IN THE HIGH COURT OF DELHI AT NEW DELHI

DEATH SENTENCE REF. No. 5 of 2013

Reserved on: July 4, 2014
Decision on: September 17, 2014

STATE ..... Petitioner
Through: Mr. Lovkesh Sawhney, APP with Mr. D.K. Pandey, Advocate.

versus

SURENDER @ SONU PUNJABI & ORS. ..... Respondent
Through: Mr. Yogesh Swaroop with Mr. C.P. Malik, Mr. B.K. Roy and Mr. Abdul Gaffar, Advocates.

AND
CRL. APPEAL No. 1219 of 2013

SUNIL AND ANOTHER ..... Appellant
Through: Mr. Yogesh Swaroop with Mr. C.P. Malik, Mr. B.K. Roy and Mr. Abdul Gaffar, Advocates.

versus

STATE (GOVT. OF NCT OF DELHI) ..... Respondent
Through: Mr. Lovkesh Sawhney, APP with Mr. D.K. Pandey, Advocate.

AND
CRL. APPEAL No. 1362 of 2013 & CRL. M.B. No. 2161/2013

SURESH @ PHULLU ..... Appellant
Through: Mr. Yudhishtar Kahol, Mr. Manjeet Godara, Mr. Kunal Kahol and Mr. Naresh Yadav, Advocates.

versus

STATE ..... Respondent
Through: Mr. Lovkesh Sawhney, APP with Mr.

D.K. Pandey, Advocate.

AND

CRL. APPEAL No. 1463 of 2013 & CRL. M.B. No. 2283/2013

SURENDER @ SONU PUNJABI ..... Appellant
Through: Mr. K. Singhal, Advocate.

versus

STATE ..... Respondent
Through: Mr. Lovkesh Sawhney, APP with Mr. D.K. Pandey, Advocate.

AND

CRL. APPEAL No. 1464 of 2013 & CRL. M.B. 2285/2013

RAJ KUMAR @ DANNY ..... Appellant
Through: Mr. K. Singhal, Advocate.

versus

STATE ..... Respondent
Through: Mr. Lovkesh Sawhney, APP with Mr. D.K. Pandey, Advocate.

AND

CRL. APPEAL No. 345 of 2014 & CRL. M.B. No. 613/2014

SANJAY ..... Appellant
Through: Mr. M.L. Yadav, Advocate.

versus

STATE ..... Respondent
Through: Mr. Lovkesh Sawhney, APP with Mr. D.K. Pandey, Advocates.

CORAM:
HON'BLE DR. JUSTICE S. MURALIDHAR
HON'BLE MS. JUSTICE MUKTA GUPTA

JUDGMENT
17.09.2014

MUKTA GUPTA, J.

1. Death Sentence Reference 5/2013 has been sent by the learned Additional Sessions Judge for confirmation of the death sentence awarded to Sunil and Sudhir. By Crl. Appeal No. 1219/2013 Appellants Sunil and Sudhir have challenged the judgment of conviction dated 31st July, 2013 convicting them for offence punishable under Sections 302/307/34 IPC and the order on sentence dated 27th August, 2013 awarding them sentence of death for offence under Sections 302/34 IPC. The appeal also challenges the conviction and sentence awarded to Sudhir for offences under Sections 25 and 27 Arms Act. By Crl. Appeal Nos. 1362/2013, 1463/2013, 1464/2013 and 345/2014 the Appellants Suresh, Surender, Raj Kumar and Sanjay have challenged the impugned judgment convicting them for offence punishable under Sections 302/307/34 IPC and sentence dated 27th August, 2013 directing them to undergo imprisonment for life.

2. Learned APP for the State has taken us through the evidence on record. The case of the prosecution unfolds from the statement of PW-3 Neeru, mother of the deceased Ex. PW3/1 on the basis of which FIR was registered. Neeru has stated that she had three daughters and one son. On 20th July, 2009 at 11.30 PM she and her daughter were standing outside their house when Sunil named goon and his younger brother Sudhir, who lived in the same locality, came there and created nuisance. They started passing lewd remarks and obscene gestures towards her daughter 'N'. She and her son Subhash came out and objected to their wrong doing. Her son told them to

get away from in front of their house. Sunil and his brother while hurling abuses to them said that they would teach them a lesson shortly. About twenty minutes later, Sunil, Sudhir, Rajkumar @ Danny, Suresh@Phullu, Surender @ Sonu Punjabi came there. Sunil was carrying a baseball bat in his hand, Sudhir a knife, Sonu Punjabi iron rod and Phullu and Danny were having empty bottles of liquor in their hands. They started challenging her son Subhash. On seeing them her son ran away towards the street. They all ran after him saying "this bastard must be killed, he has challenged our hooliganism." They caught hold of her son in the street of Shiv Mandir. Sunil attacked her son with baseball bat on his head, Sonu Punjabi with iron rod and Phullu and Danny with empty bottles of liquor. Her son became unconscious and fell down. She and her daughter followed them while crying and shouting for help. Hearing their screams her nephew Naresh and neighbour Samir @ Kale followed them in order to intervene. The assailants also caught hold of her and her daughter. Sudhir stabbed Naresh with the knife he had been carrying and Sunil, Sonu Punjabi, Danny and Phullu also inflicted injuries on them. The empty bottles of liquor which Danny and Phullu were carrying in their hands were broken and their glass pieces got scattered in the street. In the scuffle Sunil fell on the glass pieces due to which he also sustained injuries. Thereafter Sunil and his accomplices ran from the spot leaving behind the baseball bat and iron rod etc. Sunil and his accomplices caused fatal injuries to her son while attacking them murderously with the common intention. The alleged incident took place around 12.00 in the night and the *rukka* was sent for the registration of the FIR at 2.15 AM on the intervening night of 21st July, 2009 and 22nd July, 2009.

3. Learned APP contends that the eye witnesses are the natural witnesses and despite there being social pressure, they have deposed in the court. He further states that the two incidents took place in succession and form integral part of the chain. The place of occurrence starts from the house of the deceased, Neeru and PW-27 'N', sister of the deceased and ends at the Mandir. The witnesses have identified the spot as the one in front of Shiv Mandir where the deceased died. The seizures have been also effected from the said spot. PW-28 Inspector Yashpal Singh has admitted that PW-19 ASI Rawal Singh informed him that Naresh, Sameer @ Kale and Sunil were admitted in the hospital however he could not find Sunil there as he was shifted to Safdarjung Hospital. The plea of alibi taken by the defence was required to be proved by them however the same has not been proved. In the statement under Section 313 Cr PC, Sunil has admitted his presence at Mandir in the night. There is no requirement that in the brief facts, names of the assailants should be mentioned. The prosecution by the testimony of Neeru and 'N' and other scientific evidence has proved beyond reasonable doubt that the appellants committed the offence punishable under Sections 302/307/34 IPC. Thus the appeals be dismissed and the sentence of death of Sunil and Sudhir be confirmed. *Reliance is placed on Pedda Narayan and others vs. State of Andhra Pradesh, 1975 (4) SCC 153; Brahm Swaroop and Anr. vs. State of U.P. 2011 (6) SCC 288* and *C. Muniappan and Ors. vs. State of Tamil Nadu, 2010 (9) SCC 567.*

4. Learned counsel for Sunil and Sudhir contends that a perusal of the PCR entries and the place of occurrence show that there were two distinct incidents. As per the first PCR call, the incident was allegedly at the house of the Complainant whereas the son of the Complainant died in front of Shiv

Mandir. The gap between the two incidents shows that they were two distinct incidents and material facts have been concealed by the prosecution. Though it is the case of the prosecution that the deceased was given knife blows however, as per the postmortem report and the MLC there is no injury by knife on the deceased. Hence, the eye witnesses are planted witnesses. Neeru and 'N' reached the hospital later and thus they were not the eye witnesses. Further the factum of Sunil being admitted in the hospital was sought to be concealed by the prosecution. The Investigating Officer PW-28 Inspector Yashpal Singh has deposed falsely when he stated that he did not know as to where Sunil had gone. There is no explanation to the injuries on Sunil. From the MLC, it is clear that the injuries to Sunil were from knife. The finding of the learned Trial Court that Sunil got injured due to the fall on the glass pieces is unfounded as no blood stains were found on the glass pieces recovered. Though Sunil was fit for statement however, his statement was not recorded by the investigating officer. The plea of alibi of Sunil has not been considered by the learned Trial Court. The witnesses stated that all the accused ran away after the incident however, as per the MLC Sunil was admitted by ASI Rawal Singh in the hospital. Hence the version of the eye witnesses is incorrect. From the site plan and the seizure memo it is evident that four baseball bats were at the spot. This is contrary to the version of the eye witnesses. There are contradictions in the testimony of police witnesses. PW-21 Constable Rupesh has stated that the knife was blood stained however, Inspector Yashpal Singh stated that the knife was not blood stained. Though it is alleged that there was recovery at the instance of Sudhir however, his disclosure statement was recorded later on.

5. It is further contended that ASI Rawal Singh has not supported the

prosecution case and has even stated that the Complainant did not inform that her daughter was abused. Neeru admitted having visited the jail for meeting the Appellants. It is thus evident that Neeru was trying to extort money from the appellants. 'N' does not allege that there was any threat from the accused but she states that she was under pressure from her mother and PW-23 Naresh. 'N' is not new to the Court environment as she has appeared before the Court earlier. The testimony of 'N' cannot be looked into as the entire evidence has been elicited from her in the cross-examination by the learned APP without declaring her hostile. Even under Section 154 Indian Evidence Act only those questions can be put as leading questions in cross-examination which questions can be put by the opposite party. The findings of the doctor who conducted post mortem with regard to cause of death are disjunctive in nature. There is no finding that the injuries were either simple or grievous, or dangerous to cause death. There is no opinion that the injuries caused were sufficient to cause death in the ordinary course of nature. The finding of the learned Trial Court based on the alleged testimonies of the witnesses as to which accused hit by which weapon is incorrect as from a distance in a melee, no eye witness can state which injury is caused by whom and by which weapon. PW-7 Dr. Manoj Dhingra in his cross-examination has admitted that cerebral damage may be caused by dashing of head against a hard surface or a wall or any standing hard object. As per the eye witnesses all the accused were armed with weapons and had beaten the deceased however, there were no corresponding injuries on the body of the deceased. The entries in the malkhana register have not been proved in accordance with law. Even if the entire evidence of the prosecution is believed, the present is at best a case of sudden fight and thus Section 302 IPC is not attracted. The manner of death, the nature of injuries and who

caused the injuries has not been proved. The Appellants are entitled to be acquitted. In the alternative, even if this Court comes to the conclusion that the offence of murder has taken place, the sentence of death be not confirmed. Reliance is placed on *Purshottam and another vs. State of Madhya Pradesh, 1980 (Suppl) SCC 409; Sarwan Singh and others vs. State of Punjab, 1978 (4) SCC 111; Daulat vs. State, ILR 2009 (4) Delhi 101; Bunnilal Chaudhary v. State of Bihar; 2006 (7) SCC 245; Idrish Bhai Daudbhai v.State of Gujarat; JT 2005 (2) SC 411, Tulsiram and Ors. v. State of M.P. JT 2008 (6) SC 537*.

6. Learned counsel for Sanjay while adopting the arguments of learned counsel for Sunil and Sudhir further submits that he has not been named in the FIR. The witness implicated the Appellant subsequently and stated that she had forgotten the name of the Sanjay due to fear, however the FIR is a clear document with no confusion therein. The Appellant had examined defence witness who stated that Sanjay was sleeping in his house and was taken away by the police. However, this aspect has not been considered by the learned Trial Court. The Appellant has been falsely implicated and thus be acquitted.

7. Learned counsel for Suresh @ Phullu while adopting the arguments of learned counsel for Sunil and Sudhir further submits that manipulation is writ large in the prosecution evidence from the very beginning. Though Neeru stated that she made a PCR call however, as per the PCR call the informant is Pravesh Kumar, her husband. Thus Neeru was not present at the time of the incident rather her husband was present. In cross-examination Neeru admits that though she called from the mobile of her nephew but police recorded the

name of her husband. Recording of the FIR was deliberately delayed. Local police reached at the spot around 12.35 hours in the night however, FIR was registered only at around 2.30 a.m. The version of Neeru and 'N' is highly improbable as in a melee no person can see much less remember the weapon in the hand of each person and which blow was given by whom. The motorcycle alleged to be involved in the incident has been planted. It is the admitted case of the prosecution that the Appellant was residing near the house of the Complainant and hence there was no necessity of going on the motorcycle. 'N' had also appeared as a witness in another murder case. The Appellant has been falsely implicated and be acquitted.

