

Vijay @ Biju Vs. State

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Court : Delhi

Decided On : Oct-28-2014

Judge : Pradeep Nandrajog

Appellant : Vijay @ Biju

Respondent : State

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI % Judgment Reserved on : October 17, 2014 Judgment Delivered on : October 28, 2014 + CRL.A.491/2013 ROHIT @ NANHE Represented by:Appellant Mr.Chetan Lokur, Advocate with Mr.Inderjit Singh Kapur, Advocate versus STATE Represented by: Respondent Ms.Aashaa Tiwari, APP Insp.Harish Kumar and SI Kuldeep Yadav, PS Connaught Place CRL.A.834/2013 VINOD KUMAR @ GANJAAppellant Represented by: Ms.Aishwarya Rao, Advocate versus STATE Represented by: Respondent Ms.Aashaa Tiwari, APP Insp.Harish Kumar and SI Kuldeep Yadav, PS Connaught Place CRL.A.838/2013 BOBBY @ ROBIN Represented by:Appellant Mr.Sitab Ali Chaudhary, Advocate with Mr.Hanjala Kazim, Advocate versus STATE Crl.A.No.491/2013 & conn.matters Respondent Page 1 of 45 Represented by: Ms.Aashaa Tiwari, APP Insp.Harish Kumar and SI Kuldeep Yadav, PS Connaught Place CRL.A.823/2013 VIJAY @ BIJU Represented by:Appellant Ms.Sunita Arora, Advocate for Mr.Krishan Kumar, Advocate versus STATE Represented by: Respondent Ms.Aashaa Tiwari, APP Insp.Harish Kumar and SI Kuldeep Yadav, PS Connaught Place CRL.A.1015/2013

DHANJEET @ DHANNE Represented by:Appellant Ms.Sonali Karwasra Joon, Advocate with Mr.Gaurav Bhatt, Advocate versus STATE Represented by: Respondent Ms.Aashaa Tiwari, APP Insp.Harish Kumar and SI Kuldeep Yadav, PS Connaught Place CORAM: HON'BLE MR. JUSTICE PRADEEP NANDRAJOG HON'BLE MS.JUSTICE MUKTA GUPTA PRADEEP NANDRAJOG, J.

1. Criminal law was set into motion when at around 10:45 PM on June 15, 2011, an entry was made in the PCR form Ex.PW-8/A to the effect that one Noor Jahan has informed over telephone that a quarrel and stabbing by knives is taking place near Shivaji Stadium opposite Rivoli Cinema. The aforesaid information was flashed to Police Station Connaught Place where HC Ashok Kumar recorded DD No.37A, Ex.PW7/A, noting the aforesaid information.

2. Two PCR vans Nos.V-26 and C-8 present near the spot i.e. pavement opposite Rivoli Cinema also picked up the wireless message flashed and proceeded to the spot. On reaching the spot the PCR officials found two male persons viz. Tatiya (deceased) and Rohit PW-12 and one female Lachhi PW-4, lying injured. PCR Van No.V-26 removed Lachi to RML Hospital and PCR Van No.C-8 removed Tatiya and Rohit PW-12, to RML Hospital. Part-II of PCR Form Ex.PW-8/A, contains recordings with respect to removal of (three) injured persons to RML Hospital by PCR van No.V-26, the relevant portion whereof reads as under:

DCR No.Received 65 Report Received from VAN BEGGARS KA QUARREL HAI HAMARI GADI PAR BHI PATHAR MAR RAHE HAI1506/2011 22:59:28 EK LADY INJ HAI HOSP LAI JA RAHE HAI EK KO CHAKU LAGA HAI JO PAHLA HI RML HOSP JA CHUKA HAI1506/2010 23:32:29 LADY KO HOSH MAI D/CT RML HOSP KAI H/O KIYA1506/2011 23:39:22 SAME CALL SI. NO66OF V-26 15/06/2011 23:59:05 TATIA S/O BAJRANG KALE AGE2426 YRS R/O PATRI HANUMAN MANDIR C.P. KO NANHAI S/O GOGI & USKE34 SATHIO NAI STOMACH MAI RIGHT SIDE MAI CHAKU MARA HAI USKO TATIA KA JIJA RAJU GULATI TSR MAI RML HOSP LAYA THA DOCTOR NALB/DEAD DECLARE KAR DIYA HAI C/ROOM INF1506/2011 23:59:56 DEAD KAI HALAT FROM T-41 (Emphasis Supplied) 3. Being handed over a copy of DD No.37A, accompanied by SI Ram Babu PW-13 and Ct.Raghu Nandan PW-21, Insp.Ravi

Kant PW-23, reached the spot. On learning that the (three) injured persons have been removed to RML Hospital, the aforesaid three police officials proceeded to the hospital where they learnt that Tatiya had been declared brought dead.

4. Thereafter Insp.Ravi Kant PW-23, collected the MLCs Ex.PW- 14/A, Ex.PW-14/B and Ex.PW-15/A of the deceased, Lachi PW-4 and Rohit PW-12 respectively.

5. Being relevant, we note the following portion of the MLC Ex.PW- 14/A of the deceased:

BROUGHT BY H/C Indrapal 330/PCR C8DATE & HOUR OF ARRIVAL156/11; 11.00 pm Stab wound of size 8 x 6 cm & (penetrating into abdominal cavity) illegible in right hypochondrial & Rt. Lumbar area of abdomen with exposure of omentum intestine.

6. Being relevant, we note the following portion of the MLC Ex.PW- 14/B of Lachi PW-4:

BROUGHT BY ASI Gajender V-26/PCR DATE & HOUR OF ARRIVAL156/11; 11.05 pm CIW extending from Rt. side of neck to back (Lt.) (obliquely) (12 cm x 5 cm x 2 cm) (12 x 5 x 2 cm); active bleeding

7. Being relevant, we note the following portion of the MLC Ex.PW- BROUGHT BY H/C Indrapal 330/PCR C8DATE & HOUR OF ARRIVAL156/11; 11.00 pm Incised wound on head R side of midline:

2. cm x 0.5 cm

8. At the hospital Insp.Ravi Kant PW-23 met Raju Gulati PW-22, who claimed to have knowledge as to how the deceased, Lachi and Rohit were injured. Insp.Ravi Kant recorded the statement Ex.PW-22/A of Raju Gulati and made an endorsement Ex.PW-23/A thereunder at 00:35 hours on June 16, 2011. He handed over the same to Ct.Raghu Nandan PW-21 for FIR to be registered. Ct.Raghu Nandan took the rukka to PS Connaught Place where ASI Ramesh Tirki PW-1, recorded the FIR No.115/2011, Ex.PW-1/A.

9. The statement Ex.PW-22/A of Raju Gulati, in Hindi, loosely translated reads as under:

I reside on a pavement at Hanuman temple, BKS Marg, New Delhi with my family and engaged in the business of stitching school bags at Singhara Chowk, Nabi Karim. Today at about 10:30 PM I along with my wife Shanno and son Rohit was sleeping on a footpath near Tiwari shop towards State Emporium at BKS Marg. My brother-in-law along with his wife Lachi and infant daughter was sleeping near us. At that time Rohit @ Nanhe, son of Gogi who applies Mehendi at Hanuman Temple, along with his friends Vijay @ Biju, Dhanjeet @ Dhanne, Vinod @ Ganja and Bobby @ Robin who toil around Hanuman Temple came there. I know the aforesaid five boys prior to today. Nanhe, Biju and Dhanne were having long-long knives in their hands. Nanhe and his friends came to us and asked from us that who amongst us had sold mud instead of smack to Biju today afternoon and quarreled and hit Biju on his head when he had complained. They insisted us to name the person so that they could take revenge from said person. Tatiya told said persons that we do not know said person and that they should go from there upon which Nanhe and his associates got very angry and Nanhe stabbed Tatiya on his stomach with the knife held by him in his hand. On seeing this Lachi and all of us ran to save Tatiya upon which Dhanne hit Lachi on her waist with a knife held by him in his hand. Lachi fell down after getting injured. Thereafter Biju charged towards us whereupon his son Rohit intervened in between. Biju hit Rohit on his head with the knife held by him in his hand. In the meantime Vinod and Bobby had picked up stones in their hands and were stopping people from coming to their rescue. After the incident the aforesaid five persons fled from the spot. Thereafter the police came at the spot and along with Tatiya, Lachi and Rohit took me to the hospital where Tatiya was declared brought dead by the doctors while Lachi and Rohit are getting treatment. Nanhe, Dhanne, Biju, Vinod @ Ganja and Bobby @ Robin with a common intention attacked us and murdered Tatiya and injured Lachi and Rohit. Legal action be taken against them. I have heard my statement. The same is correct.

