

**IN THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR**

BEFORE

JUSTICE SUJOY PAUL

&

JUSTICE AMAR NATH (KESHARWANI)

CRIMINAL APPEAL No. 2746 OF 2011

BETWEEN :-

**RINKU @ AZHARUDDIN S/O NOOR
UDDIN, AGED ABOUT 21 YEARS,
SHED NO. 208, BACK OF RAVINDRA
COLLEGE, PANCHSHEEL NAGAR,
T.T. NAGAR, BHOPAL (MADHYA
PRADESH)**

.....APPELLANT

**(SHRI PRAMENDRA SINGH - ADVOCATE FOR THE APPELLANT- RINKU @
AZHARUDDIN)**

AND

**THE STATE OF MADHYA PRADESH
POLICE STATION T.T. NAGAR,
BHOPAL (MADHYA PRADESH)**

.....RESPONDENT

(BY SHRI S.K. KASHYAP- GOVERNMENT ADVOCATE)

&

CRIMINAL APPEAL No.2750 OF 2011

**ANKUR RAJAK S/O LATE SANTOSH
RAJAK, AGED ABOUT 19 YEARS,
JHUGGI NO 146 BEHIND SEWA
SADAN PANCHSHEEL NAGAR T.T.
NAGAR (MADHYA PRADESH)**

.....APPELLANT

**(SHRI SIDDHARTH DATT – ADVOCATE FOR THE APPELLANT- ANKUR
RAJAK)**

AND

**THE STATE OF MADHYA PRADESH
POLICE STATION T.T. NAGAR,
BHOPAL (MADHYA PRADESH)**

.....RESPONDENT

(BY SHRI S.K. KASHYAP- GOVERNMENT ADVOCATE)

Reserved on : 23 /01/2023
Pronounced on : 31/01/2023

These Criminal Appeals having been heard and reserved for judgment, coming on for pronouncement this day, Justice Sujoy Paul pronounced the following :

J U D G M E N T

These appeals filed under Section 374(2) of Criminal Procedure Code take exception to the judgment dated 29.10.2011 passed in Sessions Case No.151/2011 by learned Sessions Judge, Bhopal whereby both the appellants were convicted and sentenced by the trial Court as under -

Sl. No.	Convicted under Sections	Sentenced to undergo
1.	302 of the IPC in alternative 302 read with 34 of the IPC (each)	Life imprisonment with fine of Rs.1000/- and in default, to undergo R.I. for two months (each)
2.	25(1-B) of the Arms Act (each)	R.I. for one year with fine of Rs.1000/- and in default, to undergo R.I. for two months (each)
3.	27 of the Arms Act (each)	R.I. for one year with fine of Rs.1000/- and in default, to undergo R.I. for two months (each)
With the direction that all the sentences shall run concurrently		

2. The prosecution story in short is that complainant Ahmed Hussain (PW-1) got an information from Raees (PW-2) on 09.12.2010 that his son Altaf @ Cheeku was assaulted by appellants Rinku @ Azharuddin and Ankur Rajak by means of swords. Altaf was taken to Katju Hospital in a 108 Ambulance. Upon receiving the said information, complainant Ahmed Hussain reached Katju Hospital where he received the information about the death of his son. He found various injuries on the person of Altaf. He received information upon inquiry that before the incident, appellants blamed Altaf regarding stealing some material of sister of Ankur Rajak. Thus, a quarrel took place between them and they were having enmity towards Altaf @ Cheeku.

3. As per the information given by Ahmed Hussain (PW-1), a report in Police Station-T.T. Nagar was registered at 44/2010 and thereafter FIR No.1091/2010 under Section 302/34 of IPC was registered. During the course of investigation, the Investigating Officer visited the scene of crime and a spot map was prepared. The incriminating materials were collected from the place of incident. Statement of witnesses under Section 161 of the Cr.P.C. were recorded. The appellants were arrested and swords were recovered from them. The seized materials in sealed condition were sent for examination to Forensic Science Laboratory – Sagar (FSL-Sagar). After the investigation, *Challan* was filed. Appellants abjured the guilt. Sister of Ankur Rajak i.e. Pooja (DW-1) entered the witness box as a solitary witness. The Court below framed four questions for its determination

and thereafter recorded the statements of fifteen prosecution witnesses and one defence witness. After hearing the parties, the impugned judgment was passed and appellants were convicted and directed to undergo sentence as mentioned hereinabove.

