IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on:27.03.2012
Decided on: 30.03.2012

\+ **Crl.A. 244/2010**
DEVENDER alias BITTOO ..... Appellant

versus
STATE NCT OF DELHI ..... Respondent

\+ **Crl.A. 317/2010**
PARDEEP AND ANR. ..... Appellant

versus
STATE NCT OF DELHI ..... Respondent

\+ **Crl.A. 162/2010**
DHARAMBIR AND ORS. ..... Appellant

versus
STATE ..... Respondent

\+ **Crl.A. 163/2010**
SATENDER alias SANJU ..... Appellant

versus
STATE ..... Respondent

…..Appellants
Through: Sh. K.B. Andlay, Sr. Advocate with Sh. M. Shamikh, Advocates, in Crl.A. 317/2010.
Sh. Jitendra Sethi with Sh. Sharad Saini, Advocates in Crl.A.244/2010.
Sh. Mukesh Kalia with Sh. Varun Jamwal and Ms. Akriti Mahendra, Advocates.

…..Respondents
Through: Ms. Richa Kapoor, APP.

MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE S.P. GARG

MR. JUSTICE S.RAVINDRA BHAT

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1. In these appeals three accused i.e. Devender, Pradeep and Parvesh were convicted for the offences punishable under Sections 302/34/452/149 IPC; the accused Satinder, Dharamvir and Gulab Rai were convicted for the offences punishable under Sections 307/34 IPC and Sections for 452/149 IPC. The appellant Mahender was convicted for the offence punishable under section 452/34 IPC and acquitted of other charges. All the appellants were sentenced to undergo various prison terms; those convicted for the offence punishable under Sections 302/34 IPC were sentenced to imprisonment for life; for other offences, they were sentenced to lesser sentences. Those convicted for offences under Sections 307/34 and 452/149 IPC were sentenced for 3 years' imprisonment and other sentences. Mahender too was sentenced to undergo 3 years' imprisonment. All the sentences were directed to operate concurrently.

2. The incident in this case occurred in the late evening of 27-11-1999 at 11:55 PM. The police received intimation- recorded in the form of a Diary entry (DD) Ex. PW-5/C, that there was fighting at House Number 6205, Dev Nagar, Gali No.1, Block No.1. The police station concerned marked the information to Inspector Dinesh Tiwari who deposed during the trial as PW-22, and Constable Narain Singh, PW- 11. They went to the spot but the victims had been taken to the RML Hospital by the PCR Van. In the hospital they were informed that one Veer had succumbed to injuries and died. They

met the injured, Rajendra Prasad (PW-3) and recorded his statement, which formed the basis of the first information report (F I R) that was registered at 2:30 AM in the morning of 28-11-1999. The F I R was produced as Ex. PW-5/A.

3. The police case was that Satinder, Gulab Rai, Dharamveer, Pravesh and Pradeep were arrested on 28-11-1999 from the spot and were identified by the complainant. Mahender and Devender were arrested on 16 December 1999; they surrendered in the court.

4. The prosecution case against the accused was that on 27-11-1999 the stone laying ceremony had taken place in the locality where the deceased and his family members including PW-3 lived, in which the street was named as Prabhu Dayal Pareva street. Family members of Prabhu Dayal, who belonged to the Khatik Samaj, lived there. The locality was inhabited by members of another community i.e.the Raiger Samaj. After the function, the Baba Dur, Bal Nath procession took place around 8:30 PM. The members of the Pareva family, including the accused were abusing loudly, in the street, that whoever had broken the stone in which their grandfather's name was engraved (and installed that day, apparently) would not be spared by them. PW-3 in his statement recorded to the police at the hospital, stated that about 11 PM the accused went up the first floor where he used to reside; they called him out, saying that they would teach him a lesson for breaking the stone. PW-3 stated that he opened the door and said that he had not broken the stone; Gulab Rai took hold of him and the Dharambir caught hold of his left hand. It was alleged that the Veer, his nephew came down, at which Dharmbir said that he ought to be taken down, and killed, to teach the Raigar (community) a lesson. PW-3 stated that Pradeep and Pravesh caught

hold of Veer, and Mahender caught hold of his collar and dragged him (Veer) down. The two accused who had caught the witness continued to hold him. Devender gave a knife or dagger blow to Veer. He told the other accused that he had finished his work and asked Satinder that he should finish off the others including the complainant. The complainant tried to escape, and staved off blows, but could not avoid a knife injury given by Satinder. He was rescued, by members of the general public.

5. As mentioned earlier the F I R was registered at around 2:30 AM in the morning. The judicial record reveals that the special report (about the incident recorded in the F I R) was received by the Magistrate concerned in terms of Section 157 Cr. PC. at 5:30 AM in the morning.

6. After completion of investigation and on the basis of the materials collected during its course, the police charged the accused for committing various offences. They denied guilt and claimed trial. During the trial the prosecution relied on the testimonies of 23 witnesses and various exhibits including the post-mortem report as well as the MLC's (i.e. medico legal reports) of the accused as well as the injured parties. On an overall analysis of these the Trial Court concluded that the three accused mentioned previously in the judgment were guilty for having committed the offence punishable under section 302 IPC along with other offences. The other accused were variously held guilty for offences under Sections 307 IPC and sections 452/149 IPC.