10. Around the time when the incident of stabbing took place, appellant Dhanjeet @ Dhanne was beaten by the public when he tried to run away from the spot. He

was handed over to the police. He was taken to RML Hospital where his medical examination was conducted and MLC Ex.PW-15/B was prepared. Being relevant, we note the following portion of the MLC Ex.PW-15/B of Dhanjeet @ Dhanne:

Date & Hour of Arrival 16/06/2011 at 12:40 AM Two incised wounds on head one in centre, one on right side of head. CLW on left cheek 1 cm in length. CLW on right side of neck 3 cm in length Active bleeding HISTORY A/H/O assault as told by the pt. himself. MARKS OF IDENTIFICATION H/O drug addiction or ENT Bleed.

11. Dhanjeet @ Dhanne made a disclosure statement and got recovered a knife concealed in the bushes in a park located near the place of incident; appellants Rohit @ Nanhe and Vijay @ Biju after their arrest made disclosure statements and got recovered knives concealed under the stones lying near the place of incident and appellants Vinod @ Ganja and Robin @ Bobby got recovered stones from a service lane near the place of incident.

12. Surprisingly Insp.Ravi Kant PW-23, filed an application Ex.PW- 23/D1, before the Duty Magistrate, Patiala House Courts seeking police custody of appellants Rohit @ Nanhe, Dhanjeet @ Dhanne and Vijay and Biju for a period of two days, which application was allowed. Being relevant, we note the following portion of the application Ex.PW-23/D1:

It is humbly submitted that above mentioned three accused have been arrested on 16.06.2011 in case FIR No.115/11, dt. 16.06.2011, U/S148149/302/307/34 IPC, PS Connaught Place, Delhi. They are named in FIR and have confessed their crime. As per their disclosure, they have hidden the weapon of offence at a place known to them and can get it recovered. The source of weapon of offence is also to be identified. Their detail custodial interrogation is required to find out exact sequence of events.

13. Regretfully, said conduct of Insp.Ravi Kant has obviously cast a cloud over the knives got recovered pursuant to their disclosure statements by Dhanjeet, Rohit and Vijay.

14. On June 18, 2011 Dr. Manoj Kumar Handsa PW-5, conducted the post-mortem of the dead body of the deceased and prepared the postmortem report Ex.PW-5/A. The external injury found on the person of the deceased is as follows:- Surgically bandaged wound present on right lumbar and right hypochondrial region. On removal of the bandage obliquely placed wedge shaped stabbed wound of size 8cmx4cmxcavity deep with sharp upper outer angle present 6.5 cm above the highest point of right iliac crest and 23.5 cm below the roof of the right axilla and the lower inner blunt angle present 3.5 cm above right anterior superior iliac spine and 29.5 cm below anterior border of right axilla. The wound shows herniation of 9cm long small intestinal loop along with dribbling of blood. The lower margin of the wound shows beveling while the upper margin was found over hanging. The stabbed wound cuts through the subcutaneous tissue through the right eleven inter coastal space making a cut of 6 cm size on the right antero inferior border of liver and then puncturing the stomach interior of size 2.5cm x 1cm just above pyloric acid. The directions of the wound was found to be upwards inwards and backwardly directed and the depth was found to be approximately 14cm.

15. The post-mortem report Ex.PW-5/A of the deceased records that the cause of death is due to hemorrhagic shock as a result of ante-mortem stab injury caused on the abdomen of the deceased by a sharp pointed single edged weapon and that the said injury found on person of deceased is fatal in ordinary course of nature to cause death.

16. After conduct of post-mortem of deceased, the doctor handed over the clothes worn by the deceased at the time of incident and his blood sample on a gauze to Insp. Ravi Kant PW-23, who seized the same vide memo Ex.PW-19/A.

17. On June 29, 2011 Dr. Trilok Chand PW-16, examined the MLCs of Lachi and Rohit and opined that the injuries found on their person were similar in nature as noted in the endorsements Ex.PW-16/A and Ex.PW16/B recorded in the MLCs Ex.PW-14/B and Ex.PW-15/A of Lachi and Rohit respectively.

18. On February 10, 2012 Insp. Ravi Kant PW-23, Investigating Officer, sent the knife (allegedly) recovered at the instance of appellant Rohit @ Nanhe to Dr. Manoj

Kumar Handsa PW-5, (the doctor who had conducted post-mortem of the dead body of the deceased) for his opinion regarding weapon of offence. Vide his opinion Ex.PW-5/B Dr.Manoj Kumar Handsa opined that the (fatal) injury found on the abdomen of the deceased is possible to have been caused by the knife (allegedly) recovered at the instance of appellant Rohit @ Nanhe.

19. The clothes worn by the deceased at the time of incident; blood sample of deceased on a gauze and knives (allegedly) recovered at the instance of appellants Dhanjeet @ Dhanne, Rohit @ Nanhe and Vijay @ Biju were sent to the Forensic Science Laboratory for serological examination. Vide FSL reports Ex.PW-17/A and Ex.PW-17/B it was opined that blood group of deceased was B; human blood of B group was detected on the knife (allegedly) recovered at the instance of appellant Dhanjeet @ Dhanne and human blood was detected on the knife (allegedly) recovered at the instance of appellant Rohit @ Nanhe, group whereof could not be determined. (Be it noted here that the stones (allegedly) recovered at the instance of appellants Vinod Kumar @ Ganja and Bobby @ Robin were not sent to the FSL.) 20. Needless to state, the appellants were sent for trial.

21. Charges were framed against the appellants for having committed offences punishable under Sections 148 IPC, Section 302 IPC read with Section 149 IPC and Section 307 IPC read with Section 149 IPC. The substance of the charge framed against the appellants was that they had formed an unlawful assembly at about 10:30 PM on June 15, 2011 with a common object. They armed themselves with deadly weapons at a pavement near Hanuman Temple, for rioting and committing murder of the deceased, Lachi and Rohit.

22. At the trial, the prosecution examined 23 witnesses. Apart from examining the police officers associated with the investigation of the present case, Raju Gulati, Lachi, Rohit and Shanno were examined as PW-22, PW-4, PW-12 and PW-3 respectively.

23. Raju Gulati PW-22, deposed on the lines of his earlier statement Ex.PW-22/A with variations regarding role attributed to the appellants, which we shall be highlighting a little later. Being relevant, we note the following portion of the cross-

examination of the witness by appellants Rohit @ Nanhe and Dhanjeet @ Dhanne:

It is incorrect to suggest that I am in the business of supplying smack to people who come in their car. It is incorrect to suggest that on the day of incident as well some people came in the car and the dispute occurred on account of purchase of smack. It is incorrect to suggest that accused Dhanne tried to save and even threw stones on those people to make them leave. Vol. Dhanne was beaten up by the public while he was trying to escape. It is incorrect to suggest that accused persons used to dissuade me from selling smack because of which I harboured ill-will against them and implicated them falsely in the present case.

24. Lachi PW-4, wife of the deceased, Rohit PW-12 and Shanno PW- 3, deposed substantially in sync with what Raju Gulati had statement Ex.PW-4/A.

25. Being relevant, we note the following portion of the cross- examination of Lachi PW-4, by (all) the appellants:

I was taken to the hospital by the police on the date of incident. We including Tatya, the deceased had no business dealing of any kind with the accused persons. It is incorrect to suggest that as per the police we were drug peddlers dealing in smack. Rohit was also injured and was taken to the hospital by his parents while I and Tatya were taken to the hospital by the police. It is incorrect to suggest that I was not present on the scene of crime at the time of incident. It is incorrect to suggest that the accused persons had never come to the spot on the date of incident or that no such incident ever took place. It is incorrect to suggest that the accused persons were not known to me or that I have implicated them falsely at the instance of the police. It is incorrect to suggest that I am deposing falsely at the behest of the IO.

