

Dhanvir and Others Vs. the State

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Court : Delhi

Decided On : Mar-10-2000

Reported in : 2000IIIAD(Delhi)1012; 2(2000)CCR413; 85(2000)DLT711; 2000(53)DRJ632

Judge : Usha Mehra and; S.N. Kapoor, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 34, 302 and 392; [Arms Act, 1959](#) - Sections 25

Appeal No. : Crl.A. No. 110, 302 of 1998

Appellant : Dhanvir and Others

Respondent : The State

Advocate for Def. : Mr. HJS Ahluwalia Adv.

Advocate for Pet/Ap. : Mr. Raman Sawhney amices Curiae and; K.B. Andley Adv

Judgement :

ORDER

Usha Mehra, J.

1. Sessions case No.88/99 culminated into the conviction of three accused namely S/Shri Dhanvir s/o Bhagwana, Chander pal s/o Babu Ram and Sita Ram s/o Har Deo by the learned Additional Sessions Judge vide his judgment dated 27th February,1998. They have been found guilty for an offence punishable under Section 302/34 IPC and have been sentenced to undergo life imprisonment and to pay fine of Rs.5,000/- each. In case of default of payment of fine to further undergo RI for another three months. Chander Pal and Sita Ram have been found guilty under Section 392/34, I.P.C. as well as under Section 25 of the Arms Act. Whereas Dhanvir has also been found guilty under Section 392/397/34, IPC and also under Section 27 of the Arms Act. They are to get benefit under Section 428 Cr.P.C. in regard to substantial sentence awarded under Section 392/34 and 397 IPC as well as under Section 25 and 27 of the Arms Act. These sentences are to run concurrently and in default one after the other after expiry of period of substantial sentences.

2. S/Sh.Dhanvir and Chander Pal felt aggrieved with the impugned judgment and order passed by the learned Additional Sessions Judge hence approached this Court by way of their afore mentioned respective appeals. Criminal Appeal No.302/98 has been filed by Dhanvir and Criminal Appeal No.110/98 has been preferred by Chander Pal. As stated at the Bar, Sita Ram, the third accused has not assailed the impugned judgment and order.

3. In order to appreciate the challenge raised by these appellants we may acquaint ourselves with the facts of the case leading to the passing of the impugned judgment. As per the version put up by the prosecution, Smt. Rita (PW-4) along with her husband late Gopal Ballabh and their children have been residing at C-127, Bhagirath Vihar, P.S. Gokulpuri, Delhi. Deceased Gopal Ballabh was working as Chief Cashier in Dena Bank, Lodhi Road Branch. On 8th July,1989 she along with Gopal Ballabh went to see the plot of her brother Mahender at Ram Park ahead of Loni Road. They reached the house of her brother. After taking meal they left the house of her brother Mahender at about 8.30 PM. for Delhi. Since they could not get bus for their house hence certain distance they covered by Rickshaw. That in order to catch DTC bus No.2 from Shahdara they hired a TSR (Scooter). They got down from TSR near Loni Post at Kavita Palace Cinema at

about 9/9.30 PM. From there they walked on their left side of the puce road. Hardly had they reached near Pulia of Ganga Vihar when she found three persons coming in their right side. Those persons thus came in front of Smt.Rita (PW-4) and her husband. One of them who was identified by Smt.Rita (PW-4) later on as Dhanvir gave knife blows to her deceased husband. Similarly identified by PW-4 Smt.Rita, Sita Ram accused caught hold of her husband and Chanderpal caught hold of her and gagged her.

4. As a result of knife injuries inflicted, her husband started bleeding profusely, fell on the road and became unconscious. However, when she succeeded in raising alarm for help, all the three persons fled away. While help, as a result those three persons fled away. While fleeing accused Chander Pal snatched her silver chain weighing 1 to 1-1/2 tola which she was wearing at that time. According to her those persons were armed with knives. Accused Dhanvir was wearing check bush shirt and pant. Other two were wearing clothes of black colour. On hearing her cries some people came there. She sought their help to inform the matter to the police. Shri Mohan (PW-6) acceded to her request. He went to the check post of Loni Road and informed the police about Gopal Ballabh lying on the pulia. On the basis of the said information supplied by Mr.Mohan (PW-6) DD No.17-A dated 8th July,1989 was recorded.

