

Rakesh Kumar and ors. Vs. State

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Court : Delhi

Decided On : Mar-31-2014

Judge : V.P.Vaish

Appellant : Rakesh Kumar and ors.

Respondent : State

Advocate for Def. : Mr. Sanjay Lao

Advocate for Pet/Ap. : Mr. D.C. Mathur, Ms. Rebecca M. John, Mr. Jairaj Mudgal, Mr. Harsh Bora

Judgement :

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

26. h September, 2013 Date of Decision:

31. t March, 2014 % + CRIMINAL APPEAL No.387/1998 RAKESH KUMAR & ORS. Through: Appellants Mr. D.C. Mathur & Ms. Rebecca M. John, Sr. Advocates with Mr. Jairaj Mudgal & Mr. Harsh Bora, Advocates Versus STATE Through: Respondent Mr. Sanjay Lao, APP for the State. CORAM: HON'BLE MR. JUSTICE P.K. BHASIN HON'BLE MR. JUSTICE VED PRAKASH VAISH VED PRAKASH VAISH, J:

1. The appellants have assailed the impugned judgment dated 30 th July, 1998 passed by the learned Additional Sessions Judge, Delhi whereby the appellants have been convicted for the offence under Sections 302/325 read with Section 34 of the Indian Penal Code (hereinafter referred to as IPC). Vide order on sentence dated 31st July, 1998, the appellants were sentenced to undergo imprisonment for life and to pay a fine of Rs.1,000/- under Sections 302/34 IPC and in default of payment of fine, the appellants shall further undergo rigorous imprisonment for a period of six months. The appellants were also sentenced to undergo rigorous imprisonment for a period of one year and to pay a fine of Rs.500 each, in default whereof, RI for three months under Sections 325/34 IPC. Both the sentences were ordered to run concurrently.

2. The case as unfolded by the prosecution is that on 11.12.1994 on receipt of DD No.7A, ASI Sri Bhagwan along with Constable C.J.

Thomas reached at Din Dayal Upadhaya Hospital and obtained MLC of injured Ram Kumar who was under the observation of the doctor and was declared unfit for making any statement. The injured was referred for skull x-ray by the doctor, on the way to which the injured Ram Kumar succumbed to the injuries. ASI Sri Bhagwan met Shri Balwant Singh, father of the deceased Ram Kumar in the hospital. Balwant Singh made a statement regarding the occurrence of the incident. ASI Sri Bhagwan made his endorsement and sent rukka to the police station for registration of the case. SHO, PS Kanjhawla along with his staff reached the hospital. Complainant Balwant Singh was also sent for medical examination but on account of rush in the hospital and also on account of apprehension of the complainant about well being of his family members and keeping in view his request that first he wanted to go home, ASI Sri Bhagwan along with SHO and complainant Balwant Singh reached Village Kanjhawla. At the instance of Balwant Singh, police inspected the spot of incident and recorded the statement of Raj Singh, Narinder, Suraj Bhan and Ram Pat. Balwant Singh was also medically examined at Din Dayal Upadhayay Hospital and thereafter the investigation was taken over by Inspector Bhatia of Special Investigating Unit.

3. On 12.12.1994, the Investigating Officer visited Din Dayal Upadhaya Hospital and in the presence of Balwant Singh and Mangey Ram, he conducted the inquest proceedings in respect of the deceased Ram Kumar. He filled the inquest form, prepared brief facts and recorded the statements of Balwant Singh and Mangey Ram and also prepared an application for post mortem examination. Thereafter post mortem examination was conducted and clothes of the deceased were sealed and kept in a safe custody in a sealed parcel.

4. On 15.12.1994, Inspector Bhatia received an information that accused Surinder and Rakesh could be apprehended at ISBT at about 11.30 a.m. or so. Thus, he joined Balwant Singh and his nephew Suraj Bhan and proceeded to ISBT in search of the accused persons. He along with the witnesses reached ISBT, Kashmere Gate and thereafter at about 12.30 p.m., appellants Surinder and Rakesh were spotted by him near Sonapat bus platform at the instance of a secret informer, Balwant Singh and Suraj Bhan. The appellants were interrogated and during interrogation, appellant-Surinder besides giving other details of the incident disclosed that he could get the lathi used in the crime recovered from a place near pulia at Kanjhawla, Karala Road, where it was thrown by him. His disclosure statement was recorded. The appellant-Rakesh was also interrogated who also got his disclosure statement recorded wherein he stated that he had thrown the bat used in the crime near kudedan at Kanjhawla Road. The appellants were produced before the Area Magistrate and there police remand was obtained. Thereafter both the said appellants respectively got lathi and bat recovered from pulia and kuredan at Kanjhawla. Both lathi and bat were seized. On 08.01.1995, on receipt of information regarding the presence of appellant-Radhey Mohan near park Ashok Vihar, Police Colony, Inspector Bhatia proceeded along with his staff to the said place where he was spotted and apprehended. disclosure statement recorded. He also got the After completion of investigation, charge sheet under Sections 302/325/34 IPC was filed. The trial was conducted and prosecution has examined as many as 18 witnesses leading finally to the passing of the impugned judgment and order on sentence.

