

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

RESERVED ON: 02.02.2012
PRONOUNCED ON: 29.02.2012

+ **CRL.A. 288/2011**

AJAY@ CHOTU

..... Appellant

Through : Sh. S.C. Sagar, Sh. Rajesh Khatri and
Ms. Nisha Kain, Advocates.

+ **CRL.A. 402/2011**

VICKY

..... Appellant

Through : Sh. L.K. Verma, Advocate.

+ **CRL.A. 403/2011, CRL.M.(BAIL) 2196/2011**

ANIL @ MONU

..... Appellant

Through : Sh. Viraj. R. Datar, Sh. Chetan. B.
Lokur and Sh. Parmanand, Advocates.

versus

THE STATE

..... Respondent

Through : Sh. Sanjay Lao, APP.

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

MR. JUSTICE S.P. GARG

MR. JUSTICE S.RAVINDRA BHAT

%

1. This judgment will dispose of three appeals, directed against a common judgment and order of the Additional Sessions Judge, Delhi, dated

20.01.2011, in SC No. 65/2009. The appellants were convicted of the offences punishable under Section 302/34 IPC. They were sentenced to undergo Imprisonment for life and to pay a fine of Rs. 5,000 each, in default of which they were to further undergo Simple Imprisonment for 6 months each.

2. The case of the prosecution in brief is that on 23.03.2006 at about 05:35 PM, DD No.12A was recorded by PW-5, HC Krishan Lal stating that a person was lying injured (and seemed to have been stabbed) near Samadhan School, E and F Block Dakshinpuri. On receipt of this information, SI Rajeev Kumar (PW-15) reached the spot along with Constable Hari Singh; he found blood, pieces of broken glass bottle, two slippers and two buttons of a white shirt lying at the spot. As the injured had already been removed to Batra hospital, he left Const. Hari Singh at the spot and went there. He collected the MLC of Khoob Chand, (the deceased) Ex.PW-4/A, which mentioned that he was brought dead to the hospital. Ghanshyam, PW-6, the deceased's brother who was an eye witness to the incident met the IO. His statement (Ex.PW-6/A) was recorded. PW-6 in his statement stated that he saw Ajay @ Chotu, resident of Tigri, catching hold of his brother (deceased) while Anil @ Monu, resident of Tigri, was holding a broken glass bottle in his hand and Vicky, resident of Dakshinpuri was holding a knife in his hand. He further stated that all the three persons were known to his brother and they were attacking him. Upon seeing the appellants attacking his brother, PW-6 stopped his scooter and immediately rushed to save him but in the meantime Vicky stabbed his brother with a knife in the abdomen and Monu attacked him with a broken glass bottle. He

further stated that on seeing him (PW-6) the appellants fled the spot, leaving his brother in a pool of blood. A PCR van came and PW-6 along with his brother went to Batra hospital. On the basis of PW-6's statement, the rukka was prepared and FIR No. 182 of 2006 was registered under sections 302/34 IPC.

3. After completion of investigation, charges were framed against the appellants Ajay, Anil and Vicky. The accused persons pleaded not guilty and claimed trial. The prosecution, to prove its case examined 19 witnesses. The material witnesses relied upon by the prosecution are PW-6 Ghanshyam, PW-13 Nirbhay Singh, PW-15 SI Rajeev Kumar and PW-18 Sobhan Singh. After considering these, and other materials, including exhibits, and documents placed on record during the trial, the impugned judgment convicted the appellants in the manner stated earlier, and sentenced them to undergo various prison terms.

4. Counsel for the appellants argued that the impugned judgment cannot be sustained on the facts. It was highlighted that PW-6 was not an eye-witness at all, and was introduced later to bolster the case, which was essentially a blind murder. Counsel highlighted the fact that the earliest intimation was received by the police, first at 05:35PM and later, the very next minute. In both instances, the information given was that a body was lying at the spot of occurrence. Counsel argued that the prosecution had initially listed one Satish, whose shop was just opposite the spot of occurrence, and even his statement was recorded three times. Yet he was dropped as a witness, deliberately during the trial. This indicated that the prosecution wished to deliberately hide something from the court, as his

statement would have revealed the real state of affairs. In this regard, reliance was placed on the judgment reported as *State of UP v Jaggoo* AIR 1971 SC 1586, where it was held that:

“It is true that all the witnesses of the prosecution need not be called but it is important to notice that the witness whose evidence is essential to the "unfolding of the narrative" should be called. This salutary principle in criminal trials has been stressed by this Court in the case of [Habeeb Mohammad v. The State of Hyderabad](#) AIR 1954 SC 51, for eliciting the truth. The absence of Ramesh from the prosecution evidence seriously affects the truth of the prosecution case.

