

Rajinder @ Lala Vs. State

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SooperKanoon Citation : sooperkanoon.com/701817

Court : Delhi

Decided On : Jul-03-2009

Reported in : 2010CriLJ15

Judge : Pradeep Nandrajog and; Indermeet Kaur, JJ.

Acts : Delhi Police Act - Sections 92, 93 and 97; Evidence Act - Sections 145 and 157; [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 154, 161, 311 and 313; Indian Penal Code (IPC) - Sections 34 and 302; [Constitution of India](#) - Article 21

Appeal No. : Crl. Appeal No. 283/2001

Appellant : Rajinder @ Lala

Respondent : State

Advocate for Def. : Pawan Sharma, Adv.

Advocate for Pet/Ap. : Lekhraj Rehalir, Adv

Disposition : Appeals dismissed

Judgement :

Pradeep Nandrajog, J.

1. Vide impugned judgment and order dated 22.03.2001, the appellants, Baijnath @ Baiju, Ramesh @ Ramesh @ Vinod and Rajinder @ Lala have been convicted

for the offence of having murdered Roshan Lal @ Chian (herein after referred to as the Deceased), for which offence they have been sentenced to undergo imprisonment for life and to pay a fine of Rs. 2000/- each; in default to undergo simple imprisonment for two months.

2. In a nutshell, case of the prosecution was that in the night of 24.10.1997 the deceased along with one Hemraj PW-1 and Kamal PW-2, were going to a market for purchasing pigs. On their way to the market, the aforesaid persons were met by the appellants who were gambling at that time; that the deceased also joined in the gambling while Hemraj and Kamal stood outside the slum-dwelling where the deceased and the appellants were gambling. After having won the entire stake money, the deceased was leaving the slum- dwelling in question when the appellants asked him to lend some money to them. On refusal by the deceased to do so, the appellants indiscriminately stabbed him and fled from the place of occurrence after causing the death of the deceased. Hemraj PW-1 and Kamal PW-2, had witnessed the incident.

3. Needless to state, the case of the prosecution hinged upon the veracity and credibility of the testimony of Hemraj PW-1 and Kamal PW-2.

4. Machinery of law was put into motion when at around 11.21 P.M. on 24.10.1997, a PCR Form Ex.PW-9/A, was filled by HC Verina PW-9, noting therein that a person named G.Lal has informed that a person has been stabbed near A-Block, Sangam Park, Kanjar Jhuggis. Few minutes thereafter, second information regarding the incident was received by HC Usha PW-14, pursuant where to she filled PCR Form Ex.PW-14/A, noting therein that one person had been murdered near Railway Crossing, Beriwalla Bagh, Sangam Park. HC Verina and HC Usha transmitted the aforesaid information to Police Post Sangam Park where Const.Satpal PW-6, recorded DD Entries Ex.PW-6/A and Ex.PW-6/B, at 11.32 P.M. and 11.35 P.M. respectively.

5. On receiving the information about the incident, Inspector Vipin Kumar PW-16, accompanied by SI Manvinder Singh PW-4, proceeded to the spot. Simultaneously, other police officers namely Const.Jaipal Singh PW-5, and HC Bhagat Ram PW-12, also reached the spot. On reaching the spot, the aforesaid

police officers saw the deceased lying dead on the ground. Two persons namely, Hemraj PW-1 and Kamal PW-2, who claimed to have witnessed the incident of murder of the deceased were also found present at the spot. Inspector Vipin Kumar PW-16, recorded the statement Ex.PW-1/A of Hemraj and made an endorsement Ex.PW-4/A thereon, and at around 1.10 A.M. forwarded the same through SI Manvinder Singh PW-4, for registration of an FIR. SI Manvinder Singh took Ex.PW-4/A to the police station and handed over the same to HC Garib Ram PW-11, who recorded the FIR No. 698/97, Ex.PW-11/B, at 1.20 A.M. on 25.10.1997.

6. In his statement Ex.PW-1/A, Hemraj stated that he resides with his family in a house bearing Municipal No. 16, Kharid Basti, Gurmandi, Delhi and is engaged in the business of selling pork. Tonight, at around 10.30 P.M., he along with the deceased, who was his brother by relation, and Kamal had gone to Sangam Park for purchasing pigs. When they reached near a shop of scrap dealer situated at Kanjar Basti slum-dwellings, the appellants who were quite familiar to him stopped them and demanded money from the deceased. Upon the refusal of the deceased to lend money to the appellants, they forced him to do so. Thereafter the appellants started demanding the chain, ring and bracelet from the deceased and when the deceased refused to do so, the appellants took out their knives and exhorted saying that they would kill him.. Appellants Ramesh and Rajinder caught hold of the deceased while appellant Baijnath inflicted knife blows on the various parts of his body. Thereafter the appellants ran towards him and Kamal upon which they fled from the spot in order to save their lives and reached Gurmandi where they raised an alarm that the deceased has been murdered by the appellants. On reaching Gurmandi, he along with one Kuldip, Jaswinder, Ashok and some other persons went to the spot where they found that the deceased was lying dead on the ground and that the appellants had fled from there. In the meantime, the police was telephonically informed about the said incident and reached the spot. The appellants who had fled from the spot have caused the death of the deceased, who was his brother by relation.

7. Soon after the registration of the FIR, Inspector Vipin Kumar PW-16, recorded a supplementary statement Ex.PW-1/E under Section 161 Cr.P.C. of Hemraj PW-1,

wherein Hemraj ostensibly gave further details of the incident. Hemraj stated that the deceased gambled with the appellants on the day of the incident just prior to being attacked by them.

8. Kamal PW-2, also made a statement Ex.PW-2/DA under Section 161 Cr.P.C. in complete sync with the statements Ex.PW-1/A and Ex.PW-1/E of Hemraj and also indicted the appellants as the assailants of the deceased.

