

Dalip Kumar Vs. State of Delhi

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Court : Delhi

Decided On : Oct-29-2003

Reported in : 111(2004)DLT500

Judge : Usha Mehra and; Pradeep Nandrajog, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 302

Appeal No. : Crl. A. No. 690 and 694 of 2001

Appellant : Dalip Kumar

Respondent : State of Delhi

Advocate for Def. : Ravinder Chadha, Adv.

Advocate for Pet/Ap. : B.B. Lal, Senior Adv. and; Nisha V. Nayaryanan, Adv

Judgement :

Pradeep Nandrajog, J.

1. Dalip Kumar, appellant in Crl. A. No. 690/2001 Along with his three brothers Sanjeev Kumar, Rajesh Kumar, Ashok Kumar, the three appellants in Crl.A. No. 694/2001 were charged as under:

'That on 13.5.1997 at about 8.45 p.m. in the lane No. 3 in front of Shop of Dr. V.P.S. Pawar, B Block, J.J. Colony within the jurisdiction of Police Station

Inderpuri, you all in furtherance of your own common intention committed the murder by intentionally or knowingly causing the death of Bhim Sen and thereby you committed the offence punishable under Section 302 read with Section 34, IPC and within my cognizance.

And I, hereby, direct that you all be tried by this Court on the aforesaid charge.'

Signed ASJ/N. Delhi

27.10.1998

Appellant pleaded not guilty and claimed trial.

2. Substance of the case of the prosecution against the appellant is that Johri Lal was a resident of house No. D 214, J.J. Colony, Inderpuri. The accused along with their father Sh. Hari Chand residing in the neighborhood at house No. D 218, J.J. Colony, Inderpuri. There was previous enmity between Hari Chand and his sons i.e. the appellants and the family of Johri Lal. On the date of the incident i.e. 13.5.1997, around 8.40 p.m. Johri Lal (PW 2) and his two sons namely, Bhim Sen (deceased) and Surinder (PW 3) were proceeding to attend a Jagran at house of Lakshmi Narain who resided in F Block, J.J. Colony, Inderpuri. Johri Lal and Surinder were walking a little ahead of Bhim Sen. When they crossed the clinic of Dr. V.P.S. Pawar on the main road of 'B' block market, Johri Lal and Surinder heard the cry of Bhim Sen 'Pitaji Mujhe Maar Dala'. They looked back and saw that the accused Rajesh, Ashok and Sanjeev (appellants in Crl.A. No. 694/2001) had caught hold of Bhim Sen. The fourth brother, accused Dalip was stabbing Bhim Sen with a knife. Johri Lal and Surinder ran towards Bhim Sen. The four accused fled away. Bhim Sen fell down on the ground. Somebody rang up the police control room, pursuant to which a PCR Van of which H.C. Sant Ram Sharma(PW 15) was the in charge reached the spot and took Bhim Sen to RML hospital. On the way, Bhim Sen, at the asking of HC Sant Ram Sharrna told him that the accused Dalip had inflicted knife injuries on his person, while the accused Ashok, Rajesh and Sanjeev had caught him Johri Lal and Surinder also went to the hospital in a three-wheeler scooter. Bhim Sen was declared brought dead at the hospital. Dr. P.K. Dass (PW 4) had examined the deceased when brought to

the hospital. P.S. Inderpuri also received information about the incident from the Police Control Room which was recorded vide DD No. 20 A. S.I. Joginder Singh PW 6 was deputed to make inquiry. He, accompanied by Constable Narender (PW 10) reached the place of incident and learnt that the deceased had been removed to RML hospital. Constable Narender remained at the spot. S.I. Joginder Singh reached the hospital where he learnt that Bhim Sen had died. Johri Lal, met S.I. Joginder Singh in the hospital and gave his statement, recorded as Ex. PW 2/A which contained the narration of the incident. The duty constable at the hospital handed over to S.I. Joginder Singh the blood stained shirt and T-shirt of the deceased which was sealed with the seal of the hospital along with the sample seal, which was taken into possession vide memo Ex. PW 6/A. S.I. Joginder Singh came back to the place of the incident, made his endorsement on the statement of Johri Lal which he had recorded in the hospital and sent Constable Narender who had been earlier left at the spot for its protection to get the FIR Registered. The FIR was registered at about 11.45 p.m. at P.S. Inderpuri, being FIR. No. 134/1997. Constable Narender returned to the place of occurrence with a copy of the FIR and gave the same to S.I. Joginder Singh. Johri Lal and Surinder by this time also came to the site. S.I. Joginder Singh prepared site plan of the place of occurrence. Crime team was summoned. Site was photographed. At the site of the incident, S.I. Joginder Singh seized one Hawai Chappal, four shirt buttons, blood and earth control. These were sealed and seized vide memo prepared at the site and were deposited in the Malkhana. On 14.5.1997, the post-mortem was conducted and S.I. Joginder Singh conducted the inquest proceedings. One pant and underwear and blood samples of the deceased were handed over by the Doctor to him which he sealed and seized. Dr. Arvind, PW 11 who conducted the post-mortem noticed as many as 10 injuries on the person of the deceased. Same are as under:

'(i) incised wound was present on the dorsum of left index finger (defense wound) size 1 cm. x 0.2 cm.

(ii) incised wound on left forearm 4 cm below left elbow size was 2 cm. x 0.5 cm. x 1 cm. deep, traversal placed.

(iii) Stab wound on left side of front of neck 3 cm. below the angle of left mandible, size was 1 cm. x 0.5 cm. x 3 cm. deep. The track was directed upwards and laterally, both the angles were acute.

(iv) Stab wound spindle shaped present in left axilla, size was 1.5 cm. long x 0.5 cm. x 6 cm. deep. The track was directed upwards and medially.

(v) Stab wound spindle shaped present on left side of lateral wall of chest measuring 1.5. cm. x 0.5 cm. x 2.5 cm. deep, directed upwards and medially directed trace seen. Both the angles were acute. It was situated 12 cm. below and lateral to left nipple.

(vi) Stab wound spindle shaped situated on abdomen 5 cm. below and lateral to umbilicus and 18 cms. above symphysis pubis. The size was 3 cm x 2 cm x abdominal cavity deep. The track was directed upwards and medially both the angles were acute.

(vii) Stab wound 3 cms. long x 1.5 cm. x chest cavity deep 6 cm. medial to left nipple and 2 cm. lateral to mid body line.

(viii) Stab wound in right axilla size was 2 cm. x 0.2 cm. x 10 cm. deep, the track was directed upwards and medially both the angles were acute.

(ix) Stab wound on the middle of right upper arm size was 1.5 cm. x 0.5 cm. x 11 cm. deep, the track was directed upwards both the angles were acute.

(x) Incised wound present on left temporal region of scalp 1 cm. transversely placed size was 1 cm. x 0.3 cm. x muscle deep.'

3. As per the post-mortem report, Ex. PW 11/A, all the injuries were ante mortem. Death was due to cardiogenic shock following stab injury. Injury No. 7 noted above was sufficient to cause death in the ordinary course of nature. All injuries were caused by sharp weapon of offence. Time since death was found to be about 19 hours. Further investigation was taken over by Inspector Y.K. Tyagi PW 19. On 15.5.1997, he received a secret information about the presence of accused Dalip at a tea shop in 'C' Block Inderpuri where he proceeded with other police officials

and arrested accused Dalip. Accused Dalip made a disclosure statement and pursuant thereto got recovered from the bushes in Krishi Kunj, Todapur Road, the weapon of offence, being a knife Ex. P3. Recovery was effected in the presence of the police officials, father and brother of the deceased namely Sh. Johri Lal and Surinder respectively. At the instance of accused Dalip, his three brothers were arrested from the house on the same date i.e. 15.5.1997. After recovery of weapon of offence, a subsequent opinion being Ex. PW11/B of the autopsy surgeon Dr. Arvind PW 11 was obtained who opined that all the injuries could be caused with the knife which was got recovered at the instance of the deceased.

4. By the impugned judgment dated 5.9.2001, the learned Addl. Sessions Judge has held that the prosecution has successfully brought home the charge against the accused persons. In arriving at the said finding the following has been held to be stood proved against the accused:

(i) Dying declaration made by the deceased Bhim Sen to HC Sant Ram Sharma PW 15.

(ii) Testimony of Johri Lal and Surinder PW 2 and PW 3 to the effect that they were eye witnesses and their evidence was trustworthy. Their evidence proved the culpability of the accused.

(iii) Previous enmity which was the motive for committing the offence.

5. Recovery of the weapon of offence was held to be doubtful which fact however was held not to be destructive of the case of the prosecution nor was held to be of a nature so as to effect the case of the prosecution in view of other reliable evidence.

6. We have heard Mr. Dinesh Mathur, learned Senior Counsel appearing for the appellants in CrI.A. No. 694/2001 and Mr. B.B. Lal, learned Senior Counsel appearing for the appellant in CrI.A. No. 690/2001. We have heard Mr. Ravinder Chadha for the State. With the assistance of the learned Counsel, we went through the evidence.

