

Dalip Kumar @ Gudar Vs. the State

Dalip Kumar @ Gudar Vs. the State

SooperKanoon Citation : sooperkanoon.com/954740

Court : Delhi

Decided On : Nov-05-2012

Judge : Badar Durrez Ahmed

Appellant : Dalip Kumar @ Gudar

Respondent : The State

Judgement :

THE HIGH COURT OF DELHI AT NEW DELHI % + Judgment delivered on:

05. 11.2012 CRL. A 72/2009 SURESH PEHLWAN @ SURESH BASOYA AND ANR ... Appellants - versus STATE OF DELHI ... Respondent AND + CRL. A 73/2009 DALIP KUMAR @ GUDAR ... Appellant - versus THE STATE ... Respondent Advocates who appeared in this case: For the Appellants : Mr Ajay Verma For the Respondent : Ms Richa Kapur CORAM:HON'BLE MR JUSTICE BADAR DURREZ AHMED HON'BLE MS JUSTICE VEENA BIRBAL JUDGMENT BADAR DURREZ AHMED, J 1.These two appeals are being decided together as they are directed against the same judgment and order on the point of sentence. The judgment dated 11.11.2008 delivered by the Additional Sessions Judge-01, South, Patiala House Courts, New Delhi in Sessions Case No. 203/2006 arising out of FIR 225/2003 registered at Police Station Kotla Mubarak Pur, under Sections 302/120B/34 IPC and Sections 25/27 of the Arms Act, 1959 is under challenge in these appeals.

2. By virtue of the impugned judgment dated 11.11.2008, the appellants Suresh Pehlwan @ Suresh Basoya, Sushil Choudhary @ Sushil Pehlwan (appellants in CrI. A. No. 72/2009) and Dalip Kumar @ Gudar (appellant in CrI. A. No. 73/2009) have been convicted under Section 302/34 IPC. Appellant Suresh Pehlwan and Sushil Choudhary have also been convicted under Section 25 of the Arms Act, 1959. Insofar as the accused Lekhraj is concerned, he was acquitted of the charges under Sections 120B/302/34 IPC. The present appellants had also been charged under Section 120B, but they have also been acquitted under that Section but have been convicted, as mentioned above, under Section 302 read with Section 34 IPC. The appellants are also impugning the order on the point of sentence which was pronounced on 19.11.2008, whereby the three appellants were sentenced to life imprisonment for commission of the offence punishable under Section 302/34 IPC and they were also directed to pay a fine of ` 10,000/- each, in default whereof, they were required to undergo simple imprisonment for nine months each. Insofar as the appellants Suresh Pehlwan @ Suresh Basoya, Sushil Choudhary @ Sushil Pehlwan are concerned, they were sentenced to undergo rigorous imprisonment for two years each with a fine of ` 1,000/- each, in default whereof, they were required to undergo additional simple imprisonment for two months. The sentences of imprisonment awarded to Suresh Pehlwan @ Suresh Basoya, Sushil Choudhary @ Sushil Pehlwan for the offences under the IPC and the Arms Act were directed to run concurrently.

3. The charges were framed on 24.11.2003. The four accused, namely, Suresh Pehlwan, Dalip Kumar, Sushil Choudhary and Lekhraj were, inter alia, charged as under: That on 31.5.03 at about 12 noon at the corner of house no. 59 and house no. 47 Housing Society NDMC Part I near Mother Dairy ,New Delhi within the jurisdiction of PS K.M. Pur in prosecution of the common object of the conspiracy entered by you to commit the murder of deceased Surinder Gupta committed murder of Surinder Gupta by firing two shots by Sushil Pahlwan with the country made pistol and giving number of knives blows by accused Suresh Pahlwan and thereby committed an offence punishable under section 302 read with 120 B of UPC and within my cognizance. Sushil Choudhary @ Sushil Pehlwan was separately charged under Section 120B IPC as also under Sections 25 and 27 of the Arms Act. Suresh Pehlwan was similarly also charged of the offence

punishable under Section 120B IPC and the offence punishable under Sections 25 and 27 of the Arms Act, 1959. The appellant Dalip Kumar was also separately charged in respect of the offence punishable under Section 120B IPC. Insofar as the accused Lekhraj is concerned, he was also separately charged of the offence punishable under Section 120B IPC and he was regarded as the mastermind of the conspiracy.

4. All the accused pleaded not guilty to the charges and claimed trial. The prosecution examined as many as 25 witnesses. Thereafter, the statements of the accused under Section 313 of the Criminal Procedure Code, 1973 were recorded and the defence produced one witness DW1 Raj Kumar. After considering the evidence on record and the arguments advanced by the prosecution as well as by the defence counsel, the learned Additional Sessions Judge came to the conclusion that the case of conspiracy under Section 120B IPC was not made out at all. As a result, the accused Lekhraj was acquitted in entirety inasmuch as he was not present at the scene of the crime. The other three accused, who are the appellants herein, were all allegedly present at the scene of the crime and participated in committing the murder of deceased Surinder Gupta. Consequently, the learned Additional Sessions Judge came to the conclusion that the three appellants were guilty of the offence punishable under Section 302 read with Section 34 IPC. They were, however, acquitted of the charge under Section 120B IPC. They were also acquitted of the charge under Section 27 of the Arms Act. However, Suresh Pehlwan and Sushil Choudhary were convicted under Section 25 of the Arms Act. All the three appellants were awarded the punishments as already indicated above.

5. The prosecution case is that on 31.05.2003 at about 12 noon when the deceased Surinder Gupta was going somewhere in his vehicle, Suresh Pehlwan, Sushil Choudhary and Dalip Kumar had a heated conversation with the deceased Surinder Gupta on the question of some money transaction and they dragged him out of the car. It is then the prosecution case that Sushil Choudhary took out a country-made pistol from beneath his shirt and fired twice at Surinder Kumar Gupta, due to which Surinder Kumar Gupta fell down. Thereupon, Dalip Kumar caught hold of Surinder Kumar Gupta and Suresh Pehlwan assaulted Surinder

Kumar Gupta and gave him multiple knife blows. All the three appellants, according to the prosecution, left Surinder Gupta on the road, thinking that he was dead. Thereafter, people arrived at the scene and the injured Surinder Kumar Gupta was taken to hospital (All India Institute of Medical Sciences), where he later succumbed to his injuries. It is the case for the prosecution that the injured Surinder Gupta was taken to the All India Institute of Medical Sciences in his own Honda car, which was driven by PW1 Ashok Chowdhary, who was accompanied, in the front seat, by DW1 Raj Kumar. It is also the prosecution case that PW14 Subodh Kumar saw the incident and was an eyewitness of the incident. It may be pointed out, at the outset, that the entire case revolves around the testimonies of PW14 Subodh Kumar, PW1 Ashok Chowdhary and DW1 Raj Kumar.

6. Police action in the case began with the duty constable Narender Kumar giving the information on 31.05.2003 at about 12:45 pm vide DD No. 8-A that one Surinder Gupta, son of Rajpal Gupta, resident of 47, Housing Society, NDSE-I, New Delhi was admitted to hospital after being shot. Sub-Inspector Anil Kumar along with Constable Kishore Kumar went to the hospital and obtained the MLC Exhibit PW15/A in respect of the injured Surinder Kumar Gupta in which the doctor had opined that the nature of injuries was dangerous and there were fire arm injuries as well as stab injuries and the doctor had also stated that the injured was unfit for statement and that he had been admitted to the casualty ward.