16. This Court in *Habeeb Mohammad's case*, (*supra*)

*referred to the observations of Jenkins, C.J. in Ram Ranjan Roy v. Emperor ILR 42 Cal 422 : AIR 1915 Cal 545 that the purpose of a criminal trial is not to support at all costs a theory but to investigate the offence and to determine the guilt or innocence of the act-used and the duty of a public prosecutor is to represent the administration of justice so that the testimony of all the available eye-witnesses should be before the Court Lord Roche in Stephen Seneviratne v. The King AIR 1936 PC 289, referred to the observations of Jenkins, C.J. and said that the witnesses essential to the unfolding of the narrative on which the prosecution is based must be called by the prosecution whether the effect of their testimony is for or against the case for the prosecution. That is why this Court in Habeeb Mohammad's case, (*supra*) said that the absence of an eye witness in the circumstances of the case might affect a fair trial On be half of the appellant it was said that Ramesh Chand was won over and therefore the prosecution could not call Ramesh. The High Court rightly said that the mere presentation of an application to the effect that a witness had been won over was not conclusive of the question that the witness has been won over. In such a case Ramesh could have been produced for cross-examination by the accused. That would have elicited the*

correct facts. If Ramesh were an eye-witness the accused were entitled to test his evidence particularly when Lalu was alleged to be talking with Ramesh at the time of the occurrence.”

5. Similarly, the appellants relied on the judgment reported as *Takhaji Hiraji v Thakore Kubersing Chamansing* 2001 (6) SCC 145, where it was ruled that:

“if a material witness, which would unfold the genesis of the incident or an essential part of the prosecution case, not convincingly brought to fore otherwise, or where there is a gap or infirmity in the prosecution case which could have been supplied or made good by examining a witness which though available is not examined, the prosecution case can be termed as suffering from a deficiency and withholding of such a material witness would oblige the Court to draw an adverse inference against the prosecution by holding that if the witness would have been examined it would not have supported the prosecution case. On the other hand if already overwhelming evidence is available and examination of other witnesses would only be a repetition or duplication of the evidence already adduced, non-examination of such other witnesses may not be material. In such a case the Court ought to scrutinise the worth of the evidence adduced. The court of facts must ask itself — whether in the facts and circumstances of the case, it was necessary to examine such other witness, and if so, whether such witness was available to be examined and yet was being withheld from the court. If the answer be positive then only a question of drawing an adverse inference may arise.”

6. Counsel for all the appellants argued that PW-6 did not support the deposition of PW-18 regarding the preparation of a sketch map at his behest. The rough sketch map, Ex. PW-18/A as well as the scaled map, Ex. PW-18/B could not have been, in these circumstances, relied on. In the absence of any corroboration by PW-6 about how these sketch maps were prepared

by the IO, not an eyewitness, rendered it inadmissible. Furthermore, submitted counsel, even these sketch plans were of no use, because they contained no indication from where the witness, PW-6 saw all the events. Reliance was placed on the judgment reported as *Tori Singh v State of UP* AIR 1962 SC 399, where it was held that:

*“..the mark on the sketch-map was put by the Sub-inspector who was obviously not an eyewitness. to the incident. He could only have put it there after taking the statements of the eye witnesses. The marking of the spot on the sketch-map is really bringing on record the conclusion of 'the Sub- inspector on the basis of the statements made by the witnesses to him. This in our opinion would not be admissible in view of the provisions of s. 162 of the Code of Criminal Procedure., for it is in effect nothing more, than the statement of the Subinspector that the eye- witnesses told him that the deceased was at such and such place at the time when he was hit. The sketch-map would be admissible so far as it indicates all that the Sub-inspector saw himself at the spot; but any mark put on the sketch.. map based on the statements made by the witnesses to the Sub-inspector would be inadmissible. in view of the clear provisions of s. 162 of the Code of Criminal Procedure as it will be no more than a statement made to the police during investigation. We may in this connection refer to **Bhagirathi Chowdhury v. King Emperor**, (A. I. R. 1926 Cal. 550), where it was observed that placing of maps before the jury. containing statements of witnesses or of information received by the investigating officer preparing the map from 'Other persons was improper, and that the investigating officer who made a map in a criminal case ought not to put anything more than what he had seen himself.”*

7. The Counsel emphasized that there was a delay in sending the FIR to the MM which raises serious doubts as to its reliability. Constable Devender was sent from the hospital with the *rukka* on 23.03.2006 to get the case registered, and FIR bearing no. 182 of 2006 was registered at PS Ambedkar

