

Bijender vs.state

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Court : Delhi

Decided On : May-24-2018

Appellant : Bijender

Respondent : State

Advocate for Pet/Ap. : Mr. Sumer Kumar Sethi, Mr. Hirein Sharma, Mr. Mukesh Kalia, Mr. M.L. Yadav, Mr. Mukul Gupta, Mr. Vibhor Garg, Mr. Tushar Gupta, Mr. Sumit Kr. Mishra, Mr. Deepanshu Panwar, Ms. Aishwarya Rao, Mr. Aditya Aggarwal, Ms. Samia Malik

Judgement :

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

10. h May, 2018 Pronounced on:

24. h May, 2018 + CRL.A. 370/2002 MOHD.SHAHID THE STATE + BIJENDERAppellant Through: Mr. Sumer Kumar Sethi, Advocate. versusRespondent Through: Mr Hirein Sharma, APP for the State CRL.A. 404/2002Appellant Through: Mr. Mukesh Kalia and Mr M.L. Yadav Advocates. versus STATERespondent Through: Mr Hirein Sharma, APP for the State CRL.A. 507/2002 + MOHD. HANIF @ MONTIAppellant Through: Mr. Mukul Gupta, Sr. Advocate with Mr Vibhor Garg, Mr. Tushar Gupta, Mr. Sumit Kr. Mishra and Mr. Deepanshu Panwar, Advocates. versus STATE OF DELHIRespondent + RAFIQ AHMAD @ CHOOTU Through: Mr Hirein Sharma, APP for the State CRL.A. 529/2002

.....Appellant Through: Ms. Aishwarya Rao, Advocate. Crl.A.370/2002 & connected appeals Page 1 of 31 versusRespondent Through: Mr Hirein Sharma, APP for the State CRL.A. 716/2002 + HASHIM SIDDIQUIAppellant Through: Mr. Aditya Aggarwal and Ms. Samia Malik, Advocate. versus STATE STATERespondent Through: Mr Hirein Sharma, APP for the State CORAM: JUSTICE S. MURALIDHAR JUSTICE I.S. MEHTA

JUDGMENT

Dr. S. Muralidhar, J.:

1. These five appeals are directed against the judgment dated 2nd April, 2002 passed by the Additional Sessions Judge, New Delhi (ASJ) in Sessions Case No.52/1998 arising out of FIR No.229/1997 registered at Police Station (PS) Mehrauli convicting Rafiq Ahmed @ Chottu (Accused No.1 - A-1) (Appellant in Crl.A.529/2002); Bijender (A-2) (Appellant in Crl. A.404/2002); Mohd. Shahid (A-3) (Appellant in Crl. A.370/2002); Mohd. Hanif @ Monti (A-4) (Appellant in Crl. A.507/2002); and Hashim Siddiqui (A-5) (Appellant in Crl. A.716/2002) for the offences under Sections 302 read with Section 34 of the Indian Penal Code (IPC); Section 307 read with Section 34 IPC and Section 506 read with Section 34 IPC. Crl.A.370/2002 & connected appeals Page 2 of 31 2. The appeals are also directed against the order on sentence dated 5th April, 2002 whereby each of the Appellants was sentenced by the trial Court as under: (i) For the offence under Section 3

IPC, to undergo imprisonment for life with a fine of Rs.500/- each; and in default of payment of fine to undergo rigorous imprisonment (RI) for six months. (ii) For the offence under Section 3

IPC, to undergo RI for four years with a fine of Rs.500/- each; and in default of payment of fine to undergo RI for three months. (iii) For the offence under Section 5

IPC, to undergo RI for a period of two years. All sentences were directed to run concurrently. Charges 3. The Appellants along with Shakil (proclaimed offender) were charged with committing the murder of Dinesh (deceased) on 28th April, 1997 at around 1.30 pm near the Kalra Flour Mill, Gali Sabzi Mandi, Mehrauli. By the impugned judgment, three of the accused, i.e., A-6, A-7 and A-8, were

acquitted of the said offence.

4. The further charge was that all the Appellants along with a proclaimed offender (PO) Shakil in furtherance of their common intention caused grievous injuries to Puneet (PW-2) with a sharp object and thereby CrI.A.370/2002 & connected appeals Page 3 of 31 committing an offence punishable under Section 307 read with Section 34 IPC.

5. The third charge was that in furtherance of their common intention, the Appellants along with PO Shakil criminally intimidated PW-2 and Ashok Kumar (PW-6) with injuries and with intention to cause alarm of dire consequences to these persons thereby committing an offence punishable under Section 5 IPC. The incident 6. The criminal justice process was set in motion with PW-2 reaching PS Mehrauli and meeting Sub Inspector (SI) R.P. Sharma (PW-17) at the front gate of the PS and informing him that his friend (deceased) had been stabbed with knives. This fact was mentioned in the rukka (Ex.PW2/A).

7. On receiving the above information, PW-17 along with Constable Vijender (PW-23) left for the spot along with PW-2, who was himself in an injured condition. On reaching the spot, they found the deceased in an unconscious condition with knife injuries. He along with PW-2 was taken by PW-23 in a three-wheeler scooter rickshaw (TSR) to the All India Institute of Medical Sciences (AIIMS). Meanwhile, PW-17 stayed back at the spot.