5. Inspector Daryao Singh (PW-27) with one Constable Shish Ram were passing through that area under the jurisdiction of P.S. Gokulpuri near from Petrol Pump in the official van. He was going in connection with an investigation of another case. At that time Inspector Daryao Singh received message on wireless to the effect that one Mr.Mohan (PW-6) had informed that a person was lying in injured condition on the Pulia of Ganga Vihar and that police party may be deputed to the spot. On receiving this information, Inspector Daryao Singh immediately reached the spot i.e. Pulia of Ganga Vihar and found Gopal Ballabh son of Shri Munshi Lal aged 45 years, r/o C-127, Bhagirath Vihar, Gokulpuri, Delhi, smeared with blood in injured condition along with his wife Smt.Rita (PW-4) present at the pulia. The inspector lifted the injured and put him in his official van with the help of Constable Shish Ram. He took the injured Along with his wife Smt.Rita (PW-4) to GTB Hospital at about 10.30 PM. Doctor on duty examined Gopal Ballabh and declared

him brought dead. Doctor prepared the MLC No.2047/89 (Ex.PW-23/A).

6. Statement of Smt.Rita (PW-4) was recorded in the hospital itself at about 11.00 or 11.30 p.m. Thereafter deceased was sent for post mortem. Post mortem report is Exhibit PW-24/A. Medical opinion about cause of death is Exhibit PW-24/B. After recording the statement of Smt.Rita (PW-4) and obtaining the MLC of deceased Gopal Ballabh and the circumstances at the spot, the police found the commission of offence punishable under Section 302/392/34, IPC and under Section 25 of the Arms Act against accused Sita Ram and Chander Pal and under Section 302/392/34/397, IPC and under Section 27 of the Arms Act against accused Dhanvir. The case was accordingly registered vide FIR No.226/89.

7. Prosecution examined as many as 28 witnesses. Prem Ballabh (PW-1) brother of the deceased identified the body of deceased Gopal Ballabh. Inspector Davinder Singh (PW-7), Draftsman prepared the scale site plan Ex.PW-7/A. Ram Dawal (PW-9) recorded the information given by Mr.Mohan (PW-6). Mr.Bal Kishan (PW-11) took photographs of the scene of crime. Mr.Baljit Singh (PW-13) took dead body of Gopal Ballabh to the mortuary at Subji Mandi and testified that so long the dead body remained under his custody it was not interfered in any manner. Mr.Raj Gupta (PW-14) proved sale of the silver chain to the deceased for Rs.85/-. Constable Sat Pal (PW-15) delivered special report to the Metropolitan Magistrate. Constable Jagpal (PW-17) handed over the dead body of Gopal Ballabh to his relations. ASI Iqbal Singh (PW-19) received Rukka on the basis of which FIR PW-19/A) was recorded. Head Constable P.P.Shyamlan (PW-20) received wireless message and recorded DD No.17A. Head Constable Ganpat Singh (PW-21) Along with I.O. deposited sealed parcels on 8th July,1989 and 13th July,1989 with Moharar Maalkhana. S.No.1 to 14 were sent to CFSL and after analysis received report from CFSL. Kishan Lal Constable (PW-22) was on duty at GTB Hospital on 8th July,1989 when injured Gopal Ballabh was brought to hospital. He conducted the personal search of the deceased and recovered HMT wrist watch, bank slip and cash etc. Mr.R.S.Sharma (PW-23) Record Clerk, GTB Hospital proved MLC (Ex.PW-23/A). Tej Pal Singh (PW-24), Clerk of the GTB Hospital proved Post mortem report (Ex.PW-24/A) and opinion (Ex.PW-24/B). Beside the above witnesses, prosecution examined independent witnesses

namely Sh.Surender Singh (PW-5), Mr.Mohan (PW-6), Shri Sita Ram (PW-3) and Mr.Satpal (PW-2). Shri Surinder Singh and Shri Mohan by their testimony establish the presence of Smt.Rita (PW-4) with her injured husband Gopal Ballabh at the scene of crime. She was crying for help. Deceased Gopal Ballabh was lying in injured condition. On the request of Smt.Rita (PW-4), Mr.Mohan (PW-6) lodged the report with the police pursuant to which DD.No.17-A was recorded. Shri Sita Ram (PW-3) and Satpal (PW-2) were declared hostile. Mr.S.K.Sarvaria, Judge Labour Court (PW-8) at the relevant time was a Metropolitan Magistrate, Shahdara. In his presence silver chain was identified by Smt.Rita (PW-4). Mr.Satnam Singh, Additional District Judge (PW-10) at the relevant time was Metropolitan Magistrate, Shahdara. Before him application was filed by the police for fixing the date of Test Identification Parade (in short TIP) of the accused persons. In his presence accused persons refused to join TIP.

