ivory tower. I find that in recent times the tendency to acquit an accused easily is galloping fast. It is very easy to pass an order of acquittal on the basis of minor points raised in the case by a short judgment so as to achieve the yardstick of disposal. Some discrepancy is bound to be there in each and every case which should not weigh with the Court so long it does not materially affect the prosecution case. In case discrepancies pointed out are in the realm of pebbles, court should tread upon, it, but if the same are boulders, court should not make an

attempt to jump over the same. These days when crime is looming large and humanity is suffering and society is so much more. Now the maxim "let hundred guilty persons be acquitted, but not a single innocent be convicted" is, in practice, changing world over and courts have been compelled to accept that "society suffers by wrong convictions and it equally suffers by wrong acquittals". I find this Court in recent times has conscientiously taken notice of these facts from time to time. In the case *Inder Singh and Anr. v. state (Delhi Administration)* 1978 CriLJ766, Krishna Iyer, J.

laid down that "Proof beyond reasonable doubt is a guideline, not a fetish and guilty man cannot get away with it because truth suffers some infirmity when projected through human processes."

In the case of *State of U.P. v. Anil Singh*, AIR 1988 SC1998, it was held that a Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. One is as important as the other. Both are public duties which the Judge has to perform. In the case of *State of West Bengal v. Orilal Jaiswal and Anr.*, 1994 CriLJ2104 , it was held that justice cannot be made sterile on the plea that it is better to let hundred guilty escape than punish an innocent. Letting guilty escape is not doing justice, according to law. In the case of *Mohan Sigh and Anr. v. State of M.P.* 1999 CriLJ1334, it was held that the courts have been removing chaff from the grain. It has to disperse the suspicious cloud and dust out the smear of dust as all these things clog the very truth. So long chaff, cloud and dust remains, the criminals are clothed with this protective layer to receive the benefit of doubt. So it is a solemn duty of the courts, not to merely conclude and leave the case the moment suspicions are created. It is onerous duty of the court, within permissible limit to find out the truth. It means, on one hand no innocent man should be punished but on the other hand to see no person committing an offence should get scot free. If in spite of such effort suspicion is not dissolved, it remains writ at large, benefit of doubt has to be credited to the accused.

The principles that can be culled out from the aforesaid decisions are that minor discrepancies and inconsistencies cannot be given undue importance. The Court

has to see whether inconsistencies can go to the root of the matter and affect the truthfulness of the witnesses while keeping in view that discrepancies are inevitable in case of evidence of rustic and illiterate villagers, who speak them after long lapse of time.

35. In the instant case, in one transaction two incidents took place. Although the witness has denied having seen the accused persons hitting with piece of stone on the head of the deceased but that itself is not sufficient to discard that part of his testimony wherein he deposed about hitting helmet on the head of deceased. In view of the discussion made above, it was he who had informed the family members who reached the spot on the basis of information given by him coupled with the fact that it was on the basis of his statement that the FIR was registered, presence of witness at the spot stands proved.

36. Similarly, PW3 Maina, wife of the deceased also on coming to know about her husband being beaten, rushed to the spot and witnessed the accused persons hitting with a stone made of concrete on the head of her husband. All the accused were well known to her from before as they were all residents of the nearby streets and her statement under Section 161 Cr.P.C. was also recorded by the Investigating Officer of the case on the same day. Besides giving the name, parentage and the gali number where they were residing, she went on narrating that the accused persons ran away from the spot of motorcycle No.DL1SR5961 which undisputedly was in the name of mother of the accused Arvind and was seized at the instance of Arvind from Tis Hazari Courts when his police remand was taken by the police.

37. Presence of PW3 Maina @ Anju has been challenged on the ground that neither PW12 Yashpal saw anybody weeping or crying near the dead body nor ASI Om Prakash saw the wife of the deceased at the spot. As regards Yashpal is concerned, this witness has admitted in cross-examination that 30-35 public persons had collected at the place of occurrence. The mere fact that he did not see anybody weeping or crying near the dead body, does not ipso facto gives rise to an inference that wife of the deceased was not present at the place of occurrence. No specific question was put to him in cross- examination as to

whether wife of deceased was present at the spot or not. Similarly, if PW23 ASI Om Prakash did not notice wife of the deceased at the spot that does not mean that she was not present at the spot because this witness had gone to the spot along with Constable Shubh Karan. Constable Shubh Karan has deposed that when he reached the spot along with ASI Om Prakash, brother, mother and wife of the deceased were present there. PW13 Inspector Rampal has also deposed regarding presence of PW6 Ram Daresh and PW3 Maina at the spot. He recorded supplementary statement of PW6 Ram Daresh and statement of Maina u/s 161 Cr.P.C. PW1 Nandlal and PW2 Geeta Devi have also deposed that when they reached the spot, Maina was present over there. As such, mere fact that ASI Om Prakash did not see wife of the deceased at the spot is not sufficient to arrive at the conclusion that Maina was not present at the spot or did not witness the incident.