7. It was argued on behalf of the Appellants that attack, as well as the sequence of events were not established by the prosecution. It was urged that the Court should not have believed the testimony of the so-called eye-witnesses. It was argued, with some vehemence that PW-3 was

untrustworthy, and admitted more than once, during the course of his deposition that the place was ill- lit, and as a result, there was no scope for identification of the accused, positively as attackers. It was submitted that during the cross examination, the witness also admitted that he was not aware of the names of the accused, and had not interacted with them. In these circumstances, there was no question of the witness, or other witnesses, being in a position to identify the accused, positively as the attackers, and rule out the possibility of others' involvement.

8. It was argued that even though in law the Court may, in some certain circumstances, believe the testimonies of relatives, as being eye-witnesses, there is no general rule that such witnesses are always trustworthy or would not lie. It was submitted that such witnesses, on account of their relationship with the victim or the deceased, would be interested in ensuring some conviction, and the possibility of their creating stories to implicate third party innocent people cannot be ruled out.

9. It was next submitted that the prosecution was unable to give any explanation regarding the injuries sustained by the accused themselves, such as Pradeep, Pravesh, Satender and Gulab Rai. The Appellant's counsel relied on Ex. PW-4/A, Ex. PW-4/B, Ex. PW-4/C and Ex. PW-4/DA. These showed that the incident reported was not accurate at all, and the Appellants too had been injured. Having regard to the overall circumstances, the materials placed before the Trial Court did not lead to the conclusion that the accused were guilty; rather they were the victims. Counsel submitted that having regard to the overall circumstances and facts of this case, it could not be said

that there was a pre-planned or pre-meditated attack, on the part of the accused.

10. It was argued that the Trial Court overlooked a material contradiction which went into the root of the matter, namely that an important prosecution witness, i.e PW-14 resiled from the version given to the police during the investigation, and did not support the testimony of his brother, PW-3. This, coupled with the high degree of improbability regarding identification of the accused, during pitch dark, (since there was no electricity supply, concededly at the time of incident, in the locality) ought to have alerted the Trial Court in proceeding to tread with caution. Instead, it chose to accept in a wholesale manner, the testimony of the said witness, erroneously.

11. Counsel for the accused next submitted that the possibility of the FIR being *ante* timed in this case could not be ruled out. It was submitted that the evidence in the case, revealed that DD No. 24A was recorded at 10:00 PM in respect of the incident, i.e. quarrel, etc. However, the prosecution intentionally withheld this document, as it would have falsified the entire story. The learned counsel submitted that the absence of the accused's names in documents, such as the brief facts, inquest report, etc. This strongly pointed to the possibility of the assailants being some others. Counsel also submitted that the prosecution evidence – as per statement of PW-15 was that nine injured individuals had been taken to the hospital, including Gulab Rai, and the three others. However, no attempt was made to arrest them, even though the prosecution alleged that the statement of PW-3 was recorded there. This was a material suspicious circumstance, entitled to be

duly weighed and considered, to verify whether the incident took place in the manner, time, and place alleged, or in altogether different circumstances.

12. Learned counsel emphasized that even according to the accounts of the prosecution witnesses, independent witnesses were present, and some of them were instrumental in rescuing PW-3; yet no attempt was made to record their statements or even ascertain their identities. The complete lack of any independent witness undermined the credibility and truthfulness of the prosecution version. The Trial Court's failure to look into, and consider this vital aspect vitiated its judgment. Similarly, submitted counsel, the recovery of the alleged weapon of offence was highly doubtful in the circumstances of the case, since it was not witnessed by any member of the public or independent witness, though they were available at hand.

13. It was argued that the testimony of PW-3 as regards the identification of the accused, was also suspicious and unreliable because he clearly admitted in the cross examination that he was told about their names, etc by the police. Elaborating on this, it was submitted that this admission was crucial to the appellants, since it established that the witness did not know the accused, and did not even have occasion to interact with them. In the circumstances, it was highly suspicious that he would, on the basis of tenuous recollection or understanding, have been able to identify them. It was urged in this context, that the deposition of PW-3 also established that his claim that he could identify accused, by voice, was unconvincing if not down-right false. In this context, it was urged that without any social interaction, and without knowing the individuals, the witness could never

had any occasion to say definitely who had actually attacked his nephew, or him.

14. Learned counsel submitted that in the absence of any active role spoken to by the witnesses for the prosecution, the conviction of some of them under Section 307 was unsustainable. It was also argued that the Trial Court fell into error in not examining or segregating the role of each accused, and proceeding to lump them together. It was urged that nowhere did anyone attribute a role that would attract a conviction under Section 307 IPC; similarly, there was no intention on the part – nor was any proved, by the prosecution, for sustaining a conviction under Section 452 IPC.