Cr.A. No.2750/2011

Contention of Appellant :

4. Shri Siddharth Datt, learned counsel or the appellant- Ankur submits that as per prosecution story, there is only one eye witness to the incident, i.e. Sheikh Raees (PW-2). Learned counsel for the appellant – Ankur submits that on the basis of information received, the prosecution prepared a site map (Ex.P-2). By taking this Court to the site map, it is submitted that Sheikh Raees (PW-2) has signed the site map in the capacity of a witness. However, a plain glance of site map shows that the position from where incident has been witnessed by Sheikh Raees (PW-2) is not shown in the site map. In other words, it is argued that site map does not throw any light regarding presence of Sheikh Raees (PW-2) at the scene of crime. Thus, his presence itself at the scene of crime is doubtful and it is difficult to believe that he was an eye-witness.

5. The incident had taken place on 9.12.2010 whereas FIR was belatedly recorded on 10.12.2010 at the instance of Ahmed Hussain (PW-1). The statement of Sheikh Raees (PW-2) was relied upon wherein he deposed that he on his own did not go to the Police Station. He went to the Police Station only when he was called by the Police Authorities. Learned counsel for the appellant -Ankur submits that the

statement of Sheikh Raees (PW-2) were recorded under Section 161 of Cr.P.C on 11.12.2010. It is submitted that delay in recording this statement creates serious doubt on the purity of investigation. The delay is fatal to the story of the prosecution. For this purpose, reliance is placed on **(1978) 4 SCC 371 (Ganesh Bhavan Patel and Anr. Vs. State of Maharashtra)** and **(1996) 5 SCC 369 (Alil Mollah v. State of W.B.)**. In both the cases, submits Shri Sidharth Datt that statement of witnesses were recorded on the following day and yet the Apex Court held that the delay is fatal to the prosecution story. For the same purpose, reliance is placed on **State of Orissa Vs. Brahmanand Nanda** reported in **AIR 1976 SC 2488** where delay of one and half day occurred in recording the statement under Section 161 of Cr.P.C.

6. The FSL report dated 20.6.2011 (Ex.P-18) is referred to contend that the swords allegedly recovered from the appellants were marked as Article 'D' and 'E'. As per FSL report, although blood was found on the swords but there is no finding that it was human blood. Blood stains were disintegrated. The FSL report is liable to be discarded for yet another reason submits Shri Datt i.e. the incident had taken place on 9.12.2010 whereas swords were allegedly seized on 14.12.2010. Thereafter, the swords were sent to FSL on 29.12.2010 (Ex.P-19). Between 14.12.2010 to 29.12.2010 whether swords were in safe custody or not, no evidence was led. Thus, the FSL report is of no assistance to the prosecution.

7. The last attack is on the finding of Court below in Para -25 of the judgment wherein Court below while considering the statement of

Kamal Singh (PW-3) opined that deceased Cheeku informed him about the assault by both the appellants and such statement was treated to be an oral dying declaration. Learned counsel for the appellant submits that (Ex.D-1) is the statement of Kamal Singh (PW-3) recorded under Section 161 of Cr.P.C. If both the statements are examined in juxtaposition, serious infirmities can be apparently noticed and, therefore, the Court below has committed an error in accepting the statement of Kamal Singh (PW-3) regarding oral dying declaration given to him by Cheeku.