7. Whether the finding of the learned Trial Court that the deceased made a dying declaration to PW15, which dying declaration stood established and whether Johri Lal and his son Surinder examined as PW 2 and PW 3 respectively were indeed eye witnesses so as to prove the incident is sustainable on the evidence on record or not, is being considered by us simultaneously since the evidence of PW 15 has a material bearing on the issue whether PW 2 and PW 3 were present at the spot when the incident took place.

8. As per the testimony of PW 15 HC Sant Ram Sharma, on 13.5.1997 he was posted on duty on PCR Van Zebra 23 from 8 p.m. to 8 a.m. On that day at about 8.15 p.m. a call was received from the Police Control Room that stabbing is going on at 'B' Block Inderpuri. They reached 'B' Block and noticed that near the clinic of Dr. V.P.S. Pawar a crowd had gathered. A person was found lying on the road in an injured condition. He came to know the name of the injured person as Bhim Sen. He took the injured to the hospital. On the way he asked Bhim Sen as to how he had sustained injury. Bhim Sen informed him that Dalip had given knife blows on his person whereas Rajesh, Ashok and Sanjeev, brothers of the Dalip had caught hold of him. So stating Bhim Sen became unconscious. He took Bhim Sen to RML Hospital and got him admitted. Doctor declared Bhim Sen brought dead. He thereafter reached his base point from hospital.

9. On cross examination witness deposed that his statement was recorded by the police for the first time on 14.5.1997 but did not remember the name of the I.O. He admitted that there were three police officials in the van being the driver, a gunman and himself. While driven to the hospital he was sitting on the front seat near the driver. The gunman was with the injured at the back portion of the van. He admitted that the proceedings conducted by him were required to be entered in a call book, which he stated that he had so done. He admitted that in the call book, if known, name of the injured as well as of assailant is to be entered, which fact he stated he had done. He stated that it was he who told the Doctor the name of the injured but since he did not know the name of the father of the injured he could not so disclose to the Doctor. He remained in the hospital for about 30 minutes. The SHO along with staff had reached the hospital after about 15 minutes of his arrival in the hospital. He admitted that he does not know Johri Lal and that Johri Lal did

not meet him either at the spot or in the hospital. He admitted that the I.O. did not seize a copy of his call book in the case. He stated that he had made inquiries from public persons who gathered at the spot before his arrival, who told him that the deceased was a resident of the area. He further stated that he had told the names of the accused persons to the SHO at the hospital when he met the SHO but the SHO did not record his statement.

10. PW 2 Johri Lal, father of the deceased, in his deposition stated that he resided in house No. D-214 J.J. Colony, Inderpuri for the last many years till about the end of May, 1997. He had seven sons, deceased Bhim Sen was his son. He knew the accused persons as they lived one house away from his house in Inderpuri. On 13.5.1997, at about 8.45 p.m. he and his son Surinder and Bhim Sen were going to the house of Lakshmi Narain. Bhim Sen was 15 to 20 paces behind him and his son Surinder. At 8.45 p.m. when he and Surinder crossed the clinic of Dr. Pawar, they heard the shriek of his son Bhim Sen 'Pitaji Mujhe Maar Dala'. He turned back and saw accused Rajesh, Ashok and Sanjeev having caught hold of his son and accused Dalip was hitting him with a knife. He and Surinder ran towards Bhim Sen. The four accused fled away. Bhim Sen fell down. He started shouting and people gathered. After some time a PCR van came and took his son to RML hospital. He and Surinder went to the hospital in a three-wheeler scooter. His son was declared brought dead in the hospital. On 28.10.1996, accused Dalip had attacked him and his son Bhim Sen for which incident a criminal case was pending. On 12.5.1997 when Bhim Sen had come from the village, accused Dalip had threatened him, that why he had come from the village to die. Even in the morning of 13.5.1997 his son Bhim Sen had told him that Dalip had been abusing him on 13.5.1997 itself. He stated that in the evening of 14.5.2001 the police lifted the blood and blood control earth from the site in his presence. He had signed the seizure memo Ex. PW 2 /8 at point-A. The police had also recovered from the site 4 buttons which were sealed in a parcel which was seized vide seizure memo PW2/C which bore his signature at point-A. These buttons were not of the shirt of his son. One pair of Hawai chappal belonging to his son was seized by the police vide seizure memo Ex. PW 2/B which bore his signature at point-A. On 15.5.1997, the police had brought the four accused persons to his house. The accused led the police party including himself and his son Surinder to the place of incident.