15. Counsel for the appellants submitted that even assuming (though not admitting) the prosecution allegations were deemed to have been proved, the Trial Court still fell into error, in not seeing that the deceased Veer died as a result of a single knife blow. It was submitted that having regard to the circumstances, only a conviction under Section 304-II IPC could have been warranted, since the assault was a result of a sudden quarrel, and fell within the fourth exception to Section 300 IPC. Counsel relied on *Ramesh Vithalrao Thakre & Anr. vs. State of Maharashtra* 1995 Crl.L.J. 2907, a decision by the Supreme Court, where it was held that:

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> *7. There is no denying the fact that one single injury was caused to the deceased by Ramesh when Rekha intervened to save her brother Ashok being assaulted. The primary target of Ramesh was Ashok, who got saved when Rekha received the injury on her chest. After causing the single injury to Rekha, it is the*

prosecution case itself, that Ramesh did not cause any other injury to Rekha nor even to Ashok, PW-1. From the evidence on the record and the established circumstances, it is not possible to say with certainty that the appellant intended to cause the death of Rekha. Even though the principle contained in Section 301 IPC would be applicable to the case, it appears to us that the appellant can only be clothed with the knowledge that the injury which he was causing was likely to cause the death of Rekha but without any intention to cause her death or to cause such bodily injury as is likely to cause death. The offence, under the circumstances, would be one which would fall under Section 304 Part II IPC.

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Similarly, it was argued that in *Harjinder Singh vs. Delhi Administration* AIR 1968 SC 867, the accused sought to teach the deceased, and his brother a lesson, on account of a quarrel. He went back, armed with a knife, with which he inflicted blows on the witness, when he was sought to be rescued, the accused trained his guns on the deceased, and landed two knife blows. The Court held that the conviction would be justified under Section 304-II IPC.

16. It was argued by the learned APP that the appellants did not show any substantial or compelling reasons for interference with the impugned judgment. It was argued in this context that the submissions regarding *ante* timing of the first information report, and consequent false implication are without any foundation. Elaborating on this, the State submitted that the reporting of the crime occurred almost simultaneously; the police reached the spot within minutes of occurrence of the incident. The statement of injured witnesses were recorded at the hospital, since by then members of

the public and other members of the family had taken them for medical treatment and attention. The information leading to the registration of the first information report was recorded at 02:20 A.M; the F I R itself was recorded at 02:30 A.M. the Magistrate concerned was given special report within reasonable time, around 5 AM. In the circumstances the submission regarding late recording of the F I R and falsification have no basis at all.

17. It was submitted that the findings of the Trial Court have to be left undisturbed because they were premised on the testimony of injured eyewitnesses such as PW- 03. Counsel argued that this witness was consistent with the story given by him or the version recorded in support of the F I R. He was not only able to name all the assailants but even specifically mentioned the role and stated the entire sequence of events. Counsel emphasised that at the earliest opportunity, in the intimation and his statement recorded around 2 AM in the morning, the names of all the attackers had been mentioned. Since there was no controversy in this, the possibility of false implication or roping in others who were not present was completely eliminated. Learned counsel pointed out that the testimony of this witness was recorded about after over five years later as a result of which naturally some minor discrepancies or inconsistencies were bound to arise. However, these did not detract from the basic quality of his evidence which was entirely trustworthy. He clearly attributed a very aggressive role to three of the accused who were responsible for the death of his nephew. Two of them held him while the other i.e. Satinder, stabbed him. Having regard to the nature of the injury and the depth of the knife wound, there could be no doubt in the mind of the court that the intention of the assailants

was to kill and not merely cause grievous injury. Learned counsel emphasised that the question of converting the conviction from one under Section 302 IPC to a conviction under Section 304 IPC did not arise having regard to the site of the wound and the that of the injury. There was no history of quarrel; the appellants were clearly aggressors who felt slighted on account of an imagined wrong. They consequently went in a group and started pulling out PW-3 and his nephew as well as other members of the family in order to teach them a lesson. This resulted in a tragic incident. Consequently the question of sudden quarrel with in the contemplation of Explanation 4 to Section 300 IPC did not arise at all.

18. It was submitted next by the State that even though the deposition of PW- 14 another relative did not fully support the prosecution, and he had to be put leading questions with the permission of the court, that itself did not deflect in any manner from the quality of evidence placed on the record through PW-3's deposition. It was submitted that PW- 14 like the other witnesses was examined more than five years after the incident in 2008. He deposed whatever he could remember. It was not as if he completely denied the prosecution evidence or contradicted the others. Highlighting this aspect, counsel urged, that at best the evidence of PW- 14 by itself cannot be a ground for conviction and yet it is not so inconsistent with the overall prosecution story as to reject it altogether. Counsel argued that PW- 14 was not even the complainant and his statement was recorded later. Therefore even if the court were not to rely on his testimony, nevertheless, the conviction recorded by the impugned judgement would be independently

sustained on the basis of the other materials particularly the testimony of PW- 03.

19. Commenting on the submissions made on behalf of the appellants, counsel for the State submitted that the argument about lack of light or the improbability regarding identification of the attackers was adequately dealt with by the Trial Court in the impugned judgement. The submission here was that according to the position of PW- 03, being a resident of the area, he clearly identified all the attackers. In this context learned counsel argued that even though the witness did not have any social interaction with the accused, nevertheless the possibility of his knowing who they were could not be ruled out since he saw them on an everyday basis. In this context it was further argued that the accused and the victims belonged to different communities; the accused must have grievance that the victim and his family were somehow responsible for what they felt was a slight cast on their grandfathers' memory. This led to their attacking the victim with his family resulting in the death of Veer. Submitting that it was not necessary for an individual to know the names of those living in his or her neighbourhood in order to be familiar with them, the APP stated that absence of any social intercourse or interaction or even lack of knowledge of the personal details of someone would not necessarily or inevitably mean that a neighbour would be unfamiliar with him. Commenting on the repeated cross examination regarding the identity, the APP highlighted the fact that PW- 03 clearly mentioned that he could identify the accused through their voices in the darkness.