9. At the spot, Inspector Vipin Kumar PW-16, prepared the rough site plan Ex.PW-16/E of the place of offence; recording therein, at points A. and B., the spots where the body of the deceased was found and wherefrom Hemraj and Kamal witnessed the incident, respectively. On thorough search of the body of the deceased, three gold ornaments namely, a chain, ring and bracelet and cash in sum of Rs. 4,701/- was recovered were recovered and the same were seized vide memo Ex.PW-1/C. Inspector Vipin Kumar lifted the portion of the earth which was found to be stained with blood and the earth control from the place of occurrence and seized the same vide memo Ex.PW-1/C. Sat Pal PW-3, a photographer, reached the spot, on being summoned. 11 photographs, negatives whereof are Ex.PW-3/5 to Ex.PW-3/15, were taken. However, out of said 11 photographs, only 4 photographs Ex.PW-3/1 to Ex.PW-3/4 could be developed.

10. Since the deceased was found dead, his body was sent to the mortuary of Civil Hospital, Sabzi Mandi, where Dr. K.L. Sharma PW-7, conducted the post-mortem at about 12.00 noon on 25.10.1997 and gave his report Ex.PW-7/A, which records the following external ante-mortem injuries on the person of the deceased:

- 1) Abrasion 4 x 3 cm over right angle of right eye.
- 2) Abrasion over right angle of mouth 2 x 2 cm.
- 3) Partial skin cut transverse, incised wound 7 cm long over right front base of neck.
- 4) Incised penetrating wound 4.5 x 2 cm vertically oblique over right upper front of chest, right margin being 10 cm obliquely above right nipple.

- 5) Incised penetrating wound 3.5 cm x 2 cm over upper front of left chest, right angle being 4 cm above left nipple.
 - 6) Incised penetrating wound, intestinal loops coming out of wound, with stool matter, 3 x 2 cm over right iliac fossa, oblique, right margin being 6 cm above anterior superior iliac spine.
 - 7) 3 partial skin cuts each of 1 x 1 cm over right axillary fold, one below other.
 - 8) Incised penetrating wound over 3.5 x 2 cm over right upper back below inferior border of scapula. (Muscle deep only).
 - 9) Incised penetrating wound upper margin shelved, lower margin inverted. Transverse 3.5 x 2 cm over back of abdomen in vertebral line. Muscle deep only).
 - 10) 2 incised penetrating wound each of 4.5 x 2 cm and 3 x 2 cm, transverse in the midline of the back of middle part of abdomen.
10. The doctor opined that the cause of the death of the deceased was asphyxia and pneumothorax as a result of external injuries Nos. (4) and (5). That the external injuries Nos. (4), (5) and (6) were collectively sufficient to cause death in the ordinary course of nature. That the injuries Nos. (1) and (2) were caused during a scuffle whereas all the remaining injuries were caused by a sharp, penetrating, straight and flat weapon like knife or dagger. That the possibility of the use of two weapons for causing said injuries on the person of the deceased cannot be ruled out.
11. After the post-mortem, the doctor handed over the clothes and blood sample of the deceased on a gauze to Const.Jaipal Singh PW-5, who in turn handed over the same to Inspector Vipin Kumar PW-16, as recorded in the memo Ex.PW-5/A.
12. Since the two eye-witnesses; namely Hemraj PW-1 and Kamal PW-2, had indicted the appellants of having murdered the deceased, the police set out to apprehend them. The appellants surrendered before the court of Metropolitan Magistrate on 28.10.1997 and were arrested by the police at about 3.30 P.M. on the same day as recorded in the arrest memos Ex.PW-16/F to Ex.PW-16/H.

13. The appellants were interrogated and their confessional statements were recorded. We need not note the contents of the confessional statements inasmuch as the same are completely inadmissible as they admit of guilt. We note that no recovery was affected nor was a fact discovered by the police pursuant to the said statements made by the appellants.

14. On 07.11.1997 ASI Manohar Lal PW-10, a draftsman, was taken to the place of occurrence where at the instance of Inspector Vipin Kumar PW-16, he prepared the site plan to scale Ex.PW10/A; recording therein, points A. to D., the spots where the appellants attacked the deceased, the deceased fell on the ground and the blood was found, the spots wherefrom Hemraj and Kamal witnessed the incident, the spots where the electric pole and lighted electric bulb were found, respectively.

15. The seized materials viz; the blood sample and clothes of the deceased, blood stained earth and earth control lifted from the place of occurrence were sent to a serologist for serological examination. Vide FSL reports Ex.PX and Ex.PY it was opined that the blood group of the deceased was B.; that the earth lifted from the place of occurrence was stained with human blood of B. group and that human blood of B. group was found on the clothes of the deceased.

16. Needless to state, the appellants were sent for trial. Charges were framed against them for having committed offences punishable under Section 302 read with Section 34 IPC.

17. At the trial, HC Verina PW-9 and HC Usha PW-14, deposed that the recording pertaining to information of the incident in the PCR forms Ex.PW-9/A and Ex.PW-14/A, were made by them. Const.Satpal PW-6, deposed that DD Entries Ex.PW-6/A and Ex.PW-6/B were recorded by him. Const.Jaipal Singh PW-5, deposed having handed over the clothes and blood sample of the deceased to Inspector Vipin Kumar vide memo Ex.PW-5/A. ASI Manohar Lal PW-10, deposed having prepared the site plan to scale on 07.11.1997 at the instance of Inspector Vipin Kumar. Sat Pal PW-3, deposed that 11 photographs were taken by him out of which only four photographs could be developed. Const Shiv Kumar PW-13, deposed having delivered copies of the FIR to the Ilaqa Magistrate and the senior

police officials. Dr. K.L. Sharma PW-7, deposed having prepared the post-mortem report Ex.PW-7/A.

