

## **Mahesh Chander And Another vs State Of Delhi on 3 April, 1991**

**Equivalent citations: 1991 AIR 1108, 1991 SCR (2) 51, AIR 1991 SUPREME COURT 1108, 1991 AIR SCW 1072, (1991) CRICJ 526, (1991) IJR 150 (SC), 1991 CALCRILR 140, 1991 CRILR(SC MAH GUJ) 437, 1991 (2) CURCRIJ 145, 1991 CRIAPPR(SC) 313, 1991 SCC(CRI) 551, 1991 (2) UJ (SC) 385, (1991) 2 JT 108 (SC), 1991 (1) SCC(SUPP) 257, (1991) 2 SCR 51 (SC), (1991) SC CR R 627, (1991) 44 DLT 233, (1991) 2 CURLJ(CCR) 511, (1991) 2 RECCRIR 263, (1991) 1 ALLCRILR 755, (1991) 2 CRIMES 208**

**Author: S.R. Pandian**

**Bench: S.R. Pandian, M. Fathima Beevi**

PETITIONER:

MAHESH CHANDER AND ANOTHER

Vs.

RESPONDENT:

STATE OF DELHI

DATE OF JUDGMENT03/04/1991

BENCH:

PANDIAN, S.R. (J)

BENCH:

PANDIAN, S.R. (J)

FATHIMA BEEVI, M. (J)

CITATION:

1991 AIR 1108                      1991 SCR (2) 51

1991 SCC Supl. (1) 257 JT 1991 (2) 108

1991 SCALE (1)572

ACT:

Constitution of India: Article 136-Court's power to interfere with concurrent findings of fact- scope of.

Indian Penal Code, 1860: S. 302 r/w s. 34-Death due to homicidal violence-Murder trial-Evidence-Place of occurrence and cause of death not disputed-Motive for crime brought out-Serious doubts in trustworthiness and truthfulness of evidence of eye-witnesses and suspicion in veracity of prosecution case overlooked by courts below-Conviction and sentence of life imprisonment awarded by Sessions Court-Findings affirmed and sentence maintained by High Court - Legality and correctness of.

Code of criminal Procedure, 1973: S. 154-F.I.R.-Delay in registration- Name of one of the accused known to the witness and presence of main eye-witness at the scene not mentioned-Effect of.

Indian Evidence Act, 1872: S.9-Identification parade-Accused already seen by witness in police station-Refusal by accused to participate-Presence of accused at the place of occurrence not proved-whether adverse inference could be drawn.

HEADNOTE:

Appellants in Criminal Appeals nos. 628 and 432 of 1979 were accused nos. 1 and 2 respectively in the trial court. Deceased was brother-in-law (sister's husband) of accused no.1-At the time of marriage of P.W. 4 (sister of accused no.1) with the deceased, her father-in-law presented her gold ornaments which, while her visit to her parents' house, were retained by her father and brother, accused no.1, who refused to return the same, Despite persistent demand by her husband she could not be able to bring them back and on being rebuked by the husband she went to her Parent's house on 25.5.1975 to bring the same. On the same day the deceased being left alone in the house, brought Km. Sunita (P.W. 11), daughter of his brother (PW.5) for house-hold job.

In the intervening night between 27/28-5-1975 accused no.1 with

52

his friend accused no.2 stayed at the house of the deceased. They took their bed in the outer court-yard by the side of the deceased while PW-11 slept in the adjoining verandah. At about 3.15 a.m. PW-11 woke up and found accused no.2 sitting over the deceased and securing him firmly. Accused no.1 gave a blow with the wooden pestle (Moosal) on the head of the deceased, who shouted "MAR DIYA, MAR DIYA, BACHAO, BACHAO" (being killed being killed, save me, save me.) On being questioned by PW-11, the two accused threatened her, and while accused no.2 was dragging the deceased inside the house and accused no.1 kept on hitting him, PW-11 escaped from the scene and went to her father's house to inform him. On the way she met PW-3, but she was so dumb-sticken that she could not reply to his queries. On hearing the voice of deceased, "MAR DIYA, BACHAO, BACHAO", at 3.30 a.m. PW-1, a neighbour of the deceased and who had earlier seen both the accused lying on different cots in the court-yard, came from the upstairs of his terrace and saw accused no.2 dragging the deceased and accused no. 1 beating him. At that time PW-3 also reached there. Both PWs 1 and 3 shouted at the accused but on being threatened by the latter, the witnesses stepped back. PW-5, on being informed by PW-11, reached the scene with PWs 1,3 and 6, and saw from a distance of 8-10 paces running the accused from there. All