Cr.A. No.2746/2011

Contention of Appellant :

8. Shri Pramendra Singh, learned counsel for the appellant Rinku @ Azharuddin submits that he is borrowing the contentions of Shri Siddharth Datt, who argued on behalf of appellant Ankur Rajak. In addition, he submits that statement of Ahmed Hussain (PW-1) shows that he went to the hospital where his son Cheeku was taken in a 108 ambulance. He lodged an FIR at around 1:30 in the night. Heavy reliance is placed on Pre-MLC report (Ex.P-25) which was filed with the Challan. It is common ground taken by Shri Datt and Shri Singh that although this document was not proved by any witness, since it is part of the Challan filed by the prosecution which is a 'State', the defence can take advantage of this document. For this purpose, reliance is placed on a Division Bench judgment of this Court reported in **1996 MPLJ 452 (Lallu Singh Vs. State of M.P.)**. Interestingly,

reliance is placed on para-6 of the said judgment which reads as under :-

“6. We deprecate method of prosecution of withholding the evidence collected during investigation. The prosecutor is a ‘State’ and, therefore, the prosecution should be fair enough to produce all the evidence collected during investigation and it should be left to the Court to come to its own conclusion on the facts proved before him or the Court concerned.

But, despite the absence of formal proof of document of dying declaration, the same can be made use of by the accused in his defence accused can take the advantage of the document even without proof of the same. Similarly, the medical certificate showing the injuries on the body of the accused can also be made use of by the accused despite absence of formal proof.”

(Emphasis Supplied)

9. It is common ground that Pre-MLC report shows that the father of deceased did not inform the Doctors that Cheeku was assaulted by the present appellants. Indeed, name of assailants were shown as ‘unknown’. Thus, (PW-1) is not a reliable witness.

10. Shri P.S. Thakur, learned counsel for the appellants also submitted that the time gap between the preparation of MLC report and lodging of FIR is only five minutes which is improbable and this aspect has not been explained by the prosecution and not dealt with by the Court below.

11. It is further submitted that Dr. H.N.Sahu, who conducted the Pre-MLC was not produced as a witness by the prosecution. The FIR is an afterthought and neither Ahmed Hussain (PW-1) nor Sheikh Raees (PW-2) are actually eyewitnesses. The statement of (PW-1) is also relied upon to submit that the persons gathered at the place of incident allegedly informed this witness that grand-father of Rinku took the deceased to a distance of 20-25 feet and thrown him at that place. The Statement of Sheikh Raees (PW-2) is referred wherein he deposed that name of deceased was not informed to the Doctor whereas he accompanied father of deceased to the hospital.

12. The next contention is based on the spot map (Ex.P-2). In this map, the name of deceased no where finds place. The witness of this spot map is Sheikh Raees (PW-2) himself. House of Kamal in front of which incident had taken place as per Sheikh Raees (Pw-2) also does not find place in the spot map. D.D. Azad (PW-12) also admitted this fact during his deposition.

13. Kamal Singh (PW-3) is a 'chance witness' submits learned counsel for this appellant. It is submitted that name of Kamal Singh is not mentioned in the FIR nor his house is shown in the spot map (Ex.P-2). His statement under Section 161 of Cr.P.C. was recorded belatedly only on 11.12.2010. Two more witnesses Pradeep (PW-5) and Usman (PW-6) turned hostile. Vinod Sandhan was another person who was allegedly present at the place of incident as per the statement of (PW-1), was not produced as a prosecution witness. In order to unfolding the prosecution story, it was necessary to introduce this

witness. It is submitted that where statement of single witness is wholly reliable, it can serve the purpose but its a case where there are contradictions in the statements of Ahmed Hussain (PW-1) and Sheikh Raees (PW-2). Thus, they are neither wholly reliable nor wholly unreliable witnesses as per judgment of Supreme Court reported in **(2003) 11 SCC 367 (Sunil Kumar Vs. State Govt. of NCT of Delhi)**. In that case, there should be a corroboration without which their statements cannot be treated as gospel truth. For the same purpose, another judgment of Supreme Court reported in **1995 SCC (Cri.) 160 (Jagidsh Prasad and Ors. Vs. State of M.P.)** was relied upon.

14. The truthfulness of a witness must be tested as per the principle laid down in the case of **Badam Singh Vs. State of M.P.** reported in **(2003) 12 SCC 792**. If the statements of alleged eyewitnesses in the instant case are examined on the anvil of principles laid down in the case of **Badam Singh (Supra)**, their statements must be disbelieved by this first Court of appeal. Their statements are clearly doubtful and uncreditworthy.