7. In the hospital, PW20 Sub-Inspector Anil Kumar recorded the statement of the complainant PW1 Ashok Kumar Chowdhary, who stated that at about 12 noon he was in his office at H-58/59, South Extension Part-I. At that point of time, there was a hue and cry outside that Surinder Gupta had been shot. He further stated that Surinder Gupta resided in front of his building in flat No. 47, Housing Society, NDSE-I. He further stated that he knew Surinder Gupta well. On hearing the voices outside, Ashok Chowdhary immediately went out and he found that about 100 feet away from his office Surinder Gupta was lying injured on the road and that he was bleeding from his head and body. He further stated that Surinder Guptas car (Honda City No. DL5CP 0001.was also parked there. He further stated that he immediately ran towards Surinder Gupta and after reaching he spot with the help of about 4-5 persons, he lifted Surinder Gupta and placed him in Surinder

Guptas car in the rear seat. Thereafter, one Raj Kumar, who was known to Ashok Chowdhary, who was with him in his office, sat beside Ashok Chowdhary, who drove the said car to AIIMS. This statement (Exhibit PW5/A) was sent along with the rugqa Exhibit PW20/A by the said PW20 Sub-Inspector Anil Kumar to the police station which was recorded as DD 8-A (Exhibit PW9/A) on the basis of which the FIR No. 225/2003 (Exhibit PW9/B) was registered.

8. Thereafter, the said PW20 Sub-Inspector Anil Kumar went to the spot where he found one bullet having blood stains on it lying at the spot, which was seized by him vide memo Exhibit PW17/A. He also lifted blood stained earth and sample of earth control vide memos Exhibit PW17/B and Exhibit PW17/C. It is also the prosecution case that the said PW20 SI Anil Kumar recorded the statements of PW7 Narpath Singh and PW6 Om Prakash Gupta, who were present at the spot. The statement of PW18 Vinod Gupta (brother of the injured Surinder Gupta) was also recorded. The statement of PW14 Subodh Kumar was also recorded by Sub-Inspector Anil Kumar at the spot.

9. Subsequently, Surinder Gupta died at the All India Institute of Medical Sciences, after which the postmortem examination was conducted and the dead body was handed over to the legal heirs of the deceased. Thereafter, on 02.06.2003 onwards, the investigation of the case was taken over by PW25 Inspector N. P. Singh, Station House Officer of the police station Kotla Mubarakpur.

10. PW16 Dr Chitranjan Behra conducted the postmortem examination of the deceased Surinder Gupta. He found the following ante mortem injuries on the body of the deceased: 1. Firearm entry wound of size 1cm x 1cm inverted margin, with abrasion collar of radius 0.8 cm and tattooing around it, present over back of the body, 0.5 cm right to midline, 118 cm above right heel and 21 cm below nape of neck. On cutting over the wound, a tract was seen which gone through posteroanteriorly straight piercing underlying soft tissues, back muscles, vertebral column at T7-T-8 level fracturing it associated with haematoma and lacerating spinal cord at same level, then entered to body cavity piercing the diaphragm in midline tearing the venae cave and descending aorta and finally bullet lodged in diaphragm.

2. Firearm entry wound of size 2cm x 1cm inverted margin with tattooing in an area 8cm x 8cm around it, present over upper 1/3rd of left forearm on dorso - lateral side. On cutting over the wound a tract was seen which gone through lateral to medial in obliquely downward direction piercing the underlying soft tissues, muscles, fracturing both radius and ulna at upper 1/3rd associated with haematoma, then exit through a wound of size 2.8 cm x 1.8 cm inverted margin, present over medial side of left forearm at its upper 1/3rd.

3. Stitched wound of length 3 cm present over scalp in postero parietal region, 1-5 cm right lateral to midline, obliquely placed. Diffuse subscalp haematoma present below the wound associated with underlying depressed fracture of skull bone of size 1cm x 1cm. A tear in duramater of length 0.5 cm seen below the depressed fracture.

4. Incised looking lacerated wound of size 4.5 cm x 1cm present, left parieto occipital region, 2cm lateral to midline, obliquely placed and was bone deep associated with subscalp haematoma.

5. Stab wound of size 3cm x 0.5 cm with blood oozing out from it, bone deep in direction of downward and medially, present over left anterior shoulder, 5cm below tip of left shoulder.

6. Stab wound of size 2cm x 1cm present over left upper chest, 11 cm above left nipple, 13.5 cm left to midline. On cutting over the wound, a tract was seen which was cavity deep in direction of downward and medially, piercing underneath tissues, muscles, cutting 1st and 2nd anterior ribs, then entered to thoracic cavity, then piercing left middle part of lung, collapsing it associated with haematoma in thoracic cavity about 1 litre and a cut (Superficial) of size 0.5 cm was seen over left lateral ventricular wall of heart.

7. Incised wound of size 3cm x 0.5 cm, bone deep associated with haematoma present over left clavicular region, 9cm lateral to midline, 15cm above left nipple.

8. Incised wound of size 3cm x 0.5 cm, muscle deep associated with haematoma present over suprasternal notch, 8cm below chin.

9. Incised wound of size 1.8 cm x 0.5 cm, muscle deep, associated with haematoma present over upper left chest, 2cm left to midline, 9cm below suprasternal notch.

10. Incised wound of size 1.8cm x 0.5 cm, bone deep associated with haematoma, present over left cheek, 5cm medial to tragus left ear, 10 cm left to midline, and 5.5 cm below lateral margin of left eyebrow.

11. Incised wound of size 3cm x 0.5 cm, muscle deep, associated with blood clot, horizontally placed over left internal neck, just below the left angle of mandible.

12. Incised wound of size 2.5 cm x. 0.5 cm, muscle deep, associated with blood clot, present over middle of left neck, 5cm lateral to midline, 5cm below left angle of mandible.

13. Incised wound of size 1.8 cm x 0.5 cm, muscle deep, associated with haematoma present over left side of neck in middle, 10 cm lateral to midline, 4cm below left angle of mandible.

14. Incised wound of size 1.5 cm x 0.5 cm over left side chin, bone deep, associated with haematoma.

15. Incised wound of size 2 cm x 0.5 cm. present over right upper neck 5cm right to midline, 4 cm below and right to right chin. According to PW16 Dr Chitranjan Behra, the cause of death was as under: Cause of death in this case was shock due to above mentioned, ante mortem injuries. All injuries were collectively sufficient to cause death in ordinary course of nature, however, injury no. 1 and 6 were individually sufficient to cause death in ordinary course of nature. Injury no. 1 and 2 caused by firearm, injury no. 3 and 4 caused by blunt force and rest of injuries were caused by sharp edged weapons. All injuries are ante mortem in nature. Time since death was consistent with hospital record. It should also be pointed out that the said Surinder Gupta was declared dead on 31.05.2003 at 3:30 pm. The postmortem report is Exhibit PW16/A.

11. On 02.06.2003, the accused Sushil Choudhary, Suresh Pehlwan and Dalip Kumar were arrested by the police from the bus stand at Sector-27, Noida on the

pointing out of the witness Vinod Kumar Gupta (PW18). It is alleged that they made disclosure statements and that on the basis of the disclosure statement made by Sushil Choudhary (Exhibit PW14/G), one country made pistol (Exhibit P-1) was recovered at his instance from beneath the bushes in the Chick House Park near INA Complex. The sketch of the said country made pistol Exhibit P-1 is Exhibit PW14/H.

