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

**Date of decision: 4<sup>th</sup> February, 2022**

+ **CRL.A. 811/2013**

**DEEPAK @ DEEPU**

..... Appellant

Through: Mr. Siddharth Aggarwal, Senior Advocate along with Mr. Vikas Padora, Mr. Vishwajeet Singh, Mr. Divyank Tyagi, Mr. Dipanshu Chugh, Mr. Tushar Mawkin, Advocates.

versus

**STATE NCT OF DELHI**

..... Respondent

Through: Mr. Ashish Dutta, APP for the State along with S.I. Ajeet Kumar, P.S.: Neb Sarai.

+ **CRL.A. 1485/2013**

**RAJESH @ PARVEEN**

..... Appellant

Through: Mr. G. Tushar Rao, Senior Advocate along with Mr. B. Badrinath, Advocate (DHCLSC) along with Mr. Mayank Sharma, Ms. Sharavena Raghul & Mr. Dhruv Bhardwaj, Advocates.

versus

**STATE**

..... Respondent

Through: Mr. Ashish Dutta, APP for the State along with S.I. Ajeet Kumar, P.S.: Neb Sarai.

+ **CRL.A. 1501/2013**

**DILIP @ KARAN**

..... Appellant

Through: Mr. S.B. Dandapani, Advocate.

STATE versus ..... Respondent  
Through: Mr. Ashish Dutta, APP for the State along with S.I. Ajeet Kumar, P.S.: Neb Sarai.

+ **CRL.A. 1570/2013**

REENA YADAV ..... Appellant  
Through: Ms. Inderjeet Sidhu, Advocate (DHCLSC) along with Ms. Praavita Kashyap, Advocate on behalf of Ms. Rebecca John, Senior Advocate.

STATE versus ..... Respondent  
Through: Mr. Ashish Dutta, APP for the State along with S.I. Ajeet Kumar, P.S.: Neb Sarai.

+ **CRL.A. 88/2014**

STATE ..... Appellant  
Through: Mr. Ashish Dutta, APP for the State along with S.I. Ajeet Kumar, P.S.: Neb Sarai.

REENA & ANR. .... Respondents  
Through: Ms. Inderjeet Sidhu, Advocate (DHCLSC) along with Ms. Praavita Kashyap, Advocates for Ms. Rebecca John, Senior Advocate for R-1.  
Mr. Nikhilesh Kumar, Mr. Priyank Jain & Mr. Rishab, Advocates for R-2.

**CORAM:**  
**HON'BLE MR. JUSTICE SIDDHARTH MRIDUL**  
**HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI**

**J U D G M E N T**

**ANUP JAIRAM BHAMBHANI J.**

**Summary of Facts**

By way of the present judgment, we propose to deal with a batch of 05 criminal appeals bearing CrI. A. Nos. 811/2013, 1485/2013, 1501/2013, 1570/2013 and 88/2014, whereby 04 convicted appellants as well as the State have impugned judgment dated 23.02.2013 and sentencing order dated 27.02.2013, by which the learned trial court has convicted the 04 appellants for committing offences under section 302 read with section 120B of the Indian Penal Code 1860 ('IPC') and has sentenced all appellants to rigorous imprisonment for life alongwith fine of Rs.20,000/- each, with a default sentence of 01 year. By the same judgment, the learned trial court has acquitted accused Meena Gupta of the charge under sections 302 read with 120B IPC and the charge under section 25 of the Arms Act, 1959 ('Arms Act') as also acquitted Reena Yadav of the charge under section 25 of the Arms Act, against which acquittals the State has preferred the fifth appeal. For sake of completeness, it may be mentioned that one Krishna, who was also initially suspected to have been involved in the crime, was neither arrested nor charged in the matter.

2. The case arises from an incident of 18.09.2009, when Karamvir Yadav (PW-1) made a PCR call saying that around 08:45 a.m. while standing outside his house, he looked up and noticed that his nephew Parth Sarthi *alias* Yash (PW-2) was standing in the balcony with his mouth taped-up and was indicating to PW-1 to come upstairs; and on going-up to the flat on the second floor of the building, PW-1 found that his brother Dalbir Singh, who used to live there, was lying in a pool of blood with his hands tied behind his back and with a wire round his neck. Thereupon, PW-1 says he removed the tape from his nephew's mouth and untied his hands; and that his nephew told him that four persons had come and were demanding some property papers from Dalbir Singh, the deceased/victim; that they beat-up the latter; they taped and tied-up PW-2; and left thereafter.
  
3. It transpired that PW-1 then took the victim to Batra Hospital, where the victim was declared brought dead. Based on the information received from PW-1, FIR No. 231/2009 dated 18.09.2009 came to be registered under sections 302/34 IPC at P.S.: Neb Sarai and investigation commenced in the matter, culminating in the filing of chargesheet dated 19.12.2009 and supplementary chargesheet dated 23.07.2010 against 05 accused persons. The particulars of the persons concerned are the following :

<b>Appellant</b>	<b>Name</b>	<b>Relationship</b>	<b>Convicted/Acquitted</b>
A-1	Reena Yadav	Wife of deceased	Convicted under section 302/120B IPC; acquitted under section 25 Arms Act
A-2	Rajesh @ Parveen	Driver of Reena Yadav and Meena Gupta's parents; and alleged paramour of Meena Gupta	Convicted under section 302/120B IPC
A-3	Deepak @ Deepu	No relation	Convicted under section 302/120B IPC
A-4	Dilip @ Karan	No relation	Convicted under section 302/120B IPC
A-5 (accused)	Meena Gupta	Sister of Reena Yadav	Acquitted

4. At the trial, the prosecution marshalled 31 witnesses, while the defence presented 02 witnesses. The principal witnesses on whose testimony the decision of the learned trial court proceeds are :

<b>Witness No.</b>	<b>Witness Name</b>	<b>Relevance</b>
PW-1	Karamvir Yadav	Brother of the deceased
PW-2	Parth Sarthi <i>alias</i> Yash	Son of the deceased
PW-3	Preeti Yadav	Niece of the deceased
PW-4	N.K.Sharma	Senior Finger Print Expert, Fingerprint Bureau
PW-8	H.C.Rajesh Kumar	<i>Malkhana</i> in-charge

PW-9	H.C. Giriraj Prasad	Head constable of Mobile Crime Team that collected evidence
PW-18	Dr. Susheel Sharma	Post-mortem doctor
PW-23	Ajay Kapoor	Landlord of the Flat No. 2/19 B Jangpura.
PW-24	Ranjan Sharma	Purchased the deceased's property in 2006
PW-27	S.I. Heera Lal	Part of investigating team
PW-29	S.I.Karambir Singh	S.I. at P.S. Neb Sarai- Assigned DD no. 3A
PW-30	Insp. Kulbir Singh	SHO of P.S. Neb Sarai
DW-2	Dr. Ruby Kumari	Medical Officer-in-Charge, CJ-06 Tihar Jail.

5. The essential basis for convicting the four appellants, as seen from the impugned judgment, is that Reena had a matrimonial dispute with her husband, the deceased; for which reason Reena and the deceased used to quarrel and Reena used to threaten to kill her husband. Reena had made several complaints to the police authorities, alleging that her husband used to beat her up. The learned trial court further found that for about 10-12 days prior to the date of incident, Reena was staying away from her matrimonial home; and that she did not even attend the last rites of the deceased. In this backdrop, the learned trial court returned a finding that Reena hatched a conspiracy along with Parveen, Deepak and Dilip to eliminate the deceased; while it exonerated Meena.

## Submissions of Counsel

### Submissions on behalf of Reena Yadav (A1) :

6. Ms. Rebecca M. John, learned senior counsel appearing on behalf of Reena Yadav submits that, based solely upon domestic discord between her deceased husband and Reena, which is an undisputed fact since several complaints arising from their matrimonial discord were made by Reena herself before the police as well as before the Crime Against Women (CAW) Cell, the serious charge of murder has been foisted upon Reena. The impugned judgment is challenged on behalf of Reena on the following essential basis :

- (i) That PW-1 suspected Reena's involvement in his brother's homicidal death, since there had been disputes between the deceased and Reena as she is stated to have claimed a share in the sale proceeds of certain properties the deceased had sold. Furthermore, the fact that Reena did not participate in the last rites of her deceased husband is also being used as a circumstance to implicate her in the murder. It is submitted that these are all baseless allegations attributing motive to Reena, but which motive alone cannot be the basis of a conviction for murder.
- (ii) That Reena is being ascribed a role in the murder based upon certain telephonic conversations, which she is alleged to have had with other accused persons, as claimed to be seen from the Call Data Records (CDRs); which conversations

are canvassed as evidence of conspiracy to murder her husband. It is urged that even assuming such conversations exist, it is settled law, that without proof of what was said in such telephonic conversations, the same would be insufficient to infer conspiracy;

- (iii) That the recovery of a knife, which is alleged to be one of the weapons of the offence, is also sought to be attributed to Reena. However, for one, the recovery is disbelieved and disregarded by the learned trial court; and in any case, no blood was found on the knife and furthermore, the knife was not even shown to the post-mortem doctor to seek his opinion as to whether that knife could have been a weapon of offence; nor was the knife shown to PW-2, the alleged eyewitness, as to whether he identified it as the one wielded by one of the accused;
- (iv) That the knife is alleged to have been recovered at Reena's instance from the premises (flat) which was in the use and occupation of her sister Meena. It is from this very premises that Reena and Meena were both arrested on 23.09.2009; after which, it is submitted, the keys to the premises were available to the Investigating Officer. It is therefore urged that the alleged recovery of the knife from this premises on 24.09.2009 carries no credibility since the place was in the possession and control of the police, thereby tainting the alleged recovery of the knife from that place;

- (v) That Reena is alleged to have been present along with Meena, her sister and co-accused, and Parveen at Meena's flat on 23.09.2009, when all three of them are alleged to have been arrested by the Investigating Officer;
- (vi) That however, PW-2, the son of the deceased, who is canvassed as an eye-witness to the crime, makes no mention even of the quarrel between the deceased and Reena; nor does he make any allegation against her;
- (vii) That the other star witness produced by the prosecution, i.e., the niece of the deceased PW-3, also makes no allegation against Reena;
- (viii) That in his testimony, PW-30 the Investigating Officer attempts to connect Reena with the crime based upon the CDRs, alleging that it was at Reena's instance that Parveen and the other accused persons, who were known to Parveen, beat her husband to death. However, even the CDRs do not disclose any direct calls between Reena's cell-phone number and that of Parveen's. This is so even if one ignores the fact that the cell-phone number 9654387582, which is alleged to have been used by Reena for this purpose, admittedly stands in the name of one Santosh Tamang, who was never produced as witness in support of the prosecution case; and there is no tangible evidence to show that Reena was at all using this cell-phone number. Use of this cell-phone is being attributed to Reena only on the allegation that it was

recovered from her as recorded in her personal search memo;

- (ix) That it may be noticed that there is only one solitary call between Santosh Tamang's cell-phone number to Parveen's cell-phone number, lasting about 60 seconds, which is on 20.09.2009 i.e. after the date of the offence, thereby belying the charge of conspiracy, namely falsifying the theory of prior meeting of the mind between the interlocutors;
- (x) That it is the prosecution's theory that through her cell-phone number 9999443780 Reena was in contact with her sister Meena on cell-phone number 9891681844, which latter number is alleged to have been used by Meena though it stood in the name of one Zahid. It is further alleged that Meena used the cell-phone number 9891681844 to be constantly in touch with Parveen on 9717305439. It is submitted that apart from the fact that there was every justification for Reena to be in touch with her own sister Meena, the allegation fails to stand scrutiny since the within named Zahid was neither traced nor produced at the trial, to establish that his cell-phone number was being used by Meena. For this reason, the learned trial court itself observes that there was nothing on record to link the cell-phone number 9891681844 with Meena;
- (xi) That the CDRs show that there were no calls between the cell-phone numbers registered in the name of Reena

