

Akash vs.state

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Court : Delhi

Decided On : Oct-23-2019

Appellant : Akash

Respondent : State

Advocate for Pet/Ap. : Mr. Chetan Lokur

Judgement :

\$~ * + IN THE HIGH COURT OF DELHI AT NEW DELHI CRL.A. 1106/2018 %
Judgment reserved on: September 27th, 2019 Judgment pronounced on:

23. d October, 2019 AKASHAppellant Through: Mr. Chetan Lokur with Mr. Nitish Chaudhary, Advocates Versus State with SI Rajeshwar, PS STATE Palam VillageRespondent Through: Mr. Rajat Katyal, APP for the CORAM: SANGITA DHINGRA SEHGAL, J HON'BLE MR. JUSTICE MANMOHAN HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL1 The present Appeal is instituted on behalf of the appellant under Section 374(2) of the Code of Criminal Procedure, 1973, (hereinafter referred to as Cr.P.C.) against the impugned judgment dated 13.07.2018 and order on sentence dated 18.07.2018 passed by the Court of learned Additional Sessions Judge, Dwarka Courts, Delhi, in Session Case No.440982/2016 in FIR No.157/2013, registered at Police Station Palam Village under Section 302 of the Indian Penal Code,1860 (hereinafter referred to as IPC) whereby the appellant was convicted for the offence punishable under Section 302 IPC and was sentenced to rigorous imprisonment for life alongwith a fine of

CRL.A. 1106/2018 Page 1 of 49 Rs.50,000/-, in default of payment of fine, to further undergo simple imprisonment for a period of six months.

2. Brief facts of the case, as noticed by the Learned Trial Court, are as under:-

"The case of the prosecution is that on 05.06.2013, DD No.24A was assigned to PSI Amrender regarding an injury with screwdriver to a person. Thereafter, he alongwith Ct. Piplad reached at the spot i.e. H. No.154, Gali No.2, Phase-I, Manglapuri, where PCR Van Z- 45 was already found present and injured Sudesh Kumar was going to shift in the said PCR Van. Injured Sudesh told him that his brother in law (saala), namely Akash had hit him from behind with some sharp weapon. Thereafter, on checking, PSI Amrender found two injuries marks, one was on the back and another was between the back right and front side below the place of hand and armpit. No blood was oozing from him. PCR officials were immediately asked to take him to the hospital and house of the injured was inspected, where no blood stains were found. Thereafter, on enquiry from the family members of the injured, it was revealed that injured Sudesh was assaulted by his saala Akash and the eye witness of the same is Aadesh, brother of injured Sudesh, who had accompanied with the PCR Van and injured to CRL.A. 1106/2018 Page 2 of 49 the hospital. After that, he alongwith Ct. Piplad went to DDU Hospital, where injured was declared brought dead vide MLC No.136 and dead body was shifted to the mortuary of DDU Hospital and Sh. Aadesh, brother of injured was found present there. PSI Amrender collected the abovesaid MLC. Thereafter, he alongwith Sh. Aadesh reached at the police station and recorded the statement of Sh. Aadesh, wherein he stated that his younger brother Sudesh had got married with Monika on his own wish but the family members of Monika were not happy with the said marriage. Akash, brother of Monika was very much annoyed with the said marriage and mostly threatened him and his family members to kill him. Earlier also 2-3 times he came to his home for quarrel. Today, on 05.06.2013, at about 5 p.m., when he was going to Manglapuri Chowk, then he saw his brother Sudesh was coming and he also saw that brother in law of Sudesh came from his behind and after assaulting upon him, he ran away. He ran towards the Akash to catch him but due to distance he could not. Thereafter, he saw that Sudesh had fallen and he came near to him and Sudesh told him that Akash had

assaulted upon him with a sharp weapon from behind and had ran away. Thereafter, he brought Sudesh to home and told the CRL.A. 1106/2018 Page 3 of 49 3. entire facts to his family members and made a call at phone No.100. On his said statement, the present case was registered under Section 302 IPC against the accused Akash. Thereafter, site plan was prepared at the instance of Sh. Aadesh, accused Akash was arrested, interrogated, his disclosure statement was recorded and weapon of offence was recovered. After completion of all the proceedings and Investigation, charge sheet was filed against the accused Akash. To bring home the guilt of the accused, the prosecution examined 21 witnesses in all. Statement of the accused was recorded under Section 313 of Code of Criminal Procedure by the learned trial court wherein he pleaded not guilty and claimed trial and chose not to lead any evidence in his defense.

4. After hearing the counsel for both the sides and on appreciation of entire evidence available on record, the learned Trial Court convicted the appellant for the charged offence.

5. Mr. Chetan Lokur, learned counsel for the appellant, opened his arguments by submitting that the impugned judgment dated 13.07.2018 is based on conjectures and surmises and the same is against the facts and settled proposition of law and that the learned trial court has ignored and omitted the material evidence and has disregarded the cogent evidence in favour of the appellant. CRL.A. 1106/2018 Page 4 of 49 6. Learned counsel further contended that PW-4 Adesh Kumar (brother of the deceased) is a planted witness, who was not present at the time of incident and he has been introduced by the prosecution in order to falsely implicate the appellant.

7. Learned counsel for the appellant further argued that the learned Trial Court has erred in relying on the testimonies of PW-1, Prem Singh (Father of the deceased), PW-4 Adesh Kumar (brother of the deceased), PW-6 Bal Kishan (maternal uncle of the deceased), PW- 10 Vinod (brother-in-law of the deceased), PW-15 (Insp. Amrendra Kumar) as there are major contradictions and discrepancies in their testimonies. He further contended that all these witnesses are interested witnesses and hence their evidence cannot be treated as trustworthy and reliable,

moreover, there is a very strong possibility of the prosecution witnesses being tutored and influenced. He further contended that the learned Trial Court erred in convicting the appellant on the basis of these testimonies stated to have been made by the deceased to them after the incident and soon before his death treating the same as dying declaration.

8. He further added that the alleged dying declaration given by the deceased to the police witnesses i.e. PW-12 (Ct. Piplad Singh) and PW-15 (Insp. Amrendra Kumar) were not reduced in writing and hence the same cannot be believed. Moreso, the MLC was prepared at 6:25 p.m. wherein it was recorded that Patient brought to the casualty with alleged history of being in unresponsive state since 30 minutes. As per history available from patients attendant, the patient came back home from the market at 5:00 p.m. today. The CRL.A. 1106/2018 Page 5 of 49 attendant noticed that patient was stumbling and not walking steady and said that he had been assaulted while at the market. He also complained of shortness of breath at the time. Patient then fell unresponsive 30 minutes prior to ED arrival. whereas DD No.24A was written at 5:55 p.m. Thus, there was no possibility for the deceased to have made a dying declaration to PW-12 (Ct. Piplad Singh) and PW-15 (Insp. Amrendra Kumar). To substantiate his arguments, learned counsel for the Appellant relied upon the case of Atbir v. Government of NCT of Delhi reported at (2010) 9 SCC1 9. The next contention raised by the learned counsel for the appellant is that an accused cannot be convicted only on the basis of alleged weapon of offence having been recovered pursuant to the disclosure statement. He further contended that although the appellant is alleged to have made a disclosure statement pointing out the weapon of offence (Screw Driver) but the said pointing out memo does not fall within the purview of Section 27 of the Indian Evidence Act and is not admissible in the eyes of law as the same does not find support from the scientific evidence. To substantiate his arguments, learned counsel for the Appellant relied upon the case of Shiv Narayan v. State (NCT of Delhi) reported at 2002 (61) DRJ734(DB).