the four witnesses entered the house and found the deceased dead. PWs 1 and 6 went to the police post concerned where PW-1 gave report before the Sub-Inspector incharge, PW-17 who endorsed the same to the main Police Station for registration of a case. PW-17 accompanied by PWs 1 and 3, went to the place of occurrence, recorded statements of PWs 3,5 and 6 and conducted the investigation. On 29.5.1975 he arrested both the accused. An identification parade was arranged but accused no.2 refused to participate on the ground that his face was never muffled and that the prosecution witnesses had seen him in the police station. The investigation completed in both the accused being charged for offence punishable under s. 302 read with s. 34, I.P.C. for committing murder of the deceased.

Accepting the prosecution case, the Sessions Court convicted both the accused of the offence charged and sentenced them to undergo imprisonment for life. Appeal against conviction was dismissed by the High Court which affirmed the findings of the trial court and maintained the sentence. Hence the present appeals.

Before this Court it was contended by the appellants that presence of the prosecution witnesses at the scene of occurrence was not believable and their evidence was highly tainted with interestedness; that in

53

the F.I.R. name of accused no.2 who was known to the eye-witness and presence of the sole eye-witness PW-11 at the scene were not mentioned; that there was 5 hours' delay in registration of the F.I.R. while the distance between the place of occurrence and the police station was only 3 km; and that no adverse inference could be taken on refusal to participate in identification parade by accused no.2 as he was seen by the witnesses earlier in the police station.

On consideration of court's power under Article 136 of the Constitution and the scope of interference in appeal arising from concurrent findings of fact,

Allowing the appeals, this court,

HELD:1 Under Article 136 of the Constitution, the Court within its restrictions imposed by itself has, in very exceptional circumstances when a question of law of general public importance arises or a decision shakes the conscience of the Court, the undoubted power to interfere with the findings of fact masking no distinction between judgment of acquittal and conviction, if the High Court in arriving at those findings has acted either perversely or otherwise improperly. [60C-D]

The State of Madras v.A.Vaidyanath Iyer, [1958] SCR 580, relied on.

Himachal Pradesh Administration v.Shri Om Prakash, [1972] 1 SCC 249; Arunachalam v. P.S.R. Sadhanathan, [1979] 3 SCR 482 and State of U.P. v. Pheru Singh & Ors, [1989] Suppl. 1 SCC 288, referred to.

2.1 The trial court and the appellate Court, without

making a comprehensive and detailed analysis of the evidence in the proper perspective and by overlooking the manifest errors and glaring infirmities surrounding the case, were not right in rendering their conclusions that the appellants were guilty of the offence charged .[65G-H;66A]

2.2. Although the place of occurrence and case of death of the deceased due to homicidal violence were not in dispute and the dispute regarding the gold ornaments served as motive for the crime, yet a meticulous examination of the entire evidence created a serious doubt about the truthfulness and trustworthiness of the evidence of the eyewitnesses. The credibility of the evidence was completely shaken and the circumstances attending the case also debilitate the entire prosecu-

54

tion case. To what extent falsehood in the evidence had taken root and spread over the entire prosecution case was hard to fathom. Hence the irresistible and inescapable conclusion was that the prosecution had failed to establish the guilt of the appellants beyond all reasonable doubts. [60E-H;65F-G;66A]

2.3 The prosecution story that PW-4's brother accused no. 1, who was said to have retained her jewels and refused to return them, and who consequent upon his defiant attitude, was ill-disposed of towards the deceased, came to his house within two days of his sister being driven away and took his bed in the front court-yard along with the deceased and accused no.2, was patently incredible and too big a pill to be swallowed. Moreover the deceased who had sent away his wife from his house on 25.5.1975 asking her either to get back the jewels or not to return to her marital home would not have allowed accused no.1 to come to his house and to enter a friendly talk with him and also would not have allowed him to sleep in his house by his side. [64B-D]

