Ravi @ Munna vs.state

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Court : Delhi

Decided On : Feb-23-2018

Appellant : Ravi @ Munna

Respondent : State

Judgement :

IN THE HIGH COURT OF DELHI AT NEW DELHI CRL.A. 231/2017 DEEPAK YADAV Judgment Reserved On:

18. 08.2017 Judgment Pronounced On:

23. 02.2018 versus ... Appellant No.1 STATE (GOVT OF NCT OF DELHI) ... Respondent CRL.A. 317/2017 & CRL.M. (BAIL) 545/2017 RAVI @ MUNNA STATE versus ... Appellant No.2 ... Respondent CRL.A. 493/2017 & CRL.M. (BAIL) 871/2017 BABU MUSAHID @ ALI @ AKRAM versus STATE NCT OF DELHI ... Appellant No.3 ... Respondent Through: Mr. Chetan Lokur, Advocate with Mr. Harsh Prabhakar, Advocate for Appellant No.1 Mr. Harsh Prabhakar, Advocate with Mr. Anirudh Tanwar, Advocate for Appellant No.2 Mr. Chetan Lokur, Advocate with Mr. Pritish Chaudhary, Advocate for Appellant No.3 Mr. Ravi Naik, APP with Inspector Prashanant Yadav, PS - Jagat Puri CRL.A. Nos.231/2017, 317/2017 and 493/2017 Page 1 of 49 CORAM: HONBLE MR JUSTICE SIDDHARTH MRIDUL HONBLE MR JUSTICE NAJMI WAZIRI

JUDGMENT

SIDDHARTH MRIDUL, J.

1. The present batch of criminal appeals instituted under the provision of section 374(2) of the Code of Criminal Procedure, 1973 (hereinafter referred to as Cr PC), assail the judgment and order on sentence dated 07.01.2017 and 21.01.2017, respectively, rendered by the Ld. Additional Sessions Judge, Shahdara, Karkardooma Court, Delhi, in Sessions Case no.67/2011; emanating from FIR No.65/2011 (hereinafter referred to as the subject FIR).

2. By way of the impugned judgment and order on sentence dated 07.01.2017 and 21.01.2017, respectively, Deepak Yadav (hereinafter referred to as Appellant No.1); Ravi @ Munna (hereinafter referred to as Appellant No.2); and Babu Musahid @ Ali @ Akram (hereinafter referred to as Appellant No.3), were convicted and sentenced as under: I) Appellant Nos.1 and 3 i. Life Imprisonment and a fine of Rs.5,000/- for the offence punishable under the provisions of sections 3
of the CRL.A. Nos.231/2017, 317/2017 and 493/2017 Page 2 of 49 Indian Penal Code, 1860 (hereinafter referred to as IPC). In default of payment of fine, simple imprisonment for a further period of three months. ii. Rigorous Imprisonment for a period of 7 years and a fine of Rs.2,000/- for the offence punishable under the provisions of sections 3
IPC read with section 397 IPC. In default of payment of fine, simple imprisonment for a further period of one month. II) Appellant No.2 i. Life Imprisonment and a fine of Rs.5,000/- for the offence punishable under the provisions of sections 3
IPC. In default of payment of fine, simple imprisonment for a further period of three months. ii. Rigorous Imprisonment for a period of 7 years and a fine of Rs.2,000/- for the offence punishable under the provisions of sections 3
IPC read with section 397 IPC. In default of payment of fine, simple imprisonment for a further period of one month. CRL.A. Nos.231/2017, 317/2017 and 493/2017 Page 3 of 49 iii. Rigorous Imprisonment for a period of 3 years and a fine of Rs.2,000/- for the offence punishable under the provision of section 25 of the Arms Act, 1959. In default of payment of fine, simple imprisonment for a further period of one month. The sentences have been directed to run concurrently. Furthermore, the benefit of section 428 Cr PC has been granted to the Appellant Nos.1, 2 and 3

(hereinafter collectively referred to as the Appellants).

3. The fulcrum of the case of the prosecution is that on 15.02.2011, the Appellants along with K (juvenile in conflict with law/JCL), in furtherance of their common intention committed robbery at Bharat Medicos, 65 South Anarkali Extension, Delhi (hereinafter referred to as the crime spot/medical shop) using deadly weapons, and during the course thereof committed murder of Mr. Mulakh Raj Batra (hereinafter referred to as the deceased) by firing a bullet on his forehead.

4. On 15.02.2011 around 11:55 P.M., ASI Mangal Singh (PW-4) recorded DD No.48A [Ex.PW-4/A]. in relation to the underlying incident. Pursuant thereto, SI Sandeep (PW-25) reached at the crime spot where Constable Sandeep (PW-12/16) was already present. On enquiry from one CRL.A. Nos.231/2017, 317/2017 and 493/2017 Page 4 of 49 Gulshan Kumar, PW-25 got to know that the deceased was taken to a hospital. Subsequent thereto, PW-25 proceeded to the hospital where the deceased was found to be admitted. Statement of the son of the deceased, namely, Mr. Bharat Batra (PW-3) was recorded [Ex.PW-3/A also Ex.PW- 25/A].. Thereafter, PW-25 returned back to the crime spot and the rukka was prepared and sent for registration of the subject FIR. After registration of the subject FIR, investigation of the case was assigned to Inspector Ajab Singh (PW-23). Crime team arrived and inspected the crime spot as well as took photographs thereof. Visual site plan [Ex.PW-23/A]. was prepared by PW-23 at the instance of PW-3. PW-23 seized the country made pistol/firearm, live cartridge therein, fired bullet, fired bullet shell, and lifted the blood from the crime spot, vide separate seizure memos Ex.PW-3/K, Ex.PW-3/D, Ex.PW- 3/C, Mark PW-3/PX-3 and Ex.PW-3/E, respectively. A motorcycle bearing no.DL-4S-6051, which was parked outside the medical shop, was also seized vide seizure memo Ex.PW-3/B. Blood stained clothes of the deceased were seized from the hospital vide seizure memo Ex.PW-3/G. Thereafter, investigation of the case was transferred from PW-23 to Inspector Yogesh CRL.A. Nos.231/2017, 317/2017 and 493/2017 Page 5 of 49 Malhotra (PW-21), until the same was again assigned to the former on 21.04.2011. The deceased succumbed to his injuries during treatment in the hospital on 21.02.2011 and the body was thereafter shifted to the mortuary. On 22.02.2011, Dr. S. Lal (PW-5) conducted post-mortem [Ex.PW-5/A]. on the body of

the deceased. Following injuries were found on the body of the deceased: 1. Partially healed contused lacerated wound (fire arm entry wound) of size 1.5 X02 cm with stitches over it over left temporal area placed 4.5 cm posterior to lateral end of eyebrow and 5 cm. above the ear pinna associated with spectacles hematoma around the left eye. The wound enter the cranial cavity by making a hole of size 1 X1cm with beveling seen on inner table over posterior aspect of left side frontal bone and perforating the brain from left side to right side through and through and coming out from right side parietal area by making a exit wound. Hole on left parietal bone of size 2 X1cm with beveling on outer table and then by making an exit wound of size 2 X02 cm with stitches on parietal area. The exit bone placed 5.5 cm above the right pinna and 1 cm from the mid line. The direction of the bone left to right and backward direction.