8. Learned counsel for Surender @ Sonu Punjabi and Rajkumar @ Danny contends that the incident did not take place as projected. There is no common intention shared by the Appellants to either murder or commit culpable homicide not amounting to murder. Though the MLC of Neeru and 'N' were prepared after registration of the FIR however, still the FIR number has not been mentioned. Hence the FIR is ante timed. Though iron rod was recovered from the spot however, PW-1 Constable Ravi Malik from the Crime Team did not inform about it. The crime team took photographs of 6/28, West Friends Enclave where the alleged incident took place. It is not the case of the prosecution that any police officer was left behind to guard the place of incident, thus the scene of crime was tampered with. The FIR is a computer generated document and has not been proved in accordance with Section 65B of the Indian Evidence Act. PW-10 has not proved the *rukka*. The application for postmortem does not state as to when the dead body was received and when papers were received. It does not give the time of conducting the postmortem. The site plan does not show the presence of

Neeru and 'N'. As per the case of the prosecution when Surender @ Sonu Punjabi was arrested he was wearing his blood stained shirt and pant. This is highly unnatural. Though recoveries were made at different time, however, the seals were not given to independent witnesses. Inspector Yashpal Singh stated that he deposited the case properties with MHCM, however the case properties were deposited in three installments and he did not sign the Malkhana register. The version of PW-21 Constable Rupesh is contrary to that of Inspector Yash Pal Singh. The recoveries are doubtful. There is no seizure of the keys of the motorcycle. Further the motorcycle had no blood stains though as per the case of the prosecution, Sunil was taken on the motor cycle. Raj Kumar has been tried to be linked with the motorcycle of red colour from the spot. The motorcycle is not shown in the site plan. Moreover the Appellant resides in the house adjoining the place of occurrence. Thus motorcycle was naturally to be there. Reliance is placed on *Ram Prasad and others vs. State of U.P., 1976 (1) SCC 406. Salamat Ali vs. State, 2010 (174) DLT 558, Ravinder Singh vs. State NCT of Delhi, 2013 (197) DLT 99 (DB)*.

9. Heard learned counsel for the parties. Complainant Neeru has deposed that on 20th July, 2009 at about 11.30 PM she along with her daughter was standing outside their house and at that time Sudhir and Sunil, both real brothers were passing through the Gali. While passing, they stopped for a while in front of her house, started eve teasing her daughter and also made indecent gestures. She tried to make Sunil understand not to do the same. In the meantime, her son Subhash came there from inside the house, who also asked Sunil to refrain from the said act on which he uttered that they had challenged his ruffianship (Badmashi). After uttering abuses both Sunil and Sudhir left the place and Neeru and her family went inside the house. After

20-25 minutes, accused Sudhir, Sunil, Sanjay, Sonu Punjabi, Phullu and Danny again came there. Sudhir was having a knife in his hand, Sunil was having a base ball bat, Sonu Punjabi was having iron rod, Phullu and Danny were having empty liquor bottles and Sanjay was having bat of baseball. They called her son and challenged him. On this, being frightened her son ran away towards Shiv Mandir in gali. All the accused chased him and started beating her son Subhash with the said weapons due to which he became unconscious. She, her daughter, one Samir and her nephew Naresh after raising alarm rushed towards the said spot. Sudhir gave a knife blow to Naresh. She, her daughter and Samir also sustained injuries during intervention. Her neighbours took Subhash, Naresh and Samir to Sanjay Gandhi Hospital where her son was declared brought dead. She called the police from the mobile of her nephew but by mistake the police recorded the name of her husband. The police reached the spot and recorded her statement first in the hospital Ex.PW3/A which bears her signature at point A and then again at the spot. From the spot, the police lifted two bats of baseball, one iron rod and broken pieces of glass bottles. One bat of baseball was having black tape on it and on the other something was written in red colour. These articles were seized, kept in *Pullanda* and sealed. Site plan was prepared. In the incident one of the accused Sunil fell down on the broken pieces of glasses and sustained injuries. The accused on the said date came on two motorcycles out of which one disappeared from the spot and the other of red colour was seized by the Police. This testimony of Neeru was recorded on 20th May, 2010.

10. Since the case property was not available, further examination-in-chief of Neeru was deferred and on 7th March, 2011 when she was examined again,

she did not support the prosecution case. Though she identified the case property, however, she stated that she did not remember the date of incident. She further stated that the accused were not present at the spot and she did not know who caused injuries to her son, to her and her daughter. Thus, the prosecution sought permission to declare the witness hostile. On a Court question as to which of her depositions whether of 20th May, 2010 or 7th March, 2011 was correct, this witness stated that her deposition made on 20th May, 2010 was the correct version. This witness further stated that the accused persons present in Court killed her son in the manner deposed by her on 20th May, 2010, however, she had three daughters and she was residing with her husband and three daughters in the neighborhood of the accused. Though there was no pressure on her mind, she wanted the accused to be set free. This witness also admitted that she had gone to meet the accused in jail. She further stated that she met one person Shakir in the Central Jail where Appellants were also present.

11. Learned counsels for the Appellants have sought to assail the testimony of this witness on the ground that this witness had in fact gone to demand the money from the Appellants in the jail and was thus vacillating in her statements. Neeru admitted that she had gone to meet one Suresh on 28th April, 2010. She denied the suggestion that she had gone to bargain with the accused for extracting money for the acquittal. It may be noted that Neeru visited Suresh in Jail on 28th April, 2010 however, despite the said meeting she stood by her version in the FIR on 20th May, 2010 when she deposed against the Appellants. It is only in the deposition dated 7th March, 2011 that Neeru stated that the accused be set free. Even if this witness has subsequently prayed for acquittal of the accused for the reason her son was

dead and she had three grown up daughters, her testimony cannot be discarded on the ground that she went to meet Suresh in jail on 28th April, 2010. From the testimony of 'N' the pressure on the family of the deceased in favour of the appellants is evidence.

12. The two other eye witnesses who were injured as well PW-23 Naresh and PW-12 Mohd. Samir @ kale have turned hostile. As per the MLC Ex.PW-4/A of Mohd. Samir, he reached the hospital at 12.35 AM and the investigating officer's name mentioned in the MLC is ASI Rawal Singh of PS Sultanpuri. Ex.PW4/A shows two sharp incised wounds on Samir at the chin and left lumbar region. Similarly, Ex.PW-4/D MLC of Naresh also shows the name of investigating officer as Rawal Singh of PS Sultanpuri. Ex.PW4/D shows two sharp incised wounds on Naresh at the right hand and left side lower chest besides tenderness at the parietal region. Even though Naresh and Mohd. Samir have turned hostile, the fact that they were present at the spot, were injured in the incident and taken to the hospital is sufficient to corroborate the version of Neeru and 'N'.

13. 'N' the daughter of Neeru, when appeared as a witness before the Court on 23rd February, 2012, was highly perplexed and stated that she was stopped by the family members from coming and deposing in Court. She further had the apprehension that if she would speak the truth then legal action may be taken against the mother. This witness was pacified and counseled by the Court whereafter she stated that about 2½ or 3 years ago in the month of July, she along with her mother was standing outside her house. Sudhir and Sunil were going in front of gali of their house. They both started passing obscene gestures and commenting on her. Her mother objected to it and

asked them to go away from there. On hearing the noise of her mother, Subhash her brother who was inside the house came out and objected to the act of the accused on which they started arguing with him and went away saying that they will see him after sometime. After about 20 minutes, they both came along with many other boys namely Sonu Punjabi, Phullu, Sanjay and Danny. She identified all the accused persons in the Court. They called her brother out of the house. Her brother came out of the house and after seeing the accused persons armed with weapons he ran towards Shiv Mandir in the gali. They all apprehended her brother and started giving beatings with baseball bat, iron rod, glass bottles and knives. She stated that she cannot tell which of the accused was hitting with which weapon. On hearing the noise, her neighbor Samir and cousin Naresh came out who were also given beatings by the accused persons. Naresh and Samir sustained injuries in that quarrel. Even she was given beatings by accused Sudhir by iron rod. Her brother fell on the ground. She along with her mother went towards her brother who was almost dead. Thereafter, they went to hospital with her brother where her brother was declared brought dead by the doctor. She, her mother, Naresh and Samir were also medically examined at the hospital.

14. Though this witness has deposed about all the main contours of the prosecution case, however in her examination-in-chief she failed to give details as to which of the accused inflicted particular injury and by which weapon. Thus, learned APP sought permission to put leading questions to this witness as she had substantially deposed about the incident but she escaped details. This request was opposed by the defence counsels which request was thus rejected. However, learned APP was permitted to put questions by way of cross-examination in order to establish the facts

forgotten by this witness. It is this further evidence of the witness which has been challenged by the defence counsels. According to them this witness could not have been permitted to be cross-examined after denying the permission under Section 142 Indian Evidence Act. Further no leading questions could have been put to this witness under Section 154 Indian Evidence Act without the learned Trial Court declaring this witness as hostile. It is also stated by the learned defence counsel that only those questions could have been put to this witness by the learned APP in cross-examination which defence would have asked and defence would not have asked these details and hence the evidence adduced by this witness on cross-examination by the learned APP is illegal and cannot be taken into consideration by this Court.

15. The reliance of the learned counsel for the Appellants on *Koli Nana Bhana and Ors. Vs. State of Gujarat 1986 Crl.L.J. 571* which notes that the procedure followed by a Court permitting public prosecutor to put questions to witnesses which can be put in cross-examination without declaring hostile is illegal is misconceived as the decision fails to note the law laid down by Privy Council and Supreme Court in this regard. Way back in *Baikuntha Nath Chattoraj Vs. Prasannamoyi Debya & Anr. AIR 1922 Privy Council 409* on an application moved before the District Judge to declare the witness hostile and to allow the proponent to cross-examine him, it was held that this is a position for which provision is made by Section 154 of the Evidence Act, which says nothing as to declaring a witness hostile, but provides that the Court may in its discretion permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse

party. Following *AIR 1922 Privy Council 409* the Calcutta High Court in *Tulsi Ram Shah Vs. R.C. Pal Ltd. AIR 1953 Calcutta 160* held:

> "……A witness is not necessarily hostile if in speaking the truth as he knows and sees it, his testimony happens to go against the party calling him. There is no proposition in the law of evidence that a witness who is not partial or partisan in favour of the party calling him is on that ground alone to be treated as hostile. The Court always aspires to find if the witness desires to tell the truth. That aspiration is the yardstick which measures the appreciation of the evidence of a witness. It is with that object that the Court is given the discretion to permit the person who calls a witness to put any question to the witness which might be put to him in cross-examination. That provision is enacted in Section 154 of Evidence Act. Section 154 says nothing about declaring a witness hostile. It allows a party with the permission of the Court at its discretion to cross-examine his own witness in the same way as the adverse party. Ordinarily a party calling his witness is not allowed to ask him these questions but this ordinary rule is relaxed in Section 154, Evidence Act. The purpose of such relaxation can only be to find out if the witness is one of truth & can be relied on, because cross-examination is the most powerful & effective instrument for bringing out and testing truth. But that is far from saying that a witness is hostile whenever his testimony is such that it does not support the case of the party calling him. Such a view would seriously undermine the independence, integrity and dignity of a witness in a Court of law."

16. Later, in *Sat Paul Vs. Delhi Administration AIR 1976 SC 294* the Supreme Court noted the distinction between the English Statute and the Indian Evidence Act in this regard and held:

> "37. To steer clear of the controversy over the meaning of the terms "hostile" witness, "adverse" witness, "unfavourable" witness which had given rise to considerable difficulty and conflict of opinion in England, the authors of the Indian Evidence Act, 1872 seem to have advisedly avoided the use of

any of those terms so that, in India, the grant of permission to cross-examine his own witness by a party is not conditional on the witness being declared "adverse" or "hostile". Whether it be the grant of permission under Section 142 to put leading questions, or the leave under Section 154 to ask questions which might be put in cross-examination by the adverse party, the Indian Evidence Act leaves the matter entirely to the discretion of the court (see the observations of Sir Lawrence Jenkins in Baikuntha Nath v. Prasannamoyi), AIR 1922 PC 409. The discretion conferred by Section 154 on the court is unqualified and untrammeled, and is apart from any question of "hostility". It is to be liberally exercised whenever the court from the witnesse's demeanour, temper, attitude, bearing, or the tenor and tendency of his answers, or from a perusal of his previous inconsistent statement, or otherwise, thinks that the grant of such permission is expedient to extract the truth and to do justice. The grant of such permission does not amount to an adjudication by the court as to the veracity of the witness. Therefore, in the order granting such permission, it is preferable to avoid the use of such expressions, such as "declared hostile", "declared unfavourable", the significance of which is still not free from the historical cobwebs which, in their wake bring a misleading legacy of confusion, and conflict that had so long vexed the English Courts.