Nagar at 07:50 PM. However, a copy of the FIR was delivered to the Magistrate only at 04:55 AM on 24.03.2006, i.e., 9 hours later. The Magistrate made an endorsement on Ex.PW-5/A, stating, “*received and seen at 04:55 AM*”. The prosecution was unable to explain the delay in sending the FIR to the Magistrate. PW-8 Const. Sanjay Kumar deposed that he delivered the copies of FIR to the house of the Metropolitan Magistrate and office of the police superiors and returned back to the police station at about 02:30 AM. In his cross examination, he stated that he went to the house of the Magistrate at about 12:30 AM. Counsel submitted that in such cases, having regard to the dispatch and promptness mandated by Section 157 Cr. PC in informing the duty magistrate about such crimes, the onus was on the prosecution to explain the reasons for the delay; however, no such grounds were made out in this case. Consequently, the benefit of this lapse has to go to the accused/Appellants.

8. The appellant’s Counsel argued that the guilt of the accused was not proved beyond reasonable doubt and that they were framed in the present case due to their previous criminal history. The counsel further submitted that the testimony of PW-6, the alleged eye-witness ought not be relied upon as there are material discrepancies in his testimony. PW-6 in his examination in chief stated that in the night intervening 23/24.03.2006, he was with the police officers and on the road between Dakshinpuri and Tigri, accused Vicky was apprehended and he identified him as Vicky but then he corrected himself and said that on the road between Dakshinpuri and Tigri accused Ajay and Anil were apprehended by the police and he identified them. However in his cross-examination he stated that on 23.03.2006 after leaving

the spot, he went home and remained there throughout the night. Later in his cross examination, he mentioned that Ajay and Anil were arrested on 23.03.2006, but did not give any further details. Furthermore, in Ajay and Anil's arrest memo (Ex.PW-15/C and Ex.PW-15/B) PW-6 has not signed as a witness. The prosecution failed to explain why PW-6 was not made a witness to their arrest if he in fact was present there at the time of their arrest. PW-6 did not give any details regarding Ajay and Anil's arrest and therefore his presence at the time of their arrest is doubtful. As far as arrest of accused Vicky is concerned, PW-6 in his cross examination stated that on 24.03.2006, he was called to PS Ambedkar Nagar and from there he and PW-13 and other police officials went to Sangam Vihar and apprehended Vicky. He stated that PW-15 was not present with them at Sangam Vihar. However PW-15 has deposed that he was present at Sangam Vihar when accused Vicky was arrested; he stated that PW-13, 18 and 6 were with him when Vicky was arrested. Even PW-13 and 18 have deposed regarding PW-15's presence at Sangam Vihar at the time of Vicky's arrest. In Vicky's arrest memo Ex.PW-13/C, PW-15 has signed as a witness and therefore his presence is established and hence it raises a doubt as to whether PW-6 was actually present at the time of Vicky's arrest. Therefore PW-6 is an unreliable witness and his testimony cannot be relied upon.

9. The appellants' counsel also submitted that the arrest of Vicky was shown at 11:50 PM of 24th March, 2006. Yet, recoveries were allegedly made at his behest, after the disclosure statement was recorded by the police. These recoveries and seizure memos were also allegedly prepared on 24-03-2006. Such claims were not only improbable, but impossible, because there

could have been no doubt that interrogation, disclosure statement and recovery of articles could not have been completed within 10-15 minutes, as was sought to be urged by the prosecution. Another discrepancy highlighted was that the deceased's MLC mentioned about a lacerated wound on the cheek. However, the post mortem report was silent about such an injury.

10. It was submitted that having regard to the improbability of PW-6's presence at the site, on the day of the incident, and the various discrepancies and inconsistencies, which appeared *prima facie* from the record, the Trial Court could not have convicted the appellants, as it did.

11. The Ld. APP submitted that the guilt of the three accused was proved by the testimony of the eye-witness Ghanshyam. It was submitted that PW-6 in his deposition before the court stated that the appellants attacked his brother; he also deposed regarding the role of each accused in the attack. There are no material discrepancies in his testimony and his testimony was unshaken in the cross-examination. The Ld. APP stated that the presence of PW-6 Ghanshyam at the place of incident is supported by the fact that his name is recorded on the MLC (Ex.PW-4/A) which specifically states that the patient was brought to the hospital by his brother Ghanshyam via PCR van. Furthermore PW-19 HC Ram Kishan deposed that on receipt of information from the control room about an injured person lying at Dakshinpuri, he immediately rushed there with the PCR staff and found a person lying in a pool of blood and another person who stated that he was the injured person's brother. He further deposed that he took the injured and his brother to Batra hospital in the PCR Van.