8. Constable Amar Pal(PW-12), Head Constable Subhash Chand (PW-16), Constable Jagpal (PW-17),SI Anil Kumar (PW-18), Inspector Murli Dhar (PW- 25), SI Kali Charan (PW-26) as well as Inspector Daryao Singh (PW-27) testified the receipt of secret information on the basis of which Investigating Officer Along with the above said witnesses raided Jhuggi No.173, arrested accused Sita Ram and Chander Pal from Jhuggi No.173 and accused Dhanvir from another jhuggi in the same vicinity. They also proved recovery of knife, silver chain and blood stained shirt and pant.

9. Appellant Dhanvir was without a counsel, therefore, this Court appointed Mr.Raman Sawhney as the amicus Curiae for the appellant Dhanvir. Appellant Chander Pal was represented by Mr.K.B.Andley. Since these appeals bearing Crl.A.No.302/98 and Crl.A.110/98 have arisen from the same Judgment hence were taken up and heard together for disposal.

10. The case of the prosecution hinges and revolves around the testimony of Smt.Rita (PW-4), wife of late Gopal Ballabh stated to be the eye-witness of the occurrence. Prosecution case thus rest on her evidence. If her statement inspires confidence and is found trustworthy then prosecution succeeds in establishing the guilt of the accused persons. Appellants' conviction is primarily based on the

testimony of Smt.Rita (PW-4). Hence her testimony assumes importance and is crucial for the determination of these appeals.

11. Mr.Raman Sawhney and Mr.K.B.Andley have assailed the case of the prosecution amending into the impugned judgment on the following amongst other grounds:-

1. Presence of Smt.Rita (PW-4) at the time of occurrence doubtful. She could not witness the crime nor she could have identified the assailants.

2. Identity of the accused persons has not been established rather accused persons had been shown to the witnesses. They were not kept in muffled faces. No adverse inference could have been drawn on their refusal to join the TIP.

3. That the injuries as reflected in the MLC do not tally with the injuries reflected in the post-mortem report.

4. No motive had been established by the prosecution for the offence. Robbery could not have been the motive because neither the cash nor the HMT make wrist watch of the deceased were removed from the possession of the deceased. Snatching of silver chain as alleged by Smt.Rita (PW-4) was an after thought. Even the identification of silver chain was not proper.

5. Common intention not proved.

EYE WITNESS ACCOUNT, PRESENCE OF SMT.RITA

12. Counsel for the appellants urged that Smt.Rita (PW-4) was not present at the spot at the time of occurrence. To establish the same they relied on the following circumstances namely (i) Her blood stained clothes were not taken into possession by the Investigating Officer nor those blood stained clothes were sent to the CFSL for examination. It is prosecution's case that on account of knife blow Gopal Ballabh was bleeding profusely, had she been present with her husband her clothes would have got blood stained. That the Investigating Officer did not notice blood on her clothes hence he could not have taken her clothes into possession as those were not blood stained. This in itself is a sufficient proof that she was not

present at the spot. Counsel for the appellant to support their contentions placed reliance on the decision of Supreme Court in the case of Meharaj Singh (L/Nk.) v. State of U.P. reported in 1994 SCC 1390. In that case also cloths of the wife of the deceased were found to be blood stained nor she tried to save her husband hence the Apex Court found the presence of the wife doubtful. Relying on this judgment it was contended that since the cloths of Smt.Rita were not blood stained nor she tried to save her husband hence her presence at the scene of crime was doubtful. Secondly when the deceased was taken to the hospital her name was not recorded on the MLC to show that she accompanied the deceased or furnished the cause of his death. MLC shows deceased was brought by Inspector Daryao Singh. This circumstance itself show that she was not present with her husband.

13. Arguments of the counsel for the appellants at the first blush appears attractive, but if we scrutinise and assess the oral as well as documentary evidence their argument finds no substance. It crumble under its own weight. The unrebutted testimony of independent witnesses namely of Surinder Singh (PW-5) and Mr.Mohan (PW-6) leave no manner of doubt that Mrs.Rita (PW-4) was present with her husband when Gopal Ballabh in injured condition was lying on the Pulia. Beside the unrebutted testimony of PW-5 and PW-6, testimony of Investigating Officer (PW-27) further establishes beyond any shadow of doubt that Mrs.Rita (PW-4) was present with her husband when the Investigating Officer reached the place of occurrence. He took Gopal Ballabh Along with Smt.Rita (PW-4) to GTB Hospital at about 10.30 PM. The circumstances on which appellants relied to disprove the presence of Smt.Rita (PW-4) at the scene of occurrence in fact stood negatived by the testimonies of above said witnesses.

