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Badri and Others Vs. the State

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Court : Delhi

Decided On : Nov-24-1995

Reported in : 1996CriLJ1928

Judge : J.B. Goel and; P.K. Bahri, JJ.

Acts : Indian Penal Code (IPC), 1860 - Sections 34 and 302; Code of Criminal Procedure (CrPC) , 1973 - Sections 103, 157, 162 and 313

Appeal No. : Cri. A. No. 84 of 1991

Appellant : Badri and Others

Respondent : The State

Advocate for Def. : H.S. Ahluwalia, Adv.

Advocate for Pet/Ap. : K.K. Sud, Jayant Bud,; Ms. Kamna Vohra and; Ms. Meenakshi J

Judgement :

J.B. Goel, J.

1. Appellants Badri, Khem Chand and Raju were tried for offence u/S. 302/34, IPC for the murder of one Kirpal at House No. D-236, Prashant Vihar, Delhi on 16-6-1988 and on being found guilty they have been convicted and sentenced to

imprisonment for life and a fine of Rs. 100/- each and in default of payment of fine further RI for one month by an Additional Sessions Judge, Delhi vide his judgment and order dated 28-5-1991.

2. Briefly stated the prosecution case is that the deceased Kirpal and his wife Rama PW. 16 were working as labourers for the construction of houses Nos. D-250 and D-236, Prashant Vihar, Delhi. The deceased was also working as Chowkidar at these Houses. They were staying at House No. D-250. Om Shankar, PW. 8 who was the cousin brother of Rama (she being daughter of his maternal uncle) was working as labourer on construction of House No. D-63, Prashant Vihar, Delhi and was living at House No. D-236. Om Shankar, after doing his work left the site at about 11-45 a.m. to take his lunch at house No. D-236 and first he went to house No. D-250 where Rama met him and he enquired of her as to where his brother-in-law Kirpal was. On this she told him that Kurwa and his three companions had come and had taken Kirpal with them on the excuse of playing cards. From there Om Shankar went to house No. D-236 and on entering the house he noticed that Kirpal had been caught by two persons whereas Kurva and the fourth person were inflicting blows with knives on the person of Kirpal. He had also seen playing cards lying there. On seeing Kirpal being given knife blows he became nervous and came out raising alaram. He went to the nearby Police Post Prashant Vihar and police came with him but in the meantime all the four assailants had escaped.

3. In the meantime, one V. K. Talwar resident of House No. D-229 on hearing noise came in the Gali and found Kirpal in injured condition and profusely bleeding lying in the lane one or two away from house No. D-236. He informed PCR on telephone from House No. D-235. This information was recorded at PCR as DD No. 48-A PCR in turn had conveyed the information to the Police Station Samaipur Badri where it was recorded as DD No. 6-A at 12-10 p.m. Copy of this DD entry was sent to ASI Yoginder Singh through Constable Balraj. PCR Van had visited the spot but the injured had already been removed from the spot by Constable Ram Kumar to Hindu Rao Hospital where he was admitted at 1 p.m. and had been examined vide MLC Ex. PW-18/B. He was declared dead at about 1-15 p.m. on the same day.

4. On receipt of copy of the aforesaid DD entry ABI Yoginder Singh came to the spot but on finding that the injured had already been removed to the Hospital, he went to Hindu Rao Hospital. information of the incident had also been given to Shri Rati Ram, SHO when he was present in the office of DCP (North) and he also reached Hindu Rao Hospital. obtained MLC of the injured and found that the injured Kirpal had already died. No eye-witness met him there. He came to the spot where Om Shankar complainant met him, who got recorded his statement Ex. PW. 8/A giving information about the occurrence as aforesaid. The said SHO made his endorsement on his statement and got the FIR registered at Police Station through constable Balraj. The said SHO had found a blood stained Durri, two pairs of Chappals, Playing Cards and their pack lying blood stained in the bath room, one blood smeared towel and one more pair of Chappals was laying at the door of the kitchen of the House No. D-236. Some blood was also noticed near the gate of the house and was also seen on a stone slab in the Gali near house No. D-246.

5. The scene of occurrence was photographed. He picked up aforesaid various articles lying there as well as sample blood from that room; blood stained stone was also seized from the Gali in sealed parcels. Blood stained shirt and Banyan and an HMT watch of deceased were seized by him in sealed parcels from the hospital. The site plan was also prepared. The Inquest report was prepared by him on 17-6-1988 and Post Mortem was conducted by Dr. L. K. Bharua on 17-6-1988 at 2.00 p.m. vide his report Ex. P.12/A. Blood stained underwear and sample blood of deceased were preserved by the post-mortem doctor in sealed parcels which were also seized by the police.

6. On 18-6-1988 after search the three appellants were arrested by SHO Rati Ram from a house

Majnu Ka Tilla on the pointing out of Om Shankar in the presence of the ASI Yoginder Singh. On interrogation all the three appellants had made separate disclosure statements and in pursuance thereof Badri had got recovered blood stained knife (Ex. P.8) and his blood stained washed shirt and pant from his house No. 8-43, Phase II, Budh Vihar, Delhi. Appellant Khem Chand had got recovered

his blood stained shirt and pant from his house No. 8-42, Budh Vihar, and Appellant Raju had got recovered from his house No. V-39, Budh Vihar his blood stained shirt and pant. These articles were sealed and seized. All the seized articles were sent to CFSL. In CFSL reports Ex. PW. 21/E, Ex. PW. 21/F and Ex. PW. 21/G human blood of 'O' group which was of the deceased, was found on Durri, one pair of chappals, one towel and playing cards seized from the spot. Human blood of 'O' group was also found on the knife (Ex. P.8) got recovered from Badri appellant. However, though blood was detected on the clothes of the three appellants as also on other two pairs of chappals, but it was too small for serological test.

7. Test identification parade (TIP) of the three appellants was also arranged. However, they declined to participate in the TIP on the ground that they had been shown to the identifying witnesses.

8. Kurva the fourth accomplice of the appellants had absconded. After investigation the three appellants were charged and tried for offence under S. 302/34, IPC.