18. Eschewing the reference to the testimonies of few formal police witnesses who deposed to the receipt of various articles in Malkhana and further movement thereof to FSL, we note the testimonies of the material witnesses of the prosecution.

19. Hemraj PW-1, deposed that on 24.10.1997 at around 9.30 P.M. he along with Kamal was standing outside his house situated at Gurmandi when the deceased asked him and Kamal to accompany him to Sangam Park for purchasing pigs. On reaching the slum- dwellings situated at Sangam Park, they saw that the appellants were gambling in a slum-dwelling pursuant where to the deceased also started to gamble with the appellants and won the entire stake money in thirty minutes. Thereafter appellant Baijnath asked the deceased to lend him some money which was refused by the deceased whereupon the other two appellants also started demanding money from him. When the deceased refused to lend money to the appellants despite their repeated insistence, they started demanding the gold chain and bracelet worn by the deceased. Upon the refusal of the deceased to do so, the appellants took out their knives and gave an exhortation that they would kill him (Saale tere ko upar pahucha dehenge.). Thereafter the appellants inflicted various knife blows on the person of the deceased and also gave threats to him and Kamal upon which they got scared and fled from the place of occurrence. On reaching their neighbourhood at Gurmandi, he and Kamal raised an alarm pursuant to which a crowd gathered there and then they along with some persons from the crowd namely Kuldeep, Ashok and Jaswinder went to the place of occurrence where they found that the deceased was lying dead. Thereafter the police arrived at the spot and conducted investigation. The seizure memos Ex.PW-1/B and Ex.PW- 1/C were prepared by the police in his presence. He identified the dead body of the deceased at the mortuary as recorded in the memo Ex.PW-1/D. n being cross-examined about the non-mention of the fact that the deceased gambled with the appellants just prior to being attacked by them in his statement Ex.PW-1/S, Hemraj stated that since I was perturbed due to the incident, I made another statement the next day explaining the circumstances. On

being cross-examined about the manner of the assault of the deceased by the appellants, Hemraj stated that I did not see where Ramesh and Lala and Baij Nath hit the knife on which portion of the body of the Chian

20. Kamal PW-2, also deposed on the same lines as Hemraj but with the difference that he deposed that appellants Ramesh and Rajinder caught hold of the deceased while appellant Baijnath inflicted knife blows on his person. Rest of the deposition of the witness is same as that of Hemraj.

21. Kuldip PW-8, deposed that on 24.10.1997 at around 11.00 P.M. he along with Jaswinder and Ashok was standing outside his shop when he saw Hemraj and Kamal running and shouting that the deceased has been stabbed by the appellants pursuant where to a crowd gathered there. He along with Hemraj, Kamal, Jaswinder and Ashok and some other persons from the crowd proceeded to the place of occurrence where they found that the deceased was lying dead. After sometime, the police arrived at the spot and started conducting the investigation. The search of the body of the deceased resulted in recovery of three gold ornaments namely a gold chain, ring and bracelet and a sum of Rs. 4,701/- from his possession. The seizure memos Ex.PW-1/B and Ex.PW-1/C were prepared by the police in his presence.

22. In their examination under Section 313 Cr.P.C., the appellants pleaded innocence and false implication. They stated that witnesses Hemraj and Kamal are interested witnesses and have deposed falsely at the instance of the police. That the investigation conducted by the police is not fair and forthright. That the deceased used to steal pigs in his lifetime and was killed by the owners of the pigs.

23. In defence, appellant Baijnath examined Const.Vinod DW-1, to establish that the police arrested him in connection with another case and subjected him to torture in the custody due to which he was forced to surrender before the court in the present case. The witness produced one Kalandra Ex.DW-1/A and a DD Entry Ex.DW- 1/B, both of which record that appellant Baijnath was arrested on 25.10.1997 in connection with a case registered against him under Sections 92, 93 and 97 of Delhi Police Act.

24. Believing the testimony of Hemraj PW-1 and Kamal PW-2, to be creditworthy, the learned Trial Judge convicted the appellants.

25. At the hearing of the appeals, learned Counsel for the appellants advanced under-noted submissions:

A. That appellants Rajinder and Ramesh were not represented by any counsel during a considerable period in the trial and therefore, it was incumbent upon the learned Trial Judge to provide legal aid to said appellants and to appoint a counsel for counsel for conducting their defence. The learned Trial Judge failed to do so and continued to conduct the trial in the absence of any counsel for said appellants. During the said period, material witnesses of the prosecution including the alleged eye-witness Kamal were examined and appellants Ramesh and Rajinder did not get an opportunity to cross-examine the said witnesses. According to the counsel, the right to free legal services is an essential ingredient of reasonable, fair and just. procedure for a person accused of an offence and is fundamental right of every accused person who is unable to engage a lawyer under Article 21 of [Constitution of India](#). Counsel argued that the failure of Trial Judge to provide legal assistance to appellants Rajinder and Ramesh is clearly a violation of the fundamental right of said appellants and the trial must accordingly be vitiated on account of a fatal constitutional infirmity, and the conviction and sentence recorded against the said appellants must be set aside. In support of the said argument, learned Counsel placed reliance upon the decisions of Supreme Court reported as Hussainara Khatoon v. State of Bihar : 1979 CriLJ1045 , Suk Das v. Union Territory of Arunachal Pradesh AIR 1986 SC 90 and Khatri v. State of Bihar : 1981 CriLJ597 , decision of Bombay High Court reported as Hiranman v. State of Maharashtra 2000 Cri LJ 1485 and decision of this Court reported as and decision of this Court reported as State (Delhi Admn) v. Balroop Singh : 49(1993)DLT644 .