15. Since name of Kamal Singh does not find place in the FIR, the FIR is not genuine. For this purpose, the judgment of Division Bench of this Court passed in the case of **Jagan Vs. State of M.P.** reported in **2007 (2) MPLJ 327** is pressed into service.

16. Consistent with argument already advanced by Shri Siddharth Datt regarding delay in recording statement under Section 161 of Cr.P.C, Shri Pramendra Singh relied upon the judgment of Supreme

Court in **CRA Nos. 1624 -1625 of 2013 (Harbeer Singh Vs. Sheeshpal Singh and Ors.)** decided on October 20, 2016. This judgment is referred for yet another purpose. It is submitted that Kamal Singh (PW-3) is a 'chance witness'. The statement of 'chance witness' needs to be examined with circumspection.

17. Reverting back to the statements of Ahmed Hussain (PW-1) and Sheikh Raees (PW-2), it is submitted that as per the judgment of Supreme Court in the case of **Rehmat vs. State of Haryana** reported in (1996) 10 SCC 346, both the aforesaid witnesses did not disclose the name of assailant to the Doctor, hence, their statements are not creditworthy. Another judgment of Supreme Court rendered in the case of **Ishwar Singh vs. State of U.P.** reported in (1976) 4 SCC 355 is referred to contend that in order to unfold the story of prosecution, the prosecution was obliged to introduce Vinod Sandhan and H.N. Sahu. In absence of producing these two material witnesses, the prosecution story becomes vulnerable.

18. The alternative argument of the learned counsel for the appellant is that in the event, this Court finds complicity of the appellants in the crime, by no stretch of imagination, the appellant can be held guilty of committing offence under Section 302 of the IPC. **Shahajan Ali and Ors. Vs. State of Maharashtra and Ors.** reported in (2017) 13 SCC 481 is relied upon to buttress this point. It is submitted that in the light of this judgment and the principles flowing therefrom, at best, offence under Section 304 part-II IPC can be made out. Moreso, when factum of quarrel is clear from the statements of PW-1 and PW-2. A sudden

quarrel, if takes an ugly shape, will not attract Section 302 of IPC. Indeed, exception 4 of Section 300 will be applicable. Lastly, Shri Pramendra Singh, learned counsel for the appellant placed reliance on a recent Division Bench judgment of this Court in **Criminal Appeal No. 119/2016 (Gaurav Pandey V/s State of M.P.)** decided on 25.07.2022 wherein this Court gave findings regarding unnatural conduct of witnesses. It is submitted that the conduct of Ahmed Hussain (PW-1) and Sheikh Raees (PW-2) was highly unnatural because when they allegedly reached Katju Hospital but they did not inform Dr. H.N. Sahu regarding the names of assailants. Similarly, Ahmed Hussain (PW-1) did not take the name of Kamal (PW-3) while lodging the FIR. For these reasons, it is common ground that the impugned judgment deserves be set aside. Both the appellants are in custody since 14.12.2010.

Contention of State :

19. Shri S.K. Kashyap, learned Government Advocate for the State submits that the Court below considered and appreciated the evidence in accordance with law. The conclusion drawn by the Court below is based on material available on record. The statement of sister of Ankur i.e. Pooja Rajak (DW-1), itself shows that there existed a 'motive'. As per her deposition, coupled with the statement of PW-1, it is clear that few months back, Pooja Rajak (DW-1) informed her family members that deceased Cheeku entered their house and incident of theft in the said house had taken place. The FIR (Ex.D-1) was lodged by Pooja Rajak against Cheeku about that incident on 27.04.2010.

20. The next submission of Shri Kashyap is that in view of the prompt FIR lodged by PW-1 which is a named FIR and nature of injuries were shown, no doubt can be raised on the prosecution story.

21. Heavy reliance is placed by Shri Kashyap, learned Government Advocate for the State on the *post-mortem* report (Ex.-P/11) wherein on 10.12.2010 itself, the police informed the name of assailants/appellants in the said application preferred for conducting the autopsy. The injuries on the person of the deceased were also shown to show there were multiple injuries and three injuries were on the vital parts.