(Emphasis Supplied) 26. Being relevant, we note the following portion of the cross-examination of Rohit PW-12, by (all) the appellants:

I was taken to the hospital by a police vehicle along with my father. It is correct that I had woken up on the hearing of cries of Lachi and had not heard the quarrel

which had taken place before then. It is incorrect to suggest that I have deposed today on the basis of tutoring by IO. I had seen the accused Nanhe when he was giving knife blow to Tatya. The accused Nanhe had given knife blow to Tatya on his stomach by right hand. It is incorrect to suggest that I do not know who had inflicted injury on my head. It is incorrect to suggest that I had not seen the accused Birju inflict injury on my head. It is incorrect to suggest that I had named the accused Birju at the instance of IO. It is incorrect to suggest that I am deposing falsely.

(Emphasis Supplied) 27. Being relevant, we note the following portion of the cross-examination of Shanno PW-3:

.I and my husband are rag-pickers by profession. My son is about thirteen years old. He is also a rag-picker. The deceased and his family are also in the business of rag-picking. The deceased was not selling drugs/smacks but was only a ragpicker. I, my husband and my son went to the hospital in a TSR. The police had taken Tatya to the hospital while Rohit my son was taken to the hospital by us. The accused persons are Mehendiwalas who sit outside Hanuman Mandir for business. I had identified the accused persons only in the police station any no where else. It is incorrect to suggest that I have intentionally wrongly identified the accused persons at the behest of the IO. It is incorrect to suggest that accused persons were not present on the spot. it is incorrect to suggest that none of the accused persons do Mehandi Business outside Hanuman Mandir. It is wrong to suggest that I am deposing falsely.

(Emphasis Supplied) 28. Before proceeding further, it would be better if we note the role attributed by the witnesses; Raju Gulati PW-22, Lachi PW-4, Rohit PW12 and Shanno PW-3 to each of the appellant in their respective testimonies (as also in the statement Ex.PW-22/A in case of Raju Gulati) in a tabular form. The same would be as under:

Name of Role	Appellant attributed by Raju Gulati in his statement Ex.PW22/A	Role attributed by Raju Gulati PW-22, in his testimony	Role attributed by Lachi PW-4, in her testimony	Role attributed by Rohit PW-12, in his testimony	Role attributed by Shanno PW-3, in her testimony	Rohit @
						He was Nanhe carrying a knife and He was carrying a knife and He was carrying a knife

31. SI Ram Babu PW-13, deposed regarding the role played by him in the investigation of the present case as noted by us in the foregoing paragraphs. Being relevant, we note the following portion of the crossexamination of the witness by appellants Vijay @ Biju, Vinod Kumar @ Ganja and Bobby @ Robin:

It is incorrect to suggest that I was not associated in the investigation at any point of time and accused persons were falsely implicated at the instance of IO. It is further incorrect to suggest that I am deposing false facts.

32. Being relevant, we note the following portion of the cross- examination of SI Ram Babu by appellants Rohit @ Nanhe and Dhanjeet @ Dhanne:

The place of incident was in front of the police station and by the time call was received, we were aware of the situation and that is why several police officials proceeded for the spot. .It is incorrect to suggest that accused Dhanne was present at the spot as soon we reached the spot and he disclosed that some persons had come in a car and they had assaulted Tatiya and other injured persons as Tatiya had supplied them soil in place of smack. It is further incorrect to suggest that accused Dhanne had sustained injuries from the hands of those assailants while he was trying to rescue Tatiya and his family. It is further incorrect to suggest that complainant sensed that Dhanne was the assailant and under the wrong perception he named Dhanne as assailant.

33. Insp.Ravi Kant PW-23, Investigating Officer in the present case, deposed regarding the role played by him in the investigation of the present case as noted by us in the foregoing paragraphs. Being relevant, we note the following portion of the cross-examination of the witness by (all) the appellants:

When I reached the spot from hospital, the public had informed that the accused Dhanjit @ Dhanne lives somewhere near Manipur Emporium. On coming to know the same, we had gone to search for accused Dhanjit @ Dhanne. It is wrong to suggest that the accused was present on spot. It is wrong to suggest that the accused had stab wounds on his forehead and chest. But when we visited the accused to nab him he had been beaten up by the public persons and had suffered some injuries because of that. No public person stab the accused Dhanjit

@ Dhanne, in my presence. It is wrong to suggest that we have falsely implicated the accused Dhanjit despite being informed about the true facts that four boys in a vehicle had come to purchase smack from Lachi and that those four boys had stabbed Lachi and the deceased and that the accused Dhanjit @ Dhanne had tried to save the deceased and had himself suffered injury because of that. It is wrong to suggest that this being a blind case and the murder had happened in front of PS and we were under pressure to solve the same and thus falsely implicated all the accused persons. It is correct that step mother of accused Rohit @ Nanhe does mehendi work near Hanuman Mandir. I do not know his step mother was Padma. I am not aware whether Ct Jagdish and some other constable had been harassing accused Rohit @ Nanhes mother for Hafta. I do not know whether his mother had lodged complaints on 25.4.2011, in this regard against the said constables with SHO, ACP and DCP and other higher officials. It is wrong to suggest that the police officials nursed a grudge against Nanhes mother and that is why falsely implicated him in this case. I cannot say whether Mark A (collectively) are the copies of the said complaints. It is wrong to suggest that in order to solve this case we also apprehended accused Rohit @ Nanhes other associates/other accused persons also. It is wrong to suggest that we pressurized the complainant party to name the accused persons threatening them to otherwise dislodge them from the pavement, where they were residing. .It is wrong to suggest that while seeking police remand, it was mentioned by me that the knife was yet to be recovered. But I had mentioned that the source of knife is to be found out. I have seen Ex.PW-23/D1. Same is request letter for remand, which was moved by me. It is wrong to suggest that the knife were purchased by me from Sadar Bazar and planted on the accused persons. It is correct that all the three knives are similar. I cannot say whether those knives were brand new. It is wrong to suggest that to implicate the accused persons the police officials had put blood on the said knives. .It is wrong to suggest that accused Rohit @ Nanhe has been falsely implicated in this case to take revenge for suspension of Ct.Om Prakash, against whom accused Rohit and his mother had lodged a complaint. I have already stated that I am not aware whether any such complaint was lodged against Ct Om Parkash.

34. In his statement under Section 313 Cr.P.C., appellant Rohit @ Nanhe pleaded innocence and false implication. Being relevant, we note the following portion of the statement of appellant Rohit @ Nanhe under Section 313 Cr.P.C.:

Q.1 It is evidence against you that PW-3 Shanno along with her husband Raju Gulati, and sons namely Rohit, Akash and Vishal used to reside at the footpath near Hanuman Mandir, Baba Kharag Singh Marg, New Delhi and were rag pickers. What do you have to say in this regard?. Answer. It is wrong and incorrect. In fact, they used to sell smack there. Q.4 It is further in evidence against you that you and your associates were already known to Shanno and her family members as well as Taty and Lachi as you and your associates used to reside nearby and some of you used to deal in Mehendi work. What do you have to say in this regard?. Answer. I do not know them. It is correct that I used to deal in Mehendi work. Q.59 Why PWs Smt Shanno, Lachi, Rohit son of Raju Gulati and Raju Gulati deposed against you. What do you have to say in this regard?. Answer. They have falsely deposed under pressure and at the instance of I.O. Ravi Kant. Q61. Why this case against you?. Answer. It is a false case. It was a blind case as the assailants had come in the car to buy smack and on refusal altercation had taken place and after incident they left. No car number was noted. Q62. Do you want to say anything else?. Answer. I am innocent and have been falsely implicated by the police. I and my mother used to do Menhdi work at Hanuman Mandir. HC Jagdish Prasad had been demanding money from us. When we refused to oblige him, I was beaten up severely by him and his fellow Constables in April, 2012. My mother had sent complaints to various authorities and thereafter, he was suspended and police had a grudge against me. It was a blind case which was committed in front of Police Station. In order to save their skin and to solve this case, I.O. had threatened the witnesses to name me and other persons as they were selling smack and were occupying the footpath. I was picked up from my house at about 04.00 AM on that day and knife was planted upon me by the I.O. My another shirt was also taken by the police from my house and blood was also placed on that shirt.