14. Shri Surender Singh (PW-5) testified that in the year 1989 he was residing at F-456, Ganga Vihar. At about 9/9.30 PM he was at his house when he heard cries of a lady. Hearing those cries he went to the spot there he found the lady sitting on the pulia. She was crying and saying that three persons had killed her husband. This part of his testimony that lady was crying and saying that her husband had been killed by three persons was not subjected to any cross-examination. Not even a suggestion was given that there was no lady crying or saying that three persons killed her husband. Nor it was suggested that Smt.Rita (PW-4) was not

the same lady.

15. To the same effect is the testimony of Sh.Mohan (PW-6). He also heard cries of a lady at about 9.30 or 10.00 PM. He on reaching the spot found a lady sitting on the road crying 'Bachao-Bachao' and saw a person lying in injured condition. That lady asked him to inform the matter to the Police. Accordingly he informed the matter to the police at check-post of Loni Border. On the basis of his information DD No.17A dated 17th September,1989 was recorded. Mr.Mohan's name appears in the DD.No.17A. He was subjected to cross examination but the only question asked to him was at what distance that lady was sitting from the injured. Posing of this question instead of helping the defense in fact lends credence to the case of the prosecution that Smt.Rita (PW-4) was present at the scene of crime.

16. Inspector Daryao Singh (PW-27) reached the place of occurrence at about 10.00 PM. He removed the injured Along with his wife Smt.Rita (PW-4) in his official vehicle to GTB Hospital. At the hospital he recorded the statement of Smt.Rita (PW-4) at about 11.00 or 11.30 PM. This part of his testimony has not been subjected to cross examination and thus remain unassailed. Not even a suggestion was given to him that Smt.Rita (PW-4) was not present or that that lady was not Smt.Rita (PW-4). In view of this uncontroverted statement it can safely be concluded that Smt.Rita (PW-4) was present with her husband at the scene of crime. PW-1 Prem Ballabh brother of the deceased undisputedly reached at the hospital at about 11.00 PM. If PW-4 had not given his address there was none else who could have furnished the information about there being a brother and his address to fetch him to the hospital.

17. The mere fact that the Investigating Officer did not notice blood on the clothes of Smt.Rita or did not care to take her blood stained clothes into possession will not discredit the version of the occurrence given by Smt.Rita (PW-4) nor it proves that story nor can be used as a circumstance to prove that Smt.Rita (PW-4) was not present at the spot. It can at best be a lapse on the part of the Investigating Officer. However a lapse of the Investigating Officer cannot be used as a circumstance to discredit the testimony of Smt.Rita (PW-4). Reliance by the

counsel for the appellants on the decision of Supreme Court in the case of Meharaj Singh (Supra) is misplaced. That case is distinguishable on facts. In Meharaj Singh's case (Supra) the facts were quite different which led to the inference that the wife of the deceased was not present. In that case it was proved that there were no blood stains on deceased's wife's cloths nor there was any blood found at the place of occurrence nor his wife tried to protect her husband while he was being stabbed. It was in this backdrop the Apex Court made these observations. But that is not the case in hand. In the present case Smt.Rita (PW-4) in no uncertain words stated that her husband was bleeding profusely and his blood fell on her. She could not save her husband because of being held by accused Chander Pal and her mouth was gagged. She could neither raised alarm or cry for help nor could save her husband. But as soon as she was out of the clutches of the accused she raised alarm and cry for help. She went towards her husband but could not save him. It is not the statement of the Investigating Officer that her clothes were not blood stained. He only said that he did not notice whether her cloths were blood stained. Non-noticing of her cloths by the Investigating Officer cannot be a ground to infer that Smt.Rita was not present at the place of occurrence. Police found blood of the deceased at the place of crime. Hence in the facts of this case decision of the Supreme Court in the case of Mehraj Singh (Supra) is of no help to the appellants. On the contrary observation of the Apex Court in the case of Manjit Singh Kukku Vs . State of NCT of Delhi, : 2000 CriLJ1439 helps the prosecution. In that case Court found the testimony of the junior counsel of the deceased who was to be naturally present in the Chamber of his senior, reliable and trustworthy. Apex Court relying on the testimony of the said junior counsel ignored the discrepancy of blood group on the shirt of the said junior. The Court since found the testimony of the junior counsel who was naturally to be present in the chamber of his senior to be credit worthy upheld the conviction. Similarly in the case in hand, it is nobody's case that Smt.Rita (PW-4) had no brother by the name of Mahender or she never went to his house Along with her husband. Since the deceased and Smt.Rita had gone together to Mahender's house, it was but natural that they were returning to their home together. Since she was coming with her husband hence she was naturally the eye witness of that ghastly incident which led to the death of her husband.