2. Superficial lacerated wound three in number varies in size from 1.5 X01 cm to 0.5 X01cm over middle of forehead. Nails mark, crescent shape of size 0.3 X01 cm over bridge of nose. On internal examination sub scalpel bruising seen on left fronto- parietal and temporal region under injury No.1 and occipital area. Injury of skull as mentioned in injury No.1. Defuse sub arrachnoid hemorrhage with laceration of brain seen in the track with contusion and oedema of brain present. The cause of death was opined to be as follows: CRL.A. Nos.231/2017, 317/2017 and 493/2017 Page 6 of 49 The cause of death was cranio cerebral damage consequent upon penetrating injuries to skull could be possible to cause death projectile of fire arm. Injury No.1 was sufficient to cause death in ordinary course of nature and injury No.2 & 3 could be possible to cause by nails. All injuries were ante mortem in nature and old in duration. Time since death was around 24 hours. 5. It is the case of the prosecution that during the course of investigation of a separate offence, it came to light that Appellant No.2 and K had committed the underlying offence.

6. On 10.04.2011, Appellant No.2 was arrested in another FIR being FIR No.73/2011 at Police Station Krishna Nagar, Delhi, and pursuant to his arrest therein he also made a disclosure statement with respect to the present case. On 15.04.2011, Appellant No.2 was formally arrested by PW-21 with the permission of the court [vide arrest memo Ex.PW-11/A].. On 21.04.2011, TIP of Appellant No.2

was conducted by PW-20, wherein the latter identified the former [Ex.PW-7/B].. Thereafter, Appellant No.2 was taken into police custody and his disclosure statement admitting to the commission of the underlying offence was recorded on 25.04.2011 [Ex.PW-11/B].. On 26.04.2011, Appellant No.1 was arrested at the instance of Appellant No.2 from his house at Kanti Nagar, Delhi [vide arrest memo Ex.PW-15/C]. and his personal search was conducted [Ex.PW-15/D].. On CRL.A. Nos.231/2017, 317/2017 and 493/2017 Page 7 of 49 interrogation, Appellant No.1 admitted to the commission of the crime and his disclosure statement was recorded [Ex.PW-15/E].. Pursuant to his disclosure statement being recorded, Appellant No.1 also produced a mobile phone of black colour make Nokia from an almirah of his house, which was seized vide seizure memo Ex.PW-15/B. Pointing out memo of the crime spot was also prepared at the instance of Appellant No.1 [Ex.PW-15/A].. Insofar as K is concerned, he was arrested by Surat Police in Surat, Gujrat in another case. Pursuant to his arrest, K made a disclosure statement to the Surat Police, admitting his complicity in the commission of the underlying offence along with Appellant Nos.2 and 3 and one more unknown person [Ex.PW-17/B].. Information in this behalf was transmitted to P.S. Jagat Puri, pursuant to which DD No.12A was recorded on 29.03.2011. Production warrants of K were obtained by PW-23 on 24.05.2011 and on 27.05.2011 Surat Police produced him in muffled face. Thereafter, he was formally arrested vide arrest memo Ex.PW-14/A. On 08.06.2011, PW-23 recorded disclosure statement of K [Ex.PW-14/B]., and supplementary disclosure statement was recorded on 08.06.2011 [Ex.PW- 23/B].. Pointing out memo was prepared on 08.06.2011 [Ex.PW-23/C].. On CRL.A. Nos.231/2017, 317/2017 and 493/2017 Page 8 of 49 04.07.2011, TIP of K was conducted, however, he refused to participate in the same. Subsequently, Appellant No.3 was arrested on 09.12.2011 on the basis of secret information, from Gali No.18 West Kanti Nagar, Delhi [vide arrest memo Ex.PW-23/D].. Pursuant to his arrest, Appellant No.3 made a disclosure statement admitting his complicity in the commission of the offence [Ex.PW-23/H].. Further, personal search of Appellant No.3 was conducted and pointing out memo of the crime spot was prepared [Ex.PW- 23/E and Ex.PW-23/I, respectively].. On 17.12.2011, TIP of Appellant No.3 was conducted, however, he refused to participate in the same.

7. At the trial, the prosecution had examined 26 witnesses in support of its case.

8. The Appellants in their respective statements under section 313 Cr PC have stated that they have been falsely implicated in the present case. However, they have chosen to not lead any defence.

9. Broadly, the Trial Court has based the conviction of the Appellants on the following grounds: i. The testimonies of PW-3 and PW-20; CRL.A. Nos.231/2017, 317/2017 and 493/2017 Page 9 of 49 ii. Recovery of the mobile phone of the deceased from Appellant No.1; and iii. Identification of Appellant No.2 in Test Identification Parade proceedings (TIP) by PW-20.

10. Learned counsel appearing on behalf of the Appellants would asseverate that there are defects in the investigation conducted by the police and the benefit of the same shall accrue to the Appellants. In order to buttress this submission reliance would be placed on the decisions of the Honble Supreme Court in Hema v. State reported as (2013) 10 SCC192 Kailash Gour and others v. State of Assam reported as (2012) 2 SCC34 Sunil Kundu and another v. State of Jharkand reported as (2013) 4 SCC422 State of U.P. v. Bhagwant Kishore Joshi reported as 1964 (3) SCR71 and Datar Singh v. State of Punjab reported as (1975) 4 SCC272 11. Learned counsel appearing on behalf of the Appellants would then invite our attention to the testimonies of PW-3 and PW-20, to assert that there are material contradictions therein and it would not be prudent to base conviction thereupon. Further, the testimony of PW-3 is sought to be discredited on the ground that he is related to the deceased. CRL.A. Nos.231/2017, 317/2017 and 493/2017 Page 10 of 49 In this behalf reliance would be placed on the decisions of the Honble Supreme Court in State of Punjab v. Parveen Kumar reported as (2005) 9 SCC769 and Raju alias Balachandran v. State of Tamil Nadu reported as (2012) 12 SCC701 12. Further, it would be urged that mere identification of Appellant No.2 by PW-20 in TIP proceedings cannot form the basis of conviction, since the testimony of the latter is not creditworthy. In order to buttress this submission reliance would be placed on the decision of a Division Bench of this Court in Rahisuddin v. State reported as 2016 (157) DRJ372 13. In the alternative it would be urged that the matter should be remanded back to the Trial Court for fresh trial,

since the quality of representation afforded to the Appellants at the trial was below the expected threshold and, resultantly, the prosecution witnesses were not subjected to meaningful cross-examination. In this behalf reliance would be placed on the decision of a Division Bench of this Court in Salamat Ali v. State reported as 174 (2010) DLT558(DB). CRL.A. Nos.231/2017, 317/2017 and 493/2017 Page 11 of 49 14. Per contra, learned Additional Public Prosecutor whilst supporting the impugned judgment in its entirety, would urge that the findings of the Ld. Trial Court require no interference. It would be urged that the material on record conclusively establishes the guilt of the Appellants beyond reasonable doubt.

15. Whilst admitting that there are certain inconsistencies in the testimonies of PW-3 and PW-20 in relation to the role played by the Appellants, it would be submitted that convergence therein with respect to the presence of the Appellants at the medical shop during the course of the commission of the offence would be sufficient to form the basis of conviction.

16. Further, it would be submitted that since no explanation is forthcoming from the Appellants with respect to the incriminating material put to them, an adverse inference is liable to be drawn. In order to buttress this submission reliance would be placed on the decision of the Honble Supreme Court in Rajkumar v. State of M.P. reported as (2014) 5 SCC353 17. We have heard the learned counsel appearing on behalf of the parties and perused the entire case record. CRL.A. Nos.231/2017, 317/2017 and 493/2017 Page 12 of 49 Defects in investigation 18. We shall first examine whether defects, if any, in the investigation conducted by the police would attribute to the benefit of the Appellants and, if yes, to what extent.