(9999443780 and 9911271917) and the cell-phone number 9717305439 attributed to Parveen;

- (xii) That insofar as the alleged dispute between Reena and the deceased in relation to her share in property is concerned, it is argued that, even on the prosecution's own reckoning, the subject property was sold to PW-24, Rajan Sharma back in 2006 and the sale proceeds were received by the deceased in 2006; whereby, it is hard to accept that Reena was asserting her claim to her share in the sale of that property in 2009, least of all to the extent of conspiring to kill her own husband for that reason;
- (xiii) That it is also submitted that the CDRs in question cannot be looked into since they are not supported by requisite certificates under section 65B of the Indian Evidence Act, 1872 (Evidence Act) and do not fulfil the requirements of that provision;
- (xiv) That explaining her absence at the last rites of her deceased husband, it is submitted on behalf of Reena, that she could not join the last rites by reason of her illness, namely that she was suffering from epilepsy. In evidence of her illness, an MLC has been produced and marked in the course of evidence. It is further explained that, as seen from the domestic violence complaints made by Reena, she had not only complained against the victim but also against his family members, whereby it was only natural for Reena to

stay away from attending the last rites of the deceased, to avoid acrimony with his family members;

- (xv) That most importantly, it is argued that in its judgment acquitting Meena, the learned trial court observes that the mere presence of Reena and Parveen in the premises of Meena is not sufficient to bring home guilt upon Meena, while at the same time holding Reena guilty in the same circumstances. It is argued that if the presence of three accused, Reena, Meena and Parveen is not sufficient to convict Meena, the same circumstance of the three accused being present together cannot be held to incriminate Reena;
- (xvi) That it is also submitted, that according to the prosecution itself, Parveen was supposed to be Meena's paramour, whereby it would be natural for him to be present at the premises. Equally, Reena's presence at Meena's premises is not unnatural or suspect, since Reena is Meena's sister and was staying away from her matrimonial home due to discord with her husband;
- (xvii) That the case against Reena is premised only on suspicion, conjectures, and surmises; and proceeds solely on the basis that since there was matrimonial discord between Reena and the deceased, that was motive enough for her to conspire to murder him. It is argued that motive alone, even assuming that there was motive, cannot be the basis of conviction.

**Submissions on behalf of Rajesh *alias* Parveen (A2) :**

7. Mr. Tushar Rao, learned senior counsel appearing on behalf of Rajesh *alias* Parveen (A2) (referred to mainly as Parveen) challenges Parveen's conviction on the following basis :

- (i) That PW-2 who is being cited as an eyewitness to the incident, is unlikely to have been at home at 8:30 a.m. on a Friday since it is the admitted position that he was a student of Class-VII at the relevant time; and would therefore have been attending school at that hour. Additionally, though Parveen has a burn mark/scar on his hand and neck, curiously PW-2 does not mention this scar in the *rukka*. These aspects, according to the submission, point towards PW-2 being a 'planted witness';
- (ii) That insofar as the testimony of PW-3 is concerned, if it is to be believed that she saw four accused persons coming down the stairs, from the second floor, then how did PW-1 who claims to have been standing outside the same building not see the same persons. It is contended therefore that, PW-3 is also not a credible witness;
- (iii) That though Parveen is stated to have made his disclosure statement on 23.09.2009, the alleged recovery of a pair of blood-stained shoes belonging to him, is stated to have been made at Parveen's instance several days later on 02.10.2009, which makes the recovery at Parveen's instance doubtful;

- (iv) That the Investigating Officer has very neatly attributed one recovery each to the accused persons, namely Reena, Meena and Parveen, which is not believable since if they were acting in conspiracy and all three of them were found together in the same room at the time of their arrest, all three would have known where the weapons/articles were kept;
- (v) That notably, no money was recovered from or at the instance of any of the accused persons, thereby belying the only alleged motive for the crime;
- (vi) That it is the prosecution's case that the Investigating Officer did not have access to the flat from where recoveries were made since the keys to the flat were handed-over by the Investigating Officer and kept with the *malkhana* in-charge. However, there is no entry in the *malkhana* register about the retention of these keys;
- (vii) That as for the CDRs, which form the basis of the alleged conspiracy between the accused persons, the allegation is that Meena was using the cell-phone number 9891681844, which belongs to one Zahid, for speaking with the other co-accused persons involved in the conspiracy. But the within-named Zahid has neither been traced nor examined at any stage; and since no evidence was adduced to prove the link between Zahid and Meena and the use of Zahid's cell-phone by Meena, the learned trial court has also disbelieved the alleged use of the said cell-phone number by Meena;

- (viii) That though the State contends that Parveen and Deepak's CDRs disclose their location as M.B. Road, Khanpur, on 18.09.2009 at 08:08:18 hours, where these two persons are alleged to have spoken for 62 seconds, the Cell-ID Chart was not duly proved since no certificate as required under section 65B of the Evidence Act was filed in respect of such chart in the case;
- (ix) That the refusal by Parveen to face a Test Identification Parade (TIP) on 25.09.2009 is being baselessly held against him. Such refusal was justified since Parveen clearly stated that he was shown to many people at the police station and his photograph was also taken. Furthermore, along with other accused, Parveen was also taken to the building where the deceased used to reside, which is the crime scene, where he was shown to several persons including the alleged eyewitnesses, who must have been present, and saw Parveen before the TIP and the dock identification happened;
- (x) That the pointing-out memo dated 23.09.2009, whereby Parveen is alleged to have pointed-out the place of occurrence of the crime, is meaningless since PW-30 admits in his cross-examination that the crime scene was already in their knowledge before the accused persons allegedly led them to the spot. This is further corroborated by PW-27, who admits in his cross-examination, that the Investigating Officer was very well aware of the place of occurrence

before effecting the arrest of the accused persons and before the preparation of the pointing-out memo;

- (xi) That even the place and time of Parveen's arrest, as cited in arrest memo dated 23.09.2009 are false as is evident by the responses given by Reena, Meena as well as Parveen in their respective statements under section 313 CrPC, which are all consistent. Both Reena and Meena have said that only the two of them were present at Flat No. 2/19B Jangpura at the time of their arrest; and that Parveen was not present there at all nor was he arrested or brought to the police station from that premises. It is contended that Parveen was in fact arrested before that, on 19.09.2009, when he was on his way to work from his house;
- (xii) That the medical evidence that has come on record, through the post-mortem doctor PW-18, belies any intention to kill since even though a wire was allegedly discovered wound around the neck of the deceased, no ligature mark was present at the neck region and the thyro-hyoid complex was found intact. This shows that there was no pressure applied with the wire around the neck, which evidences that there was no intention to kill;
- (xiii) That though the post-mortem report describes a stab wound on the left buttock of the deceased, it is argued that the buttock is not a vital area and a stab wound at that point is

not enough to cause death in the ordinary course. Therefore, stabbing there does not show any intention to kill;

(xiv) That the post-mortem doctor has opined that death was caused by reason of shock as a result of multiple injuries caused by stabbing and blunt force; but the knife and the pistol, the allegedly recovered weapons, were never put to the post-mortem doctor for his opinion, as to whether these could have been the weapons of offence;

(xv) That peculiarly, the post-mortem doctor has also observed that surgical bandages were present on the head, on the left hand and the right elbow of the deceased, which contradicts the prosecution's story that the victim was found dead at the crime scene, since no one would put bandages on a dead body.

**Submissions on behalf of Deepak alias Deepu (A3) :**

8. Mr. Siddharth Aggarwal, learned senior counsel appearing on behalf of appellant Deepak *alias* Deepu (A3) submits that Deepak's conviction is premised essentially on three circumstances. First, that Deepak has been identified as one of the assailants by PW-2 and PW-3; second, that Deepak's specimen fingerprints matched chance fingerprints lifted from the scene of crime; and third, that the CDRs of various accused persons, including Deepak, indicate that they were part of a conspiracy to murder the deceased. Mr. Agarwal makes the following

submissions against the conviction of the accused Deepak *alias* Deepu :

- (i) That the circumstance that Deepak refused a TIP on 25.09.2009 is being held against him. This, it is submitted, is not an incriminating circumstance, since Deepak has explained in his statement recorded under section 313 CrPC, that he refused a TIP because he had been shown to many people in the police station prior to the TIP and his photographs were also taken. This statement is corroborated by the fact that Deepak's photograph was indeed found on the judicial record during the deposition of the Investigating Officer PW-30 and PW-9. Although PW-30 attempts to explain this by saying that photographs were taken in order to create Deepak's dossier, that explanation is falsified on a comparison of the photographs of Deepak as available on the trial court record and the one appearing in his dossier, both of which are different. Also, that does not rule-out the fact that Deepak's photographs were available to be shown to witnesses for the purposes of the TIP and at the stage of dock identification;
- (ii) That it is the admitted case of the prosecution that on 23.09.2009, Deepak along with other accused persons, was taken to the house of the deceased, where both PW-2 and PW-3 were likely to have been present; and that this happened prior to the TIP being conducted. Therefore, even

the subsequent dock identification of Deepak by PW-2 and PW-3 does not carry any weight;

- (iii) That since both PW-2 and PW-3 are related to the deceased, that is additional reason why their testimony requires higher scrutiny;
- (iv) That the testimony of PW-2, who was the son of the deceased, warrants closer scrutiny also for the reason that he is a 'child witness' studying in Class-VI/VII; and is not an 'injured witness';
- (v) That since it is the prosecution case that the incident occurred at possibly the busiest time of the day, between 08.00 a.m. and 09.00 a.m on a Friday in a three-storeyed house situated, in a locality with small plot sizes and closely built houses, it is hard to believe that no other person was alerted upon hearing noises of, what the prosecution itself says, was a protracted attack upon the deceased by the accused persons spanning over 30 minutes;
- (vi) That a peculiar aspect of PW-2's testimony is that he gives no description of the actual attack on his father but simply says "... *they killed my father and went away ...*"; without affording any particulars nor delineating the roles of the various assailants. Though PW-2 provides an identification mark for appellant Rajesh *alias* Parveen, being a scar/burn

mark on his hand and neck, no such identification marks are specified for Deepak;

- (vii) That though PW-2 identifies Deepak as the assailant who wielded the pistol, the witness does not say that the pistol was fired; nor is the use of pistol borne-out from the medical evidence, that is the MLC or the post-mortem report. No pistol was recovered at the Deepak's instance; but was recovered instead, at the instance of appellant Meena. Even the recovery of the pistol was disbelieved by the learned trial court considering the manner in which it was stated to have been recovered. It is pointed-out that PW-2 was also not made to identify the pistol in his deposition in court; nor did the prosecution check for any fingerprints on the allegedly recovered pistol;
- (viii) That a knife was subsequently recovered, statedly at the instance of appellant Reena but PW-2 does not depose about any of the assailants carrying a knife;
- (ix) That a conjoint reading of PW-2's deposition in court and his statement dated 18.09.2009 recorded under section 161 CrPC show that he used the Hindi word '*mara*', meaning assaulted, which bolsters the theory that if at all, the assailants intended only to assault the deceased and did not intend to kill him. Accordingly, when two views are possible on the same facts, which is the case here, as per settled

principles of law, the view favourable to the accused ought to be adopted;