38. Suspicion was also sought to be raised regarding presence of the witness from the fact that as per her version when she reached the spot and saw her husband being beaten by accused persons, she tried to save him but was pushed away by them as such, she sustained injuries. However, she was not medically examined. It has come on record that she did not inform the police regarding receipt of any injury, therefore, there was no occasion for the police to get her medically examined. Moreover, she would be least concerned about her injuries when her husband had been killed.

39. According to PW3, when she took her husband in her lap, her clothes were smeared with blood. However, her blood stained clothes were not seized. If the Investigating Officer failed to seize the blood stained clothes of PW3, it only indicates remission on his part but the evidence of PW3 is not in any way impaired thereby, vide *Chhotu & Ors. vs. State of Maharashtra*, 1997 SCC (Cri) 1143.

40. The submission that FIR is anti-timed as inquest report does not find mention the name of Arvind which was prepared after registration of FIR, on the statement of Ram Daresh, again deserves rejection because the inquest report, Ex.A3 prepared by the Investigating Officer of the case u/s 174 of Criminal Procedure Code does not contain any column requiring the IO to mention the names of the

accused. Moreover, record reveals that along with the death report, brief summary of the case, Ex.A2 was prepared which gives a narration of the incident including the name of the accused Arvind.

41. Similarly the plea that crime team report does not contain the name of accused does not advance the case of accused as the format on which Crime Team In-charge submitted his report Ex.13/A goes to show that there is no column in the said proforma against which the Crime Team In-charge is required to mention the names of the accused. Nevertheless, it does mention the FIR number which makes it clear that FIR was recorded prior to preparation of crime team report. A clerical error regarding the name of police station has occurred as instead of P.S. Timarpur, P.S. Burari has been mentioned but that is inconsequential.

42. Further, the ocular testimony of both these witnesses find corroboration from crime team report as well as the testimony of the police officials. According to Ram Daresh, accused Arvind hit helmet on the head of his brother Gopal whereas according to Maina, Arvind lifted a big stone and struck the same on the head of her husband. When the police official reached the spot and crime team was called, two concrete stone pieces having blood and helmet pieces were found lying at the spot which were seized from the spot. As such, ocular testimony of Ram Daresh and Maina that the deceased was hit by helmet and concrete stone pieces find corroboration from the weapon of offence lying at the spot.

43. Not only that, the testimony of the witnesses finds corroboration from the medical evidence. Post-mortem on the dead body of Gopal was conducted by PW5 Dr. Akash Jhanjee who gave his report Ex.PW5/A. As per the report on external examination, following injuries were found: On external examination following injuries were found: 1. Lacerated wound 3x1.5 cm x bone deep over right side forehead lying 5 cm above inner half of right eye brow with underlying bone fractured ends reddish and bruised.

2. Grazed abrasion reddish 3x 1.5 cm over right parietal region of the head with surrounding contusion 4 cm above top of the right ear pinna.

3. Abrasion 3x 1 cm reddish over right chest region 5.5 cm outer and below to right nipple.
4. Abrasion contusion reddish 2x1 cm over lying nasal bridge with laceration measuring 1.5 cm x bone deep in the middle portion with underlying bone fractured and fractured ends reddish and bruised.
5. Abrasion contusion 3x3 cm over right cheek region of the face 1.5 cm below right eye brow outer end.
6. Multiple abrasion reddish 3x2 cm over centre of the forehead 2.6 cm above root of the nose.
7. Lacerated wound 3x0.5 cm skin deep over right cheek region of the face 0.5 cm outer to injury no.5.
8. Multiple abrasion contusion reddish 5x3 cm over left cheek region of the face just outer to the left nostril opening.
9. Multiple abrasion contusion reddish 5x3 cm over left cheek region of the head just below and right of external occiput with underlying bone fractured with fractured ends reddish and bruised.
10. Lacerated wound 1.5 cm x 1 cm x muscle deep over outer surface of right upper lip 1 cm inner right angle of mouth.
11. Lacerated wound 2.5 cm x 1cm x muscle deep over left temporal region of the head just behind left ear pinna with underlying bone fractured and fractured ends reddish bruised.
12. Lacerated wound 3x1 cm x bone deep over left temporoparietal region of the head 1.8 cm above injury no.11 with underlying bone fractured and fractured ends reddish bruised.
13. Lacerated wound 5x1.5 cm x bone deep over left parietal region 5.6 cm above top of left ear pinna with underlying bone fractured and fractured ends reddish bruised.