20. As noticed in the previous part of the judgment, the incident occurred late in the evening. By PW-3's account, the ceremony or a function had taken place earlier during the day when the accused's grandfather's name engraved on a stone had been installed. Apparently, the accused felt insulted since some people had damaged the stone and went around the neighborhood, abusing those responsible that they would not be spared. The evidence also indicates that the accused belonged to the Khatik community and the deceased as well as his relatives belonged to the Raigar community or Samaj. Both these communities lived in the same locality. In this background, PW-3 narrated that he used to live on the second floor of the building and his nephew Veer lived on the first floor. The witness claimed that he knew the accused by names and by their voices before the incident and that they belonged to the Khatik Samaj. The Trial Court noted that this witness was examined in-chief by the prosecution on 29.07.2002. His cross-examination, however, was conducted on different dates. His identification of the accused, for the first time, noted the Trial Court, was challenged during the cross-examination on 15.03.2008. A very crucial aspect which the appellant's counsel highlighted is that at the time of the incident, the locality was in darkness since the electricity supply had failed. PW-3 was dragged down from the second floor but he testified that he had seen the faces. He later admitted that he could not clearly see the faces since it was dark but he could hear the voices of the attackers. He clarified that he could identify the individuals who committed the acts of aggression, by their voices. The Trial Court, in this context explained the seeming contradiction by stating that the long lapse of time, of about five years was a reasonable explanation why the witness was unable to satisfy the identity. In this regard, the Trial Court

relied upon the testimony in *Khujji v. State of M.P.* 1991-(3) SCC 627. The Trial Court also reasoned that PW-3 and the accused used to live in the same locality and, therefore, the witness was in a position to identify them distinctly. The Trial Court also took into consideration the circumstance that PW-3 was dragged from inside his house and even though there was no electricity, it was highly improbable that he would have opened the door without ascertaining who went there. PW-3 deposed that on being accused of having defiled the stone containing the accused's grandfather's name, he said that he was not responsible. The accused persons, however, were not to be mollified; Gulab Rai caught hold of his right hand and Dharamvir caught hold of his left and and Satinder pushed him down from the back and dragged him to the ground floor. He deposed that Devender and Satinder took out their daggers; the other accused continued to hold him. His nephew, Veer**,** the deceased, on hearing the commotion went outside. Parvesh and Pradeep caught hold of him and Devender inflicted the knife or dagger blow on his chest. Thereafter Devender said that since he had finished the work, the other accused Satinder should finish his, i.e. PW-3. The witness went on to say that Rajbir**,** his brother saved him with the members of the general public, who had collected by then. He also deposed to having reached the RML Hospital and that Veer was also taken there. In the hospital, Veer was declared dead.

21. The witness deposed to having accompanied the police, on 8.11.1999, to Satinder's house which led to the recovery of dagger from beneath a mattress. Satinder had made a disclosure statement to the police, as a result of which the dagger was seized. He also deposed about arrest of Gulab Rai**,**

Pradeep**,** Parvesh and Dharamvir. Since the witness did not further depose about other recoveries seized from the house of Satinder, he was put leading questions at the behest of the prosecution. During the cross-examination of the witness, on 06.05.2005, PW-3 deposed that his house was situated at a distance of 5 minutes' walk; he was unable to say whether members of his family went to the police station at 11.00 PM when the incident happened. He also deposed that the hospital was at a distance of 4-5 kms. He testified that he went to the hospital on his brother's scooter but was unable to say how long it took to reach there. He was not aware whether Gulab Rai one of the appellants, had been injured and admitted in the same hospital; he did not state that the police enquired about Gulab Rai from him in the hospital. In the cross-examination, the witness, on 15.03.2008, for the first time, admitted that there was no electricity supply in the area, when he was pulled down from the second floor and that it was dark. To a specific question, he said that though there was no light of any kind when he was brought to the road, 50-60 persons had gathered at the spot; 7-8 had brought him down from the second floor; He could not state how long the quarrel continued with any precision. He admitted in the cross-examination that when attacked with the knife, there was some bleeding which stained his shirt and that it had been seized by the police. In the cross-examination, he stated that 2-3 persons could comfortably go side-by-side by the staircase, to his house. He also stated that though he could not see the faces of the accused or the attackers, he could hear their voices clearly. To a specific query, he stated that he was very scared and could not see the faces clearly but could identify the persons by their voices.