- (x) That though PW-2's statement under section 161 CrPC, is dated 18.09.2009, which is the date of the incident; however, in his deposition in court, PW-2 says that his statement was recorded by the police 2-3 days after the incident, which lends credence to the possibility that PW-2 is a 'put-up' witness;
- (xi) That PW-3's name does not find mention either in the *rukka* or in the statement of PW-1 (complainant and brother of the deceased), which bolsters the possibility that PW-3 was not present at the spot and did not see the assailants at all. Even assuming PW-3 was present at the spot, admittedly PW-3 only got a fleeting glimpse of the assailants as she saw them hurriedly climbing down the stairs; and therefore, Deepak's dock identification by PW-3, ought not to be given weightage;
- (xii) That as for Deepak's fingerprints having allegedly been found at the scene of the crime, this circumstance is baseless since, *firstly*, there is no evidence to indicate that Deepak's specimen signatures were at all taken; secondly, there is no evidence to indicate as to who took Deepak's purported specimen fingerprints, or when, or in what manner. There is also nothing to indicate as to how and where Deepak's purported specimen fingerprints were kept before being sent

to the Fingerprints Bureau. There is no seizure memo or *panchnama* to document the taking of specimen fingerprints. None of the witnesses involved in taking or in the comparison of fingerprints has deposed about taking, storing or handing-over of the purported specimen fingerprints. *Secondly* and most importantly, the purported specimen fingerprints were never exhibited during the trial, and peculiarly, they were simply “... *taken on record* ...” by the learned trial court during the examination-in-chief of PW-15: S.I. Gyanender Singh, who is the fingerprint expert, in a manner contrary to law;

- (xiii) That the position of ‘chance prints’ alleged to have been lifted from the scene of the crime is similar, namely PW-4: N.K. Sharma, who is stated to have lifted the chance prints from the crime scene, states that he had handed-over the same “... *in open condition and not in a sealed cover* ...” to the record keeper A.S.I. Satish Kumar on 18.09.2009; but the said A.S.I. Satish Kumar was neither cited nor produced as a witness during trial. Furthermore, neither the *malkhana* register nor the *malkhana* in-charge PW-8, HC Rajesh Kumar has shed any light on how the chance prints were handled and by whom. In the course of his testimony in court, PW-4 : N.K. Sharma does not identify that the chance prints placed before the court are the same ones that he had lifted from the scene of the crime on 18.09.2009. It is

submitted that all this indicates a serious possibility that the chance prints may have been tampered with;

- (xiv) That comparison of the purported specimen fingerprints with the chance prints was made despite the fact that the chance print 'Q-1' in question, was a partial print, which could not have fulfilled the bare minimum requirement of an eight-ridge characteristics comparison, that is required to conclude matching fingerprints. In view thereof, it is submitted that, the alleged circumstance that Deepak's fingerprints were found on the crime scene, is unsustainable;
- (xv) That the prosecution case that Deepak was in touch with the other alleged co-conspirators on cell-phone No. 9654050805, is also baseless, since the said number was found registered in the name of one Deepika Rawat, who is stated to be Deepak's sister; but the prosecution did not examine either Deepika Rawat or any other caller mentioned in the CDRs of that cell-phone number and therefore, failed to prove that the number was at all being used by Deepak, or that it was in his possession during the relevant period of time. It is submitted that even the Cell-ID Chart relating to the said number has not been placed on record to attempt to establish Deepak's location at the time of the incident. Peculiarly, no questions were put to Deepak as regards the possession or use of the cell-phone number 9654050805 while recording his statement under section 313 CrPC; and

instead, a different cell-phone number 9717305439 was put to him; which number is anyhow attributed by the prosecution itself to appellant Parveen. It is pointed-out that cell-phone No. 9654050805 attributed to Deepak, clearly finds mention in the personal search memo of appellant Meena. This anomaly is later sought to be clarified in further examination-in-chief of the Investigating Officer PW-30, as being an inadvertent error committed by him, which does not inspire confidence;

(xvi) That the foregoing aspects cast serious doubt on the prosecution theory as to the possession, use or recovery of the cell-phone No. 9654050805 by and from Deepak. It is submitted that the learned trial court holds that Deepak had failed to adduce any evidence to show that cell-phone No. 9654050805 was not being used by him; while in the case of appellant Meena, the learned trial court says that the use of the cell-phone No. 9891681844 cannot be attributed to Meena since the registered owner thereof was not examined, and hence the identity of the SIM card owner has not been established. It is contended that thereby, the learned trial court adopts two contrary standards for proving the use and possession of cell-phones by the two appellants;

(xvii) That the charge of criminal conspiracy rests entirely on the use of cell-phones and the CDRs, the allegation being, that *inter-alia* Deepak, Parveen and Dilip *alias* Karan were in

constant touch with Reena and Meena, as part of such conspiracy. In this behalf, it is submitted that there are no calls between Deepak and Reena or Meena or Dilip *alias* Karan. Furthermore, Deepak was not afforded an opportunity to explain his calls to Parveen, since the calls between the two were not put to him while recording his statement under section 313 CrPC. Also, since the prosecution has failed to establish the possession and use of cell-phone number 9891681844 by Meena, the CDRs relating to the said number cannot be relied upon against the remaining accused persons either. It is submitted that if the CDRs relating to Meena's cell-phone number are eschewed from consideration, there is nothing to show that any calls were made between Reena and the remaining accused persons, barring a single call of 60 seconds duration, made by Reena on 20.09.2009 i.e., after the date of the incident which happened on 18.09.2009, to Parveen. No CDRs relating to Dilip *alias* Karan have been adduced in evidence;

(xviii) That in any case, as is the settled position in law, the mere factum of showing phone-calls between co-accused persons is insufficient to establish a case of conspiracy, without establishing the contents of such phone calls;

(xix) That the prosecution has failed to establish against Deepak any motive or intention to cause death. The prosecution has failed to adduce any evidence to support its theory that the

offence was committed for monetary reward. No searches were conducted at Deepak's residence or at any other place related to him; nor was the crime scene investigated for any missing valuables. Only a paltry sum of Rs. 50/- was recovered from Deepak during his personal search; and moreover, no question in this behalf was put to Deepak during his statement recorded under section 313 CrPC;

- (xx) That no recovery whatsoever was effected at Deepak's instance. It is submitted that considering the nature of injuries on the deceased and in the absence of any clearly delineated roles having been ascribed by the alleged eyewitness to the various assailants, it cannot be concluded that there was any intention to kill the victim. In such circumstances, it is submitted that in the alternative, the conviction of the accused persons, *inter-alia* Deepak, ought to be converted from one under section 302 IPC to that under section 304 (Part-II) read with section 34 IPC.

**Submissions on behalf of Dilip alias Karan (A4) :**

9. Mr. S.B. Dandapani, learned counsel appearing on behalf of Dilip *alias* Karan challenges the latter's conviction on the following basis:
- (i) That PW-2, the alleged eyewitness to the incident, did not give a description of Dilip in the *rukka* though he gave a description of other accused persons;

- (ii) That though the allegation is that Dilip was the one who put tape on the mouth and hands of PW-2, no fingerprints were picked-up from the tape alleged to have been used;
- (iii) That though PW-1 states that he removed the tape from the hands and mouth of PW-2 in the balcony, according to the Investigating Officer, the tape was found on the staircase, with no explanation as to how it got there;
- (iv) That though PW-2 is cited as an injured eyewitness, no MLC of PW-2 was conducted, which casts doubt if the witness was at all injured, thereby also creating doubt as to his presence at the spot;
- (v) That Dilip was fully justified in refusing TIP and his dock identification was also meaningless since Dilip had already been shown *inter-alia* to PW-3 in the police station on 02.10.2009 ;
- (vi) That there is nothing in the CDRs of the accused persons which evidences that Dilip was in contact with any of the other accused; and in fact, in his statement under section 313 CrPC, Dilip has said that he did not know Parveen until he met him in prison;
- (vii) That though Dilip's arrest memo dated 23.09.2009 shows the place of his arrest as P.S.: Neb Sarai, the Investigating Officer PW-30 himself says in his testimony, that after making inquiries as to the whereabouts of his companions, Parveen disclosed that they were drug addicts and would be found somewhere at New Delhi Railway Station or India

Gate Boat Club. On the other hand, in his statement under 313 CrPC, Dilip says that he was picked-up when he was leaving his place of work i.e., Khanna Tent House at Paharganj;

- (viii) That there is no motive whatsoever for Dilip to have killed or participated in the killing of the victim; and
- (ix) That nothing was found on Dilip's person at the time of his arrest; nor was any recovery made at Dilip's instance.

**Submissions on behalf of the State :**

10. Mr. Ashish Dutta, learned Additional Public Prosecutor, appearing on behalf of the State has endeavoured to sustain the judgment of conviction of the four appellants; and has argued for reversing the acquittal of accused Meena of the charges under sections 302/120B IPC and under section 25 Arms Act and the acquittal of Reena of the charge under section 25 Arms Act. The principal submissions advanced on behalf of the State are :

**Submissions against appellants Reena, Rajesh @ Parveen & Deepak and Dilip @ Karan**

- (i) That the culpability of appellant Reena is evident from the fact that she had frequent fights with her husband, the deceased, in relation to money, which are evidenced by the several complaints made to the police by Reena herself, which are duly exhibited in the course of the trial. The filing

of these complaints, arising from disputes with the deceased, is also admitted by Reena in her statement recorded under section 313 CrPC. Upon a careful examination of the complaints, it transpires that Reena's quarrel with her husband was with respect to the sale of a plot of land at Sainik Farms, from which she was demanding her share of sale proceeds. The disputes also related to sale of another property, sold by the deceased in 2009, the sale documents whereof were proved in his deposition by PW-19 Mahaveer Singh; all of which shows that the crime was committed with the purpose of illegally acquiring the money which was received by the deceased from sale of the said properties;

- (ii) That in the course of his deposition PW-1 has stated clearly that in the context of the disputes with her husband, Reena used to threaten him, saying she would get him killed; and for about 10-12 days before the date of the incident, Reena had not been residing with the deceased in their matrimonial home. It is submitted that Reena did not even come for the last rites of her deceased husband. These facts are admitted by Reena in her statement recorded under section 313 CrPC. The statement of PW-1, the complainant, who also says that Reena used to quarrel with the deceased and had threatened to kill him, has been consistent and Reena has failed to cross-examine PW-1 on this aspect;

- (iii) That Reena gave a false excuse for not being present at her husband's last rites, when she said she was suffering from epilepsy and was sick at that time, the falsity of which excuse is proved by the testimony of defence witness DW-2 Dr. Ruby Kumari, who says that Reena was not suffering from any illness at the relevant time and that all her parameters were normal. In these circumstances, Reena has failed to establish her illness, the burden to prove which was entirely on her;
- (iv) That the conspiracy between the accused persons is evidenced by the fact that to achieve her illicit purpose, Reena sought the help of her sister Meena, who introduced Reena to her flatmate and paramour Parveen, with whom Meena had been residing at Flat No. 2/19-B, Jangpura. The fact that Meena and Parveen were residing together is established *inter-alia* by the testimony of PW-23 Ajay Kapoor, who is the landlord of the premises in question, and who categorically says that Meena and Parveen used to reside in the said flat. It will be seen that in his statement refusing TIP before the learned Metropolitan Magistrate on 25.09.2009, Parveen also mentions the same premises as his residential address. The fact that Parveen and Meena were in a romantic relationship is evidenced by a compromise deed dated 03.11.2008 signed between Parveen and his wife Rosie, in the presence of Reena and Meena's mother, which

document has also been marked as PW 30/X-1 in the course of trial;