9. Prosecution had examined in all 21 witnesses including Om Shankar PW. 8 as eye-witness to the occurrence, and PW. 16 Rama wife of the deceased to show that the deceased was last seen in the company of the appellants. Another witness Radhey Shayam PW. 13 has not supported the prosecution case that he had seen the accused persons in the company of Kurva shortly before the occurrence. PW. 8 supported the prosecution case. P.W. 12 post-mortem doctor proved the nature of the injuries and cause of the death and this Doctor has also opined that some of the injuries could possibly be caused by weapon Ex. P.8.

10. The accused in their statements under S. 313, Cr.P.C. have denied their involvement. They have taken the plea that they have been falsely implicated and were detained by the police from 16-6-1988 itself. The accused Badri has also taken the plea that he was working as mason and had worked for sometime in a Kothi with the deceased and his wife Rama. Khem Chand and Badri examined one Bachan Singh, DW. 1 in support of the plea that they were picked up by the police in the evening of 16-6-1988. Similarly, Raju also examined DW. 2 Rohtas

that he was picked up from his house on the evening of 16-6-1988. Accused Badri also examined Dr. Vishnu Kumar as DW. 3. He has opined that injuries Nos. 9, 10, and 11 found on the person of the deceased could be caused possibly by a double edged sharp weapon and could not have been caused by knife Ex. P.8.

11. The trial court found the prosecution case proved, held all the three appellants guilty and accordingly convicted and sentenced them as aforesaid.

12. P.W. 12 Dr. L. K. Bharua had conducted the post mortem examination on 17-6-1988 at 2 p.m. He had found injuries Nos. 1, 5, and 22, as abraisions; injuries Nos, 7 and 8 are surgical injuries; whereas remaining injuries Nos. 2, 3, 4, 6, 9 to 21 are incised to stab wounds. Injuries Nos. 9, 10, and 11 have been opined as sufficient to cause death individually in ordinary course of nature. Death was due to shock and haemorrhage and death took place about 25 hour earlier.

13. That the deceased had died homicidal death due to injuries caused to him has not been disputed and is also proved on record by the testimony of Post Mortem Doctor (PW 12) who has not been cross-examined about the extent and nature of injuries and also cause of death.

14. Prosecution has been mainly relied on the testimony of P.W. 8 Om Shankar as an eye-witness. His testimony has been believed by the trial Court.

15. It has been very strenuously contended on behalf of the appellants that PW. 8 is an interested witness being near relation of the deceased, his testimony suffers from infirmities and is not of the type on which implicit reliance should have been placed and that the trial court has erred in basing the conviction on his discrepant sole testimony.

16. The question is whether PW. 8 had seen the occurrence as deposed by him The Trial Court his believed his testimony as an eye witness during part of occurrence when the deceased was being inflicted stab blows.

17. P.W. 8 has deposed that he was working as a labourer on the construction of house No. D-63, Prashant Vihar, that at about 11-45 a.m. he went to take his meals at Kothi No. D-236, Prashant Vihar, first he went to take water at house No.

D-230 where Rama his sister (who is his cousin sister) met him and enquired from her about the whereabouts of Kirpal, his brother-in-law; (i.e. Rama's husband) she told him that Kurva with three other persons had come to call Kirpal and they had taken him to Kothi No. D-236. From D-250, PW. 8 went to Kothi No. D-236 from back lane and saw that Badri (whom he pointed out in court) and one another person, (Who he said was not present in the Court), were stabbing Kirpal with knives while the other two accused persons (who he pointed out in court) had caught hold of Kirpal, on seeing the scene he became nervous, returned back after raising an alarm, saying that, 'Mere Jeeja Kumar Rahein Hain' and went to police post; police arrived at the spot; accused persons had fled away from the spot before the arrival of police.

18. He has also stated that he gave his statement Ex. PW. 8/A to the Police which us signed by him and it was read over to him. In cross-examination he has stated that Kirpal and Rama used to live in Kothi No. D-250 which was under construction and Kothi No. D-236 was on its back and was at 2/3 minutes walking distance from that house, and it was also under construction; he used to live, in Kothi No. D-236 along with his father with the permission of Kirpal for the last about one month; that he had prepared his meals in the morning at house No. D-236, part of the meals was taken by him in the morning and the remaining food was kept on the upper slab of the kitchen there which he was to take at lunch time.

19. He further stated that he had gone for his work at 8-30 a.m. and his lunch break is from 12 noon.

20. It is suggested to him that he was not working at Kothi No. D-63 and had not gone to Kothi No. D-236, which he denied. But no specific suggestions have been put to him either that he has not been residing at House No. D-236 or houses Nos. D-236 and D-250 were not under construction, or that his lunch break was not at 12 Noon or he was not to take his lunch at House No. D-236. There is also no suggestion that house Nos. D-236 and D-250 were not being looked after by deceased Kirpal. Nor it is challenged that deceased Kirpal with his wife Rama was living at house No. D-250. No material to the contrary has also been brought on the record. There is no reason to disbelieve his statement that he was residing at

House No. D-236 which was under construction and was looked after by Kirpal; that he (PW 8) was working as labourer at the construction of House No. D-63; Kirpal and Rama were living at House No. D-250 and were working as labourers and deceased was also working as Chowkidar at Houses Nos. D-236 and D-250 which were under construction. There is also no reason to disbelieve him that he had gone to take his meals at Kothi No. D-236 at about 12 Noon from House No. D-63.

21. Testimony of P.W. 8 has been assailed on a number of pleas as noticed hereafter.

22. It has been contended that according to PW 8 the place of occurrence should be inside house No. D-236 whereas the injured was actually lying 3/4 houses away from there in Gali and this belies the presence and testimony of PW 8 as eye witness.

