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Mohd. Yusuf vs.state

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Court : Delhi

Decided On : May-30-2017

Appellant : Mohd. Yusuf

Respondent : State

Advocate for Pet/Ap. : Mr. Sharma, Mr. Yadav

Judgement :

$~ * % + + IN THE HIGH COURT OF DELHI AT NEW DELHI CRL.A. 640/2000 BABU Judgment reserved on:

25. h April, 2017 Judgment pronounced on:30th May,2017 ..... Appellant Through Mr. M.L. Yadav, Advocate versus STATE OF DELHI CRL.A. 720/2000 ..... Respondent Through Ms. Radhika Kolluru, APP MOHD. YUSUF ..... Appellant Through Mr. S.K. Sharma, Mr.Yugant Kumar and Mr. Prayas Aneja, Advocates STATE versus Through Ms. Radhika Kolluru, APP ..... Respondent CORAM: HON'BLE MR. JUSTICE G.S.SISTANI HON'BLE MR. JUSTICE VINOD GOEL G.S. SISTANI, J.

1. Both the appeals have been heard together. Arguments have been addressed by the learned counsel for the parties and the same are being disposed of by a common judgment. CRL.A.Nos.640/2000 & 720/2000 Page 1 of 29 2. Both the appeals have been filed under Section 374 of the Code of Criminal Procedure and are directed against the judgment and order on sentence dated 09.10.2000

passed by the learned Additional Sessions Judge in Sessions Case No.15/1998, arising out of FIR No.725/1996 registered at Police Station S. N. Puri. By virtue of the order of conviction, both the appellants were convicted under Section 302 read with Section 34 of the Indian Penal Code (hereinafter referred to as IPC) and sentenced to undergo imprisonment for life and to pay a fine of Rs. 1,000/- each, and in default of the payment of fine to further undergo simple imprisonment for a period of three months.

3. The case of the prosecution as noticed by the learned Trial Court is as under: Police filed a challan under Section 3
IPC and Section 27 of the Arms Act against accused Babu, Mohd. Rashid, Vir Singh, Navab-U-din and Mohd. Yusuf. Accused Navab-U-din has been sent to Juvenile Court to face trial since he was a child. Accused Babu and Yusuf are facing trial in this case whereas other accused have been declared POs. The facts leading to this case as alleged in the challan are that on 09.07.1996 at about 9 PM deceased Mohd. Zahid along with his brother Mohd. Shahid and friend Taskin had gone for a walk after dinner in Tikona Park opposite State Bank of India, Zakir Nagar, New Delhi. Mohd. Zahid and Taskin were allegedly talking to each other whereas Mohd. Shahid was strolling in the park. In the meantime, all the accused persons allegedly came in the park near Mohd. Zahid and accused Yusuf allegedly told his associates that he should not escape. At this accused Yusuf and his associates allegedly attacked Zahid with knives and daggers. It is also alleged that accused Yusuf told his associates that they should inflict as many wounds on Zahid as he should not survive. Shahid and Taskin allegedly tried to save Zahid but finding the situation out of their control they allegedly ran from the park in order to save their own lives towards Zakir Nagar. All the accused again allegedly surrounded and again attacked Zahid as a result of which he fell down in the park. Shahid and Taskin allegedly raised an alarm as a result of which people came at the spot but till then all the accused had already escaped from the spot. Shahid with the help of people at the spot allegedly removed Zahid to Holy Family Hospital in a TSR. Mohd. Zahid allegedly died in the hospital. Police investigated the case and came to the conclusion that Mohd. Zahid died due to injuries caused to him by the accused persons, therefore, a challan was filed against them. Accused Yusuf was arrested on the next date

whereas accused Babu was arrested on 13.05.1997. These are, in brief, facts leading to the filing of the challan against the accused persons. 4. After completion of the investigation, charge sheet for the offence under Section 302 read with Section 34 IPC and Section 27 of Arms Act was filed. The prosecution examined 16 witnesses in all, besides the exhibits produced during the trial. The statements of the appellants were recorded under Section 313 of the Code of Criminal Procedure whereby both the appellants showed ignorance about the alleged incident and stated that they have been falsely implicated in the present case due to previous enmity. The appellants entered the plea of not guilty and claimed trial. No evidence was led by the appellants in their defence.

5. Mr. Sharma, learned counsel for the appellant Mohd. Yusuf in Crl.A. 720/2000 submits that the Trial Court has failed to appreciate that the prosecution has miserably failed to prove the case against the appellant Yusuf. Counsel contends that the Trial Court has made a grave error in not appreciating that the testimony of PW-1, Mohd. Shahid, (brother of the deceased) and PW-2, Taskin (friend of the deceased) is not trustworthy and reliable. It is strongly urged before the Court that both these witnesses are not eye witnesses which is evident from the fact that PW-1 has testified that he removed his brother in a TSR, however, the MLC shows that the name of the deceased has been wrongly written, complete address has not been mentioned and in the Column of Name and Address of the accompanying person has been left blank. Additionally, in the MLC, the correct description of the spot of the incident has not been mentioned. All the above factors leave no room for doubt that PW-1 was neither present at the spot of the incident, nor he removed his brother to the Hospital in a TSR. Mr. Sharma further contends that in case PW-1 removed his brother as claimed by him in the TSR, there would have been blood on his clothes. However, his clothes were not taken into possession by the police and not sent for examination. Reliance is placed on the testimony of PW-1 where he has deposed that the injured was removed to the Hospital in the TSR and the injured was on his lap. Counsel further contends that according to PW-1, the knife was recovered from Yusuf. However, the case of the prosecution is that the knife was recovered after three days of the arrest of Yusuf. Even otherwise, it is contended that the recovery of the knife has not been accepted by the Trial Court. The counsel for the