22. In the cross-examination on behalf of Satinder, Devender and Mahender, PW-3 admitted on 12.08.2008 ignorance about the work done by the members of the accused's family, the details of their family and also stated that he had neither played or had any dealings with them or any association or contact or association. In reply to another query, he stated that Satinder's house was a three-storeyed one and explained his ignorance as to how many rooms it had, or other details. He also did not know the particulars of Satender's family or who were living on the first floor. He mentioned about the recovery of the dagger from the second floor and signatures on the memo and also stated that the dagger was measured with an inch-tape. He denied the suggestion of having signed on blank paper and stated that he signed on written sheets; he confirmed to the contents of the statement recorded, Ex.3/A put to him by the learned counsel for the accused Gulab Rai and Parvesh**.**

23. The first question which this court is to address itself is whether the incident took place at the time, and manner, alleged by the prosecution. PW-3 stated that the attack and its aftermath, occurred around 11:00 PM. He also stated that the police station was nearby and the hospital was within 4-5 kms radius. His testimony further is that he went to the hospital on his brother's scooter. The MLC records that he reached the hospital at around 12-15 AM on 28-11-1999. PW-23 corroborates the deposition of PW-3, saying that around 11:30 PM, someone went and told him on a scooter about the fight; he went there and saw that a crowd had collected at the spot. He took the injured (the deceased) lying there to the hospital, where he was declared dead. He informed another PCR van to reach the spot. The FIR was

registered at 2:30 AM; earlier, the intimation (*rukka)* forming the basis of the FIR was registered upon the statement of PW-3; it clearly implicated all the accused, and specifically named and assigned the roles the witness attributed to each of them.

24. Two serious objections about the testimony of PW-3 articulated during the Appellants' submissions were that there was a black out, due to electricity failure; the area was covered in darkness. If one considered this with the PW-3's statement that the police had told him regarding the identity, and his further deposition during cross examination, that he had no occasion to talk to, interact or have any contact with them, the witness was untrustworthy. Facially, the argument is powerful. Yet, the overall effect of the witnesses' testimony has to be considered rather than snatches of what he said. He very specifically stated about the awareness or ability to recognize the accused's voices. The Trial Court has observed – to our mind, pertinently – that the appellant and the witnesses' family lived in the same locality, and that the witness had specifically mentioned his ability to recognize the voices of the accused. *Kedar Singh v State of Bihar* AIR 1999 SC 1481, is an authority for a court to accept identification on the basis of not only face recognition, but also on the basis of other attributes such as body shape, voice, gait, manner of walking and so on. Similarly, the Supreme Court's ruling, in *Anwar Hussain v. The State of U.P*. (AIR 1981 SC 2073) is an authority that even if there is insufficient light, a witness can identify someone, with whom he is fairly acquainted or is in intimate terms, from his voice, gait, features etc. As a consequence, the court does not find

substantial the argument that the witness PW-3 could not have identified the accused, due to darkness.

25. As regards the second submission with respect to identification, ie. PW-3 not having any occasion to socialize, or having any social contact with the accused, the Court notices two salient features. One, immediately after his treatment, at around 12-12:30 AM, the witness recorded his statement. In this, he clearly named all the accused, and even attributed specific roles to each of them. This strong circumstance could not be shaken by the Appellants during cross examination of PW-3. The witness significantly mentioned that the house which he lived in, i.e No. 6205, Gali No. 1, belonged to the Pareva family, which was from the Khatik community, and that his community had differences with the Khatik community. The evidence on record also shows that in the examination in chief, the witness had clearly mentioned awareness about the identity of the accused, before the incident. Having regard to these facts, and the witnesses' repeated assertion, that he could identify the attackers, due to their voices, the Court is of opinion that the Trial Court's finding that since the accused, as well as the deceased lived in the same locality, he was aware about the accused, is justified and correct. Though the witness was cross examined, on several dates extensively and his examination was spread over 5 years, the essence of his deposition remained unshaken.

26. The next question which the court has to consider is the injuries on the accused. These have been proved by the MLCs, Ex. PW-4/A (Pradeep); Ex. PW-4/B (Satender); Ex. PW-4/C (Parvesh) and Ex. PW-4/DA (Gulab Rai). Great emphasis was given to the fact that the injury of Gulab Rai, was a

serious one, as he had broken his ankle, even though the doctor stated that it was simple. Now, the evidence of PW-3 itself reveals that soon after the attack on him, or in the latter part of the incident, a crowd had collected, and some scuffle and even beatings had taken place. The appellants had submitted that the failure of the police to nab Gulab Rai, or anyone else, from the same hospital, falsified the prosecution story. This court is of opinion that these arguments are without merit.

27. First, the question of injuries on the accused. All the MLCs concerned clearly show that the injuries, according to the attending doctor, were not serious. In the case of PW-3, on the other hand, the doctor, PW-4, deposed that he had been inflicted with multiple stab injuries. He was cross examined, but not challenged about his opinion that the nature of the accused injuries or that they were simple injuries. Therefore, the question is whether in this factual background, where the injuries are not serious, does the prosecution owe a duty to the Court to furnish an explanation. In this regard, the Supreme Court, after re-visting the previous decisions on the issue, had this to say, in its ruling reported as *Shajahan v State of Kerala* 2007 (113) Cr. LJ 2291:

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> *non-explanation of the injuries sustained by the accused may assume greater importance where the defence gives a version which competes in probability with that of the prosecution. But where the evidence is clear, cogent and creditworthy and where the Court can distinguish the truth from falsehood the mere fact that the injuries are not explained by the prosecution cannot by itself be a sole basis to reject such evidence, and consequently the whole case. Much depends on the facts and circumstances of*

each case. These aspects were highlighted by this Court in Vijayee Singh and Ors. v. State of U.P. (AIR 1990 SC 1459).