12. The Ld.APP submitted that there is no doubt regarding the arrest of the three accused. PW-6, 13, 15 and 18 have all deposed that the accused Ajay and Anil were arrested in the night intervening 23/24.03.2006 and the arrest memo corroborates their deposition. The arrest memo, Ex.PW-15/C and Ex.PW-15/B both show the time of arrest to be 02:20 and 02:30 AM on 24.03.2006. As far as accused Vicky is concerned PW-6, 13, 15 and 18 have all deposed that the accused Vicky was apprehended after the arrest of Ajay and Anil in the night intervening 24/25.03.2006 and PW-13 has specifically deposed that accused Vicky was arrested from Sangam Vihar in the night intervening 24/25.03.2006 at about 11 PM. This stands corroborated from the arrest memo Ex.PW-13/C where the time of arrest is recorded as 11:50 PM on 24.03.2006.

13. The Ld. APP further argued that apart from the unshaken testimony of the eye-witness PW-6, the recovery of knife also proves the guilt of the accused Vicky. PW-6, 13 and 18 have all deposed regarding the recovery of the knife from the latrine. PW-6 stated that he signed the sketch of the knife at the spot. The sketch of the knife Ex.PW-6/E has PW-6's signature as a witness.

14. We would analyze the testimonies of all four witnesses in detail. PW-6 Ghanshyam, the deceased's brother is the star prosecution witness as he is the only eye-witness to the incident. PW-6 deposed that on 23.03.2006, at about 05:30 PM when he reached near the shop of Satish *meatwala*, while going towards E Block Khanpur Subzi Mandi, he saw that Chotu (a resident of Tigri) was catching hold of his brother while Anil @ Monu had a broken glass bottle in his hand and Vicky had a knife with him. He deposed that he

parked his scooter to reach his brother but in the meanwhile, Anil hit his brother in the abdomen with the broken bottle and Vicky inflicted a knife blow. He further stated that on seeing him all the accused fled. Within 5-7 minutes of the incident a PCR van reached the spot and took them to Batra hospital where his brother was declared brought dead. He stated that SI Rajeev Kumar (PW-15) and Insp. Soban Singh (PW-18) reached the hospital and his statement was recorded (Ex.PW-6/A). He further stated that he took the police officials to the place of incident and the police seized his brother's grey colour slippers, pieces of broken bottle, blood stained earth and earth control from the spot; these were sealed and seized (Ex.PW-6/B and Ex.PW-6/C). He signed the seizure memos. Post-mortem of the dead body was conducted after which the body was handed over to PW-6.

15. The witness deposed that in the night intervening 23/24.03.2006 he was with the police officers, and on the road between Dakshinpuri and Tigri, Vicky was apprehended and he identified him as Vicky but later said that on the road between Dakshinpuri and Tigri accused Ajay and Anil were apprehended by the police and he identified them. He further deposed that on 24.03.2006 he and SI Nirbhay Singh (PW-13) went to Gali No. 10 H.No. 2077 Sangam Vihar and apprehended Vicky. The latter led to the recovery of a knife from the roof of the toilet. A sketch of the knife (Ex.PW-6/E) was prepared by the IO and the knife was seized (Ex.PW-6/F); both bear his signature. Vicky also led to recovery of a blood stained blue colour shirt and a black pant. Both were seized by seizure memo Ex.PW-6/G. He further deposed that the shirt he was wearing on 23.03.2006 with blood stains was also seized (Ex.PW-6/11).

16. In his cross-examination, PW-6 stated that he did not notice the make of the broken bottle as his attention was towards the attack on his brother. He did not know whether a piece of glass was left in the wound of his brother or whether any blood was present on the broken piece bottle. He stated that the broken pieces of the bottle were seized by the police after he returned to the spot from the hospital at about 06:00 or 06:15 PM. He stated that he knew the accused persons from before and that he stopped his scooter at a distance of about 8-9 steps from the place of incident. He again stated that Ajay was catching hold of his brother, Anil hit his brother with a broken bottle and Vicky hit him with a knife. He admitted that he did not chase the accused as he first wanted to save his brother. He deposed that SI Rajeev Kumar (PW-15) recorded his statement. He left the hospital at about 06:00 PM and took the police party comprising of SI Rajeev Kumar and other police officers to the spot. He deposed that he left the spot at about 8/8:15 PM and went home and remained there throughout the night. He also stated that he went to the hospital the next day at about 09/10:00 AM and returned home from the hospital at about 11:30/12 in the noon. He further stated that in the evening of 24.03.2006 the police called him for the identification of the accused. He did not remember the time at which he reached PS Ambedkar Nagar and met SHO and SI Nirbhay Singh (PW-13). He voluntarily stated that Ajay and Anil were arrested on 23.03.2006 and that he was taken to Sangam Vihar by the police. He further stated that from PS Ambedkar Nagar he went to Sangam Vihar in a police vehicle along with SI Nirbhay Singh and 3-4 police officials but SI Rajeev Kumar was not with them. In Sangam Vihar they went to Vicky's house in Gali No. 10. From Sangam Vihar, the police dropped him home. He admitted that his statement

