

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

% Reserved on: 22nd September, 2022.
Decided on: 31st October, 2022

+ **CRL.A. 64/2021**

PARDEEP THROUGH PAIROKAR / MOTHER Appellant
Through: Mr. R.D. Rana, Adv.

versus

STATE Respondent
Through: Mr. Prithu Garg, APP for the State
SI Madhav PS: SP Badli.

+ **CRL.A. 114/2021**

ANIL THROUGH PAIROKAR/MOTHER Appellant
Through: Mr. R.D. Rana, Adv.

versus

STATE NCT OF DELHI Respondent
Through: Mr. Prithu Garg, APP for the State
SI Madhav PS: SP Badli.

+ **CRL.A. 130/2021**

KAUSHAL Appellant
Through: Mr. Ajay Verma, Adv.

versus

THE STATE (GOVT OF NCT), DELHI Respondent
Through: Mr. Prithu Garg, APP for the State
SI Madhav PS: SP Badli.

+

CRL.A. 131/2021

MEHTAB

..... Appellant

Through: Mr. Sumeet Verma, Advocate with
Mr. Mahinder Pratap Singh,
Advocate.

versus

STATE (NCT OF DELHI)

..... Respondent

Through: Mr. Prithu Garg, APP for the State
SI Madhav PS: SP Badli.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

HON'BLE MR. JUSTICE ANISH DAYAL

1. By these four appeals, the appellants challenge the judgment dated 29th September 2020 convicting all the four appellants for murder of one Surjit Singh (“deceased”) by stabbing him with a knife, after hatching a criminal conspiracy to commit robbery of the tractor bearing registration number HR30G 4498, mobile phone Nokia 1209 and currency amount of ₹2,500/- all belonging to one Bhim Singh (“injured”) who was also hurt by the appellants while committing the offence; and order on sentence dated 19th October, 2020 wherein the appellants Anil, Kaushal and Mehtab were directed to undergo rigorous imprisonment for life alongwith fine of ₹5,000/- each and in default whereof simple imprisonment of one year for offence punishable under Section 302/34 of the Indian Penal Code (“IPC”). These three appellants were further directed to undergo rigorous imprisonment for seven years alongwith fine of ₹5,000/- each in default whereof simple imprisonment of one year for offence punishable under section 120B IPC

and Sections 392/394/397 r/w Section 120B IPC. Appellant Anil was further sentenced to undergo rigorous imprisonment for a period of 3 years for offence under section 414 IPC. Appellant Pradeep was directed to undergo rigorous imprisonment for a period of 7 years alongwith a fine of ₹5,000/- in default whereof simple imprisonment of 1 year for offence punishable under Section 120B IPC and Sections 392/394/397 IPC r/w Section 120B IPC.

2. The investigation was set into motion on receipt of an information vide DD No. 7B that ahead of GT Karnal Road, near Barat Ghar, Gurudwara Siraspur, Delhi, four persons had robbed a tractor after stabbing a person and had fled away towards Singhu Border. At the spot Bhim Singh, the complainant who was found undressed informed that on 20th December, 2010, at about 3.30 am, he alongwith Surjit Singh were in front of the Barat Ghar on a trolley with registration no. HR30G4498 when one auto with passengers came in front of their tractor trolley. Surjit Singh stopped the tractor. Four boys aged about 20-25 years came out of the auto, started abusing and asked Surjit Singh and the complainant to give them money. Two of the assailants were carrying knives with them. Those boys forcibly pulled them out of the tractor. Two of them caught hold of Surjit Singh, while the other two caught hold of the complainant and pulled out ₹2,500/- from his pocket. When Surjit Singh tried to escape, one person holding the complainant ran towards Surjit Singh, and then those 3 assailants dragged Surjit Singh towards the nala and inflicted knife blows on him. The assailants snatched the mobile phone of the complainant. Thereafter, the complainant escaped and ran towards the dark side and hid himself about 100 meters from the spot. One of the assailants loosened the trolley's latch, sat on the tractor and took it towards the Singhu border and other three