38. It is important to note that the English statute differs materially from the law contained in the Indian Evidence Act in regard to cross-examination and contradiction of his own witness by a party. Under the English Law, a party is not permitted to impeach the credit of his own witness by general evidence of his bad character, shady antecedents or previous conviction. In India, this can be done with the consent of the court under Section 155. Under the English Act of 1865, a party calling the witness, can "cross-examine" and contradict a witness in respect of his previous inconsistent statements with the leave of the court, only when the court considers the witness to be 'adverse.' As already noticed, no such condition has been laid down in Sections 154 and 155 of the Indian Act and the grant of such leave has been left completely to the discretion of the Court, the exercise of which is not fettered by or dependent

upon the "hostility" or "adverseness" of the witness. In this respect, the Indian Evidence Act is in advance of the English law. The Criminal Law Revision Committee of England in its 11th Report, made recently, has recommended the adoption of a modernised version of Section 3 of the Criminal Procedure Act. 1865, allowing contradiction of both unfavourable and hostile witnesses by other evidence without leave of the court. The Report is, however, still in favour of retention of the prohibition on a party's impeaching his own witness by evidence of bad character.

39. The danger of importing, without due discernment, the principles enunciated in ancient English decisions, for, interpreting and applying the Indian Evidence Act has been pointed out in several authoritative pronouncements. In Prafulla Kumar Sarkar v. Emperor AIR 1931 Cal 401, an eminent Chief Justice, Sir George Rankin cautioned, that "when we are invited to hark back to dicta delivered by English Judges, however, eminent, in the first half of the nineteenth century, it is necessary to be careful lest principles be introduced which the Indian Legislature did not see fit to enact". It was emphasised that these departures from English law "were taken either to be improvements in themselves or calculated to work better under Indian conditions".

40. Unmindful of this substantial difference between the English Law and the Indian Law, on the subject, the Calcutta High Court in some of its earlier decisions, interpreted and applied Section 154 with reference to the meaning of the term "adverse" in the English Statute as construed in some English decisions and enunciated the proposition that where a party calling a witness requests the court to declare him "hostile", and with the leave of the court cross-examines the witness, the latter's evidence should be excluded altogether in criminal cases. This view proceeds on the doctrine enunciated by Campbell C. J. in the English case, Faulkner v. Brine (1858) 1 F & F 254 that the object of cross-examination of his own witness by a party is to discredit the witness in toto and to get rid of his testimony altogether. Some of these decisions in which this view was taken are: Luchiram Motilal v. Radha Charan; (AIR 1922 Cal

267); Emperor v. Satyendra Kumar Dutt, AIR 1923 Cal 463; Surendra V. Ranee Dassi (AIR 1921 Cal 677); Khijiruddin v. Emperor AIR 1926 Cal 139 and Panchanan v. Emperor AIR 1930 Cal 276.

41. The fallacy underlying this view stems from the assumption that the only purpose of cross-examination of a witness is to discredit him; it ignores the hard truth that another equally important object of cross-examination is to elicit admissions of facts which would help build the case of the cross-examiner. When a party with the leave of the court, confronts his witness with his previous inconsistent statement, he does so in the hope that the witness might revert to what he had stated previously. If the departure from the prior statement is not deliberate but is due to faulty memory or a like cause, there is every possibility of the witness veering round to his former statement. Thus, showing faultiness of the memory in the case of such a witness would be another object of cross-examining and contradicting him by a party calling the witness. In short, the rule prohibiting a party to put questions in the manner of cross-examination or in a leading form to his own witness is relaxed not because the witness has already forfeited all right to credit but because from his antipathetic attitude or otherwise, the court feels that for doing justice, his evidence will be more fully given, the truth more effectively extricated and his credit more adequately tested by questions put in a more pointed, penetrating and searching way. (Emphasis supplied)"

17. A perusal of the examination-in-chief of 'N' clearly shows that she has deposed about the entire incident. She has deposed about the weapons, which the accused were carrying. She only failed to depose as to which of the injury was caused by which of the accused. Even ignoring the subsequent evidence adduced by learned APP by putting leading questions to this witness, the conviction of the appellants can be based on the rest of her testimony as the same is cogent and convincing. It is well settled that when large number of persons attack one person, it is difficult for any witness to

explain the role of each accused in inflicting of injuries individually and the weapon used. In *Kuria and another v. State of Rajasthan, AIR 2013 SC 1085* the Court held:–

> *"16. In light of the above principles, we may revert to the evidence in the present case. A large number of persons had attacked one person. These witnesses cannot be expected to explain the role in the inflicting of injuries by each one of them individually and the weapons used. Such conduct would be opposed to the normal conduct of a human being. The fear for his own life and anxiety to save the victim would be so high and bothersome to the witness that it will not only be unfair but also unfortunate to expect such a witness to speak with precision with regard to injuries inflicted on the body of the deceased and the role attributable to each of the accused individually. In the present case, the result of the blunt injuries is evident from the report of the post mortem (Exhibit P/11), the ribs of the deceased were broken and they had punctured the lungs. The pleural cavities were full of blood and his body was dragged causing injuries on his back. In these circumstances, some blood would but naturally ooze out of the body of the deceased and his clothes would be blood stained. The post mortem report (Exhibit P/11), the inquest report, the statements of PW2, PW3, PW4, PW7 and PW15 are in line with each other and there is no noticeable conflict between them. The injuries on the body of the deceased were so severe that they alone could be the cause of death and the statement of PW6 in relation to cause of death is definite and certain. Thus, we see no merit in this contention raised on behalf of the accused."*

18. Thus, the fact that 'N' being overtaken by events and so could not precisely tell which accused attacked her brother with which weapon or where, would not have any bearing on her otherwise credible testimony, which finds corroboration in material particulars. Moreover the deposition of 'N' was recorded after two years and eight months of the incident and hence the witness forgetting the minute details is obvious.

19. 'N' was also examined as SW-1 by the Court wherein she stated that Naresh her cousin and Samir her neighbour tried to save her brother in the incident and also received injuries but during trial they have been pressurized by the accused and thus both turned hostile. Her mother was also threatened by the accused persons not to depose true facts before the Court or else they would kill her nephew Naksh, 4 years son of deceased Subhash and her mother came under the influence of the accused persons. Her mother brought her to the Court on the issuance of warrant and insisted not to speak true facts before the Court due to the fear of accused persons. She reiterated that after the incident they have been receiving threats from the family of the accused. The Court also examined Inspector Ram Kishore as SW-2 who placed on record the details of involvement of other family members of Sunil and Sudhir, involvement of Surender and Sanjay. Though this evidence of threat is not being used as incriminating against the accused qua committing the offence, however this explains the reason of the witnesses Neeru and 'N' deposing in fear and Naresh and Samir turning hostile. Having lost the protective umbrella of the only son, with three daughters and a young child to be looked after explains the apprehension of Neeru and her coercing 'N' not to depose against the appellants. In *Mohan Lal & Anr. V. State of Punjab AIR 2013 SC 2408* the Supreme Court while commenting on the sorry state of affair with regard to lack of protection to the victim noted as under-

> "5. We have gone through their depositions and it is clear that in the earlier part of their evidence, both the witnesses had clearly implicated all these accused. The FIR could not be lodged immediately after the incident, as there was no one in the family to support their cause. Smt. Jaswant Kaur (PW-2) had to send a telegram to her husband and it is only after he reached their place, that FIR was lodged. The victim was examined on several dates within the period of two years and she had been consistent throughout, that rape had been committed upon her. However, her father died during the trial and it may be because of his

death that both the prosecutrix and her mother had resiled to a certain extent from the prosecution case. Naturally, when the protective shield of their family had withered away, the victim and her mother could have come under immense pressure from the Appellants. The trial Court itself has expressed its anguish as to how the accused had purposely delayed and dragged the examination of the prosecutrix and finally succeeded in their nefarious objective when the father of the prosecutrix died and the prosecutrix resiled on the last date of her cross-examination. The Appellants belonged to a well-to-do family, while the prosecutrix came from poorest state of the society. Thus, a sudden change in their attitude is understandable.

6. Legally, a witness has no obligation whatsoever unless they agree to testify. The only real moral (and legal) obligation is that if they agree to testify to what they witnessed, it must be the truth as they saw it.

But the community has a legal and moral responsibility to respond to criminal victimization in order to preserve order and protect the community. Victims and witnesses of crime are essential partners in this community effort. Without their participation and cooperation as a citizen, the criminal justice systems cannot serve the community.

7. A witness is a responsible citizen. It is his duty to support the case of the prosecution and should depose what he knows about the case. In the instant case, it is shocking that the mother of the prosecutrix had turned hostile and she repeatedly told the court that there had been some talks of compromise. In a case where an offence of this nature had been committed, we fail to understand as to how there can be a compromise between the parties. The conduct of the mother herself is reprehensible.

8. It is a settled legal proposition that statement of a hostile witness can also be examined to the extent that it supports the case of the prosecution. The trial court record reveals a very sorry state of affairs, inasmuch as no step had ever been taken by the prosecution or the Investigating Officer, to prevent the witnesses from turning hostile, as it is their solemn duty to ensure that the witnesses are examined in such a manner that their statement must be recorded, at the earliest, and they should be assured full protection.

9. There is nothing on record, not even a suggestion by the Appellants to the effect that the victim had any motive or previous enmity with the Appellants, to involve them in this case. Unfortunately, the trial court went against the spirit of law, while dealing with such a sensitive case of rape of a student by her teachers, by recording the statement of prosecutrix on five different dates. Thus, a reasonable inference can be drawn that defence had an opportunity to win her mother."

20. 'N' has stated that she was given beatings by Sudhir by iron rod when she went after her brother. This witness was medically examined and PW-4 Dr. Binay Kumar, proved her MLC Ex.PW4/B. As per the MLC, she suffered fresh injuries in the form of abrasions over left side of frontal region of scalp. Dr. Binay Kumar in cross examination also clarified that the injury on the person of 'N' could be caused by the iron pipe or a blunt object. The witness being an injured witness, her presence at the spot cannot be doubted. Further, the version of this witness is also corroborated from the PCR record. The PCR received the information at 23.56 hrs on 20th July, 2009 vide Ex. PW6/A. After the PCR reached on the spot it noted that 3 men have received knife injuries and the quarrel was on teasing a girl. This noting is made at 00.36 hrs. on 21st July 2009 and by that time four persons namely Mohd. Samir, Subhash, Naresh and Sunil had been sent to the hospital. A perusal of the MLC of Mohd. Samir Ex PW4/A shows sharp incised wound. Even MLC of Naresh Ex. PW4/D shows sharp incised wound. MLC of Sunil also shows incised wound vide ExPW28/D. Merely because post mortem report of Subhash shows that there was no incised wound, the same would not belie the version of the prosecution witnesses, who have stated that one of the accused was armed with knife as knife injuries have been received by two other witnesses i.e. Mohd. Samir and Naresh though they may have turned

hostile. However, this Court can look into their MLCs to find corroboration to the version of Neeru and 'N'. PW-7 Dr. Manoj Dhingra in his testimony has stated that injuries to Mohd. Samir, Naresh and Sunil were possible with broken glasses and the knife corroborating the version of the eye witnesses. The contention of defence is that Neeru is not a truthful witness as she stated that Sunil fell down on the broken pieces of glasses and sustained injuries, however the broken glass pieces were not blood stained. This contention is contrary to the evidence on record. Dr. Manoj Dhingra noticed the glass pieces to be blood stained. Even as per FSL report Ex.PX and Ex.PY the broken glass piece was stained with human blood.