2.4 Though PWs 1,3,5, and 6 stated that they had seen accused no.1 and one another running from the scene of occurrence, they all in a chorus asserted that they did not know the name of the other culprit, It was quite amazing that none of the PWs except PW-11 know the name of accused no.2. The case of the prosecution that the accused who had been questioned by PWs 1 and 3 about their vicious attack, perpetrated on the deceased, continued to be in the scene house till PWs 1 and 3 along with PWs 5 and 6 returned back was not plausible and persuasive. The conduct of these witnesses sin not chasing and attempting to apprehend the accused or even not raising a hue and cry in order to collect other villagers and apprehend the accused especially when one when one of them was unarmed and another was armed only with a stick, created a hallow of suspicion in the veracity of the prosecution case and led to an inference that the culprits whoever they might have been might not have stayed back for 1-1/2 hours till the arrival of the

witnesses but might have left the scene earlier. [63F;64A]

2.5 It was brought in the evidence that PW-1 was related to the deceased as a third degree collateral PWS 5 and 6 were the younger brother and father of the deceased respectively. PW-11 was the daughter of PW-5. Thus PWS 5, 6 and 11 were shown to be the members of the same family and PW-1 closely related to them. PWS 3 and 6 had married from the same village. [61G-H;62A]

3.1 The evidence of PW-11, who claimed to have known names of

55

both the accused even earlier to the incident, unambiguously made it clear that she had revealed their names to her mother, inmates of her house and neighbors even much earlier to the lodging of the report at the police station. The houses of PWS 1,3,5,6 and the deceased were all situated in the same locality. It was very surprising that in spite of the fact that PW-11 informed every one the names of the appellants excepts her father, name of accused no.2 was not mentioned in the F.I.R. which was registered by 8.15 a.m. on 28.5.9175. It is incomprehensible as to why this adolescent girl PW-11 had chosen to sleep in the house of the deceased when her house was situated within a short distance from there. The only irresistible inference was that PW-11 could not have been present at the scene house. [62C-D;63B-D]

3.2 The admission of PW-1 in the cross-examination that the D.S.P. came to the place of occurrence at 8.00 or 8.30 a.m. on 28.5.1975 and stayed there for about 5 or 10 minutes and that the S.H.O. came 10 minutes before the arrival of D.S.P., when examined along with the glaring admission of PWQ-3 that all the witnesses had a consultation before lodging the report, gave an impression that the report was obtained from PW-1 only at the scene place at a later point of time and thereafter the case was registered. [64E-G]

4. No adverse inference could be drawn by refusal of accused No. 2 from participating in identification parade as the case of the prosecution that the appellants were in the house of the deceased after perpetrating the heinous crime till the late arrival of PWS 5 and 6 along with PWS 1 and 3 was not acceptable; and it was admitted by PW-5 that he had seen the accused in the police station during the course of investigation. [68B-F]

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos.432 & 628 of 1979.

From the Judgment and Order dated 4.5.1979 of the Delhi High Court in Crl. A.No.323 of 1976.

A.N. Mulla, Uma Dutta and B.D. Sharma for the Appellants.

Tapas Ray, Kailash Vasdev and Ms. A Ssubhsashinsi (NP) for the Respondent.

Shreepal Singh, (NP) for the intervener.

The Judgment of the Court was delivered by S. RATNAVEL PANDIAN, J. The above appeals by special leave under Article 136 of the Constitution of India are directed against the correctness and legality of the judgment dated 4th May, 1979 of the High Court of Delhi in Criminal Appeal No.323/76.

respectively before the 8th Additional Sessions Judge and they took their trial in Sessions Case No. 38/75 on the charge that on 28.5.1975 at about 3.30 a.m. in Pitam Pura within the jurisdiction of Punjabi Bagh Police Station both appellants in furtherance of their common intention committed murder of Hanumant Singh, the deceased herein and thereby committed an offence punishable under Section 302 read with 34 IPC. The facts of the case briefly stated are as follows:

The deceased Hanumant Singh was the son of Harkishan Singh (PW-6). At the time of the marriage of the deceased with Smt. Santosh (PW-4), PW-6 presented about 30 tolas of gold ornaments worth about Rs.10,000 to PW-4. PW-4 on her first visit to the house of PW-6 brought all the ornaments and stayed there for 6 months. Then she went to her parents house wearing all those ornaments but left them with her father Dhani Ram and brother Mohinder Singh and all the ornaments were never returned by her father and brother. The deceased persistently asked his wife PW-4 to bring back the ornaments telling her that her father and brother had intended to grab the same. Though PW-4 went to her parents house many times to fetch the ornaments she was not successful. On 25.5.75 the deceased rebuked PW-4 and asked her to bring the ornaments from her parents, but PW-4 expressed her helplessness. So under the pressure of her husband, PW-4 went to her parents house on 25.5.75 at about 3.00 a.m. to get back the ornaments. As PW-4 had gone to her parents house, the deceased brought Km. Sunita (PW-11), the daughter of his brother Kartar Singh (PW-5) for household job and PW-11 stayed in the house of the deceased.

On 27.5.75 at about 8.00 p.m. the appellant Mohinder Singh who is none other than the brother of PW-4 came to house of deceased along with his friend appellant Mahesh Chander. The deceased and these two appellants took their bed in the outer court-yard. PW-11 was sleeping in the verandah adjoining the outer court-yard.

At about 3.15 a.m. on the intervening night of 27/28.5.75 PW-11 was woke-up and found the appellant Mahesh Chander sitting over the deceased and securing him firmly. While so, appellant Mohinder Singh gave a blow with a wooden pestle (Moosal) on the head of the deceased resulting in bleeding injuries. The deceased shouted "MAR DIYA, MAR DIYA, BACHAO BACHAO"

(Being killed, being killed, save me, save me). PW-11 questioned both the appellants as to what they were doing to which the appellants threatened PW-11 saying that she would also be killed if she uttered any word. So PW-11 became panicky and kept

silent. Then appellant Mahesh Chander dragged the deceased inside the house while appellant Mohinder Singh kept on hitting the deceased with that pestle. At this point of time PW-11 escaped from the scene house and went to the house of her father (PW-5) to inform him. On the way PW-11 met PW-3 at some distance but despite enquiry by PW-3, PW-11 could not give any reply and she was dumb-sticken. PW-1, a neighbour of the deceased who had earlier seen the deceased and both the appellants lying on different cots in the front court-yard of the house of the deceased and who was sleeping on the terrace of his house heard the voice of the deceased "MAR DIYA, BACHAO, BACHAO" by about 3.30 a.m. From the upstairs of his terrace he saw the appellant Mahesh dragging the deceased inside the house and appellant Mohinder Singh beating the deceased with the wooden pestle (Ex.P.1). By that time, PW-3 came by the side of the house of the deceased. Both PWs 1 and 3 shouted at the appellants to which both the appellants threatened the witnesses if they tried to intervene. Then PW-1 and PW-3 stepped back. PW-1 ran to the house of PW-6 to inform him. In the meanwhile PW-5 on being informed by PW-11 came to the scene house along with Pws 1,3,and 6. When they were at a distance of 8 to 10 paces, they saw the appellants running towards Shakurbasti. Thereafter all the four namely, PWs 1,3,5 and 6 entered the house and found the deceased dead. PWs 1 and 6 went to the police station of Shakurbasti where PW-1 gave the report Ex.PW-1/B before PW-17, the Sub-Inspector of Police of Punjabi Bagh who was at the relevant time was incharge of Shakurbasti Police Station also. PW-17 after making his endorsement Ex.PW-17/A, to the report, dispatched the same for registration of a case to the concerned Punjabi Bagh Police Station where the F.I.R. Ex.PW-7/A was registered by PW-7 (Head Constable). PW-17 accompanied by PWs 1 and 6, went to the scene place and recorded the statements of PWs 3,5,6, and 11. He summoned the crime team and got the place of occurrence photographed. He seized the blood-stained earth from 5 different spots under the recovery memo Ex PW2/B-13. He also recovered some human hair Ex.P8 from the front court yard and the blood-stained wooden moosal Ex.P1 from near the dead body. He prepared a rough site plan and held inquest over the dead body of the deceased. He sent the dead body for post-mortem examination. PW-2 the police Surgeon performed necropsy on the dead body of the deceased and noted as many as 9 injuries, of which injury Nos. 1 to 3 were lacerated wounds, injury Nos. 5,7 and 9 were fractures and injury No.6 was a contusion. Injury No.4 was a bruise over the tip of right shoulder. The bones at various places were broken. On 29.5.75 PW-17 arrested both the appellants. An identification parade was arranged but the appellant Mahesh refused to participate in the parade. After completing the investigation PW-17 laid the charge-sheet. The prosecution examined PWs 1,3, and 11 as eyewitnesses to the occurrence. PWs 5 and 6 were examined to speak about the appellants running away from the scene after the commission of the crime. The other witnesses were formal witnesses and PW-17 was the investigating officer.