appellant further submits that the sketch of the knife (Ex.PW-15/F) would show that the said knife was not used to cause injuries. Reliance is placed on the testimony of PW-3, Dr. P.O. Murti as per whom, the weapon was a double edged weapon, however, the sketch of the knife would show that the knife was a single edged weapon and thus, the recovery of the weapon was not connected with the crime and thus, the appellant could not have been convicted by the Trial Court. Counsel also contends that as per the testimony of PW-1, he along with CRL.A.Nos.640/2000 & 720/2000 Page 4 of 29 public persons removed the injured in the TSR. However, no public person has been examined by the prosecution. Learned counsel also contends that the place of occurrence is also doubtful. As per the MLC, the incident took place at Zakir Nagar, near Ashoka Park where some boys had beaten the deceased. However, the case of the prosecution is that the incident took place at Tikona Park. Learned counsel also submits that PWs-1 and 2 have referred to the division of the Tikona Park, while as per PW-15, Inspector Rajesh Kumar, Tikona Park is not divided into two parts, wherein he could not tell how many gates were in Tikona Park and stated that there was no wall in the park.

6. Mr. Sharma also contends that another aspect which would show that the PW-1 was not present at the spot is his conduct. Learned counsel submits that in case he was present, his natural conduct would have been to save his brother and in the process he would have also received injuries , but his conduct shows that he was not present at the spot of occurrence. It is also contended before us that PW-2 is also not a reliable witness. Counsel contends that as per the testimony of PW-2 after the incident, he went to his house, which is highly unnatural. Ordinarily, he would have attempted to save his friend and assuming that he did not attempt to save his friend and went to his house which was merely two-three galis away from the spot of occurrence, instead of going to his house, he would have informed someone about the incident. To substantiate his argument, learned counsel has relied upon Mangilal and others. Vs. State of Madhya Pradesh reported at 1991 SCC (Cri) 134, wherein the Apex Court observed the conduct of the sole interested witness to be highly unnatural and his testimony to be in conflict with the medical evidence. It was also CRL.A.Nos.640/2000 & 720/2000 Page 5 of 29 held by the Apex Court that it was highly dangerous to convict as many as nine persons

where there were strong circumstances showing that many of them would not have participated in the incident.

7. Additionally, it is contended that PW-1 Shahid claims that he helped in putting the injured in the TSR, but his clothes were not taken into custody by the police. Counsel contends that in his cross-examination, PW-2 testified that there was no blood on his clothes as also on the clothes of Shahid (PW-1). Counsel also contends that the description with regard to the injuries suffered by the deceased do not match with the post-mortem report. In the examination-in-chief, PW-2 testified that the deceased got the first injury on the hand and in fact the deceased had caught hold the weapon of offence in his hand which was made of aluminium, whereas the handle of the knife was made of wood. Reliance is placed on the cross- examination of PW-13, Dr. Rajiv Sethi where the witness stated as correct that Ex.PW-13/A the column of accompanying person is blank which could mean that as nobody was accompanying the deceased or the accompanying person was not ready to give his name. He deposed that the alleged history was given by the patient himself. In the MLC Ex.PW- 13/A, the name of patient mentioned as Zahid while in Certificate of cause of death, which is Ex.PW13-/B, the name of the deceased was initially mentioned as Zahid Hussain and was struck off and was written Mohd Zahid from which it could be implied that at the time of preparation of MLC Ex.PW-13/A there was no person who could give correct particulars of the patient. The name Zahid Hussain in Ex.PW-13/B had been corrected to Mohd Zahid ostensively after the name of deceased was disclosed by relatives who might have arrived at the hospital after his CRL.A.Nos.640/2000 & 720/2000 Page 6 of 29 death. The witness deposed that it was correct that the address gali no.40 is mentioned in only Ex.PW-13/B and not 13/A which was also because of aforesaid reasons. Reliance is also placed on the testimony of PW-14, Constable Prem Prakash, who has stated in his cross-examination that Ashoka Park and Tikona Park are two different parks.

8. Mr. Yadav, learned counsel for the appellant Babu in Crl.A. 640/2000 submits that the appellant has been falsely implicated in this case which is evident from the fact that the appellant was arrested after ten months of the date of the incident. The counsel submits that both PWs-1 and 2 are not reliable witnesses as they

were not present at the spot of occurrence. He submits that the evidence would also show that the appellant was shown to the witnesses and the appellant rightly refused the Test Identification Parade (TIP) and this refusal of TIP cannot be held against the appellant.

9. Counsel submits that the appellant was not named in the rukka or named by PW-1 or PW-2 despite the fact that he was known to PW-1 and PW-2. Learned counsel submits that in the testimony of PW-2, he has stated that he knew appellant Babu for the last two-three years and the fact that he was not named at the first opportunity available to him would show that the appellant has been falsely implicated in the case. He further submits that no recovery was made from this appellant as is evident from the testimony of PW-15, Inspector Rajesh Kumar, who testified that photographs of the spot were taken on 10.07.1996 so as to cover the entire spot of incident. He testified that the photographs were taken from different angles. He testified that he did not know the number of photographs. He testified that he had not collected the positive of the CRL.A.Nos.640/2000 & 720/2000 Page 7 of 29 photographs. The appellant also in his statement under Section 313 of the Code of Criminal Procedure categorically stated that he has been falsely implicated on the ground of his animosity with one Mahinder.