14. Lacerated wound 2x1 cm x bone deep over left frontal region of the head 3.3 cm in front of injury no 13 with underlying bone fractured and fractured ends reddish bruised.

15. Abrasion reddish 2x1 cm over back of lower half of right arm region.

16. Grazed abrasion reddish over right side outer half of forehead extending down to right side face outer to right eye outer angle in area of 5.5 cm x 3 cm.

17. Contusion abrasion reddish 3x1cm over back of right hand middle phalanx of middle finger.

18. Multiple abrasion reddish 3x1cm over back of lower half left arm. On internal examination: HEAD-Scalp showed sub scalp bruising in and underneath scalp layers over front side and back of the head right side. Skull showed multiple comminuted fracture involving left frontal, left parietal, left temporal bones with fractured ends reddish alongwith sutural separation of the coronal suture and fissured fracture lying extending on to the right frontal and right parietal bones with fractured ends reddish and bruised. Skull base showed fracture of both sides middle and posterior cranial fossae. Diffused subdural and sub arachnoid haemorrhages present over both sides cerebral and cerebellar hemispheres. Multiple Petechial haemorrhages intra cerebral in the white matter of both sides cerebral and cerebellar hemispheres. NECK: Structure Intact. CHEST: Structures Intact. ABDOMEN AND PELVIS: Structures intact and stomach contained around 250 gms of semi digested food material non identifiable in nature with no specific smell and walls were NAD. Bladder was full and rectum was empty. No fractures of pelvic bones present. Spinal column Intact. It was opined that cause of death was Cranio cerebral damage consequent upon blunt force impact to the head. All injuries were antemortem in nature and fresh in duration. Post mortem findings are consistent with blunt assault before death. Cranio cerebral damage produced is sufficient to cause death in ordinary course of nature. Manner of death is homicidal in nature.

44. He further deposed that on 21st July, 2009, two parcels containing concrete slabs/stones were produced before him for giving opinion and vide his opinion

Ex.PW5/B, he opined that injuries mentioned on the head and the face region of the deceased mentioned in detail in the post-mortem are possible by concrete slabs/stones examined or similar such weapon. On 20th September, 2009, another application was received seeking his opinion in respect of helmet received in sealed parcel and after examination, he gave his opinion, Ex.PW5/C that possibility of some of the injuries mentioned in the post-mortem report being caused by the helmet during scuffle between the parties cannot be ruled out.

45. It was submitted by learned counsel for the appellant that in cross-examination, the witness deposed that multiple injuries are possible on all the parts of the body if a person falls from the height on the concrete stone pieces. It was submitted by learned counsel for the appellant that the medical evidence by the same doctor at three different occasions with respect to the same incident mentioning different weapon of offence and cause of death creates doubt regarding the cause of death. This submission is devoid of merit, inasmuch as, as seen above, as many as 18 injuries were found on external examination of deceased. Even before the weapons of offence were shown to him, in the post-mortem report itself, he had opined that the cause of death was Cranio Cerebral damage consequent upon blunt force impact to the head. There is no inconsistency in the report, as the helmet and concrete stone pieces are blunt object, therefore, the subsequent opinion were given that the injuries were possible by the concrete slabs/stones and helmet shown to him. The appellant does not get any benefit from the fact that in cross-examination, the witness deposed that multiple injuries were possible on all parts of the body if a person falls from the height on the concrete stone as it is not the case of accused that the deceased had fallen from a height on the concrete stone and, as such, sustained injuries. There is no challenge to the testimony of the witness that the manner of death was homicidal in nature. Under the circumstances, there is no inconsistency between ocular and medical evidence. Rather the ocular testimony of the witnesses finds complete corroboration from the medical evidence.

46. Furthermore, it has come on record that two concrete cemented stone pieces, pieces of helmet, blood stained earth and sample earth were seized from the spot. After post-mortem on the dead body of the deceased was conducted, Dr. Akash

Jhanjee handed over blood stained clothes of the deceased and blood sample of the deceased. During the course of investigation, all the exhibits were sent to FSL. As per the report, Ex.PW8/A given by Ms. Shashi Bala, Sr. Scientific Assistant, blood was detected on the two concrete cemented stone pieces, shirt, pant, under wear, shoes and earth. As per serological report, Ex. PW8/B, origin of blood on the blood stained stone pieces, shirt, blood stained earth and blood stained gauge was human. The blood group of the deceased was opined to be of A group and the human blood on the stone pieces was also opined to be that of A Group. However, on the clothes of the deceased, the group of blood could not be opined. Under the circumstances, this report also proves that blood of the deceased was found on the stone pieces with which injuries were caused to him on his head.