The appellants when examined under Section 313 of the Code of Criminal Procedure, denied their complicity with the offence in question though admitted the relationship. The appellant Mahesh Chander explained his refusal to take part in the

identification parade stating that he did so as his face was never muffled and that the PWs saw him in the police station. The appellants examined PWs 1 to 6 on their side to prove the strained relationship between the parties and the arrest of the appellants in the office of the Electricity Board, Gurgaon. The learned Trial Judge, accepting the case of the prosecution convicted both the appellants under Section 302 read with Section 34 IPC and sentenced them to undergo imprisonment for life.

Feeling aggrieved by the judgement of the Trial Court both the appellants preferred Criminal Appeal No. 323/76 before the High Court which for the reasons assigned, affirmed the judgement of the Trial Court and dismissed the appeal as being devoid of merits. Hence these two appeals.

Mr. A.N. Mulla, the learned senior counsel appearing on behalf of the appellants after taking us very meticulously through the judgement of the Trial as well as the High Court, the depositions of the witnesses and other relevant records contended inter alia submitting that despite the prolonged deliberation, neither the name of appellant Mahesh Chander nor the presence of Km. Sunita (PW-11) at the scene was made mention of in the First Information Report; that the First Information Report was registered at about 8.15 a.m. on 28.5.75 after a delay of 5 hours from the time of occurrence in spite of the fact that the police station is only at a distance of 3 kilometers from the scene and that PW-5 who is none other than the brother of the deceased and an Advocate by profession did not mention the fact of his daughter (PW-11) informing him about the murder of the deceased to any one. According to the learned counsel it is highly surprising that Mrs. Kartar Singh (w/o PW-5) though was informed by her daughter Sunita (PW-11) about the participation of both the appellants in the murder by mentioning their names, she did not inform this information to her husband before PWs 1 and 6 left for the police station and that the present story of the prosecution is nothing but a fabricated one in order to project PW-11 as an eye-witness and that if really PW-11 had slept on the verandah of the house of the deceased and witnessed the occurrence she would have immediately mentioned the incident to PW-3 whom she met on the way to her house. Though PW-11 claims to have told the incident to her father (PW-5) she had not mentioned the name of Mahesh Chander whose name she claims to have known even earlier to this occurrence and whose name she mentioned to her mother. It is further submitted that the evidence of PW-11 is nothing but a tissue of falsehood and her evidence is demonstrably proved to be unworthy of credence for more than one reason that being that PW-11 who was by then aged about 13 would not have slept alone in the house of the deceased. Secondly if she had been an eye-witness to the occurrence, she would have immediately come forward with a statement that she saw both the appellants by mentioning their names. Thirdly PW-5, the father of PW-11 who had filed a criminal case against the deceased for offences under Sections 307 and 324 IPC which case was pending during the relevant time should not have allowed his daughter to go to the house of his enemy, the deceased.



In continuation of his submission Mr. Mulla urged that no adverse inference can be drawn against the appellant Mahesh Chander on his refusal to take part in the identification parade since PW-5 has admitted that he had seen Mahesh Chander at the police station. According to the learned counsel PW-3 is a chance witness as he could not have come to the house of PW-1 at that odd hour for purchasing milk; that the evidence of PWs 1,3,5,6 and 11 are highly tainted with the interestedness and that the evidence of PWs 5 and 6 that they saw the appellants running away from the house of the deceased is nothing but deliberate perjury.

Before we examine the above contentions with reference to the evidence adduced by the prosecution, we shall deal with the scope of interference of this Court in appeal arising from the concurrent findings of fact. In *The State of Madras v. A. Vaidynatha Iyer*, [1958] SCR 580 at 588 this Court has ruled thus :

"In Art.136 the use of the words "Supreme Court may in its direction grant special leave to appeal from any judgement, decree, determination, sentence or order in any cause or matter passed or made by any Court or tribunal in the territory of India" shows that in criminal matters no distinction can be made as a matter of construction between a judgement of conviction or acquittal."