12. Suresh Pehlwan is also alleged to have made a disclosure statement Exhibit PW14/M pursuant to which recovery of a knife is said to have been made from the sand under the ganda nallah pull pilanji. The sketch of the said knife is Exhibit PW24/C. There was a supplementary disclosure statement of 04.06.2003 (Exhibit PW24/A) and the recovery of the knife was allegedly made on the same day.

13. We have already indicated that after completion of the investigation, the challan was filed and the charges were framed by the Trial Court and the matter proceeded to trial. The result of the trial has also been indicated above.

14. The learned counsel appearing on behalf of the appellants submitted that the only witness who tends to support the prosecution case is PW14 Subodh Kumar. According to the learned counsel for the appellants, this witness is not an eyewitness at all. His conduct was unnatural and his antecedents were also suspect. Consequently, it was submitted that he cannot be relied upon at all. It was submitted that PW14 allegedly knew the deceased Surinder Gupta and was an alleged chance witness. Yet, when the incident took place, he did not come forward to help Surinder Gupta at all nor did he raise any alarm or call for help or go to the police station. He merely stood there and saw the crime being committed. After the assailants had left, he is alleged to have helped PW1 Ashok Choudhary in lifting the injured Surinder Gupta onto the car. Thereafter, he is alleged to have left on foot to inform the father of the injured Surinder Gupta, who resided at their old house at Bhogal, which was about 15-20 minutes away (walking distance). Apparently, he stopped on the way at Bhanu Garments, which was a shop belonging to Surinder Guptas brother. But, when, according to him, he reached the said shop, they were aware of the incident. Yet, the said PW14 proceeds towards Bhogal. This conduct of the said PW14 Subodh Kumar has

been alleged to be unnatural by the learned counsel for the appellants and it is because of this that they seek to discredit and besmirch his testimony.

15. It was also contended by the learned counsel for the appellants that actually it is only PW1 Ashok Choudhary and DW1 Raj Kumar, who were the eye witnesses of the incident, who ought to be believed and not PW14 Subodh Kumar. It was contended by the learned counsel for the appellants that PW1 Ashok Choudhary is the person who drove the vehicle carrying the injured Surinder Gupta in the rear seat to the hospital. There is no denying that this fact has been established beyond doubt. Therefore, the presence of PW1 Ashok Choudhary cannot be doubted and consequently, his deposition ought to be believed. According to the learned counsel for the appellants, PW1 Ashok Choudhary categorically stated that he had not seen Subodh Kumar at the spot and that he (PW1 Ashok Choudhary) and one DW1 Raj Kumar had removed Surinder Gupta to AIIMS. According to PW1 Ashok Choudhary, Surinder Gupta was assaulted by three individuals whom he could recognize if brought before him. Importantly, PW1 Ashok Choudhary categorically stated that the three assailants were not present in Court on the date of his deposition meaning thereby that the three appellants who were accused were not the assailants.

16. DW1 Raj Kumars testimony also supports the testimony of PW1 Ashok Choudhary. Therefore, according to the learned counsel for the appellants, PW1 Ashok Choudhary is a credible eyewitness, whereas PW14 Subodh Kumar is a planted eyewitness. It was further contended that PW14 Subodh Kumar did not go to the hospital with the injured and to cover this up the story of going to Bhogal was introduced. It was further contended that as per the evidence of PW9 Head Constable Swaroop Singh and PW20 Sub-Inspector Anil Kumar, the distance from the place of occurrence and the police station (Kotla Mubarak Pur) was just 1 to 1-1/2 kilometers. Yet, PW14 did not go to the police station to inform the police about the incident. It was further submitted by the learned counsel for the appellants that PW8 Bhanu Gupta, who is the son of the deceased Surinder Gupta, did not state in his testimony that PW14 Subodh Kumar had come to his shop after the incident.

17. It was also argued by the learned counsel for the appellants that there is a discrepancy with regard to the time of recording of the statement of PW14 Subodh Kumar. According to PW20 sub-Inspector Anil Kumar, the statement of PW14 Subodh Kumar was recorded at the spot. But, PW20 Anil Kumar, as per his own statement, reached the spot at around 2:30 or 3 pm. PW14 Subodh Kumar in his testimony stated that he returned to the spot between 1 to 1:30 pm and that between 1:30 to 2 pm he had told the police, for the first time, about having witnessed the occurrence. He stated that he left the spot after about 1520 minutes. Thus, according to the learned counsel for the appellants, PW14 Subodh Kumars statement could not have been recorded between 1:30 to 2 pm inasmuch as PW20 Sub-Inspector Anil Kumar had arrived at the spot around 2:30 or 3 pm, by which time, PW14 Subodh Kumar had left the spot. Therefore, the learned counsel for the appellants submitted that not much credence could be attached to the testimony of PW14 Subodh Kumar. It was also contended that PW14 being a chance witness, his testimony had to be examined with care and caution particularly as PW14 Subodh Kumar was known to the injured Surinder Gupta being an ex part-time employee of his. For the proposition that the testimonies of chance witnesses, who were related or friends ought to be viewed with suspicion and at least with care and caution, the learned counsel for the appellants placed reliance on the following three decisions of the Supreme Court:(i) (ii) Shankar Lal v. State of Rajasthan: (2004) 10 SCC 632.and (iii) 18. Bahal Singh v. State of Haryana: AIR 197.SC 2032.Jarnail Singh v. State of Punjab: (2009) 9 SCC 719.In Bahal Singh (supra), the Supreme Court observed as under:If by coincidence or chance a person happens to be at the place of occurrence at the time it is taking place, he is called a chance witness. And if such a person happens to be a relative or friend of the victim or inimically disposed towards the accused then his being a chance witness is viewed with suspicion. Such a piece of evidence is not necessarily incredible or unbelievable but does require cautious and close scrutiny.

19. In Shankar Lal (supra), the Supreme Court observed as under:In this background if we appreciate the evidence of PW-6, we notice the fact that he is purely a chance witness whose presence at the place of the incident is highly doubtful. His conduct too seems to be unnatural in not informing anyone else in

the village until he met Khyali Ram at the village square.

20. In Jarnail Singh (supra), the Supreme Court observed as under:¹⁴ The Court further explained that the expression chance witness is borrowed from countries where every mans home is considered his castle and every one must have an explanation for his presence elsewhere or in another mans castle. It is quite unsuitable an expression in a country like India where people are less formal and more casual, at any rate in the matter of explaining their presence.

15. The evidence of a chance witness required a very cautious and close scrutiny and a chance witness must adequately explain his presence at the place of occurrence Satbir v. Surat Singh: (1997) 4 SCC 192. Harjinder Singh v. State of Gujarat: (2004) 11 SCC 253. Acharaparambath Pradeepan and Anr. v. State of Kerala: (2006) 13 SCC 643. and Sarvesh Narain Shukla v. Daroga Singh and Ors. (2007) 13 SCC 360. Deposition of a chance witness whose presence at the place of incident remains doubtful should be discarded vide Shankarlal v. State of Rajasthan: (2004) 10 SCC 632. Conduct of the chance witness, subsequent to the incident may also be taken into consideration particularly as to whether he has informed anyone else in the village about the incident. Vide Thangaiya v. State of Tamil Nadu: (2005) 9 SCC 650.