5. Learned senior counsel for the appellants contended that the appellants are falsely implicated in this case. There is no evidence against the appellants and the

conviction against them is bad in the eyes of law. There is delay in lodging of FIR and sending of special report. There is no mention of FIR in inquest report while all the documents have daily diary number which shows that till the time of post mortem, the alleged eye-witness account and the allegations against the appellants were not mentioned in them. There are material discrepancies in the statements of Balwant Singh (PW-2) and Suraj Bhan (PW-4). He further contended that the motive of the crime is not established. Further, material evidences are totally in contradiction with the ocular evidence while according to PW-2, PW-4 and PW-11, the incident lasted for 10-15 minutes, as per the post mortem report, there were only two injuries on the body of the deceased. Balwant Singh (PW-2) got himself medically examined after considerable delay and from the testimony of Dr.Sanjay Rohtagi (PW-8), it is clear that the injury could have been received by PW-2 as a result of fall. It was lastly contended that there is doubt regarding the recovery of weapon of offence as they were recovered from an open place.

6. Per contra, learned APP for the State contended that the testimonies of PW-2, PW-4 and PW-11 are consistent and corroborated with each other and point out towards the guilt of the appellants. In the light of their cogent testimonies, the motive of crime need not be proved and even if needed was consistently stated by them that it was due to fight that it occurred 3-4 times prior to the date of incident over a tap situated outside the house of Balwant Singh. There is no delay in recording of the FIR. As soon as the statement of PW-2 was recorded at 3.00 p.m, the rukka was forwarded for registration of FIR that was registered at 3.40 p.m. The DD entries Ex.PW12/A to Ex.PW12/C established that the incident was reported to have occurred because of appellants hitting the deceased as a result of which he died. He also pointed out that the recovery was established from the statement of PW-2 and PW-4 who had witnessed the same.

7. We have given our anxious thought to the rival submissions made by learned senior counsel for the appellants and learned APP for the State and also perused the material on record.

8. Balwant Singh (PW-2), who is father of the deceased, has stated that on 11.12.1994 at about 10.00 a.m., he was at his house as it was a holiday. He had got a water tap installed in front of their house and the appellants also used to fetch water from it. It was on 06.12.1994, wife of appellant-Surinder had thrown some dirty material at the said water tap and they asked her not to have water from that tap. Thereafter appellant-Radhey Mohan and his both sons came in front of their house, abused them and threatened them. The appellant-Radhey Mohan had also warned them that they will be finished one by one. He, his wife and his son Ram Kumar were watching a serial inside their house and on 11.12.1994 at about 10.00 a.m., when they opened the gate of their house and after opening the door, his son Ram Kumar holding a glass of water threw water on his face when appellant-Radhey Mohan said that the boy should be finished. Appellant-Rakesh hit with a bat on the head of his son and then Surinder gave lathi blow on the head of his son Ram Kumar. On receiving bat and lathi blows when his son wanted to run inside, appellant-Radhey Mohan came running and gave a mongri blow on the head of his son Ram Kumar who fell down there itself. Narinder, Suraj Bhan and Raj Singh also reached there. They all tried to separate but the appellants kept on assaulting his son. Thereafter, the police arrived and they enquired from him about the incident and he told the same to them and pointed out towards the appellants who were present there. enquired the names of the appellants. The police The police then removed his son Ram Kumar along with him to Din Dayal Upadhaya Hospital. They reached Din Dayal Upadhaya Hospital at about 11.30 a.m. Police took his son into the ward and he also accompanied them where his son was given glucose drip. Thereafter his son was referred for xray and at that time his son died. Two police officials of Kanjhawla also reached there and they recorded his statement which is Ex.PW2/A. He had also received injury at the hands of the appellants while trying to save his son. Police also asked him to get himself examined in the hospital but since there was rush, he returned to his house along with the police. There he pointed out at various spots, prepared site plan and interrogated Narinder and Raj Singh.