accused also went towards the border in the auto. Complainant/ injured tried to seek help from the moving vehicles to save Surjit Singh but no one stopped, and then the complainant went to the Gurudwara, took phone from the chowkidaar and dialed no. 100, and stayed at the spot till the arrival of the police. Surjit Singh was taken to the Harish Chandra Hospital at Narela where he was declared “brought dead”. On this statement, FIR no. 404/2010 dated 20th December, 2010 was registered under sections 392/397/302/34 at PS Samaypur Badli. During the course of investigation the four appellants and one ‘A’ was arrested. On completion of investigation charge-sheet was filed against the four appellants and ‘A’ being a juvenile, inquiry report qua him was filed before the Juvenile Justice Board.

3. Dr. Mazhar Hussain (PW-12) examined the deceased patient on 20th December, 2010 at about 4:40 AM and prepared MLC (Ex.PW-12/A). He noted the following injuries:

- i. *Incised wound of about 2 x 1 cm over left side of neck with upward tailing.*
- ii. *Incised wound 2cm x .5 cm over left angle of jaw.*
- iii. *Lacerated wound of about 3.5 cm x 1 cm just above left ear.*
- iv. *Two superficial incised wound, both of size about 3cm x .5cm over front of right shoulder joint.*
- v. *Perforating/lacerated wound over front of lower part of neck with oozing of blood.*

4. Dr. Bhim Singh (PW-10) conducted the Post Mortem of the deceased on 20th December, 2010 and prepared the post mortem report (Ex. PW-10/A). He found the following injuries:

- i. *(I) shaped contusion 1.5 cm x 0.2 cm front of right shoulder.*
- ii. *Superficial contused incised wound measuring horizontally shaped 2cm x 0.3cm x 0.5 cm front of right chest.*

- iii. *Contusion horizontally shaped 2 cm x 0.3 cm right side of chest, 2cm below injury No.2.*
- iv. *Contusion 0.5 cm x 0.5 cm just medial injury No.2.*
- v. *Penetrating stab wound, front of neck just below the level of thyroid 0.5 cm x 0.5 cm x 5cm, direction of the wound inwards, upwards, cutting the skin, subcutaneous tissues, enters the thyroid gland rupturing the thyroid vessels, margins and under lying tissues contused.*
- vi. *Stab wound 0.5 cm x 0.5 cm x 2 cm left side of chest just below the clavicle, margins contused.*
- vii. *Contusion 1.5 cm x 0.3cm front of left arm.*
- viii. *Lacerated wound 3.5 cm x 1 cm x 0.5 cm just above the left ear temporal region.*

Cause of death was opined to be shock consequent to excessive bleeding due to injury No. (v), caused by penetrating object like screw driver or like weapon. The said injury was sufficient to cause death in ordinary course of nature. All the injuries were antemortem and fresh in duration. Injury No. (i) to (vii) could be caused by screw driver like weapon and injury No. (viii) could be caused by blunt object.

5. To establish its case, the prosecution examined 33 witnesses during trial and Bhim Singh/ injured/complainant (PW-4) was the star witness of the prosecution.

6. The appellants assail the impugned judgment on the ground that the trial court has placed reliance on the testimony of the eyewitness Bhim Singh (PW-4) and convicted the appellants, however, Bhim Singh is an unreliable and untrustworthy witness. PW-4 deposed that two of the four assailants were carrying knives by which the deceased was stabbed. However, as per the PM report (Ex.PW-10/A), injuries no. (i) to (vii) were caused by a screw

driver or a like weapon and injury (viii) was caused by a blunt object, and therefore, the version of PW-4 was belied. It was further submitted that Bhim Singh was at a distance of 100 meters when the deceased was stabbed, and as per the testimony of PW-27 and PW-28, it was dark at the spot being a foggy winter night. Thus in fog, it is difficult to see beyond three meters and therefore, the fact that PW-4 saw the deceased being stabbed by the appellants cannot be believed. It was also submitted that the IO had planted the screw driver on the appellant Mehtab after becoming aware about the opinion in post-mortem report. Further, the screwdriver was recovered after one month from the date of incident i.e. on 26th January, 2011 from a slab at the appellant's house and not from any concealed place. As per the FSL report (Ex.PW-27/I), although blood was found on the screwdriver, but the report returned the finding of "no reaction".