21. On going through the aforesaid three decisions of the Supreme Court, it is apparent that if the chance witness happens to be a relative or friend of the victim or inimically disposed towards the accused, then such a chance witness has to be viewed with suspicion. At the same time, however, the Supreme Court cautioned that such a piece of evidence was not necessarily incredible or unbelievable but required cautious and close scrutiny. In the present case PW14 Subodh Kumar was not a relative of Surinder Gupta nor was he a friend of his, nor was PW14 Subodh Kumar inimically disposed towards the appellants, at least, there is no evidence of this. Thus, we feel that there is no occasion in viewing the testimony of PW14 Subodh Kumar with suspicion. Of course, PW14 Subodh Kumars testimony has to be considered with caution and must pass close scrutiny before a conviction can be founded upon it.

22. In Shankar Lal (supra), the Supreme Court, on the facts of the case before it, came to the conclusion that the evidence of PW6 in that case was not reliable inasmuch as his presence at the place of the incident was highly doubtful and that his conduct was also unnatural in not informing anyone else in the village until he met Khyali Ram at the village square. If we consider this in the backdrop of the factual matrix of the present case, we find that PW14 Subodh Kumar, according to his testimony, had gone to inform the family of Surinder Gupta about the incident. On the way, he had stopped at Bhanu Garments and then proceeded to Surinder Guptas old house at Bhogal. It is another matter that when Subodh Kumar reached Bhanu Garments, the information of the incident had already been received there. What is to be seen is what the chance witness did. In this case, PW14 Subodh Kumars first reaction was to go and inform the family members and not to keep the information with himself. Therefore, PW14 Subodh Kumars testimony cannot be discarded on this ground.

23. Insofar as the decision in Jarnail Singh (supra) is concerned, we find that the Supreme Court itself noticed that it is quite unsuitable to use the expression chance witness in a country like India where the people are less formal and more casual. As mentioned above, the Supreme Court reiterated the legal principle that the evidence of a chance witness requires cautious and close scrutiny and the chance witness must explain his presence at the place of occurrence. It was also pointed out that the conduct of the chance witness subsequent to the incident may also be taken into consideration. There is no denying these legal principles but the question is whether the testimony of PW14 Subodh Kumar passes the test of cautious and close scrutiny and whether PW14 Subodh Kumar has adequately explained his presence at the place of the occurrence as also whether his conduct has been natural or not. These are aspects which we shall examine subsequently in this decision when we consider the testimony of PW1 in detail.

24. The learned counsel for the appellants also raised the point of an extra-judicial confession having allegedly been made by Sushil Pehlwan to PW18 Vinod Gupta (brother of the deceased Surinder Gupta). However, we need not spend any time on this aspect of the matter. This is so because it is doubtful that Sushil Pehlwan could have made the confession to PW18 Vinod Gupta in the manner alleged by

the prosecution. We are, therefore, not placing any reliance on the so-called extra-judicial confession made by Sushil Pehlwan to PW18 Vinod Gupta and, therefore, it is not necessary for us to examine the submissions made by the learned counsel for the appellants on this aspect of the matter nor is it necessary for us to examine in detail the decision of the Supreme Court in *State of Rajasthan v. Raja Ram*: AIR 200.SC 360.(1), relating to extra-judicial confession.

25. It was then contended by the learned counsel for the appellants that the present case is a peculiar one because as many as 5 witnesses were chance witnesses. According to the appellants PW5 Raj Pal Gupta (who is the father of the deceased Surinder Gupta) had overheard the accused talking about their conspiracy. But, this is no longer relevant inasmuch as the trial court has already acquitted all the accused of the charge under Section 120 B. Similar is the fate of the conversation allegedly overheard by PW13 Viresh Kumar. With regard to PW14 Subodh Kumar being a chance witness, we have already given our observations above and would discuss this in greater detail, when we are discussing the testimony of PW14 Subodh Kumar. As regards PW18, Vinod Kumar Gupta, the allegation that he received the extra-judicial confession by chance, is also not really relevant in view of the fact that we are not placing any reliance on the so-called extra-judicial confession. The last aspect of chance which the learned counsel for the appellants contended was that the accused were also arrested by chance. Nothing much turns on this. Thus, the submission of the learned counsel for the appellants regarding five instances of chance being involved in this case does not turn the case either way.

26. The learned counsel for the appellants then argued on the question of recoveries. It was argued that the recoveries of the katta (Exhibit P-1) in the park near INA complex was from an area of public access and, therefore, the said recovery cannot be foisted upon Sushil Choudhary. It was also contended that the recovery of the knife allegedly at the joint instance of Suresh Pehlwan and Dalip Kumar from beneath the ganda nallah pull pilanji was also from an area of public access and thoroughfare and, therefore, the same cannot be linked with the appellants. Insofar as the recovery of clothes Exhibit PW14/F is concerned, it was submitted that the same do not, in any manner, advance the case of the

prosecution.

27. It was also submitted that in any event, the katta (Exhibit P-1) has not been connected with the offence. This would be apparent from the CFSL report dated 08.11.2004 (Exhibit P-X), where it is recorded that the individual characteristic of striations present on the deformed bullets marked EB-1 and EB2 were insufficient for comparison and opinion as to whether these had been fired from the country made pistol of .315 bore marked Exhibit F-1 or not. Exhibit EB-1 was the deformed bullet which PW20 Sub-Inspector Anil Kumar found lying at the spot and Exhibit EB-2 was the bullet which was recovered from the dead body of Surinder Gupta.

28. Therefore, we agree with the submission of the learned counsel for the appellant that the bullets EB-1 and EB-2 have not been connected with the katta (Exhibit P-1). As such, it cannot be said that the katta (Exhibit P-1) which was used in the commission of the offence of murder of Surinder Gupta. Therefore, the alleged recovery of the same at the instance of Sushil Pehlwan would really be of no consequence.

29. The learned counsel for the appellants also submitted that the knife which was supposed to contain blood stains was sent for analysis to the Forensic Science Laboratory. The report dated 24.03.2004 (Exhibit P-X) clearly indicated that blood could not be detected, inter alia, on the said knife (Exhibit 11 marked by CFSL). Similarly, no blood was detected on Exhibits 8a, 8b (alleged to be Dalip Kumars clothes), Exhibit 9 (alleged to be Suresh Pehlwans T-shirt) and Exhibits 10a, 10b (alleged to be Sushil Choudharys clothes). It is, therefore, clear that there is no evidence connecting either the knife or the clothes of the accused to the offence inasmuch as blood could not be detected thereon. To this extent, the contention of the learned counsel for the appellants is correct that the so-called recoveries have not been connected with the offence alleged against them.

30. Consequently, the learned counsel for the appellants submitted that while the testimonies of PW1 Ashok Chowdhary and DW1 Raj Kumar ought to be believed, the testimony of PW14 Subodh Kumar ought to be discarded. The so-called recoveries do not bear any connection with the offence of murder of Surinder Gupta. The extra-judicial confession cannot be relied upon for convicting the

appellants. Consequently, the appeals ought to be allowed and the impugned judgment and the order on the point of sentence ought to be set aside.