9. On 15.12.1994, SI Bhatia came to their house at about 7.45 a.m. and told them that they had seen the appellants near bus stand and he should accompany him. He accompanied the police along with Suraj Bhan and reached ISBT. When police

asked them to search for the accused persons, they took rounds to search the appellants and spotted the appellants Surinder and Rakesh standing in queue for tickets at the counter from where buses for Sonapat go. Police apprehended both the appellants namely Rakesh and Surinder. They were searched and Rupees nine was recovered from Surinder and Rupees eleven from appellant-Rakesh. They were interrogated by the police and they gave details of the incident which was written and he put his thumb impression and Suraj Bhan signed the same. The police then took the appellants to Court and he as well as Suraj Bhan went to their house. Thereafter, at about 5.00 p.m. or so, the police brought the two appellants to their house in Kanjhawla and police requested them to accompany them and affecting recovery of lathi and bat as disclosed by the appellants. Then they all went near the canal which is between Kanjhawla and Karala. Then they went to pulia which was ahead of the canal and from there the appellants Surinder brought a lathi lying downwards which was identified by him, the same was sealed after measuring it. Then they came to Kanjhawla and made enquiry from Rakesh regarding the bat and he disclosed that he had thrown it near a dustbin on the road leading to Kutubgarh. Thereafter, they went to the said place and from there, the appellant-Rakesh brought a bat lying behind the dustbin which was about two and a half feet long. The said bat was also sealed. Papers regarding recovery were prepared and all bearing his thumb impression and signature of Suraj Bhan, the same are Ex.PW2/C to Ex.PW2/G. Police once again visited their house in January 1995 and he was asked to show various places of incident which he showed. Measurements were taken and site plan was prepared. In his cross-examination, he reiterated his statement made before the Court and denied the suggestion that his son Ram Kumar was playing cricket on that day along with other children and that a fight ensued between Ram Kumar and other children on which Ram Kumar received injuries. He also denied that he was not present at the scene of occurrence and had deposed falsely to implicate the appellants as he wanted to purchase the house of appellant-Radhey Mohan by clandestine manner.

10. Suraj Bhan (PW-4) has stated that on 11.12.1994, he was present at the roof of his house at about 10.00 a.m. when he saw his neighbours Surinder, Rakesh and Radhey Mohan came running towards the house of Balwant. Rakesh had a bat in his hand, Surinder had a lathi and on seeing them he came down from the

roof as a quarrel had taken place between Balwant and Radhey Mohan 3-4 days earlier on the point of throwing filth near the water tap of Balwant and on that day of quarrel Radhey Mohan had threatened Balwant that they would kill them one by one. On 11.12.1994 when the appellants came running, Ram Rakesh hit bat on the head of Ram Kumar and then Surinder gave lathi blow on the head of Ram Kumar and when Ram Kumar wanted to enter the house in order to escape, appellant-Radhey Mohan gave a mongri blow on the head of Ram Kumar from back side. After receiving the mongri blow, Ram Kumar fell down in front of the gate of his house having his face downward. Appellants kept on assaulting Ram Kumar even after his fall. Neighbours Raj Singh, Narinder, Balwant Singh and he tried to intervene and with great difficulty he could separate them. Thereafter, police PCR came and took Ram Kumar to the hospital along with Balwant. Later on he came to know that Ram Kumar had died in the hospital. On 15.12.1994, SI Bhatia came to their house and he informed them that the accused persons were attempting to go out of Delhi. He accompanied the police along with Balwant at ISBT and reached there at about 11/11.15 a.m. The police asked them to look for the accused persons at ISBT. When they spotted appellants-Surinder and Rakesh standing in queue to buy tickets at Sonapat platform, on their pointing, said appellants were apprehended. The appellants were searched, their statements were recorded and they gave the details of incident. Appellant- Surinder told that he had thrown lathi near pulia of canal at Kanjhawla Road and appellant-Rakesh said that he had kept bat near dustbin at Kanjhawla Road. Police prepared papers, which were signed by him. On the same day at about 4.30 or 5.00 p.m., police came to their house and asked them to accompany them to the place of recovery. He also stated that appellant-Surinder got lathi recovered from pulia and appellant-Rakesh got recovered bat from behind the dustbin respectively which were sealed and seized. In his cross-examination, besides several other things, he stated that he was present when the occurrence prior to 3-4 days of 11.12.1994 had taken place. He has also tried to convince the appellant not to quarrel with Balwant. He denied the suggestion that Ram Kumar was playing cricket with other children and received injuries during quarrel.