was recorded once in the hospital and once at the spot after the recovery. He denied the suggestion that he was not present at the spot at the time of the incident. He denied that PW-15 only recorded his statement in the hospital and no other proceedings were carried out by him in his (PW-6's) presence. He admitted that the sketch of knives and memos of recovery were prepared at the spot i.e. Vicky's house. He stated that he signed the sketch of knife at his residence.

17. In cross-examination PW-6 further stated that the PCR van left after dropping them at the hospital. He knew the accused as they were living in the same area and were known criminals of the area. He denied the suggestion that his brother was "BC" (bad character) of the area. He did not know if FIRs lodged in PS Tughlak Road, PS Ambedkar Nagar and PS Lodhi Road were registered against his brother. His deceased brother told him in the evening of 22.03.2006 while having dinner at the witness's house that he had a quarrel with the accused. He stated that there was visibility at the spot but he did not notice how many poles were there. Members of the public were present at the spot but they refused to join the investigation due to fear of the accused. He also stated that his statement was recorded on the spot regarding the seizures. The documents were prepared on the spot on the cardboard that the IO had in his possession then. He further stated that he did not remember the time at which the police called him for the identification of the accused; he did not see the accused at the Police Station but was called as the police were going to arrest Vicky and he was required for identification. He admitted that Vicky's house was in a residential area and there were other houses nearby. He further admitted that SI Rajeev Kumar

(PW-15) was not with them when Vicky was arrested. There were blood stains on the knife recovered at the instance of Vicky. He further stated that he signed the sketch at the spot. His statement regarding the arrest of Vicky and recovery from Vicky's house was not recorded. In response to a question put by the Defence Counsel, he admitted to signing the sketch of the knife at the spot. He said that there was no person in between him and the scene of crime and he could see the faces of all the accused persons from the place where he parked his scooter.

18. PW-15 Insp. Rajeev Kumar deposed that on 23.03.2006 he was handed over DD No.12A (Ex.PW-5/B) regarding a stabbing incident near Samadhan Kendra, Dakshinपुरi. He and Const. Hari Singh reached the spot and in the meantime SHO Soban Singh (PW-18) and SI Nirbhay Kumar (PW-13) also went there. He deposed that he found pieces of a broken glass bottle, one pair of *chappal*, two white shirt buttons and some blood stains on the spot. As the injured had been removed to Batra hospital, he left Const. Hari Singh at the spot and went to Batra hospital where he was informed that the injured had been declared brought dead. He further deposed that the SHO and other staff members too reached the hospital and he (PW-15) recorded the statement of Ghanshyam (PW-6), an eye-witness to the incident. The *rukka* Ex. PW-15/A was prepared and was handed over to Constable Devender (PW-11) for registration of the case at about 07:30 PM. He stated that he, Ghanshyam and the SHO left the hospital for the spot and from there Soban Singh (PW-18) lifted the exhibits and took them into custody through seizure memo Ex.PW-6/B. A supplementary statement of PW-6 regarding the seizure proceedings were recorded at the spot. He

further deposed that during the night intervening 23/24.03.2006 he and SI Nirbhay Kumar went to *Peepal wala chowk*, MB road; the SHO was busy searching in other nearby areas. At the instance of PW-6 accused Ajay and Anil were apprehended by the police party while they were getting down from the TSR. He further deposed that they were interrogated by Insp. Soban Singh (PW-18) as he also came over there. Thereafter the arrest memo Ex.PW-15/B of Anil and Ex.PW-15/C of Ajay were prepared and their personal search was conducted. Later PW-18 recorded their disclosure statements Ex. PW-13/A and Ex.PW-13/B. He further deposed that on the basis of their disclosure statements they started to search for Vicky and both the accused took them to his house at Sangam Vihar and he was arrested by arrest memo Ex.PW-13/C and his personal search was conducted. He made a disclosure statement which was recorded Ex.PW-13/E. He stated that thereafter he was discharged as he was not feeling well.