31. On the other hand, Ms Richa Kapur, appearing on behalf of the State, submitted that it was never the case of the prosecution that PW1 Ashok Chowdhary and DW1 Raj Kumar were eyewitnesses of the actual assault. In fact, there was not much in the examination-in-chief of PW1 Ashok Chowdhary which was inconsistent with the police case and, therefore, at that stage, there was no occasion for having him declared as being hostile. It is only subsequently when PW1 Ashok Chowdhary was cross-examined by the defence counsel that an entirely new story was introduced. The said witness transformed himself as an eyewitness of the actual incident of assault and gave a clean chit to the appellants by stating that the assailants were not present in Court. It is because of this volte face in the stance of PW1 Ashok Chowdhary that it became necessary for the Additional Public Prosecutor to request for an opportunity to cross-examine PW1 Ashok Kumar Chowdhary. Thereafter, he had been cross-examined by the defence counsel. It was, therefore, contended by Ms Kapur that PW1 Ashok Chowdhary's testimony, to the extent it supports the prosecution case and corroborates the testimony of PW14 Subodh Kumar should be accepted and to the extent it runs counter to the prosecution case and sets up an entirely new dimension ought to be discarded. This, according to her, was an exercise which the court could do and ought to do. Therefore, according to her, the trial court was entirely correct in basing the conviction on the testimony of PW14 Subodh Kumar. As regards chance witnesses, the learned counsel placed reliance on the following two decisions of the Supreme Court: (i) *Rana Pratap v. State of Haryana*:

1983. (3) SCC 327. and (ii) *Gangadhar Behera v. State of Orissa*:

2002. (8) SCC 38.32. It would be appropriate to refer to these decisions at this stage itself. In *Rana Pratap* (supra), the Supreme Court observed as under: 3. There were three eye witnesses. One was the brother of the deceased and the other two were a milk vendor of a neighbouring village, who was carrying milk to the dairy and a vegetable and fruit hawker, who was pushing his laden cart along the road. The learned Sessions Judge and the learned Counsel described both the

independent witnesses as chance witnesses implying thereby that their evidence was suspicious and their presence at the scene doubtful. We do not understand the expression 'chance witnesses'. Murders are not committed with previous notice to witnesses; soliciting their presence. If murder is committed in a dwelling house, the inmates of the house are natural witnesses. If murder is committed in a brothel, prostitutes and paramours are natural witnesses. If murder is committed in a street, only passersby will be witnesses. Their evidence cannot be brushed aside or viewed with suspicion on the ground that they are mere chance witnesses'. The expression 'chance witnesses' is borrowed from countries where every man's home is considered his castle and every one must have an explanation for his presence elsewhere or in another man's castle. It is a most unsuitable expression in a country whose people are less formal and more casual. To discard the evidence of street hawkers and street vendors on the ground that they are 'chance witnesses' even where murder is committed in a street is to abandon good sense and take too shallow a view of the evidence.

33. In Gangadhar Behera (supra), the Supreme Court observed as under:⁷ We shall first deal with the contention regarding interestedness of the witnesses for furthering prosecution version. Relationship is of a factor to affect credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible.

8. In Dalip Singh and Ors. v. The State of Punjab it has been laid down as under: A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily a close relation would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any

sweeping generalization. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts.

12. To the same effect is the decision in *State of Punjab v. Jagir Singh and Lehna v. State of Haryana*. Stress was laid by the accused appellants on the non-acceptance of evidence tendered by some witnesses to contend about desirability to throw out entire prosecution case. In essence prayer is to apply the principle of *falsus in uno falsus in omnibus* (false in one thing, false in everything). This plea is clearly untenable. Even if major portion of evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, notwithstanding acquittal of number of other co-accused persons, his conviction can be maintained. It is the duty of Court to separate grain from chaff. Where chaff can be separated from grain, it would be open to the Court to convict an accused notwithstanding the fact that evidence has been found to be deficient to prove guilt of other accused persons. Falsity of particular material witness or material particular would not ruin it from the beginning to end. The maxim *falsus in uno falsus in omnibus* has no application in India and the witnesses cannot be branded as liar. The maxim *falsus in uno falsus in omnibus* has not received general acceptance nor has this maxim come to occupy the status of rule of law. It is merely a rule of caution. All that it amounts to, is that in such cases testimony may be disregarded, and not that it must be disregarded. The doctrine merely involves the question of weight of evidence which a Court may apply in a given set of circumstances, but it is not what may be called a mandatory rule of evidence. (See *Nisar Alli v. The State of Uttar Pradesh*. Merely because some of the accused persons have been acquitted, though evidence against all of them, so far as direct testimony went, was the same does not lead as a necessary corollary that those who have been convicted must also be acquitted. It is always open to a Court to differentiate accused who had been acquitted from those who were convicted. (See *Gurucharan Singh and Anr. v. State of Punjab*). The doctrine is a dangerous one specially in India for if a whole body of the testimony were to be rejected, because witness was evidently speaking an untruth in some aspect, it is to be feared that administration of criminal justice would come to a deadstop. Witnesses just cannot

help in giving embroidery to a story, however, true in the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of acceptance, and merely because in some respects the Court considers the same to be insufficient for placing reliance on the testimony of a witness, it does not necessarily follow as a matter of law that it must be disregarded in all respect as well. The evidence has to be shifted with care. The aforesaid dictum is not a sound rule for the reason that one hardly comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggeration, embroideries or embellishment. (See *Sohrab s/o Beli Nayata and Anr. v. The State of Madhya Pradesh*) and *Ugar Ahir and Ors. v. The State of Bihar*. An attempt has to be made to, as noted above, in terms of felicitous metaphor, separate grain from the chaff, truth from falsehood. Where it is not feasible to separate truth from falsehood, because grain and chaff are inextricably mixed up, and in the process of separation an absolutely new case has to be reconstructed by divorcing essential details presented by the prosecution completely from the context and the background against which they are made, the only available course to be made is to discard the evidence in toto. (See *Zwinglee Ariel v. State of Madhya Pradesh : AIR 1954 SC15* and *Balaka Singh and Ors. v. The State of Punjab*). As observed by this Court in *State of Rajasthan v. Smt Kalki and Anr.*, normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not normal, and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so. These aspects were highlighted recently in *Krishna Mochi and Ors. v. State of Bihar* etc. Accusations have been clearly established against accused-appellants in the case at hand. The Courts below have categorically indicated the distinguishing features in evidence so far as acquitted and convicted accused are concerned.

34. As can be noticed from the above extracts, in the case of *Rana Pratap* (supra), the Supreme Court aptly observed that murders are not committed with previous notice to witnesses soliciting their presence. The Supreme Court also noted that

the evidence of a chance witness cannot be brushed aside or viewed with suspicion merely because he/ she is a chance witness. In this light, it was argued on behalf of the State that the testimony of PW14 Subodh Kumar cannot be discarded merely because he happened to be there. We may also point out that in *Rana Pratap* (supra), the Supreme Court also observed that every person who witnesses a murder reacts in his own way. Some are stunned, some become speechless and stand rooted to the spot, some become hysterical and start wailing, some start shouting for help, others run away to keep themselves as far removed from the spot as possible and yet others rush to the rescue of the victim and even go to the extent of counter-attacking the assailants. Importantly, the Supreme Court observed that everyone reacts in his own special way. It also noted that there is no set rule of natural reaction. The Supreme Court also observed that to discard the evidence of witnesses on the ground that they did not react in any particular manner is to appreciate evidence in a wholly unrealistic and unimaginative way. These observations were relied upon by the learned counsel for the State to counter the submissions made by the learned counsel for the appellants with regard to the so-called unnatural conduct of PW14 Subodh Kumar in not raising any cry for help or in not going to the police station or in not rushing forward to help the victim Surinder Gupta. It is obvious that, as observed by the Supreme Court in *Rana Pratap* (supra), every person reacts in a different manner. In his own special way. We shall also deal with the reactions of PW14 Subodh Kumar subsequently.