21. In *Kuria (supra)* their Lordships further held that the position of law in cases of contradiction between the medical evidence and ocular evidence can be crystallized to the effect that though the ocular testimony of a witness has greater evidentiary value vis-à-vis medical evidence, when medical evidence makes the ocular testimony improbable, that becomes a relevant factor in the process of evaluation of evidence. However, where the medical evidence goes so far that it completely rules out all possibility of the ocular evidence being true, the ocular evidence may be disbelieved. In the instant case the medical evidence neither makes the ocular testimony improbable nor rules out all possibility of the ocular evidence being true, rather the medical evidence corroborates the version of Neeru and 'N'.

22. Learned counsel for Sunil has tried to urge that Sunil was not present at the spot and he received injuries in a different incident. The case of Sunil in his statement under Section 313 Cr PC is that he had gone to temple on the fateful night to meet Kanwarias where some unknown person attacked him

and gave him knife blows with which he suffered injuries to his different parts of body however no statement of Sunil was recorded by the police. Thus Sunil has taken a plea of alibi of not being present in the incident but involved in another incident. This was required to be proved by Sunil. No doubt Sunil could have proved the same either by leading evidence or from cross-examination of prosecution witnesses, however neither any complaint has been proved in this regard, nor any witness produced nor anything elicited in the cross-examination of prosecution witnesses on this count. Since this fact is in the special knowledge of Sunil as to how he received injuries, it was for him to explain the same and onus of a defence set up by an accused cannot be put on the prosecution. Sunil cannot escape by merely taking the plea that the investigating officer did not record his statement and thus on this lapse of the investigating officer he should be extended the benefit. As noted earlier, no complaint on this count has been filed either by Sunil or his family members. Despite Neeru having deposed that Sunil received injuries by fall on glass pieces she has not been cross-examined on this aspect. As a matter of fact, this witness has not even been cross-examined on behalf of Sunil. Thus this plea is clearly an afterthought.

23. Learned counsels for the Appellants have also assailed the prosecution case on the ground that the FIR was registered belatedly and thus there was sufficient time for manipulating the same. A perusal of Ex.PW6/A PCR form shows that the local Police reached the spot at 00.34 hrs by which time injured Mohd. Samir and Naresh had been taken to the hospital, who were examined in the hospital at 00.35 AM and 1.00 AM respectively. Further Subhash and Sunil were admitted at 00.45 hrs and 1.05 hrs. on 21st July, 2009 by ASI Rawal Singh. It is thus evident that ASI Rawal Singh immediately on

reaching the spot went to the hospital whereafter he recorded the statement of Neeru in the hospital and sent the same by Constable Bijender to the Police Station at about 2.15 AM. The time between reaching the hospital, recording of statement of Neeru and thereafter sending the same to the Police Station at 2.15 AM for recording of FIR cannot be said to be unreasonable time which could have given time to Neeru to have manipulated the facts. The genesis of the quarrel being on account of teasing a girl is even noted in the PCR report. Moreover PW-10 HC Sat Narain the duty officer deposed that on 21st July, 2009 he received the *rukka* at about 2.25 AM on the basis of which he registered the FIR. This witness has not been cross-examined and thus his testimony has gone unchallenged.

24. As per the seizure memo three baseball bats have been recovered, one baseball stick/bat with black coloured tape wrapped on it, one black colored baseball stick/bat 'RAPTOR' written on it by red color and the handle of the same being broken and a white coloured baseball bat/stick with the lower portion missing. From the photographs, learned counsel for the Appellants have sought to state that in fact there were four baseball bats however, none of the photographs show four baseball bats. Moreover this fact was required to be put to the witnesses, however the same has not been put to them. In *State of U.P. Vs. Nahar Singh*, *AIR 1998 SC 1328* the Supreme Court noted observation of Lord Herschell, L.C. in Browne v. Dunn. The report noted as under:-

> "14. The oft quoted observation of Lord Herschell, L.C. in Browne v. Dunn, (1893) 6 The Reports 67 clearly elucidates the principle underlying those provisions. It reads thus:

"I cannot help saying, that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which, it is suggested, indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness, you are bound, whilst he is in the box, to give an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but it is essential to fair play and fair dealing with witnesses."

This aspect was unfortunately missed by the High Court when it came to the conclusion that explanation for the delay is not at all convincing. This reason is, therefore, far from convincing."

25. Much of the debate of learned counsel for the appellants was centered towards the spot of incident. According to them, there were two spots of incident. Since PCR call was made from the house of the deceased and the Police also reached there, the same had no connection with the incident which took place at Shiv Mandir. This argument deserves to be rejected at the outset. The purpose of the PCR call is only to call the Police for immediate help. In case the complainant starts making detailed graphic statement of the events occurring, the very purpose of getting Police to act fast will be lost. As a matter of fact the law provides that even the FIR may not give a complete narration of the entire prosecution case as the purpose of FIR is only to set the criminal law into motion. Merely because phone call was made from the spot where the initial incident of eve-teasing took place

and culminated at Shiv Mandir where Subhash was attacked, the prosecution case cannot be thrown out by hypothetically assuming that there were two spots of incident and thus two separate incidents had taken place. It is not the case of Sunil that he suffered injuries in this incident and he has not proved the incident in which according to him he received injuries.

26. Learned counsels for the Appellants have also assailed the recoveries on the ground that though they were made at different times however, *pullandas* were all deposited together. Inspector Yashpal Singh who is the investigating officer of the case has also stated about the seizure memos, seizure of weapons of offence from the spot and the motorcycle. He has explained that after the spot inspection, he went to the mortuary, prepared the inquest papers, got the dead body identified and moved an application for conducting the post-mortem of Subhash. Thereafter, he came back with Constable K.N. Goud to the Police Station and deposited the exhibits with MHCM. With regard to motorcycle being recovered at the instance of Suresh @ Phullu on which Sunil was taken to the hospital, and the blood stained shirt of Surender @ Sonu Punjabi, he deposited the same with MHCM after coming back on the same day in the evening. No question was put to this witness that while in his custody the case property was tampered with or that he deliberately kept back the case property and deposited it later on. PW-14 HC Krishan Lal, the Mohrar Malkhana also appeared in the witness box and stated about the deposit of the seized articles vide serial No. 11970 and exhibited the copy of the Malkhana Register No. 19 vide Ex.PW-14/A. There is again no suggestion to this witness with regard to tampering of the articles.

27. DW-3 Om Prakash has appeared on behalf of Sanjay who deposed that

on 21st July, 2009 Sanjay was sleeping in his house and he was taken away by the Police officials at 4.00 AM. This witness does not clarify that at around 12.00 to 1.00 O'clock when the alleged incident took place, Sanjay was at home or not. Further, he admits that he made no complaints in this regard to either any authority. Sanjay also assails his conviction on the ground that he was not named in the FIR. No doubt Sanjay is not named in the FIR, however on the same day in the supplementary statement recorded under Section 161 Cr.PC Neeru and in the first statement of 'N' Sanjay is named. It is not unnatural that when there are a number of assailants and a near one has died the complainant being overcome by the events fails to narrate some of the facts. It is well settled that the purpose of registration of FIR is only to set the criminal law into motion.

28. As per PW-7 Dr. Manoj Dhingra, the deceased was brought dead to hospital at about 12.45 am on 21st July, 2009 and he conducted his postmortem and prepared the report vide Ex.PW7/A. He noted that the deceased received the following injuries:-

"EXTERNAL INJURIES:

1. Contusion, reddish 6 cm x 2.5 cm present on right side of the face, 2.5 cm in front of ear and 5.5 cm outer to outer angle of right eye with abrasion over the area 2 x 1 cm within the lower third of the contused area with a spread area of 1 cm x 0.5 cm within the abrasion and laceration 0.1 cm x 0.1 cm into subcutaneous tissue deep present at upper end of contused area. The contusion is obliquely placed on right side of face.

2. Contusion, reddish 6 cm x 2.5 cm on right side of the neck, 6 cm below right ear low with a semi circular abrasion in the middle of the contused area.

3. Abrasion 1 cm x 1 cm on back of the left elbow.

4. Abrasion 1 x 0.5 cm on middle back of left forearm, 10 cm above wrist joint.

HEAD:

Brain matter meninges – brain weight is 1500 gms, diffuse subarachnoid hemorrhage all over the brain.

OPINION:

Cause of death is cerebral damage consequent to blunt force impact to the head. All injuries are antemortem in nature, fresh in duration and caused by blunt object. Time since death is approximately 12 hours… "

29. Dr. Manoj Dhingra also stated that total inquest papers were 11 in number and he exhibited the same vide Ex.PW7/B-1 to Ex.PW8/B-8 which bear his signature at point A and Ex.PW4/E i.e. MLC of deceased Subhash which bear his signature at point B. This answers the contention of the learned counsel for the appellants that the application for postmortem did not state about documents sent to the doctor. The documents having been sent along with the application stand duly exhibited.

30. The contention of the learned counsels for the Appellant is that believing the prosecution case at best offence punishable under Section 304 IPC is made out, firstly because the postmortem doctor did not opine that the injuries were sufficient to cause death in the ordinary course of nature and secondly, the offence was committed in a sudden fight without any premeditation and thus the case falls under Exception 4 to Section 300 IPC.

31. As noted above, though the doctor has described the injuries and the result of the injuries also, however, no opinion was rendered that the injuries individually or collectively were sufficient to cause death in the ordinary course of nature was made. So the issue arises as to whether in the absence of opinion of the doctor on that count, the Appellants are entitled to be exonerated of the offence under Section 302 IPC or that opinion can be formed by the Court on the basis of material evidence available on record. Dealing with this aspect in *Narayanan Nair Raghavan Nair V. The State of Travancore AIR 1956 SC 99* while dealing with the question whether the case was of "Murder" or one under Section 304 IPC in a case where the doctor though noted that the injury was fatal, however, no opinion was rendered that the injury was sufficient to cause death in the ordinary course of nature and the Court on the basis of injuries and the medical evidence came to the conclusion that injuries were sufficient to cause death in the ordinary course of nature. The Court noted as under:-

> "9. This is fundamentally a question of fact. Modi's book does not establish that injuries to the diaphragm cannot be fatal: some are and some are not. The question is, therefore, reduced to one of fact in each case. Was the particular injury in question of the fatal or non-fatal type? Both Courts have relied on the doctor who says emphatically that the injury was fatal. We see no reason to differ from that and can find nothing to indicate negligence.
>
> 10. The dying declaration (Ex. K) states--
>
> "Regular and proper breathing is not possible for me"
>
> and the doctor explains that the power of controlling respiration is lost when the diaphragm is injured and there is a chance of collision between the organs of the chest and the abdomen. The 'post-mortem' reveals that that is just what happened, the stomach and the omentum had herniated together and the omentum protruded through the hole which the injury had made. The pleura and the diaphragm were both cut

and the injury had extended right up to the abdominal cavity. We accept the finding that the injury was sufficient to cause death in the ordinary course of nature."

32. In *Brij Bhukhan and Ors. Vs. The State of Uttar Pradesh* *AIR 1957 SC* 474 the Court noted that although the medical evidence does not say that any one of the injuries on the body of the deceased was sufficient to cause death in the ordinary course of nature, it is open to the court to look into the nature of injuries found on the body of the deceased and infer from them that the assailants intended to cause death of the deceased. It was held that even if none of the injuries by themselves was sufficient in the ordinary course of nature to cause the death of the deceased, cumulatively they may be sufficient in the ordinary course of nature to cause his death and hence upheld the conviction of the appellant therein for an offence punishable under Section 302/149 IPC.

33. The opinion of the doctor conducting postmortem that the injury is sufficient to cause death in the ordinary course of nature is only an opinion evidence under Section 45 of the Evidence Act. It is ultimately for the Court to form an opinion and come to the conclusion on the basis of entire evidence on record and return its own finding. This Court while following *State of H.P. Vs. Jia Lal & Ors., (1999) 7 SCC 280* in *Niwas @ Patel Vs. State* ILR (2010) I Delhi 342 held –

"54. In a serious charge, as that of murder, where the life and liberty of an accused is at stake, technical and doctrinal approach to problems has to be eschewed and the matter has to be approached with prudence keeping in view the fact that a fact is treated to be proved, as defined in the Evidence Act, when after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a

prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. Expert evidence is admissible under Section 45 of the Evidence Act and is treated as relevant evidence. But, the same is nothing more than evidence and this means that a Court has to evaluate the same as evidence and not treat it as conclusive proof of the subject matter to which the opinion relates. For treating it as binding, the Court would be delegating its judicial function. In the decision reported as 1999 (7) SCC 280 *State of H.P. v. Jai Lal and Ors.*, in para 18 it was observed as under:

> 18. An expert is not a witness of fact. His evidence is really of an advisory character. The duty of an expert witness is to furnish the Judge with the necessary scientific criteria for testing the accuracy of the conclusions so as to enable the Judge to form his independent judgment by the application of this criteria to the facts proved by the evidence of the case. The scientific opinion evidence, if intelligible, convincing and tested becomes a factor and often an important factor for consideration along with the other evidence of the case. The credibility of such a witness depends on the reasons stated in support of his conclusions and the data and material furnished which form the basis of his conclusions."