From whatever angle we may examine her testimony inspires confidence and is truthful. Submission of the appellants, therefore, on this count is untenable.

18. As regards furnishing the information to the doctor, we need not search for the answer. As the injured was brought to the hospital in the official van by the Investigating Officer Daryao Singh hence the doctor correctly recorded 'patient brought by SHO Daryao Singh'. Perusal of the MLC show that the doctor on duty except mentioning the injuries has not mentioned the history of the case. Hence there was no question of recording the presence of Smt.Rita (PW-4) on the MLC. Smt.Rita (PW-4) was present with her husband. It is established from her statement recorded by the police (Ex.PW-4/A) in the hospital between 11.00 and 11.30 PM. This fact in itself falsify the contentions of the appellants, rather it proves that Smt.Rita (PW-4) with her injured husband had been taken to hospital by the Investigating Officer.

IDENTIFICATION OF ACCUSED :

19. It was urged on behalf of the appellants that Smt.Rita (PW-4) could not have identified the assailants. There was darkness at the spot of occurrence. Counsel by the appellants to prove their contentions relied on the cross-examination of Smt.Rita (PW-4). According to them she admitted that the electric light pole was at a distance of 250 yds. Relying on this admission Mr.Andley contended that Smt.Rita (PW-4) had no opportunity to identify the assailants in that darkness. This argument has been noted to be discarded for the obvious reason that Smt.Rita in no uncertain words testified that she saw the assailants face to face. She was capable of identifying the assailants. Smt.Rita nowhere stated that there was total darkness at the place of occurrence. It was not even suggested to her that there was no visibility at the spot or she could not have seen or identified the assailants. In fact she correctly identified the accused persons in Court and stated about the role played by each one of them. While pointing out towards Dhanvir she testified that he was the one who inflicted knife blows to her husband. Sita Ram accused caught hold of her husband and appellant Chander Pal caught hold of her and gagged her mouth. Incident took place in the month of July at about 9.30 or 9.45 PM. It is nobody's case that place of occurrence was pitch dark or that there was

no sufficient light. This argument stood contradicted because the Investigating Officer completed the proceedings at the site. Investigating Officer left the GTB hospital after recording the statement of Smt.Rita (PW-4). He revisited the place of occurrence at about 12.15 a.m. i.e. in the intervening night of 8th/9th July,1989. He remained at the spot till about 3.30/4.00 AM. He prepared the site plan, got the photographs of the site, lifted the blood stained earth and the earth control sample. He took into possession piece of blood stained cement of the Pulia. Sealed those articles into Pullandas. He could do so only if there was sufficient light. On this aspect of his testimony the Investigating Officer was neither questioned nor even it was suggested that there was no light at the spot. The very fact that the Investigating Officer could lift blood stained earth, earth control sample and blood stained piece of cement of the pulia at mid night between 12.15 AM to 3.30/4.00 AM shows that on the scene of occurrence there was no problem of visibility. Recording of proceedings at the site of occurrence proves that Smt.Rita (PW-4) had no difficulty to identify the assailants.

20. The appellants Along with Sita Ram were the assailants stood established from the recovery of blood stained knife (Ex.P-3), shirt (Ex.P-2) and pant (Ex.P-1) from accused Dhanvir. The knife (Ex.P-3) was the weapon used for the crime. Shirt and pant (Ex.P-2 & P-1) blood stained were worn by accused Dhanvir. These articles were recovered from his possession. These articles on being examined by CFSL it was found that these contained blood of AB group. CFSL report Ex.Px1 and Ex.Px2 show that clothes of the deceased which he was wearing were having blood stains. Blood stained earth, blood stained piece of cement and blood stained clothes of the deceased on being examined were found having blood of AB group. This shows blood group of the deceased was of AB group. It was not the case of the appellants that on the knife (Ex.P-3), shirt (Ex.P-2) and pant (Ex.P-1) blood was that of the accused Dhanvir or of other accused persons. Since the blood group of the deceased was AB and the same blood group was found on the knife, shirt and pant recovered from the accused Dhanvir vide Ex.PW- 12A and PW-12D respectively, hence this circumstance completes the chain to establish that appellants were the assailants.