19. In the cross-examination he stated that when he reached the spot PW-6 and the PCR both were not present. He remained present at the spot for 5/7 minutes and then left for the hospital. He admitted that he recorded PW-6's statement in the hospital; Const. Devender (PW-11) was with him at that time. He could not recollect the exact time at which PW-13 and PW-18 came to the hospital. He further stated that from the hospital he went to the spot and he along with PW-13 and PW-18 remained at the spot till 10/10:15 PM. Accused Ajay was already known to him as he was arrested earlier twice or thrice in some cases in PS Ambedkar Nagar. He admitted that PW-6 was present with them through the entire proceedings, and he accompanied them to PS Ambedkar Nagar, however he could not remember up to what

time PW-6 remained present with them in the PS. He stated that PW-13, PW-18 and PW-6 were with him when Vicky was arrested. He further admitted that he did not try to search the unknown person who gave the information on the basis of which DD No.12/A was recorded. He admitted that no piece of the glass was blood stained. He stated that when he recorded the statement of PW-6 in the hospital at that time PW-18 was not present over there but he met him when he was sending the *rukka*.

20. PW-18 Soban Singh deposed that on 23.03.2006 he reached Batra hospital at about 7 PM where he met SI Rajeev Kumar (PW-15), PW-6 and other staff members. He stated that by the time he reached hospital, SI Rajeev Kumar had already recorded the statement of the complainant and had sent the *rukka* through Constable Devender. He further deposed that he prepared the unscaled site plan at the instance of the complainant which is Ex.PW-18/A. He deposed that he found pieces of a broken glass bottle, one pair of *chappals*, two white shirt buttons and some blood stains at the spot; they were seized. He also seized the deceased's blood stained shirt by seizure memo Ex.PW-11/A. He further deposed that he recorded the statement of one witness Satish who was dropped and not examined in this case. On the intervening night of 23/24.03.2006, he arrested accused Anil and Ajay and their personal search was conducted. They made disclosure statements Ex.PW-13/A and Ex.PW-13/B. He further deposed that he prepared the inquest proceedings Ex.PW-18/B and also prepared the brief facts Ex.PW-18/C. He stated that on the night intervening 24/25.03.2006 accused Vicky was arrested (Ex.PW-13/C) and his personal search was conducted. He made a disclosure statement Ex. PW-13/E and got recovered

the weapon of offence which was kept between the wall and sink of the latrine, situated outside his house under the boundary of the house. A sketch of the knife was prepared and was taken into possession by memo Ex.PW-6/F; SI Rajeev Kumar (PW-15), SI Nirbhay Kumar (PW-13) and 3-4 other police officials along with the complainant were also present. Vicky also led the police in the recovery of a pant and a shirt.

21. In his cross-examination he stated that he reached the spot at about 7:00 PM and one Const. Hari Singh along with 2/3 police officers was present at the spot. As the injured had been removed to the hospital, he immediately rushed there; SI Rajeev Kumar, Const. Devender along with other officers were in the hospital. He deposed that SI Rajiv had already prepared the *rukka* by then and the injured had died. He stated that he instructed Const. Devender to take the *rukka*, get the FIR registered and return to the spot. He admitted that he recorded the statement of Satish on 23.03.2006 at the spot and thereafter on 24.03.2006 he again recorded his statement. He further stated that he recorded the statement of PW-6 3-4 times - at the spot, at the time of arrest and when recovery was made. He left the spot at about 10:30/11 PM at night. He left in search of the accused one or one and a half hour later with the complainant. However he clarified that the complainant did not accompany him from the spot, he went to his house from the spot and then he reached the Police Station at night on his own. Anil was already known to him due to his criminal history. He also stated that SI Rajeev and SI Nirbhaya were with him when the accused were arrested; they returned to the PS at about 4 or 5 AM.

22. PW-13 SI Nirbhay Kumar deposed that on 23.03.2006 upon receiving information of a stabbing incident near Samadhan School, Dakshinpuri, he reached the spot and found SI Rajeev Kumar with Const. Hari Singh. He noticed some broken glass, blood and two buttons at the spot and after about 15/20 minutes Insp. Sobhan Singh also reached the spot. The IO lifted the earth control, blood stained earth and prepared seizure memo Ex.PW-6/C. IO also seized two buttons, *chappals* and broken pieces of glass and prepared seizure memo Ex.PW-6/B. During the night intervening 23/24.03.2006, at about 12:00/1:00 AM the SHO received information that two of the accused persons would be coming to Peepwala Dakshinpuri Chowk in a TSR. He and SI Rajeev Kumar, SHO Sobhan Singh and the complainant went to Peepwala chowk and at about 01:15 AM accused Ajay and Anil came in a TSR and were apprehended. They made disclosure statements. On 24.03.2006 in the afternoon accused Vicky was apprehended from Sangam Vihar; SI Rajeev Kumar, Insp. Sobhan Singh and complainant were also present. Accused Vicky was arrested and his personal search was conducted and he made a disclosure statement which led to recovery of a knife from in between the wall of the bathroom; the clothes he wore at the time of the incident were also recovered.