11. Sharbati (PW-11) stated that deceased Ram Kumar was her son. It was on 11th day of the month, about one year ten months earlier, Chander Kanta serial on

television had ended and she was present at her house. Her husband was also at the house when her son deceased Ram Kumar was standing at the gate of the house washing his face. It was a day time that all the appellants had come there. The appellant Rakesh had cricket bat, appellant Surinder had a lathi and appellant Radhey Mohan had a mongri used for washing clothes. All the three appellants started beating her son Ram Kumar with the above mentioned objects. They kept on beating him mercilessly and when she tried to intervene, Radhey Mohan pushed her, on account of which she fell down at a distance. Her son Ram Kumar fell down near the door and became unconscious on account of the beating given by the appellants. The appellants, thereafter, started beating her husband. Suraj also intervened and other persons also came for intervention. She went to the adda of the village where PCR van was present. She informed them about the incident. They inquired her name and then she along with police returned to the spot and the appellants (accused persons) had run away. She also stated that 4-5 days earlier to the said incident, wife of appellant-Surinder had thrown filth on their water tap which is fitted outside their house. Her son Ram Kumar had asked the appellants on that occasion that they should not take water from their tap. On this, the appellant had very filthily and badly abused them. On the said day when the filth was thrown on the tap, appellant-Radhey Mohan had threatened them by asking his both sons Rakesh and Surinder that they should finish one by one Ram Kumar etc. and that he would see to it this happened. After about a month, two police persons came to her house and recorded her statement. In her cross-examination, she reiterated her statement that she had informed the police about the incident and also the earlier incident which happened 4-5 days earlier when an altercation had occurred over water tap. She denied the suggestion that her son was playing cricket on the day of occurrence or that while playing cricket somebody inflicted injuries on her son Ram Kumar and as a result of which he died. She also denied that she stated to PCR officials that her son received injuries while he was playing cricket with other boys.

12. It is a well settled law that evidence of the witness cannot be discarded merely on the ground that he is either partisan or interested or close to the deceased, if it is otherwise found to be trustworthy and credible. The said evidence only requires scrutiny with more care and caution so that neither the guilty escapes nor the

innocent is wrongly convicted. If on such careful scrutiny the evidence is found to be reliable and probable then it could be acted upon. If it is found to be improbable or suspicious, it ought to be rejected. Where the witness has a motive to falsely implicate the accused, his testimony should have corroboration in regard to material particulars before it is accepted. Even more so, merely relations do not amount to interested in a case which has to be proved by clear and cogent evidence. The Honble Supreme Court in Dalip Singh vs. State of Punjab, AIR 1953 SC364 has held:-

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

13. It is also well settled principle of law that the Court can act on the testimony of a single eye-witness provided he was wholly reliable and base conviction on the testimony of such sole eye-witness. Thus, there is no legal impediment in convicting a person on sole testimony of single eye-witness if it is found to be reliable and trustworthy. In the present case, Balwant Singh (PW-2), Suraj Bhan (PW-4) and Sharbati (PW-11) are eye-witnesses to the said incident between the appellants and the deceased in which the deceased had died. Their testimonies before the trial Court are consistent and corroborated in material parts with the testimony of each other, as regards the factum of appellants coming to the house of the deceased on 11.12.1994 and hitting him as a result of which he died. Their statements are also corroborated in regard to the incident which had occurred 3-4

days prior to the incident on 11.12.1994 in which the appellant-Radhey Mohan had threatened Balwant Singh that he would kill one by one. As we have observed above, the testimonies of Balwant Singh (PW-2) and Sharbati (PW-11) cannot be discarded simply because they are the parents of the deceased Ram Kumar. Although, as per judgment in Dalip Kumars case (supra) the testimony of relatives do not require corroboration if it is found to be reliable, however, in the present case, the testimonies of both these witnesses corroborate with each other and the testimony of an independent witness Suraj Bhan (PW-4).