10. Per contra, Ms. Radhika Kolluru, learned APP for the State submits that the State has been able to prove its case beyond any shadow of doubt. She submits that the prosecution has relied upon two eye-witnesses being PW-1 (brother of the deceased) and PW-2 (friend of the deceased). She submits that the presence of these witnesses stands duly established on record. She further submits that PW-1 had named Yusuf at the first opportunity available, i.e. at the time of Rukka. He did not name the appellant Babu as he has deposed that he did not know the name of Babu, though he was acquainted with him. She further submits that PW-1 and 2 have categorically stated that the injured was removed to the hospital by PW-1 in a TSR. However, the information was supplied to the attending Doctor not by PW-1 but by the injured himself.

11. She further submits that as far as recovery of the knife is concerned, no benefit can accrue to the appellants on the ground that the doctor had opined that the

injuries were suffered by a double-edged weapon. She submits that the injuries were caused all over the body of the injured and that too multiple injuries and merely because the weapon of offence was not found, that cannot be a ground to acquit the appellants.

12. Counsel further submits that the reaction of an individual would vary from person to person. She relies upon a judgment of the Honble Supreme Court in the case of State of U.P. v. Devendra Singh, reported at (2004) 10 SCC616 wherein it has been held that different persons may behave differently at the same time, while one person may run; the other may sit CRL.A.Nos.640/2000 & 720/2000 Page 8 of 29 in the same area and cry. She further submits that the reaction of PW-2 was understandable in the sense that he had gone to inform the parents of the injured and then reached the hospital with the father of the injured person. As far as PW-1 is concerned, his initial reaction was to run for help. However, the help reached a little late but on reaching of PW-1 along with other persons, the assailants fled from the spot in question. She further submits that the post-mortem report would show that injury No.4 was caused on the hand and wrist of the deceased which would show that PW-2 had rightly described the manner in which the injury was caused to the deceased.

13. Counsel further submits that much has been said about the partition wall. She submits that a doubt has been unnecessarily created about the spot of incident which have been mentioned by the deceased at the time of giving the particulars to the doctor. On the other hand, the site plan has been prepared by PW-8, for which earth control was taken, blood was found at the spot and thus, there is no ambiguity that the murder has taken place near Tikona Park at Zakir Nagar. She also submits that a controversy has sought to be created with regard to the partition wall. She submits that the witness PW-2 has described the wall as being 1- ft. in height at one place while in his cross-examination, the witness clarified that there was no demarcation. She submits that the area in question at best has been mis-described and for that no benefit can accrue in favour of the appellants. She further submits that since the appellant Babu had refused the TIP, he was shown to the witness in Court who identified the person.

14. In rejoinder, the learned counsel for the appellants has reiterated that the conduct of PW-1 and PW-2 was unnatural. He further submits that CRL.A.Nos.640/2000 & 720/2000 Page 9 of 29 PW-15 has stated that he did not notice blood on the clothes of PW-1 which is highly unnatural. He has also stated that he did not find Taskin at the hospital. Thus, the testimonies of PW-1 and PW-2 are most unreliable. Reliance is placed by the learned counsel for the appellants on Din Dayal v. Raj Kumar Alias Raju and others, reported at 1998 Supreme Court Cases (Cri) 892, wherein the Apex Court upheld the view taken by the High Court, the relevant paras 3 and 4 reads as under: 3. It has pointed the improbability of the version given by them. The witnesses had not accompanied the deceased to the hospital nor had taken any trouble of going and informing the police about what had happened. After seeing the incidence they quietly went back to their homes. It cannot be said that the view taken by the High Court that the conduct of the witnesses was not natural is unreasonable. They were not merely eye witnesses. They were closely connected with the deceased. The High Court was, therefore, justified in not placing any reliance upon their evidence.

4. Witness Din Dayal had accompanied the deceased to the hospital but after reaching there he did not disclose the name of the accused to the Police Constable who was on duty even though he disclosed other facts regarding the incident. This circumstance has been relied upon by the High Court together with some other reasons for doubting truthfulness of the evidence of this witness. The High Court has also referred to the improvements made by Din Dayal and those improvements clearly indicate that they were deliberately made with a view to make the presence of other eye witnesses acceptable. Having gone through the evidence we find that the view taken by the High Court is not unreasonable and no interference is called for by this Court. 15. The counsel further relied on State of Rajasthan v. Mahaveer, reported at 1998 SCC (Cri) 904, wherein the Supreme Court upheld the view taken by the High Court which reads as under: CRL.A.Nos.640/2000 & 720/2000 Page 10 of 29 The High Court acquitted them all on the grounds that the version given by the four eye-witnesses was improbable, that they had made material improvements while giving evidence in the court and that police statements of some of them were recorded late. The High Court also considered the evidence of each eye-witness separately and held that they could

not be regarded as a reliable witnesses as their evidence suffered from various infirmities. 16. Lastly, the counsel for the appellants had relied upon the case of State of Punjab v. Sucha Singh and others, reported at (2003) 3 Supreme Court Cases 153, wherein the presence of the eyewitnesses were doubtful and there was a contradiction in the ocular and the medical evidence resulting in the acquittal of the accused persons. The Apex Court dismissed the appeal and concurred with the findings of the High Court.

17. We have heard learned counsel for the parties, considered their rival submissions, carefully examined the testimonies of the witnesses on record and the impugned judgment rendered by the Trial Court. In order to deal with the contentions of both the parties, it would be appropriate to examine the testimonies of material witnesses. The prosecution has relied upon the testimony of PW1 Mohd. Shahid and PW2 Taskin who had witnessed the incident.