7. It was contended on behalf of Pradeep and Anil Kumar that it is doubtful as to how the IO got to know the IMEI no. through which the mobile was put on surveillance and the location of the phone was tracked, when Bhim Singh PW-4 had deposed that he does not remember the IMEI no. of his mobile phone which was snatched. It was further contended that there is a contradiction over the ownership of the mobile phone as PW-4 stated that the mobile phone snatched by the assailants belonged to him, while PW-28 testified that the same belonged to the deceased Surjit Singh. Further, no member of public was made a witness to the arrest of Pradeep and other three accused including juvenile 'A' from the TSR at Bhajanpura bus stop. It was also contended that Pradeep was only arrested as he was present at the stop and that his role was only that the TSR belonged to him.

The prosecution has failed to prove any conspiracy or the purpose of the alleged conspiracy hatched by the appellants.

8. On behalf of the appellants Kaushal and Mehtab, it was contended that there are material contradictions in the statements of the prosecution witnesses. Bhim Singh, in his examination in chief, stated that he made a call to the police on 100 from a truck driver's mobile phone, but in his statement to police under section 161 of the Code of Criminal Procedure, 1973 ("CrPC"), he had stated that the call was made from the mobile of gurudwara's chowkidar. Further, PW-4 in his examination in chief stated that his statement was recorded at the spot but in cross examination he stated that the statement was recorded at the police station. He further stated that he had signed the statement given on 26th January, 2011, but when confronted, no signatures were found on the statement. Statement of Rahul PW-7 contradicts the statement of HC Gajendra Singh PW-24, on the fact that PW-7 stated that at time when police came to his house, they were in civil clothes, but PW-24 stated that they were in their uniform. As per the statement of HC Phool Kumar PW-23 and SI Bhupesh PW-26, Bhim Singh was found at the spot wrapped in white shawl, but as per the statement of IO Dharmavir PW-27, Bhim Singh was found in a nude condition. As per PW-23, he and SI Bhupesh reached the spot on separate motorcycles, but as per SI Bhupesh (PW-26), he reached the hospital with HC Phool Kumar PW-23 in his car. Both PW-27 and PW-28 claimed to have made the site plan and PW-27 stated that they reached Rahul's house at about 5-6 pm, but PW-28 stated that they reached Rahul's house at around 3.30 pm. The mobile phone which resulted in the arrest of all the four appellants, was never proved to belong to Bhim Singh and no bill was produced by PW-4, rather as per the

CAF, the mobile was found to belong to one Laxmi Bai. Further, the mobile phone was recovered from Rahul PW-7 who was not made an accused by the police, but was rather given a clean chit on the same day, despite the looted mobile set being recovered from his possession. It was further contended that no chance prints were lifted from the tractor and that HC Dharambir PW-13 was introduced at a later stage in the investigation merely to strengthen the prosecution story.

9. Learned APP for the State countering the above-noted arguments on behalf of the prosecution contends that PW-4 who is the eyewitness/ injured and complainant in the present matter had narrated the entire incident clearly. Soon after the incident, the robbed tractor was intercepted by HC Dharambir PW-13 which was being driven by appellant Kaushal who was duly identified in TIP by PW-13. The robbed Nokia mobile phone was recovered from one Rahul, who deposed that the same was purchased from Anil for a sum of Rs.400/- and the same was identified by Bhim Singh during recovery and seizure. Further, the weapons of offence i.e. knife (Kirpan) and screw drivers were recovered from the residences of Anil and Mehtab respectively. The post mortem report (Ex.PW-10/A) opined that the fatal injuries could have been caused by screw driver or a similar instrument. Auto/TSR used in the commission of offence was recovered from Pradeep. Further, all the recoveries made were duly witnessed by PW-4, who is an independent witness and has no previous connection or enmity with the appellants.