47. The pieces of helmet seized from the spot, however, were not sent to FSL. Failure on the part of the Investigating Officer to send blood stained pieces of helmet, at the most, is a lapse on his part, but does not cause any prejudice to the defence of the accused and, therefore, trial cannot be held to be vitiated on that count. In Baleshwar Mandal and Anr. vs. State of Bihar, (1997) 7 SCC219also, blood stained earth seized from the place of occurrence was not sent for chemical examination, it was held by Honble Supreme Court that this omission does not vitiate trial.

48. Much emphasis was laid by learned counsel for the appellants for submitting that there is material contradiction in evidence regarding place of occurrence. The information given by PW12 Yashpal was regarding a man lying in an unconscious state near CNG Pump in gali No.6. CNG Pump was about 1/3rd km away from the entrance of gali No.6. According to PW6 Ram Daresh, accused was beating the deceased in gali No.6 whereas PW3 Maina told the location of incident in front of Gupta General Store in gali No.6, which was about 1 km from CNG Pump and, therefore, it was submitted that distance between the two locations was quite substantial in nature. Although the information given by Yashpal was about a person lying in unconscious state near CNG Pump in Gali No.6, Wazirabad but the fact remains that even in this information there was reference of Gali No.6 which finds mention in the statement of PW6 Ram Daresh and even Gupta General Store referred by Maina is in gali No.6. The police officials also reached gali No.6,

Wazirabad where they found the dead body of deceased Gopal with lot of blood besides blood stained stones and pieces of helmet. Same were seized and as seen above, the report of FSL also proves that the stones and the earth lifted from the spot was of the deceased.

49. The next plank of submission which has been ambitiously and zealously pyramided by the learned counsel for the appellant is that despite the fact that number of independent persons were available at the spot, however, no independent witness has been examined by the prosecution. It is common experience that public persons are generally reluctant to join police proceedings. They do not want to get dragged in police and criminal cases and want to avoid them because of long drawn trials and unnecessary harassment.

50. We can't be oblivious to the reluctance of common men to join such proceedings, lest they are compelled to attend Police Station and Courts umpteen times at the cost of considerable inconvenience to them, without any commensurate benefit.

51. Dealing with a similar contention in Ram Swaroop vs. State (Govt. NCT) of Delhi, 2013(7) SCALE407 where the alleged seizure took place at a crowded place yet no independent witness could be associated with the seizure, the Apex Court inter alia observed as under:

7.We may note here with profit there is no absolute rule that police officers cannot be cited as witnesses and their depositions should be treated with suspect. In this context we may refer with profit to the dictum in State of U.P. v. Anil Singh, 1988 Supp SCC686 wherein this Court took note of the fact that generally the public at large are reluctant to come forward to depose before the court and, therefore, the prosecution case cannot be doubted for non-examining the independent witnesses.

9. In Ramjee Rai and others v. State of Bihar, (2006) 13 SCC229 it has been opined as follows:²⁶ It is now well settled that what is necessary for proving the prosecution case is not the quantity but quality of the evidence. The court cannot overlook the changes in the value system in the society. When an offence is

committed in a village owing to land dispute, the independent witnesses may not come forward.

10. Keeping in view the aforesaid authorities, it can safely be stated that in the case at hand there is no reason to hold that nonexamination of the independent witnesses affect the prosecution case and, hence, we unhesitatingly repel the submission advanced by the learned counsel for the appellant.

52. Substantially, similar plea was taken in Appabhai and Anr. vs. State of Gujarat, AIR 1998 SC696 where it was held as under:

11.It is no doubt true that the prosecution has not been able to produce any independent witness to the incident that took place at the bus stand. There must have been several of such witnesses. But the prosecution case cannot be thrown out or doubted on that ground alone. Experience reminds us that civilized people are generally insensitive when a crime is committed even in their presence. They withdraw both from the victim and the vigilante. They keep themselves away from the Court unless it is inevitable. They think that crime like civil dispute is between two individuals or parties and they should not involve themselves. This kind of apathy of the general public is indeed unfortunate, but it is there everywhere whether in village life, towns or cities. One cannot ignore this handicap with which the investigating agency has to discharge its duties. The court, therefore, instead of doubting the prosecution case for want of independent witness must consider the broad spectrum of the prosecution version and then search for the nugget of truth with due regard to probability, if any, suggested by the accused.

53. Similar view was taken in Manish vs. State, 2000 VIII AD (SC) 29; Pramod Kumar vs. State, (2013) 6 SCC588 Hiralal Pandey & Ors. vs. State of UP, (2012) 5 SCC216 and Kashmirilal vs. State of Haryana, (2013) 6 SCC595 54. The indifferent attitude of the public is writ large in the instant case as it has come in the testimony of PW13, Inspector Rampal that when he reached the spot, there was huge crowd but inquiry revealed that there was no eye-witness of the incident. Maina has further deposed that one CD shop owner and Gupta were present at the time of incident but they did not try to save her husband, rather they closed their shops and went inside their houses. In this scenario, if nobody came forward

to disclose about the incident, no adverse inference can be drawn against the prosecution on account of their inability to join public witness.