18. PW1 Mohd. Shahid (brother of the deceased) deposed in his examination- in-chief that on 09.07.1996 at about 8.30 pm, he along with his brother Zahid (hereinafter referred to as the deceased) and Taskin (PW-2) had gone to Tikona park, opposite State Bank of India, Zakir Nagar for a walk. PW-1 further deposed that on the day of occurrence he was walking at a distance of about 5 to 6 feet away from the deceased and his deceased CRL.A.Nos.640/2000 & 720/2000 Page 11 of 29 brother was sitting on the wall in the park facing towards the road while Taskin (PW-2) was sitting with him. At about 9.00 pm, the appellants Babu and Yusuf along with other associates namely Nawab, Rashid, Vir Singh, Ajay (Nawab was declared as juvenile and others were declared as PO). The appellant Yusuf told his associates that he is the same person who had insulted him, thereafter all the accused persons attacked the deceased and he tried to run away but the accused persons Nawab and Rashid caught hold of him. PW1 further deposed that he along with Taskin (PW-2) tried to save the deceased but out of fear they ran away towards Zakir Nagar while shouting for help. PW-1 further deposed that after the appellants and their other associates fled away from the spot, he removed his brother in a T.S.R to Holy Family Hospital where his brother expired on the same day due to multiple stab wounds. PW-1 categorically deposed that the appellant Yusuf was armed with a knife, the appellant Babu was

armed with a dagger and the other associates of the appellants were also armed with knives and daggers. After sometime, police reached the hospital, his statement was recorded and he went to the spot of incident along with the police officials and pointed out the place where his brother was sitting, pursuant to which a site plan was prepared and photographs of the spot were taken. PW-1 further deposed that the accused Nawab and the appellant Yusuf were arrested in his presence near Sainik club at the bank of river Yamuna in Zakir Nagar and a knife was recovered from the appellant Yusuf. It was further deposed by PW-1 that the appellant Babu was arrested on 13.05.1997 and he correctly identified him when he was shown to him in Patiala House Courts on 30.05.1997. He further deposed that the knife which was recovered from the appellant Yusuf was not a spring actuated knife and was similar to the knife used by the butchers. He further deposed that there was only one entry to the park from the side of Zakir Nagar from where the appellants along with their associates who were 6-7 in number entered the park. PW-1 further deposed that the appellant Yusuf entered the park first having a churra in his hand and made the first attack on his brother and thereafter he was surrounded by other assailants.

19. PW-1 in his cross-examination categorically admitted that apart from appellant Yusuf, he was not aware of the names of other assailants but had seen them before and could identify them if shown to him. It was further admitted by PW-1 that when he was removing the deceased to the hospital, his clothes got bloodstains but the same were neither demanded by the police officials nor handed over by him. PW-1 stated that he informed the doctor, the name and parentage of the deceased Zahid and had brought him to the hospital.

20. Another eyewitness PW-2 Taskin (friend of the deceased) deposed on similar lines as deposed by PW-1 and remained consistent as to the time, place of the incident and all material aspects. PW-2 duly identified the appellants Yusuf and Babu in Court and named all the other associates of the appellants in Court. As to the weapon of offence, he deposed that they all were armed with knife and daggers. PW-2 in his cross-examination stated that he was acquainted with the appellant Babu for the last 2-3 years as the appellant Babu used to visit appellant

Yusuf. PW-2 also stated that after the incident he left from the spot to inform the family members of the deceased and returned to the hospital along with the family members of the deceased. It was also stated by PW-2 that the deceased was removed to CRL.A.Nos.640/2000 & 720/2000 Page 13 of 29 Holy Family Hospital by Shahid (PW-1) in a TSR.

21. With respect to the first attack, it would be relevant to note the ques tion raised in cross-examination to PW-2 which reads as under: Q: Who attacked for the first time and on which part of the body?. A: First attack was made by Yusuf which was saved by Zahid by taking the same on his hand, infact, he had caught the blade of knife by his hand. 22. On careful analysis of entire evidence adduced by the prosecution, we are of the view that the presence of the appellants at the spot stands established from the testimonies of eye witnesses PW-1 Shahid and PW-2 Taskin and the appellants were duly identified by them in Court.

23. Besides the above public witnesses, PW-4 HC Surinder Kumar recorded FIR on the basis of rukka sent by Insp. Rajesh Kumar (PW-15), copy of which is Ex.PW-4/A. PW-5 Const. Kaptan Singh and PW-6 Const. Murari Lal are witnesses to the recovery of knife at the instance of the appellant Yusuf. PW-8 Const. Harjeet Singh prepared the scaled site plan, copy of which is Ex.PW-8/A. PW-12 Const. Girdhar took the photographs of the place of incident, copies of which are proved as Ex.PW-12/1-4. PW-13 Rajiv Sethi proved the MLC of the deceased, copy of which is Ex.PW- 13/A.PW-15 Insp. Rajesh Kumar was the Investigating Officer of the case. PW-16 V.K.Bansal, the then Metropolitan Magistrate who conducted the identification parade of the appellant Babu.

24. The counsel for the appellants have argued that it is the case of prosecution that PW-1 has removed his brother to the hospital in a TSR, however, the MLC shows that the name of the deceased has been wrongly written, complete address has not been mentioned and in the Column of CRL.A.Nos.640/2000 & 720/2000 Page 14 of 29 Name and Address of the accompanying person has been left blank. It was further argued that in the MLC, the correct description of the spot has not been mentioned which creates a doubt as to the place of occurrence. As per the MLC, the incident took place at Zakir Nagar, near Ashoka Park where some

boys had beaten the deceased. However, the case of the prosecution is that the incident took place at Tikona Park.