10. It was further submitted by Ld. APP for the State that commission of offences can be proved beyond reasonable doubt as in this case by the testimony of the sole eyewitness and reliance was placed on the decisions

reported as AIR 1957 SC 614 Vadivelu Thevar v. State of Madras and (2003) 11 SCC 367 Sunil Kumar v. State (Govt. of NCT of Delhi). Reliance was placed on the decisions reported as (2010) 15 SCC 69 State of A.P. v. M.Sohan Babu, 2018 SCC OnLine Del 9969 Fayaz Ahmed v. State NCT of Delhi and (2014) 2 DLT (Cri) 907 (DB) Mukesh Singh v. State (NCT of Delhi) in support of the contention that the appellants committed the offences in furtherance of their common intention.

11. Having heard learned counsel for the parties at length and perusing the record, the following evidence led by the prosecution emerges on record.

12. Bhim Singh (PW-4) during his examination in chief stated that on 19th December 2010, at about 9 pm, he alongwith the deceased left their village after loading *dhan* in the tractor trolley bearing no. HR30G4498. The deceased was driving the tractor, and while coming back at about 3.30 am, when they reached Siraspur Gurudwara, near Barat Ghar, one auto came in front of their tractor, and four boys aged between 20-25 years got down from the auto. Two of the boys had knives in their hands and those boys abused them. Two boys caught Surjit Singh and two caught him, took out ₹2,500/- from his pocket, snatched his Nokia 1209 mobile phone and forcefully took out his clothes. When Surjit Singh tried to escape, one of the boys holding the complainant joined the other two boys to catch Surjit Singh. Thereafter, Surjit Singh was pushed into a *nala* and was stabbed with knives. The complainant, thereafter, tried to escape, and stationed himself at a distance of 100 meters from the spot. One of the four boys separated the trolley from the tractor, and after leaving the trolley drove the tractor towards Singhu Border, and the other three boys ran away in the auto. After the assailants left, he came back to the spot and asked the cars passing by for help, but no one

stopped. Thereafter, he made a call to no. 100 from the mobile of one truck driver who had parked his truck near the Barat Ghar. He identified Kaushal as the one who ran away with the tractor, and identified the two other appellants Anil and Mehtab as those who ran away in the auto. He also stated that Mehtab and Kaushal had stabbed Surjit Singh while Anil caught hold of him. He also identified Anil as the one who had snatched mobile phone and currency from him.

13. Rahul (PW-7) stated that appellant Anil was residing in his neighbourhood and had given him one Nokia Mobile of black and white color in the month of January, 2011 about 10-12 days prior to 26th January, 2011. Anil told him that he was in need of money and hence sold the said phone to him for Rs.400/-. Rahul stated that he used the mobile no. 9873653843 which was in the name of his father in the said mobile phone.

14. HC Dharambir (PW-13) deposed that on the intervening night of 19-20th December, 2010, at about 3.44 am he received a call from the control room that four persons inflicted knife injury and thereafter, ran towards Singhu Border alongwith tractor which they had robbed. He stated that he started from his position and parked his PCR van at the carriage way on the road going from Delhi to Sonapat. In the meanwhile, he saw that the said tractor was being driven by one person and when he tried to stop the tractor by placing his PCR van, the said person after slowing down the tractor, jumped towards the right side and tractor remained in the running position. He tried to chase the said person but due to darkness could not catch him and the gunman who was with him stopped the tractor after climbing on the same. He thereafter informed the control room at about 3.50 am that a tractor

with registration no. HC30G4498 of blue color and make New Holland 3600 was found. He identified Kaushal as the person who ran away leaving the tractor during judicial TIP (Ex.PW18/B) as also in the Court.