(Emphasis Supplied) 35. In his statement under Section 313 Cr.P.C., appellant Dhanjeet @ Dhanne also pleaded innocence and false implication. Being relevant,

we note the following portion of the statement of appellant Dhanjeet @ Dhanne under Section 313 Cr.P.C.:

Q.1 It is evidence against you that PW-3 Shanno along with her husband Raju Gulati, and sons namely Rohit, Akash and Vishal used to reside at the footpath near Hanuman Mandir, Baba Kharag Singh Marg, New Delhi and were rag pickers. What do you have to say in this regard?. Answer. It is wrong and incorrect. In fact, they used to sell smack there. Q.4 It is further in evidence against you that you and your associates were already known to Shanno and her family members as well as Taty and Lachi as you and your associates used to reside nearby and some of you used to deal in Mehendi work. What do you have to say in this regard?. Answer. I do not know them. It is correct that I used to deal in Mehendi work. Q.22 It is further in evidence against you that I.O. Ravi Kant along with Raju Gulati and S.I Ram Babu in pursuance of information that you (Dhanjeet @ Dhanne) may be found at Manipur Emporium where your father was working, proceeded from the spot and they noticed you on the back side of Emporium and then noticing the presence of police, you (Dhanjit @ Dhanne) started running towards Union Academy School where you were over powered by the public persons and were also assaulted by the public and then over powered by the I.O. and were saved from public and taken into custody. What do you have to say in this regard?. Ans. It is wrong and incorrect. In fact I was present near place of incident. After hearing the shout of scuffle I reached there and tried to pacify and intervened. I was also assaulted by those unknown persons by sharp weapon. Police came there and took me to PS where I was kept for more than an hour and was sent to RML Hospital and later on involved in this case falsely. Q.23 It is further in evidence against you that you (Dhanjit @ Dhanne) was taken to RML Hospital by Ct Pardeep and were examined by Dr.Deepa Sharma (PW-15) vide MLC Ex PW15/B. What do you have to say in this regard?. Answer. It is incorrect. But, was taken at a later stage though I was actively bleeding. Q.59 Why PWs Smt Shanno, Lachi, Rohit son of Raju Gulati and Raju Gulati deposed against you. What do you have to say in this regard?. Answer. They have falsely deposed under pressure and at the instance of IO. Q.60 Why other witnesses deposed against you?. Answer. They are police (official) witness and have toed with the line of IO. Q.61 Why this case against you?. Answer. It is a false case. It

was a blind case. Police in order to solve it had falsely implicated and planted article and weapon. Q.62 Do you want to say anything else?. Answer. I am innocent. I have been falsely implicated by the police. I was present near the place of occurrence. On hearing the shrieks I reached there. Some unknown persons who had come in a car were assaulting the injured persons with sharp weapon. I tried to pacify but I was also attacked with sharp object. Injured person had a suspicion that those persons were known to me. I was actively bleeding. I was taken to police station and was kept there for more than one hour and later on I was sent to RML Hospital and was falsely implicated next day and knife was planted upon me. I am unmarried and poor person.

(Emphasis Supplied) 36. In their respective statements under Section 313 Cr.P.C. appellants Vijay @ Biju, Vinod Kumar @ Ganja and Bobby @ Robin also pleaded innocence and false implication. They stated that the witnesses (Raju Gulati PW-22, Lachi PW-4, Rohit PW-12 and Shanno PW-4) have implicated them in the present case at the instance of the Investigating Officer.

37. In his defence, appellant Rohit @ Nanhe examined his stepmother Padma as DW-1. In her testimony, Padma DW-1, deposed on the lines of defence taken by appellant in his statement under Section 313 Cr.P.C. (See answer to question No.62 given by appellant Rohit @ Nanhe in his statement under Section 313 Cr.P.C. noted by us in the foregoing paragraphs). Being relevant, we note the following portion of the crossexamination of the witness:

Today is 06.12.2012. I know Lachi, Raju Gulati, Shanno and her son Rohit, who sell smack nearby. I also know Bajrang Manik Kale. We have no enmity with them. Neither me nor my son Rohit ever had any quarrel with these persons i.e. PW Lachi, Raju Gulati, Shanno and her son Rohit. I also knew Tatya, who has died. I had no enmity with Tatya also.

38. In his defence, appellant Dhanjeet @ Dhanne examined his wife Bulbuil as DW-2. She deposed that on June 15, 2011 she had gone to her parental house. On said day i.e. June 15, 2011 at about 11:00 PM he received a telephonic call that four-five persons who had come in a car had stabbed her husband Dhanjeet. She immediately proceeded to the place of incident where she learnt that her

husband has been taken to PS Connaught Place. On reaching the hospital, she saw that her husband was bleeding from his head, cheeks and neck. She requested the police officials to take her husband to the hospital but they assured her that they would take him i.e. Dhanjeet to the hospital later. It was only after one and half hours that the police officials took her husband Dhanjeet to the hospital. The police officials brought her husband Dhanjeet back to the police station to the hospital. She requested the police officials to leave her husband but they refused to do so. Her husband Dhanjeet was falsely implicated by the police officials in the present case.

39. The remaining three appellants viz. Vijay @ Biju, Vinod Kumar @ Ganja and Bobby @ Robin chose not to lead any evidence in their defence.

40. Holding that the evidence of witnesses; Raju Gulati PW-22, Lachi PW-4, Rohit PW-12 and Shanno PW-3, inspires confidence (but ignoring the circumstance that knives and stones were recovered at the instance of the appellants on the reasoning that the eye-witnesses account (s) of Raju Gulati PW-22, Lachi PW-4, Rohit PW-12 and Shanno PW-3, is sufficient to establish the guilt of the appellants), vide impugned judgment dated January 17, 2013 the learned Trial Judge has convicted (four) appellants Dhanjeet @ Dhanne, Vijay @ Biju, Vinod Kumar @ Ganja and Bobby @ Robin for having committed an offence punishable under Section 304 Part-II IPC read with Section 149 IPC for forming an unlawful assembly, object whereof was to cause such injuries on the persons of group of deceased (deceased, Lachi PW-4, Rohit PW-12, Raju Gulati PW-22 and Shanno PW-3) with the knowledge that such injuries are likely to cause death. The learned Trial Judge convicted appellant Rohit @ Nanhe for having committed an offence punishable under Section 302 IPC for stabbing the deceased in his stomach with the intention of causing such bodily injury sufficient to cause death in the ordinary nature of nature and thereby causing death of the deceased. In addition thereto, the learned Trial Judge has also convicted the appellants for having committed offences punishable under Section 324 IPC read with Section 149 IPC and Section 148 IPC for causing injury on the person of Lachi and Rohit and rioting after being armed with deadly weapons.

41. Vide order dated January 22, 2013, the learned Trial Judge has sentenced appellant Rohit @ Nanhe to undergo imprisonment for life and pay fine in sum of `5,000/- for having committed offence punishable under Section 302 IPC; in default to undergo simple imprisonment for a period of six months. For the offence punishable under Section 304 Part II IPC read with Section 149 IPC appellants Dhanjeet @ Dhanne, Vijay @ Biju, Vinod Kumar @ Ganja and Bobby @ Robin have been sentenced to undergo rigorous imprisonment for a period of seven years and pay fine in sum of `3,000/-; in default to undergo simple imprisonment for a period of six months. For the offence punishable under Section 324 IPC read with Section 149 IPC the appellants have been sentenced to undergo rigorous imprisonment for a period of three years and pay fine in sum of `2,000/-; in default to undergo simple imprisonment for a period of two months. For the offence punishable under Section 148 IPC the appellants have been sentenced to undergo rigorous imprisonment for a period of three years. All the sentences were directed to run concurrently.

42. Aggrieved by the impugned judgment dated January 17, 2013 and January 22, 2013 the appellants have filed the above captioned appeals.