See also *Himachal Pradesh Administration v. Shri Om Prakash*, [1972] 1 SCC 249; *Arunchalam v. P.S.R. Sadhanathan*, [1979] 3 SCR 482 at page 487 and *State of U.P. v. Pheru Singh & Ors.*, [1989] Suppl. 1 SCC 288 to which one of us (S. Ratnavel Pandian, J.) was a party.

A conspectus of the above decisions clearly shows that the power under Article 136 can be invoked in very exceptional circumstances when a question of law of general public importance arises or a decision shakes the conscience of the court and the Court within its restrictions imposed by itself has the undoubted power to interfere even with the findings of fact making no distinction between judgement of acquittal and conviction, if the High Court, in arriving at those findings, has acted either perversely or otherwise improperly.

In the light of the above proposition of law, we shall now scrutinise the evidence and examine whether the concurrent findings of fact in the present case call for interference.

With regard to the place of occurrence and the cause death of the deceased due to homicidal violence are not in dispute. The motive for the occurrence is spoken to by PWs 5 and 6. It is the evidence of PW-6, who is the father of the deceased that during the marriage of his deceased son with PW-4, he presented gold ornaments worth about Rs.10,000 and that when PW-4 had been to her parents house, her parents and her brother appellant Mohinder Singh had removed all the jewels from her and retained the jewels with them. Though the deceased was consistently stressing and pressurising his wife to get back those ornaments, PW-4's parents did not return them. Despite the fact that PW-4 had expressed her helplessness in the matter, the deceased on 25.5.75 sent PW-4 to her parents house asking her either to get back the ornaments or not to return to her marital home. This serves as a motive for the appellants to put an end to the life of the deceased.

The deceased was alone in his house after his wife had left. In order to do the household job in his house he brought his brother's (PW-5's) daughter Sunita (PW-11) who, according to the prosecution stayed in the house of the deceased.

According to PW-11, she, by chance woke up by 3.15 a.m. and saw the appellant Mahesh Chander sitting over the deceased and securing him firmly while the appellant Mohinder Singh hitting the deceased with the wooden pestle (Moosal) Ex. P.1. The deceased tried to riggle out of that situation and shouted "MAR DIYA, MAR DIYA, BACHAO BACHAO". When PW-11 questioned both the appellants, her life was threatened by the appellants. When the appellants took the deceased inside the house dragging him PW-11 escaped from the scene, came to her parents' house and informed her father PW-5 about the entire incident. On the way she claims to have met PW-3, but she did not tell PW-3 about the incident despite the enquiry by PW-3.

PW-1 claims to have got up from his bed on hearing the distressed cry of the deceased and seen the appellant Mahesh Chander dragging the deceased towards the inner verandah and the appellant Mohinder Singh beating the deceased with the wooden pestle (Moosal). He witnessed the same standing on his terrace where he was sleeping. According to him he met PW-3 and that both of them questioned the appellants to which the appellants replied that they would also be murdered if they interfered and that thereafter they reiterated. PW-1 further states that when he went to the house of PW-6 to inform this incident, PW-5 came there from his house and then they all (i.e. PWs 1,3,5, and 6) rushed to the house of the deceased where they saw both the appellants running towards Shakurbasti. PW-5 states that he on being informed about this incident by his daughter went to the scene house along with PWs 1,3 and 6 and found his brother lying dead in the inner room of the house. PWs 5 and 6 speak of having seen both the appellants running from the scene and that at that time appellant Mahesh Chander was having a lathi in his hand.

According to all the witnesses there was an electric light fitted in the house of the deceased and there was also moon light.

It is brought in the evidence that PW-1 is related to the deceased as a third degree collateral. As we have pointed out earlier. PWs 5 and 6 are younger brother and father of the deceased respectively.

PW-11 is the daughter of PW-5. Thus PWs 5,6, and 11 are shown to be the members of the same family and PW-1 closely related to them. PW-3 and PW-6 have married from the same village, namely, Asoda.