34. There is also no merit in the second contention of learned counsels for the Appellants that the act was not a premeditated one but was on the spur of the moment on a sudden quarrel. The evidence proved on record shows that Sudhir and Sunil first teased 'N' due to which verbal altercation took place between them and the deceased; they went away and came back after 20-25 minutes armed with knife, baseball bats, iron rod and empty liquor bottles and exhorted the deceased to come out and attached him. Thus, this premeditated assault would not fall in Exception 4 of Section 300 IPC.

35. The reliance of learned counsel for the Appellants on *Ram Prasad (supra)*, *Sarwan Singh(supra)* and *Idrish Bhai Daudbhai (supra)* is

misconceived. In *Ram Prasad (supra)* the Court came to the conclusion that there was no evidence of common intention established. In *Sarwan Singh (supra)* it was held that the common object of the unlawful assembly was not to cause death and in *Idrish Bhai Daudbhai (supra)* there was no evidence of pre-concert or that the appellants therein shared the common intention.

36. To determine whether an offence falls within the definition of 'Culpable Homicide' under Section 299 IPC or 'Murder' under Section 300 IPC, the special *mens rea* which consists of the four mental attitudes as stated in Section 300 IPC has to be determined. "Culpable Homicide" is the genus of "Murder" and "Murder" is its species and all "Murders" are "Culpable Homicides" but all "Culpable Homicides" are not "Murders". Thus to ascertain whether an offence is "Murder" or not, it has to be first seen whether the intention was of "Culpable Homicide" or "Murder". Once it is established that the intention was to cause "Murder", it is then to be seen whether the offence falls in any of the Exceptions as noted in Section 300 IPC thus bringing out the offence again to "Culpable Homicide" not amounting to murder. Where an Act is done with the clear intention to kill that person or done with intention of causing such bodily injury as the offender knows to be likely to cause death of the person to harm is caused or knows that it is so imminently dangerous that it must in all probability cause death or such injury as is likely to cause death, it will be "Murder" within the meaning of firstly, secondly or fourthly of Section 300 IPC and is punishable under Section 302 IPC.

37. In light of the law noted above, it would now be appropriate to note whether the two injuries that is injuries No.1 and 2 caused by blunt object are

on the vital parts of the body. Injury No.1 has been caused on the right side of the face in front of the ear and near the outer angle of the right eye, injury No.2 has been caused on the right side of the neck below the right ear lobe. Face being a part of the head which comprises of the cranium and the face, the consequence of the two injuries was subarachnoid hemorrhage all over the brain causing cerebral damage. The cause of death was thus opined as cerebral damage consequent to blunt force impact to the head.

38. In *Camilo Vaz. Vs. State of Goa*, (2000) 9 SCC 1 the Supreme Court in the case where the appellants were armed with dandas, bottles and cycle-chains and not with any particular weapon came to the house of the deceased and his brothers belonging to the other village, with the intention of thrashing them and hit with danda on the head of the deceased a vital part of the body, with such force that the deceased therein fell down unconscious and later succumbed to his injuries, it was held that the offence committed was one under Section 304 Part-II and not 302 IPC. The Supreme Court noted that Section 304 was in two parts. If analysed, the section provides for two kinds of punishment for two different situations: (1) If the act by which death is caused is done *with the intention of* causing death or causing such bodily injury as is likely to cause death. Here the important ingredient is the "intention"; (2) if the act is done with the "knowledge" that it is likely to cause death but without any intention to cause death or such bodily injury as is likely to cause death. When a person hits another with a danda on a vital part of the body with such force that the person hit meets his death, knowledge has to be imputed to the accused. In that situation the case will fall in Part II of Section 304 IPC.

39. As noted above, the facts proved by the prosecution are that Sunil and Sudhir teased 'N' in the presence of Neeru and when they were stopped from doing so by Neeru and deceased Subhash, they went away threatening them. After 20-25 minutes, they came back along with the other co-accused and exhorted Subhash to come out. When Subhash came out of the house, they followed him and all of them assaulted him resulting in his death. As per 'N' when the Appellants came back, they exhorted her brother to come out of the house and when he came out of the house, the Appellants ran after him with different weapons in their hands. There are only two injuries on the face which are by blunt object. Despite the Appellants being armed with knife, no knife was used on the deceased. There is no exhortation to kill, however all the Appellants went in a concerted manner to assault the deceased. Considering the evidence on record, it cannot be said that the Appellants share the common intention to murder the deceased, however they certainly possessed the common intention to cause the injury with the knowledge that it was likely to cause death.

40. Consequently, the conviction of all the appellants is modified to one under Section 304II/34 IPC. As regards order on sentence, since the appellants have been held guilty for culpable homicide not amounting to murder, the appellants are directed to undergo Rigorous Imprisonment for 8 years each and a fine of Rs.10,000/- each and in default of payment of fine to undergo simple imprisonment for three months. Sunil and Sudhir will also pay a compensation of Rs.1 lakh each to the deceased's family and in default will undergo simple imprisonment for six months each. The sentences for offences under Section 307 IPC qua all the appellants and under Sections 25/27 Arms Act qua convict Sudhir shall remain the same as directed by the

learned Trial Court and run concurrently. The appellants will be granted the benefit of sentence undergone under Section 428 Cr PC.

41. The Death Sentence Reference is answered in the negative. The appeals are accordingly disposed of. Trial Court record be sent back. Copies of the judgment be sent to the Superintendent, Central Jail, Tihar, for his record and for the Appellants.

(MUKTA GUPTA)
JUDGE

SEPTEMBER 17, 2014

Dr. S. Muralidhar, J.

42. I concur with the judgment of Justice Mukta Gupta both as regards conviction and sentence. However, I wish to supplement her reasons with some of my own.

The beginning

43. A call was made to the Police Control Room (PCR) on 20th July 2009 at 23:56:24 hours regarding a quarrel at Block F-3 Sultanpuri, Delhi. The PCR Form-I (Ex. PW6/A) filled in by the Wireless Staff of the Delhi Police gives the name of the informant as Pravesh Kumar with the address as 'Block F-3, Sultanpuri, Delhi'. The contact name is given as "Neeru". The complaint is described as 'quarrel'. The place of the incident is given as '6/4 Friends Enclave, Sultanpuri'. In a column below, the incident information is noted as "*quarrel me chaku churi chal rahi hai*". On the right side of the PCR Form, the report received from the PCR Van which reached the spot is noted. The time when the local police reached the spot is noted as "21-Jul-2009

0:34:29". The report reads: "*jhgra may 3 aadmi ko chaku lagay batalaya jo U/K Hosp. ja chukay jankaro ka ladaki chadanay par jhgra tha 21/07/2009 00:36:16 M/CY N. DL4SBN 4120 ko chodkar bhag gaya 21/07/2009 00:38:26 ladaki chhedane par jhgra huaa tha*". The name and rank of the police official of Police Station (PS) Sultan Puri is indicated as "ASI Rawal Singh" (PW-19).

44. The person who recorded the call at the PCR was Lady Constable Sangeeta (PW-6) who confirmed that the address given in the information was "6/4 Friends Enclave, Sultan Puri". What happened next is to be found in the deposition of ASI Rawal Singh (PW-19) who was posted at PS Sultan Puri when D.D. No. 3A was received. He along with Constable Vijender Singh (PW-18) and Constable Roopesh Kumar reached 6/4 Friends Enclave, Sultan Puri. PW-19 stated: "At the spot no eye-witness met us and I was informed by the people present there that the injured have been taken to SGM Hospital." PW-19 left Constable Roopesh Kumar at the spot and along with PW-18 went to the SGM Hospital (SGMH). There he met Neeru @ Guddo (PW-3). She told them that her son Subhash had come to the hospital in an injured condition and was declared as "brought dead" by the doctor. He then obtained three MLCs, i.e., of the deceased Subhash and two other injured persons. The dead body was shifted to the mortuary. PW-19 recorded the statement of PW-3 (Ex. PW-3/A) on which he made an endorsement (Ex. PW19/A). He sent the *pulandas* containing the clothes of the deceased and a *rukka* through PW-18 to the PS to be handed over to a senior officer. He then returned to the spot with PW-3 and on her pointing out prepared the site plan (Ex. PW-19/B).

The first statement of PW-3

45. The statement of PW-3 (Ex. PW-3/A) which constituted the *rukka* was dispatched by PW-19 to the PS at 2.15 a.m. on 21st July 2009. PW-3 stated that at around 11.30 p.m. on 20th July 2009 she and her daughter 'N' (PW-27) were outside their house when Sunil (A-2) and his younger brother Sudhir (A-5) living in the same locality came there and started passing lewd remarks and making obscene gestures at PW-27. PW-3 and her deceased son Subhash came out and objected. Subhash told them to go away. A-2 and A-5 are stated to have hurled abuses. They said that Subhash would be taught a lesson shortly. Twenty minutes later, A-2, A-5, Raj Kumar @ Danny (A-3), Suresh @ Phullu (A-4) and Surender @ Sonu Punjabi (A-1) came there. A-2 was carrying a baseball bat; A-5 was having a knife; A-1 was having an iron rod and A-3 and A-4 were having empty bottles of liquor. They challenged Subhash who on seeing them ran into the street. They all ran after him saying "this bastard must be killed, he has challenged our ruffianism". They then caught hold of Subhash in the street opposite Shiv Mandir. A-2 attacked Subhash with the baseball bat on his head, A-1 with an iron rod, A-3 and A-4 with the empty bottles of liquor. Subhash then became unconscious and fell down.

46. PW-3 stated that she and PW-27 followed the accused while crying and shouting for help. On hearing their screams, Naresh (PW-23) a nephew of PW-3 and their neighbour Samir @ Kale (PW-12) followed in order to intervene. The accused then caught hold of them as well. A-5 stabbed PW-23 with the knife he had been carrying and the other four accused, i.e., A-1, A-2, A-3 and A-4 also inflicted injuries on them. The bottles of liquor being carried by A-3 and A-4 got broken and the glass pieces got scattered on the

street. In the scuffle, A-2 fell on the glass pieces due to which he also sustained injuries. A-2 and his accomplices ran away from the spot leaving behind the baseball bat, the iron rod etc.

Investigation at the scene of occurrence

47. After sending the *rukka* through PW-18, PW-19 came back to the place of occurrence with PW-3 and on her pointing out prepared the site plan. The scaled site plan (Ex. PW2/A) shows the path supposed to have been taken by the deceased Subhash around a vacant plot, then down another street. It shows the distance between 6/4 Friends Enclave and the Shiv Mandir (opposite 6/28 Friends Enclave) to be about 58.70 m.

48. Inspector Yashpal Singh (PW-28) with some police officials reached the spot and further investigation was entrusted to him. PW-28 lifted two baseball bats (Ex. P1 and Ex. P2), the broken pieces of glass (Ex. P5) and one iron pipe (Ex. P3) from the spot. They were kept in separate *pulandas* and sealed with the seal of YP and seized under memo (Ex. PW-3/B). The liquor bottles (Ex. P8 and Ex. P9) and the broken glass pieces were seized under memo (Ex. PW-3/C). A red-coloured motor cycle DL4SBN-4190 of Pulsar make (Ex. P4) was also seized from the spot under memo (Ex. PW3/D). PW-3 and PW-27 were taken to the hospital for their MLCs in the police vehicle.