10. Learned counsel for the appellant further submitted that the police is required to carry out a fair and thorough investigation and collect favourable and unfavourable evidence against a suspect but in the instant case there are major

loop holes in the investigation by the police which have been ignored by the learned Trial Court. CRL.A. 1106/2018 Page 6 of 49 11. On the other hand, Mr. Rajat Katyal, learned APP for the State, strongly refuted the contentions raised by the learned counsel for the appellant and argued that the impugned judgment does not call for any interference as it is a well reasoned judgment.

12. Learned APP for the State further contended that the testimonies of PW-1 Prem Singh (Father of the deceased), PW-4 Adesh Kumar (brother of the deceased), PW-6 Bal Kishan (maternal uncle of the deceased), PW-10 Vinod (brother in law of the deceased) and PW-15 (Insp. Amrendra Kumar) are consistent and trustworthy and the minor contradictions and discrepancies, if any, do not affect the case of the prosecution as they do not go to the root of the matter. It is a settled proposition of law that even if there are some omissions, contradictions and discrepancies in the testimonies of the witnesses, the entire evidence cannot be completely disregarded. The learned APP further contended that the testimony of the eye witness PW-4 (Adesh Kumar) cannot be rejected on the mere ground of his relationship with the deceased because it is not a sufficient ground to discard the evidence of the eye witness. To substantiate his arguments learned APP for State relied upon the case of Khujji @ Surendra Tiwari vs. State of Madhya Pradesh reported at (1991) 3 Supreme Court Cases 627.

13. He further submitted that the testimonies of prosecution witnesses coupled with the dying declarations of the deceased are corroborative in nature and the prosecution has been able to prove its case beyond reasonable doubt. To substantiate his arguments learned APP for CRL.A. 1106/2018 Page 7 of 49 State relied upon the case of Parbin Ali and Another vs. State of Assam reported in 2013 2 SCC81 14. We have given our anxious consideration to the submissions advanced on behalf of counsel for the parties at considerable length and also perused the material available on record. Whether testimony of Eyewitness reliable?.

15. The first argument raised by the learned counsel for the appellant is that PW-4, Adesh Kumar (brother of the deceased) is a planted witness. Who has been introduced by the prosecution in order to falsely implicate the appellant.

16. It is a settled law that the conviction can be recorded on the basis of the statement of a single eye-witness provided his credibility is not shaken by any adverse circumstances, appearing on the record against him and the court at the same time is to be convinced that he is a truthful witness. Eyewitnesses account requires a careful independent assessment and evaluation for its credibility, which should not be adversely prejudged on the basis of any other evidence. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistent with the account of other witnesses held to be creditworthy; consistent with the undisputed facts, the credit of the witnesses; their performance in the witness box; their power of observation etc. In this context, we may profitably refer to the case of Jagdish Prasad vs. State of M.P reported as AIR 1994 SC1251 wherein the Honble Supreme Court held as follows: - CRL.A. 1106/2018 Page 8 of 49 6. As a general rule, a court can and may act on the testimony of a single witness though uncorroborated provided the testimony of that single witness is found out entirely reliable. In that case, there will be no legal impediment for recording a conviction. But if the evidence is open to doubt or suspicion, the court will require sufficient corroboration. In this connection, reference may be made to a decision of this Court in Vadivelu Thevar v. State of Madras, wherein this Court has classified the testimony of a witness into three categories. viz. (1) wholly reliable (2) wholly unreliable, and (3) neither wholly reliable nor wholly unreliable and observed that though in the first two categories of classification, there may not be any difficulty in coming to a conclusion either accepting or rejecting the testimony but it is in the third category of cases that the court has to be circumspect and has to look for corroboration in material particulars by reliable testimony either direct or circumstantial.

7. Now, let us scrutinise the testimony of P.W. 1 in the light of the observation made by this Court in the above decision. It is seen from the evidence that P.W. 1 was an arch enemy of the fifth respondent as the former had assaulted the fifth accused on a prior occasion. Probably this must have been the proximate motive for the occurrence in question. The trial court, in fact, took note of this and made the following observations: CRL.A. 1106/2018 Page 9 of 49 The description given by the witness (PW.

1) regarding the part played by each of the five accused in hitting the deceased also does not seem to be correct, because the object of assault was in fact against this witness because of the previous enmity and that he was first aimed at by accused Bawan, but escaped the assault and, therefore, in the natural course of conduct, the witness ought to have left the spot at the next moment to save himself. It is far-fetched to visualise that P.W. 1 could have witnessed the entire occurrence viz., the actual assault perpetrated on the deceased when he was fleeing for his life and thereafter hid himself inside a room of the hospital till 5 a.m. Though P.W. 1 claims to have known all the six accused persons it appears he has not mentioned the name of the accused Pangoo (acquitted) in his first report. Surprisingly, before the trial court P.W. 1 has mentioned only the names of five accused and specifically and deliberately omitted the name of the first accused in his evidence. The High Court has commented upon the conduct of P.W. 1 in its judgment stating "he deliberately tried to help the acquitted accused Mishrilal". In fact, the trial court taking a very serious view of the conduct of P.W. 1 had gone to the extent of conducting a preliminary enquiry under Section 340 of the Cr PC for launching a prosecution against P.W. 1 for perjury. CRL.A. 1106/2018 Page 10 of 49 8. The evidence of P.W. 1 is found to be discrepant in its material particulars by the High Court. We, after going through the evidence, hold that it is quite unsafe to act upon the evidence of P.W. 1 whose testimony is clouded with grave suspicion and serious doubts. For all the aforementioned reasons we are constrained to set aside the judgment of the High Court confirming the judgment of the Trial Court. In the result, the conviction of all the appellants (accused 2-5) Under Section 302, I.P.C. read with Section 34, I.P.C. and the sentence of imprisonment for life imposed therefore are set aside and the appellants are acquitted. 17. Further the Court, after going through the entire evidence must form an opinion about the credibility of the witnesses and otherwise also, evidence is to be considered from the point of view of trustworthiness and if the evidence is incredible and cannot be accepted by the test of prudence, then it may create a dent in the prosecution version. In case of Mritunjoy Biswas vs. Pranab @ Kuti Biswas and Anr., reported at (2013) 12 SCC79 the Apex Court held as under: 28. As is evincible, the High Court has also taken note of certain omissions and discrepancies treating them to be material omissions and irreconcilable discrepancies. It is well settled in law that

the minor discrepancies are not to be given undue emphasis and the evidence is to be CRL.A. 1106/2018 Page 11 of 49 considered from the point of view of trustworthiness. The test is whether the same inspires confidence in the mind of the court. If the evidence is incredible and cannot be accepted by the test of prudence, then it may create a dent in the prosecution version. If an omission or discrepancy goes to the root of the matter and ushers in incongruities, the defense can take advantage of such inconsistencies. The omission should create a serious doubt about the truthfulness or creditworthiness of a witness. It is only the serious contradictions and omissions which materially affect the case of the prosecution but not every contradiction or omission (See Leela Ram vs. State of Haryana and another, Rammi alias Rameshwar vs. State of M.P. and Shyamal Ghosh vs. State of West Bengal).

