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IN THE HIGH COURT OF MADHYA PRADESH AT JABALPUR

BEFORE

JUSTICE SUJOY PAUL
&
JUSTICE BINOD KUMAR DWIVEDI

CRIMINAL APPEAL No. 6479 OF 2023

BETWEEN :-

1. **RAVI KUSHWAHA S/O GANGARAM KUSHWAHA, AGED – 35 YEARS, R/O BESIDE OF OLD RAILWAY LINE, HATHITAL, P. S. GORAKHPUR, DISTRICT JABALPUR.**

2. **RAJA KUSHWAHA S/O GOKUL PRASAD KUSHWAHA AGED -24 YEARS, R/O KAILASHPURI, KHERMAI MANDIR, P.S. GORAKHPUR, DISTRICT – JABALPUR**

….APPELLANT

(BY SHRI MANISH DATT – SENIOR ADVOCATE WITH SHRI ESHAAN DATT - ADVOCATE)

AND

1. **STATE OF MADHYA PRADESH, THROUGH POLICE STATION GORAKHPUR, DISTRICT - JABALPUR (M.P.)**

2. **GOLU KUSHWAHA S/O RAM KISHORE KUSHWAHA, AGED ABOUT 23 YEARS, R/O SAI NAGAR RAMPUR, POLICE**

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STATION – GORAKHPUR, DISTRICT JABALPUR.

.....RESPONDENT

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

CRIMINAL APPEAL No. 7954 OF 2023

BETWEEN :-

VINAY KUSHWAHA S/O KAMLESH KUSHWAHA, AGED – 33 YEARS, R/O AT SAI NAGAR TANK, RAMPUR, P.S. GORAKHPUR, DISTRICT - JABALPUR

....APPELLANT

(BY SHRI MANISH DATT – SENIOR ADVOCATE WITH SHRI ESHAAN DATT - ADVOCATE)

AND

1. **STATE OF MADHYA PRADESH, THROUGH POLICE STATION GORAKHPUR, DISTRICT - JABALPUR (M.P.)**

2. **GOLU KUSHWAHA S/O RAM KISHORE KUSHWAHA, AGED ABOUT 23 YEARS, R/O SAI NAGAR RAMPUR, POLICE STATION – GORAKHPUR, DISTRICT JABALPUR.**

.....RESPONDENT

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

CRIMINAL REFERENCE No.03 OF 2023

BETWEEN :-

IN REFERENCE
RECEIVED FROM IVTH ADDITIONAL SESSIONS JUDGE, DISTRICT JABALPUR (M.P.)

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....APPELLANT

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

AND

1. **RAVI KUSHWAHA S/O GANGARAM KUSHWAHA, AGED – 35 YEARS, R/O BESIDE OF OLD RAILWAY LINE, HATHITAL, P.S. GORAKHPUR, DISTRICT JABALPUR.**

2. **RAJA KUSHWAHA S/O GOKUL PRASAD KUSHWAHA AGED -24 YEARS, R/O KAILASHPURI, KHERMAI MANDIR, P.S. GORAKHPUR, DISTRICT – JABALPUR**

3. **VINAY KUSHWAHA S/O KAMLESH KUSHWAHA, AGED – 33 YEARS, R/O AT SAI NAGAR TANK, RAMPUR, P.S. GORAKHPUR, DISTRICT - JABALPUR**

.....RESPONDENT

(BY SHRI MANISH DATT – SENIOR ADVOCATE WITH SHRI ESHAAN DATT – ADVOCATE)

Reserved on : 14/12/2023

Pronounced on : 19/12/ 2023

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

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J U D G M E N T

These Criminal Appeals take exception to the judgment dated 26.04.2023 passed in S.T. No. 544/2021 whereby the appellants Ravi Kushwaha and Raja Kushwaha (in criminal appeal No. 6479 of 2023) and appellant Vinay Kushwaha (in criminal appeal No. 7954 of 2023) were held guilty for committing offences as under:

Appellants	Convicted under Sections	Sentenced to undergo
1. Ravi Kushwaha	302 of IPC (on two counts)	Death sentence to each accused (on each count).
	450 of IPC	R.I. for seven years and fine of Rs. 10,000/-
	307/34 of IPC	R.I. for seven years with fine of Rs.10,000/-
	324/34 of IPC	R.I. for one year with fine of Rs. 1,000/-
	323/34 of IPC	R.I. for six months with fine of Rs. 1,000/-.
2. Raja Kushwaha	302 of IPC (on two counts)	Death sentence to each accused (on each count).
	450 of IPC	R.I. for seven years and fine of Rs. 10,000/-
	307/34 of IPC	R.I. for seven years with fine of Rs.10,000/- to each accused.
	324/34 of IPC	R.I. for one year with fine of Rs. 1,000/- to each accused.
	323/34 of IPC	R.I. for six months with fine of Rs. 1,000/- to each

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		accused.
3. Vinay Kushwaha	302 of IPC (on two counts)	Death sentence to each accused (on each count).
	450 of IPC	R.I. for seven years and fine of Rs. 10,000/-
	307/34 of IPC	R.I. for seven years with fine of Rs.10,000/-
	324/34 of IPC	R.I. for one year with fine of Rs. 1,000/-.
	25(1-B)(b) of Arms Act	R.I. for one year with fine of Rs. 1,000/-.
With the direction that the sentences under Sections 450, 307/34, 324/34, 323/34 of IPC and 25(1-B)(b) of Arms Act (only for Vinay Kushwaha) shall run consecutively.		

2. The criminal reference heard analogously is also answered in this judgment.

3. Draped in brevity, the starting point of the case is lodging of *Dehati Nalishi* by Golu Kushwaha (PW-1) wherein he stated that on 14.06.2021 at around 10:45 pm, he was taking dinner. Main gate of his house was locked by him. He heard certain cries and found that by jumping his boundary wall Vinay Kushwaha, Raja Kushwaha and another boy entered the premises and started abusing him and his wife Ruchi (PW-8). Raja Kushwaha caused injuries to him by means of *lathi*. When his wife Ruchi tried to interfere, Vinay Kushwaha caused injury by means of knife on several parts of her body. His child Prateek was assaulted by Vinay by means of knife. He tried to chase them and outside his house he came to know that Vinay and Raja caused injuries by means of knife to Pushpraj and his wife Neelam. Thereafter police

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came and took the injured persons to medical hospital. Pushpraj was brought dead to hospital. On the basis of *Dehati Nalishi* (Ex.P-1), a FIR (Ex.P-47) in Crime No. 357/21 was registered and accordingly investigation commenced. The injured persons namely Neelam Kushwaha, Prateek Kushwaha, Golu Kushwaha and Ruchi Kushwaha were taken to Medical Hospital and there statements as per their version were recorded.