55. Both the witnesses PW3 as well as PW6 have been subjected to very lengthy cross-examination. Extensive cross-examination of PW3 Maina was done for showing that she had an affair with one Sanjay prior to her marriage with deceased Gopal; it was she who got her husband murdered and that deceased himself was involved in various criminal cases but nothing turned out from the same. Even if, deceased was involved in various criminal cases, that does not give a licence to anyone to commit his murder. Similarly, except for bare suggestions, it could not be proved by accused that PW3 Maina got her husband murdered. Despite searching cross examination, nothing material could be elicited to discredit their testimony. Testimony of the witnesses are reliable, trustworthy and inspire confidence. Facts unfolded by the witnesses are consistent. No inherent infirmity affecting substratum of the case, is noted in their testimony. They fared well during the cross examination. Defence could not dispel the case detailed by the witnesses. They are reliable witnesses and accountability of accused can be adjudged on their testimony. It is well settled that in a criminal trial, credible evidence of a solitary witness can form basis of conviction and that of even half a dozen witnesses may not form such a basis unless their evidence is found to be trustworthy, inasmuch as, what matters in the matter of appreciation of evidence of witnesses is not the number of witnesses but the quality of their evidence.

56. Coming to the aspect of motive, it is settled law that when prosecution relies upon the evidence of eyewitness to prove the incident, motive assumes a secondary role. In *Molu vs. State of Haryana*, AIR 1996 SC2499 *Bhagirathi and Ors. vs. State of Haryana*, AIR 1996 SC3431 *Mahender vs. State*, (2010) VII AD (Delhi) 645 and *Rishipal vs. State of Uttarakhand*, (2013) II AD SC103 it was held that though motive for crime is an important factor in a criminal trial to establish the guilt of the accused but at the same time, failure of the prosecution to prove motive is not fatal to the case against the accused if there is direct evidence to establish it. When the direct evidence regarding the assailant is worthy of credence and can be believed, the question of motive more or less becomes academic. In the present case, testimony of eyewitness has been found to be acceptable and

credible, therefore, adequacy of motive is not relevant. The fact that relations between the deceased and accused Arvind were not cordial is manifest from the fact that the appellant Arvind alleges that for committing theft of water motor, a complaint was lodged by him against the deceased. According to PW3 Maina, even prior to her marriage, there was a quarrel between her husband and accused Arvind, his brother Kuldeep and their mother. At that time, they had beaten her husband and she intervened to pacify the matter. After 2nd or 3rd day of her marriage, accused Arvind along with some of his associates had set her jhuggi on fire. Ram Daresh has also deposed that even prior to the incident, quarrel had taken place between the appellant Arvind and his brother. Under the circumstances, enmity between the deceased and the accused Arvind, is undisputed. Motive is a double edged weapon. If according to accused, he has been implicated falsely because of the enmity, the same also furnishes the motive to commit murder of the deceased. Moreover, besides the motive, there is eyewitness account in the shape of testimony of PW3 and PW6 whose ocular testimony find corroboration from medical and scientific evidence and as such, there is no reason to disbelieve the same.

57. The only plea taken by the appellant Arvind in his statement recorded under Section 313 Cr.P.C. is that since the complaint was lodged by him against the deceased for committing theft of water motor, his wife had threatened to implicate him in a false case and, as such, at her instance, he has been falsely implicated in this case which, in view of the discussion made above, is without merit. Appellant Arvind has examined two witnesses in support of his defence. DW1 Sh. Ram Sujjan has deposed that he used to prepare jalebis at Shastri Nagar. Accused Arvind used to come to purchase jalebis from him. Accused Arvind had given his visiting card to show that he is mechanic of air-conditioner and fridge. His fridge had gone out of order, as such, he called Arvind on 28th June, 2009 at Nangloi. Arvind reached his house at 4:30 pm but there was no electricity in the area and the electricity came only at 10:00 pm. Thereafter, Arvind checked the fridge and left his house at about 10:45 pm. According to him, the date 28th June, 2009 was written by the accused himself on the fridge. However, neither he has placed on record the visiting card allegedly given by Arvind to him nor the writing given by the accused to show that he checked his fridge on 28th June, 2009. He admitted

that the distance between his house and the working place is 17 kms. Accused is not even a specialist for repairing of AC and fridge. DW2 Maya Mudgil, mother of appellant Arvind admitted that Arvind has not obtained any diploma or course to repair AC or fridge, therefore, it does not appeal to reason that even if on some occasion he purchased jalebi from DW1 at Shastri Nagar, the accused being the resident of Wazirabad would be called at Nangloi to repair the fridge. Moreover, the plea that accused was not present at the spot or was in the house of DW-1 is not even taken by the accused in his statement under Section 313 Cr.P.C. As such, testimony of DW1 does not help the appellant.