18. The statement of Adesh Kumar (brother of the deceased), the sole eyewitness was recorded by the police vide Rukka (Ex.-PW4/A) wherein he stated that:-

"Sudesh ka saala Akash uske pichhe se aaya aur Sudesh par hamla karke bhag gaya. Mein Akash ko pakadne ke liye bhage lekin duri hone ki vajehe se veh haath nahi aya. Phir meine dekha ki Sudesh Ladkhada kar gir Gaya aur mein jaa k Sudesh ko sambhala aur usne bataya ki Akash kisi nukili chiz se pichhe se vaar kar k bhag gaya CRL.A. 1106/2018 Page 12 of 49 19. PW-4, Adesh Kumar (brother of the deceased) stepped into the witness box and deposed that: On 05.06.2013, there was a puja at the house of my sister who is residing in Manglapuri, New Delhi and on that day when I was going towards Manglapuri Chowk at around 5 p.m and when I reached near the main gate of our colony, I saw my brother Sudesh coming from the side of chowk and he told me that accused Akash and two of his cousins (sons of his Bua), one of them namely Rahul and I do not know the name of other person, had assaulted on him with a screw driver on his back and chest on left side. I saw that Sudesh was having injuries on his chest and back. I informed the police on telephone No.100. One police van came there after about hour. I took my brother Sudesh to DDU hospital in a PCR van in injured condition and on the way when we reached at Dabri, my brother Sudesh expired. I did not see accused Akash following my brother Sudesh on the day of incident. I also did not see accused Akash on assaulting my brother

Sudesh. Vol. I had seen him while running from the spot along with his two aforesaid cousins. 20. In his cross examination, he deposed that:-

"It is correct that on 05.06.2013 at about 5 p.m when my brother Sudesh was coming from the side of main gate of our colony, I saw that accused Aakash, brother-in-law CRL.A. 1106/2018 Page 13 of 49 of Sudesh came from behind and he assaulted on Sudesh and thereafter he ran away. It is also correct that I chased the accused to apprehend him but he managed to escape due to the distance. It is also correct that I saw that my brother had fallen and when I came near him, he told me that Akash had assaulted on him with a sharp object. It is also correct that first I brought my brother Sudesh in injured condition to my home and told the entire facts to the family members and thereafter informed the police on telephone No.100. It is also correct that I had stated all the aforesaid facts to the police when my statement was recorded. 21. A close examination of the statements made by PW-4 Adesh Kumar at different stages shows that the same are full of contradictions and improvements as detailed below:-

"a. The witness, in his initial statement, Rukka (Ex-PW-4/A), has deposed that the alleged incident was seen by him and stated that (Sudesh ka saala Akash uske piche se aaya aur Sudesh par hamla karke bhag gaya. Mein Akash ko pakadne k liye bhaga lekin duri hone ki vajehe se veh haath nahi ayaa) but, during his examination-in-chief he has deposed that the alleged incident was narrated to him by his brother (the deceased) and stated that when I reached near the main gate of our colony, I saw my brother Sudesh coming from the side of chowk and he told me that accused Akash and two of his cousin (sons of his CRL.A. 1106/2018 Page 14 of 49 Bua) one of them namely Rahul and I do not know the name of other person, had assaulted on him with a screw driver. b. The witness, in Rukka (Ex-PW-4/A), failed to give the details of the weapon of offence used for causing injury but during his examination-in-chief he disclosed that the injury had been caused by a screw driver. c. According to PW-4 (brother of the deceased), the deceased was attacked by the accused while he was accompanied by two more assailants i.e. two cousins of Aakash (sons of his Bua) and stated that when I was going towards Manglapuri Chowk at around 5 p.m. and when I reached near the main gate of our colony, I saw my brother Sudesh coming from the side of chowk and

he told me that accused Akash and two of his cousins (sons of his Bua), one of them namely Rahul and I do not know the name of other person, had assaulted on him with a screw driver on his back and chest on left side. but, during cross-examination PW-4 (brother of the deceased) did not refer to the cousins of the accused which is totally contrary to the stand taken by him in the examination-in-chief and deposed that I saw that accused Aakash, brother-in-law of Sudesh came from behind and he assaulted on Sudesh and thereafter ran away. d. Another noticeable contradiction is that PW-4 (brother of the deceased) in his examination-in-chief stated that the deceased narrated the incident to him but in the cross-examination, he added that he chased the accused who managed to escape. The CRL.A. 1106/2018 Page 15 of 49 witness (PW-4) deposed that accused Akash and two of his cousins (sons of his Bua), one of them namely Rahul and I do not know the name of other person, had assaulted on him with a screw driver on his back and chest on left side. I saw that Sudesh was having injuries on his chest and back. I informed the police on telephone No.100. One police van came thereafter about hour. I took my brother Sudesh to DDU hospital in a PCR van in injured condition and on the way when we reached at Dabri, my brother sudesh expired.. The witness (PW-4) during cross-examination deposed that It is also correct that I chased the accused to apprehend him but he managed to escape due to the distance. e. PW-4, contradicting his initial statement in Rukka (Ex-PW-4/A) as well as testimonies recorded before court, the witness, at one stage, deposed that I did not see accused Akash following my brother Sudesh on the day of incident. I also did not see accused Akash on assaulting my brother Sudesh.

22. On a careful analysis of the testimony of PW-4, Adesh Kumar (brother of the deceased), we find that there are apparent contradictions in his testimony making it unsafe to rely on the same. The testimony of PW-4, Adesh Kumar (brother of the deceased) is surrounded by suspicion and the contradictions, inconsistencies, concealment, improvements and exaggerations. The testimony of PW-4, Adesh Kumar (brother of the deceased) casts a shadow of doubt on his presence at the scene of crime. CRL.A. 1106/2018 Page 16 of 49 Dying Declaration 23. The main thrust of the arguments of counsel for the appellant is that the multiple dying declarations made by the deceased are not trustworthy and fail to inspire confidence in the eyes of law hence, it is necessary to examine the position of law

relating to dying declarations. Section 32 of the Evidence Act deals with a statement, when the same is made by a person in relation to cause of his death, which reads as under: - Section.32. Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant.-- Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the Court unreasonable, are themselves relevant facts in the following cases: -- (1) When it relates to cause of death--When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that persons death comes into question. Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be CRL.A. 1106/2018 Page 17 of 49 the nature of the proceeding in which the cause of his death comes into question. 24. To treat a statement as dying declaration following ingredients need to be fulfilled: (i) Statement should be of a person who is dead/cannot be found/has become incapable of giving evidence etc. (ii) It should relate to the relevant facts; and (iii) It should relate to cause of his death or circumstances of the transaction which resulted in his death, in cases in which the cause of that persons death comes into question.

25. It has been repeatedly held by the Apex Court that even though a dying declaration is admissible in evidence, yet the Courts must scrutinize the dying declaration with care and caution as a person who has made such a statement is not available for cross- examination. The Apex Court in the case of Ramilaben Hasmukhbhai Khristi and Ors. V. State of Gujarat, reported at AIR 2002 SC2996has held as under: Under the law, dying declaration can form the sole basis of conviction, if it is free from any kind of doubt and it has been recorded in the manner as provided under the law. It may not be necessary to look for corroboration of such a dying declaration. As envisaged, a dying declaration is generally to be recorded by an Executive Magistrate with the certificate of a medical doctor about the mental fitness of the declarant to make the statement. It may be in the CRL.A. 1106/2018 Page 18 of 49 form of question and answer and