35. It is also true that in *Gangadhar Behera* (supra), the Supreme Court observed that relationship is not a factor which should affect the credibility of a witness and it is more often than not that a relative would not conceal the actual culprit and make allegations against an innocent person. The Supreme Court, however, noted that a foundation has to be laid if the plea of false implication is made. It was, therefore, contended by the learned counsel for the State that merely because the deceased Surinder Gupta was known to PW14 Subodh Kumar does not mean that the credibility of his testimony is dented. The defence, according to her, has not laid any foundation for the plea of false implication. There is no evidence that PW14 Subodh Kumar is inimically disposed towards the appellants and would wish to implicate them falsely. In the absence of any such factual foundation, the

testimony of PW14 Subodh Kumar, according to the learned counsel for the State, cannot be brushed aside lightly. She also laid stress on the observations of the Supreme Court with regard to the maxim of falsus in uno falsus in omnibus. She stated that the Supreme Court has recognized that this maxim has no application in India and if a witness makes a false statement, he cannot be branded as liar in the entire testimony and it is the duty of the Court to separate the grain from the chaff and that, where the chaff can be separated from the grain, it would be open to the Court to convict an accused notwithstanding the fact that evidence has been found to be deficient to prove guilt of other accused persons. Falsity on a material particular would not ruin it from the beginning to the end. The Supreme Court had also observed that the said maxim did not occupy the status of a rule of law and it was merely a rule of caution. Consequently, the learned counsel for the State submitted that no interference with the impugned judgment or the order on the point of sentence was called for and that the appeals ought to be dismissed.

36. In rejoinder, the learned counsel for the appellants reiterated that the testimonies of PW1 Ashok Chowdhary and DW1 Raj Kumar ought to be considered as credible and that of PW14 Subodh Kumar ought to be discarded on the ground of unreliability and that of his unnatural conduct. He placed reliance on three other decisions of the Supreme Court: (i) (ii) Surjit Singh v. State of Punjab: AIR 199.SC 110. and (iii) 37. Karuppanna Thevar v. State of Tamil Nadu: AIR 197.SC 980. State of Haryana v. Ram Singh: AIR 200.SC 620. In Karuppanna Thevar (supra), the Supreme Court observed as under: 11. According to Alagiri Chettiar he and the deceased took their food on the 6th evening and thereafter they went to their fields at about the time when one normally goes to sleep. They took a round of their respective fields and the case of Alagiri Chettiar is that he and the deceased kept talking behind a thatti near a well adjoining the field of the deceased. This claim is also highly unnatural. The offence took place at about 1 a. m. on the 7th and it is highly improbable that at that hour Alagiri and the deceased would be just chatting idly near the well. Villagers do chat idly but our attempt in this appeal is to find whether the view taken by the Sessions Court can be characterised as unreasonable or perverse. Unnatural events also do take place in life but when a series of unnatural incidents are alleged to have taken place in quick succession, the case acquires an air of unreality.

38. In *Surjit Singh (supra)*, the Supreme Court observed as under: The conduct of the witness is highly unnatural. When he has seen one of the appellants inflicting injuries one would expect him to raise an alarm or at least inform the kith and kin of the deceased so that they can go for the rescue of the victim, which he did not do. From the record, it does not appear that at least he was examined during the inquest. We do not know when his statement was recorded during the course of the next day. On his own showing, he was involved earlier in some cases. In one case, he has been stabbed by the deceased and in another case he himself was the accused for molestation of a woman. Therefore, he is of a questionable character. However, his conduct is highly unnatural. Though we cannot call him entirely a false witness but in the absence of any other corroborating evidence we think it is highly unsafe to accept his evidence and then convict both the appellants.

39. In *State of Haryana v. Ram Singh (supra)*, the Supreme Court observed as under:¹⁹ Significantly all disclosures, discoveries and even arrests have been made in the presence of three specific persons, namely, Budh Ram, Dholu Ram and Atma Ram no independent witness could be found in the aforesaid context is it deliberate or is it sheer coincidence this is where the relevance of the passage from Sarkar on Evidence comes on. The ingenuity devised by the prosecutor knew no bounds Can it be attributed to be sheer coincidence? Without any further consideration of the matter, one thing can be more or less with certain amount of conclusiveness be stated that these at least create a doubt or suspicion as to whether the same has been tailor-made or not and in the event of there being such a doubt, the benefit must and ought to be transposed to the accused persons. The trial Court addressed itself on scrutiny of evidence and came to a conclusion that the evidence available on record is trustworthy but the High Court acquitted one of the accused persons on the basis of some discrepancy between the oral testimony and the documentary evidence as noticed fully herein before. The oral testimony thus stands tainted with suspicion. If that be the case, then there is no other evidence apart from the omnipresent Budh Ram and Dholu Ram, who however are totally interested witnesses. While it is true that legitimacy of interested witnesses cannot be discredited in any way nor termed to be a suspect witness but the evidence before being ascribed to be trustworthy or being capable of creating confidence, the Court has to consider the same upon proper scrutiny.

40. The observations of the Supreme Court in *Karuppanna Thevar (supra)* do not help the appellants. In fact, the Supreme Court observed that unnatural events also take place in life and it is only when a series of unnatural incidents are alleged to have taken place in quick succession that the case acquires an air of unreality. The only unnatural event that is alleged in the present case is with regard to the so-called unnatural conduct of PW14 Subodh Kumar. There is no series of unnatural incidents which could give this case an air of unreality. Therefore, this decision of the Supreme Court does not advance the case of the appellants. On the contrary, it lends credence to the prosecution case even if we consider the conduct of PW14 Subodh Kumar to be unnatural. This is so because the Supreme Court recognized the fact that unnatural events also take place in life. As regards *Surjit Singh (supra)*, the observations of the Supreme Court pertain to the facts of the case before it and the conduct of the witness being highly unnatural. According to the Supreme Court, witnesses could be expected to raise an alarm or at least to go to the deceased so that they rescue the victim which, in that case, the witness did not do. In the present case, the situation is different. PW14 Subodh Kumar, after seeing off the injured Surinder Gupta in the car driven by PW1 Ashok Chowdhary for hospital, immediately left, though on foot, to inform the family of the injured. This conduct is entirely different from the conduct in the fact situation in *Surjit Singh (supra)*. Furthermore, in *Surjit Singh (supra)*, the witness in question was earlier involved in criminal cases, where in one case he had been stabbed by the deceased. There was, therefore, an earlier criminal involvement with the victim of the crime. That is not the position in the facts of the present case. We will see that PW14 Subodh Kumar has allegedly been involved in criminal cases, but as per his testimony in cross-examination, in none of those cases the accused herein are also involved and, in any event, PW14 Subodh Kumar had been acquitted in all those cases. Therefore, the remark that he was of questionable character would not squarely cover the case of PW14 Subodh Kumar.