22. The statement of Kamal (PW-3) is referred to show that deceased gave an oral dying declaration (DD) to this witness which is admissible under Section 32 of the Indian Evidence Act (Evidence Act).

23. Learned Government Advocate submits that the incident of assault/murder of Cheeku had taken place in the intervening night of 09-10.12.2010. The autopsy was conducted on the next day and statements of (PW-1), (PW-2) and (PW-3) were recorded on 11.12.2010. Thus, there is a gap of only one day between the date of incident and the date when such statements were recorded. There is no inordinate delay which may cause any dent to the investigation or to the prosecution story. FSL report is relied upon to submit that in both the swords recovered from the appellants namely article 'D' and 'E' blood was found.

24. At last, Shri Kashyap, Govt. Advocate submits that as per post-mortem report, death of Cheeku is homicidal in nature. There is no such flaw in the impugned judgment which warrants interference of this Court.

25. Learned counsel for the parties confined their argument to the extent indicated above.

26. We have bestowed our anxious consideration on rival contentions and perused the record.

Findings -

Ocular evidence and delay in recording statement under Section 161 of Cr.P.C. :

27. As per the prosecution story, father of deceased i.e. Ahmed Hussain (PW-1) got the information of assault on Cheeku @ Altaf from Raees (PW-2). Raees is an eye-witness and a star witness of the prosecution. The another important witness of prosecution is Kamal (PW-3) who deposed that Cheeku knocked his door and when he opened the door, he found him in an injured condition and behind him both the appellants were there with swords in their hands. As noticed above, learned counsel for the appellants raised eyebrows on their testimony by contending that their statements under Section 161 of Cr.P.C. were recorded on 11.12.2010 whereas incident had taken place in the intervening night between 09.12.2010 and 10.12.2010. The delay in recording 161 statements creates doubt on the case of prosecution.

28. The contention that delay of about one day in the instant case in recording statements under Section 161 of Cr.P.C. of PW-1, PW-2 and PW-3 has vitiated the case of prosecution and weakened the statements of said witnesses is based on the judgments of Supreme Court in **Ganesh Bhawan Patel, Ali Mollah and Brahmanand Nanda (Supra)**. A careful reading of judgment of Supreme Court in **Ganesh Bhawan Patel (supra)** shows that delay in recording the said statement, simplicitor by itself will not cause serious infirmity to the prosecution case unless it is of a character and based on a circumstance to suggest that investigator was deliberately marking time with a view to decide about the shape to be given to the case and the eye-witnesses to be introduced. The delay in recording the statements of material witnesses in such cases, cast a cloud of suspicion on the credibility of the warp and woof of the prosecution. In the instant case, there was no iota of material which suggests that delay of one day in recording the statement of three witnesses aforesaid was deliberate and was in order to gain time to give a definite shape to the prosecution story. Thus, as a rule of thumb, it cannot be said that one day's delay in recording the statement is fatal to the prosecution story. Apart from this, the said judgment of Supreme Court in **Ganesh Bhawan Patel (Supra)** was considered by Supreme Court in **State of U.P. vs. Satish** reported in **(2005) 3 SCC 114**, the Apex Court opined as under:

“18. As regards delayed examination of certain witnesses, this Court in several decisions has held that unless the investigating officer is categorically asked as to why there was delay in examination of the witnesses the defence cannot gain any advantage

therefrom. It cannot be laid down as a rule of universal application that if there is any delay in examination of a particular witness the prosecution version becomes suspect. It would depend upon several factors. If the explanation offered for the delayed examination is plausible and acceptable and the court accepts the same as plausible, there is no reason to interfere with the conclusion. (See : *Ranbir v. State of Punjab* [(1973) 2 SCC 444 : 1973 SCC (Cri) 858 : AIR 1973 SC 1409] , *Bodhraj v. State of J&K* [(2002) 8 SCC 45 : 2003 SCC (Cri) 201] and *Banti v. State of M.P.* [(2004) 1 SCC 414 : 2004 SCC (Cri) 294])

20. It is to be noted that the explanation when offered by the IO on being questioned on the aspect of delayed examination by the accused has to be tested by the court on the touchstone of credibility. If the explanation is plausible then no adverse inference can be drawn. On the other hand, if the explanation is found to be implausible, certainly the court can consider it to be one of the factors to affect credibility of the witnesses who were examined belatedly. It may not have any effect on the credibility of the prosecution's evidence tendered by the other witnesses.”