19. The Honble Supreme Court in Hema (supra) whilst holding that fair investigation is a part of the constitutional rights guaranteed under Articles 20 and 21 of the Constitution of India and it is the immediate requirement of the rule of law that investigation must be fair, transparent and judicious, observed as follows: 14. It is also settled law that for certain defects in investigation, the accused cannot be acquitted. This aspect has been considered in various decisions. In C. Muniappan v. State of T.N. [(2010) 9 SCC567: (2010) 3 SCC (Cri) 1402]. , the following

discussion and conclusions are relevant which are as follows: (SCC p. 589, para

55) the defect 55. There may be highly defective investigation in a case. However, it is to be examined as to whether there is any lapse by the IO and whether due to such lapse any benefit should be given to the accused. The law on this issue is well settled that in the investigation by itself cannot be a ground for acquittal. If primacy is given to such designed or negligent investigations or lapses by perfunctory investigation, the faith and confidence of the people in the criminal justice administration would be eroded. Where there has been negligence on the part of the investigating agency or omissions, etc. which resulted in defective investigation, there is a legal obligation on the part of the court to examine the prosecution evidence dehors such lapses, carefully, to find out whether the said evidence is reliable or not and to the omissions or CRL.A. Nos.231/2017, 317/2017 and 493/2017 Page 13 of 49 to what extent it is reliable and as to whether such lapses affected the object of finding out the truth. Therefore, the investigation is not the solitary area for judicial scrutiny in a criminal trial. The conclusion of the trial in the case cannot be allowed to depend solely on the probity of investigation. xxxxxxxxx xxxxxxxxx xxxxxxxx is clear that merely because of some defect in the 18. It it investigation, lapse on the part of the investigating officer, cannot be a ground for acquittal. Further, even if there had been negligence on the part of the investigating agency or omissions, etc. it is the obligation on the part of the court to scrutinise the prosecution evidence dehors such lapses to find out whether the said evidence is reliable or not and whether such lapses affect the object of finding out the truth. 20. In Kailash Gour (supra), the Honble Supreme Court observed as (Emphasis supplied) follows: 43. At any rate, the legal proposition formulated by Bedi, J.

based on the past failures does not appear to us to be the solution to the problem. We say with utmost respect to the erudition of our Brother that we do not share his view that the reports of the Commissions of Inquiry set up in the past can justify a departure from the rules of evidence or the fundamental tenets of the criminal justice system. That an accused is presumed to be innocent till he is proved guilty beyond a reasonable doubt is a principle that cannot be sacrificed on the altar of inefficiency, inadequacy or inept handling of the investigation by the police. The

benefit arising from any such faulty investigation ought to go to the accused and not to the prosecution. So also, the quality and creditability of the evidence required to bring home the guilt of the accused cannot be different in cases where the investigation is satisfactory vis--vis cases in which it is not. The rules of evidence and the standards by which the same has to be evaluated also cannot be different in cases CRL.A. Nos.231/2017, 317/2017 and 493/2017 Page 14 of 49 depending upon whether the case has any communal overtones or in an ordinary crime for passion, gain or avarice. (Emphasis supplied) 21. The Honble Supreme Court in Sunil Kundu (supra) held as follows: 29. We began by commenting on the unhappy conduct of the investigating agency. We conclude by reaffirming our view. We are distressed at the way in which the investigation of this case was carried out. It is true that acquitting the accused merely on the ground of lapses or irregularities in the investigation of a case would amount to putting premium on the deprecable conduct of an incompetent investigating agency at the cost of the victims which may lead to encouraging perpetrators of crimes. This Court has laid down that the lapses or irregularities in the investigation could be ignored subject to a rider. They can be ignored only if despite their existence, the evidence on record bears out the case of the prosecution and the evidence is of sterling quality. If the lapses or irregularities do not go to the root of the matter, if they do not dislodge the substratum of the prosecution case, they can be ignored. In this case, the lapses are very serious. PW5Jaldhari Yadav is a pancha to the seizure panchnama under which weapons and other articles were seized from the scene of offence and also to the inquest panchnama. Independent panchas have not been examined. The investigating officer has stated in his evidence that the seized articles were not sent to the court along with the charge-sheet. They were kept in the malkhana of the police station. He has admitted that the seized articles were not sent to the forensic science laboratory. No explanation is offered by him about the missing sanha entries. His evidence on that aspect is evasive. Clothes of the deceased were not sent to the forensic science laboratory. The investigating officer admitted that no seizure list of the clothes of the deceased was made. Blood group of the deceased was not ascertained. No link is established between the blood found on the seized articles and the blood of the deceased. It is difficult to make allowance for such gross inspire lapses. Besides, confidence.

Undoubtedly, a grave suspicion is created about the involvement of the accused in the offence of murder. It is well settled that suspicion, however strong, cannot take the place of proof. In such a case, benefit of doubt must go to the accused. In the circumstances, the evidence of eyewitnesses does not CRL.A. Nos.231/2017, 317/2017 and 493/2017 Page 15 of 49 we quash and set aside the impugned judgment and order [Sunil Kundu v. State of Jharkhand, Criminal Appeal No.1762 of 2004, decided on 20-8-2007 (Jhar)]. . The appellant-accused are in jail. We direct that the appellants A-1 Sunil Kundu, A-2 Bablu Kundu, A-3 Nageshwar Prasad Sah and A-4 Hira Lal Yadav be released forthwith unless otherwise required in any other case. (Emphasis supplied) 22. In Bhagwant Kishore Joshi (supra), the legal position in relation to defects in investigation was succinctly laid down as follows: 12. The argument of the learned counsel for the respondent may be elaborated thus: Whenever there is consistent disregard of the provisions of the Code of Criminal Procedure in the matter of investigation it must be held in almost all cases that it has prejudiced the accused in the matter of trial, for otherwise it would enable a police officer below the rank of Deputy Superintendent of Police to make an investigation free from the statutory safeguards designed to prevent the abuse of police powers, to secure the necessary information and thereafter to take the requisite permission of the Magistrate and then to shape his investigation to achieve the desired result or to implement scheme. No doubt this practice, if it exists, must be condemned; but the question is, does the infringement of the salutary provisions of the act in the matter of investigation, without more, invalidate the trial?. If we accept the broad proposition advanced by the learned counsel, we would be disregarding the provisions of Section 537 of the Code of Criminal Procedure; would be ignoring an honest body of compelling evidence on the basis of dereliction of duty by the police. The question is not whether in investigating offence the police have disregarded the provisions of the Act, but whether accused has been prejudiced by such disregard in the matter of his defence at trial. It is, therefore, necessary for the accused to throw a reasonable doubt that the prosecution evidence is such that it must have been manipulated shaped by reason of the irregularity in the matter of investigation, or that was prevented by reason of such irregularity from putting forward his defence or adducing evidence in support thereof. But where the prosecution evidence has been held to be true

and where the accused had full CRL.A. Nos.231/2017, 317/2017 and 493/2017 Page 16 of 49 say in the matter, the conviction cannot obviously be set aside on the ground of some irregularity or illegality in the matter of investigation: there must be a sufficient nexus, either established or probabilized, between the conviction and the irregularity in the investigation. In this case, as we have earlier pointed out, not only the trial was fair and the evidence convincing, but even the earlier defect was rectified by having practically a de novo investigation in strict compliance with the provisions of the Code of Criminal Procedure. We cannot, therefore, hold that the accused has been prejudiced by the illegality committed by the police in the first the investigation. stage of (Emphasis supplied) 23. The legal conspectus that emerges from a careful consideration of the aforesaid decisions is encapsulated hereinbelow: i. Benefit arising from any faulty investigation cannot go to the prosecution and ought to go to the accused, since the quality and credibility of evidence required to bring home the guilt of the accused cannot be different in cases where the investigation is satisfactory vis- -vis cases in which it is not and the guilt of the accused is required to be established by the prosecution beyond reasonable doubt de hors whether the investigation was faulty or not. ii. Some defect in the investigation, lapse on the part of the investigating officer, would not entitle the accused to acquittal. CRL.A. Nos.231/2017, 317/2017 and 493/2017 Page 17 of 49 iii. Even if there is some negligence on the part of the investigating agency or omissions etc., the court will have to scrutinize the evidence of the prosecution de hors the lapses in the investigation. iv. If the evidence on record bears out the case of the prosecution and the evidence is of sterling quality and reliable, lapses or irregularities in the investigation will not attribute to the benefit of the accused. However, if the lapses or irregularities go to the root of the matter and dislodge the substratum of the case of the prosecution or affect the object of finding out the truth, they cannot be ignored. v. However, to set aside the conviction there must be a sufficient nexus, either established or probabilized, between the conviction and the irregularity in the investigation. Conviction cannot be set aside on the basis of some irregularity or illegality in the matter of investigation, if the prosecution evidence on which the accused has been convicted is held to be true and the accused had full say in the matter.