4. After 'Merg' *panchnama*, post-mortem report of Pushpraj was prepared. From the scene of crime, blood stained and simple soil were collected and seized. The blood stained clothes of deceased and injured persons were seized in Medical College. Later on, Neelam Kushwaha succumbed to injuries on 23.06.2021. Before that her statement under Section 161 of Cr.P.C was recorded on 16.06.2021. The appellants were arrested on 30.06.2021. In the custody, their memorandum statements were recorded and *lathi* and knives allegedly used in assault were recovered from them. Accordingly, offence under Section 25 of Arms Act was added. The seized material, after the query, were sent to Forensic Science Laboratory (FSL), Sagar for examination. After completion of investigation, the challan was filed before Judicial Magistrate First Class (JMFC) Jabalpur. The said Court committed the matter to the Sessions Court. The appellants abjured the guilt and pleaded innocence. The Court below framed six questions for its determination, recorded statements of 26 prosecution witnesses but no defence witness was examined. After hearing the parties, the Court below passed the impugned judgment.

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Contention of appellants :-

5. Shri Manish Datt, learned Senior Advocate assisted by Shri Eshaan Datt, Advocate, at the outset submits that the statement of complainant Golu Kushwaha (PW-1) shows that accused persons Ravi, Raja and Vinay are his distant relatives. Thus, there is no manner of doubt that he knew all the accused persons by name. However, in his *Dehati Nalishi* (Ex.P/1) and in FIR (Ex.P/47), he did not take the name of Ravi. Although he stated that Raja, Vinay and another person were assailants. Thus, it creates serious doubt about the involvement of Ravi. No Test Identification Parade (TIP) was conducted. Thus, the presence of Ravi is highly doubtful.

6. Learned Senior Advocate submits that the incident had taken place in two parts. As per prosecution story, *firstly*, the appellants allegedly entered the house of Pushpraj and Neelam and assaulted them by means of knife and *lathi* and then they came out and entered the house of Golu and assaulted Golu, his wife Ruchi and his child Prateek. It is argued that whole case of prosecution hinges upon the statement of Golu Kushwaha (PW-1), Smt. Ruchi @ Jyoti Kushwaha (PW-8), Sudhir Kushwaha (PW-9), Lallan @ Chhotu Kushwaha (PW-14) and S.D.OP. Ms. Sarika Pandey (PW-26) (Investigating Officer).

7. The statement of Golu Kushwaha (PW-1) is relied upon to submit that in his court statement, he stated that he had seen the appellants coming out of the house of Pushpraj @ Vijay whereas in his statement recorded under Section 161 of Cr.P.C. (Ex.D/1), there exists

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no such averment. This is a serious omission which makes this portion of statement highly unreliable.

8. The statement of Ruchi (PW-8) is relied upon to submit that the name of Ravi was added for the first time after two days from the date of incident. For this purpose, statement recorded under Section 161 of Cr.P.C. (Ex.D/2) is relied upon.

9. Learned Senior Advocate fairly submits that there is nothing significant in the statement of Bhaiyalal (PW-2) who is a witness to memorandum and seizure (Ex.P/5 & Ex.P/6) of knife from Vinay.

10. Similarly, Deepak (PW-3) is witness to memorandum and seizure of weapon recovered from Ravi and Raja. Nothing significant is pointed out from this statement of Deepak (PW-3).

11. Memorandum and property seizure memo, (Ex. P-7) and (Ex.P-8) show recovery of *lathi* from Raja. It is contended that there is no mention of any blood stain on the *lathi*. Raja's memorandum and seizure dated 30.6.2021 leads to recovery of *lathi* from an open place and prosecution tried to prove it by introducing Deepak Kushwaha (PW-3) and Anuj Kushwaha (PW-4). Babli Sen (PW-5) turned hostile. Dinesh Singh Thakur (PW-6) is the witness to appellant Vinay's memorandum. Smt. Manjula Kushwaha (PW-7) is the sister of deceased Pushpraj @ Vijay. She reached at the scene of crime immediately after commission of crime and Neelam told her that she was assaulted by present appellants. Shri Datt learned Senior Counsel read out the statement of Smt. Manjula Kushwaha (PW-7) recorded under Section 161 of Cr.P.C. on 21.6.2021. Smt. Ruchi @ Jyoti

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Kushwaha (PW-8), wife of Golu clearly admitted that she had not witnessed the incident of assault by the appellants on Pushpraj and Neelam. Likewise Sudhir Kuswaha (PW-9) took the name of assailants as Vinay and Raja and another boy but did not take the name of Ravi.

12. Learned counsel for the appellants by taking this Court to MLCs of Neelam, Prateek and Ruchi urged that all the injuries on their bodies were cut/stab injuries. There were no *lathi* injuries found on their bodies.

13. A conjoint reading of all the MLCs makes it clear that only Golu suffered an injury which could be caused by *lathi.* Other persons namely Neelam, Ruchi, Prateek and Pushpraj received injuries by hard and cutting object. Thus, it is highly doubtful whether Ravi and Raja caused any injury on the deceased and other injured persons.

14. To buttress this argument, Shri Manish Datt, learned Senior Counsel placed reliance on the Autopsy Report of Neelam (Ex.P/24) and statement of Autopsy Surgeon Dr. Prashant Awasthi (PW-11). All the injuries were caused by sharp cutting objects. The statement of Dr. Harish Lodhi (PW12) is in the same line who deposed that injuries were caused by pointed and sharp cutting object. He further deposed that such injuries could be caused by a knife. An open knife was produced before him which was not even sealed. Dr. Akshay Pol (PW-13) entered the witness box and described about the injuries of Neelam and Ruchi. Shri Datt, learned Senior Counsel referred these injuries to show that the injuries were caused by sharp cutting object. So far injury No.5 on the person of Neelam is concerned, he fairly submitted

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that it is a lacerated wound on the back side of head in the occipital region.