25. To deal with the said argument, it would be relevant to discuss the view taken by the learned Trial Court. The relevant para 21 reads as under: Ex.PW13/A is the MLC of the injured. It is Medico Legal Report. Prior to that MLC Ex.PW13/B was prepared. In both these documents in column of Address near Ashoka Park Zakir Nagar N.D. has been mentioned. In Ex.PW13/A in the column of place of incident Zakir Nagar N.D. has been mentioned. In the column of history of incident it is mentioned alleged h/o beaten by some boys with knife at about 9.15 pm at Zakir Nagar near Ashoka Park. Nowhere it is mentioned in Ex.PW13/A or Ex.PW13/B that the incident was mentioned as having taken place in Ashoka Park. It was stated to have taken place in Zakir Nagar near Ashoka Park. Specific questions were put on behalf of accused persons to PW2 in this regard, and he clarified the position. PW2 Taskin has stated that Tikona Park is near his house which takes 5-7 minutes to reach there where as Ashoka Park is in front of New Friends Colony and it takes about 10-15 minutes to reach there. No suggestion has been put to this witness that incident took place in Ashoka Park. Moreover, PW11 Insp. Nirmal Singh who inspected the spot found blood lying in Tikona Park. Similar is the version of Insp. Rajesh Kumar PW15 who reached the spot after the incident. Insp. Rajesh Kumar PW15 had also prepared the site plan of place of incident which has been proved as Ex.PW15/B. Even in the rukka which was recorded on the statement of PW1 Mohd. Shahid the place of incident has been recorded as Tikona Park opposite SBI Zakir Nagar. Therefore, merely inapt description of place of incident as Zakir Nagar near Ashoka Park is hardly of any significance. CRL.A.Nos.640/2000 & 720/2000 Page 15 of 29 Such inapt description was likely to occur because injured was having twenty serious injuries on his body. Though he is stated to be conscious, but one can well imagine the mental condition of a man with 20 stab injuries on his body. Viewed in the light of these facts, mere inapt description of place of incident does not cast any doubt on the prosecution story or the veracity of prosecution witnesses. 26. We may note that with regard to the other park, PW-2 Taskin had stated as There is another park in Zakir Nagar, in front of New Friends Colony, which is a bigger park and is used by persons for strolling. Tikona Park is nearer from my house to Ashoka Park. It takes about 5-7

minutes from my house to reach Tikona Park. To reach Ashoka park it takes about 10 -15 minutes. 27. In the light of the deposition made by PW-2 and the reasoning adopted by the learned Trial Court in the aforegoing para, we are persuaded that a doubt has been unnecessarily created about the spot of incident and having regard to the fact that there were 20 injuries on the body of the injured, there is every possibility that he was speaking in a low tone and there is likelihood that the doctor may have incorrectly heard his name and the appellants cannot derive any benefit on this ground.

28. The next argument raised by the learned counsel for the appellants that in case PW-1 had removed his deceased brother as claimed by him in the TSR, there would have been blood on his clothes as PW-1 had deposed that the injured was on his lap. However, his clothes were not taken into possession by the police and not sent for examination. The attention of this Court has also been drawn to the cross-examination of PW-2 wherein it was stated by him that there was no blood on the clothes of PW-2 as well as on the clothes of Shahid (PW-1). CRL.A.Nos.640/2000 & 720/2000 Page 16 of 29 29. To deal with the aforestated submission, the Court would like to refer to the judgments which explain the general approach of the Courts to appreciation of evidence.

30. In the case of Sathi Prasad vs. The State of U.P. reported at AIR 1973 SC448 the Apex Court observed that it is well settled that if the police records become suspect and investigation perfunctory, it becomes the duty of the court to see if the evidence given in the court should be relied upon and such lapses ignored.

31. In the case of State of U.P. v. Anil Singh reported at 1988 Supp SCC686 the Honble Supreme Court observed as under: . If there is a ring of truth in the main, the case should not be rejected. It is the duty of the Court to cull out the nuggets of truth from the evidence unless there is reason to believe that the inconsistencies or falsehood are so glaring as utterly to destroy confidence in the witnesses. It is necessary to remember that a Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. One is as important as the other. Both are public duties which the Judge has to perform. (Emphasis Supplied) 32. In Mohan Singh v. State

of Madhya Pradesh, reported at (1999) 2 SCC428the Honble Supreme Court pointed out as under: . Efforts should be made to find the truth, this is the very object for which courts are created. To search it out, the courts have been removing the chaff from the grain. It has to disperse the suspicious cloud and dust out the smear of dust as all these things clog the very truth. So long as chaff, cloud and dust remains, the criminals are clothed with this protective layer to receive the benefit of doubt. So, it is a solemn duty of the courts not to merely conclude and leave the case the moment suspicions are created. It is the onerous CRL.A.Nos.640/2000 & 720/2000 Page 17 of 29 duty of the court, within permissible limit, to find out the truth. It means on the one hand that no innocent man should be punished but on the other hand to see that no person committing an offence should go scot-free. If inspite of such effort, suspicion is not dissolved, it remains writ at large, benefit of doubt has to be credited to the accused. For this, one has to comprehend the totality of the facts and the circumstances as spelled out through the evidence, depending on the facts of each case by testing the credibility of eye witnesses including the medical evidence, of course, after excluding those parts of the evidence which are vague and uncertain. There is no mathematical formula through which the truthfulness of a prosecution or a defence case could be concretized. It would depend on the evidence of each case including the manner of deposition and his demeanor, clarity, corroboration of witnesses and overall, the conscience of a judge evoked by the evidence on record. So courts have to proceed further and make genuine efforts within the judicial sphere to search out the truth and not stop at the threshold of creation of doubt to confer benefit of doubt. (Emphasis Supplied) 33. Noticing the possibility of investigation being faulty, the Apex Court in the case of Dhanaj Singh alias Shera & Ors. Vs. State of Punjab reported at (2004) 3 SCC654in relevant paras 5 and 8 observed as under: 5. In the case of a defective investigation the Court has to be circumspect in 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 investigating officer if the investigation is designedly defective. (See Karnel Singh v. State of M.P. reported at 1995 Cri LJ4173 8. The stand of to acceptability of evidence. Even if the investigation is defective, in view of the legal principles set out above, that pales into the appellants relate