Thereafter the accused Dalip took the police, his son and himself to some place from where the police recovered a knife which as per the testimony of the witness was the same knife which was used by Dalip to inflict injuries on his son in the evening of 13.5.1997. Accused Dalip was wearing a shirt which was seized by the police vide memo Ex. PW2/5 which bore his signature at point-A. In cross-examination, he stated that he had embraced his son when he saw him with injuries. After embracing his son he did not notice whether his clothes had been stained with blood. On further cross-examination he stated that he reached the hospital wearing the same clothes which he was wearing at the site. On further cross-examination he stated that he did not remember the time taken to reach the hospital nor could he tell the distance between the place of the incident and RML hospital. He remained in the hospital for some time and came back to his house at 11 p.m. On 14.5.1997 he went to the Police Station and proceeded there from to Safdarjung hospital where he identified the dead body of his deceased son. After post-mortem the body was handed over to him in the evening of 14.5.1997. The body was brought back to the house at about 4-6 p.m. for cremation. They remained at the cremation ground till the fire was burning. All the family members had gone to the cremation ground. He denied that he was not present at the spot nor was he present at the hospital when the deceased was declared brought dead. He denied that he did not speak to the Doctor.

11. PW 3 in his testimony stated that on 13.5.1997, along with his father and brother he was proceeding to T' Block to attend a Jagran. At 8.45 p.m. when they were near the clinic of Doctor Pawar on the main road at 'B' Block, he and his father who were ahead of this brother Bhim Sen heard the cries 'Pitaji Mujhe Maar Diya'. He and his father looked back and saw accused Rajesh, Ashok and Sanjeev having caught hold of his brother. Accused Dalip was hitting him with a knife. He and his father ran towards Bhim Sen. The four accused left Bhim Sen and fled away. Bhim Sen fell down on the road. His father caught hold of Bhim Sen while he ran towards the accused. His father asked him to look after his brother and he stopped the chase. At their shouting people collected. A PCR vehicle came to the spot and shifted Bhim Sen to RML hospital. He and his father followed them in a three-wheeler scooter. Bhim Sen was declared brought dead by the Doctor. On hearing the death of Bhim Sen, his father became unconscious and regained

conscious after some time in the hospital itself. Police arrived at the hospital and recorded the statement of his father. His statement was also recorded. After some time they came back to their house. They got the body of the deceased after post-mortem on 14.5.1997 in the afternoon. After cremation they came back to the house, late evening. Police came and took them to the place of incident from where the police lifted the blood, the earth control, one pair of Hawai chappal and four buttons. The same was sealed and seized. He had also signed the seizure memos. On 15.5.1997 the police had brought all the four accused to their house. Accused Dalip led the police party which included himself to Todapur Road, Krishi Kunj ground and got recovered from the bushes a knife. The knife was having blood stains. The knife was sealed in a parcel and seized. On cross-examination, witness stated that he did not know English but had signed the seizure memos at the asking of the investigation officer. He stated that the accused Rajesh and Ashok had caught hold of Bhim Sen by his arms and accused Sanjeev had caught hold from behind by putting 'kohani'. He further stated that he and his father reached the hospital after about one or two minutes of the arrival of the PCR Van. He remained in the hospital till the police recorded his statement. He stated that the clothes which he and his father were wearing were having blood stains of the deceased. The police asked them to hand over these clothes which they gave to the police. He and his father returned to the house from the hospital at about 10-11 p.m. on 13.5.1997. On further cross-examination, the witness stated that he did not recollect the time when the police arrived at their house with the accused persons on 15.5.1997. He admitted that Todapur Road had heavy traffic plying thereon. He also admitted that Krishi Kunj is a place where children play and is a public place. He stated that he had signed one paper at the site of the recovery of the knife. He denied the suggestion that nothing was recovered from the site at instance of the accused person in his presence.

12. Refereeing to the testimony of PW 15, learned Counsel for the appellants contended that it is apparent that PW 2 and PW 3 were neither present at the site of the incident nor they reached the hospital till the time when PW 15 remained in the hospital. As per the evidence of PW 15, he remained in the hospital for about 30 minutes. Learned Counsel for the appellants contended that from the evidence of PW 15 it was clear that he had gathered information at the site from the people

of the locality who had gathered at the site of occurrence that the injured person was named Bhim Sen and was a resident of the area. PW 2 and PW 3 were residing in the same area and there was a high degree of probability that PW 2 and PW 3 received information of the deceased having been assaulted after some time and pursuant thereto they reached the hospital much later. Learned Counsel sought to sustain the said submission from the testimony of PW 4 Dr. P.K. Dass, testimony of PW 6 S.I. Joginder Singh, testimony of PW 7 H.C. Jagpal Singh and testimony of PW 10 Constable Narender. Let us examine the testimony of said witnesses.