15. Statement of Chhotu (PW14) is referred which contains oral dying declaration of Neelam who allegedly informed about the role of present appellants.

16. Learned counsel for the appellants further urged that Ramkushal Kushwaha (PW15) turned hostile. His statement is of no assistance to the prosecution. Ramcharan Patel (PW-16) is the witness of seizure of soil from the scene of crime whereas Ramrati (PW-17) is a Constable and witness to body *supurdnama.*

17. Another argument of learned senior counsel for the appellants is that Prateek is son of injured witness Ruchi. As per prosecution story, Prateek was also injured. However, this crucial witness was not produced by the prosecution and this causes a dent on the story of prosecution.

18. During the course of argument, the statement of Ramrati (PW-17) was referred to show that this Cop has handed over the clothes of deceased Pushpraj to Constable Indra Kumar Vishwakarma.

19. Anita (PW-18) is a Cop who handed over the dead body of Neelam to her family members. The statement of Sumit Mishra, Sub Inspector (S.I.) was referred who recorded the *Dehati Merg* Intimation (Ex.P/30) to Pushpraj @ Vijay. He is also witness to Ex.P/31 to Ex.P/34. He informed about the death of Neelam Kushwaha by 'Merg' Intimation No.0/2021 (Ex.P/35). He requisitioned the witnesses for their presence for preparing death Inquest *Panchayatnama* (Ex.P/36).

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He preferred application (Ex.P/37) for conducting autopsy of Neelam Kushwaha.

20. Shri Datt, learned senior counsel fairly submits that this statement is not of much significance. Same is the case with statement of Amar Singh (ASI) and police photographer. He has exhibited the photographs and certificates issued under Section 65-B of Evidence Act. This statement is also not of much significance for the defence fairly submits Shri Datt.

21. Other statements are of Shailendra Kushwaha (PW-21) and Manish Kushwaha (PW-22). These statements are also of no significance is the stand of learned counsel for the appellants.

22. The statement of Smt. Sunita Tiwari, Forensic Officer (PW-23) is relied upon to submit that she reached the scene of crime and prepared the Crime Scene Report (Ex.P/34). Nothing further is pointed out from her statement.

23. Dr. Neha's (PW-24) statement is relied upon who conducted the X-ray of Golu Kushwaha. Her medical report (Ex.P/43) shows that there was no fracture on the knee or thigh of the injured person.

24. Learned Senior Counsel for the appellants has taken pains to minutely refer to the statement of Dr. Parth Deshmukh (PW-25). It is argued that Para-1 of his examination-in-chief shows that he had examined the injured Neelam and Ruchi and opined that they are in a position to give statement and thereafter the Police Officer recorded their statements. However, Para-2 of said statement shows that after recording of statement of Neelam and Ruchi he had recorded about

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their fitness to give statement. In the cross-examination, this Doctor stated that he does not remember as to when he gave report about fit state of mind of injured persons. The argument developed by learned Senior Counsel for the appellants is that before taking the statement of aforesaid injured persons, no finding was recorded or certification made that they are in a fit state of mind/health to depose the statements. Thus, it causes a dent on the statements.

25. The statement of I.O. (S.D.O.P.) Ms. Sarika Pandey (PW-26) is referred to point out that while preparing the spot map (Ex.P-49), the witnesses did not inform about the name of accused persons. This statement was relied upon for yet another purpose. Through Ex. P-6, the knife was recovered from a place, which is called as a 'public place' by this witness. It is contended that when knife/weapon is allegedly recovered from an open space approachable by anybody, the recovery is doubtful.

26. Shri Manish Datt, learned Senior Counsel lastly placed reliance on the question no. 140 of all the appellants from their statements recorded under Section 313 of Cr.P.C. wherein they pleaded innocence and stated that they have been falsely arraigned.

27. Criticizing the capital punishment imposed on these appellants Shri Datt, learned Senior Counsel urged that the offence by no stretch of imagination can invite penalty of 'death sentence'. The Court below has failed to consider the necessary parameters and mechanically imposed capital punishment which runs contrary to settled legal position.

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28. Shri Manish Datt, learned senior counsel for the appellants by taking this Court to the FSL report (Ex.P/56), has submitted that a careful reading of the FSL report shows that a *lathi* Article - M from Raja and Article - N from Ravi was recovered, whereas from Vishnu @ Vinay, a knife Article - O was recovered. In the opinion part of the report, no blood stains were found on Article – 'M, N & O'. Yet another finding is given in the report that the blood available on Article 'M & O' is insufficient. Thus, there exists no conclusive proof that these weapons were used in commission of crime. Neither origin of blood nor blood grouping could be established.

29. Furthermore, it is argued that in the manner the counsel for the appellants conducted the case of the appellants before the Court below, it can be safely concluded that they did not get a fair trial before the Court below. Thus, the Article 21 of the Constitution is breached so far present appellants are concerned.

30. To elaborate, heavy reliance is placed on **(2004) 4 SCC 158 Zahira Habibulla H. Sheikh and another v. State of Gujarat and others, (2012) 9 SCC 408 Mohd. Hussain @ Julfikar Ali vs. The State (govt.) of NCT) Delhi** and recent judgment of Apex Court reported in **(2022) 2 SCC 89 Nasib Singh v. State of Punjab and another.** It is submitted that in a case of this nature where failure of justice is apparent, this Court may exercise the power under Section 386 and send the matter back for re-trial. It is urged that High Court may consider framing appropriate rules so that expert Advocate can be engaged as per gravity of the matter.

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31. Shri Manish Datt, learned senior counsel further placed reliance on **Nasib Singh (supra)** and urged that Section 157 of Cr.P.C. mandates that after recording the FIR, copy thereof must be sent to the concerned Court *forthwith* whereas in the instant case, there exists a delay which is also unexplained. For this reason alone, in the light of aforesaid judgments, the case of prosecution cannot sustain judicial scrutiny. Reliance is placed on the statement of Ms. Sarika Pandey, Investigating Officer (PW-26) wherein she has categorically admitted that FIR was sent to the Court of learned ACJM through Ex.P/52 on 16/06/2021. The incident took place on 14/06/2021 whereas FIR was recorded and sent on 16/06/2021.

32. The next reliance is on **(1976) 3 SCC 104 Munnu Raja and another v. State of Madhya Pradesh,** wherein the Apex Court opined that the Investigation Officer should not be encouraged to record the dying declaration. Neelam was admitted in the hospital on 14/06/2021 and died on 23/06/2021. The prosecution has not assigned any reason whatsoever as to why during this period any competent/independent officer could not record her dying declaration.

