as per their own showing, notice could not be served on the drawer. Even otherwise, notice in respect of the cheque for Rs. 5 lakh, presented in October, 1998, was issued in April, 1999; the complaint was filed in June, 1999. The Court, under Sections 138/141 can take cognizance only if the prescribed time frames are followed. In any other situation, the bar of Section 142, from taking cognizance would operate. Therefore, I find no infirmity with the order of the trial Court as far as it did not issue the summoning order in respect of Section 138.

15. The upshot of the above discussion is that the impugned order, as far as it pertains to Section 409 is set aside; the trial Court is directed to issue a fresh notice, after modifying the order, by appropriately including Section 409, IPC. As regards the non-inclusion of Section 420, IPC, and Section 138, Negotiable Instruments Act, the petitions have to fail. The petitions are, therefore, partly allowed to the extent indicated above.

Petition partly allowed.

II (2007) DLT (CRL.) 54 (DB)

DELHI HIGH COURT

R.S. Sodhi & P.K. Bhasin, JJ.

GHAN SHYAM & ORS. —Appellants

versus

STATE —Respondent

Crl. A. No. 100 of 2004 with Crl. A. Nos. 324, 333, 340 and 357 of 1999—Decided on 5.2.2007

Indian Penal Code, 1860 — Sections 147, 149, 302, 34 — Rioting, Unlawful Assembly, Murder, Common intention — Dying declaration — Inquest — Non-mentioning of name of assailants — Effect of — Sole testimony of eye-witness not corroborated from any other evidence — Cause of death opined by autopsy surgeon was due to haemorrhagic shock as result of stab injury to left ventral artery and vein — Injuries caused on person of deceased with knife — Trial Court rejected dying declaration part of prosecution case and that finding not challenged before this Court on behalf of State — PW 5 cannot be said to be eye-witness at all — Possibility of PW 5 deposing falsely cannot be ruled out as Investigating Officer indulged in fabrication of evidence against appellants by getting names of assailants introduced in MLC at subsequent stage — In inquest form and brief facts prepared by Investigating Officer name of assailants not mentioned — Only inference which can be drawn is that by 6.4.1988 name of assailants not known to police — Evidence of PW 5 discarded from consideration — Thereafter nothing remains against any of appellants to sustain their conviction for any of offences of which they were found guilty by Trial Court — Judgment and order on sentence unsustainable and set aside.

[Pg. 58 (Paras 8 to 10)]

Result : Appeals allowed.

Cases referred:

1. *Rang Behadur Singh & Ors.* v. *State of U.P.*, II (2000) SLT 574=I (2000) CCR 313 (SC)=2000 II AD (SC) 103. *(Relied)* *[Pg. 57 Para 6 g]*
2. *Balwant Singh* v. *The State*, 1976 CLR (Delhi) 41. *(Referred)* *[Pg. 57 Para 6 g]*
3. *Rana Partap & Ors.* v. *State of Haryana*, AIR 1983 SC 680. *(Referred)* *[Pg. 57 Para 7 g]*

Counsel for the Parties:

For the Appellant : *Mr. Jitender Sethi and Mr. A. Rohen Singh, Advocates with appellant in person.*

For the Respondent : *Mr. Ravinder Chadha, APP with Mr. Jagdish Prasad, Advocate.*

JUDGMENT

P.K. Bhasin, J.—Criminal Appeal Nos. 357/99, 324/99, 333/99, 340/99 and 100/04 arise out of same judgment dated 21.5.1999 passed by learned Additional Sessions Judge, Shahdara, Delhi in Sessions Case No. 49/96 in respect of FIR No. 132/88, Police Station Vivek Vihar under Sections 302/147/148/149/34, IPC whereby all the appellants have been found guilty under Sections 147 and 302, IPC read with Section 149, IPC. As far as

appellant Rakesh Chaudhary is concerned, he has been held individually also guilty for the substantive offence of murder for having killed one Sanjay Bhardwaj. Vide order dated 28.6.1999, all of them have been sentenced to life imprisonment for the offence under Sections 302/149, IPC. Fine has also been imposed on each one of them and they have been awarded separate sentence for their convictions under Section 147, IPC also. Feeling aggrieved, the five convicted accused have filed separate appeals and since all of them have been heard together and arise out of a common judgment, they are being disposed of by this common judgment.