the answers be written in the words of the person making the declaration. But the court cannot be too technical and in substance if it feels convinced about the trustworthiness of the statement which may inspire confidence such a dying declaration can be acted upon without any corroboration. 26. The Apex Court in the case of Madan @ Madhu Patekar Vs the State of Maharashtra reported at AIR 2018 SC2007 has taken into consideration its various decisions and culled out the principles governing dying declarations. Germane portion of the judgment is extracted below: 10. The rule of admissibility of dying declaration is no more res Integra. In the adjudication of a criminal case, dying declaration plays a crucial role. A dying declaration made by a person as to cause of his/her death or as to any of the circumstances which resulted in his/her death, in cases in which cause of death comes in question, is relevant under Section 32 of the Evidence Act. It has been emphasized number of times that dying declaration is an exception to the rule against admissibility of hearsay evidence. The whole development of the notion that the dying declaration, as an exception to the hearsay rule, is based on the formalistic view that the determination of certain classes of evidence as admissible or inadmissible and CRL.A. 1106/2018 Page 19 of 49 not on the apparent credibility of particular evidence tendered. 11. In order to ameliorate such concerns, this court has cautioned in umpteen number of cases to have a cautious approach when considering a conviction based on dying declaration. Although there is no absolute rule of law that the dying declaration cannot form the sole basis for conviction unless it is corroborated, the courts must be cautious and must rely on the same if it inspires confidence in the mind of the Court [See: Ram Bihari Yadav Vs. State of Bihar &Ors. (1998) 4 SCC517 and Suresh Chandra Jana &Ors. Vs. State of West Bengal &Ors., 2017 (8) SCALE697. 12. Moreover, this court has consistently laid down that a dying declaration can form basis of conviction, if in the opinion of the Court, it inspires confidence that the deceased at the time of making such declaration, was in a fit state of mind and there was no tutoring or prompting. If the dying declaration creates any suspicion in the mind of Court as to its correctness and genuineness, it should not be acted upon without corroborative evidence [See Also: Atbir Vs. Government of NCT of Delhi, 2010 (9) SCC1 Paniben Vs. State of Gujarat, 1992 (2) SCC474 and Panneer Selvam Vs. State of Tamil nadu, 2008 (17) SCC190 CRL.A. 1106/2018 Page 20 of 49 27. Reference

can also be made to the dicta of the Apex Court in Sampat Babso Kale & Anr. Vs. State of Maharashtra reported at 2019 SCC OnLine SC236 wherein it has been held that:

14. No doubt, a dying declaration is an extremely important piece of evidence and where the Court is satisfied that the dying declaration is truthful, voluntary and not a result of any extraneous influence, the Court can convict the accused only on the basis of a dying declaration. We need not refer to the entire law but it would be apposite to refer to the judgment of this Court in the case of Sham Shankar Kankaria v. State of Maharashtra reported in (2006) 13 SCC165 held as follows:

11. Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross-examination. Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the court also insists that the dying declaration should be of such a nature as to inspire full confidence of the court in its correctness. The court has to be on guard that the statement of deceased was not as a result of either tutoring or prompting or a product of imagination. The court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailant. Once the court is satisfied that the declaration was true and CRL.A. 1106/2018 Page 21 of 49 voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence. 28. In view of the aforesaid settled legal position, it is to be seen whether the multiple dying declarations made by the deceased inspire confidence and are uninfluenced by any tutoring, prompting, or any other extraneous reasons.

29. The prosecution produced PW-1, Prem Singh (Father of the deceased), PW-6, Bal Kishan (Maternal uncle of the deceased), PW- 10, Vinod (brother-in-law of the deceased), PW-12 (Ct. Piplad) and PW-15 (Inspector Amrender Singh) who when examined in Court narrated the dying declaration made to each one of them soon after the incident and before his death. PW-1, Prem Singh (Father of the deceased) narrated what Sudesh deceased had told him in following words: At around 5 pm, my son complainant Adesh Kumar had brought Sudesh in injured

condition having injuries on his chest and back. Sudesh told us that accused Akash had assaulted on him with a screw driver and caused the aforesaid injuries on his person. My son Sudesh was taken to DDU hospital CRL.A. 1106/2018 Page 22 of 49 where he was declared by the doctors as declared dead. 30. PW-4, Adesh Kumar (brother of the deceased) narrated the incident as follow: On 05.06.2013, there was a puja at the house of my sister who is residing in Manglapuri, New Delhi and on that day when I was going towards Manglapuri Chowk at around 5 p.m. and when I reached near the main gate of our colony, I saw my brother Sudesh coming from the side of chowk and he told me that accused Akash and two of his cousin (sons of his Bua) one of them namely Rahul and I do not know the name of other person, had assaulted on him with a screw driver on his back and chest on left side. I saw that Sudesh was having injuries on his chest and back. I informed the police on telephone No.100. One police van came there after about hour. I took my brother Sudesh to DDU hospital in a PCR van in injured condition and on the way when we reached at Dabri, my brother Sudesh expired. I did not see accused Akash following my brother Sudesh on the day of incident. I also did not see accused Akash on assaulting my brother Sudesh. Vol. I had seen him while running from the spot along with his two aforesaid cousins. 31. During cross-examination, PW-4, deposed as under: - It is correct that on 05.06.2013 at about 5 p.m. when my brother Sudesh was coming from the side of main gate of our colony, I saw that accused Aakash, brother-CRL.A. 1106/2018 Page 23 of 49 in-law of Sudesh came from behind and he assaulted on Sudesh and thereafter he ran away. It is also correct that I chased the accused to apprehend him but he managed to escape due to the distance. It is also correct that I saw that my brother had fallen and when I came near him, he told me that Akash had assaulted on him with a sharp object. It is also correct that first I brought my brother Sudesh in injured condition to my home and told the entire facts to the family members and thereafter informed the police on telephone No.100. It is also correct that I had stated all the aforesaid facts to the police when my statement was recorded. 32. PW-6, Bal Kishan (Maternal uncle of the deceased) narrated the incident as follows: Today I do not recollect the date and month, but in the last year 2013 about 1 year ago I was present at my house at about 4 p.m. I heard the noise in the gali at that time, then my nephew Suresh who

is the son of the brother of my wife, came to me and stated that he was beaten by Akash and he had kept his hand on his left side chest and after saying me, he fell down in front of my house in the gali. Thereafter police came there and Suresh was taken to the hospital by the police and his brother Adesh accompanied the police to the hospital. Thereafter I came to know that Suresh has expired in the hospital. CRL.A. 1106/2018 Page 24 of 49 33. Similarly, PW-10, Vinod (brother-in-law of the deceased) narrated the entire incident as follows: On 05.06.2013 there was a pooja function at my house at about 4pm and all the relatives had come to my residence to attend the pooja ceremony. After completion of the pooja ceremony., I along with my brother in law Sudesh went to the bus stand to see of my brothers Sukhpal, Suresh and their wives. I remained stood with my above said brothers and Bhabhies till the bus is coming and my brother in law Sudesh came back to my house. When I was standing at the bus stand, I received a call on my mobile phone from my another brother-in-law Adesh, that the accused Akash has committed the murder of my brother in law Sudesh by inflicting injuries on his person and I immediately came back to my house and saw my brother in law/saala Sudesh was lying in a pool of blood in my house and I along with my other family enquiries from him as to how he sustained injuries on his person, then my brother in law/ saala disclosed me that these injuries have been caused to him by his brother in law Akash. 34. PW-12 (Ct. Piplad) during his examination-in-chief deposed that: On 05.06.2013 when I along with PSI Amrender Singh reached Phase-I, Manglapuri, New Delhi, we found that one PCR van present there where injured Suresh, again Sudesh was also found there. He CRL.A. 1106/2018 Page 25 of 49 disclosed that he was assaulted by his brother in law (saala) Akash with a sharp object from behind. Thereafter the injured was taken to DDU hospital by the PCR van. 35. PW-15 (Inspector Amrender Singh) narrated the incident as follows: On 05.06.2013, while I working in Delhi Police as Sub-Inspector and was posted at P.S. Palam Village, on that day at about 5.55 pm, I received a DD No.24- A, the same is already Ex.PW3/A which was marked to me for its investigation. I along with Ct.Piplad went to Manglapuri Phase-I where the PCR van was already found parked there and the person who was having stabbed injury was brought from the gali by the PCR official and his family members because the PCR van was unable to enter in the gali due to narrowness. When I made enquiry from the injured, he