The prosecution through the evidence of PWs 1 and 11 attempts to prove that both the appellants were in the house of the deceased on the night of 27.5.75 and took their beds in the front court-yard of the said house. While PW-11 has deposed that she woke up by chance at 3.15 a.m., it is the evidence of PW-1 that he got up only on hearing the cry of the deceased.

We shall first of all scrutinise the evidence of PW-11, the sole eye witness to the entire occurrence. As rightly pointed out by Mr. Mulla who is proved to have been enemically disposed of towards the deceased, could not have allowed his 13 years old daughter to take the household job in the house of

the deceased and to sleep there during night hours. Further when the house of PW-5 is situated within a short distance from the house of the deceased, we are unable to comprehend as to why this adolescent girl had chosen to sleep in the house of the deceased. PW-11 claims to have known the names of both the appellants even earlier to this incident. She did not inform about incident much less the names of the appellants to PW-3 while she was rushing towards her house from the scene spot in spite of the fact that she was asked by PW-3 as to what was the matter. In her house she narrated the entire incident to PW-5 stating that Mohinder Singh and some one were beating the deceased, but she did not mention the name of the appellant Mahesh Chander. However, she claims to have told the names of both the appellants to her mother, brothers, sisters, and some neighbours. The relevant portion of her evidence reads thus:

"My mother met me after my father ran towards the house of Hanumant Singh. I told my mother, that Mohinder Singh and Mahesh Chander had beaten my uncle Hanumant Singh. I told only that Mohinder Singh and Mahesh Chander had beaten Hanumant Singh, but I did not ask her to go and tell my father accordingly. My brothers and sisters were also present at our house besides my mother."

Then she states she gave the names of Mohinder Singh and Mahesh Chander to the police in her statement. In yet another portion of her evidence she states :

Before my going to make any statement before the police our neighbours came to our house. I told those neighbours also that Mohinder Singh and Mahesh had beaten Hanumant Singh. Our neighbours came to our house about 1/1-1/2 hour after my father ran towards the house of Hanumant Singh."

The evidence of PW-11 unambiguously makes it clear that she revealed the names of both the appellants to her mother, inmates of her house and neighbours even much earlier to the lodging of the report at the police station. The houses of PWs 1,3,5,6, and the deceased are all situated in the same locality. Admittedly PWs 1 and 6 left for the police station by 5.00 or 5.30 a.m. It is very surprising that in spite of the fact that PW-11 informed every one the names of the appellants except her father the name of appellant Mahesh Chander is not mentioned in the F.I.R. which was registered by 8.15 a.m. on 28.5.75. The explanation now offered by the prosecution through PWs 5 and 11 that PW-11 did mention the name of appellant Mahesh Chander to her father is neither conceivable nor believable. The only irresistible inference is that PW-5 could not have been present at the scene house and witnessed the occurrence.

PW-5 who is an Advocate by profession and brother of the deceased could not have kept silent without ascertaining or at least asking the names of both the perpetrators of the crimes from his daughter. Even assuming that his daughter did not mention the name of appellant Mahesh Chander, the wife of PW-5 who rushed to the scene house on being informed by her daughter should have told the names of both the appellants to her husband and father-in-law (PWs 5 and 6). Further it is quite understandable as to why PW-5 kept himself back instead of going to the police

station but only sent PW-1 and his father, PW-6. Though PWs 1,3,5 and 6 state that they saw the appellant Mohinder Singh and one another running from the scene of occurrence they all in a chorus assert that they did not know the name of the other culprit. It is quite amazing that none of the PWs except PW-11 knew the name of Mahesh Chander. The case of the prosecution that the appellants who had been questioned by PWs 1 and 3 about their vicious attack, perpetrated on the deceased, continued to be in the scene house till PWs 1 and 3 along with PWs 5 and 6 returned back is not plausible and persuasive. Further the conduct of these witnesses in not chasing and attempting to apprehend the appellants or at the worst not raising a hue and cry so that the neighbours and other villagers might have got collected and apprehended the appellants especially when one of the appellants was unarmed and another one was armed only with a stick, creates a hallow of suspicion in the veracity of the prosecution case and leads to an inference that the culprits whoever they might have been might not have stayed back till the arrival of the witnesses but might have left the scene earlier. In this connection reference may be made to the evidence of PW-3 who has stated that it took 1-1/2 hours for PWs 5 and 6 to come to the scene.