(Emphasis Supplied)

29. In **Satish (supra)**, the Apex Court considered catena of judgments and opined that unless the investigating officer is categorically cross-examined as to why there was delay in examination of witnesses, the accused cannot gain any advantage therefrom. In the instant case, the Investigating Officer Subodh Kumar Tomar (PW-15) was not subjected to any cross- examination on the aspect of delay in

recording the statements under Section 161 of Cr.P.C. Thus, alleged delay in recording the said statements in the facts and circumstances of this case will not cause any dent to the statements of the prosecution witnesses. This view is consistently taken by Supreme Court in **(2004) 1 SCC 414 (Banti v. State of M.P.)**, **1973 2 SCC 444 (Ranbir v. State of Punjab)** and **(2002) 7 SCC 334 (Mohd. Khalid v. State of W.B.)** and **(2009) 17 SCC 208 (Abuthagir v. State)** and followed by Division Bench of this Court in the case reported in **(2010) 5 MPHT 218 (Pillu @ Prahlad Vs. State)**.

30. Ahmed Hussain (PW-1) deposed that after receiving information of assault on his son from Raees (PW-2) he went to the hospital. From the hospital, he went to the police station and lodged the report. The learned counsel for the appellants argued that in the Pre-MLC report there is no information that appellants assaulted Cheeku. The common ground taken by learned counsel for the appellants was that Pre-MLC although was not proved by any witness of the prosecution, since it forms part of the challan, in the light of judgment of this Court in **Lallu Singh (supra)** it can be taken into account. We are only inclined to observe that there is no iota of material to show that Ahmed Hussain or Raees contacted the doctor before preparation of Pre-MLC. In absence thereof, said argument will not cut any ice. Apart from this, it is noteworthy that in the request letter sent by the police for post mortem (Ex.P-11), it was duly mentioned that present appellants were the assailants.

31. So far time gap between lodging of police report and visiting the hospital is concerned, it cannot be forgotten that incident of murder of Cheeku had taken place almost at the midnight. Ahmed Hussain (PW-1) (father) had seen the injured dead body of his young son. In that pathetic mental condition, if some discrepancy has occurred regarding the time mentioned, it will not cause any scratch on the story of prosecution. The statements of Raees Khan (PW-2) and Kamal Singh (PW-3) are questioned on yet another ground. It is submitted that in the site map, (Ex.P/2), the place from where incident is witnessed by Raees is not mentioned nor the house of Kamal in front which incident had taken place is clearly mentioned.

32. In our opinion the statements of Ahmed Hussain (PW-1), Sheikh Raees (PW-2) and Kamal Singh (PW-3) are specific, clear and without there being any material ambiguity. Their statements cannot be said to be unreliable. Similarly, statement of Kamal (PW-3) is consistent when he deposed that Cheeku asked for help and knocked his door and on opening the door, he found him full of wounds and behind him witnessed both the appellants carrying swords. In addition, he deposed, that when he inquired from Cheeku who assaulted him, he took the name of both the appellants. This part was treated to be an oral dying declaration by the Court below. Our attention was also drawn on minor discrepancies in the statements of Ahmed Hussain (PW-1) and Sheikh Raees (PW-2). Such discrepancies bound to take place and since not material in nature, do not spoil the crux of their depositions (See : **A. Shankar v. State of Karnataka, (2011) 6 SCC 279**). The

relevant portion of para-22 and 23 of the aforesaid judgment reads as under :-

“22.However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety.

23.The court has to form its opinion about the credibility of the witness and record a finding as to whether his deposition inspires confidence. Therefore, mere marginal variations in the statements of a witness cannot be dubbed as improvements as the same may be elaborations of the statement made by the witness earlier.”