B. The second submission advanced was predicated upon the timing of dispatch of the rukka from the place of occurrence to the police station for registration of an FIR. Learned Counsel for the appellant first drew attention of the court to the PCR form Ex.PW-9/A, to contend that the first information about the incident was

received by the police at 11.21 P.M. on 24.10.1997 and therefore, it could logically be assumed that the police would have reached the spot within few minutes of receiving the said information. Counsel submitted that as per the case of the prosecution the alleged eye- witnesses Hemraj and Kamal were found present when the police arrived at the spot and therefore, it would not have taken much time for the police to record their statements and prepare rukka on the basis of the said statement. Therefore, as per the counsel, it can reasonably be taken that the police would have prepared the rukka by 00.20 A.M. on 25.10.1997. In the backdrop of said contentions, learned Counsel then drew attention of the court to the recording contained in the rukka Ex.PW-4/A that the same was dispatched on 01.10 A.M. on 25.10.1997. Culminating the argument, the counsel contended that delay of nearly 1 hour and 40 minutes in dispatching the rukka shows that there was a delay in recording the statement of Hemraj PW-1, which as per the counsel leads to a very strong inference that the said witness was a procured witness and falsely deposed at the instance of the police.

C. The third submission advanced pertained to genesis of the occurrence. Counsel submitted that case projected by the prosecution was that the incident in question occurred when the deceased along with the alleged eye-witnesses Hemraj and Kamal were going to a market situated at Sangam Park for purchasing pigs. In said regards, counsel drew attention of the court to the statement of Hemraj in his cross-examination that it is correct that in Gurmandi, there is business of sale and purchase of the pigs. According to the counsel, when the deceased could have purchased pigs from Gurmandi itself, where was the occasion for the deceased and the two so-called eye-witnesses to go from Gurmandi to Sangam Park for purchasing pigs. Counsel therefore argued that the genesis of occurrence set up by the prosecution fails which in turn casts a serious doubt on the truthfulness of the case of the prosecution.

D. The fourth submission advanced was predicated upon the veracity of the evidence of Hemraj PW-1. Counsel argued that the omission of Hemraj to mention about the fact that the deceased gambled with the appellants just prior to being attacked by them in his statement Ex.PW-1/A, which statement formed the basis of the registration in the present case, raises a big question mark on the

truthfulness of the said witness.

E. The fifth submission advanced by the learned Counsel was again predicated upon the evidence of Hemraj PW- 1. Counsel pointed out that Hemraj in his statement Ex.PW-1/A stated that appellants Ramesh and Rajinder caught hold of the deceased while appellant Bajinath stabbed him whereas in his testimony before the court he deposed that all the appellants stabbed the deceased and that the said witness did not furnish an adequate explanation for said discrepancy when confronted with the necessary portion of the statement Ex.PW-1/A in his cross-examination. Counsel argued that the said material contradiction when coupled with inability of the said witness to explain the manner of assault on the deceased by the appellants establishes that Hemraj did not witness the appellants attacking the deceased.

F. The sixth submission advanced by the learned Counsel for the appellants was that though the locality where the incident occurred was a thickly populated one yet no person from the locality was examined by the prosecution, which circumstance lends credence to the defence of the appellants that the police contrived evidence against the appellants and falsely implicated them. In support of the said contention, counsel placed reliance upon the decisions of Supreme Court reported as *State of UP v. Madan Mohan* : 1989 CriLJ1485 , *State of Haryana v. Ram Singh* 2001 Cri LJ 987, *Megha Singh v. State of Haryana* : 1995 CriLJ3988 and *State of Punjab v. Sarup Singh* 1998 SCC (Cri) 711.

G. The seventh submission advanced by the learned Counsel for the appellants was predicated upon the conduct of the witnesses Hemraj and Kamal after having witnessed the incident. Counsel argued that the conduct of the so-called eye-witnesses in running from the place of occurrence without raising an alarm particularly when the locality where the incident occurred was a thickly populated one is most unnatural which in turn seriously dents the credibility of the said witnesses.

H. The last submission advanced by the learned Counsel was predicated upon the motive of the appellants for murdering the deceased. Counsel contended that the case projected by the prosecution was that the appellants murdered the deceased

when the deceased refused to lend money to them. Counsel pointed out that a sum of Rs. 4,701/- was recovered from the possession of the deceased when the police conducted the personal search of his body. Counsel argued that had the appellants murdered the deceased over money as alleged by the prosecution, then they would have surely stolen the money possessed by the deceased before fleeing from the place of occurrence and therefore, said fallacy in the theory of motive of the appellants for committing the crime is fatal to the case of the prosecution.

26. Pertaining to the first submission advanced by the learned Counsel for the appellants, we first proceed to take a bird's eye view of the record of the trial court.

27. A perusal of the trial court record shows that there are 6 Vakalatnamas on record. First Vakalatnama dated 31.03.1998 was executed by appellants Rajinder and Ramesh in favour of R.D.Dubey, and A.Ahmad, Advocates. Second Vakalatnama dated 02.05.1998 is executed by appellant Baijnath in favour of Rajinder Pershad, Advocate. Third Vakalatnama dated 30.06.1998 is executed by appellant Ramesh in favour of S.P. Sharma, Advocate. Fourth Vakalatnama dated 10.12.1998 is executed by appellant Rajinder in favour of Kamlesh Sambharwal and Rakesh Kumar, Advocates. Fifth Vakalatnama dated 27.11.1998 is executed by appellant Baijnath in favour of S.C.Garg, Advocate. Sixth Vakalatnama dated 19.03.99 is executed by appellants Ramesh and Rajinder in favour of Raj K. Bahri, Advocate.

28. It be noted here that S.C.Garg and R.K.Bahri, Advocates, appear to be associates as they were operating from the same chamber which fact is borne out from the perusal of the respective Vakalatnamas executed in their favour.