The story of the prosecution that PW-4's brother- appellant Mohinder Singh- who was said to have retained the jewels of PW-4 and refused to return them, and who, consequent upon his defiant attitude, was ill-disposed of towards the deceased came to the house of the deceased within two days of his sister being driven away and took his bed in the front court-yard of the deceased along with deceased and the other appellant Mahesh Chander, is patently incredible and is too big a pill to be swallowed. Moreover the deceased who had sent away his wife (PW-4) from his house on 25.5.75 asking her either to get back the jewels or not to return to her marital home would not have allowed Mohinder Singh to come to his house and to enter a friendly talk with him and also would not have allowed him to sleep in his house by his side.

PW-1 as we have pointed out supra claims to have witnessed the attack on the deceased by the two appellants by standing on the terrace of his house and then after the arrival of PWs 5 and 6, he went with PW-6 to the police station and laid the report at Shakurbasti Police Station at about 5.00 or 5.30 a.m. This report was despatched by PW-17 to the concerned Punjabi Bagh police station by 6.45 a.m. and the case was registered in that station at about 8.15 a.m. A suggestion was made to PW-17 that the report was obtained from PW-1 only at the scene place at a later point of time and thereafter the case was registered. PW-17 had, of course, denied that suggestion. But the admission of PW-1 in the cross-examination that the D.S.P. came to the place of occurrence at 8.00 or 8.30 a.m. on 29.5.75 and stayed there for about 5 or 10 minutes and that the Station House Officer (PW-17) came 10 minutes before the arrival of D.S.P. when examined along with the glaring admission of PW-3 that all the witnesses had a consultation before lodging the report, we are left with an impression that there is some force in the defence suggestion.

PW-1 makes an embellishment in his evidence stating that the deceased was dragged by the appellant Mahesh Chander by holding the hair of the deceased. The new introduction is purposely made by PW-1 to support the recovery of a bunch of hair from the scene by PW-17. In his earlier statement he has not come forward with such a statement. Though we would not be giving any

significance or importance for such an omission in the earlier document, we are constrained to point out the significant omission, since PW-1 has now come forward with such an exaggerated version in order to fall in line with the prosecution case that the deceased was dragged inside the house by his hair. A thorough scrutiny of the evidence of PW- 1 does not inspire confidence in the minds of the court and command acceptance.

An adverse inference has been drawn by the courts below on the refusal of the appellant Mahesh Chander to participate in the identification parade. Mahesh has given an explanation stating that since his face was not muffled and he was shown to the witnesses at the police station he refused to participate in the identification parade. In support of this explanation it has been brought to our notice the following evidence of PW-5 admitting that he had seen Mahesh Chander at the police station :

"I gave the particulars of the co-accd. of Mahinder Singh, accd. I joined again in the police investigation about 15 days after this occurrence. I had seen Mahesh Chander, accd. in handcuffs in the police station that day and I identified and told the police that I had seen him running alongwith (Mohinder Singh) outside the house of Hanumant Singh."

As we are not inclined to accept the case of the prosecution that the appellants were in the house of the deceased after perpetrating the heinous crime till the late arrival of PWs 5 and 6 along with PWs 1 and 3 no adverse inference could be drawn by such refusal of the appellant Mahesh Chander to take part in the identification parade.

Thus a meticulous examination of the entire evidence creates a serious doubt about the truthfulness and trustworthiness of the evidence of the eye-witnesses. The credibility of the evidence is completely shaken and the circumstances attending the case also debilitate the entire prosecution case. To what extent falsehood in the evidence has taken root and spread over the entire prosecution case is hard to fathom. The Trial Court and the Appellate Court without making a comprehensive and detailed analysis of the evidence in the proper perspective and by overlooking the manifest errors and glaring infirmities surrounding the case have rendered their conclusions that the appellants are guilty of the offence charged. In spite of our best efforts and great deal of pondering over the matter, we are quite unable to agree with the conclusions arrived at by both the courts. Hence the irresistible and inescapable conclusion, in our considered opinion, is that the prosecution has failed to establish the guilt of the appellants beyond all reasonable doubts., In the result, we set aside the conviction and the sentence as recorded by the High Court, allow both the appeals and acquit the appellants. The bail bonds are discharged.

R.P.

Appeals allowed.