8. There were two MLCs prepared at AIIMS - one concerning the deceased (Ex.PW24/A) and the other concerning PW-2 (Ex.PW24/B). The MLC of the deceased showed that he was brought there by PW-23 and brother Suresh Mehta (PW-1) at 2:12 pm. It was recorded there that he was brought CrI.A.370/2002 & connected appeals Page 4 of 31 dead.

9. As far as the MLC of PW-2 was concerned, it showed that he was brought to AIIMS by PW-23 at 2:14 pm. He was examined by Dr. N. Mohan, whose handwriting was later identified at the trial by Dr. S Roy (PW-24). It was noted in the MLC: allegedly stabbed by some person one hour ago. There were two cut injuries noted in the MLC. The first was a 4.5 cm injury in the palm, which was a

linear cut started just below the wrist line. The second was a horizontal clear cut over the dorsal aspect of the left index finger above the MP Joint. The nature of injuries were noted as grievous.

10. Meanwhile at 2.02 pm, another information recorded as DD No.14A (Ex.PW8/D) was received at PS Mehrauli regarding the stabbing with a knife near Shiv Mandir, Main Market, Mehrauli. This too was marked to PW-17 by the Duty Officer (DO). Post mortem 11. The post-mortem of the deceased was performed by Dr. OP Murathi (PW-8) on 29th September, 1997. He first described how the black jeans worn by the deceased were showing one cut of 2.2 cm just below the right knee. The printed shirt was having one arm folded, another straight with a button missing and showing fresh cuts and tears. One cut was 2.9 cm obliquely placed over the right middle from chest above the base of the shirt. On the left front side of the shirt there were two fresh cut marks just over the pocket and another in the middle of the pocket. Another L-shaped cut was present over the long arm and another below the collar bone. The clothing CrI.A.370/2002 & connected appeals Page 5 of 31 showed tears and cuts corresponding to the injuries all over the body.

12. As far as the external injuries were concerned, PW-8 noticed as many as 16 wounds - four of which were contused wounds and abrasions and twelve were incised wounds. The death was due to haemorrhage consequent upon the multiple stab injuries caused by multiple sharp edged weapons. Some were caused by a double-edge weapon and others by blunt objects. The time since death was about one day prior to the conduct of the post-mortem examination. The stomach of the deceased was found empty at the time of post-mortem and this was confirmed in the cross-examination.

13. Later the seized weapons (Ex. P7 and P8) were shown to PW-8 and he confirmed that the incised stab wounds described in the post-mortem report were possible to have been caused by these weapons. Investigation 14. Inspector Sarabjit Singh (PW-28) was the Investigating Officer (IO) of the case. He stated that on 28th April, 1998 itself after receiving the original rukka, he came to the spot along with SI Chinta Singh (PW19). There, PW- 17 along with PW-2, PW-6 and

Head Constable (HC) Ram Parkash (PW-

29) met him. On the pointing out of PW-2, PW-28 prepared the site plan (Ex.PW28/A). He collected the blood and the bloodstained earth and control earth samples from the spot. A chappal (slipper) was also lying on the spot which was seized and sealed by him. The clothes of PW-2 were also seized and sealed by him. After the post-mortem was completed, he collected the clothes of the deceased and other articles and deposited them in the CrI.A.370/2002 & connected appeals Page 6 of 31 malkhana. Arrests and seizures 15. On 30th April, 1997, PW-28 received information that Chottu @ Rafiq (A-1) was present at his house near Pare Wali Masjid within the jurisdiction of PS Mehrauli. One public witness Amit Kaul (PW-16) joined PW-28 and his team. On the pointing out of the informer, A-1, who was standing at the gate of his house, was apprehended. Upon interrogation, A-1 made a disclosure statement and offered to get the knife and his bloodstained pant recovered from the house of his chacha (uncle) in Village Chandanhola. He then led the police party there and from the outer room beneath the gadda took out a green polythene bag in which bloodstained jeans and a bloodstained dagger were found. The dagger was sealed in a cloth parcel. The jeans pant was also sealed in a separate parcel. A-1 was arrested and his personal search was undertaken.

16. A-1 then led the police party to Village Asola, to the house of Bijender (A-2) who was found present there at the time. He too was interrogated and disclosed that the knife used by him was kept in the inner room of his house. He then got the said knife recovered which was then seized and sealed. Thereafter along with A-1 and A-2 the police party went to the house of Mohd. Shahid (A-3) near Olia Masjid at the instance of A-1. He was apprehended and his personal search was conducted. A-3 also made a disclosure statement and offered to get the knife used by him recovered from the paharis of Andheria More. The police party went there and undertook a search but the knife could not be recovered. CrI.A.370/2002 & connected appeals Page 7 of 31 17. On 1st May, 1997, the three accused were produced in the concerned Court and remanded to judicial custody. A test identification parade (TIP) was fixed for 9th May, 1997, but A-2 refused to participate in it. A-3 was correctly identified by PW-2.

18. On 31st May, 1997, PW-28 received secret information that Mohd. Hanif @ Monty (A-4) would come near the Modi Hospital, Hauz Rani. On the pointing out of PW-2 present as a public witness with the police party, A-4 was arrested and his personal search conducted. He made a disclosure statement and offered to get the knife and the clothes used by him at the time of the incident recovered from a place in Bulandshahar. However, despite search in several places, including Bulandshahar neither the knife nor the clothes could be recovered.