23. PW 8 had seen the actual assault taking place inside House No. 236 and in cross-examination he has stated that when he returned from the Police Post along with police, he had found Kirpal lying near another Kothi. No. 11 V. K. Talwar who was residing at House No. D-229 has deposed that (on that day) at about 1 Noon he was present at his house and was taking his meals when he heard noise coming from the street; he came out and saw that the chowkidar, who was working in Kothi No. D-236, which was under construction, was lying injured and bleeding in the open, one or two houses away from House No. D-236, he informed the Police Control on telephone from House No. D-235 and thereafter police had removed the injured to hospital. V. K. Talwar has not deposed that he had seen the actual occurrence at the place where the injured was lying. From this it cannot be said that the actual occurrence had not taken place at House No. D-236 as deposed by PW 8. It is approved by the testimony of PW. 8 Om Shankar, PW 17 ASI Yoginder Singh and I.O. PW. 21 Rati Ram; SHO that the I.O. had lifted blood stained earth, blood stained Durri, Towel, and playing cards lying scattered and 3 pairs of Chappals from inside of the house No. D-236, and one blood stained stone from near House No. D-236 which is situated at two/three houses away from House No. D-236. The places from where these articles were picked up and where

blood was noticed inside House No. D-236 are shown in site plan Ex. PW. 21/8 prepared by the I.O. PW. 21. Blood group of the deceased has been found on most of these articles. The deceased had not died an instant death, he was taken to Hospital where he had died at 1.15 pm The injured must have walked from House No.D-236 to the place where he was found lying as also held by the trial Court. There is no infirmity in the statement of PW. 8 on this count and this circumstance would not belie his testimony.

24. It is also contended that PW. 8 has stated that his father Rameshwar had taken the injured in a three wheeler scooter which statement is incorrect as Rameshwar who appeared as PW. 9 does not support him; Duty Constable Bidhi Chand (PW. 7) also does not corroborate him who has deposed that the injured was brought to Hindu Rao Hospital by Constable Ram Kumar who is also corroborated by MLC Ex.PW. 18/8. This makes presence of PW 8 at the spot doubtful.

25. Rameshwar appeared as PW. 9 and he has deposed that he was informed about the murder of Kirpal at about 8 pm when he returned from work. However, in cross-examination he had stated that he was working in a Kothi 1-1/2 to 2 furlongs away from D-236 in Prashant Vihar and on this the trial Court has observed that he had no comprehension about 'furlong'. Obviously, he is not a very intelligent person. He was a very near relation of the deceased and when PW 8 had gone to inform other relations available nearby, it does not inspire confidence that he when available nearby would be ignorant of the occurrence till late in the evening. So, it cannot be said definitely that Rameshwar would not have accompanied the injured to the Hospital at the same time or soon afterwards. Rama PW 16 has also deposed that Rameshwar and some other persons had also gone to the Hospital and police had also accompanied her husband to the Hospital. In the circumstances, it cannot be said with certainly that PW-8 and PW 16 are lying on this point for no valid reasons. In any case should whole of his testimony be discarded for this and other discrepancies or inaccuracies in his statement

26. It has been judicially noticed that there is a tendency amongst witnesses in our country to back up a good case by false or exaggerated version and the Courts

should not disbelieve the evidence of such witnesses altogether if they are otherwise trustworthy. In Sohrab v. State of Madhya Pradesh : 1972 CriLJ1302 it has been observed as under :

'This Court has held that falsus in uno falsus in omnibus is not a sound rule for the reason that hardly one comes across a witness whose evidence does not contain a grain of untruth of at any rate exaggeration, embroideries or embellishments. In most cases, the witnesses when asked about details venture to give some answer, not necessarily true or relevant for fear that their evidence may not be accepted in respect of the main incident which they have witnessed but that is not to say that their evidence as to the salient features of the case after cautious scrutiny cannot be considered .....'

27. Again in Bharwada Bhoginbhai Hirjibhai v. State of Gujarat : 1983 CriLJ1096 it has been observed as under :

'A witness though wholly truthful, is liable to be overawed by the Court atmosphere and the piercing cross-examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events or fill up details from imagination on the spur of the moment. The sub conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him perhaps it is a sort of a psychological defense mechanism activated on the spur of the moments.'

'Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses, thereforee, cannot be annexed with undue importance. More so when the all important probabilities factor echoes in favor of the version narrated by the witnesses.'

28. The tendency amongst witnesses normally to back up good case by false or exaggerated version had been noticed by the privy Council long ago in Bankim Chander v. Matagini AIR 1919 PC 157 wherein it was observed as under :

'That in Indian litigation it is not safe to assume that a case must be false if some of the evidence in support of it appears to be doubtful or is clearly untrue, since there is, on some occasions, a tendency amongst litigants to back up good case by false exaggerated evidence.'

29. After about 70 years the same conditions being prevalent have been noticed in State of Uttar Pradesh v. Anil Singh : 1989 CriLJ88 it has been observed as under :

'15. It is also our experience that invariably the witnesses add embroidery to prosecution story, perhaps for the fear of being disbelieved. But that is no ground to throw the case overboard, if true, in the main. If there is a ring of truth in the main, it should not be rejected. It is the duty of the court to cull out the nuggets of truth from the evidence unless there is reason to believe that the inconsistencies or falsehood are glaring as utterly to destroy confidence in the witnesses. It is necessary to remember that a judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. One is as important as the other. Both are public duties which the Judge has to perform.'

30. In Abdul Gani v. State of Madhya Pradesh : AIR 1954 SC31 . The Supreme Court had deprecated the tendency of Courts to take an easy course of holding the evidence discrepant and discarding the whole case as untrue. The Courts should make an effort to disengage the truth from falsehood and to sift the grain from the chalf.

31. In view of this legal position, the whole of the testimony of PW-8 cannot he discarded nor the whole of prosecution case can be thrown overboard because of some falsehood or embellishments or improvements here and there.

32. Then it is contended that the conduct of PW. 8 in running away from the spot without trying to rescue the deceased from the assault and also not even informing Rama wife of the deceased who was living nearby about the attack on her husband; or even not accompanying the injured to the Hospital is unnatural and this makes his presence doubtful and testimony unreliable.

33. PW. 8 had deposed that on seeing the stabbing he became nervous and returned/retraced from there and had raised alarm shouting 'Mere Jeeja Kumar Rahein Hain'. Not only this immediately he ran to the nearby Police Post and brought the police party. He has further given the Explanationn that he was terrified and so did not try to catch hold of the accused or to rescue Kirpal from their clutches because he apprehended danger to his own life.