13. As per the testimony of PW 4, Dr. P.K. Dass who had examined Bhim Sen when he was brought to the hospital and found him to be dead, when the patient was brought to the hospital, his father's name was not known and that is why in the MLC he recorded 'Father's name not known'. Later on, somebody told the name of the father of the patient, and therefore, within bracket, he recorded the name of the father, being Johri Lal. He stated that he issued the death certificate being Ex. PW 4/B to Johri Lal and admitted that in the certificate also, he first recorded father's name unknown and then later on recorded the father's name as Johri Lal.

14. PW 6 S.I. Joginder Singh in his deposition stated that on receipt of DD No. 30A, when he was posted at P.S. Inderpuri, he along with Constable Narender reached near clinic of Dr. Pawar situated at 'B' block J.J. Colony, Inderpuri and found one Hawai chappal, broken buttons of shirt and blood on the ground. No eye witness was available. They learnt that the injured had been removed to RML hospital. Leaving Const. Narender at the spot for its protection, he reached RML hospital where he found Bhim Sen son of Johri Lal having been brought dead to the hospital. Father of the deceased namely Sh. Johri Lal met him in the hospital whose statement he got recorded as Ex. PW 2/A. The duty constable in the hospital handed over to him the blood stained clothes of the deceased, which he seized. They came back to the spot and he handed over Asal Tehrir to Cons. Narender for registration of the FIR, who got the FIR registered. After some time, complainant Johri Lal and his son also reached the spot and at their instance site plan PW 6 /C was prepared. He got the spot photographed. Constable Narender

returned with the copy of the FIR and Asal Tehrir. He seized Hawaii chappals, broken buttons, blood and earth control. He recorded statements of witness under Section 161, Cr.P.C. He went to the Police Station and deposited the case property in the Malkhana. On 14.5.1997 he prepared the inquest papers and got the post-mortem conducted. A sealed parcel containing the pant and underwear of the deceased were seized and thereafter he handed over case file to the Inspector Y.K. Tyagi for further investigation. On 15.5.1997 a secret information was received that accused Dalip was present near the police booth at 'C' block of J.J. Colony. He was apprehended. Dalip made a confessional statement being Ex. PW 6/C. He led them to Ms house at D-218, J.J. Colony from where other accused persons were arrested. Johri Lal and Surinder identified the accused persons. Insp. Y.K. Tyagi took Dalip to the place where he had thrown the weapon of offence. A knife was recovered from the bushes at the pointing out of Dalip. It was seized. It was deposited in the Malkhana. In cross-examination he denied the suggestion that the Ruqqa Ex. PW 2/A was scribed later and not try at the time as he deposed. He admitted that he did not to ascertain whether any Jagran was to be held at the place stated by the PW2 and PW3.

15. In contradiction to the testimony of PW 6, PW 10 Constable Narender in his deposition stated that after having reached the spot on receipt of DD No. 20A, S.I. Joginder Singh left him at the spot and went to RML hospital as they were informed that the injured was taken to said hospital. After considerable time S.I. Joginder came back to the spot along with Johri Lal and Surinder. S.I. Joginder wrote the statement of Johri Lal at the spot and deputed him to go to the Police Station for registration of the FIR. In cross-examination the witness admitted that the house of the accused was about 200 metres from the place of occurrence and the house of Johri Lal is also situated at a distance of about 200 metres. On further cross-examination he stated that the saw Surinder and Johri Lal coming to the spot on foot. He stated that the saw Johri Lal at the spot at 10-11 p.m. Johri Lal's statement was recorded by S.I. Joginder Singh after 11 p.m. It took about 50 minutes for recording of the statement. Joginder Singh recorded the statement while standing, keeping the paper on a Phatta.

16. PW 7 H.C. Jagpal Singh in his deposition stated that about 23.15 hours on 13.5.1997 he had received a Ruqqa from S.I. Joginder through Constable Narender and on the basis of which he recorded the FIR. In cross-examination he stated that the FIR was sent to the Ilaka Magistrate through Constable Jagdish. He admitted that the arrival of the Const. Jagdish after delivering the FIR to the Metropolitan Magistrate is not mentioned in the D.D. Register. He, however, admitted that the Metropolitan Magistrate had received the FIR on 14.5.1997.