14. The appellants had produced four defence witnesses out of which Raj Singh (DW-2) has stated that on 11.12.1994 at about 9.30/10.00 a.m., he was standing outside his house. Some children were playing cricket, he heard shouts of children and heard that somebody was injured. He saw Ram Kumar, son of Balwant Singh in injured condition and he had injuries on his head. He enquired as to how he received injury. The enquiry revealed that Sunder and Radhey Shyam had given him injuries with the bat. He took Ram Kumar in injured condition inside his house where the mother of Ram Kumar met him and he asked her to take care of injured Ram Kumar. Then, he went and reported all this to PCR van which was standing nearby at the chowk. PCR took the injured Ram Kumar to the hospital. He further stated that none of the appellants were present at the spot. There was some dispute between Balwant and Radhey Mohan on account of some land situated near their house, Balwant used to say that this was his piece of land and it should be given to him. In his cross-examination by learned APP, he denied the suggestion that he had been won over by the accused persons and that he saw appellant Surinder armed with lathi, appellant-Rakesh armed with a cricket bat and appellant-Radhey Mohan armed with a mongri coming out and then they stood outside house of Balwant. He also denied that he saw or heard appellants hit the deceased or that the appellants assaulted the deceased in his presence. He also denied that he did not report the incident or that he did not see any child playing cricket at the spot.

15. Ram Pat (DW-3) has stated that on 11.12.1994 at about 9 or 10.00 a.m., that he was sitting outside his house on a cot. Children were playing cricket outside his house. His house and house of Balwant and Raj Singh are in one line and only a

single road falls in front of their house. Children started fighting among themselves and in that melee Ram Kumar received injury on his head. Raj Singh also reached the spot and took Ram Kumar inside the house of Balwant. Then PCR van came to the spot and took Ram Kumar to the hospital. Three appellants-Radhey Mohan, Surinder and Rakesh were not present at the spot when Ram Kumar received injuries. He did not see Suraj Bhan and Balwant at the spot. Appellants and complainant Balwant used to have dispute over this issue that the house belongs to him and that they should not visit him. The house in question was the house of Radhey Mohan. In his cross-examination by learned APP, he stated that he did not know why Balwant was laying claim on the house of Radhey Mohan. He denied the suggestion of having accepting money from the appellants to depose falsely and that the appellants had hit the deceased in his presence or that there was a quarrel 3-4 days prior to the incident. He also denied that he had not seen Ram Kumar playing cricket and that Ram Kumar did not receive injury in any such cricket game dispute as stated by him.

16. A perusal of testimony of Raj Singh (DW-2) shows that he heard the shouts of children and heard that someone was injured which was the deceased and also suggested that the said incident occurred in a fight between children. However, it is not clear whether he actually saw someone hitting the deceased. He witnessed the incident himself. Ram Pat (DW-3) has, on the other hand, stated that he saw that the children started fighting and in that melee deceased Ram Kumar died. However, in either case these witnesses have failed to prove as to what steps were taken by them to get the incident of fight between the children reported. Their statements are general in nature, only to show the presence of appellants from the place of incident and to state the reason of injury as a fight amongst children. In support of their case, the appellants have also relied on the statement of HC Inder Pal Singh (DW-1) who recorded DD No.8A, copy of which is Ex.DW1/A in which the cause of incident referred was a fight over cricket. These statements and the DD entry cannot be looked into in isolation and have to be looked in the light of the prosecution case which stands fortified from the consistent statements of Balwant Singh (PW-2), Suraj Bhan (PW-4) and Sharbati (PW-11) who had, in depth, described the entire evidence and also the statement of ASI Virender Singh (PW12), Duty Incharge at PCR van, commander 38 from Kanjhawla Chowk from

8.00 a.m. to 8.00 p.m on 11.12.1994, who stated that at about 10.30 a.m. on 11.12.1994, a lady namely, Sharbati came to him at Kanjhawla Chowk and informed that her son was beaten by her neighbour and that he was lying unconscious. He recorded this information in the wireless log and diary register. He along with Smt.Sharbati reached the spot and found Ram Kumar lying unconscious and came to know that her neighbours Radhey Mohan and Sunder had hit his son with a cricket bat on his head. ASI Virender Singh (PW-12) removed the deceased along with his father to DDU Hospital and handed over the case to duty Constable. He had also proved entries made on 10.35 a.m, 10.45 a.m. and 11.22 a.m. as Ex.PW12/A to Ex.PW12/C. Clearly in the light of his statement and the documents proved by him, the factum of the incident occurred because of a quarrel over cricket is not established. Even the DD No.8A was recorded at 11.50 a.m., however, it bears no mention of the name as to at whose instance it was recorded. On the other hand, Ex.PW12/A to Ex.PW12/C recorded earlier to DD No.8A and statements of PW-2, PW-4 and PW-11 established that the incident occurred because the appellants had hit the deceased and the same fact was informed by PW-2 to ASI Virender Singh (PW-12) soon after the incident by Sharbati (PW-11) which was so stated by him in his testimony.