33. Shri Datt, learned senior counsel submits that if dying declaration is excluded, the only thing remains are oral dying declarations so far alleged murder of Neelam and Pushpraj is concerned. The Advocate for the appellants before the Court below did not put any question in cross-examination regarding the oral dying declaration. Thus, reverting back to the same argument that appellants

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were denied fair trial, it is urged that matter be remitted back before the Court below so that appellants can be effectively represented by a counsel having necessary expertise.

34. So far quantum of punishment is concerned, he placed reliance on two judgments of this Court reported in **2022 SCC OnLine MP 1826 (Ramnath Kewat v. State of Madhya Pradesh)** and **2023 LiveLaw (MP) 62 (Ribu @ Akbar Khan v. State of Madhya Pradesh)** wherein this Court has taken note of *catena* of judgments of Supreme Court. It is argued that if the factual backdrop is examined, it cannot be said that appellants only deserve capital punishment. Thus, the impugned judgment may be interfered with.

Contention of Govt. Advocate:

35. Shri S.K. Kashyap, learned Government Advocate supported the impugned judgment and submits that neither there exists any perversity of finding nor miscarriage of justice in imposing the punishment in a case of this nature where two persons were murdered and three persons received grievous injuries.

36. The incident had taken place on the night of 14.06.2021 and statements of injured persons were recorded on 16.06.2021. Thus, in between there is a gap of only one day. No question is asked to the investigation officer about alleged delay. The delay in recording statement under Section 161 Cr.P.C. is therefore not fatal to the case of prosecution.

37. The statement of SDOP (PW-26) makes it clear that she recorded the statement of Neelam in the presence of Dr. Deshmukh. Dr.

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Deshmukh deposed that injured person was in the fit state of mind and therefore, no fault can be found in the finding of Court below whereby oral dying declaration was accepted. Since all the injured persons namely Neelam (deceased), Golu (PW-1) and Ruchi (PW-8) have categorically taken the names of all three accused persons/appellants, the prosecution story cannot be doubted.

38. Shri S. K. Kashyap, learned Government Advocate for the State submits that three counsel on various dates represented the appellants before the Court below which is apparent from the perusal of order sheets and record. If on these grounds, interference is made and matter is sent back for re-trial, it will lead to an endless process which will never come to an end. When direct evidence is available on record, there is no question of sending the matter for re-trial.

39. To rebut the argument relating to Section 157 of Cr.P.C., it is submitted that on 14/06/2021, *Dehati Nalishi* was recorded. Neelam was unconscious till 16/06/2021 and when she gained consciousness, FIR was recorded on 16/06/2021 and sent to the competent Court on the same day. Thus, there is no delay on the strength of which any dent can be caused on the story of prosecution.

40. So far dying declaration recorded by Investigating Officer is concerned, Shri Kashyap, learned Government Advocate placed reliance on **(2013) 12 SCC 121 Rafique alias Rauf and others v. State of Uttar Pradesh.** On the strength of this judgment, it is urged that merely because Investigating Officer recorded the dying declaration, the dying declaration cannot become unreliable.

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41. Faced with this, Shri Manish Datt, learned senior counsel assisted by Shri Eshaan Datt, submits that a conjoint reading of statements of all the Doctors [Dr. Kuldeep Pathak (PW-10), Dr. Prashant Awasthi (PW-11) and Dr. Akshay Pol (PW-13)] leaves no room for any doubt that none deposed that Neelam was in an unconscious state between 14-16/06/2021. Thus, the argument advanced by learned Government Advocate needs to be discarded.

42. Heavy reliance is placed on nature of injuries found on the person of deceased namely Pushpraj and Neelam and also on the body of Golu (PW-1) and Ruchi (PW-8) to submit that the nature of crime is heinous and barbaric. The appellants behaved like hardcore criminals. In the manner they have murdered and assaulted the persons, the Court below has not committed any error of law in imposing capital punishment.

43. Parties confined their arguments to the extent indicated above.

44. We have heard the parties at length and perused the record.

Findings :-

45. As noticed above, as per prosecution story, on 14/06/2021, two sets of incident have taken place in quick succession. First, appellants allegedly caused injuries to Pushpraj Kushwaha and his wife Neelam Kushwaha. Both of them succumbed to the injuries. After assaulting aforesaid two persons, they came out of their house and entered the adjacent house of Golu Kushwaha. They allegedly assaulted Golu, his wife Ruchi and son Prateek Kushwaha. All of them were taken to

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Medical College Hospital. Their MLCs were promptly prepared. The *Dehati Nalishi* was also promptly recorded by Golu Kushwaha (PW-1) on 14/06/2021 at 10.45 P.M.

Effect - Name of one appellant is missing in *Dehati Nalishi* and FIR:-

46. *Dehati Nalishi* (Ex.P/1) was recorded by Golu Kushwaha wherein he mentioned that after he locked the gate of his house from inside and started taking the dinner, he heard some noise and found that his boundary wall is crossed by Vinay, Raja Kushwaha and *another boy*. Thereafter he narrated how Vinay assaulted him and his wife by means of knife and other two persons assaulted by means of *lathi*. It is noteworthy that he has mentioned that there were three assailants although did not mention the name of one such assailant i.e. Ravi.

47. In FIR founded upon *Dehati Nalishi* and recorded on 15/06/2021 at 4:09 O' clock, the same story is narrated that boundary was crossed by Vinay Kushwaha and Raja Kushwaha and another person.

48. The bone of contention of learned senior counsel for the appellants was that since name of Ravi was not specifically taken in *Dehati Nalishi* (Ex.P/1) and FIR (Ex.P/47), the presence of Ravi as an assailant is highly doubtful. The argument on the first blush appears to be very attractive. Moreso, when it was supported by the judgment of Supreme Court in the case of **(1976) 4 SCC 288 (State of Orissa v. Brahmananda Nanda)** and **(2007) 8 SCC 523 (Mallanna and others v. State of Karnataka).** However, on closure scrutiny, the argument

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lost much of its shine. It is found that there is no rule of thumb that a person cannot be held guilty despite availability of legal evidence against him merely because his name was not mentioned in the FIR. At the cost of repetition, it may be remembered that although name of Ravi was not mentioned in the *Dehati Nalishi* and FIR, in both the said documents it was clearly mentioned that Raja and Vinay and *another person* was there. Golu Kushwaha (PW-1) stated that assailants are distant relatives of complainant.