17. We find the following contradictions and improbabilities in the evidence of the various witnesses whose depositions we have noted above:

(i) PW 6 S.I. Joginder Singh states that he recorded the statement of Johri Lal at the hospital and then came to the spot to make the endorsement for sending the Ruqqa. He sent the Ruqqa through PW 10 Constable Narender for registration of the FIR PW 10 on the other hand states that a statement of Johri Lal was recorded at the spot by S.I. Joginder Singh after he returned from RML hospital.

(ii) PW 15 categorically stated that he neither met PW 2 and PW 3 at the spot nor at the hospital. He stated that he remained in the hospital for about 30 minutes. This is at complete variance with the testimony of PWs 2 and 3 who stated that they followed PCR Van and reached the hospital one or two minutes later. If PW 2 and PW 3 had reached the hospital one or two minutes after PW 15 reached the hospital along with the injured, it was improbable that in the MLC the doctor PW 4 would have recorded the name of the father of the injured as 'unknown'. It is apparent that when he reached the spot of occurrence, PW 15 gathered the name of the deceased from the persons present at the spot and give the same to the doctor on duty PW 4 and since PW 15 did not know the name of the father of the injured he did not so state.

(iii) From the testimony of the prosecution witness and in particular PW 10 it is apparent that the house of deceased was about 200 metres from the place of the incident. The possibility of PW 2 and PW 3 having received information of the assault on Bhim Sen and his having been taken to RML Hospital, and on receipt of said information they proceeded to the hospital and reached there after the MLC was prepared cannot be ruled out. The aforesaid inferences stands probalised

from the fact, that later on, in the MLC, PW 4, in brackets recorded the name of the father of the injured as Johri Lal. From the testimony of PW 4 it is clear that he had later on recorded the name of the father of the injured being Johri Lal. Thus, Johri Lal having reached the hospital much later stands corroborated from the testimony of PW 4.

(iv) PW 2 & PW 3 who claim to be eye witnesses are categorical in their deposition that they embraced the deceased at the spot when he was injured and at the asking of the police handed over their blood stained clothes to the police. It is surprising that no seizure memo was prepared nor were the blood stained clothes of PW 2 & PW 3 sent to the CFSL. PW 6 S.I. Joginder Singh does not state that he seized the clothes worn by PW 2 and PW 3. Indeed, if the blood stains of the deceased were on the clothes of PW 2 & PW 3 it would have been a material evidence to establish their presence at the spot. From the records it is clear that the clothes of PW 2 & PW 3 were not seized by the police and their testimony to that effect is incorrect and false.

(v) We find material contradiction between the testimony of PW 2 & PW 3 on the one hand and testimony of PW 6 and PW 10 on the other. As per testimony of PW 2 and PW 3, they were associated in the investigation of the spot on 14.5.1997 after they had cremated the deceased and it was in the evening of 14.5.1997 that the police recovered from the spot the chappals of the deceased, four buttons, blood and control earth samples. According to the testimony of PW 6 and PW 10 when PW 6 returned to the site from the hospital and handed over the statement of PW 2 which he had recorded in the hospital to Constable Narender with a direction that the FIR be registered, PW 2 & PW 3 reached the spot and at their instance he prepared the site plan. Further, when PW 10 returned to the spot, PW 10 recovered Hawaii chappal belonging to the deceased, four buttons, blood and earth control. As per testimony of PW 6, he came to the spot along with PW 2 and PW 3. We find that there is material contradiction between the testimony of PW 2 & PW 3 on the one hand as to the time when the spot was investigated and the testimony of PW 6 & P W 10 on the other hand, apart from the contradiction in the testimony of PW 6 and PW 10 inter se.

(vi) In para 2 above, we have noted the injuries inflicted on the deceased. Injury Nos. 1, 2 and 9 are on the arms and hand. Injury No. 4 is on left axilla, injury No. 5 is on left side of lateral wall of chest, injury No. 6 cm. medial to left nipple and 2 cm. lateral to mid body line, injury No. 8 is in right axilla (armpit). If, indeed, the testimony of PW 2 and PW 3 is to be believed, the arms of the deceased were caught hold of by accused Rajesh and Ashok and accused Sanjiv had caught him from behind by putting 'Kohni' (bear hug). Dalip had inflicted knife injuries. Had this been so, it is difficult to accept aforementioned injuries being inflicted.

18 The evidence on record probabilises the fact that PW 2 & PW 3 were not eye witnesses to the incident. Being residents of the locality and residing about 200 metres away from the place of occurrence, they probably learnt about the assault on the deceased and on solearning, reached the hospital by which time the deceased was brought dead to the hospital.