24. In the present case, following instances of defective investigation have been pointed out on behalf of the Appellants: a) Finger prints were not obtained from the firearm seized from the medical shop; CRL.A. Nos.231/2017, 317/2017 and 493/2017 Page 18 of 49 b) CDR of the mobile phone of the deceased, which was allegedly snatched therefrom on the fateful night, were procured only till the 15.02.2011 i.e. the date of the incident, and not thereafter; and c) The Visual Site Plan [Ex.PW-23/A]. prepared by PW-23 on 16.02.2011 i.e. the very next day of the incident, finds mention of a spot from where K allegedly fired the firearm. However, the names of the assailants were not known until 26.03.2011.

25. No doubt that the said defects in the investigation would attribute only to the benefit of the Appellants and not the prosecution.

26. However, since there is no reasonable nexus between the finding of conviction rendered by the Trial Court vis--vis the aforesaid defects and the Appellants have been convicted de hors the defects, it cannot be now urged before us that the Appellants are entitled to be acquitted on this ground alone.

27. Even otherwise, since no question was put to the relevant witnesses in cross-examination in relation to the said defects, in order to enable them to offer an explanation, the defects would not attribute to the benefit of the Appellants at all. [Ref: Mahavir Singh v. State of Haryana reported as (2014) 6 SCC716 CRL.A. Nos.231/2017, 317/2017 and 493/2017 Page 19 of 49 28. We shall now examine whether the evidence de hors the said defects is sufficient and reliable to uphold the finding of conviction rendered by the Trial Court. Testimonies of PW-3 and PW-20 29. In the present case, PW-3 and PW-20 are the star witnesses of the prosecution. They are stated to have witnessed the entire incident. Therefore, it would firstly be prudent to examine the testimonies of these two witnesses, in order to determine their credibility.

30. Both PW-3 and PW-20 were declared hostile and permission was granted to the APP to cross-examine them, however, their evidence cannot be rejected in toto on the said ground alone and the same can be accepted to the extent their version is found to be dependable on a careful scrutiny thereof. [Ref: Khujji v. State of M.P. reported as (1991) 3 SCC627 31. In relation to discrepancies in the

evidence of witnesses, the Honble Supreme Court in State of U.P. v. Naresh reported as (2011) 4 SCC324 observed as follows: 30. In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about the truthfulness of the witness and other witnesses also make material improvement while deposing CRL.A. Nos.231/2017, 317/2017 and 493/2017 Page 20 of 49 contradictions, inconsistencies, embellishments in the court, such evidence cannot be safe to rely upon. However, minor or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety. The court has to form its opinion about the credibility of the witness and record a finding as to whether his deposition inspires confidence. 9. Exaggerations per se do not render the evidence brittle. But it can be one of the factors to test credibility of the prosecution version, when the entire evidence is put in a crucible for being tested on the touchstone of credibility. [Ed.: As observed in Bihari Nath Goswami v. Shiv Kumar Singh, (2004) 9 SCC186 p. 192, para 9.]. Therefore, mere marginal variations in the statements of a witness cannot be dubbed as improvements as the same may be elaborations of the statement made by the witness earlier. The omissions which amount to contradictions in material particulars i.e. go to the root of the case/materially affect the trial or core of the prosecution's case, render the testimony of the witness liable to be discredited. [Vide State v. Saravanan [(2008) 17 SCC587: (2010) 152]. , Arumugam v. State [(2008) 15 SCC590: (2009) 3 SCC (Cri) 11

AIR 2009 SC331 , Mahendra Pratap Singh v. State of U.P. [(2009) (2009) 3 SCC (Cri) 1352]. and Sunil Kumar 11 SCC334: Sambhudayal Gupta (Dr.) v. State of Maharashtra [(2010) 13 SCC657: JT (2010) 12 SC287 .]. : AIR SCC (Cri) 4 580 2009 SC (Emphasis supplied) 32. The Honble Supreme Court in Lal Bahadur v. State (NCT of Delhi) reported as (2013) 4 SCC557 reiterated the principle laid down in Bharwada Bhoginbhai Hirjibhai v. State of Gujrat reported as (1983) 3 SCC217 in relation to minor discrepancies in evidence of eye-witnesses, as follows: CRL.A. Nos.231/2017, 317/2017 and 493/2017 Page 21 of 49 (1) 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. (2) 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 therefore cannot be expected to be attuned to absorb the details. (3) 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 person's mind, whereas it might go unnoticed on the part of another. (4) By and large people cannot accurately recall a conversation and reproduce the very words 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. (5) 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. (6) Ordinarily a witness cannot be expected to recall accurately the sequence of events which takes place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on. (7) A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross-examination made by the 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 subconscious 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-perhaps it is CRL.A. Nos.231/2017, 317/2017 and 493/2017 Page 22 of 49 a sort of a psychological defence mechanism activated on the spur of the moment. 33. In this backdrop, we shall first examine the testimony of PW-3. PW-3 was admittedly not acquainted to the Appellants beforehand and shared no enmity therewith, although, he was related to the deceased. But he cannot be termed as an interested witness merely as a reason of being the son of the deceased. However, needless to state that as a consequence of PW-3s relation with the deceased, his evidence is liable to be meticulously and carefully examined. [Ref: Waman and Ors. v. State of Maharashtra reported as (2011) 7 SCC295 State of Rajasthan v. Kalki reported as

(1981) 2 SCC752 Dalip Singh v. State reported as AIR 1953 SC364 Ashok Kumar Chaudhary v. State of Bihar reported as (2008) 12 SCC173 , and Raju (supra].