49. PW-28 prepared the brief facts (Ex. PW7/B2) in which he noted that at the SGMH, PW-19 had obtained MLCs of PW-12, PW-23 and of A-2 who were undergoing treatment. From the brief facts prepared by PW-28 and the PCR Form, it appears that the three persons brought to SGMH with knife

wounds were PWs 12, 23 and A-2. The deceased Subhash had no knife injuries. While two of them (i.e., PWs 12 and 23) were shown to have been brought to SGMH in their own vehicle, A-2 is shown to have been brought by PW-19. Subhash was shown as brought to the SGMH by PW-19 and was declared brought dead.

50. The Mobile Crime Team Report (MCTR) (Ex. PW-5/A) described the place of the offence as "In front of house of Ram Chander……H. No. 6/28 West Friends Enclave (between Shiv Mandir and above said address)". The report was prepared between 2 and 3 a.m. on 21st July 2009. It noted the articles seized by the Investigating Officer (IO) as: (i) Two wine bottles (empty); (ii) broken pieces of bottles; (iii) one baseball stick broken and (iv) another baseball stick (v) one iron rod (pipe) (vi) wooden stick (size 1 feet). It advised photographs to be taken of the scene of crime, recording of the statement of the victim's relatives, exhibits be sent to the CFSL/FSL for opinion, recording statement of eye-witnesses (if any), opinion of the doctors and details to be taken from the place of offence. This MCTR was prepared by Sub Inspector Sanjay Gade (PW-5). In his deposition PW 5 stated that the crime team visited only 6/28 Friends Enclave and not 6/4.

The MLCs

51. The MLC of PW-23 (Ex. PW4/D) showed that he was brought to the SGMH at 1 a.m. on 21st July 2009. The MLC of Md. Samir (PW-12) (Ex. PW4/A) showed that he was brought to the SGMH at 12.35 a.m., on 21st July 2009. The MLC of PW-23 showed that he had a sharp incised wound. The MLC of PW-12 revealed that he too had sharp incised wounds on the lumbar region. All these MLCs noted the alleged history of physical assault.

52. The MLC of A-2 Sunil (Ex. PW28/D1) for some reason was not produced by the prosecution at the time of filing the charge-sheet. It was marked as an exhibit during the cross-examination of PW-28 during the trial. This showed that A-2 was brought by ASI Rawal Singh at 1.05 am on 21st July 2009. There was a fresh incised punctured wound of 2.5 cm x 1 cm over right lateral lower part of the chest. There was another punctured wound of 1.5 cm x 0.5 cm over the lateral part of right upper thigh. A-2 was referred to surgery. He was smelling of alcohol and was referred to the Safdarjung Hospital. The MLC had an endorsement: 'fit for statement'.

53. The MLC of PW-27 (Ex. PW4/B) showed that she was brought to the SGMH, Mangolpuri, Delhi at 3.10 am by PW-18. The injuries noted were: "fresh abrasion (0.10 x 0.1 cm, scratch mark) over left side of frontal region + scalp".

54. The MLC of Neeru (PW-3) (Ex. PW-4/C) showed mild tenderness and erythma in the upper neck. She was examined at 3.30 am at the SGMH. An MLC was also prepared for Subhash (Ex. PW 4/E). It showed that he was brought by ASI Rawal Singh at 12.45 am on 21st July 2009. It notes that the patient was declared brought dead and the dead body was shifted to the mortuary.

The evidence of PWs 8 and 9

55. The central issue concerns fixing the presence of the accused at the spot of incident. The prosecution tendered two eye-witnesses to the incident. They were Hari Singh (PW-8) and Sanjay (PW-9). PW-8 turned hostile. He claimed that no statement of his was recorded by the police and that he only

identified the dead body of Subhash. The previous statement made by this witness is Ex. PW7/B6 which purportedly identifies the deceased. The statement of PW-8 (Mark A) claims that Subhash was murdered by the accused who lived in the same locality. An identical statement is recorded of PW-9 Sanjay who incidentally lives in 6/4 Friends Enclave, i.e., the house of Subhash. He too had earlier stated (Mark B) that all the accused had killed deceased Subhash. But in the trial Court he too resiled from his statement. Both statements (Mark-A and Mark-B) have been recorded by PW-28.

The evidence of the injured witnesses PWs 12 and 23

56. The other two eye-witnesses were the injured cousin Naresh (PW-23) of the deceased, who also turned hostile. PW-23 stated that some boys came and started teasing PW-27 and that Subhash objected to the acts of those boys. He states that he received a call from Subhash after those boys left the spot and then he reached the spot. While he was talking to Subhash, 7-8 boys came there and started beating Subhash and he too was given beatings by them. He stated that no accused present in the court was part of the boys who attacked Subhash. He stated that the deceased was taken to the hospital.

57. The fourth eye-witness was Md. Samir (PW-12) who was injured in the incident. However, he too turned hostile. He stated that at around 11/11.30 p.m. some 12/13 *kanwarias* and other public members were present and heard the noise "*bachao bachao*" and suddenly a stampede started. He was hit by something on the left side of his waist due to which bleeding started and he was taken to Safdarjung Hospital by someone. He denied the following statement made by him earlier to the police. With the four eye-

witnesses including the two injured ones turning hostile, the prosecution case hinged on two remaining eye-witnesses, i.e., PW-3 and PW-27.

The evidence of PW-3

58. As far as PW-3 is concerned, she was first examined on 20th May 2010. In her examination-in-chief, she stuck to what she stated in her first statement to the police (Ex. PW3/A) but added the name of Sanjay (A-6) as also having come back with A-2 and A-5 to the house when they started chasing Subhash. She now stated that A-6 also had a baseball bat. She stated that neighbours took her son Subhash, PWs 12 and 23 to the SGMH and that she had called the police from the mobile phone of her nephew but by mistake police recorded the name of her husband from whose mobile she had called the police. She further added that the accused had come on two motorcycles out of which one disappeared from the spot and the other of red colour which was seized from the spot by the police. She explained that she had missed out the name of A-6 in the first statement "due to nervousness and hopelessness" in her mind.

59. The record of proceedings of the trial Court on 20th May 2010 shows that on that date a further examination-in-chief was deferred "for want of case property". The case was adjourned to 19th and 31st July 2010 for the remaining prosecution evidence (PE)". On 2nd June 2010, A-6 was admitted to interim bail for a period of two months. The proceedings of 19th July 2010 gives no indication that PW-3 was present for continuation of her examination-in-chief. The APP who was present failed to point out this to the trial Court. PW-6 was absent on 19th July 2010 and non-bailable warrants (NBW) were issued for his presence on 22nd July 2010. On the same day,

however, the NBW was recalled on an application filed on behalf of PW-6. On 21st July 2010 A-5 was granted interim bail till 31st July 2010. On 31st July 2010, again PW-3 was not present and the APP did not point this out to the trial Court. The trial Court extended the interim bail of A-5 till 12th August 2010.

60. Surprisingly no orders were passed either on 19th or 31st July 2010 by the trial Court noting the absence of PW-3. On 2nd August 2010, the interim bail of A-6 was extended upto 3rd September 2010. On 11th August 2010, the bail application of A-1 was rejected. On 12th August 2010, the interim bail was granted to A-3 upto 24th September 2010. On 19th August 2010, interim bail to A-5 was granted upto 21st September 2010. On 3rd September 2010, the interim bail of A-6 was extended upto 21st September 2010. On 21st September 2010, again no questions were asked as to the whereabouts of PW-3. The interim bail application of A-4 was rejected. PWs 5 and 6 were examined and discharged. The next date was fixed for 24th September 2010. On that date, the interim bail of A-3 was extended and the next date was fixed for 2nd and 8th November 2010 for PE. In the meanwhile on 21st October 2010, A-1 was enlarged on interim bail upto 8th November 2010. On 8th November 2010 PWs 8, 9 and 10 were examined and discharged. No question was again asked about the presence of PW-3.

61. The above orders have been referred to only to highlight the fact that despite being the star prosecution witness, PW-3 was not bound down so that her examination-in-chief could be completed in a time-bound manner. The trial Court not only failed to insist upon her presence and continuation of examination-in-chief but even the learned APP made no effort to point this

out to the trial Court. In the meanwhile interim bail was being granted to many of the accused. Till 7th March 2011, by which time 17 prosecution witnesses were examined, the further examination-in-chief of PW-3 did not take place.

62. PW-3 admittedly visited Tihar jail but stated that she had not gone to meet any Suresh (which could be A-4) on 28th April 2010. Although this visit does not appear to have had an impact on her examination-in-chief on 20th May 2010, between that date and her subsequent examination-in-chief on 7th March 2011 many of the accused were released on interim bail. On 7th March 2011, the Presiding Officer (PO) changed. In response to a question by the counsel for A-3 "What comments were passed against your daughter by the accused?", the observations of the PO read as under:

> "Court observation: question disallowed being insulting to the witness as she has already deposed in her examination in chief and same is taken by this court in the language of the court which is otherwise decent and not insulting to the witness and question is disallowed u/s 152 of the Evidence Act."

63. Immediately thereafter, PW-3 made the following statement:

> "I saw Kanwariyas at the spot of incident but I do not remember the date of incident. It is correct that the accused were not present at the spot. It is correct that I have not seen anything or any person and accused present in the court. It is correct that I do not known as to who has caused injuries to my son and to me and my daughter. It is incorrect to suggest that I am deposing falsely."

64. PW-3 was next cross-examined by counsel for A-1 and A-6 and stated as under:

> "It is correct that lot of people around 100/200 had gathered at the spot. I do not know if police had recorded my statement on the same

day or the next day. Police had taken into possession the baseball bat etc. in my presence. Police had prepared some documents at the time of taking into possession the baseball bat and other articles from the spot. I cannot tell the number of papers signed by me which were prepared by the police. Some of those were blank and some were written. It is correct that contents of the papers were not read over to me by the police. It is correct that I have seen the accused first time in the court. I had made the statement in the court on 20.5.10 on the instructions of police officials. It is correct that said statement was not given by me on my own."

65. The APP at that stage sought permission to cross-examine the witness. The court ordered: "Heard. The same is allowed." The observation thereafter of the trial Court reads as under:

"Court Observation: Ld. Addl. PP has explained the entire examination in chief to the witness in vernacular and this court has specifically asked and informed the witness that she may be subjected to a criminal charge and thereafter, the witness has been asked as to which of the deposition i.e. whether dt. 20.5.10 or today given in her cross examination, is correct to which the witness replied that her deposition dt. 20.5.10 is correct."

66. This is followed by the statement of the witness (PW-3) which is recorded as under:

"It is correct that these were the accused persons present in court today who killed my son in the manner as deposed by me in my examination in chief dt. 20.5.10. It is correct that I have got three daughters and I am residing with my husband along with said three daughters. It is correct that all the accused persons present in the court are residing in my locality and are my neighbours. I have no pressure on my mind and I want that accused be set at liberty and no action should be taken against the accused as I want that I should live with my three daughters peacefully in the same locality. It is incorrect to suggest that today I have deposed in favour of the accused due to fear and pressure of the accused as I am living with my three daughters and my son was killed due to the reason that accused Sunil has passed indecent comment upon my daughter N."

67. A careful examination of the above passage reveals that the first three lines begin with the words "It is correct that" which suggests that these were close-ended questions of 'yes-no' type. However, in the same narration, PW-3 states "I have no pressure on my mind and I want that accused be set at liberty…….". She again states that "it is incorrect to suggest that today I have deposed in favour of the accused due to fear and pressure of the accused ……".

68. PW-3 was again cross-examined by counsel for A-3 and she said:

> "Today I have deposed without any coercion or pressure from anyone. Neither I nor my husband and daughters have been threatened to be killed. It is correct that I am living with my family peacefully in my house."

69. PW-3 was finally cross-examined by counsel for A-1 and A-6 when she again stated as under:

> "It is incorrect to suggest that due to fear of going jail I have admitted my examination in chief dt. 20.5.10 as correct. I had suggested not to take any action against the accused as they are innocent and have not committed any offence. It is correct that I have no fear from the accused persons either at present or in future and there was no fear in the past also. It is correct that I have not made any statement to the police either on the day of incident or the following day."

70. An application was filed under Section 311 Cr PC on behalf of A-5 pursuant to which PW-3 was recalled for further cross-examination on 12th August 2011 when she admitted that she had gone to meet the "accused in jail". She now mentioned that she had gone to meet one Shakir at Central Jail along with Shakir's mother. She denied having gone to meet any Suresh and she could not say if she had gone to jail on 28th April 2010. She denied the suggestion that she went to the jail to cut a deal and extract money for the

acquittal of the accused. She again stated "It is wrong to suggest that accused have been falsely implicated in the present case".