15. SI Bhupesh (PW-26) deposed that on the day of incident he was on emergency duty and he received the DD No.7B (Ex.PW-15/A) regarding the fact that 4 persons had inflicted injuries to one person near Gurudwara Baratghar and have robbed tractor and fled away. He informed about this to HC Phool Kumar who reached the spot on his own motorcycle and SI Bhupesh reached the spot on his motorcycle. He stated that Bhim Singh was present at the spot and also other police officials. One trolley was found at the spot and Bhim Singh had wrapped himself with a cloth and Bhim Singh told that the assailants had removed his worn clothes. He recorded the statement of Bhim Singh Ex.PW-4/A. He thereafter informed about the incident to senior officers and at about 4.45 am, he received information about death of Surjeet from the hospital and accordingly, he went to the hospital with HC Phool Kumar leaving Ct. Omprakash at the spot. He prepared the rukka and sent it to PS through HC Phool Kumar for registration of FIR. When he returned to the spot IO Insp. Dharamvir was present at the spot and on IO's direction, he went to the mortuary BJRM for post mortem and the body was identified by brother of deceased Surjit Singh. In his cross examination, he stated that street light was working at the place of incident and that it was a foggy night because of winters. He stated that the trolley was facing towards Narela. He stated that the clothes of Bhim Singh were lying at a distance of about 10 feet from where Bhim Singh was standing and that Bhim Singh wore clothes in his presence, and when he reached the spot, Bhim Singh had covered himself in a '*chaddar*'.

16. HC Phool Kumar (PW-23) stated that he was on emergency duty with SI Bhupesh on the intervening night of 19-20th December 2010, and that SI Bhupesh received an information recorded as DD No.7B upon which he along with SI Bhupesh reached the spot where they met Bhim Singh. He stated that IO interrogated him and recorded his statement. After enquiry it was revealed that Surjit was shifted to SRHC hospital by PCR. IO prepared the rukka and handed it over to him for getting the FIR registered. In his cross examination, he stated that he and SI Bhupesh reached the spot on their separate motorcycles. He stated that there was a street light at the spot and that the complainant had covered himself in a white shawl and was wearing an underwear.

17. IO Insp. Dharamvir Singh PW-27 stated that an information was received regarding robbery and murder at about 4 am. When he reached the spot, he found the complainant Bhim Singh in nude condition near the gurudwara and a trolley loaded with *dhan* covered with *tirpal* there. Crime team was called by him and thereafter, he prepared the site plan Ex.PW-23/DA. He seized the blood stained voter ID and driving licence of deceased Surjit vide Ex.PW27/B. He received a message on the wireless that a tractor was stopped by PCR near Singhu Border, and on reaching there, he found one blue colour New Holland-3600 parked there. The PCR official informed him that the driver of the truck ran away due to darkness. He seized the tractor and went to Harish Chandra Hospital where he got to know that the body of the deceased was shifted to Mortuary at BJRM Hospital. The dead body was identified by Bhim Singh PW-4 and Jaswant Singh. He collected the IMEI no. of the mobile phone used by Surjit and obtained CDR of the said IMEI no. and found that one SIM no. 9XXX653834 was being used on

the said IMEI no. and which was found to be used by one Rahul r/o Panchal Vihar, Karawal Nagar. Rahul was interrogated who informed them, that one Anil, his neighbour, had sold the said handset (Ex.PW-4/E) to him for Rs.400/-, and Bhim Singh who was accompanying him, identified the handset. Thereafter, on 26th January, 2011, upon the identification by Rahul, Anil was overpowered. Anil was later identified by Bhim Singh also. Anil was arrested and he produced one Kripan without handle and cover of Kripan which was taken into possession (Ex.PW-4/F). Thereafter, Anil led him to Bhajanpura Bus Stand where TSR no. DL1R2588 was recovered and Anil disclosed that the same belonged to his brother Pradeep. At that time, IO noted that Pradeep, 'A', Mehtab and Kaushal were sitting in the TSR, and he arrested all of them. Pradeep got recovered one stepney and battery (Ex.PW-4/V). Mehtab got recovered one screw driver of yellow colour mentioning VENUS from his house. Kaushal led the police team to Singhu Border and pointed the place where he left the tractor and ran away on the day of incident.

18. L. Babyto Devi, Asstt. Director (Biology), FSL PW-33 deposed that he prepared the detailed FSL Report Ex.PW27/I & J. As per report Ex.PW27/I, no blood was detected on the knife and blood was detected on the screw driver and as per the serology report there was "no reaction" on the blood detected on the screwdriver. As per Ex.PW27/J, blood was detected on the voter ID and driving licence, which was of human origin of blood group B.