disclosed me that his brother in law/saala Aakash gave him blow with sharp edged weapon from his back side. I also checked his injuries and there was found two injuries, one was on the back and another was between the back right and front side right below the place of hand and armpit. I immediately asked the PCR officials to take him to the hospital and the PCR officials took him to the hospital. Thereafter I went to his house to search regarding lying the blood but I found no blood over there. CRL.A. 1106/2018 Page 26 of 49 36. A close examination of above statement made by the witnesses produced by the State makes it clear that there are various contradictions in their statements. PW-1, Prem Singh (Father of the deceased) (R/o H.No.54, Gali No.2, Manglapuri, Phase-I, Palam, New Delhi) has deposed that At around 5 p.m. my son complainant Adesh Kumar had brought Sudesh in injured condition having injuries on his chest and back. Sudesh told us that accused Akash had assaulted on him with a screw driver and caused the aforesaid injuries on his person, whereas, PW-6, Bal Kishan (Maternal uncle of the deceased) (R/o H. No.72, Gali No.2, Phase-I, Manglapuri, Palam, New Delhi) has claimed that the deceased alongwith PW-4 (brother of the deceased) came to his house and deposed that my nephew Suresh who is the son of the brother of my wife, came to me and stated that he was beaten by Akash and he had kept his hand on his left side chest and after saying me, he fell down in front of my house in the gali. Both the witnesses, i.e. PW-1 (father of the deceased) and PW-6 (maternal uncle of the deceased) deposed that Sudesh (the deceased) after being attacked by the appellant came to their house alongwith Adesh and claimed to have been stabbed by the appellant. Contradicting the testimony of the PW-6 (maternal uncle of the deceased), PW-4 (brother of the deceased), was silent on this aspect and stated that after the incident he picked up his brother Sudesh (the deceased) in an injured condition from the spot and CRL.A. 1106/2018 Page 27 of 49 brought him to his house i.e. H.No.54, Gali No.2, Manglapuri, Phase-I, Palam, New Delhi. PW-4 (brother of the deceased) neither in his statement recorded by the police official i.e. Rukka (Ex. PW-4/A) nor in his testimonies recorded by the Court has mentioned about taking his brother Sudesh (the deceased) to the house of PW-6 (maternal uncle of the deceased) after the alleged incident. PW-4 (brother of the deceased), in this context deposed that It is also correct that first I brought my brother Sudesh in injured condition to my home and told the entire facts to the

family members and thereafter informed the police on telephone No.100. Moreover, the scaled site plan (Ex. PW-14/A) as also un-scaled site plan (Ex. PW-21/A) which was prepared at the instance of PW-4 (brother of the deceased) does not depict the house of PW-6 (maternal uncle of the deceased). As far as the testimony of PW-1 (father of the deceased) that Sudesh (the deceased) has informed him that accused Akash had assaulted on him with a screw driver is concerned, the same is in contradiction with the testimony of PW-2 (Smt. Monika) (wife of the deceased) who was present at H.No.54, Gali No.2, Manglapuri, Phase-I, Palam, New Delhi where PW-1 (father of the deceased) claimed to have been present when the deceased was brought by PW-4. The witness, PW-2 (wife of the deceased) deposed that On 05.06.2013 at about 04:30 p.m., my husband Sudesh had gone to bus terminal Manglapuri to see the son of our relative and after sometime, CRL.A. 1106/2018 Page 28 of 49 he was brought to our house by my brother in law (jeth) namely Aadesh in injured condition. Police was informed on telephone No.100 and one PCR van came and took my husband to DDU hospital where he was declared dead. Sudesh did not tell me anything as to how he sustained injuries.. The witness, PW-2 (wife of the deceased) further during her cross-examination deposed that When Sudesh was brought to our house by Aadesh in injured condition, he was unconscious. Sudesh did not tell anything to his family members in my presence at the time when he was brought in injured condition.. PW-2, categorically claimed that when Sudesh (the deceased) was brought by PW-4 (brother of the deceased) to their house, he was unconscious and no dying declaration was made by him to any person of his family. Moreover, PW-4 (brother of the deceased), in his statement recorded by the police official i.e. Rukka (Ex. PW-4/A) as well as in his deposition recorded by the Court was silent on this aspect and he failed to inform about any dying declaration made by Sudesh (the deceased) to PW-1 (father of the deceased) when the deceased was brought to his house at H.No.54, Gali No.2, Manglapuri, Phase-I, Palam, New Delhi. Further, the testimony of PW-1 (father of the deceased) is inconsistent with MLC of the deceased (Ex. PW-5/A) recorded on 05.06.2013 at 06:25 pm., as per which the deceased was unresponsive for the last 30 minutes which fully supports the testimony of PW-2 (wife of the deceased) who also CRL.A. 1106/2018 Page 29 of 49 deposed that when Sudesh (the deceased) was brought in the house he

was in an unconscious state of mind. PW-10, Vinod (brother-in-law of the deceased) (R/o H. No.28, Gali no.1, Manglapuri Phase-I) has deposed that I received a call on my mobile phone from my another brother- in-law Adesh, that the accused Akash has committed the murder of my brother in law Sudesh by inflicting injuries on his person and I immediately came back to my house and saw my brother in law/saala Sudesh was lying in a pool of blood in my house and I along with my other family enquiries from him as to how he sustained injuries on his person, then my brother in law/ saala disclosed me that these injuries have been caused to him by his brother in law Akash. Contradicting the testimony of the PW-10, Vinod (brother-in- law of the deceased), as discussed above PW-4 (brother of the deceased), was silent on this aspect in as much as neither PW- 4, mentioned about any dying declaration made by the deceased to PW-10 in his statement recorded by the police officials i.e. Rukka (Ex. PW-4/A) nor in his testimonies recorded by the Court. PW-4 (brother of the deceased), in this context deposed that It is also correct that first I brought my brother Sudesh in injured condition to my home and told the entire facts to the family members and thereafter informed the police on telephone No.100.

37. As far as the dying declaration recorded by PW-12 (Ct. Piplad) and PW-15 (Inspector Amrendra Kumar) is concerned, it is relevant to CRL.A. 1106/2018
Page 30 of 49 peruse MLC No.136

of the deceased (Ex. PW-5/A), which was proved by PW-5, (Dr. Aruna Singh) who deposed on behalf of Dr. Ritu, Sr. Casualty, DDU Hospital who conducted the medical examination of the deceased and proved the same as Ex.PW-5/A. Relevant portion of the testimony of PW-5 is reproduced below: I have been deputed by the MS to appear for Dr. Ritu SR Casualty because Dr. Ritu has worked with me during her service period in DDU Hospital. So I had seen her writing and signing. Now Dr. Ritu has left the service of the hospital and her present whereabouts are not known to the hospital nor her permanent address is known to the hospital. I have seen MLC No.136

dated 05.06.2013 of Sudesh S/o Prem Singh, aged 23 years, male. Same is in the handwriting of Dr, Ritu and as per the contents of the MLC the patient was brought dead to the casualty with alleged history of being unresponsive since 30 minutes and as per history available from patient attendant the patient came back from the