71. The evidence of PW-3 reveals a constant flip-flop and she obviously did not speak the entire truth. Apart from the fact that she is both a related and interested witness warranting a more careful scrutiny of her evidence, it is difficult to trust a witness who keeps prevaricating on the version of events. I am unable to agree with the conclusion of the trial Court that since PW-3 gave "valid and plausible explanation" for not mentioning A-6 in the first instance that would not be fatal to the case of the prosecution. To be fair to the trial Court, however, it has not placed further reliance on PW-3 as far as the discussion on the ocular evidence is concerned (see para 118 of the judgment). The inevitable conclusion is that the evidence of PW-3 is both unreliable and unsafe to form the basis of conviction of the accused.

Evidence of PW-27

72. This leaves the testimony of the remaining eye-witness, N (PW-27) the sister of the deceased. When she was first examined by the police on 21st July 2009 she stated (Ex. PW27/A) that on 20th July 2009, PW-23 (her cousin) had come from Haridwar with *kanwar* and offered the holy water of Ganga at Shiv Mandir in the area and the persons who had brought the said *kanwars* were dancing opposite Shiv Mandir. PW-27 stated that she was watching PW-23 dancing and many ladies, boys and gents were present at the Shiv Mandir. Thereafter, she returned home. While she was standing outside her house with her mother PW-3 at about 11.30 p.m., A-2 and A-5 passed through the *gali* in front of her house. They passed lewd comments at her and made indecent gestures.

73. PW-27 was first examined in the trial Court on 23rd February 2012, more than two years and seven months after the incident. The learned trial judge found her bitterly weeping. When asked the reason, PW-27 stated that her family members had prevented her from coming to the Court. The learned trial judge noted that on being consoled, PW-27 stated that she wanted to depose against the accused but PW-23 and her mother had stopped her from deposing. PW-27 stated that she was being treated for a neuro ailment at Shri Balaji Action Medical Institute, Paschim Vihar and she was in a dilemma whether she should depose truthfully. The trial Court then asked the SHO of PS Sultan Puri to provide protection to PW-27.

74. The trial Court thereafter proceeded to record the deposition of PW-27 who stated as under:

> "About two and half years or three years back, in the month of July, I along with my mother was standing outside our house. From the gali of our house, accused Sudhir and Sunil present in the court today were going. They both started giving obscene gestures towards me and started commenting upon me. My mother objected to it and she asked them to go away from there. On hearing the noise of my mother, my brother Subhash who was inside the house came out and objected on (*sic 'to'*) the act of both the accused persons, on which both the accused started arguing with my brother and went away from there by saying that they will see my brother after sometime. After about 20 minutes, they both came along with many other boys namely Sonu Punjabi, Fullu, Sanjay, Sudhir, Sunil and Danny. The witness is asked to see if all the accused persons are present in the court or not to which she had identified each and every accused present in the court by their names. They all started saying my brother to come out of the house. My brother came out of the house and after seeing all the accused persons with different weapons in their hands, ran towards shiv mandir in the gali. They all apprehended my brother and started giving beatings with baseball bat, iron rod, glass bottles and knives. I cannot tell which of the accused was hitting with which weapon. On hearing the noise, my neighbor Samir and my cousin Naresh came out who

were also given beatings by the accused persons. Naresh and Sameer also sustained injuries in that quarrel, even I was given beatings by accused Sudhir by iron rod. There were other persons along with the accused persons whom I did not know. My brother fell on the ground, I along with my mother went towards my brother who was almost dead. Thereafter, we all went to hospital with my brother where he was declared dead by the doctor. I, my mother, Naresh and Sameer were also medically examined in the SGM Hospital."

75. Immediately thereafter, the APP sought permission of the trial Court to put leading questions to PW-27. The trial Court recorded as under:

> "Ld. APP wants to put some leading questions as the witness has substantially deposed the incident but she is forgetting the details. The said request is opposed by the Ld. Defence counsels. Hence, the same is rejected. However, the Ld.APP may otherwise put the questions by way of cross-examination in order to establish the facts forgotten by the witness."

76. Immediately thereafter a series of close-ended questions were put to PW-27 by the APP and she replied to each of them beginning with the words "It is correct that..." Her replies read thus:

> "**It is correct** that in my statement Ex.PW27/A to the police, I had stated that on 20.07.09, my cousin Naresh had come from Haridwar with kanwar and offered the holy water of Ganga at Shiv Mandir of our area and the persons who had brought the said kanwars were dancing opposite Shiv Mandir in the gali. **It is correct that** I was watching my said cousin dancing and there were many ladies, boys and gents were present and after some time, I came back at my home. **It is correct that** it was 11.30 p.m. when I was standing outside my house with my mother. **It is correct that** accused Sudhir and Sunil are residing in our basti. **It is correct that** after watching the dance, accused Sudhir and Sunil were going from my gali when they had commented upon me and made indecent gestures towards me. **It is correct that** I had stated to the police that I know all the accused persons as they are resident of the same locality. Vol. Accused Danny is residing just behind my house. **It is correct that** accused Sunil and Sanjay were having base ball bat in their hands and accused Sudhir

was having knife in his hand and accused Sonu Punjabi was having iron rod in his hand and accused Phullu and Danny were having glass bottles in their hands. (court observation:- The weapons i.e. iron rods and glass bottles in the respective hands of the said three accused were uttered by the witness voluntarily even prior to putting the question in complete sense by the Ld.APP)

It is correct that when the accused persons were chasing my brother when he was running towards mandir, accused Sunil was uttering that "*is saley ne hamari badmashi ko chunoti di hai, is saley ko khatam karna hai*" (the said deceased had challenged their ruffianism so he should be killed). **It is correct that** accused Sudhir had caught hold of my brother Subhash opposite Shiv Mandir in the gali and accused Sunil and Sanjay hit on the head of my brother with baseball, accused Sonu Punjabi hit on his head with iron rod and accused Danny and Phullu gave blows on the head of my brother with empty liquor glass bottles. **It is correct that** when I, my mother, my cousin Naresh and neighbor Sameer raised alarm of 'bachao bachao' then accused Sudhir inflicted knife blows on Naresh and Sameer. **It is correct that** in the quarrel, the empty liquor glass bottles in the hands of accused Danny and Phullu were broken and pieces of glass had scattered in the gali and in the scuffle, accused Sunil fell on the said glasses and sustained injuries on his body. **It is correct that** due to fear of apprehension, all the accused persons ran away from the spot. **It is correct that** Naresh and Sameer were referred to Safdarjung hospital from SGM Hospital. **It is correct that** due to lapse of time, I could not recollect the facts which are put to me in my cross-examination." (emphasis supplied)

77. Counsel for the Appellants, have objected to the trial Court having permitted the above cross-examination of PW-27 by the APP without the APP even seeking permission to do so. Extensive arguments were addressed on the above aspect and these are dealt with hereafter.

78. Section 142 of the Indian Evidence Act, 1872 (EA) states that leading questions may not be put in examination-in-chief except with permission of the Court. As noted above, the learned APP sought permission of the trial

Court under Section 142 of the EA to put leading questions and permission was declined. The learned AAP did not seek permission of the trial Court to declare PW-27 hostile and to cross-examine her. This was an important aspect of the matter since the record in fact showed that the APP maintained at this stage that "the witness has substantially deposed the incident but she is forgetting the details". Therefore, from the point of view of the APP, the witness had not turned hostile and that is why he sought to ask leading questions under Section 142 EA.

79. Section 154 of the EA talks of permission being granted by the court in its discretion to the party who calls a witness, in this case the prosecution, to put questions to such a witness 'which might be put in cross-examination by the adverse party'. In ***Sat Paul v. Delhi Administration 1976 Cri LJ 295***, the Supreme Court observed that the words "hostile" and "adverse" in fact restrict the discretion of the court "and that it is to be liberally exercised whenever the court from the witnesses' demeanour, temper, attitude, bearing, or the tenor and tendency of his answers, or from a perusal of his previous inconsistent statement, or otherwise, thinks that the grant of such permission is expedient to extract the truth and to do justice." The Supreme Court in ***Sat Paul*** drew a distinction between the English law and the Indian law and observed that "faultiness of the memory in the case of such a witness would be another object of cross-examining and contradicting him by a party calling the witness". However, the Supreme Court did not dispense with the requirement of the party having to seek permission of the Court to put leading questions in the cross-examination of such witness.

80. In ***Sri Rabindra Kumar Dey v. State of Orissa (1976) 4 SCC 233***, the Supreme Court explained in what circumstances Section 154 EA could be invoked by the prosecution:

> "10….. Thus it is clear that before a witness can be declared hostile and the party examining the witness is allowed to cross-examine him, there must be some material to show that the witness is not speaking the truth or has exhibited an element of hostility to the party for whom he is deposing. Merely because a witness in an unguarded moment speaks the truth which may not suit the prosecution or which may be favourable to the accused, the discretion to allow the party concerned to cross-examine its own witnesses cannot be allowed. **In other words a witness should be regarded as adverse and liable to be cross-examined by the party calling him only when the Court is satisfied that the witness bears hostile animus against the party for whom he is deposing or that he does not appear to be willing to tell the truth.** In order to ascertain the intention of the witness or his conduct, the judge concerned may look into the statements made by the witness before the Investigating Officer or the previous authorities to find out as to whether or not there is any indication of the witness making a statement inconsistent on a most material point with the one which he gave before the previous authorities. The Court must, however, distinguish between a statement made by the witness by way of an unfriendly act and one which lets out the truth without any hostile intention." (emphasis supplied)

81. The above position was reiterated in ***Gura Singh v. State of Rajasthan (2001) 2 SCC 205*** as under:

> "Section 142 requires that leading question cannot be put to the witness in examination-in-chief or in re-examination except with the permission of the Court. The Court can, however, permit leading question as to the matters which are introductory or undisputed or which have, in its opinion, already been sufficiently proved. Section 154 authorises the Court in its discretion to permit the person

> who calls a witness to put any question to him which might be put in cross-examination by the adverse party. The Courts are, therefore, under a legal obligation to exercise the discretion vesting in them in a judicious manner by proper application of mind and keeping in view the attending circumstances. Permission for cross-examination in terms of Section 154 of the Evidence Act cannot and should not be granted at the mere asking of the party calling the witness."

82. In ***Varkey Joseph v. State of Kerala AIR 1993 SC 1892***, in the context of Section 142 EA the Supreme Court held that the prosecution should not allowed to put leading questions so as to lead the witness to say that what the prosecution intends. The Court observed:

> "The attention of the witness cannot be directed in Chief examination to the subject of the enquiry/trial. The Court may permit leading question to draw the attention of the witness which cannot otherwise by called to the matter under enquiry, trial or investigation. The discretion of the court must only be controlled towards that end but a question which suggest to the witness, the answer the prosecutor expects must not be allowed unless the witness, with the permission of the court, is declared hostile and cross-examination is directed thereafter in that behalf. Therefore, as soon as the witness has been conducted to the material portion of his examination, it is generally the duty of the prosecutor to ask the witness to state the facts or to give his own account of the matter making him to speak as to what he had seen. **The prosecutor will not be allowed to frame his questions in such a manner that the witness by answering merely "yes" or "no" will give the evidence which the prosecutor wishes to elicit. The witness must account for what he himself had seen.** Sections 145 and 154 of the Evidence Act is intended to provide for cases to contradict the previous statement of the witnesses called by the prosecution. Sections 143 and 154 provides the right to cross-examination of the witnesses by the adverse party even by leading questions to contradict answers given by the witnesses or to test the veracity or to drag the truth of the statement made by him. **Therein the adverse party is entitled to put leading questions but Section 142 does not give such power to the prosecutor to put leading questions on the material part of the**

> **evidence which the witnesses intends to speak against the accused and the prosecutor shall not be allowed to frame questions in such a manner which the witness by answering merely yes or no but he shall be directed to give evidence which he witnessed**."
> (emphasis supplied)

83. Before proceeding to examine the position in the case at hand, the law explained in the above decisions of the Supreme Court may be summarised thus:

(i) Under Section 142 EA, the permission by the Court to a party to put leading questions to its witness has to be liberally exercised where the court thinks that the grant of such permission is expedient to extract the truth and to do justice.