19. In his statement recorded under Section 313 Cr.P.C., appellant Pradeep admitted that the TSR in question belonged to him but he was falsely implicated in this case. He stated that PW-24 falsely identified him at

the instance of IO. He further stated that nothing was recovered from him, and the recovery, if any, were planted on him. He stated that he was acquitted in another case filed against him.

20. Appellant Anil in his statement recorded under section 313 CrPC stated that PW-4 identified him at the instance of IO and denied having made any disclosure statement. He stated that recovery, if any from him, was planted on him. He denied having given any phone to PW-7, and stated that he was falsely implicated in the present case.

21. Appellant Kaushal in his statement recorded under Section 313 CrPC stated that PW-4 deposed falsely and that the appellant was not present at the spot. He stated that he was called from his house to the police station and was falsely implicated in the case. He also stated that the witness PW-13 was shown his photograph in the police station itself, and therefore he was identified in the TIP proceedings

22. Appellant Mehtab in his statement recorded under Section 313 CrPC stated that the police officials lifted him from his house at Pehelwan ka Wera, Zhande wali building, Second Pushta, Usmanpur, Delhi on 26th January, 2011 at about 4.30 am and he was falsely implicated in the case.

23. Appellants Anil, Kaushal and Mehtab have been convicted for offences punishable under Section 302/34 IPC, 120-B IPC and Section 392/394/397 read with Section 120-B IPC. Appellant Anil has further been convicted for offence punishable under Section 414 IPC.

24. Evidence in relation to Section 302/34 IPC:

(i) From the testimony of injured complainant Bhim Singh it is evident that Anil, Kaushal and Mehtab along with a juvenile came in an auto, stopped their tractor trolley and brought down Surjit Singh and Bhim Singh

from the trolley. Bhim Singh has identified Mehtab and Kaushal as the assailants who stabbed Surjit Singh while Anil caught hold of him. Though, in his testimony he stated that two boys had knives in their hands, however from the weapon of offences recovered and the medical evidence it is evident that one was a knife and the other was a screw driver.

(ii) The post mortem report clearly notes 8 injuries on the deceased out of which injury No.(i) to (vii) could be caused by the screw driver like weapon and injury No.(viii) could be caused by blunt object. The cause of death was opined to be shock consequent to excessive bleeding due to injury No. (v) which was a penetrating stab wound, front of neck just below the thyroid, cutting the skin, subcutaneous tissues, and rupturing the thyroid vessels and underlying tissues. The said injury was sufficient to cause death in the ordinary course of nature. It is thus established that Anil, Kaushal and Mehtab shared the common intention to cause murder of Surjit Singh.

(iii) The challenge to the testimony of Bhim Singh is laid on the ground that he is an unreliable witness and though he stated that four assailants were carrying two knives it turned out that one was a screw driver and the other weapon recovered was a knife. It may be noted that Bhim Singh was seeing from a distance of 100 meters where the deceased was being stabbed and as per the site plan there was a Gurudwara nearby indicating that there was sufficient light and thus even if he was not able to see exactly which weapon was being used he was in the visible distance to see that Surjit was being held by Anil and stabbed by Kaushal and Mehtab. This Court finds no force in the objection raised to the testimony of Bhim Singh and finds him to be a cogent and reliable witness, testing his evidence on the anvil as laid down by the Hon'ble Supreme Court in the decision in CrI. A. No.739 of 2017

decided on 14th July, 2022 titled as Shahaja @ Shahajan Ismail Mohd. Shaikh Vs. State of Maharashtra wherein it was held :

“28. To put it simply, in assessing the value of the evidence of the eyewitnesses, two principal considerations are whether, in the circumstances of the case, it is possible to believe their presence at the scene of occurrence or in such situations as would make it possible for them to witness the facts deposed to by them and secondly, whether there is anything inherently improbable or unreliable in their evidence. In respect of both these considerations, the circumstances either elicited from those witnesses themselves or established by other evidence tending to improbabilise their presence or to discredit the veracity of their statements, will have a bearing upon the value which a Court would attach to their evidence. Although in cases where the plea of the accused is a mere denial, yet the evidence of the prosecution witnesses has to be examined on its own merits, where the accused raise a definite plea or puts forward a positive case which is inconsistent with that of the prosecution, the nature of such plea or case and the probabilities in respect of it will also have to be taken into account while assessing the value of the prosecution evidence.