Non-explanation of injuries by the prosecution will not affect the prosecution case where injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and creditworthy, that it outweighs the effect of the omission on the part of prosecution to explain the injuries. As observed by this Court in Ramlagan Singh v. State of Bihar (AIR 1972 SC 2593) prosecution is not called upon in all cases to explain the injuries received by the accused persons. It is for the defence to put questions to the prosecution witnesses regarding the injuries of the accused persons. When that is not done, there is no occasion for the prosecution witnesses to explain any injury on the person of an accused. In Hari Krishna Singh and Ors. v. State of Bihar (AIR 1988 SC 863), it was observed that the obligation of the prosecution to explain the injuries sustained by the accused in the same occurrence may not arise in each and every case. In other words, it is not an invariable rule that the prosecution has to explain the injuries sustained by the accused in the same occurrence. If the witnesses examined on behalf of the prosecution are believed by the Court in proof of guilt of the accused beyond reasonable doubt, question of obligation of prosecution to explain injuries sustained by the accused will not arise. When the prosecution comes with a definite case that the offence has been committed by the accused and proves its case beyond any reasonable doubt, it becomes hardly necessary for the prosecution to again explain how and under what circumstances injuries have been inflicted on the person of the accused. It is moreso when the injuries are simple or superficial in nature. In the case at hand, trifling and superficial injuries on accused are of little assistance to them to throw doubt on the veracity of the prosecution case. (Surendra Paswan v. State of Jharkhand (2003)) : (2003 AIR SCW 6905) 8 Supreme 476 and Anil Kumar v. State of U.P. (JT 2004 (8) SC 355) : (2004 AIR SCW 5238).

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Having regard to the nature of injuries on the accused, and the deposition of PW-3 about the background of the quarrel as well as the circumstances of the attack itself, (and his statement that some of the accused were beaten up soon after the incident) this court is of opinion that the prosecution's omission to furnish any explanation cannot lead to any adverse inference against it.

28. So far as the role of the accused goes, PW-3 mentioned that Satender and Devender were armed with a dagger, and a knife. These were recovered at their instance, and produced as Ex. P-5; the dagger was seized through Memo Ex. PW-11/G. The deposition of PW-11, who spoke about the recovery of the dagger, at the instance of Satender, mentioned that the complainant PW-3 was called to House No. 6216, Gali No. 1, where he identified Satender, Gulab Rai, Pravesh, Pradeep and Dharambeer. They were arrested. Satender's disclosure led to recovery of the dagger, which was seized, and taken into possession. In cross examination, the witness PW-11 mentioned that the recovery was made from the first floor, at the disclosure of Satender. PW-3, who also spoke of recovery of the dagger, mentioned that it took place from the second floor. According to this witness, the dagger was measured with an inch tape; PW-11 said it was measured with a ruler. Though there are minor variations, they can be put down to normal memory lapses on account of lapse of time. However, the broad details of what took place, have matched in the testimonies of the two witnesses. These depositions have a ring of truth, and the Court cannot ignore them. Consequently, the Court is of the opinion that the prosecution

was able to prove the recovery of the knife and dagger, from the places alleged by it.

29. The deposition of PW-14 does not support the prosecution – a circumstance heavily relied on by the appellants' counsel to undermine the entire edifice of the allegations levelled against them. Here, the Trial Court noticed the deposition of the witness, and remarked that he partially supported the prosecution to the extent he heard commotion (he lived on the third floor of the building where PW-3 lived), and peeped out; he came down and saw his nephew, the deceased, lying on the road. No doubt, the witness did not mention about having seen the attack, or described its details, therefore, his testimony is just not relevant. What therefore, had to be seen, were if there were other materials and whether they were sufficient to measure up to the standard of proof beyond reasonable doubt, to convict the accused for the offences they were charged with. The deposition of PW-3, in Court, as well as the early reporting of the crime, in which he mentioned the role played by each accused, which in turn was backed by the nature of injuries suffered by him, (proved through PW-4/D, the MLC) shows that the witness is truthful and reliable.

30. The all important question which the Court now has to address itself to is whether the convictions returned by the Trial Court, vis-à-vis various accused, is justified and sustainable. The deposition of PW-3 shows that Satender knocked at his door, asking him to come out, he opened the door, and remonstrated that he had not broken the stone. Gulab Rai caught hold of his right hand, Dharambir caught hold of his left hand; Satender pushed him down. Devender and Satender drew out their daggers. In the meanwhile, the

deceased Veer had come out; Pravesh and Pradeep caught hold of him. Devender gave him a knife blow, and said that he had finished the work *"Kaam Tamam kar diya"*in respect of Veer and that Satender ought to finish his (PW-3's) work. He claimed that Gulab Rai and Satender attacked his right arm with daggers. Now, in this entire narrative, there are two distinct features. The first is Satender asking the witness to go out and his being restrained. The second is the attack on Veer, by Devender, with a dagger; Pradeep and Parvesh facilitated this, by holding the deceased (Veer). He also said that Mahender had caught hold of Veer, by the collar, and dragged him down from the building.