- (v) That the conspiracy is further evidenced by the fact that Parveen called upon his friends, the other appellants Deepak and Dilip *alias* Karan as well as another person Krishna (who is absconding), who all conspired to murder the victim;
- (vi) That the CDRs relating to the cell-phone numbers of the appellants and accused Meena, as proved by the concerned nodal officers from the respective telecom service providers, show that the said persons were constantly calling and receiving calls from each other at the time when the offence was being committed. The Cell-ID Charts show Khanpur as the location of Parveen and Deepak at the time of commission of the offence. In this behalf, the State has also placed on record a tabulated summary of the calls made, purportedly between the accused persons, and their location as per the Cell-ID Charts, arguing that the existence of such calls is proof of their involvement in the commission of the offence;
- (vii) That the chance fingerprints lifted from the crime scene match the specimen fingerprints of appellant Deepak, which proves Deepak's involvement in the crime;
- (viii) Eye-witnesses PW-2 and PW-3 have identified all the accused persons, which clinches the prosecution case against

all of them. Notably, the testimony of the said witnesses has been consistent and has withstood cross-examination;

- (ix) That the submission of the appellants that the statements and testimony of child witness PW-2 is bereft of any particulars, carries no weight, inasmuch as it has repeatedly been held that the evidence of a child who has witnessed a heinous crime may not be brushed aside even if it lacks certain particulars;
- (x) That the foregoing circumstances point unerringly to the guilt, not only of the four appellants, but also of accused Meena, who also ought to have been convicted. Furthermore, the acquittal of both Reena and Meena for the offence under section 25 Arms Act, also ought to be reversed.

#### **Submissions against Meena**

- (xi) That the fact that accused Meena was using the cell-phone number 9891681844, which belongs to Zahid, is evidenced by the deposition of PW-23 Ajay Kapoor, the landlord of the apartment where Meena resided, who also brought in his deposition the rent agreement signed with Meena (Exhibited as PW 23/A) and a copy of the tenant verification form. In the tenant verification form Meena has stated her cell-phone number as 9891681844, which is the same number that she used during the commission of the offence. Since

inadvertently the tenant verification form was not exhibited during the deposition, for that purpose the prosecution moved an application under section 91 CrPC read with section 311 CrPC. for recalling PW-3 and for production of that document, which however was rejected by the learned trial court. Subsequently, a criminal revision petition bearing Crl. Rev. Pet. No. 116/2013 filed before the High Court was rendered infructuous, since by the time it came-up for hearing, the learned trial court had already pronounced the impugned judgment. However, it is pointed-out, that in the said criminal revision petition, the High Court gave liberty to the State to raise the matter of recall of witness and exhibition of the tenant verification form in the present appeal;

- (xii) That the fact that Meena was using the cell-phone number 9891681844 is also borne-out from the fact that the cell-phone recovered from Meena with IMEI No. 353205036144970 is co-relatable with the CDRs of the said cell-phone number. Although there is a discrepancy in the last (15<sup>th</sup>) digit of the IMEI number appearing in the CDRs, namely that the last digits shown in the CDRs are '970' instead of '978' (which are the last digits of the IMEI number of the cell-phone recovered from Meena), that discrepancy is irrelevant in light of the decision of the Hon'ble Supreme Court in *State (N.C.T. Of Delhi) vs Navjot*

*Sandhu*<sup>1</sup> which says that since the 15<sup>th</sup> digit of an IMEI number is known to be a ‘spare’ digit and the last digit is transmitted by a cell-phone as ‘0’ according to GSM specifications, this discrepancy is of no consequence. The State emphasises that the use of the said cell-phone number by Meena connects all the accused persons with the crime;

- (xiii) That PW-20, PW-27 and PW-30 have all testified to the recovery of the knife through Reena and the pistol through Meena. Although the learned trial court has disbelieved both recoveries on the reasoning firstly, that the premises from which the recoveries were made was accessible to all including the police; and secondly, by reason of delay in making such recoveries; the State contends that these are no grounds to disbelieve the recoveries made. Furthermore, the recoveries of the knife and pistol were made, not from a place visible to the naked eye but from inside a sofa, where the weapons were hidden by Reena and Meena; That as per FSL report dated 28.05.2020, blood was found on the pistol recovered at Meena’s instance.

### **Discussion**

11. We have given our thoughtful consideration to the submissions made by learned counsel on both sides. We have also carefully perused the record and have examined the evidence. We consider it

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<sup>1</sup> (2005) 11 SCC 600

appropriate to deal with the submissions made by learned counsel as weighed against the evidence on record and the circumstances which have been proved thereby.

### **Eyewitness & Other Oral Testimony**

12. Parth *alias* Yash (PW-2), the son of the deceased, and Preeti Yadav (PW-3), the niece of the deceased, have been canvassed by the prosecution as eyewitnesses to the incident. Karamvir Yadav (PW-1), who is the brother of the deceased, is cited as witness to events subsequent to the incident. The relevant portions of their testimonies are as under :

#### **Deposition of PW-2 :**

*“On 18.09.2009, I had (sic, heard) a noise from the IIInd floor and I came down stairs. **I saw that four persons had caught hold of my father and had tied the hands of my father. One of the person was having the pistol in his hand and the other one having the tape in his hand. The person having the tape taped/covered my mouth with the tape and also tied my hands with the tape towards the backside and they were asking for the money from my father. Thereafter they killed my father and went away,** I came to the balcony. My uncle Karambir was standing down stairs. I called him upstairs with the gesture/pointing by shaking my head. My uncle came upstairs and opened me and took my father to the hospital. The police recorded my statement to this effect. **On 02.10.2009, I along with my uncle Karambir, my great father Mahavir and my sister Priti had gone to the police station where I saw three accused persons. I immediately identified them. They were the same persons who had killed my father.** All those three persons whom I had see in the police station are present in the court today and correctly identified by the witness. **The witness points out towards accused Deepak and states that accused Deepak was having gun in his hand. The witness points out towards***

**accused Dalip and states that he was having the tape in his hand had put the tape on his mouth and on his hand. The witness points out towards accused Praveen and states that there was a burn scarce on his hand and neck and was asking money from my father. These three persons along with one more person had killed my father, IO recorded my statement to this effect.**

(PW-2's examination- in-chief dtd. 15.12.2010)

\* \* \* \* \*

*"... It is wrong to suggest that I have seen the accused Deepak on 20.10.2010, 30.10.2010 and 19.11.2010 so I identified him. ...*

\* \* \* \* \*

*".... None had told me that accused Deepak and Dalip are accused persons in this case VOL. I had myself identified the accused persons. It is incorrect to suggest that I have identified accused Dalip in court at the instance of the police or the counsel of the complainant. It is further incorrect to suggest that I was shown the accused Deepak and Dalip by the police before 02.10.2009 in the police station. It is wrong to suggest that accused persons were shown to me immediately after their arrest in the police station."*

(PW-2's cross-examination dtd. 15.01.2011)

**Deposition of PW-3 :**

**"On 18.09.2009 I had come from the morning walk at about 8.30 AM and at that time I saw four persons coming down from the stairs of the house of my deceased uncle Dalbir Singh. Out of the above four persons, two persons were healthy and two were thin built. One of them was having burn impression/mark on his neck as well as on his hand. Two persons were of bit dark complexion and one was having long hairs. I thought that they might have come to my deceased uncle for some work so I went to my house and was getting ready for my office and in the meantime I heard a noise. I could perceive the voice of the noise to be of my uncle Ashok, of my mother and others. So, I also ran to them and saw that the PCR van was there and my uncle namely Karamvir was taking my deceased uncle to the hospital in the**

PCR van and thereafter I came to know that my uncle Dalbir Singh is no more.

\* \* \* \* \*

“On 02.10.2009 I alongwith my cousin brother Yash @ Parth, my uncle Karamvir and my father went to PS Neb Sarai where a number of persons were present. I saw three persons present there whom I had seen coming down from the stairs of house of my uncle on the date of incident and I immediately identified them and told the police accordingly. I came to know the names of the said persons as Deepak, Praveen and Karan.”

(PW-3’s examination-in-chief dtd. 21.03.2011)

xxxxxxx by Sh N. Kush counsel for accused Meena

Nil. Opportunity given

xxxxxxx by Sh S.K.Saxena counsel for accused Deepak and amicus curiae for accused Dalip

Cross examination deferred at the request of ld counsel

(PW-3’s cross-examination dtd. 21.03.2011)

xxxxxxx by accused Reena

Nil. (opportunity given)

xxxxxxx by accused Dalip

Nil. (opportunity given)

xxxxxxx by accused Rajesh

Nil. (opportunity given)

xxxxxxx by accused Deepak

Nil. (opportunity given)

(PW-3’s cross-examination dtd. 02.04.2011)

“All the accused had come down from the stairs one by one. I can identify the accused by face and tell the court who had come down first. I had not been shown any of the accused earlier in the PS and asked me to identify them. I had not noticed the color of the clothes wore by the accused persons.

(PW-3 cross examination dtd. 07.08.2012 by counsel for Parveen )

Deposition of PW-1 (complainant)

*"I am staying on the third in the above mentioned house no. 154, Khan Pur. My elder brother deceased Dalbir Yadav was living along with his family in the adjacent house which is also numbered as 154, Khan Pur. On 18.09.2009 at about 8:30 am I had gone to wash my car parked near the MCD office in front of my house. When I came back after washing the car towards my house and stood in front of my house. My nephew Parth dropped his shoes from the second floor. I saw upward. There was a tape applied on the mouth of Parth @ Yash and he was pointing out me to go upstairs. I asked him from the down stairs whether his mother or his father had put the tape on his mouth to which he refused by the gesture of his head. **I went upstairs. I saw that the hands of Parth were tied to his back side. I opened his hands and removed the tape. I also saw my brother lying with his face and stomach towards the floor ("mera bhai ulta pada tha"). The hands of my brother Dalbir were tied with the wire towards the backside and one wire was also tied from his mouth towards the backside and the blood in huge quantity was also lying there.** My nephew Parth told me that "four persons had come to the house and that they were asking for the papers of the property and the money and that they have killed my father and tied the hands of my father. They also tied my hands and applied tape on my mouth". **I immediately made a call at 100 number and told that my brother has been shot.** The PCR Van came there. I removed my brother to Batra Hospital where the doctor declared my brother dead. Accused Reena and my deceased brother Dalbir used to quarrel often and accused Reena used to threaten to kill my brother and from about 10-12 days before the incident accused Reena was away from home and was not coming home. Accused Reena even did not come at the last rites/cremation of my deceased brother Dalbir Yadav."*

(PW-1's examination-in-chief dtd. 30.10.2010)

*"I dropped the tape by which the mouth and hands of my nephew Parth was tied there only. I did not handle the shoe dropped by Parth. My brother Dalbir used to tell me about the threats given by accused Reena to him. On 2-3 occasions the accused Reena got my brother Dalbir locked up in PS-Neb Sarai."*

(PW-1's cross examination dtd. 30.10.2010 by counsel for Meena)

### **Recoveries**

13. FSL report dated 28.05.2010 records that 19 parcels/exhibits were examined. According to the prosecution, the following recoveries made at the instance of the appellants constitute incriminating evidence, details of which have been summarized below:
- (i) The recovery of a pair of shoes, alleged to belong to and recovered at the instance of Parveen, are referred to as Exb.-17 in the FSL report. Human blood was detected on the shoes; however, blood grouping of the same gave an 'inconclusive result';
  - (ii) One metallic knife with wooden handle, which is alleged to have been recovered at the instance of Reena, is Exb.-18 in the FSL report. No blood could be detected on this exhibit;
  - (iii) One pistol, described as 'a country made pistol' is alleged to have been recovered at the instance of Meena, which is Exb.-19 in the FSL report. Human blood is stated to have been detected on this pistol; however, blood grouping on this pistol gave an 'inconclusive' result.