29. There is nothing palpable or glaring in the evidence of the two eye-witnesses on the basis of which we can take the view that they are not true or reliable eye-witnesses. Few contradictions in the form of omissions here or there is not sufficient to discard the entire evidence of the eye-witnesses.

30. In the aforesaid context, we may refer to a decision of this Court in the case of State of U.P. v. Anil Singh, AIR 1988 SC 1998, wherein in para 15, it is observed thus :

“15. It is also our experience that invariably the witnesses add embroidery to prosecution story, perhaps for the fear of being disbelieved. But that is no ground to throw the case overboard, if true, in the main. If there is a ring of truth in the main, the case should not

be rejected. It is the duty of the court to cull out the nuggets of truth from the evidence unless there is reason to believe that the inconsistencies or falsehood are so glaring as utterly to destroy confidence in the witnesses. It is necessary to remember that a Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. One is as important as the other. Both are public duties which the Judge has to perform.”

(iv) Testimony of Bhim Singh is cogent and convincing particularly in view of the fact that he was travelling with Surjit Singh and was assaulted by the appellants and the juvenile, his Nokia phone was robbed besides the tractor and it is on the information of Bhim Singh about the number of tractor that the same was immediately intercepted at Singhu border and that when investigating officer reached the spot he saw Bhim Singh in a nude condition near the Gurudwara and the trolley laden with grain covered with *tripal* was found there and deceased Surjit Singh by then had been shifted to SRHC Hospital. Surjit Singh's blood-stained voter ID card and driving license were found at the spot and seized vide memo Ex.27/B. Thus from the testimony of Bhim Singh whose presence at the spot is fully established, the prosecution has proved beyond reasonable doubt the offence punishable under Section 302/34 IPC having been committed by Anil, Kaushal and Mehtab.

25. Conviction for offences under Section 392/394/397 r/w Section 120B IPC qua Anil, Mehtab and Kaushal:

(i) Section 397 IPC reads as under:

“397. Robbery, or dacoity, with attempt to cause death or grievous hurt.—If, at the time of committing robbery or

dacoity, the offender uses any deadly weapon, or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person, the imprisonment with which such offender shall be punished shall not be less than seven years.”

(ii) In the decision reported as (1975) 1 SCC 797 *Phool Kumar Vs. Delhi Administration* Supreme Court clearly laid down that Section 397 IPC cannot be used with the aid of Section 34 or 120B IPC and can be invoked only against the accused who uses the deadly weapon. It was held:

“5. Section 392 of the Penal Code provides:

“Whoever commits robbery shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine; and, if the robbery be committed on the highway between sunset and sunrise, the imprisonment may be extended to fourteen years.”

The sentence of imprisonment to be awarded under Section 392 cannot be less than seven years if at the time of committing robbery the offender uses any deadly weapon or causes grievous hurt to any person or attempts to cause death or grievous hurt to any person: vide Section 397. A difficulty arose in several High Courts as to the meaning of the word “uses” in Section 397. The term “offender” in that section, as rightly held by several High Courts, is confined to the offender who uses any deadly weapon. The use of a deadly weapon by one offender at the time of committing robbery cannot attract Section 397 for the imposition of the minimum punishment on another offender who had not used any deadly weapon. In that view of the matter use of the gun by one of the culprits whether he was accused Ram Kumar or somebody else, (surely one was there who had fired three shots) could not be and has not been the basis of sentencing the appellant with the aid of Section 397. So far as he is concerned he is said to be armed with a knife which is also a

deadly weapon. To be more precise from the evidence of PW 16 “Phool Kumar had a knife in his hand”. He was therefore carrying a deadly weapon open to the view of the victims sufficient to frighten or terrorize them. Any other overt act, such as, brandishing of the knife or causing of grievous hurt with it was not necessary to bring the offender within the ambit of Section 397 of the Penal Code.”