(Emphasis Supplied)

The aforesaid view taken in **A. Shankar (Supra)** was also followed by the Apex Court in the case of **Mahavir Singh v. State of Haryana (2014) 6 SCC 716**. An attempt was made by the appellants to create doubt on this statement on the basis of non-mentioning of house of Kamal Singh (PW-3) in the site map. This point deserves serious consideration.

Site Map :

33. Raees Khan (PW-2) is the witness to the ‘Site Map’ (Ex.P-2). The testimony of this witness shows that no amount of cross-examination was made regarding location of house of Kamal (PW-3). Investigating Officer (I.O.) Subodh Kumar Tomar (PW-15) was also not subjected to cross-examination on this point. We have already held that statements of Ahmed Hussain (PW-1), Sheikh Raees (PW-2) and

Kamal Singh (PW-3) are of reliable quality and therefore, ancillary question is whether aforesaid flaw pointed out by the appellants relating to spot map will demolish the story of prosecution. This point, in our opinion, is no more *res integra*. The Supreme Court in **(2004) 13 SCC 279 (Prithvi (minor) vs. Mam Raj and others)** opined that site plan is not a ground to disbelieve the otherwise credible testimony of eye-witnesses. This principle was followed with profit in a subsequent judgment reported in **(2017) 11 SCC 195 (Yogesh Singh Vs. Mahabeer Singh and others)**.

34. In **(2000) 4 SCC 515 (State of U.P. Vs. Babu Ram)**, it was held that it is not possible to understand the rationale of the reasoning that if an Investigating Officer did not instruct the person, who drew up the site plan to note down certain details that would render the testimony of material witnesses unreliable. In view of these judgments of Supreme Court, in our view, the alleged flaw in the 'site map' is not fatal to the prosecution story. The statements of material witnesses are creditworthy and aforesaid technical flaw in preparation of site map will not make their testimony vulnerable.

Genuineness of FIR :

35. The appellants also raised doubt on the F.I.R. on the ground of delay. However, the chronology of events show that incident had taken place in the midnight of 09.12.2010 and F.I.R. was lodged promptly on 10.12.2010 at 00:40 O'clock. As per the deposition of PW-1 and PW-2, it is clear that both of them first visited the hospital to

see Cheeku @ Altaf and thereafter promptly reported the incident to the Police. The time gap is very little and in our opinion, there is no delay in lodging the F.I.R.

36. The testimony of Kamal Singh (PW-3) was put to question by calling him as a 'chance witness' by placing reliance on the judgment of Supreme Court in **Harbeer Singh (Supra)**. It was argued that his statement must be examined carefully. At the cost of repetition, in our opinion, a careful reading of statement of Kamal Singh (PW-3) shows that his statement is worthy of credence. The oral dying declaration given to him is beyond cavil of doubt and Court below rightly based its finding on such oral dying declaration.

37. Since name of Kamal Singh (PW-3) is not mentioned in the F.I.R., validity of F.I.R. was called in question in the light of judgment of this Court in **Jagan (Supra)**. In the peculiar facts and circumstances of that case, this Court has taken into account the aforesaid aspect of non-mentioning the name of one person / witness in the F.I.R. In the case in hand, there are many circumstances which are proved against the appellants. It is trite that F.I.R. is not an encyclopedia. [See : **Satpal vs. State of Haryana (2018) 6 SCC 610**] The minimum essential details alone were required to be mentioned in the F.I.R. Those details were indeed mentioned in the relevant FIR. The details are - the date and place of the incident, the name of assailants and the name of the complainant. Non-mentioning of names of witnesses will not vitiate the case of the prosecution.