34. In relation to the sequence of events, PW-3 on 27.01.2012 deposed before the court that, around 9:00 P.M. on the date of the incident i.e. 15.02.2011, PW-20 came to meet him at the medical shop. Around 11:00 P.M. when he was present at the medical shop along with PW-20 and the deceased, a boy aged 25-26 years came to take medicine as he had purportedly met with an accident. After taking a painkiller the boy left. However, after 10-15 minutes around 11:30 P.M. that boy came again. By CRL.A. Nos.231/2017, 317/2017 and 493/2017 Page 23 of 49 that time two shutters of the medical shop were already down and only one shutter was open. Further, that another boy was standing outside the medical shop and talking on the phone. The boy who purchased the medicine put a gun on his forehead and asked for cash, mobile and other valuables. PW-3 tried to snatch the firearm from that boy and in that process firearm fell from his hand. Thereafter, two more boys came inside the medical shop and while one of them was carrying a firearm, other was carrying a knife. One of them put a firearm on PW-3; other put a knife on PW-20; and the third one snatched the mobile phone from the deceased which he had taken out to call the police. Further, that these boys took the cash from the medical shop and while they were trying to run away noise was raised by PW-3. Thereafter, one of the boys fired the fatal bullet. The assailants also left behind a bike while they were trying to run away. On being declared hostile, during the course of cross-examination by the APP, PW-3 deposed that the boy who had purchased the medicine came to the medical shop for the second time around 11:40 P.M and was carrying a firearm. Pursuant to the arrest of Appellant No.3, PW-3 was re-called for examination on 29.04.2013. It was then deposed by PW-3 that PW-20 came to the medical shop at 8:30 P.M and at 9:00 P.M. the first assailant came to CRL.A. Nos.231/2017, 317/2017 and 493/2017 Page 24 of 49 buy medicine. After buying the medicine the first assailant kept standing outside, on the counter of the medical shop. Another boy who was his associate was also standing outside the medical shop with a bike and after half and hour both of them left from there. Around 11:10 P.M., the first assailant who purchased the medicine came back to the medical shop and put a firearm on his head. After two minutes, two more assailants came inside the medical shop, one with a knife and other with

a pistol. The two assailants carrying the firearm put the same on his forehead, and the third assailant carrying the knife took PW-20 inside, near the inverter. Subsequent thereto, PW-3 caught the hands of both the assailants who had put the firearm on him, and in that process, firearm of one of the assailants fell. The deceased asked PW-3 to catch hold of both the assailants so that in the meanwhile he could make a call to the police. The deceased dropped his mobile phone while taking out the same and noise was raised by PW-3. Thereafter, while fleeing from the crime spot, one of the assailants fired the fatal bullet. The assailants also took away the mobile phone of the deceased and some petty articles from the shop, however, left behind their bike. Subsequent thereto, PW-3 was again declared hostile and the APP was again granted permission to cross-examine him. During the course of cross-examination, PW-3 CRL.A. Nos.231/2017, 317/2017 and 493/2017 Page 25 of 49 deposed that the painkiller was bought at 11:00 P.M. Further, that the two other assailants came inside the medical shop after the first assailant was caught; and of the two boys who came subsequently, one of them snatched the mobile phone of the deceased and the other fired the fatal bullet. During the course of cross-examination on behalf of the appellants on 04.03.2015, PW-3 deposed that PW-20 came to the medical shop at 8:30 P.M and the first assailant bought the painkiller at 11:00 P.M. He was even confronted with his previous statement to the police [Ex.PW-3/A]., where time when PW-20 came to the medical shop was mentioned as 9:00 P.M. It was further deposed that first assailant returned to the medical shop at 11:10 P.M, however, in his statement to the police [Ex.PW-3/A]., with which he was confronted, the time was mentioned as 11:40 P.M. Further, PW-3 deposed that he had stated to the police that the assailant carrying the knife took PW-20 inside; one of the assailants was carrying a long knife; the assailants carrying the firearms had put the same on his head; deceased asked him to apprehend both the assailants; some petty articles were taken away from the medical shop by the assailants and they left behind their bike; the assailant who was standing outside the medical shop also ran away with the CRL.A. Nos.231/2017, 317/2017 and 493/2017 Page 26 of 49 other three assailants, however, none of these details were confronted to be so mentioned in the statement given by PW-3 to the police.

35. A perusal of the testimony of PW-3 in relation to the timeline of sequence of events would reveal that, he first deposed that the first assailant came to the medical shop to buy painkiller at 11:00 P.M. and left around 11:15 P.M. Thereafter, the time was varied to 9:00 P.M. and 9:30 P.M., respectively. Subsequent thereto, the time when the first assailant came to buy medicine was again stated to be as 11:00 P.M. Insofar as, the time when the first assailant returned to the medical shop is concerned, PW-3 initially deposed that first assailant returned at 11:30 P.M.; then as 11:40 P.M.; and thereafter again varied it to as 11:10 P.M. However, these inconsistencies with respect to time being minor in nature can be overlooked if deposition with respect to other aspects inspires confidence.

36. In relation to the sequence of events, even though PW-3 initially did not depose anything about an associate accompanying the first assailant to purchase a painkiller; subsequently another associate was introduced by him, CRL.A. Nos.231/2017, 317/2017 and 493/2017 Page 27 of 49 who was deposed to be standing outside the medical shop along with the first assailant. Insofar as the deposition of PW-3 with respect to the second visit by the assailants is concerned, he initially deposed that the other two assailants came inside the medical shop after the firearm of the first assailant fell down, pursuant to being snatched by him. To the contrary, it was subsequently deposed by PW-3 that the other two assailants came inside the medical shop two minutes after the first assailant, and in his attempt to catch hold the hands of both the assailants carrying the firearm, one of the firearm fell. Although, on being cross-examined by the APP, PW-3 again deposed on the lines of his earlier statement. In relation to the aspect whether cash was taken away from the medical shop or not, PW-3 intially deposed that the assailants took away cash from the medical shop, whereas, subsequently PW-3 mentioned nothing about cash being taken away but only petty articles. It would also be relevant to note that nothing was stated by PW-3 in his statement to the police in relation to petty articles being taken away by the assailants from the medical shop. CRL.A. Nos.231/2017, 317/2017 and 493/2017 Page 28 of 49 Further, although PW-3 initially deposed that the mobile phone of the deceased was snatched by one of the assailants, it was subsequently deposed by him that the mobile phone fell down. Furthermore, contrary to his deposition in court, PW-3 in his statement to the police [Ex.PW-3/A]. neither mentioned, inter alia, that either

of the assailants was carrying a knife; nor that deceased carrying the knife had taken PW-20 inside near the inverter. There was also no mention of the fact that the assailants carrying firearms had put the same on his forehead; or that another boy was standing outside the medical shop, who ran away with the other three assailants.

37. Coming to the aspect of number of assailants involved in the commission of offence and the role alleged to be played by the Appellants therein. On the first date of examination i.e. 27.01.2012, PW-3 deposed that Appellant Nos.1 and 2 subsequently entered the medical shop and the former fired the fatal bullet. On being declared hostile, during the course of cross- examination by the APP, PW-3 deposed that one of the two assailants who came subsequently fired the fatal bullet. There was no mention of any fourth person being involved in the commission of the offence or that he saw a fourth person standing outside the medical shop. CRL.A. Nos.231/2017, 317/2017 and 493/2017 Page 29 of 49 Pursuant to the arrest of Appellant No.3, on being re-called for examination, PW-3 for the first time on 29.04.2013 deposed that he saw one more person standing outside the medical shop, who ran away with the other three assailants. PW-3 further deposed that due to lapse of time he cannot identify the assailants. On that date, PW-3 was again declared hostile and permission was granted to the APP to cross-examine him. During the course of cross-examination by the APP, PW-3 deposed that even though on 27.01.2012 he had identified two assailants in the court, due to lapse of time he has forgotten their faces. PW-3 even refused to identify the assailant whose firearm had fallen down; who snatched the mobile phone from the deceased; who was standing outside the medical shop during the course of commission of the underlying offence. PW-3 was even confronted by the APP with his statements made to the police [Mark PW-3/PX1 and PW- 3/PX2]., wherein it was stated by him that Appellant No.2 bought medicine from the medical shop; Appellant No.3 snatched the mobile phone from the deceased; and K fired the bullet from the firearm, but to no avail. Further, PW-3 even refused to recall whether a live cartridge and an empty shell were recovered from the crime spot, despite he being a witness to those recoveries. CRL.A. Nos.231/2017, 317/2017 and 493/2017 Page 30 of 49 On the next date of examination i.e. 17.02.2014, during the course of cross-examination by the APP, PW-3 surprisingly

identified Appellant No.2 as the person who came at the medical shop to first buy the medicine and then again came first with a firearm, which was snatched by him; even though he had refused to so identify him on the last date of hearing. Further, PW-3 identified Appellant No.3 as the other person who was carrying the firearm. However, he was not able to identify whom out of Appellant No.2 or Appellant No.3 fired the fatal bullet. Furthermore, PW-3 also deposed that a live cartridge was seized; and sketches of the firearm, cartridge and empty shell were prepared in his presence.