34. The assailants were four in number two of whom were armed with knives. He was a lad of 18 years and had come from village a few months earlier. He was alone and unarmed. He would certainly have invited danger to his own life if he proceeded further and attempted to catch hold of the culprits in an attempt to rescue the deceased and such an attempt would not have served any purpose. It is not that he ran away and concealed himself. He had raised an alarm, immediately rushed to the police post and brought the police party. Obviously, it was at his instance that the injured was removed to Hospital without any loss of time. Rama was living in nearby House No. D-250. It cannot be said that his shouting would not have attracted attention of Rama. Immediately at that time no purpose would also have been served in his first informing Rama of the occurrence and in his wisdom he had rushed to the Police Post. Not only this, shortly afterwards he had also proceeded to inform all his near kith and kin. It cannot be said that in the prose he had not informed Rama or Rama had not come to know of it or had not reached the spot. No Explanationn has been obtained from him in cross-examination for his not accompanying the injured to Hospital. In the absence of such cross-examination raising of any adverse inference against him would not be justified and proper. He might have thought that his alone going to the hospital would not serve any purpose and he preferred to inform other near relatives of the injured who were available in nearby areas. His this conduct, in the circumstances, was not abnormal or absurd or unwise to invite unnecessary criticism or to discard his testimony for this reason.

35. In Rama Partap v. State of Haryana : 1983 CriLJ1272 , the Court of Session Judge had doubled the testimony of eye witnesses as conduct of the witnesses in not going to the rescue of the deceased when he was in the clutches of the assailants and it was held to be unnatural. Disapproving this approach of the trial

Court as unreal the Supreme Court had observed as under :

'6. Every person who witnesses a murder reacts in his own way. Some are stunned, become speechless and stand rooted to the spot. Some become hysteric and start walling. Some start shouting for help. Others run away to keep themselves as far removed from the spot as possible. Yet others rush to the rescue of the victim, even going to the extent of counter-attacking the assailants. Every one reacts in his own special way. To discard the evidence of witnesses on the ground that he did not react in any particular manner is to appreciate evidence in a wholly unrea list and unimaginative way.'

This has been followed in Appabhai v. State of Gujarat : 1988 CriLJ848 it has been emphasised as under :

'11. The Court, however, must bear in mind that witnesses to a serious crime may not react in a normal manner. Nor do they react uniformly. The horror stricken witnesses at a dastardly crime or an act of egregious nature may react differently. Their course of conduct may not be of ordinary type in the normal circumstances. The Court, thereforee, cannot reject their evidence merely because they have behaved or reacted in an unusual manner.'

36. It has also been contended that constable Ram Kumar who had got the injured admitted in the Hospital has not been examined and has been unreasonably withheld as he would not have supported the prosecution case.

37. No doubt as per the MLC Ex. PW. 18/8 Constable Ram Kumar had got the injured admitted in Hospital and he has not been examined as prosecution witness and no Explanationn is also available for not examining him. This may show lack of diligence on the part of the investigating agency. However, the material on record does not show that he was an eye witness. PW. 21 Rati Ram (I.O) has deposed that constable Ram Kumar was posted at a Police Post Prashant Vihar at that time. The injured had been removed from the spot before ASI Yoginder Singh had reached the spot on receipt of copy of the DD Entry No. 6-A. Obviously, constable Ram Kumar had accompanied PW. 8 from the Police Post when the latter had gone there. He was not an eye witness and only would be a link witness

and so he is not a material witness. His non-examination in itself would not justify to discard the prosecution case altogether. We do not find any valid grounds to disbelieve PW. 8 that it was at his instance that the policemen had come from Police Post and removed the injured to the Hospital.

38. It was also contended that the FIR is an tees timed and it is not shown that special report was sent to the Magistrate concerned forthwith and that circumstance also makes testimony of PW. 8 as unreliable.

39. PW 8 has deposed that police had arrived at the spot and he had given his statement EX.PW. 8/A to the police. He has not disclosed at what time it was recorded nor it was elicited on behalf of the appellants. But he has also deposed that police remained at the spot for some time and various articles were seized by the Police from House No. D-236 and also Stone Ex. P.7 was seized from outside that house in his presence through seizure Memo Ex. PW. 8/B which is signed by him. PW. 21 Rati Ram has deposed that he was present in the office of the ACP when he received information of the crime and from there he immediately went to Hindu Rao Hospital and found that the injured kirpal had already died. From the Hospital he came to the spot. Complainant Om Shankar met him and got recorded his statement Ex. PW. 8/A. He made his endorsement Ex. PW. 21/A on it and got the FIR registered through Constable Balraj. He had then got the scene photographed, prepared the site plan Ex. PW. 21/B, seized various articles from the spot vide seizure memo Ex. PW 8/B and also recorded the statements of witnesses. This Rukka purports to have been dispatched by him at 2.50 p.m. No suggestion has been put nor any material has been brought on record to the contrary. Constable Balraj PW. 5 has deposed that he reached the spot along with ASI Yoginder Singh; he was deputed to guard the scene. SHO had reached the spot and had given the Rukka at 2.50 p.m. and he got the FIR registered at the Police Station. PW 3 Dharamvir Singh has deposed that he was working as Duty Officer at that time at the Police Station and at 3.15 p.m. Rukka was received through Constable Balraj. FIR (copy of which is Ex. PW. 3/A) was registered and the copy of the FIR and Rukka were sent to Inspector Rati Ram. He has denied the suggestion that the FIR was recorded later on and not at the time it purports to have been so recorded. No material has been brought to support such a

suggestion.

40. Various steps towards investigation had obviously been taken by PW 21 after registration of the FIR. No material has been brought on record to show that the FIR is ante-timed. Except the name of Kurva, names and descriptions of the other three assailants are not given in the FIR. Apparently, it cannot be said that this FIR is an act of concoction and fabrication or was made after consultations. There is thus no reason to hold that the FIR is ante-timed.