58. DW2 Maya Mudgil is the mother of the accused Arvind. According to her, police officials came to her house on 29th June, 2010 at 4:30-4:45 am, when accused was sleeping and then he was taken to police station. Later on, she came to know that he had been falsely implicated in this case. However, according to the arrest memo of accused Arvind vide Ex. PW13/D he was arrested on 29 th June, 2009 at 6:30 pm. Therefore, her above contention stands dismissed. She also deposed that she made written complaints to Commissioner of Police, ACP and SHO, PS Timarpur regarding false implication of her son by posting the letters. However, copies of letters have not been placed on record. Only the postal receipts have been marked as Mark A and Mark B. The record was not summoned from the concerned police station to prove any such letters sent by her to the authorities. Under the circumstances, her testimony does not help the appellant in any manner.

59. The authorities relied upon by learned counsel for the appellant are on peculiar circumstances of respective cases and as such has no bearing on the present case. The result of the aforesaid discussion is that in view of the version given by the eye witnesses, in addition to recovery of weapon of offence having blood stains of human origin and the medical evidence, we do not find any wrong with the conclusion arrived at by the learned Trial Court in recording conviction of accused Arvind for the offence punishable under Section 302 of Indian Penal Code. The findings are, accordingly, affirmed.

60. As far as appellant Rohit Tyagi is concerned, it is additionally submitted by Sh. P.K. Dubey, learned counsel for the appellant that the main allegation against this accused is that he caught hold of hands of the deceased. By placing reliance upon Pyare Lal and Anr. vs. State of Rajasthan, Crl. Appeal No.328/2006; Ramashish Yadav and Ors. vs. State, (1999) 8 SCC555 and Narender & Anr. vs. State, Crl. A. No.1165/2010, it was submitted that merely holding the hands of the deceased was not enough to impute common intention in the absence of other material to show the same. The name of this accused does not find mentioned in the Rukka or the FIR. His name finds mentioned for the first time in the statement of PW3 Maina which is inadmissible in view of Husna and Ors. vs. State of Punjab, (1996) 7 SCC382. This accused has not been named by either PW1 and PW6 or any other person, as such, impugned order is liable to be set aside.

61. Ms. Richa Kapoor, learned Additional Public Prosecutor for the State, on the other hand, submitted that name of this accused finds mentioned in the statement of PW3 Maina u/s 161 Cr. P.C. which was recorded on the date of incident itself even prior to the arrest of this accused. Thereafter, the accused has been duly identified by PW3 and PW6 in the Court. Since Ram Daresh had not mentioned the name of this accused in his initial statement, as such, TIP proceedings were arranged qua him but accused refused to join TIP proceedings and, as such, adverse inference is liable to be drawn against him. By relying upon Ramesh Singh @ Photti vs. State of AP, (2004) 11 SCC305 it was submitted that even if the role assigned to the present appellant is that of catching hold of the deceased, he facilitated the commission of crime and shared common intention with that of co-accused Arvind and, as such, he has been rightly convicted under Section 302/34 IPC.

62. It is true that in the initial statement, Ex.PW6/A, made by Ram Daresh, which formed the basis of registration of FIR, name of this accused is not specifically mentioned, however, he stated that he can identify the associates of Arvind, if shown to him. On the same day, statement of PW3 Maina @ Anju was recorded under Section 161 Cr.P.C. wherein she has not only named all the three accused but also gave the complete particulars and the role played by them by stating that Arvind, S/o Maya Devi was hitting her husband with stone while Kuldeep, brother