### **Medical & Forensic Evidence**

14. Insofar as the medical and forensic evidence is concerned, it comprises the Medico-Legal Report (MLC) dated 18.09.2009 as conducted on the victim at the Batra Hospital & Medical Research

Centre, New Delhi which declared him 'brought dead'; but notably recorded, that both the victim's hands were tied behind his back with a wire and a wire with a knot was circled multiple times around his neck. In addition, several lacerated and incised wounds and bruises were also recorded in the MLC. The nature of injuries was opined as 'dangerous'.

15. Post-Mortem Report dated 19.09.2009 as conducted at the All India Institute of Medical Sciences, New Delhi, describes the following 23 wounds including multiple lacerations, abrasions and contusions with a solitary stab wound on the left buttock but no gunshot injury:

- (i) *"A c shape laceration 2x0.3 cms x bone deep present at left occipital region of the scalp associated with haematoma.*
- (ii) *A laceration (incise looking as mentioned in post- mortem report at mark Y) 4x3cms x bone deep present at left parital occipetal region of scalp, at 1 cm left to midline, associated with haematoma.*
- (iii) *A c shape laceration 1.5 cm x 0.3 cm x bone deep present at right temporal region of the scalp associated with haematoma.*
- (iv) *A linear laceration 2 x 0.2 cms x bone deep present at right temporal region of the scalp 6.5 cm right to midline associated with haematoma.*
- (v) *A linear laceration 3 x 0.4 cms x bone deep present at the right parital region of the scalp 5 cms right to midline associated with haematoma.*

- (vi) *A linear laceration 2 x 0.4 cms, 2 cms above the left eyebrow associated with haematoma and left black eye.*
- (vii) *A laceration 1.5 cms x 0.3 cms x bone deep present at midline of forehead at upper side associated with haematoma.*
- (viii) *A laceration 5.5. cm x 1 cm x bone deep present at 2 cms above the right eyebrow associated with haematoma.*
- (ix) *A laceration of right ear concha 3 cms x 0.3 cm x muscle deep associated with haematoma.*
- (x) *A laceration 4 cm x.1 cm x bone deep present at 3 cms right outer aspect of right eyebrow of face associated with haematoma.*
- (xi) *Multiple abrasions- contusions present in an area 5 cms x 4 cms at left cheek region, brownish red in colour.*
- (xii) *A linear abrasion 10 cms x 1 cm, extending fro left angle of mouth to left mandibule angle region, another 7 cms x 1 cms linear abrasion extending from right angle of mouth to right mandibule angle region, directed down and outward of both sides, bluish-brownish in colour.*
- (xiii) *Multiple lacerations size 0.4 cm x 0.3 cm x miscle deep present at mucosal surface of both upper and lower lip associated with haematoma.*
- (xiv) *A linear abrasion 2 cms x 0.5 cms present at right mandibular region and three linear abrasions 0.5 cm x 0.1 cm present at left upper aspect of neck, brownish in colour, no extra vessation of blood present in neck tissue. No. ligature mark present at neck region and thyro-hyoid complex intact.*

- (xv) *A contusion 4 cms x 3 cms, brownish in colour present at outer aspect of upper 1/3 of right arm.*
- (xvi) *An incised wound 12 cms x 1 cm present at right elbow and right arm region associated with haematoma.*
- (xvii) *Multiple lacerations size varies 1 cm x 0.3 cm present at the dorsum aspect of right hand in an area 6 cms x 5 cms at base of thumb and knuckle region.*
- (xviii) *Three abrasions (size 2.5 cms x 2 cms) present at left elbow region in an area 5 cms x 5 cms, brownish in colour.*
- (xix) *Multiple lacerations size 0.3 cm x 0.2 cm x bone deep present at dorsum aspect of left hand.*
- (xx) *Grazed abrasions in an area 5 cms x 6 cms at left shoulder region, brownish in colour.*
- (xxi) *A stab wound horizontally placed 3 cms x 1 cm x muscle deep, outer angle sharp edge undermined track directed downward, forward and inward present at left buttock situated 62 cms below the shoulder tip, 80 cms above the left heel and 8 cms left to midline.*
- (xxii) *Multiple contusions in an area 6 cms x 5 cms at back of left thigh at middle aspect, brownish in colour.*
- (xxiii) *Abrasions 2 cms x 1 cm brownish in colour, present at left lower outer quadrant of left hip.”*

In the post-mortem report, the doctor records that the cause of death was :

**“ .... shock as a result of multiple mentioned injuries in Post mortem report prior to death. Injuries are caused by stab and blunt force sufficient to cause death in ordinary course of**

*nature. All the injuries mentioned from no- 1-23 are antemortem in nature, fresh in origin, inflicted prior to death.”*

### **Position of Law on Various Aspects**

16. We may now briefly discuss the legal position in relation to various aspects of the matter, as is relevant for deciding the present batch of appeals.

#### **On Eye-witness Testimony**

17. At this point, it is relevant to allude to how the law views eye-witness testimony in general, and in particular, eye-witness testimony of an injured witness, and even more pertinently, eye-witness testimony of an injured witness who also happens to be a child.
18. Drawing upon the wisdom of the seminal judgment of the Hon’ble Supreme Court in *Vadivelu Theva v State of Madras*<sup>2</sup>, we note that referring to section 134 of the Evidence Act the Hon’ble Supreme Court has said that no particular number of witnesses are required for proof of any fact in any case. Furthermore, it is well accepted that *evidence has to be weighed, not counted*. Even sole eye-witness testimony may be pressed into service to convict a person, provided such testimony is found to be entirely reliable.
19. In *Vadivelu Theva* (supra), while explaining that oral testimony may broadly be classified into three categories, i.e.: wholly

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<sup>2</sup> AIR (1957) SC 614; para 11

reliable, wholly unreliable and neither wholly reliable nor wholly unreliable, the Hon'ble Supreme Court has held, in substance, that where the testimony of even a single eye-witness is found to be wholly reliable, there is no reason to refuse to act upon such testimony to convict a person, since the court is concerned, not with the quantity but with the quality of evidence, for proving or disproving a fact.

20. Coming next to additional weightage attached to an injured eye-witness, we need only refer to the celebrated decision of the Hon'ble Supreme Court in *Abdul Sayeed vs State*<sup>3</sup> to paraphrase that where a witness to the occurrence has himself been injured in the incident, the testimony of such witness is generally considered to be very reliable *inter-alia* since it comes with the in-built guarantee that such witness was present at the crime scene, and, in the very nature of things, it is unlikely that an injured eye-witness would spare his actual assailant to falsely implicate someone else. Special evidentiary status is therefore accorded to the testimony of an injured eye-witness and it has been held that such witness should be relied upon unless there are *strong grounds* for rejection of his evidence based on *major contradictions or discrepancies* in it.
21. More specifically, the circumstance of an injured child witness was considered by a Co-ordinate Bench of this court in *Rakesh Kumar*

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<sup>3</sup> (2010) 10 SCC 259; paras 28 and 30

*vs. State*<sup>4</sup>, to hold that section 118 of the Evidence Act does not prescribe any minimum or maximum age to test the competence of a witness, and makes all persons eligible to testify, unless the court finds that a person is prevented from understanding the questions put to him or from giving rational answers by reason of being too young or too old, diseased, whether in mind or body. In this case, the Co-ordinate Bench of our court also considered the cautionary note given by the Hon'ble Supreme Court in *Panshi vs. State of U.P*<sup>5</sup>, to observe that it is not the law that the testimony of a child witness is to be rejected even if it is found reliable; though, the evidence of a child witness is required to be *evaluated more carefully* and with greater circumspection since a child is susceptible to being swayed by what others tell him and may be easy prey to tutoring. The evidence of a child witness must find '*adequate corroboration*' before it is relied upon. Furthermore, relying upon another decision of the Hon'ble Supreme Court in *State of U.P. vs. Krishna Master*<sup>6</sup>, the Co-ordinate Bench extracted the following portion of the said verdict of the Hon'ble Supreme Court, which we think is extremely pertinent :

*"36. ...There is no principle of law known to this Court that it is inconceivable that a child of tender age would not be able to recapitulate facts in his memory witnessed by him long ago. This witness has claimed on oath before the Court that he had seen five members of his family being ruthlessly killed by the respondents by*

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<sup>4</sup> 2014 Online Del 3387; para 16 and 19

<sup>5</sup> (1998) 7 SCC 177; para 11

<sup>6</sup> (2010) 12 SCC 324

*firing gunshots. When a child of tender age witnesses gruesome murder of his father, mother, brothers, etc. he is not likely to forget the incident for his whole life and would certainly recapitulate facts in his memory when asked about the same at any point of time, notwithstanding the gap of about ten years between the incident and recording of his evidence.*

(emphasis supplied)

22. We are in respectful agreement with the principle of law laid down by the Hon'ble Supreme Court as also followed by the earlier Co-ordinate-Bench of this court, that the only precaution courts must take, is to ensure that a child witness is free from tutoring or influence and his testimony finds adequate corroboration, even more so where a child has not only seen the crime, but was also a victim of the crime himself.
23. Assessing the position of PW-2, the son of the deceased : his hands and mouth were taped by the assailants, whereby he suffered unlawful physical restraint; he also suffered injury to his mind, namely the trauma of helplessly seeing his father being trashed by the assailants. Section 44 of the IPC says that injury denotes "... *any harm whatever illegally caused to any person in mind, in body, reputation or property.*" PW-2 is therefore most certainly a child eye-witness, who has suffered injury as defined in section 44. Furthermore, in our assessment, the eye-witness testimony of PW-2 has not been discredited or controverted by any other evidence brought on record; nor is there anything to evidence that PW-2 was under any unlawful influence or that he had been tutored in any manner. The other circumstances surrounding the offence, such as

the testimony of PW-3, also affords adequate corroboration of what PW-2 has narrated. Accordingly, we consider PW-2's testimony to be credible, trustworthy and deserving of the extra weightage that law accords to eyewitness testimony of an injured witness.