essentially CRL.A.Nos.640/2000 & 720/2000 Page 18 of 29 insignificance when ocular testimony is found credible and cogent. Further effect of non-examination of weapons of assault or the pellets etc. in the background of defective investigation have been considered in Amar Singh's case (supra). In the case at hand, no crack in the evidence of the vital witnesses can be noticed. (Emphasis supplied) 34. In State of UP v Krishna Master, reported at (2010) 12 SCC324 the Supreme Court held: Before appreciating evidence of the witnesses examined in the case, it would be instructive to refer to the criteria for appreciation of oral evidence. While appreciating the evidence of a witness, the approach must be whether the evidence of witness read as a whole appears to have a ring of truth. Once that impression is found, 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 and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the 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 the matter would not ordinarily permit rejection of the evidence as a whole. If the court before whom the witness gives evidence had the opportunity to form the 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 evidence by the Trial Court and unless the reasons are weighty and formidable, it would not be proper for the appellate court to reject the evidence on the ground of variations or infirmities in the matter of trivial details. Minor omissions in the police statements are never considered to be CRL.A.Nos.640/2000 & 720/2000 Page 19 of 29 suffer evidence may fatal. The statements given by the witnesses before the Police are meant to be brief statements and could not take place of evidence in the court. Small/trivial omissions would not justify a finding by court that the witnesses concerned are liars. The prosecution from inconsistencies here and discrepancies there, but that is a short-coming from which no criminal case is free. The main thing to be seen is whether those inconsistencies go to the root of the matter or pertain to insignificant

aspects thereof. In the former case, the defence may be justified in seeking advantage of incongruities obtaining in the evidence. In the latter, however, no such benefit may be available to it. In the deposition of witnesses, there are always normal discrepancies, howsoever, honest and truthful they may be. These discrepancies are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition, shock and horror at the time of occurrence and threat to the life. It is not unoften that improvements in earlier version are made at the trial in order to give a boost to the prosecution case albeit foolishly. Therefore, it is the duty of the Court to separate falsehood from the truth. In sifting the evidence, the Court has to attempt to separate the chaff from the grains in every case and this attempt cannot be abandoned on the ground that the case is baffling unless the evidence is really so confusing or conflicting that the process cannot reasonably be carried out. In the light of these principles, this Court will have to determine whether the evidence of eye-witnesses examined in this case proves the prosecution case. 35. Faulty investigation cannot come in the way of dispensing justice. Investigating Officer may have faulted in collecting the blood stained clothes of the eyewitnesses, but then it has also come on record through the MLC of the deceased, which is Ex.PW-13/A that the deceased was conscious, alert and oriented when he reached the hospital. A conjoint reading of the MLC of the deceased along with the testimonies of PW-2 CRL.A.Nos.640/2000 & 720/2000 Page 20 of 29 and PW-15 Insp. Rajesh Kumar would show that there may not be blood on the clothes of PW-1 and even if we assume that the clothes of PW-1 were blood stained and the Investigating Officer did not seize them, it amounts to the lapse on the part of the Investigating Agency. It reflects the casual and callous attitude of the Investigating Agency in carrying out its most solemn duty of conducting fair, honest, flawless and scientific investigation into the crime. However, it is a settled law that the defective investigation by itself cannot be a ground for acquittal as laid down in the case of C. Muniappan v. State of T.N., reported at (2010) 9 SCC567 In light of the law as explained in the judgments discussed in paragraphs 30 to 34, the discrepancies pointed out by the appellants cannot be said to be significant enough to create a reasonable doubt on the case of the prosecution. Any lapse does not in the instant case dilute the evidence that is on record in the form of the depositions of the eye witnesses which adequately

bring home the guilt of the appellants beyond all reasonable doubt.

36. In view of the aforesaid dictum, we are of the considered view that if any defect is found in the investigation, benefit of the same could not be extended to the appellants and the appellants could not get any benefit of the defective investigation until and unless they prove other cogent evidence in their favour and belie the case of the prosecution. On the basis of the law discussed above, we are of the opinion that in the case of defective investigation, the court has to circumspect in evaluating the evidence, but it would not be right in acquitting the accused persons solely on account of the defect by the Investigating Agency.

37. Before deciding the appeals in hand, we deem it appropriate to anlayse the CRL.A.Nos.640/2000 & 720/2000 Page 21 of 29 medical evidence in detail. In this regard testimonies of PW-13 Dr. Rajiv Sethi and PW-3 Dr. O. P. Murti assume importance. PW-13 Dr. Rajiv Sethi has proved the MLC of the deceased, copy of which is Ex.PW-13/A. He deposed in his examination-in-chief that on 09.07.1996, at about 9.40 pm, the deceased Zahid Hussain was brought to the hospital where he examined the deceased. PW-13 further deposed that the deceased was conscious, alert and oriented but the injuries sustained were grievous in nature. He deposed that Mohd. Zahid died on 09.07.1996 at about 10.50 pm. PW-13 opined that the cause of death was multiple stab injuries leading to hypovalemic shock and cardio pulmonary arrest.