29. The present case was listed for the first time in the court of Additional Sessions Judge on 17.03.1998 on which date it was adjourned to 31.03.1998. On 31.03.1998, R.K. Bahri, Advocate appeared for appellant Baijnath and R.D.Dube, Advocate appeared for appellants Rajinder and Ramesh. On the said date, charges were framed against the appellants and the case was adjourned to 21.04.1998 for prosecution evidence.

30. Thereafter a perusal of the order sheets of the trial court shows that there was a tacit agreement between R.K.Bahri, Advocate and appellants Rajinder and Ramesh in pursuance of which R.K.Bahri, Advocate started to appear on behalf of all the three appellants. On 27.08.1998, R.K.Bahri, Advocate cross-examined Hemraj PW-1, on behalf of all the appellants.

31. However on next date i.e. 13.10.1998, appellants Rajinder and Ramesh had a fall-out with R.K.Bahri, Advocate and objected to his conducting their defence. In such circumstances, R.K.Bahri, Advocate cross-examined Kamal PW-2, only on behalf of appellant Baijnath. Noting that R.D.Dubey, Advocate had filed his Vakalatnama on behalf of appellant Rajinder and Ramesh on 31.03.1998 and that he did not turn up to cross-examine the witness, the trial court discharged witness Kamal. Thus, Kamal PW- 2, was not subjected to any cross-examination on behalf of appellants Rajinder and Ramesh.

32. As already noted herein above, on the next date i.e. 10.12.1998, Kamlesh Sambharwal and Rakesh Kumar filed their Vakalatnama on behalf of appellant Rajinder. However, no witness of the prosecution could be examined on the said date as an adjournment was sought by counsel for the appellants.

33. Thereafter on the next three dates viz; 13.01.99, 14.01.99 and 19.02.99, no counsel appeared for appellants Rajinder and Ramesh and the witnesses namely Satpal PW-3 (photographer), SI Manvinder Singh PW-4 (who stated to have taken the rukka from the place of occurrence to the police station), Const.Jai Pal (who stated to have handed over the blood sample and clothes of the deceased to the Investigating Officer) and Const.Sat Pal (who stated to have recorded DD Entries Ex.PW-6/A and Ex.PW-6/B) were cross-examined by R.K.Bahri, Advocate on behalf of appellant Baijnath. The aforesaid witnesses were not subjected to any cross-examination on behalf of the other two appellants.

34. As already noted herein above, on the next date i.e. 19.03.99, R.K.Bahri, Advocate entered appearance on behalf of appellants Rajinder and Ramesh.

35. The submission of learned Counsel was that it was incumbent upon the trial court to provide legal aid to appellants Rajinder and Ramesh when they raised an

objection to conduct of their defence by R.K.Bahri, Advocate.

36. There is no dispute with the proposition that an accused is entitled to get legal aid when he is not represented by any counsel on account of reasons such as poverty, indigence or incommunicado situation etc.

37. The question which needs consideration is whether appellants Rajinder and Ramesh were unrepresented on the dates 13.10.1998, 13.01.99, 14.01.99 and 19.02.99.

38. From the facts noted herein above, the position which emerges is that on 13.10.1998 appellant Rajinder was represented by R.D.Dubey and A.Ahmad, Advocates whereas appellant Ramesh was represented by S.P.Sharma, Advocate. It is most relevant to note on that appellant Rajinder engaged Ms. Kamlesh Sambharwal, Advocate on 10.12.1998 i.e., after raising the objection to the conduct of his defence by R.K.Bahri, Advocate, therefore where was the occasion for the trial court to provide legal aid to said appellant after 13.10.1998. Insofar as appellant Ramesh is concerned, a perusal of the trial court record shows that S.P.Sharma filed two applications dated 03/07.06.1998 seeking bail for appellant Ramesh, which applications was dismissed by the trial court on 04/08.06.1998 after hearing the arguments advanced by the said counsel. Therefore, appellants Rajinder and Ramesh were represented by a counsel on the dates in question.

39. It is true that counsel for Rajinder and Ramesh did not appear in court on various dates as noted above but it is equally true that in between said dates counsel for Ramesh filed an application seeking bail. It appears to be a case where the accused were adopting a strategy of contrivance to derail the trial by repeatedly changing counsel.

40. But the moot question is: whether a prejudice has been caused to Rajinder and Ramesh.

41. The defence taken by all the appellants was identical. R.K.Bahri, Advocate cross-examined the witnesses on behalf of appellant Baijnath. He i.e. R.K.Bahri

was later on engaged as counsel by Rajinder and Ramesh. Had R.K.Bahri, Advocate felt that any prejudice has been caused to the said appellants on account of denial of opportunity of cross-examination of the witnesses in question, he could have filed an application under Section 311 Cr.P.C. for recall of the said witnesses. He did not do so. Rajinder and Ramesh did not instruct him to do so.

42. In view of above discussion, we find no force in the first submission advanced by the learned Counsel for the appellants.

43. The submission pertaining to the delay in dispatch of rukka from the place of occurrence needs to be dealt with reference to the testimony of Inspector Vipin Kumar PW-16, the scribe of rukka Ex.PW-4/A.

44. Inspector Vipin Kumar PW-16, deposed that on 24.10.1997 he was present at police station Model Town when he received two wireless information about the incident at 11.32 and 11.35 P.M. respectively. Inspector Vipin Kumar would have taken at least 25 minutes to reach the spot after the receipt of the information of the incident. A crowd was present at the spot which fact is evident from the testimony of witnesses Hemraj, Kamal and Kuldip, therefore Inspector Vipin Kumar would have spent sometime in controlling the crowd, making enquiries from the persons present in the crowd and in ascertaining that witnesses Hemraj and Kamal have witnessed the incident and thereafter he would have elicited oral information about the incident from the said witnesses. Having elicited oral information from the said person, Inspector Vipin Kumar would have proceeded to pen the statement of Hemraj and thereafter would have prepared the rukka on the basis of the said statement.