19. On 3rd June, 1997, PW-28 received information that Hashim Siddiqui (A-5) would be present at the Mehrauli Bus Terminal. Again on the pointing out of PW-2, he was arrested. He too made a disclosure statement and offered to get the knife used by him and the clothes worn by him recovered from Bulandshahar. Despite search, those articles could not be recovered. A- 5 is stated to have refused to join the TIP.

20. At the end of the investigation, a charge-sheet was filed and by an order dated 4th January, 1999, charges were framed against the five accused persons, as indicated hereinabove. CrI.A.370/2002 & connected appeals Page 8 of 31 21. On behalf of the prosecution, 29 witnesses were examined. In the initial statement under Section 313 of the Code of Criminal Procedure (Cr PC), each of the accused denied all the incriminating circumstances put to them. Each of them claimed to have been falsely implicated. After the opinion of the doctor (PW-8) as regards the use to the weapons recovered was received, further statement was recorded of each of the accused. No witness was examined on behalf of the defence. Impugned judgment of the trial Court 22. By the judgment dated 2nd April, 2002, the trial Court reached the following conclusions: i. The mere fact that there was an incident three months prior to the killing of the deceased in which the deceased and PW-2 had beaten A-1 and A-4, could not be a reason for discarding the eye witness testimony of PW-2 or for that matter of his friends PWs 3 and 5. It only meant that their testimonies required to be examined cautiously and minutely. ii. PW-5 admitted that his statement was not recorded by the police on 28th April, 1997. There was nothing to infer that prior to 11th June, 1997, he never met the police or informed them about the incident. If the IO did not record his statement earlier than 11th June, 1997, PW-5 could not be blamed for the delay. It would

also not be a ground for rejecting his eye witness testimony. iii. Further, only because PW-5 could not give details of the ailment from CrI.A.370/2002 & connected appeals Page 9 of 31 which his relative was suffering, and which relative had been admitted for that purpose at Safdarjung Hospital where PW-5 and the deceased were going to visit him, would not discredit his testimony altogether. If there was inconsistency between the ocular and the medical evidence, the former would be preferred if otherwise found to be trustworthy and truthful. iv. Merely because PW-5 did not try to save the deceased at the time of incident and did not accompany him to the hospital, cannot lead to the conclusion that he was not an eye witness. v. PW-5 saying in his evidence that A-3 was not one of the assailants showed his truthfulness. The fact that PW5 had named six persons earlier in his statement to the police under Section 161 Cr PC but denied having done so in his testimony in the Court did not discredit him per se. This should have been clarified by the IO, but it was not done so. Therefore, the accused could not take advantage of the said lapse. The presence of PW-5 got strengthened from the fact that in his cross-examination on behalf of A-1 and A-4, it was suggested to him that when he had gone to the terrace of Kalra Flour Mill, he did not see anything. vi. Further, PW-5 had no prior enmity with any of the accused persons. He knew A-1 and A-4 before the incident and, therefore, he was able to describe what they did to the deceased. PW-5 did not know either A-2 or A-5, but was able to identify them in the Court as persons who had inflicted injuries on the deceased with the knives. His evidence remained unshaken and, therefore, his oral testimony was sufficient to bring home the guilt of the A- CrI.A.370/2002 & connected appeals Page 10 of 31 1, A-2, A-4 and A-5. vii. The evidence of PW-5 was corroborated by the post mortem report and his presence being mentioned in the FIR itself. Moreover, A-2 and A-5 had refused to participate in the TIP. According to Inspector Sarabjit Singh (PW- 28), both A-2 and A-5 had been kept in muffled faces and therefore there was nothing to show that they had been shown to PW-5 before the TIP. viii. Likewise, the cross-examination of PW-2 also did not yield much for the accused. It could not be shown that the accused had been shown to PW-2 in the PS before the TIP. Even though PW-2 exonerated A-3, his evidence could not be rejected on that ground. PW-2 named A-1, A-2, A-3, A-4 and A-5 as the persons who had inflicted injuries on the deceased and himself. He

also deposed that on 28th April, 1997, he could not tell the police that there were six assailants as he was perplexed. He was an injured witness and therefore his presence at the time of occurrence could not be doubted. ix. As regards the presence of PW-1, the brother of the deceased, neither PW-2 nor PW-18 or PW-23 had claimed that PW1 was present at the spot. A comparison of the statement made to the police by PW-1 under Section 161 Cr PC showed that he had not therein disclosed about having taken the deceased to the hospital even before the arrival of the police. In the absence of any such statement there was no need for the APP to get any clarification from PW-1. According to PW-5, the house of the deceased was five minutes walking distance from the place of the incident, so, it is possible that PW-1 might well have reached AIIMS around the same time as the deceased and Crl.A.370/2002 & connected appeals Page 11 of 31 PW-2, met the doctor and got his name mentioned in the MLC, as a relative of the deceased. x. The failure to take the bloodstained clothes of constable Vijender (PW23) did not weaken the case of the prosecution. The IO was not cross examined on this aspect. The discrepancy about PW-17 claiming that he and PW-23 had placed the deceased in a three-wheeler whereas PWs 2 and 3 claimed that they had done so did not amount to a contradiction because PW-17 did not say that the others were not present at that time. xi. The failure of PW-2 to disclose the names of the assailants to the doctor who had examined him could not result in his evidence being discarded in its entirety. Since the FIR had actually been lodged on the statement of the injured eye witness PW-2 and which contained the name of the accused, the failure to disclose the name to the doctor at the time of medical examination would not be fatal to the prosecution. xii. As regards the alleged ante-timing of the FIR, HC Ranbir Singh (PW-