17. The statements of PW-2, PW-4 and PW-11 are challenged by learned counsel for the appellants for the reason that they had stated in their testimonies the incident in which the deceased Ram Kumar had died which occurred because of incident 3-4 days prior to 11.12.1994 over a tap installed outside the house of Balwant Singh. However, in the cross-examination Balwant Singh (PW-2) has stated that there was no tap in front of his house and also that there was no tap in front of his house on the date of occurrence. He also stated that there was a tap in front of the house of Radhey Mohan and pipe of that tap was adjacent to his house. Even Suraj Bhan (PW-4) has stated in his cross- examination that Radhey Mohan had got a separate water connection and there was no water tap in front of the gate of house of Balwant. However, this fact is in itself not sufficient to dispute the testimony of these two witnesses in toto and to make their statements unreliable. The factum of presence of tap in the present case is necessary to establish the motive of the appellants to commit the said incident and its absence from that place as suggested by learned counsel for the appellants, relying on the

testimony of PW-2 and PW-4 would not be sufficient enough to wipe away their otherwise consistent and corroborated stands. Otherwise also, a perusal of visual site plan Ex.PW15/B shows that the tap at point B which is right across the gali of the house of the deceased. It could be possible that the said witnesses were referring to this water tap. It is pertinent to mention here that the absence of motive also is of no consequence and pales into insignificance when direct evidence establishes the crime. In fact, motive is a thing which is primarily known to the accused himself and it may not be possible for the prosecution to explain what actually promoted or existed him to commit a particular crime. The Court is free to act on the testimonies of witnesses if no error is found even in the absence of motive and can base its judgment on it. For the reasons of corroboration of testimonies of PW-2, PW-4, PW-11 and PW-12 as observed by us, the contention of the learned counsel for the appellants failed before us.

18. The post mortem of the deceased was conducted by Dr.L.T. Ramani (PW-3) who has prove this post mortem report as Ex.PW3/A where the various injuries were described as:

External injuries 1. Haematoma 2 x 1 in size on the left temporal region.

2. Haematoma on the right temporal paratib region.

3. An abrasion $\frac{3}{4} \times \frac{1}{2}$ on the left cheek. On internal examination scalp tissues showed blood clot over right fronto parietal and temporal and left temple region. There was fissured fracture of right temporal bone joining coronal suture which was loosen. A Fissured fracture was found radiating internally involving frontal bone. There was thick generalized subdural haemmmorage more on the right side with a oedema of brain. Neck tissues were normal, lungs and heart normal, stomach was full contained semi digested food. Other abdomen organs were normal.

19. Doctor has described the injuries as antemortem in nature caused by a blunt weapon and injury to the skull was prescribed as sufficient in the ordinary course of nature to cause death. Further, the cause of death was described as coma resulting from head injury.

20. The appellants had produced Dr.L.K. Baruah (DW-5) who has stated that a person would sustain more than two injuries when three persons attack a person with three different weapons. It is proposed to suggest that the medical evidence does not support the case of the prosecution where it is suggested that the deceased was given brutal injuries by hitting several times, however, there were two temporal injuries on the body of the deceased. However, this contention too does not find favour with us. Suraj Bhan (PW-4) has stated in his cross-examination that he tried to save the deceased Ram Kumar, and Balwant Singh (PW-2) fell on deceased Ram Kumar to save him but not fully covering him and accused persons kept on hitting the deceased for 10-15 minutes. Balwant Singh (PW-2) also stated that he too received injury at the hands of the appellants while trying to save the deceased. He also stated in his cross-examination that he tried to prevent appellants from hitting his son with lathi, he intervened, however, the lathi blow did not hit him but the deceased. Hence, in such a situation, it is quite possible that the blows given by the accused persons might have missed the deceased and some of them might have been received by Balwant Singh (PW-2).

21. Also Dr.Yashpal (PW-18), Radiologist, DDU Hospital has deposed that on 11.12.1994 while working as Radiologist he had examined skiagram bearing No.7963 dated 11.12.1994 in respect of Balwant Singh and opined that there was fracture of 5 th meta carpal base in the left hand of injured Balwant Singh. The skiagram was signed by him in token of the fact that its report was prepared by him. In his cross examination, he has stated that the injuries cannot be self inflicted but can be sustained on account of a fall on hard substance. Clearly it is seen from the above that the injury of the deceased was caused on a vital part of the body i.e. the head which is in the opinion of Dr.L.T. Ramani (PW-3) was sufficient in the ordinary course of nature to cause death of the deceased.