21. Mr. Raman Sawhney then urged that Smt.Rita (PW-4) had not seen the assailants, and therefore, could not correctly give their description. She had testified that the person who stabbed her husband was taller as compared to the other two. But fact of the matter is that Dhanvir is not the tallest. This argument does not cut any ice for the simple reason that when this question was put to Smt.Rita (PW-4) she explained that she found Dhanvir to be the tallest. We think at that moment she perceived Dhanvir who was inflicting knife blow to her husband to be the tallest. She was under trauma because in front of her eyes a man was stabbing her husband, to her he might have looked tall as compared to others. The other two accused were holding her and her husband whereas accused Dhanvir was inflicting knife blows. In such a situation she considered Dhanvir to be taller than others. Thus the description given by her cannot be said to be a ground to presume that Smt.Rita (PW-4) had not seen the assailants or could not have recognised them. Fact of the matter is that she identified the accused persons as assailants. She even correctly identified them in the Court. It, therefore, cannot be said that the identity of the accused persons was in doubt. Having held that Smt.Rita (PW-4) was present at the place of occurrence with her husband and was in a position to recognise and identify the assailant, she can legitimately be called the eye witness.

REFUSAL TO PARTICIPATE IN TEST IDENTIFICATION PARADE

22. The accused persons were not justified in refusing to join test identification parade (in short TIP). Counsel for the appellants tried to justify their refusal on the ground that they had been shown to the witnesses earlier. Mr.Andley thus urged that in such an eventuality adverse inference could not have been drawn against the appellants. To support his contentions he placed reliance on the decision of Supreme Court in the case of Yeshwant & Ors. Vs . State of Maharashtra, : [1973]1SCR291 . In that case the suspect had been seen by the witness. therefore, the Apex Court observed that identification parade in the facts of that case was farce. It was not conducted properly. But that is not the case in hand. therefore, no assistance can be drawn by appellants from that judgment. On facts that judgment is distinguishable. In the present case it has come in the testimony of Constable Amar Pal (PW-12) as well as of the Investigating Officer (PW-27) that

suspects were kept in muffled faces from the time they were taken from Jhuggi No.173 and other jhuggi to the place of occurrence as well as the time they remained in police custody at the police station and when they were produced before the Magistrate. Hence reliance by the appellants on the decision of this Court in the case of Leela Ram v. State reported in 1990 (3) RCR 620 is of no help to them. In Leela Ram's case (supra) there was no evidence to show whether the accused were in muffled faces or not? The statement of the Investigating Officer in that case was considered to be unreliable as he had connived with the witness. In Leela Ram's case even the Magistrate had not made any endorsement that the accused was prod in muffled face. It was in that view of the matter that the refusal of the accused to join TIP was held to be justified. But in the case in hand ample evidence is available on record to show that the accused persons were in muffled faces when taken out from their respective jhuggies to the place of occurrence as well as to the Court and the Police Station. Mr.HJS Ahluwalia, counsel for the State while refuting and controverting argument of the appellants contended that there is a material distinguishable feature in the case of Leela Ram (supra) and the present case. In the present case Metropolitan Magistrate made endorsement on the application dated 14th July,1989 seeking fixation of date for TIP that accused were produced in muffled faces. Endorsement by the Magistrate fortifies the contents of the application wherein it has been mentioned that accused persons were produced before the Metropolitan Magistrate in muffled faces. Relying on the contents of this application and the endorsement made therein by the Metropolitan Magistrate, Mr.Ahluwalia contended that this action of the prosecution show that it took all precautions and steps required under the law to protect the identity of the accused persons. Refusal of the appellants to join TIP was thus not justified. Appellants refused to join TIP in order to hide their guilt. They were apprehensive wanted to join TIP because of the apprehension of being identified by the complainant. There appears to be substance in what Mr.Ahluwalia contended. Refusal to join TIP on the ground that they were shown to the witnesses at police station and other place appears to be a sham defense. They in fact wanted to avoid the TIP due to fear of being identified. Hence the trial court rightly drew adverse inference against them. We see no reason to interfere with the same.

DISCREPANCY IN MLC AND POST MORTEM :

23. Regarding the discrepancies in the number of injuries on the person of the deceased as reflected in the MLC and the postmortem report, we find no material difference. Perusal of the MLC (Ex.PW-23/A) shows two injuries were recorded by the doctor namely:-

(1) Stab injury at 4th I.C.S. 4' lateral sternum;

(2) Stab injury at Lt. Lat. side (midaxillary) in 5th I.C.S.