23. In his cross-examination he stated that he reached the spot at about 6:00 PM and remained there for 1/1 ½ hour. He did not proceed to the hospital from the spot but went to the police station and reached there at about 07:30/8:00 PM. He admitted that PW-6 was present at the spot along with SI Sobhan Singh and SI Rajeev Kumar. He further admitted that SI Sobhan Singh (PW-18) prepared the site plan on the spot. He stated that

PW-18 reached the police station about 30/45 minutes after he reached the police station. He admitted to knowing the three accused persons from before. He further said that Vicky was the bad character of the area and the other two accused persons also had criminal cases against them. He stated in the evening of 23.03.2006 he left the police station at around 10:30 PM and reached Peepalwala Chowk, MB road; PW-18 and PW-13 were already there. They waited at the spot for about 1 ½ / 2 hours and on seeing the accused persons they apprehended them. The accused persons were interrogated at the spot; and they left the MB road at about 3/3:30 AM. He further stated that he again joined the investigation at around 4 PM and it continued till 01:30AM on 25.03.2006. Accused Vicky was apprehended from Sangam Vihar at about 11:00 PM and no public person was joined as a witness to his arrest. He further stated that Vicky led to recovery of a knife from under asbestos sheet of the bathroom and the blood stained clothes from behind a box in the kitchen. He further stated that perhaps Vicky's wife was present at the time of the recovery but he was not sure.

24. The conviction in this case largely hinges on the eyewitness testimony of PW-6. He claimed to have been at home, on the date of the incident, and also having seen the attack on his brother. He did not inform the police; the testimony of PW-19 is that immediately after receiving PCR information at 05:35 PM, he went to the spot, and took the deceased to the hospital. The MLC in this case records that PW-6 Ghanshyam accompanied the deceased, when he was taken to the hospital, at 06:00 PM. The testimony of PW-6 as well as police officers, particularly PW-15 and PW-18 indicate that the eyewitness account was recorded at the hospital; the proceedings later were

conducted at the spot; the crime team had reached by then, and remained at the site till 09:00 PM. The *rukka* was concededly recorded at 07:30 PM, and the FIR recorded at 07:50 PM. Yet, the endorsement on the special report to the magistrate (Ex. PW-5/A) notes that it was received and seen by the judicial officer at 04:55 AM the next morning. The importance of furnishing this report, in accordance with Section 157 Cr. PC was highlighted by the Supreme Court time, and again. In *Thanedar Singh v. State of M.P.*, (2002) 1 SCC 487, relied upon and cited the previous judgment in *Meharaj Singh v. State of U.P.* 1994 (5) SCC 188. The court had, in that case, held that:

“12. FIR in a criminal case and particularly in a murder case is a vital and valuable piece of evidence for the purpose of appreciating the evidence led at the trial. The object of insisting upon prompt lodging of the FIR is to obtain the earliest information regarding the circumstance in which the crime was committed, including the names of the actual culprits and the parts played by them, the weapons, if any, used, as also the names of the eyewitnesses, if any. Delay in lodging the FIR often results in embellishment, which is a creature of an afterthought. On account of delay, the FIR not only gets bereft of the advantage of spontaneity, danger also creeps in of the introduction of a coloured version or exaggerated story. With a view to determine whether the FIR was lodged at the time it is alleged to have been recorded, the courts generally look for certain external checks. One of the checks is the receipt of the copy of the FIR, called a special report in a murder case, by the local Magistrate. If this report is received by the Magistrate late it can give rise to an inference that the FIR was not lodged at the time it is alleged to have been recorded, unless, of course the prosecution can offer a satisfactory explanation for the delay in dispatching or receipt of the copy of the FIR by the local Magistrate. Prosecution has led no evidence at all in this behalf. The second external check equally important is the sending of the copy of the FIR along with the dead body and its reference in the inquest report. Even though the inquest report,

prepared under Section 174 CrPC, is aimed at serving a statutory function, to lend credence to the prosecution case, the details of the FIR and the gist of statements recorded during inquest proceedings get reflected in the report. The absence of those details is indicative of the fact that the prosecution story was still in an embryo state and had not been given any shape and that the FIR came to be recorded later on after due deliberations and consultations and was then ante-timed to give it the colour of a promptly lodged FIR. In our opinion, on account of the infirmities as noticed above, the FIR has lost its value and authenticity and it appears to us that the same has been ante-timed and had not been recorded till the inquest proceedings were over at the spot by PW 8.”