### **On Section 302 IPC**

24. An aspect that has been concerning us in this case, is whether the fact that the assailants caused to the victim as many as 23 documented injuries, which though opined to be cumulatively sufficient to cause his death, *were not individually such as would lead to that result*, would afford to the assailants or any of them, a defence to the charge of murder under section 302 IPC. We assess this in the light of the decision of the Hon'ble Supreme Court in *Anda vs. State of Rajasthan*<sup>7</sup>, where the Hon'ble Supreme Court was dealing with a similar situation, where several accused persons beat-up the victim with sticks and caused multiple injuries, including 16 lacerated wounds on the arms, legs, forehead and chest. In that case, the Medical Officer who conducted the autopsy opined, that the cause of death was 'shock and syncope due to multiple injuries' and that the injuries *collectively* were sufficient to cause death in the ordinary course of nature; *but individually* none of them was so sufficient. In this backdrop, the question that the Hon'ble Supreme Court addressed was if, in a case where no significant injury has been inflicted to a vital part of the body and the weapons used are ordinary *lathis* and the accused persons

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<sup>7</sup> AIR 1966 SC 148

cannot be said to have had the intention of causing death, whether the offence would amount to ‘murder’ or merely ‘culpable homicide not amounting to murder’. This question was answered in *Anda* (supra) as follows :

*“15.... The injuries were not on a vital part of the body and no weapon was used which can be described as specially dangerous. Only lathis were used. It cannot, therefore, be said safely that there was an intention to cause the death of Bherun within the first clause of Section 300. At the same time, it is obvious that his hands and legs were smashed and numerous bruises and lacerated wounds were caused. **The number of injuries shows that everyone joined in beating him.** It is also quite clear that the assailants aimed at breaking his arms and legs. Looking at the injuries caused to Bherun in furtherance of the common intention of all it is clear that the injuries intended to be caused were sufficient to cause his death in the ordinary course of nature even if it cannot be said that his death was intended. This is sufficient to bring the case within 3rdly of Section 300.”*

(emphasis supplied)

Furthermore, in *State of Andhra Pradesh vs. Rayavarapu Punnayya & Anr.*<sup>8</sup> the Hon’ble Supreme Court observed that:

*“39. The ratio of *Anda v. State of Rajasthan* applies in full force to the facts of the present case. **Here, a direct causal connection between the act of the accused and the death was established. The injuries were the direct cause of the death. No secondary factor such as gangrene, tetanus etc., supervened. There was no doubt whatever that the beating was premeditated and calculated.** Just as in *Anda* case, here also, the aim of the assailants was to smash the arms and legs of the deceased, and they succeeded in that design, causing no less than 19 injuries, including fractures of most of the bones of the legs and the arms. While in *Anda* case, the sticks used by the assailants were not specially dangerous, in the instant case they were unusually*

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<sup>8</sup> (1976) 4 SCC 382; para 39

*heavy, lethal weapons. All these acts of the accused were preplanned and intentional, which, considered objectively in the light of the medical evidence, were sufficient in the ordinary course of nature to cause death. The mere fact that the beating was designedly confined by the assailants to the legs and arms, or that none of the multiple injuries inflicted was individually sufficient in the ordinary course of nature to cause death, will not exclude the application of clause thirdly of Section 300. The expression “bodily injury” in clause thirdly includes also its plural, so that the clause would cover a case where all the injuries intentionally caused by the accused are cumulatively sufficient to cause the death in the ordinary course of nature, even if none of those injuries individually measures upto such sufficiency. The sufficiency spoken of in this clause, as already noticed, is the high probability of death in the ordinary course of nature, and if such sufficiency exists and death is caused and the injury causing it is intentional, the case would fall under clause thirdly of Section 300. All the conditions which are a prerequisite for the applicability of this clause have been established and the offence committed by the accused, in the instant case was “murder”.*”

(emphasis in bold, supplied;  
underscoring in original)

25. The principle is therefore clear : if the injuries were the *direct cause* of death; no secondary factor such as gangrene, tetanus etc. had supervened; and *there was no doubt that the beating was pre-meditated and calculated*, the death would amount to ‘murder’ within the meaning of clause *thirdly* in section 300 IPC. The Hon’ble Supreme Court further pointed-out that the expression ‘bodily injury’ appearing in the clause *thirdly* of section 300 IPC includes the plural, namely, *the clause covers a case where all injuries intentionally caused by the accused are cumulatively sufficient to cause death in the ordinary course of nature, even if individually none of those injuries measures up to such sufficiency.*

26. We would be remiss if we did not recount the celebrated decision of the Hon'ble Supreme Court in *Virsa Singh vs. State of Punjab*<sup>9</sup>, where the Hon'ble Supreme Court parsed-out the essential ingredients required to be satisfied to bring home a charge of murder under the clause *thirdly* of section 300 IPC in the following words :

*“14. To put it shortly, the prosecution must prove the following facts before it can bring a case under Section 300 “thirdly”.*

*15. First, it must establish, quite objectively, that a bodily injury is present.*

*16. Secondly, the nature of the injury must be proved; These are purely objective investigations.*

*17. Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended.*

*18. Once these three elements are proved to be present, the enquiry proceeds further and.*

*19. Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and **has nothing to do with the intention of the offender.***

(emphasis supplied)

27. From the above we note, in particular, that what is required to be proved is that there was an intention to inflict a particular bodily injury, that is to say, that injury was not accidental or unintentional or that some other kind of injury was intended; and further, that the

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<sup>9</sup> AIR (1958) SC 465

type of injury so described is sufficient to cause death in the ordinary course of nature, it being understood that the inquiry as to the intention to inflict a particular bodily injury, is a purely objective and inferential inquiry and has nothing to do with the intention of the offender; noting yet again, that the phrase *bodily injury* appearing in clause *thirdly* of section 300 includes *bodily injuries*.

28. We may also recapitulate the essential position as laid down in *Virsa Singh* (supra), that in deciding whether an offence falls within clause *thirdly* of section 300 IPC, the question is not whether the assailant intended to inflict a serious injury or a trivial one, *but whether he intended to inflict the injury that is proved to be present. If an injury is present, and if it is proved that the assailant inflicted it, the inevitable inference is that he intended to inflict that injury.* To quote *Virsa Singh* (supra) again:

*“23. ... But if there is nothing beyond the injury and the fact that the appellant inflicted it, the only possible inference is that he intended to inflict it. Whether he knew of its seriousness, or intended serious consequences, is neither here nor there. The question, so far as the intention is concerned, is not whether he intended to kill, or to inflict an injury of a particular degree of seriousness, but whether he intended to inflict the injury in question; and once the existence of the injury is proved the intention to cause it will be presumed unless the evidence or the circumstances warrant an opposite conclusion....”*

(emphasis supplied)

29. Applying the aforesaid position of law as expatiated by the Hon’ble Supreme Court, based on what is evident from the record,

we are clear in our mind, that the *very presence* of the three appellants at the residence of the deceased, who they did not know, nor had any prior dealings or transactions with, on the morning of the fateful day coupled with the evidence that all three of them inflicted upon the victim as many as 23 injuries while making upon him certain demands, is proof positive that the attack on the victim was pre-meditated and calculated. It is further clear from the evidence on record that the appellants had intended to inflict those very bodily injuries by indiscriminately beating-up the victim, which injuries were neither accidental nor unintentional; nor did the appellants intend to inflict injuries other than those inflicted. On a purely objective and inferential basis, it is also clear that even though none of the injuries so inflicted were *individually sufficient* to cause death in the ordinary course of nature, medical opinion says that the injuries were *cumulatively sufficient* to cause the victim's death. In our view, therefore, the acts of the appellants meet the test of *cumulative sufficiency* as *inter-alia* explained in *Anda* (supra) and *Rayavarapu Punnayya* (supra), for being the direct cause of the victim's death. The acts of the appellants therefore also meet the ingredients of clause *thirdly* of section 300 IPC as explained in *Virsa Singh* (supra); and regardless of their professed intention, the acts of the appellants answer to the definition of 'murder' under clause *thirdly* of section 300 IPC.

### **On Conspiracy**

30. The essence of the law of criminal conspiracy engrafted in section 120-B IPC may be summarised, from the decision of the Hon'ble

Supreme Court in *State vs Nalini*<sup>10</sup>, to say that the offence of conspiracy is not made-out if accused persons merely entertain a wish, howsoever horrendous, to commit an offence; and *it is necessary that there be an agreement to carry-out the object of the intention which is an offence*. To be sure, subsequent conduct, that is conduct *after* the object of the conspiracy has been achieved *does not* make an accused part of a conspiracy. Furthermore, the existence of the conspiracy, as also its object, *have to be inferred from the circumstances and the conduct of the accused*. The following paragraphs of *Nalini* (supra) are particularly relevant :

“583. *Some of the broad principles governing the law of conspiracy may be summarized though, as the name implies, a summary cannot be exhaustive of the principles.*

7. *A charge of conspiracy may prejudice the accused because it forces them into a joint trial and the court may consider the entire mass of evidence against every accused. Prosecution has to produce evidence not only to show that each of the accused has knowledge of the object of conspiracy but also of the agreement.*

8. ... *Offence of criminal conspiracy is complete even though there is no agreement as to the means by which the purpose is to be accomplished. It is the unlawful agreement which is the gravamen of the crime of conspiracy. The unlawful agreement which amounts to a conspiracy need not be formal or express, but may be inherent in and inferred from the circumstances, especially declarations, acts and conduct of the conspirators.*

9. *It has been said that a criminal conspiracy is a partnership in crime, and that there is in each conspiracy a joint or mutual agency for the prosecution of a common plan. Thus, if two or more persons enter into a conspiracy, any act done by any of them pursuant to the agreement is, in contemplation of law, the*

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<sup>10</sup> (1999) 5 SCC 253

*act of each of them and they are jointly responsible therefor... . And this joint responsibility extends not only to what is done by any of the conspirators pursuant to the original agreement but also to collateral acts incidental to and growing out of the original purpose. ...”*

(emphasis supplied)

31. Insofar as appellants Deepak, Parveen and Dilip are concerned, applying the ingredients of criminal conspiracy as explained in *Nalini* (supra), in our view, there is no doubt that all three visited the victim’s residence together, though they neither knew nor had any previous dealings or transactions with him, in pursuance of an *unlawful agreement*. Although it is not clear from the evidence on record as to whether this unlawful agreement was to extort from the victim money or documents or something else, what is clear is that in order to carry-out the object of their unlawful agreement, the three appellants indulged in brutal physical attack on the victim. The circumstances as proved on record, and their acts and conduct during the commission of the crime, make it clear that the three assailants were acting pursuant to their agreement to carry forward their unlawful intention, which fulfil the requisites of the offence of criminal conspiracy under section 120-B IPC. Accordingly, the three appellants must be held to be *jointly responsible for their individual acts as also for each other’s acts*.

### **Conclusions**

32. In light of the above discussion, we evaluate the position of evidence and law from the standpoint of each individual appellant.

### **Evidence & Circumstances against Reena Yadav (A1)**

33. **Ocular Evidence :** Reena Yadav has *not* been identified as being present at the crime scene at the time of the incident by either of the eye-witnesses, PW-2 or PW-3. The complainant PW-1, who is the brother of the deceased, has named her in the *rukka* and her name also therefore appears in the F.I.R *but only to say* that Reena had a running matrimonial discord with her deceased husband; that she used to demand her share of certain properties stated to have been sold by the husband; and in the context of their matrimonial discord, she had threatened even to kill her husband. While the circumstances alleged against Reena, even if taken to be *ex-facie* true, only show that Reena *may have had* motive to harm her husband; however, as per settled law, motive *alone* does not imply guilt; and a finding of conviction can certainly not be returned merely because an accused had motive to commit a crime.
34. **Electronic evidence:** Reena is alleged to have been *constantly* in touch with the appellant Parveen, using a cellphone number 9654387682, which admittedly belongs to a third person called Santosh Tamang. Santosh Tamang was not examined at any stage; and as a result, the use of the cellphone number standing in Santosh Tamang's name, by Reena remains a matter of speculation. Besides, even assuming Reena was using Santosh Tamang's number, there is only *one solitary call* made by Reena to Parveen using this number, which call is also *two days after* the date of the offence, namely on 20.09.2009. Needless to add that the

*contents of the conversion* remain unknown. Again therefore, to infer conspiracy between Reena and Parveen to commit the offence based on a solitary cell-phone call after the date of the offence, would be flawed.