market at 5 pm today. The attendant noticed that the patient was stumbling and not walking steady and that he has been assaulted while at the market. He also complained of shortness of breath at the time. Patient fell unresponsive in 30 minutes prior to emergency department arrival. 38. As per the MLC of the deceased (Ex. PW-5/A) recorded on 05.06.2013 at 06:25 pm. the deceased was unresponsive for the last 30 minutes. It is an admitted fact that the police machinery was set into motion pursuant to DD No.24-A which was recorded at 05:55 pm in Police Station, Palam Village. The fact that DD No.24A which was assigned to PW-15 (Insp. Amrendra Kumar) was recorded at 05:55 PM coupled with the fact that deceased had been unresponsive for 30 minutes starting anti-clockwise from 06:25 pm., CRL.A. 1106/2018 Page 31 of 49 would only lead to an irresistible conclusion that the deceased was not in a position to narrate the incident, before 05:55 PM to the police witnesses i.e. PW-12 (Ct. Piplad) and PW-15 (Inspector Amrendra Kumar). Moreover, the testimony of PW-2 (wife of the deceased) confirms the opinion of the examining Doctor which was recorded in the MLC (Ex. PW-5/A) as per which the deceased was brought in house No.54, Gali No.2, Manglapuri, Phase-I, Palam, New Delhi in an unconscious state of mind. Accordingly, we do not find the testimony of police witnesses i.e. PW-12 (Ct. Piplad) and PW-15 (Inspector Amrendra Kumar) to be of a sterling quality that Sudesh (the deceased) had made dying declaration to them.

39. In view of the above discussions, the statements of PW-1, Prem Singh (Father of the deceased), PW-6, Bal Kishan (Maternal uncle of the deceased), PW-10, Vinod (brother-in-law of the deceased), PW-12 (Ct. Piplad) and PW-15 (Inspector Amrender Singh) who disclosed the dying declaration made by the deceased, when analyzed, suffer from discrepancies and cannot be relied upon for basing the conviction of the appellant/Akash. Medical & Scientific Evidence 40. Dr. Narayan Dabas (PW-16) Sr. Resident, Department of Forensic Medicine, DDU Hospital, Delhi appeared on behalf of Dr. Santosh Kumar, Sr. Resident, Department of Forensic Medicine, DDU Hospital who had conducted the post-mortem of the deceased and proved the post mortem report as (Ex.PW-16/A) wherein he opined that cause of death was due to hemorrhage shock caused by a CRL.A. 1106/2018 Page 32 of 49 pointed weapon. The relevant portion from his statement recorded is reproduced below: I have been deputed by the M.S. of DDU hospital to depose

in the court in respect of the postmortem report No.718/2013 which was prepared by Dr.Santosh who has left the services of the hospital and his present whereabouts are not known. I am acquainted with the handwriting and signatures of Dr.Santosh as I have seen him while writing and signing in the hospital. I have seen the postmortem report No.718/2013 dated 06.06.2013 pertaining to deceased Sudesh Kumar, male, aged about 25 years. As per report, the date and hour of starting autopsy is 06.06.2013 at about 3.30 pm. and autopsy completed at 4.30 p.m. on the same day. On external examination, following external injuries were found on the body of the deceased.

1. One abrasion of size 1 cm x 0.5 cm present on the medical aspect of mid left arm with reddish brown in colour.

2. On penetrating injury present on the lateral aspect of the left side of chest at mid auxiliary line in fifth costal space with dimension of 0.6 cm x 0.5 cm and deep to thoracic cavity with ragged and beveled margins. The penetrating injury placed 9cm below and lateral from left nipple and 28 cm above left anterior superior iliac spine with 121 cm from left heel. On exploration of the wound penetrating injury pierces 5th intercostal space, pleura and making tear in lower lobe of left lung and pericardial sac and pierces the left ventricle wall of the heart and reached up to left ventricle cavity and penetrated whole thickness of the myocardium of the left ventricle with collection of massive amount of liquid and clotted blood into the mediastinum and left thoracic cavity.

3. One penetrating injury oval in shape with present over the right middle part of back 2 cm lateral to the mid spinal line at the level of D12 vertebrae 21 cm below from the angle of right scapula with dimension of 0.6 cm x 0.5 cm and deep to abdominal cavity with ragged and beveled margins. On further exploration the said injury pierced the whole thickness of the abdominal wall and making tear in the infero lateral aspect of right lobe of liver of size 1 cm x 0.6 cm x 5 cm with collection of liquid and clotted blood about 1000 ml in the peritoneal cavity. On examination of chest (thorax), the following injuries were found in the heart and pericardial sac: The left ventricle of the heart pierced by making a tear of 0.5 cm in diameter. The whole pericardial sac including retro pericardial area

1106/2018 Page 34 of 49 (mediastinum) contained massive blood (clotted) dark red in colour. Preserved items: (1) Blood on gauge piece (2) clothes. All exhibits sealed with seal of DFMT DDU Hospital and handed over to the concerned IO. The cause of death was due to hemorrhagic shock caused by penetrating injury to heart, on left lung and live inflicted by blunt and pointed weapon like screw driver or other conformable articles/weapons. The manner of death was homicide and the time since death of the deceased was approximately 20-22 hours prior to the postmortem examination. I identify the signature of Dr. Santosh Kumar on the postmortem report Ex.PW16/A which bears the signatures of Dr. Santosh Kumar at point A on each page. I have also seen the subsequent opinion given by Dr. Santosh Kumar regarding consistency of produced weapon of offence in respect of injuries mentioned in PM report No.7

(Ex.PW16/A) of deceased Sudesh and tears on the clothes i.e. shirt and pant. The opinion is Ex.PW-16/B which bears the signature of Dr. Santosh at point A and B. 41. After examining the testimony of Dr. Narayan Dabas and the post mortem report (Ex.PW16/A), it is observed that as per the medical CRL.A. 1106/2018 Page 35 of 49 evidence on record the cause of death was due to hemorrhage shock caused by penetrating injury to heart, on the left lung and liver inflicted by blunt and pointed weapon like a screw driver.

42. Further, Dr. Narayan Dabas (PW-16) Sr. Resident, Department of Forensic Medicine, DDU Hospital, Delhi also proved the subsequent opinion regarding consistency of produced weapon of offence in respect of injuries mentioned in PM report No.7

of deceased Sudesh (Ex. PW-16-B) which reads as under:-

"On dated 15.07.2013, IO of the case Insp. Sunder Singh, SHO PS: Palm Village submitted an application alongwith PM report No.71

of deceased Sudesh and two separately parcels containing weapon of offence (i.e screw driver sealed with seal of SSY) and clothes of deceased sealed with the seal of DFMT alongwith sample seal seeking subsequent opinion about the above cited matter. On opening of parcel containing weapon of offence, received one screw driver. On examination of the same I observe that the screw driver is made of steel like metal part appearing cylindrical in shape with flattened apical part

showing the 5.92 mm in diameter (at cylindrical parts) and 5.90 mm (at apical part). The flattened/apical part bears semi sharp edge and rectangular shape. The handle part is made of PVC like material blue in colour and quite CRL.A. 1106/2018 Page 36 of 49 facilitated for holding in hand in the event of infliction. There is no obvious blood staining observed, however 1-2 minor reddish brown patches (Blood staining) seen on the metallic part. XXXX XXXX XXX OPINION:-

"After the perusal of PM report No.7

and observations on the part of produced weapon of offence and cut marks on the clothes I am of the considered opinion that the produced weapon of offence i.e. a screw driver could have inflicted on the body of deceased which caused tearing of the clothe and injuries mentioned in PM report. 43. Perusal of the aforesaid opinion (Ex. PW-16-B) reveals that the injuries on the body of deceased could have been inflicted by the weapon produced before Dr. Narayan Dabas (PW-16) i.e. screwdriver.