24. Whereas according to the post-mortem report (Ex.PW-23/B) there were as many as six injuries on the person of the deceased and those are:-

(1) Incised wound (I.W.) 4 cm. x 2 cm. over the left mastoid region placed vertically extending from upper part of mastoid region. It is some deep.

(2) Incised Wound over left side of chest wall placed transversely size is 2.5 cm. x 1 cm. x depth. Lateral end is 1.5 cm below the nipple. Medial end is ante and 7 cm left to midline in front.

(3) Incised Wound 2.5 cm x 1 cm. x ?depth over left side wall of the chest placed transversely. It is 12 cm. below the arm pit. medial end is trailing and acute.

(4) Incised Wound 2.5 cm. x 1 cm. over left side of chest wall obliquely and transversely in the posterior axillary line and 15 cm. below the axillary fold. Lateral end i.e. towards post. axillary line it is trailing depth?

(5) Incised Wound 2.5 cm. x 1 cm. over posterior aspect of left elbow joint placed obliquely and vertically.

(6) I.W. 2 cm. x 0.8 cm. over lateral aspect of olecranon process of left elbow joint placed almost transversely. Injury No.5 is entry wound and injury no.6 is exit wound as it communicates each other.

25. Injury No.1 in the MLC i.e. 4th ICS (Inter Costal Space) 4' lateral to sternum (middle chest wall bone), corresponds to the external injury No.2 as given in the

post-mortem report (Ex.PW-24/A). External injury No.2 of the post-mortem report shows that stab had cut pericardium i.e. lining of the heart. It has further been stated in the post-mortem report that pericardial sack is full of clotted blood and liquid. The same had entered into the right ventricle i.e. right side chamber of the heart near the midline. The complete depth of this stab injury from skin surface to the heart is 9 cms. as per the post-mortem report. Thus the injury No.1 given in the MLC is exactly what has been described by the external examination in the post-mortem report as injury No.2. There is thus no variation. The injury No.2 as described in the post-mortem report (Ex.PW-24/A) was found sufficient to cause death.

26. However, before we proceed to deal with other ground taken by the appellants we would like to mention that the doctor on duty who initially examined the deceased was guilty of callousness in performing his duties properly by not recording all the injuries on the body of the accused. He examined the deceased very cursorily. Mr.Ahluwalia tried his best to justify the conduct of the doctor. According to him doctor might not have examined in details the injuries on the person of Gopal Ballabh because he was brought dead. We are not convinced with this Explanationn. As a doctor it was his duty to note all the injuries whether minor or major even if injured was brought dead. Even though all injuries had not been mentioned in the MLC till it will not make any difference because injury No.1 of the MLC and corresponding injury No.2 of the post-mortem report was found sufficient to cause death of Gopal Ballabh.

MOTIVE : NOT ESSENTIAL :

27. Turning to the question of motive, it may be said that motive is not imperative in every case. For arriving at this conclusion support can be had from the decision of the Supreme Court in the cases of Yeshwant & Ors. Vs . State of Maharashtra : [1973]1SCR291 . thereforee, even if the motive is not established that by itself is no ground to throw away the case of the prosecution.

28. Fact of the matter is that chain of Smt.Rita (PW-4) was snatched from her neck while accused Chander Pal was fleeing from the spot. Whether this could have been the motive or not is immaterial in the facts and circumstances of this case.

The said chain was identified by Smt.Rita (PW-4) in the identification proceedings held before Metropolitan Magistrate. Contention of Mr.K.B.Andley that chain was broken as per Smt.Rita's (PW-4) own showing whereas the chains which were mixed up were not broken, therefore, identification was not proper. This contention is belied from facts on record. Testimony of Mr.S.K.Sarvaria (PW-8) who was then the Metropolitan Magistrate, Shahdara proves that the case property i.e. silver chain was mixed up with other similarly looking chains having similar weight and length. The Metropolitan Magistrate ensured prior to the identification of the chain that case property was mixed up with similar looking chains. Chains as per the version of the Metropolitan Magistrate were of the similar design. It was not easy for common man to identify the chains because of their similarity unless the person identifying was owner of the same. Mr.Sarvaria denied that the case property was not similar to that of the other chains. Even Smt.Rita (PW-4) clarified that chains which had been mixed were identical. 4-5 chains were in broken condition like the case property. This shows Metropolitan Magistrate took all precautions at the time of identification of the chain. In view of the uncontroverted testimony of the Metropolitan Magistrate that the identification was done properly no inference can be drawn that the identification was not conducted in accordance with law. We also find no contradiction in the testimony of Smt.Rita (PW-4) recorded by the police on 8th July,1989 and the statement made before the Court in January/March,1995. Human memory is short. It is not like a computer where memory can be fed and restored for all times to come and later when retrieved it would be verbatim the same. Human being when describes an incident in the natural course some variation is bound to take place. So long variations are not material those can be ignored. It is only material variation which will decreate dent. The variation in the statement of PW-4 as pointed out by the appellants are very inconsequential. therefore, no dent has been created in the testimony of PW-4 because of those inconsequential variations.