41. PW 3 has also deposed that special report was sent through Constable Rajinder Singh within 25 minutes of registration of FIR but this Rajinder Singh has not been examined. In the circumstances, nothing turns out of it. In Pala Singh v. State of Punjab : 1973 CriLJ59 it was held that if in a given case it is found that FIR was recorded without delay and the investigation had started with the FIR, then however improper or objectionable the delayed receipt of the report by the Magistrate concerned that cannot by itself justify the conclusion that the investigation was tainted and the prosecution insupportable. This has also been followed in State of U.P. v. Gokaran : 1985 CriLJ511 where also it has been held that where steps towards investigation had started soon which could only follow handing over of the FIR, delayed receipt of special report by the District Magistrate would not enable the Court to doubt the investigation as tainted one nor could FIR be regarded as ante timed and ante dated.

Scene Of Occurrence :

42. Ex. PW. 21/B is the site plan prepared and proved by I.O. PW. 21. PW. 21 had also lifted two pairs of chappals, Durri, playing cards lying scattered from bath room and other pair of Chappals and blood stained Towel from near the door of the kitchen from that house vide Seizure Memo Ex. PW. PW 8/B. Obviously, two pairs of Chappals must be belonging to the assailants. Blood has not been detected on two pairs of Chappals. This would show that two of the assailants must have left the spot in some hurry leaving behind their Chappals. This circumstance gives credence to the testimony of PW. 8 that he had gone to the place of occurrence during the course of occurrence and on seeing it he had raised alarm and by his sudden appearance at the scene the assailants were

taken unaware and they had run away leaving behind their Chappals at the spot on his alarm.

43. Blood stained scattered playing cards were found at the scene of occurrence. Obviously, assailants and the deceased were involved in some dispute having arisen during the course of the game of cards. This circumstance corroborates the statement of PW. 16 Rama that Kurva and his three companions had taken deceased with them for playing cards.

44. PW. 12 Dr. L. K. Bharua had conducted the post mortem examination of the deceased on 17-6-1988 at 2.00 p.m. He had noticed the following external injuries on the body :

1. Abrasion 1 cm. x 1 cm on the middle of forehead.

2. Incised wound vertical in direction, spindle shaped of size 1.5 cm x 0.25 cm x skid deep below the left eye.

3. Incised wound over left cheek prominence of size 2 cm x 1 cm muscle deep. There was beveling of skin.

4. Incised wound just in front of left ear just above the angle of mandible of size 2 cm x 0.25 cm x muscle deep. The shape was spindle shaped.

5. Linear abrasion marks in front and sides of neck of size 8 cm. The width varies from 1.5 cm x 3 cm.

6. Incised wound in the middle of chin placed vertically of size 1 cm x 0.25 cm x muscle deep.

7. Cut open wound (surgical) over right capital fossa of size 1' 1 x /2'.

8. Cut open wound (surgical) on medial aspect on leg (ankle joint).

9. Two separately placed spindle shaped wounds (incised) of sizes 2.5 cm 1 cm ... .. and 2.5 cm x 1 cm x ... on the lateral aspect of lower part of left chest below the left axillary fold.

10. Incised wound size 2.5 cm x 2 cm x .. below the left and axillary fold and 2 inches below the injury No. 9. The injury was spindle shaped and placed obliquely.

11. The obliquely placed incised would on the left illiac region 2 inches lateral to the mid-line at the level of illiac crest of size 2 cm x 1 cm x ?. The shape is spindle shaped.

12. Incised wound on anterior lateral aspect of left thigh 6' above the mid, patella region of size 2.5 cm X 1 cm X muscle deep.

13. Incised wound on anther a lateral aspect of left elbow in size 3 cm x 2.5 cm x 3 cm deep; shape is like spindle.

14. Incised wound 4 cm x 2 cm x 2.5 cm above injury No. 13.

15. Incised wound with beveled margins one medial aspect of left hand, size 1.5 cm x 1 cm X skin deep.

16. Spindle shaped incised wound size 2 cm x 1 cm x muscle deep on medial aspect of left upper arm 2 '' above the elbow joint.

17. Incised wound spindle shaped on posterior aspect of left upper arm 5' above the left elbow joint, size 3 cm x 1 cm x muscle deep.

18. Incised wound over left buttock placed horizontally, size 2.5 cm x 1 cm x muscle deep.

19. Incised wound just above and left to the lane left cleft size 2 cm x 1 cm skin deep.

20. Incised wound on back of waist on right side of size 1 cm x 1 cm x skin deep.

21. Abrasions on an area of 4' x 2' on back of left shoulder.

22. Multiple abrasions on the back of chest on an area of 8' x 6'.

Internal Injuries :

Skin around the back shows signs of abrasions on front and sides, but no blood clots below the skin, chest shows cut marks on its skin. After exploring the chest cavity, it was seen that one of the injuries No. 9 has not entered the chest cavity, but the other has entered the chest cavity through the sixth intercostal space and has cut the lower lobe of left lung on its lower border. The depth of the injury was 5 cm long. Injury No. 10 has entered the abdominal cavity through ninth intercoastal space and has cut the diaphragm and then cut the post border (surface) of stomach (lumen deep). Injury No. 11 has entered the pelvic cavity and has cut the left illiac blood vessels and the large bowel (lumen deep).

45. The doctor has opined that all the injuries were ante mortem in nature. Abrasions as described in injuries Nos. 1, 5 and 22 were caused by blunt force; incised wounds are caused by sharp objects. Injuries Nos. 9, 10, 11 are sufficient to cause death individually in ordinary course of nature; the death was due to shock and haemorrhage.

46. Knife Ex. P.8 alleged to have been recovered from accused Badri was shown to the doctor and he further deposed that injuries Nos. 2, 3, 4, 6, 9, 10, 11, 12, 15, 18, 19 and 20 could be caused by knife like Ex. P.8. In cross-examination on behalf of accused Badri and Khem Chand, he denied the suggestion that spindle shaped injuries as noticed by him could not be caused by knife like Ex. P.8. On further cross-examination on behalf of other accused, he deposed that injuries Nos. 13 and 14 could also be caused by weapon like Ex. P.8. Injuries Nos. 1, 5, 21 and 22 are abrasions whereas injuries Nos. 7 and 8 are surgical injuries. The remaining injuries Nos. 16 and 17 which are incised wounds obviously had been caused by some other weapon. In cross-examination he further stated that it was not possible that more than two sharp edged weapons had been used for causing these injuries.