22. In the case before us, the commonality of intention to cause death of the deceased is established from the fact that the appellants had all come armed with weapons and continued beating the deceased even after he had falling down on the ground. The cause of death as we have observed was also opined to be because of injury inflicted on the skull which as the result of appellants hitting the deceased. Section 34 IPC, however, further envisages that all the accused must

have participated in the commission of the act referred to in the later part of Section 34 IPC which 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 which several persons in furtherance of the common intention of all. The section does not envisage the separate act by all the accused for becoming responsible for ultimate criminal act. If such interpretation is accepted, the purpose of Section 34 IPC shall be rendered infructuous. Participation in the crime in furtherance of the common intention cannot be conclusive of some independent criminal act by all the accused persons besides the ultimate criminal acts because for that individual act, law takes care making such accused responsible under the other provisions of the Court.

23. So far as the delay in recording FIR is concerned, it may be observed that the occurrence is alleged to have taken place at 10.a.m. on 11.12.1994. The deceased was admitted in the hospital at 11.30 a.m. and he was declared dead at 12.20 p.m. The statement of Balwant Singh (PW-2) was recorded, on the said statement immediately whereafter rukka was sent for registration of FIR at 3.00 pm and FIR was registered at 3.40 p.m. In our opinion, this is not a material delay in recording the FIR and is not fatal to the case of prosecution and the delay, if any, might have been because of the involvement of Balwant Singh (PW-2) and police authorities being involved in providing medical care to the deceased. Otherwise also, what has been stated in the FIR finds corroboration from what was stated in the DD entries, copies of which are Ex.PW12/A to Ex.PW12/C which was recorded prior in time to the recording of FIR.

24. It is a settled principle of criminal jurisprudence that mere delay in lodging the FIR may not prove fatal in all the cases, but in the given circumstances of the case delay in lodging the FIR can be one of the factors which corrode the credibility of the prosecution version. Delay in lodging the FIR cannot be a ground by itself for throwing away the entire prosecution case. The Court has to seek an explanation for delay and check the truthfulness of the version put forward. If the Court is satisfied, then the case of prosecution cannot fail on this ground alone. The delay in lodging FIR acquires significance when such a delay speaks itself of mala fide. Where the criminal machinery is set into motion by an individual to vindicate his

own personal grudge and enmity, apparent from the conduct of the delay in lodging of FIR and where the delay speak loud and clear that it was as a result of afterthought and proper planning, then the Court can look such an FIR with suspicion. In *Kishan Singh (dead) through LRs vs. Gurpal Singh & Ors.*, (2010) 8 SCC775 it was observed:

22. In cases where there is a delay in lodging an FIR, the court has to look for a plausible explanation for such delay. In the absence of such an explanation, the delay may be fatal. The reason for quashing such proceedings may not be merely that the allegations were an afterthought or had given a coloured version of events. In such cases the court should carefully examine the facts before it for the reason that a frustrated litigant who failed to succeed before the civil court may initiate criminal proceedings just to harass the other side with mala fide intentions or the ulterior motive wreaking vengeance on the other party. Chagrined and frustrated litigations should not be permitted to give vent to their frustrations by cheaply invoking the jurisdiction of the criminal court. The court proceedings ought not to be permitted to degenerate into a weapon of harassment and persecution. In such a case, where an FIR is lodged clearly with a view to spite the other party because of a private and personal grudge and to enmesh the other party in long and arduous criminal proceedings, the court may take a view that it amounts to an abuse of the process of law in the facts and circumstances of the case.

25. However, in the case before us, we have already observed that the material contents of FIR are corroborated with the contents in Ex.PW12/A to Ex.PW12/C. Also, the appellants have not been able to prove any mala fide or ill motive on the part of PW-2 also the complainant to have falsely implicate the appellants in this case. Nothing material has emerged from the cross-examination of PW-2 also to this effect.