38. A bare perusal of the testimony of PW-3 would show that in his testimony in relation to the number of persons involved in the commission of the offence and the role played by the Appellants, there are material contradictions. Initially there was no mention of a fourth person being involved in the commission of the offence, whereas, after the arrest of Appellant No.3, an attempt has been made to factor in the involvement of a fourth person. It would also be relevant to note that even in the statement of PW-3 to the police [Ex.PW-3/A]., there was no mention of any fourth person standing CRL.A. Nos.231/2017, 317/2017 and 493/2017 Page 31 of 49 outside the medical shop. PCR form [Ex.PW-13/A]. also finds mention of only three persons being involved in the commission of the offence. In relation to the aspect who fired the fatal bullet it would be relevant to note that PW-3 first identified Appellant Nos.1 and 2 as the assailants who entered the shop subsequently, and the former as the one who fired the fatal bullet. Thereafter, he refused to identify either of the Appellants. But subsequent thereto, he identified Appellant No.2 as the person who bought the painkiller and from whom he had snatched the firearm; and Appellant No.3 as the second assailant carrying a firearm, who entered the shop subsequently. At this point, it would also be relevant to note that PW-3 in his statement to the police had stated that K fired the fatal bullet. Going by the testimony of PW-3, if Appellant Nos.2 and 3 were only carrying firearms, how was it possible for Appellant No.1 or K to fire the fatal bullet unless and until there was an exchange of firearm, to which effect nothing has been deposed by PW-3. Moreover, even though first it was stated by PW-3 to the police that K fired the fatal bullet and thereafter in court that Appellant No.1 did; on a subsequent date i.e. 17.02.2014, PW-3 deposed that he was unsure as to whom out of Appellant Nos.2 and 3 fired the firearm. Therefore, resiling from his earlier

statement completely by not even mentioning the CRL.A. Nos.231/2017, 317/2017 and 493/2017 Page 32 of 49 name of either Appellant No.1 or K with the other appellants, between whom he was confused as to who fired the firearm. Further, the testimony of PW-3 has remained inconsistent in relation to the aspect who bought the medicine from the medical shop. PW-3 in his statement to the police has stated that Appellant No.2 bought the medicine, however, in his testimony in court deposed that latter came to the medical shop subsequently. Thereafter, during the course of cross-examination by the APP, PW-3 refused to identify Appellant No.2 as the person who bought the medicine; and on a subsequent date surprisingly identified the latter. Furthermore, PW-3 was not even able to identify the person who snatched the mobile phone of the deceased, despite having identified Appellant No.3 before the police.

39. To justify these contradictions in the testimony of PW-3, learned APP would invite our attention to an application filed by PW-3 before the Trial Court, wherein it was stated that the accused persons on 27.01.2012 threatened him after his deposition in court. Pursuant thereto, protection was afforded to PW-3 vide an order dated 31.08.2012. However, this submission would not come to the aid of the prosecution, since even if we were to consider the submission in relation to PW-3 being threatened on 27.01.2012 CRL.A. Nos.231/2017, 317/2017 and 493/2017 Page 33 of 49 to be true, it is evident that it did not hold PW-3 from deposing against the Appellants on subsequent dates.

40. Now we shall examine the testimony of PW-20. In relation to the sequence of events, it has been deposed by PW-20 that he reached at the medical shop around 9:00 P.M. The first assailant came to purchase the medicine around 10:45 P.M. and after taking the same he left. At that time, PW-3 and the deceased were present along with him at the medical shop. Ten minutes after leaving, the first assailant came back to the medical shop along with an associate. Both of them were carrying firearms. They jumped over the counter of the medical shop and came inside. They asked PW-3 for all the valuables, to which PW-3 objected and caught their hands, and in that process firearm of one of the assailants fell down. In the meanwhile, a third assailant who was carrying a knife came inside the medical shop and pulled down the shutter thereof. Further, the third assailant

caught hold of PW-20 and took him behind the rack where he was made to sit on the floor. PW-20 further deposed that from behind the rack he was not able to see what was happening in the front and could only hear the noise of PW-3 shouting and the sound of bullet being fired. After firing the bullet all the assailants ran away. PW-20 thereafter came to the counter of the shop and noticed that the CRL.A. Nos.231/2017, 317/2017 and 493/2017 Page 34 of 49 deceased had received a bullet injury on the right side of his forehead. PW- 20 further deposed that later he came to know that the assailants had also taken away the mobile phone of the deceased. PW-20 was thereafter declared hostile and permission was granted to the APP to cross-examine him, wherein it was deposed by him as follows: It is correct that the assailant who came first was wearing grey colour shirt and black jeans and he told me that he has met with an accident and bought painkiller for Rs.10 and he came back alone after 20-25 minutes and brought out a pistol from his shirt and threatened to hand over the cash, mobile, jewelry and ring failing which he would fire from the pistol. It is correct that when we tried to catch hold of that person, the pistol fell down from his hand. Vol. this happened after the arrival of the second person and we tried to catch hold both of them and then the pistol had fallen down from the hand of one of them. It is correct that Mulkh Raj Batra asked us to apprehend the assailant otherwise he would run away and then he brought out mobile phone to call the police at 100 number and then the other two assailants came at the shop. I do not know that out of the two persons who came later, one of them snatched the mobile phone make Nokia 1600 of grey black colour from Mulkh Raj Batra while the third assailant fired from katta at Mulkh Raj Batra or that I had stated so in my statement to the police, confronted with portion A to A of statement Mark PW20/A where this fact that Mulkh Raj Batra became unconscious because of bullet Injury on his head and our attention got diverted towards him and all the three assailants managed to run away is mentioned. It is correct 41. Insofar as the role alleged to be played by the Appellants in the commission of offence is concerned, PW-20 initially identified Appellant No.3 as the person who first came to the medical shop to buy painkiller and CRL.A. Nos.231/2017, 317/2017 and 493/2017 Page 35 of 49 after some time came back with his associate. PW-20 identified Appellant No.2 as the associate. However, during the course of cross-examination by the APP, PW-20 deposed

that out of Appellant Nos.2 and 3, one of them came first to buy medicine. PW-20 also refused to identify Appellant No.3 as the person who snatched the mobile phone of the deceased. During the course of cross-examination by the APP, PW-20 further admitted that before the police he had stated that Appellant No.2 bought the painkiller and thereafter came again to the medical shop with a firearm; Appellant No.3 snatched the mobile of the deceased; K fired the fatal bullet. Further, PW- 20 denied the suggestion put to him by the APP that he was not taken behind the desk or that he had seen the entire incident, including the firing of the fatal bullet by K.