47. Appellant Badri examined Dr.Bishnu Kumar as DW 3 who has deposed that injuries Nos. 2, 3, 4, 6, 9 and 10 to 20 are possible with one weapon, that injuries Nos. 9, 10 and 11 are stab wounds and could be caused by a double edged sharp weapon, whereas the rest of the injuries are incised wounds, that all ante mortem wounds would be spindle shaped could be caused by a single edged or a double

edged weapon even if they are of deep nature and that even superficial skin deep injuries would also become spindle shaped. He appeared again when he stated that injuries Nos. 2, 3, 4, 6 could be caused by a single edged sharp weapon. Whereas injuries Nos. 9, 10, 11 could be caused by a double edged sharp weapon and could not be caused by knife Ex. P.8 because width of injuries as per post mortem report is 2.5 cm which is nearly the same as the width of the knife Ex. P.8. He has not denied specifically that remaining injuries Nos. 12 to 20 could or could not be caused with knife Ex. P.8.

48. However, one fact is proved by the testimony of these two doctors that incised wounds would have been caused by more than one sharp edged weapon. This medical evidence shows that one of the assailants in all probability inflicted some injuries with knife Ex. P.8 whereas another assailants had inflicted other injuries with another knife. This medical evidence also corroborates PW. 8 to the extent that two of the assailants were seen by him giving blows with knives on the deceased.

49. It is then contended that PW. 8 had not entered the house No. D-236 where occurrence took place as admitted by him and as such he would not have been in a position to see the assailants giving knives blows to the deceased at point A-1 of the site plan drawn by the I.O.

50. Ex. PW. 21/B is the site plan where the position of PW 8 is shown at point A and that of the assailants giving knives blows to the deceased at point A-1. From this place it cannot be said that PW. 8 would not have been in a position to see the assailants. PW. 8 Om Shankar in his statement in chief however has stated that he was about to go from the back lane to kothi No. D-236, then he saw that accused Badri and one other person were stabbing Kirpal with Knives. In Kothi when he saw the occurrence and he retraced from the rear door but at another place he has stated that he had not entered rooms of the Kothi. He obviously was in some sort of confused state of mind. He has also stated that on seeing the occurrence he was terrified, retraced and went to the police post. From his testimony it cannot be said that he had not entered the rear gate of the house. In the circumstances, there is no reason not to believe him that he had seen two of

the assailants giving knives blows while two others were holding Kirpal.

51. It has been contended that the identification of the three accused by PW. 8 before the Investigating Officer is inadmissible in evidence and is hit by Section 162 of Code of Criminal Procedure that the identification of the accused in the Court is of no value inasmuch as the accused were shown to the PWs without holding Test Identification Parade and that even otherwise the investigation is not fair in so far as the investigating officer had taken PW. 8 for the arrest of the accused persons and thereby avoided their TIP. Reliance has been placed on a number of authorities.

52. Where the accused person is not known previous to the occurrence to the witness identifying the accused at the trial, in that case identification of the accused by such witness soon after the former's arrest is of vital importance in the interest of justice and fair play both to the accused and the prosecution (Rameshwar Singh v. State of J & K : 1972 CriLJ15).

53. The purpose of test identification is to test the statement that the witness made in the Court which constitutes substantive evidence, it being the safe rule that the sworn testimony of the witness in Court as to the identity of the accused requires corroboration in the form of an earlier identification proceeding and in the absence of such TIP if the accused was not known to the witness before the incident and was identified for the first time in the Court, in the absence of TIP the evidence of such witnesses is valueless and could not be relied upon as held in Mohan Lal Ganga Ram Gehani v. State of Maharashtra : [1982]3SCR277 .

54. However, as observed in Jadunath Singh v. State of UP : 1971 CriLJ305 absence of test identification is not fatal in all cases. And in Kanta Prasad v. Delhi Administration : 1958 CriLJ698 also it was held that failure to hold a TIP would not make inadmissible the evidence of identification in Court. The weight to be attached to such identification would be a matter for the Court of fact. 55. TIP in an early opportunity tends to minimise the chances of the memory of the identifying witnesses fading away due to long lapse of time.

56. In the present case the three appellants/accused were arrested in the presence of and on the pointing out of PW. 8. The criticism first is that this course was not fair as thereby TIP being held in the presence of a Magistrate has been avoided and so the investigation is unfair.

57. In his first information statement Ex. PW. 8/A, PW. 8 had not given the descriptions of the culprits and he did not know them earlier also. In that case it will not mean that the police should not make inquiry and investigation to find out the culprits. One of the culprits, namely, Kurva was named in the FIR. The Investigating Officer obviously had made efforts to find out this culprit first but Kurva remained untraced and had absconded. During the course of Investigation the Investigating Officer joined PW. 8 and after making inquiries he was able to locate the three appellants together at Majnu ka Tilla at the house of the father-in-law of one of them, namely, Badri on 18-6-1988, i.e. after two days of the occurrence. PW. 8 identified them and they were arrested on such identification. There was nothing improper if PW. 8 was joined in the investigation by the Investigating Officer in such circumstances. PW. 8 had seen the assailants in broad day light on 16-6-1988 and after two days it cannot be said that his memory would have faded away and he would not have been in a position to identify them. PW. 8 had seen the culprits not after long time of the occurrence. In that case it cannot be said that his identifying the accused in the court was for the first time after the occurrence. Holding of another TIP so far as PW. 8 is concerned would have served no purpose. It cannot be said that this course was mala fide on the part of the IO.

58. Learned counsel for the appellants has also contended that identification of the culprits before the Investigating Officer by PW. 8 is illegal and his statement to that effect is hit by Section 162 Cr.P.C. For this he has relied upon Ram Kishan v. State of Bombay : 1955 CriLJ196 and Harnath Singh v. State of Madhya Pradesh : 1970 CriLJ1422 .