(emphasis added)

Here, no explanation has been offered or even attempted why the special report was given late to the magistrate; on the other hand, one of the eyewitnesses, i.e the despatch rider stated that he was given copies of the FIR to deliver at 11 PM, and after delivering them he returned at 02.30 AM. This introduces doubt and uncertainty to the prosecution version, about whether the FIR was recorded at the time claimed.

25. The second aspect which injects suspicion and doubt is the conflicting evidence as to Vicky's arrest. PW-13 deposed that Vicky was apprehended in the afternoon of 24th March 2006 in Gali No. 10. On the other hand, PW-15, after mentioning about arrest of the other two accused, at 02:30 AM on 24rd March, 2006 says:

“..thereafter Insp Soban Singh recorded their Disclosure statements. The Disclosure statement of accused Anil @ Monu is Ex. PW-13/A and Disclosure statement of accused Ajay @ Chotu is Ex. PW-13/B. Both bears my signatures at point B and accused at point C. On the basis of their disclosure statements we started search of third accused Vikky and then both the

accused took us to the house of accused Vikky situated at village Tigri, near Sangam Vihar, Delhi and accused Vikky present in the court today and correctly by his name and face was arrested vide memo Ex. PW-13/C... ”

Yet another version about how Vicky was arrested, is deposed to by PW-18 who stated that:

“On the intervening night of 24 and 25th March, 2006 accused Vikky present in the court today and correctly identified among the other co-accused by his name and face was arrested vide memo Ex. PW-13/C...”

In *Asif Mamu v State of Rajasthan* AIR 2009 SC 600, the Supreme Court had held that the circumstances surrounding arrest of the accused, and doubts emerging from the prosecution’s case can be a ground for acquittal. Here, the three conflicting versions undermine the prosecution’s version about arrest of Vicky.

26. The prosecution had sought to prove through the sketch map of the place of incident, the spot where the deceased was found, when the PCR van went upon receiving information. This rough sketch was alleged to have been prepared by PW-18, at the instance of PW-6. However, PW-6 does not mention that at his pointing out, the site plan was prepared. Also, the site plan does not mark where he was standing. PW-18 mentions having prepared the scaled site plan Ex. PW-18/A, after visiting the site on 27-3-2006, and being pointed the various spots, by the PW6. That aspect has not been corroborated. This is damaging to the prosecution case, and the sketch plan is inadmissible, by virtue of the decision in *Tori Singh* (supra), where it was held that, where a map or sketch seeks to recreate the scene of occurrence, is drawn on the basis of statement of any person or witness, who

narrates it, the same cannot be considered by the Court, unless such person or witness also corroborates it. The Supreme Court had held that the marking of a spot on the sketch-map, about the event or incident in question, amounts to conclusion of the draftsman on the basis of the statements made by the witnesses to him, which would be inadmissible in view of Section 162 of the Code of Criminal Procedure Code. *Jagdish Narain v. State of U.P.*, 1996 (8) SCC 199, too has ruled to the same effect.

27. The most important aspect of the matter, apart from late compliance with Section 157, Cr. PC, is that an independent witness, Satish was available at the spot; he had even been interrogated by the police. Although it has been held that courts are concerned with the quality, and not the quantity of evidence, or the number of witnesses, at the same time, it has also been held that withholding a crucial eyewitness from the trial, whose testimony might be inconvenient, or might be contrary to the expectation of the prosecution, can inject legitimate grounds for suspecting the prosecution version. The judgment in *State of Rajasthan v. Teja Ram*, (1999) 3 SCC 507:

“..If the court has discerned from the evidence or even from the investigation records that some other independent person has witnessed any event connecting the incident in question, then there is a justification for making adverse comments against non-examination of such a person as a prosecution witness.”

The same view was reiterated in *State of UP v Ashok Dixit* 2000 (3) SCC 70

28. In view of the above reasons, i.e. the unreliability of the prosecution story regarding the time of lodging of the FIR, the lack of any explanation why the special report was received late by the magistrate, despite its being despatched at around 08:00 PM, the conflicting versions with regard to the

arrest of the accused Vicky, and the non-examination of Satish, this Court is of opinion that the accused's conviction was not justified. Therefore, the impugned judgment requires to be set aside; the appeals therefore, deserve to succeed. They are accordingly allowed.

**S. RAVINDRA BHAT
(JUDGE)**

**S.P. GARG
(JUDGE)**

February 29, 2012