45. Considering the afore-noted facts the time gap of 1 hour 40 minutes between the receipt of first information about the incident and dispatch of rukka is most reasonable, in any case not unreasonable.

46. Even otherwise, it is settled law that delay of few hours by itself in recording the statement of a witness does not amount to serious infirmity, unless there is material to suggest that investigating agency had deliberately delayed the recording of the statement in order to afford an opportunity to the maker to set up

a case of his own choice. Further, Investigating Officer has to be specifically asked as to the reasons for the delayed examination where the accused raises a plea that there was unusual delay in recording the statement of the witness. (See the decisions of Supreme Court reported as Bodhraj v. State of J & K : 2002 CriLJ4664 , Rambir Singh v. State of Punjab : [1974]1SCR102 and State of UP v. Satish : 2005 CriLJ1428).

47. In the instant case, neither any question was put nor was any suggestion given to Inspector Vipin Kumar PW-16, in his cross- examination pertaining to the delay in recording the statement of Hemraj PW-1.

48. The third submission advanced by the learned Counsel that pigs were available for sale in Gurmandi itself is neither here nor there for there could be several reasons such as quality, price of the pigs etc for the deceased to purchase pigs from Sangam Park instead of Gurmandi particularly when the distance between the two places was very less.

49. The next question which needs consideration pertaining to the fourth submission advanced by learned Counsel is whether the omission of Hemraj PW-1 to mention about the fact that the deceased gambled with the appellants just prior to being attacked by them is so fatal that renders the evidence of Hemraj unworthy of any credence.

50. The First Information Report is a report relating to the commission of an offence, given to the police and recorded by it under Section 154 of the Code of Criminal Procedure, 1973. Commenting on the object, value and use of First Information Report, in the decision reported as Sheikh Hasib @ Tabarak v. The State of Bihar : 1972 CriLJ233 a three-Judge Bench of this Court had observed as under:

The principal object of the first information report from the point of view of the informant is to set the criminal law in motion and from the point of view of the investigating authorities is to obtain information about the alleged criminal activity so as to be able to take suitable steps for tracing and bringing to book the guilty party. The first information report, we may point out, does not constitute

substantive evidence though its importance as conveying the earliest information regarding the occurrence cannot be doubted. It can, however, only be used as a previous statement for the purpose of either corroborating its maker under Section 157 of the Indian Evidence Act or for contradicting him under Section 145 of that Act. It cannot be used for the purpose of corroborating or contradicting other witnesses.

51. Apart from the fact that lodging of information under Section 154 Cr.PC keeps the District Magistrate and the Superintendent of Police informed of the occurrence and when recorded, is the basis of the case set up by the informant and provides material to the police to commence investigation, its fundamental object is that it acts as a safeguard against embellishment, exaggeration and forgetfulness.

52. The effect of an omission in the FIR on the credibility of a witness was considered by Supreme Court in the decision reported as State of MP v. Dhirendra Kumar AIR 1997 SC 3718. The facts of the said case were that the accused who was a tenant in the house where the deceased was residing was accused of murdering her. The prosecution sought to establish the guilt of the respondent by adducing evidence relating to the motive of the crime, eye-witness to the occurrence, dying declaration and recovery of the revolver from the custody of the respondent by which death had been caused, which revolver had been stolen by the respondent, who was a police constable, from the Police Malkhana in the night before the date of the murder of the deceased. The trial court accepted all these facets of the case of the prosecution whereas the High Court disbelieved all. One of the witnesses Radhabai PW-1, deposed that the deceased had made a dying declaration to her. One of the contentions advanced before Supreme Court was that since there was no mention about the dying declaration in the FIR, the evidence of PW-1 regarding the dying declaration should be discarded. Noting that the testimony of PW-1 was corroborated by the other evidence on record, Supreme Court repelled the aforesaid contention in following terms:

It was very emphatically contended by Shri Gambhir that as in the First Information Report (FIR) there is no mention about the dying declaration, we should discard

the evidence of PWs. 1 and 2 regarding dying declaration, because of what has been pointed out by this Court in Ram Kumar v. State of Madhya Pradesh AIR (1975) SC 1024. We do not, however, agree with Shri Gambhir, for the reason that what was observed in Ram Kumar 's case, after noting the broad facts, was that material omission in the FIR would cast doubt on the veracity of the prosecution case, despite the general law being that statements made in the FIR can be used to corroborate or contradict its maker. This view owes its origin to the thinking that if there be material departure in the prosecution case as unfolded in the FIR, which would so if material facts not mentioned in the FIR are deposed to by prosecution witnesses in the court, the same would cause dent to the edifice on which the prosecution case is built, as the substratum of the prosecution case then gets altered. It is apparent that prosecution cannot project two entirely different versions of a case. This is entirely different from thinking that some omission in the FIR would require disbelieving of the witnesses who depose about the fact not mentioned in the FIR. Evidence of witnesses has to be tested on its own strength or weakness. While doing so, if the fact deposed be a material part of prosecution case, about which, however, no mention was made in the FIR, the same would be borne in mind while deciding about the credibility of the evidence given by the witness in question.