43. During hearing of the appeals, following five arguments were advanced by the learned counsel for the appellants: A The first submission advanced by the counsel for the appellants predicated upon the testimony of Raju Gulati PW-22, and his statement Ex.PW-22/A. Counsel highlighted that Raju Gulati had stated in his statement Ex.PW-22/A that appellant Dhanjeet @ Dhanne had stabbed Lachi while appellant Vijay @ Biju gave a knife blow on the head of his son Rohit. Counsel then pointed out that in his testimony Raju Gulati PW-22, reversed the roles assigned by him to appellants Dhanjeet @ Dhanne and Vijay @ Biju in his statement Ex.PW-22/A inasmuch as he has stated in his testimony that appellant Vijay @ Biju had stabbed Lachi while appellant Dhanjeet @ Dhanne gave a knife blow on the head of his son Rohit. Counsel argued that aforesaid material variation regarding the role attributed to appellants Dhanjeet @ Dhanne and Vijay @ Biju occurring in the testimony of Raju Gulati and his statement Ex.PW-22/A renders the evidence of Raju Gulati PW-22, untrustworthy and thus deserves to be rejected. B The second submission advanced by the learned counsel for the

appellants is predicated upon the MLCs Ex.PW-14/A, Ex.PW-14/B and Ex.PW-15/A of the deceased, Lachi and Rohit respectively and testimonies of Dr.Gaurav Aggarwal PW-14 and Dr.Deepa Sharma PW15. Counsel highlighted that the MLCs Ex.PW-14/A and Ex.PW-15/A of the deceased and Rohit respectively record that they i.e. deceased and Rohit were brought to RML hospital by HC Inder Pal in PCR van C-8 while MLC Ex.PW-14/B of Lachi records that Lachi was brought to RML hospital by ASI Gajender in PCR Van V-26. Counsel further highlighted that the doctors viz. Dr.Gaurav Aggarwal PW-14 and Dr.Deepa Sharma PW-15, who have prepared the MLCs Ex.PW-14/A, Ex.PW-14/B and Ex.PW-15/A of deceased, Lachi and Rohit have also deposed in tune with the aforesaid recording contained in said three MLCs. Counsel argued that the aforesaid recording contained in the MLC Ex.PW-15/A of Rohit is palpably false in view of the depositions of Shanno PW-3, mother of Rohit, to the effect of she, her husband (Raju Gulati) and son (Rohit) had gone to the hospital in a TSR and that the police had taken the deceased and Lachi to the hospital while her son Rohit was taken to hospital by her and her husband Raju Gulati and Lachi PW-4, to the effect that she and the deceased was taken to the hospital by the police and Rohit was taken to the hospital by his parents (Raju Gulati and Shanno). Counsel further argued that the claim of the prosecution that PCR van V-26 which is stated to have removed Lachi to the hospital reached at the spot within mere seven minutes of the receipt of incident (inasmuch as first information regarding the incident was received by the police at 10:45 PM on June 15, 2011 and PCR van V-26 reached the spot seven minutes later at 10.50 P.M. as recorded in the PCR form Ex.PW8/A) is highly doubtful. Counsel argued that the doubt regarding removal of the injured persons/witnesses Lachi PW-4 and Rohit PW-12, is further deepened by the fact that the two police officers viz. HC Inder Pal and ASI Gajender stated to have removed Lachi and Rohit to the hospital have not been examined by the prosecution. C The third submission advanced by the counsel for the appellants is predicated upon the MLC Ex.PW-15/B of appellant Dhanjeet @ Dhanne. It was highlighted by the counsel that the MLC Ex.PW-15/B of Dhanjeet @ Dhanne records that Dhanjeet @ Dhanne was brought to RML Hospital at about 12:40 AM on June 16, 2011. Counsel further highlighted that the arrest memo Ex.PW-13/C of appellant Dhanjeet @ Dhanne records that appellant Dhanjeet @ Dhanne was

arrested from a spot near the place the place of incident at about 4:30 AM on June 16, 2011. Counsel argued that the fact that appellant Dhanjeet @ Dhanne was brought to the RML hospital at about 12:40 AM on June 16, 2011 (within two hours of happening of the incident) belies the claim of the prosecution that he i.e. Dhanjeet @ Dhanne was arrested at about 04:30 AM on June 16, 2011 and probablizes the defence taken by Dhanjeet @ Dhanne that four unknown persons had come in a car and attacked the injured persons (deceased, Lachi and Rohit); he had sustained injuries while trying to save the injured persons and he was arrested by the police from the place of incident itself as the injured persons had a suspicion that the persons who had attacked them were known to him. D The fourth submission advanced by the counsel for the appellants was predicated upon the application Ex.PW-23/D1 filed by Insp.Ravi Kant PW-23, before Duty Magistrate, Patiala House Courts seeking police custody of appellants Rohit @ Nanhe, Dhanjeet @ Dhanne and Vijay @ Biju. Counsel highlighted that as per testimony of Insp.Ravi Kant PW-23 he i.e. Insp.Ravi Kant had filed application Ex.PW-23/D1 after appellants Rohit @ Nanhe, Dhanjeet @ Dhanne and Vijay @ Biju had got recovered knives. Counsel then highlighted that the tenor of application Ex.PW-23/D1 was that appellants Rohit @ Nanhe, Dhanjeet @ Dhanne and Vijay @ Biju had made disclosure statements to the effect that they can get recover the knives used by them at the time of incident but the same are yet to be recovered. Counsel argued that the aforesaid material discrepancy between the testimony of Insp.Ravi Kant PW-23, and the application Ex.PW-23/D1 leaves no room for the doubt that the knives allegedly recovered at the instance of appellants Rohit @ Nanhe, Dhanjeet @ Dhanne and Vijay @ Biju were planted upon them by the police. E The last submission advanced by the counsel for the appellants that the (alleged) recovery of stones at the instance of appellants Vinod Kumar @ Ganja and Bobby @ Robin is most doubtful in view of the fact that no evidence whatsoever has emerged in the present case to establish that the said stones were the ones used by appellants Vinod Kumar @ Ganja and Bobby @ Robin to stop the people from coming to the rescue of the group of the deceased as stated by the (alleged) eye-witnesses to the incident in question.

44. Since the case of the prosecution against the appellants hinged upon the ocular evidence of Raju Gulati PW-22, Lachi PW-4, Rohit PW12 and Shanno PW-

4 and the first few submissions advanced by the counsel for the appellants also pertain to the alleged discrepancies in the ocular evidence of said witnesses, we first proceed to consider the veracity of said witnesses.

45. In dealing with the veracity of ocular evidence of Raju Gulati PW- 22, Lachi PW-4, Rohit PW-12 and Shanno PW-4, we first proceed to note the following observations made by a Division Bench of this Court, of which one of us, namely, Pradeep Nandrajog J., was a member of, in Criminal Appeal No.327/2007 titled as Akbar & Anr. v. State decided I. While appreciating the evidence of a witness, the approach must be whether the evidence of a witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the Court to scrutinize the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witnesses and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. II If the Court before whom the witness gives evidence had the opportunity to form an opinion about the general tenor of the evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of the evidence by the trial court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on ground of minor variations or infirmities in the matter of trivial details. III When eye-witness is examined at length it is quite possible for him to make some discrepancies. But courts should bear in mind that it is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the Court is justified in jettisoning his evidence. IV Minor discrepancies not on trivial matters not touching the core of case, hyper-technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of matter would not ordinarily permit rejection of the evidence as a whole. V Too serious a view to be adopted on mere variations falling in the narration of an incident (either as between the evidence of two witnesses or as between two statements of the same witness) is an unrealistic approach for judicial scrutiny. VI By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video

tape is replayed on the mental screen. VII Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties cannot be expected to be attuned to absorb the details. VIII The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one persons mind whereas it might go unnoticed on the part of another. IX By and large people cannot accurately recall a conversation and reproduce the very used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder. X In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person. XI Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on. XII A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross-examination by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him. XIII A former statement though seemingly inconsistent with the evidence need not necessarily be sufficient to amount to contradiction. Unless the former statement has the potency to discredit the later statement, even if the later statement is at variance with the former to some extent it would not be helpful to discredit said witness. (These principles have been culled out from the decisions of Supreme Court reported as *Bharwada Bhoginbhai Hirjibhai v. State of Gujarat* 1983 Cri LJ096 *Leela Ram v. State of Haryana* 1997 Cri LJ3178 and *Tehsildar Singh v. State of U.P.*)