38. PW-3 Dr. O.P.Murti, Associate Professor, AIIMS, Delhi conducted the post-mortem of the deceased on 10.07.1996 at 12.30 p.m., his detailed report is Ex.PW3/A. In total there were 20 injuries found on the body of the deceased. The relevant part of his testimony reads as under: 1. Multiple abrasions of 3 x 1.5 cm over base of skin.

2. Red bruises of 3 x 1 cm and 3 x 1 cm at a distance of 1.5 cm from each other present over lower edge of left side face bone. Punctured wound of 1 x .5 cm over right temporal area of head, 2 cm above, right ear pinna 10 cm below midline .5 cm from left eye brain cavity deep. Incised stale wound of 1 x .5 cm obliquely placed over outer part of left hand, 2 cm below wrist, 4 cm above knuckle of little finger, 1 angle acute, another wedge shaped. Incised stale wound of 2.5 x .5 cm

vertically placed over front of right thigh, 21 cm above knee and 40 cm from anterior superior iliac spine. 3. 4.

5.

39. Dr. O. P. Murti opined the cause of death as hemorrhage shock consequent upon multiple injuries as mentioned in post-mortem report. CRL.A.Nos.640/2000 & 720/2000 Page 22 of 29 The injuries No.1, 2, 9, 10, 11, 13 & 14 were not sufficient to cause death in ordinary course of nature while other injuries i.e. injuries No.3 to 8, 12 and 15 to 20 were fatal and were sufficient to cause death in ordinary course of nature individually as well as collectively. With respect to the weapon of offence, it was opined by the autopsy surgeon that minimum three kinds of weapons were used in the commission of crime; two of them were sharp-edged cutting and stabbing weapons (one single-edged and other double-edged) while the third one was a pointed round puncturing object and few of the injuries were caused by a blunt object. Dr. O.P.Murti further opined that the injuries at Serial No.16, 17 and 19 were caused by a double edged weapon. As to the measurement of the weapon of offence, it was further opined that the width of the double edged weapon varied from 3cm to 4cm having thickness of about 1 to 1.3 cm. The width of the single edged weapon varied from 2 to 2.5 cm with thickness of 0.5 cm or 0.6 cm of the blades. The measurements of the third weapon i.e. puncturing weapon was about 1.5 cm. It was also opined by the autopsy surgeon that Injury No.13 was caused by the buckle of a belt.

40. With regard to the contention raised by the counsel for the appellants that there is a lapse of three days in recovery of knife after the arrest of the appellant Yusuf. This contention has to be appreciated in the light of the opinion rendered by the Autopsy surgeon PW-3 Dr. O.P.Murti, who had opined that minimum three kinds of weapons were used in the commission of crime; two of them were sharp-edged cutting and stabbing weapons (one single-edged and other double-edged) while third one was pointed round puncturing object and few of the injuries were caused by blunt object. We are convinced with the argument raised by the learned CRL.A.Nos.640/2000 & 720/2000 Page 23 of 29 counsel for the State that the multiple stab injuries were caused on all over the body of the deceased and

merely because the weapon of offence was not found, and if found after a delay of three days of arrest of the appellant Yusuf it cannot be a ground to acquit the appellants. We have observed that the learned Trial Court has also disbelieved the recovery of knife as correctly pointed out by the learned counsel for the appellants. We are of the considered view that there is no point of urging this ground at this stage when there is ample evidence on record against the appellants. Therefore, non linkage of the recovery of weapon of offence does not weaken the case of prosecution.

41. The next plank of submission raised by the learned counsel for the appellants is that the conduct of the eye witnesses shows that they were not present at the spot and while pointing out the testimony of PW-1 submits that in case he was present, his natural conduct would have been to save his brother and in the process he would have also received injuries . Counsel further submits that the testimony of PW-2 would show that after the incident, he went to his house, which is highly unnatural and must have tried to save his friend. To rebut this argument, learned counsel for the State has relied upon Devendra Singhs case (supra).

42. After perusal of the evidence on record, we have found that both the eyewitness tried to intervene but looking at the number of people attacking the deceased they chose to run away. PW-1 raised hue and cry and sought help from the public persons and when the public persons gathered at the spot, the appellants along with their associates fled from the spot. Thereafter, he removed the deceased to the hospital in a TSR along with the public persons. Similarly, testimony of PW-2 would show that he left the spot to inform their family members and immediately thereafter he rushed to the hospital along with the family members. Reading of their testimonies establishes that they made every possible attempt to save the deceased and in our view, their conduct appears to be natural and given the circumstance i.e. the number of persons who were arrested with deadly weapons it cannot be said that they acted in an unusual manner. Also, the cases of Mangilal and Others and Din Dayal (supra) as relied by the counsel for the appellant Yusuf are not applicable to the facts of the case in hand as in the present case, the testimony of PW-2 Taskin is wholly reliable and consistent with the medical evidence in the light of the injury

No.4 sustained by the deceased on his hand and corroborates the manner by which the injuries were caused to the deceased. We are of the considered view that the testimonies of PW-1 Shahid and PW-2 Taskin are trustworthy, reliable and remained consistent with the medical evidence and their conduct was natural and do not suffer from any infirmity.

43. Lastly, learned counsel for the appellants referred to the division of the Tikona Park and has relied upon the testimony of PW-1 and 2 who had deposed about the division of Tikona Park, however, as per the testimony of PW-15 Inspector Rajesh Kumar, Tikona Park is not divided into two parts and further deposed that there was no wall in the park.