41. As regards the observations of the Supreme Court relied upon by the appellants in the case of *State of Haryana v. Ram Singh (supra)*, we do not see as to how these observations are really relevant for the case at hand or as to how they advance the case of the appellants. All that the Supreme Court observed is that even in the case of interested witnesses, their testimonies cannot be

discarded and that the Court has to consider the same upon proper scrutiny. It is obvious that the testimony of PW14 Subodh Kumar would have to be accordingly considered and scrutinized before a conviction can be based upon it.

42. We are, therefore, left to consider the testimonies of the three crucial witnesses, namely, PW1 Ashok Chowdhary and DW1 Raj Kumar on the one side and PW14 Subodh Kumar on the other.

43. PW1 Ashok Chowdhary in his examination-in-chief stated that his office is at H-58/59, South Extension Part-I, New Delhi. He, however, stated that on 31.05.2003 at about 12 noon, he was standing in front of the building housing his office. We may point out straightaway that this statement of PW1 Ashok Chowdhary was at variance with the statement which he had given to PW20 SI Anil Kumar in the hospital on the basis of which the FIR was registered. In that statement, PW1 Ashok Chowdhary had stated that he was inside his office, whereas, in his examination-in-chief, PW1 has stated that he was standing in front of the building which housed his office. This is a very material departure which, however, was not noticed by the learned APP as he ought to have then and there requested for examining the said witness as he had turned hostile. We say this because if PW1 Ashok Chowdhary was inside the building, he could not have seen the actual incident of assault. It is only if he was standing outside that he could state that he was an eyewitness of the actual incident of assault. The intention of this witness to turn his evidence on its head was apparent from this statement itself. However, it was missed by the learned APP.

44. PW1 Ashok Chowdhary then goes on to say in his examination-in-chief that he heard the sound of a bullet shot. Here too, we note that instead of two shots, he mentioned only one shot. This statement of his is a veiled statement inasmuch as he did not indicate as to what he saw but that what he heard. To the extent that he heard the shot did not militate against the prosecution case. But, this was the foundation for what he was to say later on in crossexamination by the defence counsel.

45. PW1 Ashok Chowdhary then stated that after hearing the sound of the bullet shot, he looked in the direction from which the noise emanated and saw that about

20-25 steps away, Surinder Gupta was lying on the road. Three persons were also seen running from the spot. This part of the testimony that he saw Surinder Gupta lying on the road is not at variance with what he stated before PW20 in the hospital. However, the fact that he had seen three persons running from the spot was not so stated in the original statement which formed the basis of the FIR. We feel that the learned APP ought to have been alert enough to have recognized this departure also but did not do so. Anyhow, the said PW1 Ashok Chowdhary, however, stated in his examination-in-chief that Surinder Gupta was known to him and that he was residing in a building opposite to his office building. The Honda City vehicle of Surinder Gupta was also parked just two steps away from him and that Surinder Gupta was bleeding. He further stated that he and one Raj Kumar removed Surinder Gupta to AIIMS hospital in Surinder Gupta's vehicle and that the injured was got admitted in the said hospital. It was further stated that the police came there and recorded his statement which he had signed and that the statement which bears his signature was Exhibit PW1/A. As such, it is apparent that PW1 Ashok Chowdhary, in his examination-in-chief, admitted the statement Exhibit PW1/A.

46. But, it is in his cross-examination, that a completely different story has emerged. In his cross-examination on the part of the defence counsel, PW1 Ashok Chowdhary stated that he had seen the deceased Surinder being stabbed. This is the first time that this witness has come up with this story. He now claimed to be an eyewitness of the actual incident of assault which was never the prosecution case. He elaborated by saying that he had also seen the person who had fired the shot at Surinder Gupta and had also seen him holding a firearm in his hand. He then states, obviously in response to questions put by the learned counsel for the defence, that the three persons were in the age group of 35-40 years. It may be relevant to point out that the accused were much younger and mostly in their 20s. This statement of PW1 Ashok Chowdhary elicited in cross-examination was essentially directed to disassociate the appellants from the crime.

47. It was then stated by PW1 Ashok Chowdhary in his cross-examination that the three persons had escaped from the spot in a vehicle. We must contrast this with his statement in examination-in-chief, where he stated that three persons had run

away from the spot. Here, he states that the three persons left in a vehicle. The Court observation with regard to the demeanor of the witness is also material, wherein the Court observed as under: witness is taking about some seconds in answering the questions after looking to this and that side. This also gives an indication that PW1 Ashok Chowdhary was somehow not telling the truth on this aspect of the matter. Then a question was put by the learned counsel for the defence as to whether PW1 could identify those persons? The witness responded by saying that he could identify in case they came before him. The next question was, were they present in Court? The witness answered that the three persons were not present in Court on that date. The obvious implication being that the three accused, namely, the appellants herein were not the assailants. Then, the effect of Exhibit PW1/A was sought to be washed away by eliciting a reply from PW1 that Exhibit PW1/A was not read over to him at the time he signed it and that whatever he had stated in Court today was what he had told the police on that occasion. The final nail in the coffin, according to the defence, were the statements eliciting from PW1 Ashok Chowdhary to the effect that he knew Subodh Kumar but that he had not seen Subodh Kumar at the spot.

48. Consequent upon this cross-examination, as the entire story had been turned on its head by this witness in the course of his cross-examination, the learned APP requested to cross-examine this witness and the request was allowed. Thereafter, the learned APP examined PW1 and confronted him with his statement Exhibit PW1/A etc.

49. What is material from the above discussion is that the manner in which PW1 Ashok Chowdhary was transformed from a witness, who merely helped in placing the injured Surinder Gupta in the car and thereafter taking him to hospital into a witness who actually saw the assailants of Surinder Gupta and by doing so claiming to be an eyewitness of the actual incident. Once he purported to become an eyewitness, he gave a clean chit to the appellants by stating that they were not the assailants.

50. It is in these circumstances that we feel that this witness to the extent he states that he was an eyewitness of the actual incident, cannot be believed at all.

However, to the extent that he heard the shot and helped in taking Surinder Gupta to hospital along with Raj Kumar cannot be disbelieved inasmuch as it is part of the prosecution case and has been corroborated not only by DW1 Raj Kumar (to this extent) and by PW14 Subodh Kumar, again, to this extent.

51. We now come to the testimony of DW1 Raj Kumar. Before we examine the testimony of DW1 Raj Kumar, it would be necessary for us to point out that this witness had earlier been cited as a prosecution witness but had been dropped by the prosecution and was picked up by the defence. He was dropped by the prosecution immediately after the testimony of PW1 Ashok Chowdhary was recorded. Since DW1 Raj Kumar was connected with PW1 Ashok Chowdhary, the prosecution probably felt that he would also turn hostile and, therefore, they dropped him from their list of witnesses. Surely enough, Raj Kumar was picked up by the defence as their only witness. Essentially, DW1 Raj Kumar has only sought to corroborate what has been stated by PW Ashok Chowdhary in his cross-examination by the defence counsel. In other words, he also stated that he was an eyewitness and that he had seen the assailants who had given the knife blows as well as who had fired upon the deceased Surinder Gupta. He also stated that all the assailants left the spot along with their weapons in their Maruti car. He also parroted the statement of PW1 that he could identify the assailants if they were brought before him and that none of the assailants were present in Court. CRL. A Nos. 72/2009&73/2009 appellants herein. In this backdrop, it is clear that both PW1 Ashok Chowdhary and DW1 Raj Kumar have converted themselves into eyewitnesses of the actual incident when the prosecution never regarded them as such at any point of time. They were only witnesses to the effect that they saw the injured Surinder Gupta lying on the road and that they along with others had helped him onto the rear seat of the car and that PW1 Ashok Chowdhary drove that car along with DW1 Raj Kumar at his side to AIIMS hospital to get the injured Surinder Gupta admitted.