19. The testimony of PW 15 to the effect that the deceased had told him that it was the accused persons who had assaulted him would mean that the deceased had made a dying declaration to PW 15. Had he done so? The evidence on record does not suggest so, much less prove any dying declaration.

20. In his deposition, PW 15 stated that if the name of the assailant was known, it was the duty of the officer in charge of the PCR Van to record the name of the assailant. He stated that as in charge of the PCR Van, he had, as a matter of fact recorded the name of the assailant when the injured had informed the same to him. In his deposition PW 15 categorically stated that he recorded the name and parentage of the injured in the call book. In his deposition PW 15 categorically stated that the SHO reached the spot after about 30 minutes. He stated in his deposition that he told the names of the accused persons to the SHO in hospital when the SHO met him. Surprisingly enough, as per the testimony of PW 15 the I.O. of the case did not seize his call book. Indeed, none was proved at the trial.

21. If indeed, PW 15 was the, recipient of an oral dying declaration by the deceased, when the SHO met him at the hospital and as per the testimony of PW 15 he gave said information to the SHO, in our opinion the FIR ought to have been recorded on the basis of the statement of PW 15. That apart, the best evidence of

the dying declaration made by the deceased to PW 15, if made, was to be found in the call book maintained by PW 15. There is no earthly reason as to why such a vital piece of evidence was suppressed by the prosecution. On a somewhat similar circumstances, the Hon'ble Supreme Court while considering the evidential value of deposition by a witness that an oral dying declaration was made to him by the deceased, in the judgment report as : 2001 CriLJ3302 , Smt. Lakshmi v. Om Prakash and Ors., in para 17 held as under:

'Neither the PCR Van Roznamcha has been produced nor such information conveyed to the Control Room and/or Police Station. If only a dying declaration was made by Janak Kumari to this witness then in the ordinary course of things, messages would have been transmitted promptly by S.I. Shiv Charan to the Police Control Room and would have been recorded as a First Information Report of the incident disclosing commission of a cognizable offence by specified accused persons..... In our opinion, the sole testimony of PW 5 Shiv Charan, ASI uncorroborated by any other evidence as a dying declaration, implicating the three accused persons having been made by the victim to him, is difficult to believe in the facts and circumstances of the case.'

22. PW 15 had learnt at the spot that the name of the injured was Bhim Singh which he conveyed to the Doctor. Father's name of the deceased was not known when PW 4 prepared the MLC. Evidence suggests that later on when PW 2 & PW 3 reached the hospital, PW 4 was informed that the name of the injured was Bhim Sen and not Bhim Singh, at which PW 4 cut the word Singh and wrote 'Sen' and under the parentage of the deceased against the word 'unknown' he recorded within bracket the name of Johri Lal as the father of the deceased. We are of the opinion that had the deceased made a dying declaration he would have given the name of his father and name of the assailants to PW 15. It would have so found mentioned in the duty book/log book maintained by PW 15 and this would have been the best evidence of any dying declaration, if made. Apart from the fact that PW 15 had not disclosed to the doctor the parentage of the injured who was found brought dead to the hospital, non-production of the log book/duty book militates against the fact that the deceased made any dying declaration to PW 15.

23. Even in the registration of the FIR evidence suggests ante timing of its registration, evidence from the fact that it was received by the Ilaka Magistrate on 14.5.1997 at 10 a.m. We may note that the register showing the time when the FIR was dispatched to the Ilaka Magistrate and when PW 7, who took the FIR for delivering to the Metropolitan Magistrate came back, has not been produced.

24. We have noticed above that the learned Addl. Sessions Judge has held that the recovery of the knife at the instance of the accused Dalip is doubtful. In this connection we may briefly note that the recovery of the knife was made from an open place accessible to all and sundry and, thereforee could not be treated as recovery of the weapon at the instance of the accused Dalip. In this connection the decision of the Hon'ble Supreme Court reported as 104 (2003) DLT 355 (SC)=2003 (4) AD SC 150, Aslant Parzvez, etc. v. Govt. of NCT of Delhi, be noted. It was observed as under:

'The recovery has been made after 8 months and that too from an open place which was by the side of a building under construction. The recovery has not been made from any closed or concealed place but from an open place which is accessible to all and every one including those who were engaged in the construction of the building.