44. The weapon of offence (screwdriver) was sent to forensic science laboratory for analysis and the same has been exhibited on record as (Ex-PW-21/H). Relevant portion of FSL.2013/DNA-5886 (Ex-PW-21/H) is reproduced below:
DESCRIPTION OF PARCELS & CONDITION OF SEALS (SEALS INTACT AS PER F.AS LETTER) Sealed cloth parcel Sealed envelope 1 1 - - Sealed polythene bag Total DESCRIPTION OF ARTICLES CONTAINED IN PARCELS Parcel

One sealed cloth parcel with the seal of DFMT13 (three) - - CRL.A. 1106/2018
Page 37 of 49 Exhibit

Parcel

Parcel 3: Exhibit 3: DDU Hospital containing exhibit 1. One screw-driver. One sealed polythene bag sealed with the seal DFMT DDU HOSPITAL said to contain exhibit 2, returned in original, unexamined. One sealed envelope sealed with the seal of DFMT DDU HOSPITAL containing exhibit 3. Damp Foul smelling brown gauze cloth piece described as blood on gauze piece of deceased Sudesh RESULTS OF ANALYSIS1 2. Blood was detected on exhibits 3. Blood could not be detected on exhibits 1. 45. As per (Ex. PW-16/B), the opinion of Dr. Santosh

Kumar, Senior Resident, Department of Forensic Medicine, DDU Hospital, the injuries inflicted on the body of deceased could have been inflicted by the weapon of offence i.e. screw driver. However, from the perusal of the FSL Report (Ex. PW-21/H), it has emerged that no blood stains were found on exhibit 1 i.e. screw driver which demolishes the case of the prosecution. Recovery of Weapon of Offence 46. Learned counsel for the Appellant laboured hard to bring forth that the recovery of screwdriver made pursuant to the disclosure statement of the appellant/Akash is not admissible in the eyes of law as the same was planted in order to incriminate him.

47. From the perusal of the record, we find that the prosecution in the present case has relied upon the recovery of weapon of offence i.e. the screwdriver, which was recovered on the pointing out of appellant/Akash. The story of the prosecution in relation to recovery of alleged weapon of offence finds corroboration from the testimony CRL.A. 1106/2018 Page 38 of 49 of police witnesses PW-9 (HC Sunder Lal) PW-18 (SI Jagdish Rathi) and PW-21 (ACP Sunder Singh). Relevant portion of the testimony of PW-9 (HC Sunder Lal) reads as under:-

"On the same day in the evening hours at about 7/7:30 p.m. I alongwith Inspector Sunder Singh, ASI Jagdish Rathi went to Sultanpuri G-Block where the IO asked some public persons to join the raiding team but none agreed to join the raiding team and went away showing their inability without telling their names and addresses. Thereafter the secret informer who was with us at the time disclosed that in the house No.G-32, Sultanpuri the boys who committed the murder of Sudesh is hiding himself in this house. Thereafter we went there and at the instance of secret informer the accused Akash, present in the court today (correctly identified), was arrested vide arrest memo Ex. PW-9/A which bears my signatures at point A and of accused Akash at point B XXXX XXXX XXXXX On 06.06.2013 after the arrest of accused Aakash, present in the court today (correctly identified by witness) was arrested by IO Inspector Sunder Singh. The accused was interrogated and his disclosure statement was recorded in which he disclosed that he can get recover the screw driver (pechkas) from a place in Manglapuri, Phase-I, New Delhi. In pursuance of the said disclosure statement, the accused led the police party including me, ASI Jagdish Rathi and Inspector

CRL.A. 1106/2018 Page 39 of 49 Sunder Singh to a place in Manglapuri and from a gatta (kudedaan) got recovered a screw driver. The handle of the said screw driver was of blue colour. IO Inspector Sunder Singh sealed the recovered screw driver in a pulanda with the seal of SSY and seized the same vide seizure memo Ex. PW-9/D which bears my signatures at Pt. A. 48. SI Jagdish Rathi stepped into the witness box as PW-18 and deposed that: Accused was interrogated and his disclosure statement was recorded in which he disclosed that he can get recover the screwdriver from Khatta, Kabristan, Manglapuri, New Delhi. The disclosure statement of the accused was recorded by IO and the same is already Ex. PW9/C bearing my signatures at point C. Thereafter, accused Akash led the police party including me to Kabristan, Manglapuri and got recovered a screw driver from Khatta to Kabristan. The handle of the screwdriver was of blue colour. The length of screwdriver was found to be 9 inches. The screw driver was having blood stains. IO Inspector Sunder Singh sealed the recovered screw driver in a pulanda with a seal of SSY. Seal after use was handed over to HC Sunder by him. The seizure memo of the screw driver is already Ex.PW9/D which bears my signatures at Point B. IO Inspector Sunder Singh prepared a site plan of the place of recovery. CRL.A. 1106/2018 Page 40 of 49 Thereafter, we came to the police station alongwith the accused. The case property i.e the pulanda of the screw driver was deposited in the Malkhana by the IO. My statement was recorded by the IO. 49. Further during his cross examination, he has deposed that: It is correct that the place of alleged recovery of screw driver is a public place. No public person was found at the spot at the time of the alleged recovery because it was midnight. 50. ACP Sunder Singh stepped into the witness box as PW-21 and deposed that: On 07.06.2013, in the morning, at about 8 oclock , accused Akash led the police including me, ASI Jagdish Rathi and HC Sunder to a Kudaghar near the gate of Kabristan, Manglapuri, Phase-I, New Delhi and he took out a screw driver from Khatta and produced the same before me and stated that he had used the said screw driver in committing murder of Sudesh. I inspected the screwdriver and found that it was having blood stains. The handle of the screwdriver was of blue colour. The screw driver was of 7 inch in total. I sealed the screw driver in a pulanda with a seal of SSY. The seal after use was handed over to HC Sunder . I seized the pulanda of screw driver vide a seizure memo and the same is already

Ex.PW9/D. I prepared site plan of the place of recovery of screw CRL.A. 1106/2018 Page 41 of 49 driver and the same is PW21/F. Thereafter, we returned to the police station and I deposited the pulanda of screw driver in the malkhana with MHC(M). The accused was present in court and was sent to judicial custody.

51. Conjoint reading of the aforementioned testimonies of the prosecution witnesses reveal that the blood-stained screwdriver was recovered pursuant to the disclosure statement (Ex. PW9/C) of the appellant/Akash from the Kabristan vide seizure memo (Ex.PW9/F). There is a major contradiction with regard to the time of recovery of the screwdriver from the Kabristan. PW-21 (ACP. Sunder Singh) in his examination-in-chief revealed the time of recovery as 8 oclock in the morning and deposed that On 07.06.2013, in the morning, at about 8 oclock , accused Akash led the police including me, ASI Jagdish Rathi and HC Sunder to a Kudaghar near the gate of Kabristan, Manglapuri, Phase-I, New Delhi whereas to the contrary PW-18 (SI Jagdish Rathi) in his cross-examination has mentioned the time of recovery of alleged weapon of offence as midnight and stated that It is correct that the place of alleged recovery of screw driver is a public place. No public person was found at the spot at the time of the alleged recovery because it was midnight.. PW-9 (HC Sunder Lal) failed to give complete details as to what time the recovery of the screw driver has been affected by the Investigating team. In our view, the contradiction in the testimonies of police witnesses in relation to recovery of weapon of CRL.A. 1106/2018 Page 42 of 49 offence is a major defect on the part of the prosecution which cannot be overlooked. Further, the pointing out memo (Ex.PW-9/D) also does not lend any support to the story of the prosecution in relation to recovery of weapon of offence, as no public witness has participated in the recovery proceedings. Moreso, as discussed above, in the preceding paragraphs, as per FSL report (Ex. PW- 21/H) no blood stains were found on exhibit 1 i.e. (screw driver) which weakens the case of prosecution in relation to recovery of the alleged weapon of offence. Hence, we are of the opinion that in the instant case, the recovery of weapon of offence is doubtful and it cannot be safely concluded that the screw driver recovered pursuant to the disclosure of the appellant is the same weapon which was used in commission of crime.