31. As far as the offence under Section 302 IPC is concerned, it is clearly made out against Devender. The nature of the weapon, and the planned manner in which the attack was executed, leaves no scope for doubt that the accused, set out to attack the victims, and had made up the minds to teach them a lesson. The submission of the Appellants that having regard to the background of facts, at best the intention to cause injury which would in all likelihood have resulted in death, cannot be accepted. The Appellants were incensed over the stone bearing their grandfather's name being damaged; they took it as an affront. They suspected members of the Raigar community, and particularly the victim's family and with a view to punish them went to the building where they lived. PW-3 was first dragged out; later the deceased, Veer was pulled out. Both were in their homes, at the time, around 11:00 PM. The incident, when the accused went around warning people in the neighbourhood about reprisals, took place around 8:30 PM. There was considerable gap of time, for tempers to cool off. In any

case, there is no evidence to suggest an altercation around 8:30 PM nor was there anything said in that regard by the accused. In these circumstances, the accused went to the building where PW-3 and the deceased lived; pulled them out of their homes, and attacked them. Two of the accused were armed with daggers. Devender's attack on Veer, was calculated to cause maximum harm, and did so. The single knife blow on the chest, pierced the lungs. The stab wound, according to PW-18, was placed obliquely over the front of left side of the chest. The lower end was 3.5 cm upper and inner to the left nipple and the upper end 6 cm outer to the midline. The size of the wound was 2.8 cm x 1.2 cm; it was chest cavity deep. The left chamber of the heart revealed a through and through cut 1.2 cm in length. Death resulted as the consequence of stoppage of heart, due to collection of blood in the cavity surrounding the heart. This injury alone was sufficient to cause in the ordinary course of nature. In the decision reported as *Mahesh Balmiki v State of MP* 2000 (1) SCC 319, it was held that:

> *"XXXXXX XXXXXX XXXXXX*
>
> *there is no principle that in all cases of a single blow Section 302 IPC is not attracted. A single blow may, in some cases, entail conviction under Section 302 IPC, in some cases under Section 304 IPC and in some other cases under Section 326 IPC. The question with regard to the nature of offence has to be determined on the facts and in the circumstances of each case. The nature of the injury, whether it is on the vital or non-vital part of the body, the weapon used, the circumstances in which the injury is caused and the manner in which the injury is inflicted are all relevant factors which may go to determine the required intention or knowledge of the offender and the offence committed by him. In the instant case, the deceased was disabled from saving himself because he was held by the*

associates of the appellant who inflicted though a single yet a fatal blow of the description noted above. These facts clearly establish that the appellant had the intention to kill the deceased. In any event, he can safely be attributed the knowledge that the knife-blow given by him was so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death.

XXXXX XXXXXX XXXXX"

In the case of *State of Karnataka v. Vedanayagam* (1995) 1 SCC 326 the accused inflicted one knife injury on the chest resulting in instant death and the trial court convicted him under Section 302 but on appeal to the High Court the conviction was altered to one under Section 304 Part II. When the matter was brought to the Supreme Court, the judgment of the Trial Court convicting the accused under Section 302 was restored and the Court observed that:

"XXXXXX XXXXXX XXXXXX

there is no doubt whatsoever that the accused intended to cause that particular injury on the chest which necessarily proved fatal. Therefore clause thirdly of Section 300 IPC is clearly attracted"

XXXXXX XXXXXX XXXXXX.

In *Dhupa Chamar v State of Bihar* 2002 (6) SCC 506, the Court, similarly observed that:

"XXXXXX XXXXXX XXXXXX

The above circumstance would show that the accused intentionally inflicted the injury and the same would indicate such a state of mind of the appellant Dhupa Chamar that he

aimed and inflicted the injury with a deadly weapon. In the absence of evidence or reasonable explanation to show that this appellant did not intend to inflict injury by bhala in the chest with that degree of force sufficient to rupture important blood vessels and cutting of aorta and other artery, it would be perverse to conclude that he did not intend to inflict the injury that he did. When once the ingredient "intention" is established then the offence would be murder as the intended injury was sufficient in the ordinary course of nature to cause death. Therefore the inevitable conclusion would be that Appellant 1 Dhupa Chamar has committed the offence of murder and not culpable homicide not amounting to murder. This being the position, we do not find that the High Court has committed any error in upholding conviction of Appellant 1 Dhupa Chamar under Section 302 of the Penal Code.

XXXXXX XXXXXX XXXXXX"

So far as Pradeep and Pravesh are concerned, no doubt PW-3 attributed the role of their being facilitators, in the sense that they restrained the deceased, which helped Devender to attack him. Even if one were to assume the worst against these accused, that they were aware that Devender was armed with a dangerous weapon, which he would have used, in all likelihood, the nature of common intention to fix joint criminal responsibility for murder, under Section 302 IPC has not been proved. There is no doubt that these accused accompanied the others. However, the sequence of events shows that there was no apparent pattern; Satender pulled out PW-3, whereas Devender pulled out a knife, and attacked the deceased. Pradeep and Parvesh were unarmed. Though they shared a common intention with Satender, that by itself is not conclusive for the Court to hold that the common design was to commit murder. In this context, the court recollects the decision in *Vencil Pushparaj v State of Rajasthan,* AIR 1991 SC 536 to the following effect:

"XXXXXX XXXXXX XXXXXX

The only question that arises for consideration is whether the facts and circumstances of the case unerringly fasten the appellant with the criminality in question so as to robe him with the aid of S. 34 IPC. The High Court disagreeing the review of the Trial Court found the appellant guilty holding thus:-