49. In **AIR 1983 SC 554 Darshan Singh and others v. State of Punjab** the Apex Court recorded as under :-

> "**7**. The First Information Report lodged by Mohinder Singh (PW-15) mentions the names of accused Nos. 2, 3, 8 & 9 only. The fact that the names of the other accused are not mentioned in the FIR was at least a circumstance which the prosecution had to explain, **though no rule of law stipulates that an accused whose name is not mentioned in a FIR is entitled to an acquittal**. ……."
>
> **(Emphasis supplied)**

50. The similar view was taken in **AIR 2007 SC 1253 Vinod G. Asrani v. State of Maharashtra.** Almost by employing similar language, the Supreme Court candidly held that it is not a hard and fast rule that FIR must always contain the names of all persons who were involved in the commission of an offence. Very often, the names of culprits surface at the stage of investigation. *Lastly,* in **AIR 2008 SC 155 State of Maharashtra & another v. Mohd. Sajid Husain Mohd. S. Husain etc.**, the Apex Court reiterated the same principle by taking

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into account its previous judgments. This is equally trite that FIR cannot be an encyclopedia containing minute details of everything. Thus, merely because name of Ravi is not mentioned in *Dehati Nalishi/* FIR, he does not get a right of acquittal. At later part of this judgment, we will examine the evidence available against him to decide regarding his presence and overt act at the scene of crime.

51. Another limb of argument of learned senior counsel was that no TIP was conducted and for this reason also, presence of Ravi was very doubtful. We do not see any merit in this contention.

52. Golu Kushwaha (PW-1) at the threshold stated that appellants were his distant relatives. Golu and Ruchi identified all the assailants while deposing in the Court. Thus, non-conduction of TIP will not be fatal to the case of prosecution

Omission in the statement of Golu (PW-1) :-

53. Golu Kushwaha (PW-1) in his court statement deposed that he had seen the appellants coming out of the house of Pushpraj @ Vijay. Indisputably, in his case diary statement (Ex.D/1), there exists no such narration of fact. In our view, it is a serious omission which makes his statement to that extent untrustworthy. In other words, we are of the opinion that in view of this omission, it cannot be accepted that Golu Kushwaha had seen the appellants coming out of the house of deceased Pushpraj Kushwaha.

Belated recording of case diary statement of Neelam (deceased) and Ruchi (PW-8) :-

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54. During the course of argument much emphasis was laid about alleged two days' delay in recording the case diary statements of Ruchi (PW-8) and Neelam (deceased). We have examined the record carefully and find that argument of learned Government Advocate has substantial force. In fact, there is no such delay as canvassed by the appellants. The incident had taken place on 14/06/2021 at around 10:45 P.M. The injured persons were taken to the hospital immediately and they were under treatment. On 16/06/2021 i.e. a day after, the statement of Ruchi (PW-8) and Neelam (deceased) were recorded. Thus, there was no inordinate delay in recording the case diary statement. This delay by no stretch of imagination will cause any dent to the case of prosecution. Moreso, when Investigating Officer was not put to cross-examination on the aspect of delay by the defence. (**See :- Ranbir v. State of Punjab (1973) 2 SCC 444, Bodhraj v. State of J & K (2002) 8 SCC 45, Banti v. State of M.P. (2004) 1 SCC 414 and State of U.P. v. Satish (2005) 3 SCC 114).**

Recovery of weapon from open space :-

55. It was strenuously contended that property seizure memo (Ex. P/7) and (Ex.P/8) shows that *lathi* was recovered from an open space. The statement of I.O. was also relied upon for this purpose. Section 27 of Evidence Act nowhere talks about 'open space'. The statement of I.O. makes it clear that the weapons were although recovered from open space but hidden inside a bush. The Apex Court in **(1994) 4 SCC 370 (State of Himachal Pradesh v. Jeet Singh)** held that :-

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"26. There is nothing in Section 27 of the Evidence Act which renders the statement of the accused inadmissible if recovery of the articles was made from any place which is "open or accessible to others". It is a fallacious notion that when recovery of any incriminating article was made from a place which is open or accessible to others, it would vitiate the evidence under Section 27 of the Evidence Act. Any object can be concealed in places which are open or accessible to others. For example, if the article is buried in the main roadside or if it is concealed beneath dry leaves lying on public places or kept hidden in a public office, the article would remain out of the visibility of others in normal circumstances. Until such article is disinterred, its hidden state would remain unhampered. The person who hid it alone knows where it is until he discloses that fact to any other person. Hence, the crucial question is not whether the place was accessible to others or not but whether it was ordinarily visible to others. If it is not, then it is immaterial that the concealed place is accessible to others.

27. It is now well settled that the discovery of fact referred to in Section 27 of the Evidence Act is not the object recovered but the fact embraces the place from which the object is recovered and the knowledge of the accused as to it (Pulukuri Kottaya [Pulukuri Kottaya v. Emperor, AIR 1947 PC 67 : 74 IA 65]). The said ratio has received unreserved approval of this Court in successive decisions. (Jaffar Hussain Dastagir v. State of Maharashtra [(1969) 2 SCC 872] , K. Chinnaswamy Reddy v. State of A.P. [AIR 1962 SC 1788] , Earabhadrappa v. State of Karnataka [(1983) 2 SCC 330 : 1983 SCC (Cri) 447] , Shamshul Kanwar v. State of U.P. [(1995) 4 SCC 430 : 1995

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SCC (Cri) 753] , State of Rajasthan v. Bhup Singh [(1997) 10 SCC 675 : 1997 SCC (Cri) 1032] .)"

(Emphasis supplied)

This judgment squarely covers the case in hand where *lathis* were concealed beneath bushes.