46. It is significant to note that Lachi PW-4 and Rohit PW-12, are injured witnesses.

47. When the evidence of an injured eye-witness is to be appreciated, the under-noted legal principles are required to be kept in mind: (a) The presence of an injured witness at the place and time of the occurrence cannot be doubted unless there are material contradictions in his deposition. (b) Unless, it is otherwise established by the evidence, it must be believed that an injured witness would not allow the real culprits to escape and falsely implicate the accused. (c) The evidence of an injured witness has a greater evidentiary value and unless compelling reasons exist, their statements are not to be discarded lightly. (d) The evidence of injured witness cannot be doubted on some embellishment in natural conduct or minor contradictions. (e) If there be any contradiction, exaggeration and immaterial embellishments in the evidence of an injured witness, then such contradiction, exaggeration or embellishment should be discarded from the evidence of injured, but not the whole evidence. (f) The broad substratum of the prosecution version must be taken into consideration and discrepancies which normally creep due to loss of memory with passage of time should be discarded.

48. From the afore-noted judicial principles, it is clear that the first step in appreciating the evidence of a witness is to examine his witness de hors the discrepancies appearing therein and to see whether the evidence appears to be a truthful account.

49. In the instant case, the incident occurred around 10:30 PM on November 15, 2006. Within twenty minutes PCR vans reached the spot and removed the deceased, Lachi and Rohit to the hospital. On her way to the hospital in PCR van, Lachi PW-3, informed the police official present in the PCR van that the deceased has been stabbed in his stomach by appellant Rohit @ Nanhe and his three-four associates as recorded in the PCR form Ex.PW-8/A. In this view of the matter, the possibility of Lachi PW-3, contriving facts and spinning a false story in such less time (twenty-thirty minutes) is remote.

50. To repeat, the incident in question occurred around 10.30 P.M. on November 15, 2006. The statement of Raju Gulati PW-22, which formed the basis of the FIR Ex.PW-1/A, was recorded at 12:35 AM on November 15, 2006. The statement Ex.PW-22/A of Raju Gulati was recorded at RML hospital as evident from the

deposition of Insp.Ravi Kant PW-23, the scribe of statement Ex.PW-22/A, that he recorded the said statement at the hospital, which deposition was not controverted by the defence. It can reasonably be taken that it must have taken at least 20 minutes for Raju Gulati in reaching RML hospital from the place of occurrence. Yet again, the possibility of Raju Gulati contriving facts and spinning a false story in such less time is remote.

51. There is yet another fact which needs to be noted. In the decision reported as (1991) 4 SCC391Malkiat Singh v. State of Punjab the Supreme Court held that it is settled law that the First Information Report is not substantive evidence. It can only be used to contradict the maker thereof or for corroborating his evidence and also to show that the implication of the accused was not an after-thought. In the instant case, the FIR Ex.PW-1/A records that Raju Gulati has stated that appellant Rohit @ Nanhe gave knife blow in the stomach of the deceased. The findings of the doctor who had conducted the post-mortem of the deceased after registration of the FIR as recorded in the post-mortem report Ex.PW-5/A are that a wound was found in the hypochondrial region (part of abdomen in the upper zone on both sides of the epigastric region and beneath the cartilages of the lower limbs) of the deceased. Therefore, the FIR Ex.PW-1/A duly corroborates the testimony of Raju Gulati PW-22, for the reason, unless Raju Gulati had seen appellant Rohit @ Nanhe giving knife blow to the deceased, he could not have correctly stated the situs of the injury suffered by the deceased, prior to the conduct of the post-mortem of the deceased.

52. It is further relevant to note that the recordings contained in the FIR Ex.PW-1/A that Raju Gulati had stated that appellant Dhaneet @ Dhanne had given knife blow on the waist of Lachi and appellant Vijay @ Biju had given knife blow on the head of Rohit stand corroborated by the MLCs Ex.PW-14/B and Ex.PW-15/A of Lachi and Rohit respectively which record presence of injury on back and head of Lachi and Rohit.

53. The four eye-witnesses; Raju Gulati PW-22, Lachi PW-4, Rohit PW-12 and Shanno PW-3, have by and large corroborated each other on material aspects relating to the incident. (See the table drawn by us in the foregoing paragraphs).

(A discrepancy has been pointed out by the counsel for the appellants in the ocular evidence of Raju Gulati PW-22, which shall be dealt by us little later).

54. Next, we note the defence taken by the appellants.

55. The defence taken by appellant Rohit @ Nanhe in his statement under Section 313 Cr.P.C. is that he has been falsely implicated in the present case at the instance of the police officials as one Head Constable Jagdish Prasad had been suspended from service due to complaints lodged by his stepmother against said police official and witnesses (Raju Gulati, Lachi, Rohit and Shanno) have been threatened by Investigating Officer Insp. Ravi Kant to depose against him. On the contrary, what was suggested to Raju Gulati in his cross-examination by appellant Rohit @ Nanhe was that the witnesses (Raju Gulati, Lachi, Rohit and Shanno) have deposed against the appellants as they harbored ill-will against the appellants as they used to dissuade them from selling smack. Further, it has been suggested to Lachi that the appellants were not known to her, which is in contradiction to the afore-noted suggestion given to Raju Gulati and claim made by Padma DW-1, stepmother of appellant Rohit @ Nanhe that the appellants were known to him and her son Rohit @ Nanhe. (Pertinently, it was claimed by Rohit @ Nanhe in his statement under Section 313 Cr.P.C. that he does not know the deceased, Raju Gulati, Lachi, Shanno and Rohit). It is also relevant to note that it has not been suggested to SI Ram Babu PW-13, who was associated with the investigation of the present case in his cross-examination by appellant Rohit @ Nanhe that the police officials had falsely implicated Rohit @ Nanhe in order to take revenge from him for suspension of HC Jagdish Prasad. Thus, there are glaring contradictions in the defence taken by appellant Rohit @ Nanhe.

56. Similar is the position with regard to defence taken by appellant Dhanjeet @ DhanNo. The defence taken by appellant Dhanjeet @ Dhanno was that at about 10:30 PM on November 15, 2011 he was present at the place of occurrence when some unknown persons came there and attacked deceased, Raju Gulati, Lachi, Shanno and Rohit. He tried to pacify said unknown persons whereupon he was also assaulted by them with sharp weapons and sustained injuries on his person. Raju Gulati, Lachi, Shanno and Rohit had a suspicion that the unknown persons

were known to him and thus they implicated him in the present case. The police officials implicated him in the present case to solve the blind case of murder of the deceased which had happened right in front of the police station. On the contrary, what was suggested to Raju Gulati in his cross-examination by appellant Dhanjeet @ Dhanne was that the witnesses (Raju Gulati, Lachi, Rohit and Shanno) have deposed against the appellants as they harbored ill-will against the appellants as they used to dissuade them from selling smack. (Pertinently, it was claimed by Dhanjeet @ Dhanne in his statement under Section 313 Cr.P.C. that he does not know the deceased, Raju Gulati, Lachi, Shanno and Rohit). No question or suggestion relating to aforesaid defence taken by appellant Dhanjeet @ Dhanne put/given to Lachi PW-4, Rohit PW-12 and Shanno PW-3 by Dhanjeet @ Dhanne in their respective cross-examinations. In fact, what was suggested to Lachi PW-4, in her cross-examination by appellant Dhanjeet @ Dhanne was that she was not present at the place of occurrence at the time of incident. (Being an injured witness, the presence of Lachi PW-4, cannot be disputed at the place of occurrence at the time of incident). (This also takes care of the third submission advanced by the learned counsel for appellants relating to defence taken by appellant Dhanjeet @ Dhanne in his statement under Section 313 Cr.P.C.) 57. The defence taken by the remaining three appellants viz. appellants Vijay @ Biju, Vinod Kumar @ Ganja and Bobby @ Robin was that witnesses; Raju Gulati, Lachi, Rohit and Shanno have falsely implicated them in the present case at the instance of the Investigating Officer (Insp.Ravi Kant). No reason have been assigned by said appellants as to why Raju Gulati, Lachi, Rohit and Shanno would toe the line of Investigating Officer and implicate them and leave real culprits or that why did Investigating Officer Insp.Ravi Kant implicated them in the present case of all the people.