of Arvind and Rohit Tyagi @ Kala S/o Hari Prakash Tyagi, R/o gali No.8, Wazirabad, who were well known to her from before, had caught hold of her husband. On her raising alarm, Arvind, his brother Kuldeep and Rohit Tyagi @ Kala escaped on motorcycle bearing No.DL1SR5961 As such, immediately after the occurrence when statement of Maina was recorded, she had named the accused with his complete particulars. However, since Ram Daresh did not name this accused in the initial statement, therefore, an application Ex.PW19/A was moved by the Investigating Officer on 6 th July, 2009 for conducting Test Identification Parade of this accused before PW19 Sh. Tarun Yogesh, Metropolitan Magistrate, Tis Hazari Courts, Delhi. However, accused Rohit Tyagi refused to join TIP on 13th July, 2009 as per proceedings Ex.PW19/B despite the warning given by the Metropolitan Magistrate by stating that he has been shown to the mother, father and wife of the deceased and his photographs were also taken by the police in the police station. As far as the wife of the deceased is concerned, as seen above, accused was well known to her from before. So far as mother and father of the deceased are concerned, they were not eye witnesses to the incident nor were they supposed to identify the accused during the TIP proceedings. There is no plea of the accused that he was shown to the witness Ram Daresh in the police station. As regards his plea that his photographs were taken by the police at the police station, there is nothing to substantiate this plea. No suggestion was even given to the Investigating Officer of the case or any other police official that photograph of the accused was taken in the police station or that the same was shown to the witness before. Under the circumstances, there was no justification for the accused to have refused to join TIP proceedings. According to the Investigating Officer of the case, on 31st July, 2009, when this accused was being produced in the Court for taking his judicial remand, at that time, Ram Daresh identified the accused in the Court. In Suraj Pal vs. State of Haryana, (1995) 2 SCC64 it was held that substantive evidence identifying the witness is his evidence made in the Court and if the accused in exercise of his own volition declined to submit for Test Identification Parade without any reasonable cause, he did so at his own risk for which he cannot be heard to say that in the absence of test parade, dock identification was not proper and should not be accepted, if it was otherwise found to be reliable. The Court observed that its true that they could

not have been compelled to line up for the test parade but they did so on their own risk for which the prosecution could not be blamed for not holding the test parade. In that case also the Court disbelieved the justification given by the accused for not participating in the identification parade on the ground that accused was shown by the police to the witness. Same is the position in the present case. Both the witnesses duly identified him in the Court and also specified the role played by him by deposing that while the deceased was being hit by helmet as well as piece of stone on his head by appellant Arvind, this accused as well as Kuldeep caught hold of the deceased thereby facilitated the commission of crime by Arvind. There is no reason as to why the witnesses would involve him in this case in the absence of any enmity. Under the circumstances, the participation of the accused in the crime stands established beyond reasonable doubt.

63. In his statement recorded under Section 313 Cr.P.C., the accused has taken a plea of alibi by stating that he was not present at the spot as he was present at his shop of readymade clothes at Sant Nagar near Choudhary Dairy, Burari. This plea taken by the accused does not appeal to reason as it has seen the light of the day for the first time in his statement recorded under Section 313 Cr.P.C. and no suggestion to this effect was given to any of the prosecution witnesses. Moreover, since the plea of alibi was taken by the accused, it was for him to prove the same with absolute certainty so as to completely exclude the possibility of the accused to be present at the place of incident at the relevant time. As observed by Honble Supreme Court in Sheikh Sattar vs. State of Maharashtra, (2010) 8 SCC430 when a plea of alibi is raised by an accused it is for him to establish the said plea by positive evidence. The accused has miserably failed to bring on record any fact or circumstance which would make the plea of his absence even probable, let alone, being proved beyond reasonable doubt.

64. Looking to the definite evidence adduced by the eye witnesses, there is no doubt about the participation of this accused in the crime, but whether that was in furtherance of the common intention is to be examined by due appreciation of the evidence available. The role ascribed to this appellant was that he caught hold of the deceased while he was being assaulted by the appellant Arvind. There is no allegation that this appellant himself inflicted any injury upon the deceased.

65. In the case of Section 34 IPC, it is well established that the common intention pre-supposes prior concert. It requires a prearranged plan because before a man can be vicariously convicted for the criminal act of another, the act must have been done in furtherance of the common intention of them all. However, the plan may not be elaborate, nor is a long interval of the time required. It could arise in a spur of moment. But as it is difficult to prove the intention of an individual, it has to be inferred from his act or conduct and other related circumstances. Also, as it was observed by the Supreme Court in *State of U.P. vs. Iftikhar Khan*, (1973) 1 SCC512 that it is not necessary to attract the section that any overt act must be done by the particular accused. It is enough if it is established that the criminal act has been done by anyone of the accused in furtherance of the common intention. The Supreme Court in *Suresh and Anr. Vs. State of U.P.*, (2001) 3 SCC673 has held:

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

39. The dominant feature for attracting Section 34 of the Indian Penal Code (hereinafter referred to as "the Code") is the element of participation in absence resulting in the ultimate "criminal act". The "act" referred to in the later part of Section 34 means the ultimate criminal act with which the accused is charged of sharing the common intention. The accused is, therefore, made responsible for the

ultimate criminal act done by several persons in furtherance of the common intention of all. The section does not envisage the separate act by all the accused persons for becoming responsible for the ultimate criminal act. If such an interpretation is accepted, the purpose of Section 34 shall be rendered infructuous.