59. In Ram Kishan's case it was held that in so far as a police officer seeks to prove the fact of identification held before the Investigating Officer, such evidence of his would be inadmissible in evidence because of S. 162, Cr.P.C., but the

evidence sought to be given by the identifier himself in regard to his mental act of identification which he would be entitled to give by way of corroboration of his identification of the accused at the trial would be admissible in evidence. This is also the position in the present case. It is not his statement to the police about his having identified the accused that is being used, but what is being used is whether he had seen the accused on 18-6-1988, i.e., after two days of the occurrence and on that basis his ability to identify the culprits in Court was reliable or not. This course is not hit by Section 162 Cr.P.C.

60. Now the question is whether the testimony of PW. 8 who had not given the description of the culprits in the FIR should be believed The objections that on his own showing PW. 8 has stated that on seeing the occurrence he was terrified and retraced from the spot and in such circumstances, from his fleeting glance he would not have been in a position to see the features of the assailants and so would not have been in a position to identify them even after two days.

61. PW 8, however, has deposed that he had seen that accused Badri (whom he pointed out) and one another person who was not present in Court were armed with knives and they were stabbing Kirpal with knives while the other two accused present in Court had caught hold of Kirpal, deceased, and on seeing this he became nervous and returned back after raising alarm. In FIR also he had stated that two of the assailants had caught Kirpal while other two had inflicted knives blows.

62. If he could see two of the assailants having caught the deceased and other two inflicting knife injuries it cannot be said that he would not have sufficiently seen in broad day light, the features of the assailants to enable him to identify after only two days. In cross-examination he has stated that he might have stayed there for one half to one minute. This period was not so small that he would not have been in a position to look at the features of the assailants and in the circumstances it cannot be said that he was not in a position to identify them two days later. PW 8 was a raw lad and would not be knowing the importance of giving the features of the culprits in FIR, for that purpose his testimony cannot be discarded. The trial Court has believed his testimony in this regard. We do not find any infirmity in it.

63. During investigation the three appellants had made disclosure statements and all the three had got recovered their one pant and one shirt each but blood was not detected on these clothes and have been excluded from consideration by the trial Court. Accused Badri had also in pursuance of the disclosure statement Ex. PW 8/C got recovered blood-stained knife Ex. P/8 from his house. The evidence of this recovery has been challenged as infirm and unreliable inter-alia as no witness from the locality or independent witness was joined at the time of his arrest or when he made disclosure statement or at the time of the recovery of the knife.

64. PW. 8 has deposed that the three accused were arrested on his pointing out from a house in Majnu Ka Tilla. Accused Badri had made disclosure statement about his blood-stained clothes and knife which he could get recovered from his house. Ex. PW. 8/C is the disclosure statement. PW. 8 has deposed that accused Badri had led the police party to his house and from the heap of debris lying in the Court-yard he had produced a knife Ex. P.8 which was sealed and seized in his presence. Seizure Memo Ex. P.W. 8/G also bears his signatures but then in cross-examination he has stated that he had not entered the house. However, the recovery of knife Ex. P/8 at the instance of accused Badri has also been proved by PW. 17 ASI Yoginder Singh and PW. 21 Rati Ram (I.O). They have also deposed that neighbours were asked to join at the time of arrest as well as at the time of recovery but none agreed. They have denied the suggestion that the accused had already been detained and the disclosure statement and the recovery are fabricated. PW 8 had no enmity prior to occurrence with any of the accused nor he has any motive or personal axe to grind by falsely implicating the accused. PW. 17 and PW. 21 are also not shown nor suggested to them that they were hostile towards the appellants or they had any motive for falsely implicating the accused. Though the two witnesses DW. 1 and DW 2 have been examined by the accused persons to show that they were detained from the evening of 16-6-1988 but no valid reasons are apparent for showing that they were so detained illegally. The three accused were arrested from the house of the in-laws of Badri from Majnu Ka Tilla where they had gone, after getting their whereabouts from the wife of Badri. Neither the wife of Badri nor any one from his in-law's house has been examined to show that they were not arrested from there on 18-6-1988. If the police wanted to falsely implicate them perhaps they would have created other false incriminating

circumstances against the other accused also and the clothes recovered from the accused would also perhaps have shown presence of human bloodstains of the deceased. It was held by the Supreme Court in H.P. Administration v. Om Prakash : 1972 CriLJ606 that evidence relating to recoveries is not similar to that contemplated under Section 103 Cr.P.C. where searches are required to be made in presence of two or more inhabitants of the locality in which the place to be searched is situated in an investigation under Section 157 Cr.P.C. the recoveries could be proved even by solitary evidence of the I.O. if it is found fit to be otherwise believed. In State of Kerala v. M. M. Mathews 1978 SC 157 it was held that the evidence of the I.O. cannot be branded as highly interested on the ground that he wants that the accused are convicted. Such a presumption runs counter to the well recognised principle that prima-facie public servants must be presumed to act honestly and conscientiously and their evidence has to be treated on its intrinsic worth and cannot be discarded merely on the ground that being public servants they are interested in the success of their case.

65. The Supreme Court had also noticed in Appabhai's case 1988 SC 696 the difficulty faced by the Investigating agency in getting assistance of independent witnesses and the general apathy of public not to involve themselves and remain aloof from Court in such matters. For that matter the Courts instead of doubting the prosecution case for want of independent witnesses have to consider the spectrum of the prosecution version for the nugget of truth with due regard to probability, if any, suggested by the accused. The trial Court has believed these witnesses about this recovery. We do not find any reason to disagree with the trial Court in this respect.

66. Blood of the group of the deceased has been detected in serologist's report on the knife Ex. P/8. The post Mortem doctor PW 12 as well as DW 3 Dr. Bishnu Kumar examined by accused Badri have affirmed that some of the injuries found on the deceased were possible with this knife. This knife connects the accused Badri as the person or one of the assailants, who had inflicted knife blows to the deceased in the absence of any Explanationn from his side.