35. **Recovery of knife** : A knife stated to have been one of the weapons of offence, is alleged to have been recovered at Reena's instance on 24.09.2009 from a premises in Jangpura, where she resided with her sister Meena Yadav. The MLC and the post-mortem report of the deceased show that he suffered 23 wounds, of which one was a stab wound; and that all these wounds were cumulatively sufficient in the ordinary course to cause death. However, even accepting that the knife was recovered at Reena's instance, the forensic report shows that no blood was found on the knife; the knife was never put to the post-mortem doctor for his opinion as to whether it could have been one of the weapons of offence; and no co-relation has thereby been established between the knife and the wounds inflicted upon the deceased. Apart from that, it is the admitted position that the keys to the premises at Jangpura, from where the knife is alleged to have been recovered, were available to the Investigating Officer from 24.09.2009 upto 02.10.2009, whether deposited with *malkhana* in-charge or otherwise, and therefore the recovery of the knife from that premises is not clear of doubt. As a result, both the recovery of the knife, as also whether the knife was a weapon of offence, remain in doubt.

36. **Arrest together with co-conspirator** : Reena is stated to have been arrested on 23.09.2009 from a premises in Jangpura, which was rented by her sister Meena; and where the latter used to reside with her paramour Parveen. This is cited as an incriminating circumstance to show that the three were in conspiracy to commit the offence. However, it has also come on record that by reason of matrimonial discord, Reena had been staying away from her husband for 10-15 days; and that Reena had been residing with her sister Meena. In these circumstances, for Reena to have been found at Meena's residence is hardly an incriminating circumstance.
37. **Conduct** : Reena's conduct after the date of the incident is stated to be suspect, since she did not attend the funeral and other last rites of her deceased husband. Apart from the fact that Reena claims to have been unwell at that time, being a patient of epilepsy, it has come on record in the police complaints arising from her matrimonial discord, that Reena had named not only her husband but also his family members in such complaints. Therefore, it is not unnatural for Reena to have stayed away even from the last rites of her husband to avoid acrimony with the family members. This again, cannot be termed as an incriminating circumstance, sufficient to infer guilt.
38. In view of the above, in our opinion, while one may suspect that Reena Yadav had motive to harm her husband, such motive alone is not sufficient to convict her of having murdered him. It may be mentioned, that there is nothing on record to show that Reena

Yadav benefitted, whether monetarily or otherwise, from the demise of her husband. Accordingly, we reverse the finding of conviction returned by the learned trial court insofar as Reena Yadav is concerned; and acquit Reena Yadav of all charges, giving her the benefit of doubt. We accordingly allow CrI. A. No. 1570/2013; and dismiss the State appeal bearing CrI A. No. 88/2014 challenging Reena's acquittal of the charge under section 25 Arms Act.

**Evidence and Circumstances against Parveen *alias* Rajesh (A2)**

39. **Ocular Evidence** : Parveen has been identified by both eye-witnesses PW-2 and PW-3, as having been present and having been part of the attack on the deceased on 18.09.2009. He has been identified *inter-alia* as the man with the burn mark on his hand and neck. As a matter of fact, Parveen indeed has such a mark on his hand and neck. PW-2, the son of the deceased, specifically says in his deposition that Parveen was the one asking his father for money. Even before Parveen's arrest, the fact that one of the persons involved in the attack had a burn mark on his hand and neck is recorded in the *rukka*. There is nothing to say that PW-2 or PW-3 knew Parveen prior to the date of the incident; or that they had had any interaction with Parveen earlier-on; or that there is any reason for them to falsely implicate him. The ocular testimony of PW-2 and PW-3 have remained consistent and unchallenged in cross-examination. Although Parveen claims that he was shown to the witnesses at the police station and also at the premises where

the crime was committed, which is why he refused TIP and which is why his dock identification should be disregarded, this does not answer why his unique description of having burn marks, finds mention in the *rukka*. We are also persuaded to think that PW-2, who is an injured witness, would not uselessly identify Parveen, thereby letting-go of some other person who was actually involved in the offence. Accordingly, we do not find any merit in Parveen's contention and we reject the same.

40. **Electronic Evidence :** Relying upon the Cell-ID Chart relating to Parveen's cellphone number 9717305439, it is shown that his location at 08:08:18 on 18.09.2009 was at M.B. Road, Khanpur, which is held against him as an incriminating circumstance. However, no certificate as required under section 65B of the Evidence Act in relation to such Cell-ID Chart was filed. Accordingly, the electronic evidence by way of the Cell-ID Chart has not been proved in accordance with law. We accordingly do not accept Parveen's purported location at the relevant time as an incriminating circumstance.
41. **Recovery:** A pair of blood-stained shoes, allegedly belonging to Parveen, are stated to have been recovered at his instance on 02.10.2009 from the premises at Jangpura where he used to reside with Meena. Although the blood on the shoes was found to be 'human' in origin, its blood grouping remains inconclusive. Besides, it has come on record that Parveen was arrested from the same premises on 23.09.2009; that from 24.09.2009 till 02.10.2009

the Investigating Officer had possession of the keys to the said premises; and therefore, for the shoes to have been recovered as late as on 02.10.2009, without any justification for the delay, strains credulity. The alleged recovery of the shoes at Parveen's instance, accordingly does not inspire confidence and we reject it as an incriminating circumstance.

42. **Arrest:** Parveen is stated to have been arrested on 23.09.2009 from the premises where he used to reside with Meena. Reena and Meena are also stated to have been arrested from the same premises on the same day, which circumstance is cited as evidence to prove that Parveen was one of the co-conspirators. On the other hand, Parveen says in his statement under section 313 CrPC, that he was arrested on 19.09.2009 from off the road when he was on the way to his work. Regardless of the contentions and counter-contentions as regards his date and place of arrest, suffice it to say that since it is the prosecution's own case that Parveen was in a relationship with Meena; that they used to reside together at the Jangpura premises that Meena had rented; and that her sister Reena was also present at that place, Parveen's presence at that premises is hardly surprising. We therefore think that this circumstance does not justify the inference of conspiracy to commit murder.
43. Disregarding all other evidence and incriminating circumstances cited against Parveen, we find the ocular testimony of PW-2 and PW-3, whereby both eye-witnesses have identified Parveen by his distinguishing physical feature, namely the burn mark on his hand

and neck, to be sufficient to find him guilty of the offence. We observe that PW-2 is in fact an ‘injured witness’, inasmuch as his mouth and hands were taped by the assailants when they were assaulting his father. Section 44 IPC defines ‘injury’ as “ ... *any harm whatever illegally caused to any person, in body, mind, reputation or property.* ”; and accordingly, taping-up the mouth and hands of PW-2 thereby causing him trauma both in body and mind, while making him witness brutal attack on his father by several men, is certainly injury to PW-2. As an injured witness therefore PW-2 warrants greater credibility, as *inter-alia* laid down by Hon’ble Supreme Court in *Abdul Sayeed* (supra) and additionally also in *Rakesh Kumar* (supra) We repeat, neither PW-2 nor PW-3 are stated to have known, or to have been familiar with, or to have had any prior dealings with Parveen; nor is there anything on record to suspect that Parveen was falsely implicated by them.

44. We accordingly uphold Parveen *alias* Rajesh’s conviction under section 302 IPC read with section 120-B IPC. We also uphold the sentence of life imprisonment alongwith fine of Rs.20,000/-, with a default sentence of one year simple imprisonment, awarded to him by the learned trial court. We accordingly dismiss CrI. A. No. 1485/2013 filed by Rajesh *alias* Parveen.

**Evidence and Circumstances against Deepak *alias* Deepu (A3):**

45. **Ocular Evidence:** Deepak *alias* Deepu is identified by PW-2, the injured eye-witness and son of the deceased, as the person who was

wielding the pistol. Though, no pistol was recovered at Deepak's instance; no gunshot injury was found on the deceased; and the recovery of the pistol at Meena's instance was disregarded by the learned trial court, in our view, the ocular testimony of the injured eye-witness PW-2 is sufficient to place Deepak at the crime scene. The contention that PW-2 did not ascribe specific individualised roles to the four assailants and that no blood was found on the pistol and the pistol was not shown to the post-mortem doctor for his opinion as to whether the pistol could have been the weapon of offence, does not impress us, for the reason that *firstly*, that an 11-12 year old boy who was witness to brutal attack upon his father by four assailants, when his mouth and hands were also taped-up by them, must evidently have been stunned and terrified out of his wits at that time. To disregard the testimony of this young boy only because he does not ascribe specific individualised roles to the assailants, in what must have been a situation of brutal violence, trauma, pandemonium and melee, is not what the law would expect of the witness. *Secondly*, when his father was being indiscriminately assaulted by three persons simultaneously, it can hardly be expected from anyone, much less from this young boy that he ought to have specifically noticed and remembered as to the manner in which each of the assailants assaulted his father. *Thirdly*, since no gunshot wound was found on the deceased, we do not fault the prosecutor for not having put the pistol to the post-mortem doctor for his opinion as to whether it could have been the weapon of offence. In any case, whether Deepak was wielding the gun is

irrelevant to our consideration, once the injured eye-witness identifies Deepak as one of the assailants who was present and had assaulted his father; and this testimony remains consistent and unchallenged in cross-examination.

46. We are accordingly persuaded to accept PW-2's version that Deepak was indeed present and was one of the persons who assaulted his father.
47. **Forensic Evidence:** According to the prosecution, the fingerprints of Deepak's right middle finger matched one of the chance prints lifted from the crime scene. Although this is being challenged on behalf of Deepak by pointing-out that there is no evidence to show that Deepak's specimen fingerprints were at all taken; that the chain of custody of the so-called specimen fingerprints as well as the chance prints, as also the method used to determine the match are all doubtful, we find that these aspects were not put to the concerned witnesses with any specificity or detail in cross-examination, except in the passing when in his cross-examination PW-4 denies that the fingerprints were planted. What we do have on record is the report of a fingerprint expert to say that Deepak's fingerprints were found at the crime scene. We accept this report, if only as an additional piece of incriminating evidence against Deepak.
48. **Electronic Evidence:** The Cell-ID Chart in relation to cellphone No. 9654050805, which is stated to have been used by Deepak and which belongs to his sister Deepika Rawat, is cited to show

Deepak's presence at M.B. Road Khanpur at 08.08.18 on 18.09.2009. This evidence is challenged on the basis that Deepika Rawat was never examined to show if her cellphone number was in Deepak's use; that no certificate under section 65B of the Evidence Act in support of the Cell-ID Chart was filed; and further that this circumstance was not put to Deepak while recording his statement under section 313 CrPC. In view of the fallacies pointed-out, we chose not to proceed on the basis of Cell-ID Chart cited against Deepak. We reiterate however, that Deepak's presence at the crime scene and the circumstance that he assaulted the deceased is sufficiently proved by the ocular testimony of PW-2, the injured eye-witness and son of the deceased, which testimony remains consistent and unchallenged.

49. **Refusal of Test Identification Parade:** While the prosecution cites Deepak's refusal to undergo TIP on 25.09.2009 as an incriminating circumstance, Deepak explains his refusal saying that he had been shown to many persons in the police station; that his photograph was taken by the police, which is indeed found on the judicial record and in his dossier; and also that he was taken to the crime scene where several persons, including the eye-witnesses, saw him even before the date of the TIP. Yet again, we do not think it necessary to decide Deepak's guilt or innocence on the basis of his refusal to undergo TIP. We accordingly ignore this circumstance.