42. A bare perusal of the testimony of PW-20 would reveal that he was taken behind a rack by one of the assailants from where he could not see who fired the fatal bullet resulting in the death of the deceased. Therefore, deposition of PW-20 loses significance with respect to the assailant who fired the fatal bullet at the deceased or the sequence of events leading to the fatal bullet being fired. It would also be relevant to note that PW-20 has only identified Appellant Nos.2 and 3 in court; and deposed only to the role CRL.A. Nos.231/2017, 317/2017 and 493/2017 Page 36 of 49 played by them in the commission of the offence, that too inconsistently. Nothing has been deposed by PW-20 against Appellant No.1 and the former has attributed no role to him, either in his deposition in court or statement to the police. Consequently, the presence of Appellant No.1 at the crime spot/medical shop is itself in doubt if the testimony of PW-20 is considered in isolation of the testimony of PW-2. Moreover, PW-20 stated before the police that K fired the fatal bullet, whereas, he has admitted in his testimony before the court that he was taken behind the desk by one of the assailants and therefore could not see who fired the bullet. There are contradictions in the testimony of PW-20 even in relation to number of assailants involved in the commission of the offence. PW-20 alike PW-3 initially deposed only about three assailants. However, subsequently four assailants in total were introduced, of which two were deposed to have come first and two thereafter. But, PW-20 thereafter deposed in court that he saw three assailants running away. Even in his statement to the police, PW- 20 had stated only towards the role played by three assailants viz. Appellant Nos.2 and 3 and K. CRL.A. Nos.231/2017, 317/2017 and 493/2017 Page 37 of 49 Further, PW-20 in his statement to the police had stated that Appellant No.2

bought the medicine from the medical shop. However, PW-20 in his testimony initially deposed that Appellant No.3 bought the medicine and thereafter that out of Appellant Nos.2 and 3 one of them came first to buy medicine. Further, there are inconsistencies in the testimony of PW-20 in relation to the aspect whether there was an attempt to overpower two assailants or one. The testimony of PW-20 is also contradictory with respect to whom out of him and PW-3 caught the hands of the assailants, due to which firearm of one of the assailants fell down. PW-20 initially deposed that PW-3 caught their hands, whereas subsequently it was deposed by him that he along with the latter caught their hands. What was least expected of PW-20 was to be able to identify the assailant who allegedly took him inside near the inverter. However, there is no clarity in his testimony even in relation to that aspect. PW-20 in court was also not able to identify Appellant No.3 as the person who snatched the mobile phone of the deceased, even though in his statement to the police [Ex.PW-23/N]. he had stated to that effect. CRL.A. Nos.231/2017, 317/2017 and 493/2017 Page 38 of 49 43. The testimonies of PW-3 and PW-20 also do not inspire confidence when considered inter se. On examination of the testimonies of PW-3 and PW-20 vis--vis each other, it would come to light that the testimonies of the eye witnesses are inconsistent with respect to the number of assailants involved in the commission of the offence as well as on other material aspects. There is also no clarity even with respect to the person who fired the fatal bullet, let alone the role played by the other assailants.

44. The Trial Court whilst acknowledging the contradictions in the testimonies of PW-3 and PW-20, concluded that there is no confusion with respect to the presence of the Appellants at the crime spot. The Trial Court further went on to observe that PW-3 and PW-20 have deposed the incident in a cogent manner and their testimonies coincided completely with what they stated during investigation.

45. In our considered view, the conclusion arrived at by the Trial Court that there is no confusion with respect to the presence of the Appellants at the crime spot and they are liable to be convicted, is perverse.

46. As discussed hereinbefore, PW-3 and PW-20 have not deposed in a coherent manner and there are material contradictions and inconsistenceis in their

testimonies with respect to the sequence of events, role played by the CRL.A. Nos.231/2017, 317/2017 and 493/2017 Page 39 of 49 Appellants, as well as, in relation to the number of assailants involved in the commisssion of the underlying offence; and, resultantly, the same do not inspire confidence. As a consequence thereof, even the identification by PW- 3 and PW-20 of the Appellants also comes under the shadow. In this behalf, we are also guided by the decision of the Honble Supreme Court in Parveen Kumar (supra). In the said report, the Honble Supreme Court while rejecting the two dying delcarations, being inconsistent to each other, observed as follows: it is satisfied that 9. Counsel for the State submitted that since the respondent has been named in both the dying declarations, his conviction could be sustained. We are afraid we cannot accede to his request. In the first place, in appeal against acquittal, this Court will not set aside the findings of fact and the order of acquittal recorded by the High Court unless recorded are wholly unreasonable, perverse, not based on evidence on record, or suffer from serious legal infirmity. The mere fact that on the basis of the same evidence another view is possible, is not a ground for setting aside an order of acquittal. We find that the view taken by the High Court is a possible reasonable view on the evidence on record and, therefore, we will not be justified in setting aside the order of acquittal. the findings 10. While appreciating the credibility of the evidence produced before the court, the court must view the evidence as a whole and come to a conclusion as to its genuineness and truthfulness. The mere fact that two different versions are given but one name is common in both of them cannot be a ground for convicting the named person. The court must be satisfied that the dying declaration is truthful. If there are two dying declarations giving two different versions, a serious doubt is created about the truthfulness of the dying declarations. It may be that if there was any other reliable evidence on record, this Court could have CRL.A. Nos.231/2017, 317/2017 and 493/2017 Page 40 of 49 considered such corroborative evidence to test the truthfulness of the dying declarations. The two dying declarations, however, in the instant case stand by themselves and there is no other reliable evidence on record by reference to which their truthfulness can be tested. It is well settled that one piece of unreliable evidence cannot be used to corroborate another piece of unreliable evidence. The High Court while considering the evidence on record has laid down by this Court in

Thurukanni Pompiah v. State of Mysore [AIR 1965 SC939: (1965) 2 Cri LJ31 and Khushal Rao v. State of Bombay [1958 SCR552:

1958. Cri LJ106 . rightly applied the principles 11. The High Court having subjected the dying declarations to close scrutiny, has reached the conclusion that they are not reliable. We entirely agree.

12. We, accordingly dismissed. therefore, find no merit in the appeal and the same is (Emphasis supplied) 47. Further, the Trial Court also fell into error in holding that PW-3 and PW-20 have deposed in a cogent manner and their testimonies coincided completely with what they said during investigation. This conclusion arrived at by the Trial Court is wrong on the face it, inasmuch as, the respective testimonies of PW-3 and PW-20 when compared to the statements made by them to the police during investigation, would show that there are material contradictions in both the versions.

48. In view of the foregoing discussion, we are of the considered view that PW-3 and PW-20 are not creditworthy witnesses so as to render a finding of conviction upon the testimonies thereof. CRL.A. Nos.231/2017, 317/2017 and 493/2017 Page 41 of 49 Test Identification Parade (TIP) 49. Coming to the aspect of TIP proceedings. Appellant No.2 was identified in TIP by PW-20 on 21.04.2011 [Ex.PW-7/B].. On 17.12.2011, TIP in relation to Appellant No.3 was also conducted, however, he refused to participate in the same [Ex.PW-7/B1].. Further, it is an admitted position that no TIP was conducted of Appellant No.1.

50. No doubt that refusal by Appellant No.3 to participate in TIP would enable the court to draw an adverse inference against him, but that would not substitute for the burden on the prosecution to prove the charges against an accused beyond reasonable doubt.

51. Insofar as the factum of identification by PW-20 of Appellant No.2 in TIP is concerned, reliance has been rightly placed by counsel for the Appellants on the decision of this Court in Rahisuddin (supra), wherein, a Division Bench of this Court whilst disbelieving the testimony of the solitary eye-witness observed as follows: 37. The testimony of the solitary eye-witness, namely Lalit Kumar @ Rinku

does not inspire confidence and it would not be safe to act upon it to fasten a finding of guilt. As highlighted by us, the conduct of the said witness is unnatural and the version of occurrence adduced by him is in teeth with the scientific/medical evidence produced by the prosecution. The fact that state of articles found lying at scene of crime is not explained by the testimony of this witness, raises more questions than answering the same. CRL.A. Nos.231/2017, 317/2017 and 493/2017 Page 42 of 49 38. Indeed, successful identification of the accused by an eye- witness in TIP does lend corroboration/assurance to the dock identification of such accused in Court. However, merely because a witness identified the accused in TIP at the stage of investigation cannot cast aside the serious embellishments in his testimony before the Court and immune his evidence from judicial scrutiny. It is a settled proposition of law that the Test Identification Parade is merely an aid at the step of investigation and cannot attain the altar of substantive evidence.