10) who recorded it was not cross examined on this aspect. PW-17 leaving the PS for the spot without informing the SHO was not unusual considering that his first duty was to help the deceased. The fact that even with his injuries, PW-2 had gone to the PS immediately and then was taken to the hospital where he was medically examined at 2.15 pm and the prompt lodging of the FIR thereafter added guarantee to the veracity of his testimony. The collective examination of the testimonies of PWs 2, 3 and 5 showed that six persons were really involved in the incident. Crl.A.370/2002 & connected appeals Page 12 of 31 xiii. Since PW-2 had

correctly identified A3 in the TIP, his statement about the involvement of A-3 could be relied upon. If indeed A-3 was not involved, then PW-3 could not have identified him in the TIP. PW-3 corroborated PWs 2 and 5 where he too had stated that there were six assailants. The non-examination of public witnesses present at the time of the incident was also not fatal to the prosecution. xiv. A-3 and A-4 had taken the plea of alibi but these pleas were held to be false and this proved another link in the chain of circumstances. The discrepancy in the site plan about the exact spot of the crime was again not material enough since the bloodstained earth lifted by the police contained human blood of group A as per the FSL report and the blood group of the deceased was of A group. However, because of the long lapse of time, the blood could not be detected on some of the exhibits. The non-examination of the driver of the TSR was not significant as it was not necessary for the prosecution to examine each and every person. xv. The evidence regarding the arrest and recovery of two weapons at the instance of A-1 and A-2 was spoken to by an independent witness PW-16, who, however, turned hostile. The police witnesses have, however, spoken consistently in this regard. The seizure memo was in fact signed by PW-16. The evidence of police witnesses could be, therefore, safely relied upon for proving the recoveries.

23. The trial Court concluded that the prosecution was able to prove the CrI.A.370/2002 & connected appeals Page 13 of 31 charges against A-1 to A-5 and proceeded to convict them for the offences with which they were charged. It sentenced them accordingly.

24. This Court has heard the submissions of Mr. Mukul Gupta, learned Senior Counsel appearing for Mohd. Hanif @ Monti (A-4); Mr. Mukesh Kalia, learned counsel appearing for Bijender (A-2); Ms Aishwarya Rao, learned counsel appearing for Rafiq Ahmed @ Chottu (A-1); Mr. Sumer Kumar Sethi, learned counsel appearing for Mohd. Shahid (A-3); and Mr. Aditya Aggarwal, learned counsel appearing for Hashim Siddiqui (A-5). Mr. Hirein Sharma, learned APP, made submissions for the State. Law relating to eye witness testimony 25. This is a case based on eye witness testimony. The star witness on behalf of the prosecution is the injured victim Puneet (PW2). The two other eye witnesses relied upon are Ashok (PW-3) and Sonu @ Kamal (PW-5).

26. Before proceeding to analyse their evidence, the law relating to appreciation of eye witness testimony may be briefly recapitulated. In *State of U.P. v. Noorie @ Noorjahan* AIR 1996 SC3073 the Supreme Court explained:

"While assessing and evaluating the evidence of eye-witnesses the Court must adhere to two principles, namely, whether in the circumstances of the case it was possible for the eye witness to be, present at the scene and whether there is anything inherently improbable or unreliable..Credibility of a witness has to be decided by referring to his evidence and finding out how he has fared in cross-examination and what impression is created by his evidence *Crl.A.370/2002 & connected appeals* Page 14 of 31 27. Further, minor discrepancies would not usually affect the credibility of an eye witness testimony for a variety of reasons. This aspect was elaborated by the Supreme Court in *Bharwada Bhoginbhai Hirjibhai v. State of Gujarat* AIR 1983 SC753as under: Over much discrepancies. The reasons are obvious: importance cannot be attached to minor (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 or 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 take place in rapid succession or *Crl.A.370/2002 & connected appeals* Page 15 of 31 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 counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him. Perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment. Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all important "probabilities-factor" echoes in favour of the version narrated by the witnesses. 28. The eye witness may be related to the victim or might have had a dispute previously with any of the accused. That per se will not persuade the Court to discard such evidence. It only mandates a more careful scrutiny of such evidence. As explained in *Lakhwinder Singh v. State of Punjab* AIR 1993 SC87 simply on the score that the deceased was related to the eye-witnesses or previously there were some disputes between the appellant and the eye-witnesses, their testimonies do not deserve to be discarded because in our view, the testimony of the said eye-witnesses was otherwise convincing and the same also stood corroborated by other facts established by the prosecution. 29. In the present case, the star witness for the prosecution is PW-2, who CrI.A.370/2002 & connected appeals Page 16 of 31 was himself injured in the incident. In this context it would be useful to recall the observation of the Supreme Court in *Paresh Kalyandas Bhavsar v. Sadiq Yakubhai Jamadar* AIR 1993 SC1544 that injured witnesses would be the last persons to leave out the real culprits and implicate others falsely. It was observed: It is needless to say that mere interestedness is not a ground to reject the evidence of the eye witnesses particularly those who were injured. Firstly their presence during the occurrence cannot be doubted. Secondly the injured witnesses would be the last persons to leave out the real culprits and implicate others falsely. However, it becomes necessary to scrutinise their evidence with great care and caution. Normally in a case of this nature the evidence of such witnesses is scrutinised in the light of the medical evidence, their previous statements, the earliest version put forward and other circumstances like the