Oral dying declarations :-

56. Manjula Kushwaha (PW-7) in her deposition categorically deposed that she resides in the same *mohalla* where deceased Vijay and Neelam were residing. She received the call of husband of her younger sister Ruchi namely Golu that Vijay and Neelam have been assaulted by accused persons. She immediately rushed to the house of Vijay and Neelam and found that both of them are lying on the floor in injured condition. Neelam informed her that Ravi, Raja and Vinay assaulted them by means of knife and *lathi*. Similarly, Chhotu (PW-14) in his Court statement stated that appellant-Raja is his cousin whereas appellants Ravi and Vinay are his brother-in-law. He further deposed that he was going towards his house from the house of Golu and heard a noise of cry and immediately reached the house of Golu and found that accused were trying to run out from the scene of crime. Golu informed him about the incident which took place with Pushpraj. He reached the house of Pushpraj where injured Neelam informed him that Vinay by means of knife and Ravi and Raja by means of *lathi* caused injuries to them. Pertinently, Manjula Kushwaha (PW-7) and Chhotu Kushwaha (PW-14) were not subjected to any cross-examination on the aspect of oral dying declaration. Thus, we find no reason to

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disbelieve the said oral dying declarations. More particularly when Chhotu Kushwaha is a close relative of accused persons.

Availability of corresponding injuries:-

57. It was forcefully and repeatedly argued that Vinay alleged assaulted the injured persons by means of knife whereas *lathis* were used to cause injuries by other two accused persons. By taking this Court to the injuries on the injured persons, it was argued that there is no corresponding injury of *lathi* on the body of deceased/injured persons.

58. It is apposite to reproduce the injuries of **Neelam** (deceased) which are as under :-

(1) 2 x 1.5 cm incised wound over epigastrium, peritoneal breach present. No active bleeding.

(2) 2 x 1.0 cm incised wound present over left hypogastrium.

(3) 3 x 1.5 cm incised wound present over left hypochondrium.

(4) Penetrating wound over gluteal region of size around 2 x 1 x 5 cm.

(5) **Lacerated wound of size 1 x 1 cm over middle of occipital region**.

Following injuries were found on the body of deceased **Pushpraj alias Vijay** :

(1) Two stab wounds present on front of chest on left side.

(2) One stab wound present on front of chest on left side 1 cm above the lift nipple which is measuring 2 cm x .1 cm

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x 10 cm depth cutting upto heart through and through and piercing liver.

(3) Second stab wound present on front of chest on left side 10 cm below from first stab (a) wound and size is 3 cm x .1 cm x 10 cm (depth) cutting upto stomach through and through.

Following injuries were found present over the body of injured **Ruchi Kushwaha** -

(1) **Incised wound** of size 3 x 1 cm present over left hypochondrium, omentum coming out through it.

(2) 3 x 1.5 cm incised wound present over right gluteal region- active bleeding present.

(3) 2 x 1 cm incised wound present over right groin region.

(4) 3 x 1 cm incised wound reaching upto pelvic cavity.

(5) 2 x 1 cm and 2 x 1 cm incised wound present over right gluteal region.

(6) 1x 1 cm incised wound present over right forearm.

(7) 2 x 1 cm incised wound present over right back near scapula.

(8) 2 x 1 x 3 cm incised wound present over right breast along interolateral border of nipple areola complex.

Following injuries were found present over the body of injured **Golu** -

(1) Swelling over left leg lower part with tenderness caused by hard and blunt object.

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59. In view of injury No.5 of Neelam and injury No.1 of Golu, it is not possible to hold that there were no corresponding injuries which could have been caused by *lathi*. It is relevant to mention here that Autopsy Surgeon Dr. Prashant Awasthy (PW-11), Dr. Harish Lodhi (PW-12) and Dr. Akshay Pol (PW-13) in one voice deposed that most of the injuries were caused by sharp cutting object. There are multiple injuries on the body of Neelam, Pushpraj (both deceased) and on the body of Golu and Ruchi. Shri Datt, learned Senior Counsel for the appellants during the course of hearing fairly admitted that injury no.5 on the person of Neelam was a lacerated wound on the backside of head in the occipital region. This injury could have been caused by *lathi* and was sufficient to cause death. Thus, argument relating to absence of corresponding injuries deserves to be rejected.

Effect of non-examination of Prateek :

60. Since as per the case of prosecution Prateek son of Golu (PW-1) was also assaulted by appellants and was injured, his non-examination in the Court is fatal to the case of prosecution. We are unable to persuade ourselves with this line of argument. As per Section 134 of the Evidence Act the quantity of witnesses are not important, what is important is the quality of their deposition. Pertinently, the Court below has not punished the appellants for causing injury to Prateek.

Dying Declaration :

61. Two fold arguments were advanced to attack the dying declaration (Ex.P/46) of Neelam recorded on 16.06.2021. Shri Datt, learned Sr. counsel, during the course of hearing, fairly admitted that

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the case diary statement (Ex.P/46) of Neelam recorded under Section 161 of Cr.P.C. can be treated as dying declaration because this is the last statement recorded before her death.

62. The *first* ground of attack to the dying declaration is that it was recorded by the Investigating Officer and the Supreme Court in **(1976) 3 SCC 126 (Munna Raja and another Vs. State of M.P.)** opined that recording of dying declaration during the course of investigation by Investigating Officer ought not to be encouraged. We have carefully gone through this judgment and are of the opinion that no principle of law is laid down that dying declaration recorded by the Investigating Officer will vitiate the declaration or cannot become basis for conviction. We find support in our view from **(2013) 12 SCC 121 (Rafique ALIAS Rauf and Ors. Vs. State of Uttar Pradesh)**. The relevant portion is reproduced below:

> "17. The High Court while relying upon the said statement has noted certain circumstances, namely, the evidence of PW 6, investigating officer, who deposed that the deceased was fully conscious when he was brought to the police station with injuries on his face, chest and other parts of the body and that he recorded his statement. It was also noted that after recording his statement the investigating officer referred him to the hospital for medical examination and treatment. The High Court, thereafter, noted the evidence of PW 5, the post-mortem doctor who categorically stated in his cross-examination that the injured was also in a position to speak and that it was not necessary that in all cases after sustaining injury in the brain a person cannot retain his conscience or will not be in a

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position to speak. The High Court noted the further statement of the doctor that it is not necessary that in every such case the patient would immediately go to a coma stage.

18. The High Court, therefore, reached a conclusion that the deceased Zahiruddin was in a position to speak and that the statement under Ext. Ka-9 was given by him who expired on the next day evening. It further stated that since it was the last statement of the deceased to the investigating officer it can very well be treated as a dying declaration. The High Court was conscious of the fact that the trial court did not place any reliance on the said statement which in the opinion of the High Court was erroneous.