Non-examination of witnesses :

38. A doubt was raised on the prosecution story by contending that Dr. H.N. Sahu who conducted the Pre-MLC was not examined despite the fact that he was a material witness. As discussed above, there is no material on record to show that before the Pre-MLC report was prepared, Ahmed Hussain (PW-1) and Sheikh Rahees (PW-2) contacted Dr. H.N. Sahu. Thus, non-examination of said Doctor is of no consequence. So far as non-examination of Vinod Sandhan is concerned, suffice it to say that the prosecution could establish its case by introducing material witnesses including Ahmed Hussain (PW-1), Sheikh Rahees (PW-2) and Kamal Singh Rajput (PW-3). The quantity of witnesses does not matter. What matters is the quality of their testimony (See : **Masalti v. State of U.P. AIR 1965 SC 202** and **Nirpal Singh and Ors. v. State of Haryana (1977) 2 SCC 131**). Thus, non-examination of Vinod Sandhan will not improve the case of the defence. We are also unable to persuade ourselves that conduct of Ahmed Hussain (PW-1) is unnatural because he has not informed the name of assailants to Dr. H.N. Sahu and name of Kamal Singh Rajput to Police Authorities. We have dealt with this aspect in sufficient detail in previous paragraphs and clearly opined that on this aspect, the appellants cannot gain any brownie points.

39. We find substantial force in the argument of Shri S.K. Kashyap learned Government Advocate for the State that evidence of Pooja Rajak (DW-1) clearly shows that FIR (D-1) was lodged by her against the deceased Cheeku regarding an incident of theft taken place on

27.4.2010. From that date, Cheeku was not traceable. As per prosecution story, Cheeku surfaced for the first time on 9.10.2012 and on the same date, he was assaulted by means of swords by both the appellants. Thus, the previous enmity became the operative reason to assault Cheeku. The assault was not arising out of a sudden quarrel. Indeed, it took place because of previous history of enmity. As per statement of Dr. Vimla Prajapati (PW-9), multiple injuries were found on the person of deceased. The description of injuries are as under :-

- (i) There is an **incised** wound present on chin of size 19 cm x 3 cm x 6 cm, both ends are sharp. It has cut the lower border of mandible (body and left ramus). Soft tissues and muscles underneath and entered into the trachea (cut throat injury). Ecchymosis present. Left side of lower lip is also having sharp cut.
- (ii) There is **incised** wound present on left side of head, vertex region of size 7 cm x 3 x 2 cm, upper end sharp, lower end broad, vertical, situated 3 cm left lateral to the mid line. Underneath scalp ecchymosed. There is a vertical fracture line present underneath the wound lying 3 cm left lateral to the sagittal suture on left parietal bone travelling parallel to the sagittal suture. Vertically downwards and posteriorly crossing the lambdoid suture and reaching upto the occipital bone. Underneath subdural subarachnoid haemorrhage present. Brain pale.
- (iii) **Stab wound** transverse of 4 x 2 x 6 cm size, both ends tapering (sharp) present on posterior aspect of left elbow. It has cut the underneath soft tissues and muscles, ecchymosis present.
- (iv) Friction abrasion transverse, size 6 x 2 cm on mid of antero-lateral aspect of right thigh.

- (v) Transverse Friction abrasion, size 7 x 0.5 cm, present on anterior aspect of left knee.
- (vi) Multiple friction abrasion of pea nut size present on dorsum of left hand and middle finger.
- (vii) Friction abrasion of 3 x 2 cm size on left shoulder tip.
- (viii) Friction abrasion of 5 x 0.5 cm present on left scapular spine region, vertical.

(Emphasis Supplied)

40. As per the opinion of Dr. Vimla Prajapati (PW-9), Cheeku died because of excessive bleeding. He sustained injuries from sharp and heavy object. In this backdrop, where the appellants assaulted the deceased by means of deadly weapon on the vital parts of his body on more than one occasions, we are unable to persuade ourselves that this overt act will fall within Exception 4 of Section 300 of IPC. In our considered view, the necessary ingredients for committing offence under Section 302 read with Section 34 of IPC were available and the Court below has not committed any error in convicting the appellants for the said offence. The conviction and sentence awarded by the Court below for the offences punishable under Sections 25(1-B) and 27 of the Arms Act are also upheld. The prosecution could establish its case before the Court below beyond reasonable doubt. The Court below appreciated the evidence on correct parameters and took a plausible view which does not warrant any interference by this Court.

41. Resultantly, both the appeals are **dismissed**.

(SUJOY PAUL)
JUDGE

(AMAR NATH (KESHARWANI))
JUDGE