> *"We are fully convinced that Pappu caught hold of Durga and kept him pinned down till Kannu had stabbed him five times over on the chest, and abdomen region. Pappu's conduct in running away from the scene of occurrence also lends corroboration to the conclusion that he participated in the* ***murder*** *of Durga by Kannu ....."*

5. Admittedly, Kannu at time of his arrest by the SHO on the morning of the very next day i.e. 31-8-72 was having injuries on his person namely on the fingers of his hands, feet, back and left thigh which injuries are not explained by the prosecution. The evidence of PW-22 indicates that the deceased and the appellant were very close friends and that this itself annoyed Kannu who found fault with the appellant and questioned him as to why he was having friendship with his enemy, namely, the deceased. These facts indicate that the occurrence had happened not in the manner as put forth by the prosecution but under different circumstances.

6. Further a scrutiny of the materials placed before us does not spell out that the appellant had shared the intention of Kannu in murdering the deceased and that he held the deceased in order to facilitate Kannu to stab the deceased. There is no material worth-mentioning even to draw an inference that the appellant and Kannu had acted in concert and/or there was existence of a pre-arranged plan to commit the murder of the deceased. Therefore, we are unable to infer the common intention on the part of this appellant with Kannu.

XXXXXX XXXXXX XXXXXX"

In a similar vein, it was held in *Harbans Nonia v State of Bihar* AIR 1992 SC 125, that:

> *"XXXXXX XXXXXX XXXXXX*
>
> *Shyambali Nonia has been convicted under Section 302 IPC which is not under challenge before us. Therefore, we have to examine as to what is the nature of the offence these two appellants committed in the circumstances of the case. The various circumstances attending the prosecution which we have pointed out above show that these two appellants did not have any intention to participate with Shyambali Nonia to cause the death of the deceased. At the same time it is, however, absolutely impossible to relieve them of any liability whatsoever in connection with the stab injury which was facilitated by their catching hold of the deceased when Shyambali Nonia was inflicting the stab wound. Hence, there is no escape for the conclusion on the evidence available that these two appellants shared at least the common intention with Shyambali Nonia to cause grievous hut punishable under Section 326 read with Section 34 IPC vide State of U.P. v. Ram Kishun [(1976) 3 SCC 449 : 1976 SCC (Cri) 443]. For all the reasons stated above, we set aside the conviction of these two appellants under Section 302 read with Section 34 IPC and the sentence of imprisonment for life, instead convict them under Section 326 read with Section 34 IPC.*
>
> *XXXXXX XXXXXX XXXXXX"*

In the absence of any clear cut motive, or proof of pre-meditated design, what this court discerns is that first PW-3 was dragged out, after which the deceased was pulled out from his home. The intention of all the accused who went to the victim's house, is undoubtedly suspect. Yet, it is difficult to conclude without any doubt that Pradeep and Parvesh shared the common intention with Devender that he would commit the offence punishable under

Section 302 IPC since they could not have been aware that injury would be inflicted on such a vital part of the body. In these circumstances, they can be attributed that the acts of Devender would have resulted in injuries on the deceased, that would have led to death in the ordinary course of nature. Their conviction under Section 302 IPC is accordingly modified to one under Section 304 Part I. The other conviction under Section 452/149 IPC is affirmed. The conviction of Devender too, for offences under Sections 452/149 IPC is maintained.

32. As regards PW-3, no doubt he is an injured witness. Yet, the injuries suffered by him, were simple, according to the attending doctor, PW-4. His MLC, PW-4/D also states that there was a single sharp edged weapon injury on the arm; it was evaluated as simple. Therefore, Satender, who inflicted that injury, is guilty for the offence punishable under Section 324, IPC. The others who held PW-3 to facilitate his attack, i.e Gulab Rai and Dharambir, are guilty by association, by theory of joint responsibility, on account of common intention, under Section 34, IPC. Their conviction under Section 452/149 IPC is also affirmed. As far as Mahendra is concerned, his conviction under Section 452 IPC is left undisturbed.

33. In view of the above findings, the conviction of Devender is maintained in respect of all the offences. The conviction of Pradeep and Pravesh, for the offence under Section 302 IPC is substituted to one under Section 304-I/34 IPC. Their sentence is modified from life imprisonment to imprisonment for 10 years each. Their sentences for the offences punishable under Section 452/149 IPC are confirmed.

34. The conviction of Gulab Rai, Satender and Dharamvir, having been modified to one under Section 324, instead of Section 307 IPC, the sentence is accordingly altered to 2 ½ years. The conviction and sentence under Sections 452/149 IPC, is left undisturbed. The conviction of Appellant Mahender under Section 452/149 IPC is left undisturbed. In all the cases, the sentences of fine are left undisturbed.

35. All the sentences in respect of all the appellants shall run concurrently. All the Appellants shall be entitled to the benefit of Section 428 Cr. PC, and the period or periods of remission, available to each of them, according to law. In the event of any one of the accused having undergone the period of sentences, he or they shall be released, if not required in any other case. The Appeals are disposed of in the above terms.

S. RAVINDRA BHAT
(JUDGE)

S.P. GARG
(JUDGE)

MARCH 30, 2012