67. This recovery of knife and also the Medical evidence thus corroborates PW. 8.

68. Then it is contended that no motive for the crime has been proved which renders the prosecution case doubtful.

69. In Narain Nathu Naik v. State of Maharashtra : [1971]1SCR133 it was held that if the Court is satisfied about the accused being assailant of victim it need not consider the question of motive. Again in State of Andhra Pradesh v. Bogam Chandrath and another : 1986 CriLJ1903 it was reiterated that when there is direct evidence of acceptable nature regarding commission of offence the question of motive cannot loom large in the mind of the Court.

70. The motive is generally known to the perpetrator of the crime and is not always known to others. The scene of occurrence as noticed earlier shows that playing cards were found scattered and smeared With blood on the scene of occurrence. Obviously, there was some dispute between the assailants and deceased during the course of game of cards and that could be the possible motive for the appellants to have connived against the deceased.

71. It is also contended that due precautions had not been taken to keep the appellants/accused in muffled faces from the time of their arrest till they were to be put for Test Identification Parade and as such the appellants were justified in declining to participate in the TIP. Reliance has been placed on Sadashiv Bajrang v. State of Maharashtra 1982 Cri LJ 2056 .

72. The Trial Court, however, has drawn adverse inference against the accused for their refusal to participate in TIP before the Magistrate. It was held in Sadashiv's case that it is the duty of the Investigating Officer to show that a person who is to be identified by the prosecution witnesses who had not seen him before had been kept in such circumstances that he would not be exposed to the view of the persons who were going to identify him later on in the Court.

73. However, in Ramanathan v. The State of Tamil Nadu : 1978 CriLJ1137 such a broad proposition has been negatived holding that the testimony of the witnesses if otherwise trustworthy cannot be rejected for this reason.

74. The accused have taken the plea in their statements under sections 313 Cr.P.C. that they were shown to the witnesses by the police and the police had taken their photographs and so they refused to participate. PW 21, I.O. in his cross-examination has denied that he had taken photographs of the accused when they were in his custody or he had shown the same to Om Shankar and Rama. The plea of accused that they were detained since 16-6-1988 has not been found correct. No suggestion has been put to Rama PW. 16 that she was shown the accused or their photographs after their arrest till they declined to join the TIP. In the present case precautions of keeping the appellants in muffled faces appears to have been taken. In the two applications one dated 19-6-1988 and another dated 23-6-1988 (Ex. PW 21/H) moved before the Magistrate for holding TIP it has been mentioned that the accused had been sent to judicial custody in muffled faces. The accused have not taken the pleas that they had not been kept in muffled faces or were shown to PW 16 Rama the only witness who was to identify them in TIP from the time of their arrest till 25-6-1988 when their TIP was arranged. We do not find any valid reasons to doubt the bona fides of the I.O. that he had not taken the photographs of the accused for showing the same to the witnesses. In the circumstances, the Trial Court was justified in drawing adverse inference against the three appellants for their declining to participate in the TIP.

75. PW 16 Rama the widow of the decease though in her testimony has made some inconsistent or contradictory or some incorrect statements which has invited criticism that she has made material improvements in her testimony in the Court. It cannot be lost sight of the fact that she was a simple and illiterate lady overwhelmed by grief on account of death of her husband. She would not have noticed or even would not have recollected all the details of happenings and their sequence which took place after her husband had sustained injuries. But her testimony that Kurva along with three companions had come to her house sometime before the occurrence and had taken her husband on the excuse of playing cards and that Om Shankar had come to her house and on his inquiry she had told him that Kurva had taken her husband remains uncontroverted and is trustworthy and there is no reason to disbelieve her in this respect. To that extent she has also corroborated PW 8.

76. It was then contended that the sole testimony of PW. 8 is not of that sterling quality on which conviction would have been justified keeping in view that he is also the near relation of the deceased and in support reliance has been placed on Radha Kishan v. State Mange Lal v. State of Madhya Pradesh : JT1990(2)SC198 ; Chanan Singh v. State of Haryana : AIR 1971 SC1554 ; Sharad Birdhi Chand v. State of Maharashtra : 1984 CriLJ1738 ; Ramji Surjya v. State of Maharashtra : 1983 CriLJ1105 ; Mangamma v. State of Andhra Pradesh 1995 (2) All Cri LR 4 and Akhilesh Hajam v. State of Bihar 1995 (2) All Cri LR 219.

77. It depends on the circumstances of the individuals case whether a particular sole witness is reliable and trustworthy on whose testimony reliance could he implicitly placed or not to sustain conviction.

78. No doubt PW 8 Om Shankar was a near relation of the deceased, however, he had no enmity with the accused persons before the occurrence or has got other motive or consideration for false implication of the appellants nor it is shown that the deceased had any prior enmity with the accused to his knowledge. Relationship by itself is not sufficient to discard the evidence of a witness as unworthy of credit in the absence of other circumstances to detract from the evidentiary value of his testimony. If there is no ill will or hostility a close relation would be the last person to screen the real culprits and falsely implicate an innocent person. As held in Shivnath Singh v. State of U.P. : (1994)2SCC563 the testimony of witnesses cannot be discarded on the ground that they are close relations of the deceased. What is necessary in such cases is that a closure scrutiny has to be done.

79. The testimony of PW. 8 has been examined by us in the setting of other attendant circumstances and on closure scrutiny it has been found reliable, satisfactory and trustworthy. The testimony of sole eye witness is sufficient if such witness is found truthful witness and is also corroborated by other satisfactory and reliable evidence. Besides that as noticed above he has been corroborated by medical evidence, by the recovery of knife Ex. P.8 from the appellant Badri also from the testimony of PW. 16 Rama to some extent and other circumstances noticed above. The trial Court has believed his testimony and we do not find any

infirmity in this finding of the trial Court.

80. In view of the above discussion we find no merit in this appeal. We, while affirming the convictions and the sentences of the appellants, dismiss the appeal and require the appellants Badri, Khem Chand and Raju who are on bail to surrender and undergo the remaining part of their sentences. The Additional Sessions Judge, shall now take steps to see that appellants Badri, Khem Chand and Raju are arrested and sent to jail for undergoing the remaining part of the sentences.

81. Appeal dismissed.

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