QUESTION OF COMMON INTENTION :

29. Regarding the last leg of appellants arguments that there was no common intention on the part of the accused persons to kill Gopal Ballabh, we find no substance in the same. Mr.K.B.Andley urged that Chander Pal was not carrying

any knife nor inflicted any knife injury to the deceased nor holding of Smt.Rita (PW-4) would amount to having common intention to kill Gopal Ballabh. In order to prove common intention, prosecution had to prove meeting of minds before the incident. Prosecution has failed to prove prearrangement or pre-planning by the accused persons. Admittedly in the absence of common intention all accused persons cannot be convicted for murder. Prosecution in order to prove common intention relied on the testimony of PW-4 Smt.Rita. It has come in her evidence that she saw all the three accused coming together having knife in their hand. Accused Sita Ram caught hold of the Prem Ballabh whereas accused Dhanvir inflicted knife blows, accused Chander Pal caught hold of her. All this happened in concerted manner by all the three accused. From these facts of the accused person there is no scope to entertain even a semblance of doubt that accused shared common intention with each other.

30. In similar circumstances, Supreme Court in the case of State of Haryana v. Bhagirath & Ors., reported in 1999 (2) CCC 33 held that such acts would amount to common intention. In that case deceased Subhram set out to his sister's house. He proceeded to the bus stop but he missed the bus. The next bus was to arrive at a long time. He, therefore, went to a nearby house for whiling away the time. The lady of the house and Subhram had a chat together for sometime. The lady withdrew to the kitchen and thereafter Subhram slept on a cot on the verandah of that house. At about 12.30 noon his father Bhagirath along with Hanuman and Kheta reached there. Bhagirath held a grip on the legs of his son while Hanuman and Kheta whacked on his neck with Kulhari. On hearing the death pangs of the victim, the lady inmates of the house rushed out and was shell shocked by the sight of the blind young man being slaughtered by the three assailants who took to their heels after accomplishing the object. defense of accused Bhagirath was that he had no intention to kill Subhram. Rejecting the contention, the Apex Court opined that prosecution had proved with reasonable certainty that Bhagirath was holding legs of the deceased when his nephews cut his throat and after finishing their work all the three ran away together. In the broad spectrum of the occurrence it was held that Bhagirath would have shared the common intention with other two assailants. In the present case also, Sita Ram and Chander Pal caught hold of the deceased as well as of Smt.Rita (PW-4) and Dhanvir inflicted several knife blows

which ultimately led to the death of Gopal Ballabh. This act of the accused persons leaves no manner of doubt that appellant Chander Pal shared common intention with Dhanvir.

31. In almost identical facts the Apex Court in the case of Pal Singh v. State of Punjab, reported in 1999 (2) CCC 112 held that accused had common intention. In that case two of the accused had gone together to the house of the deceased to take away his Tractor. On the refusal of Tractor being given one of the accused fired a shot which killed the deceased. In those circumstances the Apex Court held that due to presence and participation of the other accused in commission of crime with the accused who fired gun shot shows sharing common intention.

32. In the facts of the present case it was correctly contended that accused shared common intention for they came to the spot together, in a concerted move they caught hold of the deceased and his wife. Accused Dhanvir inflicted knife blows, accused Chanderpal gagged Smt.Rita (PW-4) and snatched her chain and all the three ran away together. Recoveries made at the instance of the accused including blood stained knife, clothes and chain etc. further strengthen the prosecution's case in this regard. Because of being caught by accused Chander Pal, Smt.Rita (PW-4) was not in a position to save her husband. The evidence on record clearly clinches the presence and participation of appellant Dhanvir as well as of Chander Pal in the commission of crime and thus sharing common intention. All the actions in a concerted move do not leave any scope to entertain even a semblance of doubt that appellants Dhanvir and Chander Pal Along with Sita Ram shared common intention to kill Gopal Ballabh. therefore, on this count also we find no merits in the arguments of the appellants.

33. For the reasons stated above, we see no reason to differ from the finding arrived at by the Trial Court. We find no merits in these two appeals. The same are accordingly dismissed.