investigation being defective and also the effect of omissions or discrepancies, if any. Analysis of the eye witness testimonies 30. In light of the above legal position, the Court proceeds to analyse the evidence of the eye witnesses. According to PW-5, he and the deceased were going to Safdarjung Hospital to meet a relative of PW-5, who had been admitted there. They intended to ask for the ward number in the hospital from PW-5s house. As they reached the Kalra Flour Mill, A-1 and A-4 along with two other unknown boys met them and started beating the deceased and PW-5. PW-5 then went to a nearby room of Harish @ Bawa to seek help. PW-2 and PW-3 who were present there accompanied PW-5 to the spot and tried to intervene. However, A-1 and the others inflicted injuries on PW-2 as well. They attacked the deceased and PW-2 with knives they were carrying. Straight from the spot, PW-2 immediately went to PS CrI.A.370/2002 & connected appeals Page 17 of 31 Mehrauli, met Inspector R.P. Sharma (PW-17), who along with Constable Vijender (PW-23) rushed to the spot and found the deceased in an injured condition. PW-23 then took the deceased and PW-2 to AIIMS.

31. PW-2, apart from being an eye witness, also spoke about the motive for the occurrence. According to him, about 3-4 months prior to 28th April, 1997, the deceased and PW-2 had a quarrel with A-1 and A-4 at a school cricket ground in front of Qutab and had beaten them up. Since then, A-1 and A-4 had borne a grudge against the deceased and PW-2. According to PW-2, on 26th April, 1997, two days prior to the incident, A-1 and A-4 had quarrelled with the deceased and PW-2 whilst they were at the Mehrauli bus stand.

32. As already noted, both the deceased and PW-2 were taken to AIIMS at around 2:12 pm. The deceased was declared brought dead. PW-2 was severely injured, as his injuries were marked grievous. PW-17 recorded the statement of PW-2 at AIIMS itself at around 4.15 pm after the doctor there declared him fit for statement. Thereafter, the FIR was registered on the basis of the said statement at around 5.30 pm.

33. The criticism of the evidence of PW-2 is that he was not present at the spot and was a planted witness. It is contended that PW-2 could have easily inflicted those injuries on himself because they were cut wounds on the left wrist and left

palm. It is submitted that according to PW-17, he had moved an application (Ex.PW17/A) before the doctor at AIIMS for recording the statement of PW-2. It is submitted that when the handwriting on this CrI.A.370/2002 & connected appeals Page 18 of 31 application is compared with the handwriting of the statement itself (Ex.PW2/A), they are different and therefore this raised a grave suspicion whether at PW-2 was present at all. It is submitted that the IO (PW-28) stated that during his stay at the spot, he had recorded the statements of PWs 2 and 3. Since there was only one statement of PW-2, it belied his presence at the spot.

34. The above criticism overlooks the fact that there is a mention in the rukka at the bottom that PW-2 had reached PS Mehrauli, met PW-17 at the front gate and told him about the stabbing of one of his friends nearby. There was no time to make a DD entry for this and this led to PW-17 along with PW-23 immediately rushing for the spot. This appears to be entirely probable. What PW-17 did was to send PW-23 along with the deceased and PW-2 to AIIMS in a TSR while he himself stayed back at the spot. Shortly thereafter at 2.02 pm, DD No.14A was noted at PS Mehrauli (Ex.PW8/D) regarding the stabbing by knife at the Shiv Mandir Main Market, Mehrauli. The DO marked this again to PW-17.

35. At 2:12 p.m., the deceased was declared brought dead. He was shown as having been brought in by PW-23 and PW-1. Soon thereafter at 2:14 p.m., PW-2 was shown as brought to AIIMS. He too was examined by the same doctor, Dr. N. Mohan [whose handwriting has been identified by Dr. S. Roy (PW-24)]. He too is shown as brought in by PW-23.

36. The Court is not persuaded to disbelieve the MLCs. There was no need for a doctor at AIIMS to falsify the record in order to falsely implicate the CrI.A.370/2002 & connected appeals Page 19 of 31 accused. With PW-2 having been brought in an injured condition and his MLC noting the injury to be serious, the Court rejects the plea that PW-2 deliberately inflicted the injuries upon himself. It is also not possible to accept the plea that the DD No.14A regarding stabbing by the knife and the noting in the bottom of the rukka about PW-2 having reached the PS to complain about the stabbing incident were fabricated. These are contemporaneous records that fully corroborate the version of PW-2.

37. FIR No.229/1997 was registered at 4:45 p.m. This meant that the statement of PW-2 was recorded prior thereto. It was entirely probable that PW-2 was declared fit for giving that statement after about 2 hours after he was brought to the AIIMS. The evidence of PW-17 is very clear that PW-2's statement was indeed recorded at the hospital. It is only after his statement was recorded, that the rukka was prepared and sent for registration of the FIR.