Defective Investigation 52. The argument by learned counsel for the appellant that the police while conducting the investigation failed to follow the procedure

prescribed under the Code of Criminal Procedure and the weapon of offence (screw driver) was recovered from an open place in absence of an independent witness and further that the investigating officer made no endeavors to lift the chance prints from the screw driver and that the investigating officer has failed to prove from whose mobile number the initial PCR call was made. It is true that there are some procedural minor faults in the investigation but in our view the same are not fatal to the case of the prosecution and benefit of the same cannot be given to the accused person. In this regard, reliance can be placed on State of Karnataka v. K. Yarappa Reddy reported in 1999 8 SCC715 wherein, CRL.A. 1106/2018 Page 43 of 49 Supreme Court occasioned to consider the similar question of defective investigation and observed that criminal justice should not be made a casualty for the wrongs committed by the investigating officers. Supreme Court, in Paragraph 19, held as follows: 19. But can the above finding (that the station house diary is not genuine) have any inevitable bearing on the other evidence in this case?. If the other evidence, on scrutiny, is found credible and acceptable, should the Court be influenced by the machinations demonstrated by the Investigating Officer in conducting investigation or in preparing the records so unscrupulously?. It can be a guiding principle that as investigation is not the solitary area for judicial scrutiny in a criminal trial, the conclusion of the Court in the case cannot be allowed to depend solely on the probity of investigation. It is well- nigh settled that even if the investigation is illegal or even suspicious the rest of the evidence must be scrutinised independently of the impact of it. Otherwise the criminal trial will plummet to the level of the investigating officers ruling the roost. The Court must have predominance and pre-eminence in criminal trials over the action taken by the investigation officers. Criminal Justice should not be made a casualty for the wrongs committed by the investigating officers in the case. In other words, if the Court is convinced that the testimony of a witness to the occurrence is true the Court CRL.A. 1106/2018 Page 44 of 49 is free to act on it albeit the investigating officer's suspicious role in the case. 53. In this regard, reliance can also be placed upon the case of C. Muniappan v. State of T.N., (2010) 9 SCC567 wherein it has been held: 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 CrI.

Appeal No.1349/2014 Page 18 of 19 the accused. The law on this issue is well settled that the defect in the investigation by itself cannot be a ground for acquittal. If primacy is given to such designed or negligent investigations or to the omissions or lapses by perfunctory investigation, the faith and confidence of the people in the criminal justice administration would be eroded. Where there has been negligence on the part of the investigating agency or omissions, etc. which resulted in defective investigation, there is a legal obligation on the part of the court to examine the prosecution evidence dehors such lapses, carefully, to find out whether the said evidence is reliable or not and to what extent it is reliable and as to whether such lapses affected the object of finding out the truth. 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. CRL.A. 1106/2018 Page 45 of 49 and in *Sunil Kundu v. State of Jharkhand*, reported in (2013) 4 SCC422 (2013) 2 SCC (Cri) 427:

2013. SCC Online SC316 which reads as under: 29...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.... and further in *Hema v. State*, (2013) 10 SCC192: (2013) 4 SCC (Cri) 7

2013 SCC Online SC20 it has been held: 18. It is clear that merely because of some defect in the investigation, lapse on the part of the investigating officer, it 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. CRL.A. 1106/2018 Page 46 of 49 Conclusion 54. In

our view, in the instant appeal before us, the prosecution has failed to link the role of the appellant with the commission of the crime. As discussed above, in our view, there are various discrepancies and improvements in the testimony of PW-4, Adesh Kumar who was canvassed as the eye witness of the alleged crime and the same cannot form the basis of conviction of the appellant. Similarly, the testimonies of PW-1, Prem Singh (Father of the deceased), PW-6, Bal Kishan (Maternal uncle of the deceased), PW-10, Vinod (brother-in-law of the deceased), PW-12 (Ct. Piplad) and PW-15 (Inspector Amrender Singh) who narrated the statement given by the deceased to them, suffer from major contradictions being unreliable, would be unsafe to act upon the evidence of these prosecution witnesses. Moreover, the recovery of the alleged weapon of offence at the instance of the appellant is also doubtful and does not find support from scientific evidence.

55. It is settled law that while deciding an appeal filed by the appellant, in case two views are possible, then the benefit of doubt must be given to the accused. The Apex Court in *P. Satyanarayana Murthy vs. The Dist. Inspector of Police and Ors.*: (2015) 10 SCC152 has held as under:-

"25. In reiteration of the golden principle which runs through the web of administration of justice in criminal cases, this Court in *Sujit Biswas v. State of Assam*: (2013) 12 SCC406 had held that suspicion, however grave, cannot take the place of proof and the prosecution cannot CRL.A. 1106/2018 Page 47 of 49 afford to rest its case in the realm of "may be" true but has to upgrade it in the domain of "must be" true in order to steer clear of any possible surmise or conjecture. It was held, that the Court must ensure that miscarriage of justice is avoided and if in the facts and circumstances, two views are plausible, then the benefit of doubt must be given to the accused. 56. In the case *Jose vs. The Sub-Inspector of Police, Koyilandy and Ors.*: (2016) 10 SCC519 the Apex Court has held as under: 53. It is a trite proposition of law, that suspicion however grave, it cannot take the place of proof and that the prosecution in order to succeed on a criminal charge cannot afford to lodge its case in the realm of "may be true" but has to essentially elevate it to the grade of "must be true". In a criminal prosecution, the court has a duty to ensure that mere conjectures or suspicion do

not take the place of legal proof and in a situation where a reasonable doubt is entertained in the backdrop of the evidence available, to prevent miscarriage of justice, benefit of doubt is to be extended to the accused. Such a doubt essentially has to be reasonable and not imaginary, fanciful, intangible or non-existent but as entertainable by an impartial, prudent and analytical mind, judged on the touch stone of reason and common sense. It is also a primary postulation in criminal jurisprudence that if two views are possible on the evidence available, one pointing to the guilt of the accused and the other to his CRL.A. 1106/2018 Page 48 of 49 innocence, the one favourable to the accused ought to be adopted. 57. Keeping in view the aforesaid settled law and the material available on record, we conclude that the prosecution has failed to prove its case beyond all reasonable doubts and it would be highly unsafe to convict the appellant. Accordingly, the present appeal is allowed. The judgment dated 13.07.2018 and order on sentence dated 18.07.2018 of the trial court are set aside.

58. The appellant stands acquitted and be released forthwith, if not required in any other case.

59. Trial Court Record be sent back along with a copy of this order. Copy of this order be also communicated to the Superintendent Jail, Tihar Jail. OCTOBER23 2019 gr SANGITA DHINGRA SEHGAL, J.

MANMOHAN, J.

CRL.A. 1106/2018 Page 49 of 49

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