25. In this context, we can also make a reference to a decision of this Court in Cherlopalli Cheliminabi Saheb v. State of A.P. [(2003) 2 SCC 571 : 2003 SCC (Cri) 659] , where it was held that it was not absolutely mandatory that in every case a dying declaration should be recorded only by a Magistrate. The said position was reiterated in Dhan Singh v. State of Haryana [(2010) 12 SCC 277 : (2011) 1 SCC (Cri) 352] wherein it was held that neither Section 32 of the Evidence Act nor Section 162(2) CrPC, mandate that the dying declaration has to be recorded by a designated or particular person and that it was only by virtue of the development of law and the guidelines settled by the judicial pronouncements that it is normally accepted that such declaration would be recorded by a Magistrate or by a doctor to eliminate the chances of any doubt or false implication by the prosecution in the course of investigation."

(Emphasis supplied)

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Thus, dying declaration can be relied upon even if it was recorded by the I.O.

63. *Secondly*, the doubt was sought to be created whether Neelam was in a fit state of mind when her statement (Ex.P/46) was recorded by the I.O.. The statement of Dr. Parth Deshmukh (PW-25) is relied upon to bolster the submission that he gave the certificate of fitness after recording of dying declaration of Neelam. A careful reading of his statement shows that the said argument is devoid of merit. He clearly certified that the patient was conscious and oriented to time, place and person. In his Court statement also he could withstand the cross-examination and no amount of cross-examination could cause any damage to his statement.

64. The law relating to dying declaration was summarized by the Supreme Court recently in **Irfan v. State of U.P., reported in 2023 SCC OnLine SC 1060** decided on **23.08.2023**. If the *litmus test* laid down in para-62 of this judgment is applied in the instant case, it will be clear like noon day that Neelam made the statement when her death was expected. The dying declaration was not recorded with undue delay. Indeed, it was recorded by following the 'rule of first opportunity'. There is no reasonable suspicion to believe that Neelam was tutored by anybody. Importantly, no such argument is even advanced. The declarant had opportunity to clearly observe the incident. The statement was recorded properly. It cannot be said that dying declaration is a manifestation/fiction of dying person's imagination. The dying declaration was certainly given voluntarily. In

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the judgment of **Irfan (supra)** it was poignantly held that there is no hard and fast rule for determining when the dying declaration should be accepted. The duty of the Court is to decide this question in the facts and surrounding circumstances of each case. If we read the ocular evidence and the dying declaration together wherein names and role of all the appellants are mentioned, we do not see any reason to disbelieve the dying declaration.

65. The latin maxim ***Nemo moriturus praesumitur mentirs*** means Nobody about to die is presumed to lie. In other words, nobody would like to meet his creator with a lie in his/her mouth. If dying declaration (Ex.P/46) is tested on the anvil on this age old principle also, the inevitable result would be that there is no circumstance which persuades us to hold that deceased Neelam gave incorrect statement which is reduced in writing as a dying declaration/case diary statement.

66. We have carefully gone through the findings given in this regard in para-38 of the impugned judgment. We give our stamp of approval to the findings mentioned therein. The findings are based on various Supreme Court judgments. Thus, the dying declaration in the instant case is certainly trustworthy.

Spot Map:

67. The spot map (Ex.P-49) was referred to contend that in the spot map, the position of witnesses etc. is not clearly mentioned. It is noteworthy that when Neelam and Pushpraj Kushwaha were assaulted, Golu, Ruchi and their son were not present there. Thus, there was no occasion to mention their location. This Court in **2023 SCC OnLine**

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MP 261 (Rinku v. State of M.P.) after relying the judgment of Supreme Court in **(2004) 13 SCC 279 (Prithvi (minor) v. Mam Raj and others)** opined that alleged flaw of this nature is not fatal to the case of the prosecution. This Court in **Rinku (supra)** held as under :

> "34. Raees Khan (PW-2) is the witness to the 'Site Map' (Ex.P-2). The testimony of this witness shows that no amount of cross-examination was made regarding location of house of Kamal (PW-3). Investigating Officer (I.O.) Subodh Kumar Tomar (PW-15) was also not subjected to cross-examination on this point. We have already held that statements of Ahmed Hussain (PW-1), Sheikh Raees (PW-2) and Kamal Singh (PW-3) are of reliable quality and therefore, ancillary question is whether aforesaid flaw pointed out by the appellants relating to spot map will demolish the story of prosecution. This point, in our opinion, is no more res integra. The Supreme Court in (2004) 13 SCC 279 (Prithvi (minor) v. Mam Raj) opined that site plan is not a ground to disbelieve the otherwise credible testimony of eye-witnesses. This principle was followed with profit in a subsequent judgment reported in (2017) 11 SCC 195 (Yogesh Singh v. Mahabeer Singh).
>
> 35. In (2000) 4 SCC 515 (State of U.P. v. Babu Ram), it was held that it is not possible to understand the rationale of the reasoning that if an Investigating Officer did not instruct the person, who drew up the site plan to note down certain details that would render the testimony of material witnesses unreliable. In view of these judgments of Supreme Court, in our view, the alleged flaw in the 'site map' is not fatal to the prosecution story. The statements of material witnesses

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> are creditworthy and aforesaid technical flaw in preparation of site map will not make their testimony vulnerable."
>
> **(Emphasis supplied)**

FSL Report regarding weapons :-

68. It was faintly argued that in the *lathis* recovered from appellant Raja (Article M) and Ravi (Article N) and knife recovered from Vinay (Article O) no blood stains were found. There is no straitjacket formula that an accused person can be held guilty only when human blood is found on the weapon allegedly used in the commission of crime. The ocular evidence, medical evidence and circumstances lead to only one conclusion that appellants and only appellants were responsible for the overt act and hence, they can be certainly held guilty for the offences.

69. We have carefully gone through the ocular, medical and documentary evidence and we are satisfied that Court below has appreciated the evidence on the anvil of Evidence Act.

70. In view of oral dying declaration (Ex.P/46) of deceased Neelam given to Manjula (PW-7) and Chhotu (PW-14) it is established beyond reasonable doubt that appellants have assaulted Neelam and her husband by means of *lathis* and knife because of which both of them died. We have already recorded that there was no cross-examination on the aspect of oral dying declarations. Apart from this, Golu (PW-1) and Ruchi (PW- 8) clearly deposed about the overt act of all the appellants. The prosecution could not demolish their statements during cross-examination. The corresponding injuries and medical evidence also

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supports the case of prosecution. Thus, in our judgment, the prosecution could establish its case beyond reasonable doubt.