58. The afore-noted gaping holes/variations appearing in the defence taken by the appellants strengthens the ocular evidence of witnesses; Ravi Gulati PW-22, Lachi PW-4, Rohit PW-12 and Shanno PW-3, that the appellants had attacked them and the deceased.

59. Therefore, the conclusion which emerges from the first reading of the evidence of the witnesses in question is that they are prima facie truthful witnesses.

60. We next proceed to consider that whether the discrepancies pointed out by the learned counsel for the appellants in the ocular evidence of Raju Gulati PW-22, Lachi PW-4, Rohit PW-12 and Shanno PW-3, renders their evidence unworthy of any reliance.

61. The first submission advanced by the counsel for the appellants pertains to the role (s) attributed to appellants Dhanjeet @ Dhanne and Vijay @ Biju by Raju Gulati PW-22, in his testimony and statement Ex.PW-22/A. Raju Gulati had stated in his statement Ex.PW-22/A that appellant Dhanjeet @ Dhanne had stabbed Lachi while appellant Vijay @ Biju gave a knife blow on the head of his son Rohit. However, in his testimony Raju Gulati PW-22, reversed the roles assigned by him to appellants Dhanjeet @ Dhanne and Vijay @ Biju in his statement Ex.PW-22/A inasmuch as he has stated in his testimony that appellant Vijay @ Biju had stabbed Lachi while appellant Dhanjeet @ Dhanne gave a knife blow on the head of his son Rohit.

62. The incident in question happened at around 10:30 PM on November 15, 2006. The statement Ex.PW-22/A of Raju Gulati was recorded at about 12:35 AM on November 16, 2006. At the time of recording of his statement Ex.PW-22/A, the incident in question was fresh in the mind of Raju Gulati as statement Ex.PW-22/A of Raju Gulati was recorded just two hours after the incident took place. The examination-in-chief of Raju Gulati was conducted on August 17, 2012 i.e. after about nine months of the incident by which time the incident had become stale in the mind of Raju Gulati. As already noted hereinabove, a witness cannot be expected to possess a photographic memory and to recall correctly the details of an incident. It is not as if a video tape is replayed on the mental screen. Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused and mix up when interrogated later on, particularly when being subjected to piercing cross-examination by the counsel. In this view of the matter, the discrepancy pointed out by the counsel for the appellants in the evidence of Raju Gulati PW-22, is a slight aberration and does not render his evidence untrustworthy, particularly when the other three eye-witnesses viz. Lachi PW-4, Rohit PW-12 and Shanno PW-3, have assigned such roles to the appellants as

have been assigned by Raju Gulati in his statement Ex.PW-22/A.

63. The next (and last) discrepancy has been pointed out by the counsel for appellants in the evidence of Shanno PW-3 and Lachi PW-4, and relates to removal of Rohit PW-12, to the hospital.

64. Shanno PW-3, has stated in her cross-examination that she and her husband Raju Gulati had taken Rohit to RML hospital. The mental condition of Shanno when her son Rohit was injured at the spot has to be kept in mind while evaluating her evidence. Shanno is the mother of Rohit. Obviously, she would have been extremely perturbed, confused and in a state of excitement when her injured son was being removed to the hospital. What has happened is thus: Two PCR vans arrived at the place of occurrence soon after the happening of the incident due to close proximity between the police station Connaught Place and place of occurrence. One PCR Van V-26 removed Lachi to RML hospital while the second PCR van C-8 removed the deceased and Rohit to RML hospital. Raju Gulati and Shanno, the parents of Rohit, hired a TSR, followed the PCR van and reached RML hospital. While being questioned about the incident, Shanno got confused and erroneously stated that she and her husband Raju Gulati had taken Rohit to hospital instead of having stated that a PCR van had taken the deceased to the hospital and she and her husband Raju Gulati reached the hospital in a TSR. The witnesses are bound to err while narrating a chaotic and stressful situation.

65. As regards Lachi stating that Rohit was removed to the hospital by his parents, suffice it to state that Lachi and Rohit were removed in separate PCR vans. It has been guesswork on the part of Lachi that since parents of Rohit (Raju Gulati and Shanno) were present at the spot he i.e. Rohit must have been removed to the hospital by his parents.

66. The discrepancies pointed out by counsel for the appellants in the ocular evidence of eye-witnesses (Raju Gulati, Lachi, Rohit and Shanno) are not of such a nature that it shakes the earlier (prima facie) evaluation of eye-witnesses made by us and renders the evidence of said witnesses unworthy of belief. (The discrepancies are clearly explainable).

67. Concerning the recoveries of the knives attributable to Dhanjeet, Rohit and Vijay, we note that on the one hand witnesses of the prosecution have sought to prove the recoveries soon after the arrest of the three on disclosure statements being recorded and on the other hand we have the application Ex.PW-23/D1 submitted to the learned Metropolitan Magistrate for a remand of the three stating in the application that recoveries of the weapon of offence has to be effected. There is a serious taint and thus it would be safe to disregard the evidence of recovery of knives attributable to the three and the opinion of the doctor who conducted the post-mortem of the deceased that the injury caused on the deceased was possible from the knife got recovered by Dhanjeet.

68. As regards the recovery of stones at the instance of appellants Vinod Kumar @ Ganja and Bobby @ Robin, we note the stones were allegedly got recovered by said (two) appellants from a service lane near the place of occurrence. One sees stones on the corners of the footpaths and pavements in India. In the absence of any evidence to show that the stones allegedly got recovered by appellants Vinod Kumar @ Ganja and Bobby @ Robin, were the ones used by them in the incident in question, it would not be safe to conclude that the stones were got recovered at the instance of appellants Vinod Kumar @ Ganja and Bobby @ Robin. We thus also discard the circumstance that the stones were got recovered at the instance of appellants Vinod Kumar @ Ganja and Bobby @ Robin.

69. However, nothing turns on the exclusion of circumstance of recovery of knives and stones at the instance of the appellants from the array of incriminating circumstances appearing against the appellants for the reason the eye-witness account(s) of Raju Gulati PW-22, Lachi PW-4, Rohit PW-12 and Shanno PW-12, is sufficient to establish the participative roles of the five accused at the incident at which the deceased died and Lachi and Rohit received injuries.

70. The question would be : what is the offence committed by the five accused. As noted above, the learned Trial Court has found that the five formed an unlawful assembly with the object of inflicting injuries with dangerous weapons.

71. Section 141, IPC defines unlawful assembly as under:

An assembly of five or more persons is designated an unlawful assembly, if the common object of the persons composing that assembly is First To overawe by criminal force, or show of criminal force the Central or any State Government or Parliament or the Legislature of any State or any public servant in the exercise of the lawful power of such public servant; or Second To resist the execution of any law, or of any legal process; or Third To commit any mischief or criminal trespass, or other offence; or Fourth By means of criminal force, or show of criminal force, to any person, or take or obtain possession of any property, or to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or Fifth By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or omit to do what he is legally entitled to do. Explanation An assembly which was not unlawful when it assembled, may subsequently become an unlawful assembly.

72. The underlying principle of Section 141 of the Penal Code is that law discourages tumultuous assemblage of men so as to preserve public peace. The essence of an offence under the Section is the combination of five or more persons, united in the purpose of committing a criminal offence, and the consensus of the purpose itself is an offence distinct from the offence which these persons agree and intend to commit. Law does not declare the mere assemblage of men, however large, illegal. But where the assemblage is inspired by an illegal object as specified in Section 141 of the Penal Code, the offence is committed.

73. Section 149 IPC reads as follows:

If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence.