38. In the very first statement made to the police, PW-2 named A-1 and A-4. He mentioned how PW-3 was present there and how when PW-2 tried to interfere and save the deceased, A-1 attacked him as well. He mentioned that there were three or four other persons attacking the deceased with knives. A-1 and A-4 have been named at the very first instance by PW-2.

39. Much was made about the so-called discrepancies in the deposition of PW-2 when compared with those of PW-3. PW-2 is supposed to have stated that PW-3 was in the hospital whereas PW-3 denied it. PW-2 is supposed to have stated that at 6 pm he was taken from the hospital to the PS and PW-3 CrI.A.370/2002 & connected appeals Page 20 of 31 was not with them whereas PW-28 stated that PW-2 and PW-3 both came to the PS from the hospital. The Court does not consider these discrepancies to be material enough since PW-2 has confirmed the presence of PW-3 at the spot and PW-3 also does not deny it.

40. There is an issue regarding PW-1 having been present at the spot and having removed the deceased with the help of Bobby and Ajay. Why PW-1 deposed to that effect is not known particularly since he makes no mention of this in his previous statement to the police. Also, Bobby and Ajay were not examined. The question really arises as to whether PW-1 who, for some reason was not declared hostile by the APP, was speaking the truth about the presence of PW-2 at the hospital.

41. As far as PW-2 is concerned, his evidence is corroborated by the records of AIIMS and also the records of PS Mehrauli. He is an injured witness, as proved by the medical evidence. He made a statement within two hours of the incident naming two of the accused and speaking about their being accompanied by the two others. Therefore, it is the version of PW-2 which is believable and lends

assurance to the Court that he is speaking the truth. The Court fully concurs with the trial Court in that regard.

42. There was also a submission made about PW-2 stating that he along with the two police officials returned to the spot in the same TSR they took the deceased in to AIIMS. The Court is aware that the TSR driver has not been examined or the bloodstains on the TSR have not been proved. However, in the case of an eye witness testimony which is truthful and reliable like that CrI.A.370/2002 & connected appeals Page 21 of 31 of PW-2, other minor details like not examining the TSR driver or even seizing the bloodstained clothes of those accompanying the deceased, does not really weaken the case of the prosecution. If this was a case of circumstantial evidence, these aspects might have become significant. In a case of direct evidence, where there is an eye witness who is speaking truthfully, these lapses in the investigation do not weaken the case of the prosecution.

43. It is true that PW-2 was cross examined by the APP, but this was only to elicit more details from him. The main portion of his deposition itself lends assurance to his presence at the scene of crime. It would be incorrect to state that PW-2 was a hostile witness, who did not support the prosecution. In court also, he correctly pointed out to A-1, A-4, A-2 and A-5 as the persons who were attacking the deceased with knives.

44. The medical evidence has corroborated the above version of PW-2. The post mortem of the deceased was conducted by Dr. Murathi (PW-8) who noticed multiple incised stab wounds and contusions and abrasions. Clearly, this could not have been the handiwork of only one person. It had to be the handiwork of several persons, each of whom was armed with a sharp-edged weapon.

45. There is further corroboration by the forensic evidence as well. The bloodstained clothes of PW-2 were seized and sealed and were sent for the FSL examination and they confirmed the presence of human blood and in particular the blood group of the deceased. This was yet another CrI.A.370/2002 & connected appeals Page 22 of 31 confirmation of the presence of PW-2 at the scene of crime.

46. It was submitted that it was unnatural for PW-2 to be rushing first to the PS instead of trying to save the deceased. With the numerous stab wounds suffered by the deceased, PW-2 must have taken him to be dead and in fact he was brought dead at the hospital. It is not as if he immediately rushed to the PS, when he saw the deceased being attacked. In fact, he intervened to save the deceased. It must also be remembered that PW-5 first sought to seek help by going to the room near the place of occurrence. This was natural for a person who is a close friend of the deceased. When PW-2 saw the assailants armed with knives and that they were outnumbered, the natural reaction was to seek help. It is only when he failed to save the deceased and got himself injured that he ran to the PS. Although it was a busy public thoroughfare, it is not surprising that the members of the public did not come forward to help them. It is, therefore, natural for him to seek the help of the police even in the first instance.

47. The Court has carefully examined the cross-examination of PW-2 and finds that there is nothing substantial that has emerged therein to discredit his testimony. He was subjected to searching and extensive cross-examination on behalf of each of the accused. The only concession is in respect of A-3. He stated that although he had identified A-3 when he had gone to Tihar Jail for the TIP he was not involved in commission of crime on the date of the incident. Again in the cross-examination by counsel for A-3, PW-2 stated that he had seen A-3 for the first time in the PS and he was not one of the assailants. However, when it came to A-5, he admitted that CrI.A.370/2002 & connected appeals Page 23 of 31 he had not known his name earlier and came to know about his name in the PS, but at that time A-5 was not present. The core part of the testimony PW- 2 lends assurance to the Court that he is speaking the truth.