40. Participation in the crime in furtherance of the common intention cannot conceive of some independent criminal act by all accused persons, besides the ultimate criminal act because for that individual act law takes care of making such accused responsible under the other provisions of the Code. The word "act" used in Section 34 denotes a series of acts as a single act. What is required under law is that the accused persons sharing the common intention must be physically present at the scene of occurrence and be shown not to have dissuaded themselves from the intended criminal act for which they shared the common intention. Culpability under Section 34 cannot be excluded by mere distance from the scene of occurrence. The presumption of constructive intention, however, has to be arrived at only when the court can, with judicial servitude, hold that the accused must have preconceived the result that ensued in furtherance of the common intention. A Division Bench of the Patna High Court in *Satrughan Patar v. Emperor* [AIR1919 Pat 111:

20. Cri LJ289 held that it is only when a court with some certainty holds that a particular accused must have preconceived or premeditated the result which ensued or acted in concert with others in order to bring about that result, that Section 34 may be applied.

66. Coming to the case at hand, there is nothing proved on record by the prosecution that appellant Rohit Tyagi had any common intention to kill the deceased or that he had any previous knowledge of the fact that the act of the appellant Arvind will cause murder of the deceased. Merely because the appellant was holding deceased, it cannot be concluded that he was having a common intention with appellant Arvind to cause death of the accused, although the intention could be to cause the grievous hurt by a dangerous weapon as he was assisting the accused in hitting the deceased with the help of helmet and concrete stone pieces.

67. In the matter of Rama Meru and another vs. State of Gujarat reported in AIR 1992 SC969 wherein the appellant No.1 and 7 were not seen inflicting any knife injury, but they were assisting the accused in causing murder of the deceased, the Honble Supreme Court held as under:

In the aforesaid circumstances, it cannot be definitely held that the appellants had been harbouring a common intention to murder the deceased and with such common intention they had inflicted knife injuries on the person of the deceased. In the absence of common intention to murder being established beyond all reasonable doubts, simply on account of death of Rambhai as a result of cumulative effect of all the injuries inflicted on the person of the deceased, a case for conviction for murder under Section 302 read with Section 34 IPC cannot be sustained. In our view, in the facts and circumstances of the case, the learned Sessions Judge was justified in holding that a case under Section 326 read with Section 34 IPC and Section 324 has been established by the prosecution against the appellants.

68. Again in Pichai @ Pichandi and Ors vs. State of TN, (2005) 10 SCC505 A-1 to A-8 armed with sticks came to deceaseds house to teach him a lesson. While A-3 and A-4 caught hold of the deceased from behind rendering him helpless with a view to facilitate others to assault, A-1 and A-2 hit the deceased with sticks on his head with such force as to cause fracture of his skull which resulted in his death. Honble Supreme Court held that accused party had not gone to the deceaseds place with the common intention to commit his murder but they would have certainly known that grievous hurt may be caused in prosecution of their common intention to teach the deceased a lesson. Having regard to the role ascribed to A3 and A4, they were convicted under Section 324/109 IPC.

69. In Pyare Lal (supra) and Ramashish (supra), the appellants were acquitted in view of the peculiar circumstances of these cases. However, in Narender (supra), sentence was converted to Section 326/34 IPC from Section 302/34 IPC.

70. In the instant case also, we find that appellant Rohit Tyagi although could not be said to have shared common intention to cause death of deceased, however, the fact that he was assisting the accused Arvind in hitting the deceased with

dangerous weapon, the intention to cause grievous hurt by dangerous weapon could be gathered. As such, he is held guilty for the offence under Section 326/34 IPC.

71. In view of our preceding analysis, we do not find any merit in Crl. Appeal No.923/2011 filed by the appellant Arvind and, accordingly, the same stands dismissed.

72. However, as regards appeal No.927/2011 filed by appellant Rohit Tyagi, the judgment and order of learned Additional Sessions Judge dated 2nd May, 2011 and sentence dated 7th May, 2011 respectively convicting him for the offence punishable under Section 302/34 IPC is modified to the extent that he is convicted under Section 326/34 IPC and accordingly the sentence of life imprisonment imposed upon him by learned Trial Court is converted to sentence of imprisonment for a period of seven years and fine of Rs.25,000/-, in default of payment of fine, he is to undergo simple imprisonment for a period of six months. The part of the order whereby the amount of fine was ordered to be paid to the parents of the deceased remains unaltered. Needless to say, the appellant shall be entitled to the benefit of Section 428 of the Code of Criminal Procedure.

73. Intimation be sent to the appellants through Superintendent Jail. (SUNITA GUPTA) JUDGE (KAILASH GAMBHIR) JUDGE MARCH 19 2014 rs

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