52. Therefore, separating the chaff from the grain, the only grain of truth that is there in the testimony of these witnesses is to the extent that they had heard the gun shots and that they had rushed to the spot and found that Surinder Gupta was lying in an injured condition on the road and that they had, with the aid of others,

placed him on the rear seat of Surinder Guptas Honda City car which was subsequently driven by PW1 Ashok Chowdhary accompanied by DW1 Raj Kumar to AIIMS hospital where the injured Surinder Gupta was admitted and where Surinder Gupta subsequently died on the same evening on 31.05.2003.

53. We are now left to consider the testimony of PW14 Subodh Kumar. We have already indicated parts of his evidence in the foregoing portions of this judgment. However, it would not be out of place to refer to his testimony in greater detail. PW14 Subodh Kumar stated that he knew Surinder Gupta as he had been working with him on a part-time basis. He stated that on 31.05.2003 at about 11:45 and 12 noon, he had gone to see Surinder Gupta at his house but before he could reach the said house, he saw Surinder Gupta sitting in the car on the road on the rear of his house. The said Surinder Gupta was talking to the accused Dalip, Suresh and Sushil. He further stated that when he was about 20 feet away from the car of the deceased, he stood there and saw that the deceased and the said three accused were having an altercation. He stopped there and then saw that Suresh pulled out Surinder Gupta from his car. Dalip also assisted in pulling him out. The third accused, namely, Sushil Choudhary, took out a katta from beneath his shirt and fired two shots at Surinder Gupta. After Surinder Gupta had been hit twice by the bullets, he fell down but Dalip held him and it was then that Suresh pulled out a knife and gave Surinder Gupta several knife blows. The deceased Surinder Gupta then fell on the road and the three accused escaped from there. He further stated that other persons had also collected there and one Ashok (referring to PW1 Ashok Chowdhary), who was a resident of the same neighbourhood, came there and removed the injured Surinder Gupta in the car of the deceased to hospital. He further stated that thereafter, he went to the house of the father of the deceased to inform him where several people were already present and the information about the incident had already reached them. Subsequently, it was informed that Surinder Gupta had expired. He then goes on to state about the manner in which the arrests of the accused were made on 02.06.2003 and the manner in which the recoveries were made with which we need not concern ourselves inasmuch as the recoveries have not been connected with the crime.

54. In cross-examination by the defence counsel, this witness stated that he did not have any cell phone in those days and that the accused had fled from the spot after the occurrence and within his sight. He further stated that the injured was lying on the road and about 3-4 persons including him reached the injured soon after. He further stated that Ashok Chowdhary also came there but did not know anybody by the name Raj Kumar and cannot say whether he was there or not. He stated that he assisted in putting the injured inside the car. PW1 Ashok Chowdhary drove away the car from there. He further stated that the injured was bleeding while lying on the road. He had not received blood on his clothes nor had he noticed as to whether anyone else had got blood on their clothes or not. He further stated that he himself did not go to AIIMS nor did he request Ashok Chowdhary to take him to the hospital but that he had just told them that he would go and inform the family of Surinder Gupta. Consequently, he went to the old house of the deceased in Kotla Mubarakpur on foot and reached there in about 15-20 minutes time. He volunteered to state that in between he stopped at the shop Bhanu Garments belonging to the family of the deceased where he saw that a crowd had collected and that they had already received information about the incident. He further stated in cross-examination that he did not inform the police nor made any attempt and that when he returned to the spot at about 1- 1:30 pm the police had already reached there and that he told the police about his having witnessed the occurrence. Consequently, his statement was recorded by the police but he did not know the name of the officer who had so recorded his statement. He further stated that at that point of time, he did not know that Surinder Gupta had died or not. After his statement, he might have stayed for 15-20 minutes and he left the spot and went to the hospital by bus and remained in the hospital till about 5 pm, where after, he went home after the dead body had been sent to the mortuary.

55. This conduct of the said PW14 Subodh Kumar has been alleged by the learned counsel for the appellants to be highly unnatural. We have already noticed the observations of the Supreme Court that every witness has his own special way of reacting. Some witnesses, on seeing a horrific crime being committed, stand still and freeze. Others may raise an alarm and cry for help. Yet others may run away from the scene and some may even advance towards the assailants in order to

help the victim. People react differently. The fact that PW14 Subodh Kumar neither cried for help nor ran away from the scene nor advanced towards the assailants but just stood still and saw the crime being committed cannot by itself be regarded as unnatural. There may be many reasons as to why he reacted in the manner he did. Perhaps, he was scared. Perhaps, he knew that the assailants were dangerous people and his life was also at stake. Perhaps, he knew that because he had been involved in earlier cases in which he had been acquitted, if he ran forward he might be implicated in this case also. There may be a myriad of reasons as to why the said PW14 Subodh Kumar reacted in the manner he did but it cannot be said that it was unnatural. Therefore, on this ground alone his testimony cannot be discarded.

56. PW14 Subodh Kumar, after the assailants ran away from the spot, immediately rushed to the injured Surinder Gupta and with the assistance of others helped him on to the car which was driven by PW1 Ashok Chowdhary towards AIIMS hospital. Thereafter, the said witness immediately went towards the old house of Surinder Gupta to inform his family members of the incident. It must be noted that it has been revealed in the cross-examination that PW14 Subodh Kumar did not have a cell phone in those days and, therefore, he could not make a phone call from the spot. Instead, he chose to walk to Surinder Gupta's father's house. On the way, he stopped at Bhanu Garments which belonged to Surinder Gupta's brother and there he came to know that the information of the incident had already been received. It is subsequently that the said witness returned to the spot when he met the police officers and made his statement before PW20 SI Anil Kumar. There is no doubt that there is a discrepancy in the timing with regard to the departure of PW14 Subodh Kumar and the arrival of PW20 SI Anil Kumar. But that discrepancy can be explained by the passage of time between the incident and the date of deposition and is not so material as to entail the discarding of the entire testimony of PW14 Subodh Kumar.

57. Consequently, we are of the view that PW14 Subodh Kumar's conduct was not unnatural and that he was a truthful witness. Some minor discrepancy with regard to timings cannot dent the credibility of this witness with regard to the actual incident. Furthermore, although PW14 Subodh Kumar was a chance witness in the

sense that he happened to see the incident, it cannot be said that his presence at the spot was unexplained. He had already testified that he had worked on a part-time basis with Surinder Gupta and had gone to see him on that day. But, before he could reach his house, the incident took place at the rear portion of Surinder Guptas house. There was nothing unnatural about the presence of PW14 Subodh Kumar. The fact of the matter is that he was there and he saw the incident. We have examined the evidence with great care and caution and come to the conclusion that PW14 Subodh Kumar was an eyewitness to the incident and that he had seen the commission of the crime at the hands of the three appellants in the manner indicated above. He had identified the three assailants in Court also.

58. Therefore, there is no escaping from the fact that the trial court has rightly convicted the appellants. Consequently, no interference with the impugned judgment and order on the point of sentence is called for. The appeals are dismissed. BADAR DURREZ AHMED, J VEENA BIRBAL, J NOVEMBER 05 2012
SR

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com