44. It is evident from the testimony of PW-2 that the wall was about 1- ft. in height at one place while in his cross-examination, the witness clarified that there was no demarcation. The relevant part of the cross-examination can be noted as under: It is incorrect to suggest that the park is divided into two parts. Vol. It is only one park. It is incorrect that there is a CRL.A.Nos.640/2000 & 720/2000 Page 25 of 29 wall in between the park. Vol. but it is a small wall and there is a way also. 45. In our view, a controversy unnecessarily has been created by the counsel for the appellants with regard to the partition wall as it was duly corroborated from the testimony of PW-15 Rajesh Kumar that the Tikona Park is not divided into two parks.

46. So far as the appellant Babu is concerned, the counsel for the appellant argued that the name of Babu does not find mention in the rukka despite the fact that both the eyewitnesses were previously known to him.

47. We are not convinced with the argument raised by the counsel for the appellant Babu as it is not necessary that the absence of names of the accused persons in rukka points towards the implication of the accused in a false case. As it has emerged from cross-examination of PW-2 Taskin that he was acquainted with the appellant Babu for the last 2-3 years as the appellant Babu used to visit appellant Yusuf. Therefore, it may be a case that both the eyewitnesses knew about the identity of the appellant Babu but they were unaware about his name. We are not convinced with the argument that the appellant Babu was arrested

after ten months of the day of the incident. Refusal of TIP proceedings also points towards the guilt of the appellant Babu that he had apprehension of being identified by the eyewitnesses.

48. In regard to the judgments relied upon by the appellants, we are of the considered view that the judgments relied upon by the counsel for the appellants are not applicable in the present case. In our view, when the evidence of PW-1, PW-2 is fully reliable and trustworthy then even if no independent witness is produced it will not adversely affect the case of the CRL.A.Nos.640/2000 & 720/2000 Page 26 of 29 prosecution.

49. On this point, reference may be made to the case of Shiv Ram and Anr. vs State of U.P. reported at (1998) 1 SCC149 wherein the Hon'ble Apex Court has considered this aspect and was of the view that nowadays it is a common tendency that no outsider would like to get involved in a criminal case much less in the crime of present magnitude. Therefore it is quite natural that no independent witness will come forward to assist the prosecution. It is well settled that the evidence of witnesses cannot be discredited only on the ground that they are close relatives of the deceased persons but what is required in such situation is that the Court must scrutinize the evidence of such witnesses with utmost care and caution.

50. In the case of Balraje @ Trimbak v. State of Maharashtra reported at (2010) 6 SCC673 the Hon'ble Supreme Court has held that when the eyewitnesses are stated to be interested, it has to be noted that it would not be proper to conclude that they would shield the real culprit and rope in innocent person. The evidence on record has to be weighed pragmatically. The Court would be required to analyse the evidence of related witnesses. But if after careful analysis and scrutiny of their evidence, the version given by the witnesses appears to be clear, cogent and credible, there is no reason to discard the same.

51. In the backdrop of the above legal propositions and the facts and circumstances of the case we have found the testimonies of PW-1 Shahid and PW-2 Taskin as trustworthy and remained consistent with the medical evidence. In our view, contradictions if any are not of material in nature and do not go to the

root of the matter. A conjoint reading of all the above discussed testimonies and the medical evidence placed on record, it stands CRL.A.Nos.640/2000 & 720/2000 Page 27 of 29 established that the appellants Yusuf and Babu in furtherance of their common intention were involved in the commission of murder of the deceased Zahid. Direct evidence of common intention is seldom available. Such common intention of the accused can only be inferred from the evidence, facts and circumstances of the case. This view is fortified from the following judgments.

52. In Vaijayanti v. State of Maharashtra reported at (2005) 13 SCC134 as regards formation of common intention, the Honble Supreme Court opined as under: 9. Section 34 of the Indian Penal Code envisages that "when a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act, in the same manner as if it were done by him alone". The underlying principle behind the said provision is joint liability of persons in doing of a criminal act which must have found in the existence of common intention of enmity in the acts in committing the criminal act in furtherance thereof. The law in this behalf is no longer res integra. There need not be a positive overt act on the part of the person concerned. Even an omission on his part to do something may attract the said provision. But it is beyond any cavil of doubt that the question must be answered having regard to the fact situation obtaining in each case. (Emphasis Supplied) 53. In Pardeep Kumar v. Union Administration, Chandigarh reported at 2006 Cri LJ3894 the Honble Supreme Court opined as under: 12. It is settled law that the common intention or the intention of the individual concerned in furtherance of the common intention could be proved either from direct evidence or by inference from the acts or attending circumstances of the case and conduct of the parties. Direct proof of common intention is seldom available and, therefore, CRL.A.Nos.640/2000 & 720/2000 Page 28 of 29 such intention can only be inferred from the circumstances appearing from the proved facts of the case and the proved circumstances. (Emphasis Supplied) 54. We are of the considered view that the learned Trial Court has rightly appreciated the evidence on record. The prosecution has successfully proved the charges levelled against the appellants. For the reasons stated above, we find no infirmity in the judgment passed by the learned Trial Court and we see no reason to interfere with the same. The conviction of the

appellants under Section 302 read with Section 34 of IPC is upheld.

55. The appeals therefore fail and are dismissed. The appellants are on bail. The appellants shall serve the sentence as imposed by the learned Trial Court and surrender within two weeks from today. They shall be taken into custody to serve out the sentence.

56. The copy of this order be sent to the Superintendent Jail.

57. Trial Court record be sent back. G.S.SISTANI, J.

VINOD GOEL, J.

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