39. The case of the prosecution hinges exclusively on the testimony of Lalit Kumar @ Rinku and there is no other evidence available on record to evince the involvement of the present appellant. We have expressed weighty reasons that impel us to jettison the evidence of Lalit Kumar @ Rinku from judicial consideration and de hors the said evidence, case of the prosecution does not survive. (Emphasis supplied) 52. In view of the foregoing, when the testimony of PW-20 itself has been discredited, identification of Appellant No.2 by PW-20 in TIP will not come to the aid of the prosecution. Recovery 53. The other piece of evidence sought to be relied upon by the prosecution is the recovery of mobile phone of the deceased from Appellant No.1.

54. The circumstances of the present case indicate that robbery and murder were part of the same transaction. However, mere recovery of stolen property from the accused, in the absence of any other evidence, would not CRL.A. Nos.231/2017, 317/2017 and 493/2017 Page 43 of 49 be a safe ground to draw an inference that Appellant No.1 committed the murder. Furthermore, in such a circumstance, conviction would be also be dependent upon the nature of the property recovered, and whether it was likely to pass readily from hand to hand. Suspicion would not take the place of proof. [Ref: State of Rajasthan v. Talevar, reported as (2011) 11

SCC666 55. In the present case, the property recovered from Appellant No.1 is the mobile phone of the deceased. The mobile phone was was likely to be passed readily from hand to hand. It would also be relevant to note that the recovery was made two months after the date of the incident.

56. Therefore, recovery of the mobile phone of the deceased from Appellant No.1 two months after the incident would not be sufficient to convict Appellant No.1 for the underlying offences and, at most, he can be convicted for the offence punishable under the provision of section 411 IPC, for being in possession of stolen property. [Ref: Nagappa Dondiba Kalal v. State of Karnataka reported as 1980 (Supp) SCC336 57. Even though a contention was sought to be raised on behalf of Appellant No.1 that the recovery of mobile phone from Appellant No.1 is tainted since, inter alia, there is no mention either in the PCR form [Ex.PW-CRL.A. Nos.231/2017, 317/2017 and 493/2017 Page 44 of 49 13/A]. or the crime team report [Ex.PW-2/A]. about the mobile phone being taken away by the assailants; the said contention is liable to be rejected, inasmuch as, relevant witnesses were not examined even in this behalf. No explanation 58. The Honble Supreme Court in Rajkumar v. State of Madhya Pradesh reported as (2014) 5 SCC353 observed in relation to duty of the accused to furnish an explanation under Section 313 Cr PC regarding any incriminating material produced against him, as follows: 21. Admittedly, the appellant did not take any defence while making his statement under Section 313 Cr PC, rather boldly alleged that the family of the deceased had roped him falsely at the instance of the police. However, the appellant could not reveal as to for what reasons the police was by any means inimical to him.

22. The accused has a duty to furnish an explanation in his statement under Section 313 Cr PC regarding any incriminating material that has been produced against him. If the accused has been given the freedom to remain silent during the investigation as well as before the court, then the accused may choose to maintain silence or even remain in complete denial when his statement under Section 313 Cr PC is being recorded. However, in such an event, the court would be entitled to draw an inference, including such adverse inference against the accused as may be permissible in accordance with law. (Vide Ramnaresh v. State of Chhattisgarh

[(2012) 4 SCC257: (2012) 2 SCC (Cri) 382]. , Munish Mubar v. State of Haryana [(2012) 10 SCC464: (2013) 1 SCC (Cri) and Raj Kumar Singh v. State of

AIR 2013 SC912 Rajasthan [(2013) 5 SCC722: (2013) 4 SCC (Cri) 812]. .) CRL.A. Nos.231/2017, 317/2017 and 493/2017 Page 45 of 49 23. In the instant case, as the appellant did not take any defence or furnish any explanation as to any of the incriminating material placed by the trial court, the courts below have rightly drawn an adverse inference against him. The appellant has not denied his presence in the house on that night. When the children were left in the custody of the appellant, he was bound to explain as under what circumstances Gounjhi died. (Emphasis supplied) 59. No doubt that failure of accused to furnish an explanation with respect to any incriminating material put to him would entitle the court to draw an adverse inference against him, however, we should not be oblivious of the fact that the initial burden is on the prosecution to prove all the charges against the accused beyond reasonable doubt. The guilt of the accused must be conclusively proved by direct or circumstantial substantive piece of evidence.

60. Further, the prosecution must stand or fall on its own legs and it cannot derive any strength from the weakness of the defence. Although, where all the links in the chain of events are complete, a false plea or a defence may be called into aid but only to lend assurance to the court. In other words, before using the additional link it must be proved that all the links in the chain are complete and do not suffer from any infirmity. It is not the law that any infirmity or lacuna in the prosecution case could be cured or CRL.A. Nos.231/2017, 317/2017 and 493/2017 Page 46 of 49 supplied by a false defence or a plea which is not accepted by the court. [Ref: Sharad Birdhichand Sarda v. State of Maharashtra reported as (1984) 4 SCC116 61. The evidence available on record has either been discredited or held to be not sufficient to render a conviction thereupon. The prosecution has failed to bring home the guilt of the accused. Now the prosecution cannot seek to fall back on the statement of the Appellants recorded without oath under Section 313 Cr PC.

62. Therefore, in light of the facts and circumstances of the present case, failure on the part of the Appellants to furnish an explanation with respect to the incriminating material put to them, would not come to the aid of the prosecution.

Conclusion 63. A Division Bench of the High Court of Bombay in Geeta Keshav Shankar v. The State of Maharashtra reported as 2009 (111) BomLR1163observed as follows: 62. The standard of proof in criminal case has to be beyond reasonable doubt. This expression is of higher standard, of course, there cannot be absolute standard stating degree of proof. This could depend upon the facts of a given case. Doubts would be called reasonable if for abstract speculation. To constitute reasonable doubt, it must be free from an over emotional response. Doubts must be actual and they are free from zest CRL.A. Nos.231/2017, 317/2017 and 493/2017 Page 47 of 49 substantial doubts as to the guilt of the accused person arising from the evidence. (Emphasis supplied) 64. In the given factual background, the possibility of persons other than the Appellants having committed the underlying offence cannot be ruled out with a fair degree of certainty. Convicting the appellants on the scanty evidence available on record would amount to conviction on mere suspicion and supposition. In our considered view, the offence has not been proved against the Appellants beyond reasonable doubt and lacks the certainty required and mandated by law.

65. Therefore, the present appeals are allowed and the impugned judgment is set aside. However, in the given factual scenario, Appellant No.1 is convicted for the offence punishable under the provision of section 411 IPC and is directed to undergo imprisonment for a period of 3 years. However, if already undergone incarceration for the said period, Appellant No.1 along with Appellant Nos.2 and 3 are directed to be set at liberty forthwith, subject to their not being required in any other case.

66. Pending applications stand disposed off. CRL.A. Nos.231/2017, 317/2017 and 493/2017 Page 48 of 49 67. Copy of the judgment be supplied to the Appellants through the Superintendent, Central Jail, Tihar for necessary information and compliance, and also be sent for updation of the records. SIDDHARTH MRIDUL, J.

NAJMI WAZIRI, J.