(iii) As per the testimony of Bhim Singh, the sole eye-witness and complainant, when the three appellants and the juvenile alighted from the auto-rickshaw two of them had knives in their hands. Thus, the use of weapon of offence out of which one was knife and the other was a screw driver which would also fall in the definition of ‘deadly’ weapon as the said screw driver resulted in fatal injuries, can only be attributed to Kaushal and Mehtab. Consequently, the conviction of Anil for offence punishable under Section 397 IPC read with Section 120-B IPC is set aside. However, conviction of Kaushal and Mehtab is modified to one for offence punishable under Section 397 IPC simplicitor.

(iv) As regards offences punishable under Sections 392/394 read with 120-B IPC, it is evident that the three appellants along with juvenile intercepted Bhim Singh and Surjit Singh who were on the tractor trolley with a prior meeting of mind to commit the offence of robbery at the highway being armed with deadly weapons and in the process also caused the death of Surjit Singh who resisted. Thus the offences punishable under Sections 392/394 read with 120B/34 IPC stand proved beyond reasonable doubt against appellants Anil, Mehtab and Kaushal.

26. Role of Pradeep:

Pradeep has been convicted with the aid of 120-B IPC. The only evidence against him is that auto used by Anil, Kaushal and Mehtab and the

juvenile belonged to Pradeep, who was the brother of Anil. Pradeep was not present at the spot nor used any weapon of offence. Thus, as held in Phool Kumar (supra), he cannot be convicted for offence punishable under Section 397 IPC with the aid of Section 120-B IPC. Hence, his conviction for offence punishable under Section 397 IPC read with Section 120-B IPC is set aside. Further, on the basis of the theory of agency for invoking conspiracy, the only foundational fact laid down is the knowledge attributable to Pradeep that his autorickshaw is being taken at night and thus can be used in the commission of robbery. However, in the absence of any other fact being proved, commission of an offence of robbery coupled with causing hurt/grievous hurt or death cannot be attributed to Pradeep. Hence, this Court deems it fit to acquit Pradeep for the charge of offence punishable under Sections 394 r/w 120-B IPC as well, maintaining the conviction for offence punishable under Section 392/120B IPC.

27. Evidence under Section 414 IPC:

Prosecution has established that the mobile phone robbed from the complainant was sold by Anil to Rahul who had come in the witness box and deposed as PW-7. According to Rahul he had purchased the mobile phone from Anil as he needed money. Objection to tracing out the robbed mobile phone to Rahul is assailed on the ground that the same could not have been traced as the complainant did not remember the IMEI number. This contention of the learned counsel fails to consider that once the mobile phone number is available, the IMEI number of the handset can be traced from the call detail records. Thus, commission of the offence punishable under Section 414 IPC by Anil is also proved beyond reasonable doubt.

28. In view of the discussion aforesaid, the conviction of the appellants Anil, Mehtab and Kaushal for offences punishable under Section 302 read with 34 IPC and 392/394/120-B/34 IPC as also for offence punishable under Section 397 IPC of Mehtab and Kaushal and 414 IPC of Anil are maintained as also their sentences for the said offences. Further the conviction of Pradeep is maintained only for offence punishable under Section 392 read with 120B IPC. Appellant Pradeep has undergone sentence of imprisonment for a period of nearly 4 years 4 months. He is thus sentenced to the period undergone for offence punishable under Section 392 read with 120B IPC.

29. Consequently, the appeals i.e. CRL.As. 114/2021, 130/2021 and 131/2021 are dismissed whereas CRL.A. 64/2021 is allowed.

30. Appellant Pradeep be released forthwith if not required in any other case.

31. Copy of the judgment be uploaded on the website and be also sent to the Superintendent Tihar Jail for intimation to the appellants and updation of record.

(MUKTA GUPTA)
JUDGE

(ANISH DAYAL)
JUDGE

OCTOBER 31, 2022/ga