50. **Lack of Motive:** Additionally, in his defence, it has been argued that Deepak had no motive to harm the deceased; and that no money was found on him; and that in fact, his residence was not even searched. While that may be true, there is also no reason why Deepak should at all have been present at the residence of the deceased on the fateful day. Deepak does not cite any prior familiarity or dealings with the deceased nor is there any other reason why Deepak should have been present at the crime scene on that day. Moreover, when un-impeached, credible ocular evidence is available against an accused, the lack of motive becomes irrelevant.
51. For the reasons as discussed above, in relation to Parveen *alias* Rajesh, we also hold Deepak *alias* Deepu guilty of the offence of murder under section 302 IPC read with section 120-B IPC.
52. We accordingly uphold the conviction of Deepak *alias* Deepu under section 302 IPC read with section 120-B IPC. We also uphold the sentence of life imprisonment alongwith fine of Rs.20,000/-, with a default sentence of one-year simple imprisonment, as awarded by the learned trial court. We accordingly dismiss Crl. A. No. 811/2013 filed by Deepak *alias* Deepu.

#### **Evidence and Circumstances against Dilip *alias* Karan (A-4)**

53. **Ocular Evidence:** Dilip is identified by injured eye-witness PW-2, who further says in his deposition that Dilip was the one who taped

his mouth and hands. The defence contends that though some tape was found at the crime scene but no fingerprints were lifted from the tape; and neither PW-2 nor PW-3 gave any description that would identify Dilip as being present at the crime scene at the time of the offence.

54. In our view, PW-2's deposition that Dilip was the one who taped him up would be conclusive of his identity and his presence at the spot, if only for the reason that PW-2 would have seen Dilip at very close quarters when Dilip taped PW-2's mouth and hands. The testimony of PW-2 and PW-3 in relation to Dilip remains consistent and has withstood cross-examination. We accordingly accept the ocular testimony against Dilip and are satisfied that Dilip's presence at the crime scene and his involvement in the brutal attack on the deceased, stands proved beyond reasonable doubt.
55. **Refusal to undergo TIP:** Although the prosecution cites Dilip's refusal to undergo TIP as an incriminating circumstance, Dilip explains his refusal on the basis that he had been shown to many people at the police station; and that he was also taken to the crime scene on 23.09.2009, when several people including the eye-witnesses were present there. In view of the explanation, we do not consider Dilip's refusal to undergo TIP as an incriminating circumstance.
56. **Conspiracy:** Although the prosecution alleges that Dilip was one of the co-conspirators, no tangible evidence such as CDRs or other

material has been brought on record to prove his interaction with the others. In his statement recorded under section 313 CrPC, Dilip says that he did not even know Parveen and met him for the first time in prison. Finding insufficient electronic evidence and material, in our view however, Dilip's involvement in the conspiracy is borne-out by the fact of his presence at the crime scene on the date of the offence as proved by the ocular testimony of PW-2 and PW-3.

57. **Arrest:** Dilip's alleged arrest alongwith Deepak at the India Gate Boat Club is also cited as an incriminating circumstance. However in his statement under section 313 CrPC, Dilip disputes this to say that he was picked from his place of work at Khanna Tent House in Paharganj. Again, the lone circumstance of Dilip's arrest alongwith Deepak, in our view, is not evidence of conspiracy and we disregard this as an incriminating circumstance.
58. **Lack of Motive:** Additionally, in his defence, it has been argued that Dilip had no motive to harm the deceased; that no money was found from him; and in fact his residence was not even searched. While that may be true, as for Deepak, so also for Dilip, there is no reason why he should have been present at the residence of the deceased on the fateful day. Dilip does not claim any prior familiarity or dealings with the deceased; nor is there any other reason why Dilip should have been present at the crime scene on that day.

59. We accordingly uphold the conviction of Dilip *alias* Karan under section 302 IPC read with section 120-B IPC; as also the sentence of life imprisonment alongwith fine of Rs.20,000/-, with a default sentence of one year simple imprisonment, awarded to Dilip by the learned trial court. We accordingly dismiss the Crl. A. No. 1501/2013 filed by Dilip *alias* Karan.

**Evidence and Circumstances against Meena Gupta**

60. Meena Gupta has been acquitted of all charges by the learned trial court and we would assess the appeal filed against such acquittal by the State on the following criteria :
61. Meena is alleged to have been a co-conspirator in the murder based *inter-alia* on the circumstance that she was in constant touch with the co-accused persons through the cell-phone number 9891681844, which though belonging to one Zahid, is alleged to have been used by Meena. This cell phone number is however not shown to have been recovered from Meena. Moreover, Zahid was never examined and accordingly, even the fundamental premise that the cell-phone number standing in Zahid's name was being used by Meena, has not been established, for which reason the learned trial court has discarded this piece of evidence. Even if it were to be accepted that Meena was using Zahid's phone to speak to the other alleged co-conspirators, that alone would not be sufficient to infer conspiracy as per the settled principles of law that even if phone calls between certain numbers are established,

conspiracy cannot be inferred without knowing the *contents* of such phone calls.

62. Accordingly, we agree with the learned trial court that the mere allegation, purportedly founded on CDRs, that Meena was in constant touch with the other co-conspirators through Zahid's cell-phone number, is not a circumstance to bring home the offence of conspiracy as far as Meena is concerned.
63. **Recovery of Pistol :** The alleged recovery of the pistol at Meena's instance, which also the learned trial court has disregarded, is again suspect since the premises from which the pistol is alleged to have been recovered was constructively in the possession of the Investigating Officer from 24.09.2009 to 02.10.2009 and therefore, the recovery of the pistol at her instance does not inspire confidence. Besides, there is nothing to establish that the pistol was a weapon of offence since no gunshot wound was found on the deceased. Perhaps for this reason, the pistol was not even put to the post-mortem doctor for his opinion as to whether it could have been a weapon of offence, even though some blood is alleged to have been found on the pistol.
64. **Arrest :** Meena is claimed to be one of the co-conspirators for the reason that she was arrested along with her sister Reena and her paramour Parveen from Meena's rented apartment in Jangpura. Since the three were found together, the prosecution says they were in conspiracy to commit the murder. Even accepting that all three were arrested together, which both Meena and Reena dispute

inasmuch as they say Parveen was not present with them; just because Meena and Reena were found together is hardly an incriminating circumstance since they are real sisters and Reena said that she was residing with Meena, away from her matrimonial home, by reason of the discord with her husband. Accordingly, we do not consider this circumstance as incriminating of Meena.

65. **Ocular testimony:** No eye-witness testimony is available nor have the principal prosecution witnesses, namely PW-1, PW-2 and PW-3, at all mentioned Meena in any context in relation to the offence.
66. In view of the above, we uphold Meena's acquittal by the learned trial court; and dismiss the State appeal bearing CrI. A. No. 88/2014 challenging her acquittal.
67. A very important factor which requires some discussion, is that in the present case, while the *alleged motive* for harming the deceased *may have* vested in his wife Reena, by reason of her marital discord with the husband; the evidence on record is *woefully inadequate* to impute to Reena anything more than *mere* motive.
68. Accordingly, it turns-out that there is un-impeached ocular evidence against the assailants Parveen, Deepak and Dilip, sufficient to hold them guilty, there seems to be no apparent motive for them to have harmed the deceased. The three assailants are therefore entitled to urge as to why they would murder a person who was unknown to them; and who had had no dealings with them, without having been impelled by monetary or other gain. To

put it differently, while Reena may have had motive to harm her husband; the three assailants Parveen, Deepak and Dilip had no reason to do so.

69. To answer this, we observe that the State has argued that the three assailants had, at Reena's urging and instance, been sent to demand from the deceased Reena's share in the alleged sale proceeds of properties that the deceased had sold. To be sure, PW-2 also says that the three assailants were demanding money from his father as they were beating him up. The State says that to this end, the assailants also ransacked the premises and since money was alleged to have been hidden in the false ceiling in the bathroom, some fingerprints were found on that false ceiling. However, regrettably, no further evidence has been adduced in regard to these fingerprints. The alleged fingerprints lifted from the false ceiling have not been attributed to any of the appellants.
70. To satisfy our conscience however, we proceed to evaluate another scenario, which is that the three assailants came to the house of the deceased *only* to extort from him the money, let us say at Reena's instance. However, we remind ourselves that there is *no evidence* on record to impute that Reena tasked the three assailants to extort money from her husband. Going by PW-2's statement it is possible that the *initial intention* of the three assailants was *only* to get money from the deceased, to which end they were beating him up, with no intention to kill him. However, the three assailants inflicted upon the deceased 23 wounds, lacerated, incised as well as a stab

wound (several of which were on the vital portions of the head, face and neck), which wounds, the post-mortem doctor opines, were sufficient to cause death in the ordinary course. Therefore, it can safely be inferred from the number and nature of the wounds inflicted; and the portions of the body on which wounds were inflicted, that eventually the assailants' intention *morphed* into an intention to kill the victim. It is immaterial that such intention may have developed or evolved then and there, in the course of administering beatings to the victim while demanding money. It is immaterial that the assailants did not *initially* come with that intention.

### **Negligent Investigation & Prosecution**

71. We are compelled to note that this case presents an instance of significantly shoddy investigation as well as prosecution. We note, in particular, the following aspects:

- (i) PW-2 was evidently roughed-up and his mouth and hands were tied with tape; and yet no MLC of PW-2 was conducted. We have held that PW-2 was an 'injured witness' inasmuch as he suffered unlawful restraint by his hands and mouth being taped-up by the assailants and since he had also suffered mental trauma in witnessing the brutal attack on his father. Though we have said that that is sufficient for us to treat him as an injured witness, if PW-2's MLC had been conducted, evidence of any physical hurt, bruises or marks

on his body would also have come on record. We find it surprising that this was not done.

- (ii) Reena and Meena were arraigned as accused on the allegation that it was at their instance, in particular at Reena's instance, that the crime was committed. It was the prosecution case that the two were in conspiracy with the other co-accused for committing the offence. The charge of criminal conspiracy was sought to be established on the basis of telephone conversations that were alleged to have taken place between Reena and Meena with other co-accused persons using certain cell-phone numbers. These cell-phone numbers, on the prosecution's own reckoning, belonged to Santosh Tamang, Zahid and Deepika Rawat. However, neither Santosh Tamang nor Zahid nor Deepika Rawat were investigated or brought in evidence, thereby leaving a whole void in the chain of circumstances insofar as the charge of criminal conspiracy was concerned. While CDRs were cited as evidence that Reena and Meena were in "*constant touch*" with the other co-accused, no insight was sought into the contents of such conversations, whether directly or inferentially. Although Cell-ID Charts were placed in evidence, requisite section 65B certificates in support of such charts were not filed. Nothing conclusive was brought on record to show the location of the accused persons based on such charts. It is as if the prosecution assumed, that courts would accept the charge of criminal

conspiracy merely on their *ipse dixit* and on the *possible* existence of motive in Reena. We would frown upon this approach as well.

72. All this, we consider to be serious lapses, both in the investigation and prosecution of the case. However, we refrain from making any further observations against the concerned persons in this behalf.
73. The criminal appeals are disposed of in the above terms. Pending applications, if any, also stand disposed of.
74. Reena, the appellant in CrI. A. No. 1570/2013, be released from prison *forthwith*, unless required in some other case.
75. Personal bond furnished by Meena Gupta stands cancelled. Surety bond is discharged.
76. There shall be no order as to costs.
77. A copy of the judgment be sent to the concerned Jail Superintendent from compliance.
78. A copy of this judgment be also given to learned counsel for the parties and be also uploaded on the website of this court *expeditiously*.

**SIDDHARTH MRIDUL, J**

**ANUP JAIRAM BHAMBHANI, J**

**February 4, 2022**

Ne/uj/ds