Fair trial and demand of remand:

71. Shri Manish Datt, learned Sr. counsel has taken pains to submit that the defence counsel appearing for appellants before the Court below very badly contested the matter. There was no cross-examination on the aspect of oral dying declarations. There are certain other serious infirmities which shows that appellants did not get competent advocate to defend themselves. Thus, their fundamental right flowing from Article 21 of the Constitution is infringed. In support of this argument, he placed reliance on **(2004) 4 SCC 158 (Zahira Habibulla H. Sheikh v. State of Gujarat)** and **2022 SCC OnLine SC 1396 (Ramanand v. State of U.P.)** and urged that in order to secure ends of justice and to prevent failure of justice, the impugned judgment may be set aside and the matter may be remanded for conducting re-trial.

72. We have gone through the aforesaid judgments cited by learned Senior Counsel. Before dealing with the same, it is apposite to mention here that in the instant case the appellants themselves engaged private Advocates. It is not a case where on account of indigency, poverty, illiteracy or any other possible factor, they could not engage a counsel of their choice. In the judgment of **Ramanand @ Nandilal Bharti (supra),** the Apex Court considered this aspect and gave certain findings on the touch stone of Article 39A of the Constitution and Section 304 of Cr.P.C. Most of the findings of both the aforesaid matters are relating to legal aid and the counsel were engaged through

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the said body. The Apex Court in Para-118 of judgment of **Ramanand @ Nandilal Bharti (supra)** opined that the legal aid counsel did not conduct himself in a proper manner. Since in the instant case, the appellants engaged a counsel of their choice, merely because his performance was not to the expectation of learned Senior Counsel here, on mere asking, the matter cannot be remanded back for re-trial.

73.. Shri Manish Datt, learned Senior Counsel during the course of hearing expressed his dissatisfaction and anguish in the manner trial cases are accepted by Advocates having no expertise in the field. He even made a request that High Court may frame some Rules in this regard. We are afraid, this is not within the province of this Court. It is for the Bar Council and Bar Associations to persuade their members to introspect so that prevailing situation and ineffective representation of litigants (if any) can be checked.

74. The Bar Council and the law makers are best suited to introduce provisions in this regard. The Apex Court in **(2016) 2 SCC 402 State (NCT of Delhi) vs. Shiv Kumar Yadav and another** has held as under :-

> "**16.** The interest of justice may suffer if the counsel conducting the trial is physically or mentally unfit on account of any disability. The interest of the society is paramount and instead of trials being conducted again on account of unfitness of the counsel, **reform may appear to be necessary so that such a situation does not arise**. Perhaps time has come to review the Advocates Act and the relevant rules to examine the continued fitness of an advocate to conduct a criminal trial on account of

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> advanced age or other mental or physical infirmity, **to avoid grievance that an Advocate who conducted trial was unfit or incompetent**. This is an aspect which needs to be looked into by the authorities concerned including the Law Commission and the Bar Council of India."
>
> **(Emphasis Supplied)**

75. Apart from this, in the said judgment, the Apex Court disapproved the view of the High Court when witness was sought to be recalled under Section 311 of Cr.P.C. on the ground of change of counsel and High Court approved it. It was candidly held that 'mere change of counsel cannot be a ground to recall the witness'.

Sentence :-

76. The Court below has imposed capital punishment to appellants for murdering two persons. The question of imposition of appropriate punishment is a vexed question. This question bothered the human being from time immemorial. In an old scripture, it was recorded as under:

> *अपराधानुरूपं च दण्डं दण्ड्येषु दापयेत्।*
> *सम्यग्दण्डप्रणयनं कुर्यात्।*
> *द्वितीयमपराधं न कस्यचित् क्षमेंत।*
>
> **(Vishnu pp. 22-23, Dharmakosha p. 571)**

Let the king inflict punishments upon the guilty (i) corresponding to the nature (gravity) of the offence, (ii) according to justice and (iii) not pardon anyone who has committed the offence for the second time.

77. The imposition of capital punishment deserves microscopic scrutiny. The *aggravating* and *mitigating* circumstances are required to

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be examined. Apart from this, the Apex Court has laid down 'Crime Test', 'Criminal Test' and 'R-R test'. This Court considered this aspect in sufficient detail in **ILR 2023 MP 353 (In Reference Vs. Ramnath Kewat).** In the instant case, the *mitigating circumstances* relating to appellants are :-

(i) It is not established that they had any criminal record of conviction.

(ii) They are aged about 35, 24 and 23 years respectively.

(iii) The accused persons belong to lower strata/middle class of the society.

(iv) There is no evidence to show that accused persons in future would commit any offence creating alarm for the society.

(v) It cannot be said that there is no possibility of their reformation or rehabilitation.

(vi) The crime was not committed to terrorize or harm a particular or large section of society.

(vii) No special reason exists to impose capital punishment.

Aggravating Circumstances are :

(i) Appellants assaulted two families one by one for no justifiable reason.

(ii) They brutally assaulted Pushpraj @ Vijay and his wife Neelam.

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(iii) The hurt caused to Golu, his wife is serious/grievous in nature.

(iv) The offence was committed after due deliberation.

(v) The accused persons had not shown any repentance after committing the offence.

78. In view of foregoing analysis, we find force in the argument of learned Sr. counsel that it is not a fit case for inflicting capital/ death penalty. Resultantly, the reference is answered in affirmative, the appeals are allowed to the extent death penalty is imposed on the appellants. While affirming the conviction of appellants under Section 302 of IPC, we deem it proper to alter the sentence from death sentence to life imprisonment with fine of Rs.50,000/- on each of the appellants. The life imprisonment shall be for the *remainder of their life*. We also affirm the conviction and sentence of appellants for committing offence under Sections 450, 307/34, 324/34 and 323/34 IPC and also affirm the conviction and sentence awarded to appellant-Vinay Kushwaha under Section 25(1-B)(b) of the Arms Act.

79. The appeals are **partly allowed** to the extent indicated above and the **Reference is answered accordingly.**

(SUJOY PAUL)
JUDGE

(BINOD KUMAR DWIVEDI)
JUDGE

sarathe