(ii) Under Section 142 EA, the Court can permit leading question as to the matters which are introductory or undisputed or which have, in its opinion, already been sufficiently proved. However, Section 142 EA does not give power to the prosecutor to put leading questions on the material part of the evidence. The prosecutor shall not be allowed to frame questions in such a manner which the witness can answer merely by stating yes or no but he shall be directed to give evidence which he witnessed.

(iii) Section 154 EA gives discretion to the Court to permit the person calling a witness to put any question to him which might be put in cross-examination by the adverse party. However, such permission for cross-examination cannot and should not be granted at the mere asking of the party calling the witness.

(iv) For the purposes of Section 154 EA, a witness should be regarded as adverse and liable to be cross-examined by the party calling him "only when the Court is satisfied that the witness bears hostile animus against the party for whom he is deposing or that he does not appear to be willing to tell the truth."

84. In the present case, what the learned APP did in the garb of cross-examination (presumably under Section 154 EA) is what he could not have done even if he had been permitted to put leading questions in examination-in-chief under Section 142 EA which permission had been specifically denied by the trial Court. The APP put to PW-27 a series of close ended questions of 'yes-no' type, which as explained in ***Varkey Joseph*** *(supra)* was not permissible. Even in terms of Section 154 EA, the cross-examination is restricted to questions that might be put to the witness by the adverse party. The trial Court did not notice the above legal position. It could not have permitted cross-examination of PW-27 by the APP in a manner contrary to the law as explained by the Supreme Court in the above decisions.

85. Mr. Lovkesh Sawhney submitted that what PW-27 stated in her cross-examination by the APP were mere embellishments to the earlier portion of her deposition and that she had only given further particulars and details. The above argument overlooks the fact that the permission to elicit the further details is to be granted by the trial Court under the proviso to Section 142 EA. The trial Court in fact declined that permission. The above answers cannot therefore be justified with reference to the proviso to Section 142 EA. In any event, the answers given by PW-27 in her cross-examination by the APP cannot be characterised as mere embellishments. They stated the exact

words spoken by the accused and as to which accused wielded which weapon and caused which injury to the deceased, PWs 12 and 23.

86. Since PW-27 is a related and interested witness, her evidence has to be scrutinised carefully. It was perhaps not noticed by the trial court that PW-27 was not inexperienced as far as deposing in criminal trials was concerned. In her cross-examination by counsel for A-2 and A-5, she admitted that she had been an eye-witness in a trial concerning the murder of one Shahid. The other aspect concerns the injuries caused to PW-27. She was confronted with her previous statement where she had not mentioned that A-5 caused her injuries. In Court she stated that she was given beatings by A-5 with an iron rod. However, the weapon attributed to A-5 is not an iron rod. PW-3 stated that he was carrying a knife and that it was A-1 who was having the iron rod.

87. The question that arises therefore is to what extent the above evidence of PW-27 can be taken to support the case of the prosecution. In view of the law explained by the Supreme Court in ***Varkey Joseph*** *(supra)* the answers given by PW-27 in her cross-examination by the learned APP require to be kept out of consideration entirely. That leaves the statements made by her in her examination-in-chief where she stated that all the accused attacked the deceased but "I cannot tell which of the accused was hitting with which weapon." An important aspect is that she did not state that A-2 and A-5 had said that they should finish off Subhash because he had challenged their ruffianism. She only stated: "...my brother Subhash who was inside the house came out and objected on (*sic 'to'*) the act of both the accused persons, on which both the accused started arguing with my brother and went away from there by saying that they will see my brother after sometime." This assumes

significance for the aspect of motive and the absence of an express intent to kill.

88. The evidence of PW-27 can be taken to support the case of the prosecution to the extent that as an injured eye witness PW-27 has in her examination-in-chief identified the accused, spoken about their chasing and beating Subhash with base ball bats and an iron pipe, and as a result of the injuries Subhash met with his death. I propose to examine next the extent to which the medical evidence corroborates the above evidence of PW-27.

The medical evidence

89. The post-mortem report of Subhash (Ex. PW7/A) described the external injuries as under:

> "1. Contusion, reddish 6 cm x 2.5 cm present on right side of the face, 2.5 cm in front of ear and 5.5 cm outer to outer angle of right eye with abrasion over an area 2 x 1 cm within the lower third of the contused area with a spread area of 1 cm x 0.5 cm within the abrasion and laceration 0.1 cm x 0.1 cm into subcutaneous tissue deep present at upper end of contused area. The contusion is obliquely placed on right side of face.
>
> 2. Contusion, reddish 6 cm x 2.5 cm on right side of the neck, 6 cm below right ear low with a semi circular abrasion in the middle of the contused area.
>
> 3. Abrasion 1 cm x 1 cm on back of the left elbow.
>
> 4. Abrasion 1 x 0.5 cm on middle of back of left forearm, 10 cm above wrist joint.

90. The internal examination noted "brain weight is 1500 gms, diffuse subarachnoid hemorrhage all over the brain". The cause of death was as under:

> "Cause of death is cerebral damage consequent to blunt force impact to the head. All injuries are antemortem, fresh in duration and caused by blunt object. Time since death is approximately 12 hours. Total inquest papers are 11."

91. The post mortem report showed no knife injuries on Subhash. It stated that the death was homicidal. The opinion was not that the death was as a result of the cumulative effect of the external injuries. The opinion was that death was due to "blunt force impact to the head". And yet, there were no external injuries noticed on the head.

92. In his cross-examination by counsel for A-1, Dr. Manoj Dhingra (PW-7) who conducted the post-mortem of the deceased [along with Dr. J.V. Kiran (PW-11)] on 21st July 2009, stated that "Cerebral damage may be caused by dashing of head against a hard surface or a wall or any standing hard object".

93. On 8th August 2009, five sealed parcels were sent to PW-11. The first parcel contained a baseball bat with black tape wound around with one end knobbed with a crack, the second one contained a broken black coloured baseball bat with the words 'RAPTOR' written at the distal end. A third *pullanda* contained a white coloured baseball bat with the distal end broken and a crack on the knob of the bat and a crack at the upper part of the bat. The fourth *pullanda* contained a hollow iron pipe and fifth *pullanda* contained a broken stick. PW-11 opined that the injuries mentioned in the post-mortem report could be caused by the weapons contained in parcels 1, 2, 3 and 4. In his cross-examination, PW-11 stated that he did not use any scientific instrument for examining the articles shown to him. He admitted

that there was an overwriting on the number of parcels received. He did not suggest which weapon could have caused which injury.

94. As regards Dr. Manoj Dhingra (PW-7), he stated that the glass pieces sent by him were having blood stains. With reference to the MLC No. 9519 (the MLC of A-2), PW-7 stated that the injuries might be possible with broken glass and also with knife. No fracture of bones was noticed on the right side of the face of the deceased. There was, however, contusion, laceration and abrasion.

95. Mr. Lovkesh Sawhney referred to the following passage in ***Modi's Jurisprudence 23rd Edition 2008***:

> "A massive rapidly fatal traumatic basal subarachnoid hemorrhage may occur from a blow to the side of the upper neck due to a rupture of the vertebral artery at the base of the skull or its passage through the first cervical vertebral. Subarachnoid hemorrhage is aggravated by alcoholic intoxication."

96. Mr. Sawhney suggested that the contusion on the upper neck could also cause the subarachnoid hemorrhage. However, no such suggestion was put to PWs 7 or 11 by the APP. There was, in other words, no attempt made by the prosecution to link the external injuries noted on the body with the cause of death mentioned in the post-mortem report. The result is that the medical evidence proves homicidal death and to that extent corroborates the admissible portion of the testimony of PW-27.

Nature of the offence

97. The next issue concerns the nature of the offence. In ***Virsa Singh v. State of Punjab (1958) 1 SCR 1495***, the Supreme Court detailed the four lines of inquiry to be undertaken to determine if murder as defined in Section 300 IPC Clause Thirdly has occurred:

> i. first, whether bodily injury is present;
>
> ii. second, what is the nature of the injury;
>
> iii. third, it must be proved that there was an intention to inflict that particular injury, that is to say, that it was not accidental or unintentional or that some other kind of injury was intended; and
>
> iv. fourthly, it must be proved that the injury of the type just described made up of the three elements set out above was sufficient to cause death in the ordinary course of nature.

98. In the case on hand, the evidence of PW-27 and the medical evidence may be said to establish the presence of the first two elements but not the third viz., there was an intention to inflict any particular type of injury on the deceased. The medical evidence is not clear as to what caused the blunt force impact on the head, much less as to who caused it. It also does not prove that the external injuries noticed on the deceased were sufficient in the ordinary course of nature to cause his death. Thus the offence cannot be classified as 'murder' within the meaning of Section 300 IPC.

99. The further question is whether the offence falls within any of the two parts of Section 304 IPC which reads as under:

> "**304-Punishment for culpable homicide not amounting to murder**.-Whoever commits culpable homicide not amounting to murder shall be punished with imprisonment for life, or imprisonment of either description for a term which may extend to ten years, and

shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death,

or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death."

100. The factors that weigh with me in assessing the nature of the offence in the present case is that A-2 and A-5 who passed lewd remarks on PW-27, to which the deceased objected, stated that they would teach him a lesson. Within twenty minutes of that incident they came back with the other accused carrying baseball bats and a hollow iron pipe. One of them was having a knife but it was not used to inflict any injury on the deceased. The doctors who conducted the postmortem have not been able to link the external injuries found on the body with the actual cause of death which was determined as cerebral hemorrhage as a result of a blunt force impact on the head. Importantly, there is no medical opinion forthcoming that the injuries found on the body cumulatively were sufficient in the ordinary course of nature to cause the death of the deceased.

101. The evidence of both PW-27 and PW-3 does not help understand how the head of the deceased was attacked or suffered a blunt force impact. The hair of the deceased perhaps was not shaved during the postmortem to ascertain whether there were injuries on the scalp. In the circumstances, while it is possible to conclude that the deceased died as a result of the attack by the accused, and that each of them gave blows with the knowledge that

the blows would result cumulatively in death, there is no conclusive evidence that they shared a common intention to cause the death of the deceased. In my view, therefore, the offence cannot be characterized murder within the meaning of Sections 299 and 300 IPC but culpable homicide not amounting to murder and further since there was knowledge on the part of the accused that the injuries might result in death but no common intention to cause death, it is classifiable as an offence under Part II of Section 304 IPC read with Section 34 IPC.

102. As regards the sentence for the above offence, I concur with what has been stated in the opinion of Justice Mukta Gupta.

(S. MURALIDHAR)
JUDGE

SEPTEMBER 17, 2014

Concluding remarks and directions

103. Before concluding, the Court would like to comment on the collective failure of the prosecution and the trial Court in the present case to ensure that the recording of the evidence of one of the key prosecution witnesses, PW-3, was completed at the earliest point in time and prior to the release of some of the accused on bail. The inexplicably long gap in the dates of examination-in chief of PW-3 resulted in her resiling from her earlier testimony and rendered her evidence unreliable. As far as PW-27 is concerned, the failure to ensure her personal safety and security, combined with the delay in her examination by over two years rendered her position extremely vulnerable.

104. The Court accordingly issues the following directions for compliance by courts conducting trials of cases involving grave offences punishable with more than seven years' imprisonment:

(i) As far as practicable, public witnesses, and in particular eye witnesses, should be examined at the earliest point in time once the witness action commences;

(ii) At every hearing, the trial Court will note the status of summoning of the public witnesses. It will elicit from the APP and record the reasons for the non-appearance of the public witnesses summoned for that date;

(iii) In relation to vulnerable witnesses, particularly eye witnesses, the trial Court will enquire in relation to each of them even at the time of their summoning whether in the assessment of the APP, they would require police protection and pass appropriate orders in that regard.

(iv) Where a public witness appears not to be confident of deposing fearlessly, the trial judge will temporarily halt the recording of evidence, enquire into the reasons and ensure that a conducive atmosphere is created for the further recording of evidence.

(v) The trial Court will ensure, as far as practicable, that short dates are given so that the evidence of the public witnesses is concluded within three months of the commencement of the witness action. Where this is unable to be adhered to, the trial Court will record the reasons in its orders.

105. A copy of this judgment be circulated to the District and Sessions Judges of all the Districts for wider dissemination amongst the Courts of the learned ASJs.

(S. MURALIDHAR)
JUDGE

(MUKTA GUPTA)
JUDGE

SEPTEMBER 17, 2014
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