48. The scaled site plan shows where the deceased was attacked and where PWs 2 and 3 interfered and where A-1 also attacked PW2. Therefore, while in the rough site plan, the presence of PW-2 was not shown, it is certainly shown in the scaled site plan. The Kalra Flour Mill is shown in the rough site plan and not in the scaled site plan. The Court is, therefore, not able to conclude that PW-2 was a planted witness. The criticism against his deposition by the learned counsel for A-1, A-2, A-4 and A-5 deserves to be rejected.

49. Now turning to the other two eye witnesses, PWs 3 and 5, it is seen that they have not entirely supported the prosecution. PW-3 was certainly present at the scene of crime. His examination-in-chief does indicate that he himself witnessed the quarrel going on between the deceased and A-1 and two or three other persons. He also clearly speaks about A-1 having inflicted injuries on the deceased. He also points to A-2 having inflicted injuries on PW-3 himself. He has been able to identify A-1 only in the Court. He concealed himself behind a shop in Mehrauli Market. Therefore, he did not accompany the deceased and PW-2 at the first instance.

50. As far as PW-5 is concerned, although his statement is shown to have been recorded only on 11th June, 1997, it is clear from his deposition that he was going along with the deceased to Safdarjung Hospital and he was very CrI.A.370/2002 & connected appeals Page 24 of 31 much present at the scene of crime. It is clear that he ran to the terrace of the Kalra Flour Mill in order to save himself. He clearly identified A-1 and A-4 giving knives blows to the deceased along with two others and also PWs 2 and 3 being attacked when they went to rescue the deceased. This portion of the deposition of PW-5 fully supports the prosecution. The mere fact that his statement under Section 161 Cr PC may have been shown to be recorded on 11th June, 1997 does not per se dilute his testimony during his examination- in-chief. He too was unable to identify A3 as one of the persons who attacked the deceased. On the material aspects, therefore, PW-5 does support PW-2.

51. As explained in *Marwadi Kishor Parmanand v. State of Gujarat* (1994) 4 SCC549 No hard and fast rule of universal application with regard to the reaction of a person in a given circumstance can be laid down. Most often when a person happens to see or come across a gruesome and cruel act being perpetrated within his sight then there is a possibility that he may lose his equilibrium and balance of mind and therefore he may remain as a silent spectator till he is able to reconcile himself and then react in his own way. The evidence of a witness deposing about a fact has to be appreciated in a realistic manner having due regard to all the surrounding facts and circumstances prevailing at or about the time of occurrence of an incident. Some contradictions and omissions even in the evidence of a

witness who was actually present and had seen the occurrence are bound to occur even in the natural course. It is a sound rule to be observed that where the facts stated by an eye-witness substantially conform to and are consistent on material points from the facts stated earlier to the police either in FIR or case diary statements and Crl.A.370/2002 & connected appeals Page 25 of 31 are also consistent in all material details as well as on vital points there would be no justification or any valid reason for the Court to view his evidence with suspicion or cast any doubt on such evidence. 52. A collective reading of the testimony of PWs 2, 3 and 5 lends assurance about their presence at the scene of crime. Motive 53. As far as the motive for the commission of the crime, in a case of direct evidence with three eye witnesses speaking consistently, motive by itself is not as significant a factor as it would be in a case of circumstantial evidence. Nevertheless, the motive for involvement of A-1 and A-4 in the commission of crime has been explained with reference to the previous incident involving PW-2 and the deceased, who are stated to have beaten them up. The previous enmity is a factor that will require the testimony of the PWs cautiously and not discard them altogether. As explained in Anil Rai v. State of Bihar (2001) 7 SCC318 The admitted position of law is that enmity is a double edged weapon which can be a motive for the crime as also the ground for false implication of the accused persons. In case of inimical witnesses, the courts are required to scrutinise their testimony with anxious care to find out whether their testimony inspires confidence to be acceptable notwithstanding the existence of enmity. Where enmity is proved to be the motive for the commission of the crime, the accused cannot urge that despite proof of the motive of the crime, the witnesses proved to be inimical should not be relied upon. Bitter animosity held to be a double edged weapon may be false involvement or for the witnesses inferring and strongly believing that the crime must have been committed by the accused. Such possibility has to be kept in mind while instrumental for Crl.A.370/2002 & connected appeals Page 26 of 31 evaluating the prosecution witnesses regarding the involvement of the accused in the commission of the crime. Testimony of eye-witnesses, which is otherwise convincing and consistent, cannot be discarded simply on the ground that the deceased were related to the eye-witnesses or previously there were some disputes between the accused and the deceased or the witnesses. The existence

of animosity between the accused and the witnesses may, in some cases, give rise to the possibility of the witnesses exaggerating the role of some of the accused or trying to rope in more persons as accused persons for the commission of the crime. Such a possibility is required to be ascertained on the facts of each case. However, the mere existence of enmity in this case, particularly when it is alleged as a motive for the commission of the crime cannot be made a basis to discard or reject the testimony of the eye-witnesses, the deposition of whom is otherwise consistent and convincing. No delay in FIR⁵⁴ Much was made by counsel for the Appellants about the alleged delay in the registration of the FIR by treating it as having been registered at 8.30 pm and not earlier. The original of the FIR has been seen by the Court. On close scrutiny it appears that the number 8 is in fact '5'. It would be wrong, therefore, to proceed on the basis that the FIR was registered at 8.30 pm. It appears to have been registered at 5.30 pm.