We, therefore, do not agree with Shri Gambhir that Ram Kumar's case would require us to disbelieve the evidence of PWs. 1 and 2 regarding dying declaration of the deceased, only because the FIR has not mentioned about it. It is a settled law that FIRs are not taken as encyclopedia and omission of a fact therein, even if material, cannot by itself make the witness deposing about that fact unbelievable at that point. PW. 1 was thus not a witness to have been disbelieved on the two aforesaid grounds. Her evidence finds corroboration, as already mentioned, from the findings of the autopsy surgeon. This apart, her evidence the respondent had killed Mumbai by firing has also received corroboration from the recovery of a revolver from the possession of the respondent, to which aspect we shall advert later, supplemented by ballistic expert's report that very revolver had been used in firing at Mumbai. (Emphasis supplied)

53. In the decision reported as *State of Haryana v. Jinder Singh* : (1997)4SCC180 the allegations against the accused persons were that they had murdered the deceased. Case of the prosecution against accused Baldev Singh was that when the deceased had fallen down after being attacked by the other accused, he wrapped the parna around the neck of the deceased and dragged him to some distance. Holding that the said fact was not mentioned in the FIR, the High Court rejected the evidence of the eye-witness and acquitted the accused persons. Noting that the said fact was contained in the inquest report which was a contemporaneous document prepared soon after the registration of the FIR and that said fact was also corroborated by medical evidence, Supreme Court held that mere omission in the FIR is hardly of any consequence and convicted the accused persons.

54. It is no longer *res-integra* that it is not the requirement of law that every minute detail of the occurrence needs to be recorded in the FIR. The FIR is not intended to be an encyclopedia of the background scenario of the crime. (See the decisions of Supreme Court reported as *State of AP v. Golconda Linga Swamy* : 2004 CriLJ3845 , *Surjit Singh v. State of Punjab* : 1992 CriLJ1952 and *Kirender Sarkar v. State of Assam* : 2009(6)SCALE589 .)

55. From the afore-noted judicial pronouncements, the legal principle which can be culled out is that omission of material facts pertaining to the crime in the FIR is a relevant factor in judging the veracity of the evidence of the maker of the FIR but by itself is not sufficient to throw the evidence of the said witness. If the evidence of said witness is otherwise found to be credible, the omission in the FIR is of no consequence.

56. In the instant case, the explanation furnished by Hemraj PW- 1, that he omitted to state fact that the deceased gambled with the appellants just prior to being attacked by them in his statement Ex.PW-1/A because he was perturbed is completely justifiable keeping in view the fact that he witnessed a ghastly incident of gruesome murder of his relative.

57. Insofar as the submission relating to the contradiction between the statement Ex.PW-1/A of Hemraj and his testimony before the court regarding the manner of

assault on the deceased by the appellants is concerned, suffice would it be to state that when an eye-witness is examined at length it is quite possible for him to make some discrepancies. A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross examination 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. But courts should bear in mind that it is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the Court is justified in jettisoning his evidence. Too serious a view to be adopted on mere variations falling in the narration of an incident (either as between the evidence of two witnesses or as between two statements of the same witness) is an unrealistic approach for judicial scrutiny. (See the decision of this Court in Criminal Appeal No. 327/2007 titled as Akbar and Anr. v. State decided on 29.05.2009)

58. It is a general handicap attached to all eye-witnesses if they fail to speak with precision their evidence is assailed as vague and evasive, on the contrary if they speak of all the events very well and correctly their evidence become vulnerable to be attacked as tutored. Both the approaches are dogmatic and fraught with lack of pragmatism. The testimony of a witness should be viewed from broad angles. It should not be weighed in golden scales, but with cogent standards. By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen. Therefore, the submission relating to failure of Hemraj PW- 1, to explain the manner of assault on the deceased by the appellants deserves to be rejected.

59. Pertaining to the submission that no person from the vicinity of the place of occurrence was examined by the prosecution, it would be most relevant to note the following observations of Supreme Court in the decision reported as State of UP v. Ganga Ram and Ors. : 2005 CriLJ4643 :

One of the grounds, on which the High Court, recorded acquittal of the accused was that the occurrence is stated to have taken place on a pucca road on which bullock-carts, buses and other vehicles also go. The time is also of 5.15 p.m. but no outsider or pedestrian or resident of the vicinity has been named in the FIR or

in the statement of the witnesses but only P.W.2- Hemraj Page 1540 has been examined as an independent witness. This ground, taken by the High Court, is far-fetched and contrary to the testimony of eyewitnesses. This can be hardly a ground to disbelieve the otherwise creditworthy testimony, which inspired confidence. It is now well-settled principle of law that whom to cite as a witness and whom not is within the domain of the prosecution. It is also well settled principle that the prosecution evidence has to be weighed and not to be counted. It is just because any other pedestrian or resident of the vicinity has not been cited as witnesses will be no ground to throw away the otherwise reliable testimony of the eyewitnesses which is natural and inspires confidence. There is no evidence on record to show that there were other pedestrian or resident of the vicinity present at the relevant time, besides the prosecution witnesses. In our view, the aforesaid reason by the High Court is based on conjectures and surmises and is perverse.

60. In this regards, it would be most relevant to note that the decision of this Court in Criminal Appeal No. 478/2008 titled Ramesh Kumar v. State decided on 06.02.2009, wherein a similar contention was advanced by the counsel for the accused. After noting the ratio laid down by Supreme Court in the decisions reported as Swaran Singh v. State of Punjab : 1995 CriLJ3630 and Ambika Prasad v. State (Delhi Admn) (2002) 2 SCC 646, this Court observed as under:

The legal position which emerges from the afore-noted decision is that the factum of non-examination of public/independent witnesses is not fatal to the case of the prosecution in every case. It depends upon the additional factor whether the evidence led by the prosecution inspires confidence or not. If the evidence led by the prosecution is otherwise credible and trustworthy, the non-examination of independent/public witness is of no consequence.

61. Dealing with the decisions relied upon by the counsel for the appellants, the facts in Madan Mohan.s case (supra) were that the evidence of eye-witnesses was rejected by Supreme Court on the grounds that the presence of eye-witnesses at the place of occurrence was not natural but doubtful; no explanation was provided by the prosecution regarding injury on the person of the accused; names of the

eye-witnesses and some of the accused were not mentioned in the dying declaration of the deceased; prosecution version about occurrence was differing from version in dying declaration; prosecution suppressed the genesis of the crime and no independent witness from locality was examined.