74. It is apparent that under Section 149 IPC the emphasis is on common object and not on common intention. Mere presence in an unlawful assembly cannot render a person liable unless there was a common object and he was actuated by

that common object and that object is one of those set out in Section 141 IPC. The crucial question to be determined is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects as specified in Section 141 IPC. It cannot be laid down as a general proposition of law that unless an overt act is proved against a person, who is alleged to be a member of the unlawful assembly, it cannot be said that he is a member of the unlawful assembly. The only thing required is that he should have understood that the assembly was unlawful and was likely to commit any of the acts which fall within the purview of Section 141. The word object means the purpose or design and in order to make it common it must be shared by all. In other words, the object should be common to the persons, who compose the assembly, that is to say, they should all be aware of it and concur in it. A common object may be formed by express agreement after mutual consultation, but that is by no means necessary. It may be formed at any stage by all or a few members of the assembly and the other members may just join and adopt it. Once formed, it need not continue to be the same. It may be modified or altered or abandoned at any stage. The expression 'in prosecution of common object' as appearing in Section 149 has to be strictly construed as equivalent to 'in order to attain the common object'. It must be immediately connected with the common object by virtue of the nature of the object. There must be community of object and the object may exist only up to particular stage, and not thereafter. Members of an unlawful assembly may have community of object up to certain point beyond which they may differ in their objects and the knowledge, possessed by each member of what is likely to be committed in prosecution of their common object may vary not only according to the information at his command, but also according to the extent to which he/she shares the community of objects, and as a consequence of this the effect of Section 149 IPC may be different on different members of the same assembly.

75. The common object of an assembly is to be ascertained from the acts and language used by the members composing the assembly; taking into account all surrounding circumstances. The conduct adopted by the members of the assembly is an important circumstance to be kept in mind. Similarly, the arms carried by the members of the assembly and their behavior at or near the scene of

incident are also important circumstances to be kept in mind. The time of forming an unlawful intent is not material. An assembly of persons may be an innocuous gathering initially but may subsequently become unlawful. In other words, common object can develop during the course of an incident at the spot constanti.

76. Section 149 IPC consists of two parts. The first part of the section means that the offence to be committed in prosecution of the common object must be one which is committed with a view to accomplish the common object. In order that the offence may fall within the first part, the offence must be connected immediately with the common object of the unlawful assembly of which the accused was a member of. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under Section 149, if it can be shown that the offence was such as the members knew was likely to be committed and this is what is required in the second part of the section. The purpose for which the members of the assembly set out or desired to achieve is that object. If the object desired by all the members is the same, the knowledge that the object which is being pursued is shared by all the members and they are in general agreement as to how it is to be achieved and that is now the common object of the assembly. An object is entertained in the human mind, and it being merely a mental attitude, no direct evidence can be available and, like intention, has to be gathered from the acts which the person commits and result thereof. The word knew used in the second part of Section 149 means something more than a possibility and it cannot be made to bear the sense of might have been known.

77. In the instant case, the evidence on record suggests that the deceased, Lachi, Raju Gulati, Shanno and Rohit were dealing with smack and appellants had purchased smack from them. (Pertinently, the MLC Ex.PW-15/B of Dhanjeet @ Dhanne records that Dhanjeet @ Dhanne had history of drug abuse). However, the deceased, Lachi, Raju Gulati, Shanno and Rohit sold mud to the appellants instead of smack. This infuriated the appellants.

78. The appellants, five in number, armed themselves with deadly weapons (knives) and formed an unlawful assembly with the object of getting smack from the deceased, Lachi, Raju Gulati, Shanno and Rohit and using criminal force in

case the deceased, Lachi, Raju Gulati, Shanno and Rohit would not give smack to them.

79. With this common object in mind, appellants, three in number, armed with knives, went to the pavement where the deceased, Lachi, Raju Gulati, Shanno and Rohit used to sleep and carry on business and entered into a dialogue with them for having sold them mud instead of smack. When the deceased, Lachi, Raju Gulati, Shanno and Rohit did not give smack to the appellants, Rohit @ Nanhe, Dhanjeet @ Dhanne and Vijay @ Biju attacked the deceased, Lachi, Raju Gulati, Shanno and Rohit with knives while Vinod Kumar @ Ganja and Bobby @ Robin took stones in their hands and prevented the people from coming to the rescue of the deceased, Lachi, Raju Gulati, Shanno and Rohit at the time of attack.

80. It is seen that one knife blow each was given by appellants Rohit @ Nanhe, Dhanjeet @ Dhanne and Vijay @ Biju to the deceased, Lachi and Rohit respectively. The knife blow given by appellant Rohit @ Nanhe hit the deceased in the hypochondrial region (part of abdomen in the upper zone on both sides of the epigastric region and beneath the cartilages of the lower limbs) and caused his death. The remaining two persons who were given knife blows viz. Lachi and Rohit were lucky and the injury sustained by them did not prove to be fatal.

81. Now, the appellants Rohit @ Nanhe, Dhanjeet @ Dhanne and Vijay @ Biju who were armed with knives inflicted only a single blow on deceased, Lachi and Rohit respectively. Having an opportunity to inflict many more (knife) blows, appellants Rohit @ Nanhe, Dhanjeet @ Dhanne and Vijay @ Biju inflicted only one blow.

82. The time of incident was about 10:30 PM. It was dark. None can say with certainty that the intention to strike a blow at any particular part of the body. But, it can be said with safety that there was an intention to cause injury to the deceased for the reason, a knife having a long blade was used as evident from the depth of stab wound found on the person of the deceased.

83. The post-mortem report Ex.PW-5/A of the deceased shows that the knife blow given by appellant Rohit @ Nanhe landed in the hypochondrial region (part of

abdomen in the upper zone on both sides of the epigastric region and beneath the cartilages of the lower limbs) of the deceased ended up cutting subcutaneous tissues and punctured the stomach of the deceased, which unfortunately caused the death of the deceased due to shock.

84. Under these circumstances, it would be difficult to conclude that the common object of the unlawful assembly formed by appellant Rohit @ Nanhe and other four appellants was to cause injury on the person of deceased (and/or other persons forming part of the group of the deceased) with the intention of causing death or such bodily injury which would be sufficient to cause death in the ordinary course of nature. Instead, what can be said is that the common object of the unlawful assembly formed by appellant Rohit @ Nanhe and other four appellants to cause injury to the deceased (and/or other persons forming part of group of the deceased) with the knowledge of the kind contemplated by Section 299(c) of IPC that death may result of the person injured by them, for the reason the fact that knives, having long blades were used would require knowledge to be imputed to the appellants that if the blow given by them struck a vital part of the body of the deceased (and/or other persons forming part of the group of the deceased) there was every likelihood of an injury being caused which could result in the death of the deceased (and/or other person forming part of the group of the deceased).

85. Thus, the offences committed by the appellants would be culpable homicide not amounting to murder in furtherance of common object of the unlawful assembly formed by them i.e. the offence punishable under Section 304 Part-II IPC read with Section 149 IPC.

86. The appeals are disposed of as a necessary corollary of our reasoning above; the conviction of the appellant Rohit @ Nanhe is altered from one under Section 302 IPC to Section 304 Part-II IPC read with Section 149 IPC, for which offence he is sentenced to undergo rigorous imprisonment for seven years and pay fine in sum of `3,000/-, in default of payment of fine to undergo simple imprisonment for a period of six months. The conviction and the sentence of the remaining four appellants viz. Dhanjeet @ Dhanne, Vijay @ Biju, Vinod Kumar @ Ganja and Bobby @ Robin for the offence punishable under Section 304 Part-II IPC read with

Section 149 IPC is maintained. The conviction of the appellants for the offences punishable under Section 324 IPC read with Section 149 IPC and Section 148 IPC is maintained.

87. All of them are sentenced to undergo imprisonment for seven years and pay fine in sum of `3,000/-, in default to undergo simple imprisonment for three months. The conviction of all five for the offence punishable under Section 324 IPC read with Section 149 IPC is maintained and so is the sentence. The sentences shall run concurrently.

88. TCR be returned. (PRADEEP NANDRAJOG) JUDGE (MUKTA GUPTA)
JUDGE OCTOBER28 2014/mamta

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