55. If that is the position then there was no undue delay in registering the FIR considering that the rukka was drawn up at 4.15 pm. There is a distance to be travelled between AIIMS and PS Mehrauli. The delay is, therefore, not extraordinary and in any event has been satisfactory explained. Crl.A.370/2002 & connected appeals Page 27 of 31 Possible lapses in investigation 56. As rightly pointed out by the trial Court, there were certainly some lapses in the investigation, but that does not affect the credibility of the testimony of PW-2. In *Ram Bihari Yadav v. State of Bihar and others*, J.T. (1998) 3 SC290 the Supreme Court held:

"In such cases, the story of the prosecution will have to be examined de hors such omissions and contaminated conduct of the officials otherwise the mischief which was deliberately done would be perpetuated and justice would be denied to the complainant party and the confidence of the people not merely in the law enforcing agency but also in the administration of justice."

this would obviously shake 57. Again, in *Dhanaj Singh v. State of Punjab* (2004) 3 SCC654 the Supreme Court observed: 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. Guilt of individual accused 58. As far as A-1 and A-4 are concerned their role has been clearly spoken of by the eye witnesses. They were named at the very first occasion by PW

On behalf of A-2, it was submitted that he had been shown to PW-2 before he could take part in the TIP and, therefore, did not participate in it. However, his role is spoken to by PW-2 very clearly. Although he was not named in the rukka itself, PW-2 is shown as having said that A-1 and A-4 CrI.A.370/2002 & connected appeals Page 28 of 31 were accompanied by two other persons. These two, which included A-2, were correctly identified by PW-2 even in the Court. It cannot, therefore, be said that PW-2 did not support the case of the prosecution as far as A-2 was concerned. PWs 3 and 5 also corroborated PW-2 as far as the role of A-2 is concerned since both of them identified him in the Court. By not participating in the TIP, A-2 risked being identified correctly in the Court by the two other eye witnesses as well.

59. No doubt, the independent witness to the recovery of knife i.e. Amit Kaul (PW-16) turned hostile, but nothing much has been elicited from the testimony of police witnesses to discredit their testimony with regard to the recoveries made. It is pointed out that the knife recovered from A-2, when sent to the FSL, did not show the presence of blood. This by itself will hardly exonerate A-2 since his presence and role have been clearly spoken about by the eye witnesses whose testimonies are consistent, truthful and reliable. Consequently, the Court is unable to accept the plea of A-2 that his conviction was wrongly returned.

60. As far as A-2 and A-5 are concerned, they were shown as having participated in the crime and, therefore, from the aid of Section 34 IPC, it is fully justified to confirm their presence given the number of stab injuries caused to the deceased. A-3 deserves acquittal 61. Where the trial Court perhaps went wrong was in maintaining the conviction of Shahid (A-3) who has clearly been exonerated by PW-2 and to CrI.A.370/2002 & connected appeals Page 29 of 31 some extent by PW-5 as well. While the Court is satisfied that the conviction of A-1, A-2, A-4 and A-5 could safely be based on the testimony of PW-2, on the same yardstick A-3 could not have possibly been convicted by the trial Court. It is neither possible nor

justified that PW-2 would be speaking the truth as far as A-1, A-2, A-4 and A-5 are concerned but not with regard to A-3.

62. The recovery of the bloodstained clothes and dagger at the instance of A-1 and A-2 on 30th April, 1997 has sought to be proved by the police witnesses. However, nothing was recovered at the instance of A-3. His presence has not been confirmed by PWs 3, 4 and 5. Although A-3 was identified by PW-2 at the TIP, in his deposition in the Court, PW-2 clearly stated that A-3 was not involved.

Conclusion 63. The result of the above discussion is as follows: (i) This Court upholds the conviction and the sentence awarded to A-1 (Rafiq Ahmed @ Chottu), A-2 (Bijender), A-4 (Mohd. Hanif @ Monti) and A-5 (Hashim Siddiqui) for the offences with which they were charged in terms of the impugned judgment and the corresponding order on sentence of the trial Court. (ii) As far as A-3 (Mohd. Shahid) is concerned, the Court sets aside his conviction and the consequent order on sentence and acquits him of the offences with which he was charged.

Crl.A.370/2002 & connected appeals Page 30 of 31 64. As a result, Crl. Appeal Nos. 404/2002, 507/2002, 529/2002 and 716/2002 are hereby dismissed. The bail bonds and surety bonds furnished by the Appellants in the said appeals i.e. A-1 (Rafiq Ahmed @ Chottu), A-2 (Bijender), A-4 (Mohd. Hanif @ Monti) and A-5 (Hashim Siddiqui) are hereby cancelled. If they are already not in custody, they are directed to surrender forthwith and in any event not later than 4th June 2018. If any of the said Appellants i.e. A-1, A-2, A-4 and A-5, fail to surrender by the aforementioned date, the concerned SHO shall immediately take steps to have them taken into custody and sent to jail to serve out the remaining sentence.

65. Crl. Appeal No.370/2002 is allowed. The bail bond and surety bond furnished by Mohd. Shahid (A-3) are hereby discharged. He will fulfil the requirement of Section 437-A Cr PC to the satisfaction of the trial Court at the earliest.

66. The trial Court record be returned forthwith along with a certified copy of this judgment. MAY24 2018 rd S. MURALIDHAR, J.

I.S. MEHTA, J.