26. Learned senior counsel for the appellants has relied upon *Rakesh Aggarwal vs. State*, 1995(33) DRJ (DB) and *L/NK Meharaj Singh vs. State of Uttar Pradesh*, JT19943) SC440 for proving that on the basis of delay in FIR, conviction can be set aside. But both these judgments are of no help to the appellants as in both these judgments it was held that if prosecution can offer a satisfactory explanation for

the delay in dispatching or the receipt of copy of the FIR by the concerned Magistrate, then such delay is not fatal to the case of prosecution. Therefore, as stated above, delay is duly explained and not mala fide, so mere delay in recording of FIR will not go to the extent of discarding the prosecution version.

27. Further, learned counsel for the appellants also relied upon *Balwant Singh vs. State*, 1976 C.L. R. (Delhi) 41 wherein it was held that once investigation is found to be tainted, the whole of the prosecution case becomes open to serious doubts and challenges. However, again this judgment is of no help to the appellants.

28. In *Ram Bali vs. State of Uttar Pradesh*, (2004) 10 SCC598 the Supreme Court observed that in case of defective investigation the Court has to be circumspect while evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigation officer if the investigation is designedly defective.

29. Further, in *Visveswaran vs. State*, (2003)6 SCC73 it was observed that in defective investigation, the only requirement is of extra caution by Courts while evaluating evidence. It would not be just to acquit the accused solely as a result of defective investigation. Any deficiency or irregularity in investigation need not necessarily lead to rejection of the case of prosecution when it is otherwise proved.

30. The law on this issue is well settled that the defect in the investigation by itself cannot be a ground for acquittal. If primacy is given to such designed or negligent investigations or to the omissions or lapses by perfunctory investigation, the faith and confidence of the people in the criminal justice administration would be eroded. Where there has been negligence on the part of the investigating agency or omissions etc. which resulted in defective investigation, there is a legal obligation on the part of the Court to examine the prosecution evidence de hors such lapses, carefully, to find out whether the said evidence is reliable or not and to what extent it is reliable and as to whether such lapses affected the object of finding out the truth.

31. Where our criminal justice system provides safeguards for fair trial and innocent till proven guilty to an accused, there it also contemplates that a criminal trial is meant for doing justice to all, the accused, the society and a fair chance to prove to the prosecution. Then alone can law and order be maintained. The Courts do not merely discharge the function to ensure that no innocent man is punished, but also that a guilty man does not escape. Both are public duties of the judge. During the course of the trial the learned Presiding Judge is expected to work objectively and in a correct perspective. Where the prosecution attempts to misdirect the trial on the basis of a perfunctory or designedly defective investigation, there the Court is to be deeply cautious and ensure that despite such an attempt, the determinative process is not subverted. For truly attaining the object of a fair trial, the Court should leave no stone unturned to do justice and protect the interest of the society as well.

32. It was further contended on behalf of the appellants that alleged recovery of weapon of offence from the appellants was itself doubtful as it was recovered from an open place which was accessible to all. It is clear from the testimony of PW-2 that recovery was effected from pulia which was ahead of a canal between Kanjhawla and Karala, from there the appellant-Surinder got the recovery of the weapon of offence i.e. lathi lying downwards. Then the appellant-Rakesh got the recovery of a bat used for committing the offence from behind a dustbin at Kanjhawla Road.

33. Learned senior counsel for the appellants relied upon *Durga Prasad vs. State*, 2009 (4) JCC2533 *Kora Ghasi vs. State of Orissa*, (1983) 2 SCC251 and *Trimbak vs. State of M.P.*, AIR 1954 SC39 as per which when recovery is effected from an open place which is accessible to all, then it is difficult to hold positively that the accused was in possession of these articles.

34. However, recently in *Irahim Musa Chauhan @ Baba Chauhan vs. State of Maharashtra*, (2013) 4 Scale 207, the recovery was effected from the terrace of the premises and the contraband article which was found hidden beneath the waste material placed therein. It was held that though the contraband articles have been recovered from the open place but the articles have been recovered from the

waste material, so it loses the significance of being recovered from the open space on the terrace. 35. Therefore, even if recovery is from an open space and accessible place but recovery was effected from a particular hiding place in that area known to the appellants only, then such recovery cannot be termed as doubtful.

36. In the light of the aforesaid discussion, the appeal is without any merit and the same is hereby dismissed. The sentence of imprisonment of the appellants was suspended during the pendency of the appeal and now that the appeal stands rejected, the personal bonds/surety bonds furnished by the appellants stand cancelled and they shall be taken into custody forthwith to serve out the remainder part of the sentence of imprisonment. A copy of this judgment be sent to trial Court along with trial Court record. (VED PRAKASH VAISH) JUDGE (P.K. BHASIN) JUDGE March 31st , 2014/gm

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