12. The inference to be drawn where an incriminating article is recovered at the pointing out of an accused from an open place accessible to all was considered by us in CrI. A. No. 685/2001, Salim Akshtar@Mota v. State of Uttar Pradesh, decided on 9.4.2003 and it was observed as under:

'In Sanjay Dutt v. State through C.B.I., Bombay, 4 (1994) CCR 744 (SC)=1994 (5) SCC 540 it has been held by a constitution Bench that with a view to hold an accused guilty of an offence under Section 5 of TADA, the prosecution is required to prove satisfactorily that the accused was in conscious possession, unauthorisedly in a notified area of any arm or ammunition of the specified description. In Trimbak v State of M.P., : AIR 1954 SC39 recovery of certain stolen articles was made at the pointing out of the accused and on that basis he was convicted under Section 411, IPC by the High Court. Reversing the judgment it was held by this Court that when the field from which the ornaments were

recovered was an open one and accessible to all and sundry, it is difficult to hold positively that the accused was in possession of these articles. It was further held that the fact of recovery by the accused is compatible with the circumstance of somebody else having placed the articles there and of the accused somehow acquiring knowledge about their whereabouts and that being so, the fact of discovery cannot be regarded as conclusive proof that the accused was in possession of these articles. In *Raosaheb Balu Killedar v. State of Maharashtra*, 1995 Cri LJ 2632 the accused had made a disclosure statement and had led the police party to a place behind a mill, pointed out the place and himself removed the earth and from a pit about 6 inches deep recovered a revolver loaded with a live cartridge wrapped in a polythene bag. It was held by this Court that the statement made by the accused was capable of an interpretation that the appellant had the knowledge about the concealment of the revolver at the particular place from where it was got recovered and not that he had concealed the same and, therefore, it was not possible to say conclusively and beyond a reasonable doubt that the appellant had conscious possession of the revolver and the cartridge. This principle was reiterated in *Khudeswar Dutta v. State of Assam*, : 1998 CriLJ2274 and it was held that mere knowledge of the accused that incriminating articles were kept at certain place does not amount to conscious possession and conviction under Section 5 of TADA was set aside.' 13. In our opinion the principle laid down above is clearly applicable here and accordingly it is not possible to hold that A4 was in possession of the revolver and cartridges which were recovered on 3.5.1988. His conviction, therefore, deserves to be set aside.'

In a later judgment reported as 2 (2003) CCR 42 (SC)=2003 SCC 1149, *Salim Akhtar v. State of U.P.*, it was observed that where recovery was effected from an open place, accessible to all where any one could easily come, it could not be said that the accused was in possession of the articles alleged to have been recovered from his possession. That apart, in his cross-examination PW 6 failed to identify accused Dalip who was present in Court when the testimony of PW 6 was recorded. Further, Johri Lal in his statement stated that accused Dalip had led police party, his son Surinder and himself i.e., Johri Lal to the place of incident. Thereafter, accused Dalip took every one except him to some place and got the knife recovered. PW 19 Insp. Y.K. Tyagi who was the police officer to whom the

disclosure statement was allegedly made by Dalip, in his testimony stated that the pursuant to the disclosure statement, he had taken Dalip to the spot. Johri Lal & Surinder were present at the time of recovery. The knife was recovered in their presence and both of them had signed the recovery memo. Recovery memo pertaining to the knife being Ex. PW 3/B does not bear the signatures of Johri Lal. Further, the recovery memo records that knife was blood stained, but CFSL report Ex. PW 19A/ 1 to 19/3 states that the result showed 'no reaction'. Blood was not detected on the knife.

25. PW 2, PW 6 & PW 19 all claim that when Dalip was arrested on 15.5.1997 i.e. two days after the incidence his shirt was having bloodstains and the same was recovered vide seizure memo Ex. PW 2/F. Admittedly the shirt never sent to the CFSL. The recovery of the blood stained shirts if at all is, therefore, of no consequences. That apart, it is highly improbable that Dalip would be wearing the same blood stained shirt for 3 days.

26. Even the manner of arrest of the accused appears to be dramatised. The accused were neighbours of the deceased. It is not the case of the prosecution that the accused absconded. As per prosecution, Dalip was arrested on 15.5.1997 on secret information being received about his where about. He led the police to his house where his brothers were found and were arrested. If the accused Sanjeev, Rajesh and Ashok were in their house which is 2 houses away from the house of the deceased, there is no earthly reason as to why they were not arrested earlier.

27. Motive is a double-edged weapon. On the facts of the present case, as noted above, there is a high degree of probability that due to previous enmity, PW 2 and PW 3 have falsely implicated the accused.

28. We accordingly allow the appeals and set aside the conviction and sentence imposed upon the appellant. The impugned judgment dated 5.9.2001 is set aside. The accused are directed to be set free, if not required to be in judicial custody in any other case.