62. The facts in Ram Singh.s case (supra) were that Supreme Court granted benefit of doubt to the accused persons on the ground that no independent person was joined in the disclosures, discoveries and arrests of the accused persons.

63. In Megha Singhs case (supra), recovery of pistol and live cartridges from the possession of the accused was sought to be proved by the prosecution through the evidence of two constables who apprehended him. Taking into account that no independent person was examined to prove the said recovery and that the investigation was tainted inasmuch as same was conducted by the very police officer who lodged the complaint, Supreme Court acquitted the accused.

64. In Sarup Singh.s case (supra), the case of the prosecution was based on circumstantial evidence. Two circumstances were relied upon by the prosecution viz; the deceased was last seen in the company of the accused and that the articles belonging to the deceased were recovered at the instance of the accused. The evidence pertaining to recovery of incriminating articles was rejected on the ground that the said articles were not recovered in the presence of any independent person but in the presence of maternal grandfather of the deceased. Holding that circumstance of last seen alone is not sufficient to establish the guilt of the accused, Supreme Court acquitted the accused.

65. Save and except Madan Mohan.s case (supra) none of the other decisions relied upon by the counsel have any application in the present case as they pertain to joining of independent persons at the time of recovery of the incriminating articles at the instance of the accused and there being other circumstances which led the court to doubt the credibility of the investigation. In so far as Madan Mohan.s case is concerned, the same is clearly distinguishable for the reason the non-examination of the independent witnesses was not the sole factor but one of the factors in rejecting the evidence of the eye-witnesses.

66. In the decision reported as State of Karnataka v. Yellappa Reddy : 2000 CriLJ400 Supreme Court held that unless the reaction demonstrated by an eye-witness is so improbable or so inconceivable from any human being pitted in such a situation it is unfair to dub his reaction as unnatural.

67. In the backdrop of afore-noted dictum, it needs to be judged whether the conduct of the witnesses Hemraj and Kamal in running from the place of occurrence without raising any alarm was unnatural or not.

68. In the instant case, both Hemraj and Kamal have categorically deposed that they ran away from the place of occurrence after being threatened by the appellants. In such circumstances, can the conduct of said witnesses in running away from the place of occurrence to the safety of their neighborhood after being threatened by the appellants who were armed with knives and had already murdered the deceased in a gruesome manner particularly when they shortly returned there along with other persons be termed as so inconceivable from the conduct of any human being pitted in such a situation? The answer to the said question is an emphatic No.

69. The last submission that recovery of Rs. 4,701/- from the body of the deceased demolishes the case of the prosecution in regard to motive of the appellants for murdering the deceased is based on surmises and conjectures. There is no evidence to show that amount of money possessed by the deceased before his death. The tenor of the evidence of the eye-witnesses Hemraj and Kamal suggests that the appellants were angry at the deceased because of his having won the entire stake money in the gambling and that they were wanting to get back from the deceased the money which was staked by them. It is quite possible that the appellants only removed the sum of money which was staked by them from the body of the deceased. It is equally possible that the appellants got scared after committing murdering the deceased and did not remove any money from the body of the deceased on account of fear and hurriedness to flee from the place of occurrence.

70. Having dealt with the submissions advanced by the counsel, the veracity of the evidence of the eye-witnesses Hemraj and Kamal needs to be considered.

71. At the outset, the defence taken by the appellants in their examination under Section 313 Cr.P.C. was that the witnesses Hemraj and Kamal were interested witnesses. and have falsely implicated them. The term interested witness. postulates that witness in question have some direct interest in seeing that the accused person is somehow or other gets convicted either because he has some animus against the accused or for some other reason. In the instant case, no suggestion was given to the said witnesses on behalf of the appellants that they had animus against them. No evidence otherwise was led by the appellants to show that they were inimically disposed towards them. In such circumstances, the witnesses Hemraj and Kamal had no reason to falsely implicate the appellants.

72. The question of credibility and reliability of a witness primarily has to be decided by referring to his testimony and by finding out as to how the witness has fared in cross-examination and what impression has been created in the mind of the court. In the instant case, the evidence of witnesses Hemraj and Kamal could not be shaken in the cross-examination. The witnesses corroborated each other on all material aspects.

73. The evidence of Kuldip PW-8, that he had seen witnesses Hemraj and Kamal running and raising an alarm that the deceased has been murdered by the appellants on the date of the incident at the time when he was present outside his shop situated at Gurmandi corroborates the evidence of the said witnesses that they kept on running from the place of occurrence till they reached their neighborhood at Gurmandi and that they raised an alarm on reaching there. The fact that dead body of the deceased was found the place where as per the witnesses Hemraj and Kamal the deceased was attacked by the appellants strongly establishes that they had seen the appellants attacking the deceased for the reason unless they had seen the same they could not have directed the people to the place where the dead body of the deceased was found. The evidence of the said witnesses that appellants stabbed the deceased is duly corroborated from the post-mortem report Ex.PW-7/A of the deceased. The factum of the recovery of three gold ornaments from the body of the deceased corroborates the evidence of the said witnesses that the appellants before attacking the deceased were demanding gold ornaments worn by the deceased.

74. The fact that FIR was registered in the present case soon after the occurrence makes the possibility that the version stated in the said FIR was fabricated too remote.

75. In view of above discussion, we have no hesitation in sustaining the conviction of the appellants on the basis of the evidence of witnesses Hemraj and Kamal, who in our opinion are reliable witnesses..

76. The appeals are accordingly dismissed.

77. The appellants are on bail. Since the appeals have been dismissed, the bail bonds and surety bonds furnished by the appellants are cancelled. The appellants are directed to surrender within two weeks.

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