2. The prosecution case, as unfolded from the evidence of the eye-witness, namely, PW 5 Mahesh Chand, is that on 4.4.1988 at about 7-7.30 p.m. while he was going to his house in Old Seelampur and when he reached near the graveyard he saw appellants Ramesh, Dinesh and Rakesh Kumar son of Mohender loitering in that area. When he reached near the graveyard, he saw appellants Rajesh, Dalip, Ghan Shyam, Rakesh Chaudhary and Mukesh standing there. He knew all of them. When he proceeded a little ahead of these accused persons, he heard some noise from behind and when he turned around, he saw that appellant Mukesh had caught hold of Sanjay Bhardwaj. Appellant Dalip had also caught hold of him by neck, appellant Rajesh @ Babu (who is a proclaimed offender) had caught hold of Sanjay Bhardwaj by his arm and appellant Ghan Shyam was exhorting *"Ise maar do"*. At that time, the appellants Rajesh and Rakesh son of Kaley Ram took out knives and stabbed Sanjay at his legs a number of times and at that time, the injured Sanjay started shouting. After causing knife blows, these persons went towards Bihari Colony. As per this eye-witness, appellant Dalip was giving *mukka* blows to the injured Sanjay. Rajesh and Rakesh while running away from there took with them the knives used by them in the incident. Ambulance reached the spot and on his signal it stopped there and the policeman took away the injured Sanjay to the hospital and thereafter he himself went to the house of *Tau* of the injured to inform him about the incident. The injured was taken to GTB Hospital where he was medically examined by PW 1 Dr. V.K. Jain. As per the prosecution case, when the injured was examined by him at 8.45 p.m., he was declared fit for statement and he allegedly named the appellants as the assailants who had caused injuries to him. The injuries sustained by Sanjay were found to be dangerous in nature. On getting the information about the incident, the police reached the spot. They did not find the injured or any eye-witness. From the spot, the PW 19 SI Arjun Singh came to GTB Hospital from where he collected the MLC Ex. PW 11/A and on the basis of nature of injuries described therein, he prepared a Rukka and sent the same to the police station for registration of a case under Section 324, IPC. Later on getting the information about nature of injuries to be dangerous the case was got converted into Section 307, IPC. When the injured succumbed to his injuries on the next day of the incident in the evening the case was converted into one under Section 302, IPC. On 5.4.1988, the Investigating Officer when came to the spot for investigation, he came across the eye-witness, namely, PW 5 Mahesh Chand. At his instance, the Investigating Officer prepared the site plan of the place of incident and also recorded his statement under Section 161, Cr.P.C.

3. The dead body of the deceased was subjected to post-mortem examination conducted by PW 1, Dr. George Paul on 6.4.1988 at the Maulana Azad Medical College. The cause of death opined by this autopsy surgeon was due to haemorrhagic shock as a result of stab injury to left ventral

artery and vein which injury was noticed at Serial No. 8 in his report. The post-mortem report is Ex. PW 20/A. During investigation, the appellants were arrested. During investigation in police custody, appellant Rakesh Chaudhary is alleged to have made disclosure statement and got recovered one knife pursuant thereto. The autopsy surgeon on being shown that knife opined that the injuries on the person of the deceased were possible with that knife. On completion of investigation, the appellants along with three other persons, namely, Rakesh Kumar son of Mohender, Dinesh Kumar @ Dinesh and Ramesh @ Pappu were charge-sheeted and in due course the case stood committed to Sessions Court. The learned Additional Sessions Judge framed a charge under Section 147, IPC and another charge under Section 302, IPC read with Section 149, IPC against all of them. A separate charge under Section 148, IPC was framed against accused Rajesh @ Babu and Rakesh Chaudhary. All the accused persons pleaded not guilty to these charges and claimed trial.

4. The prosecution in support of its case examined twenty witnesses including the sole eye-witness PW 5, Mahesh Chand. In addition to the evidence of eye-witness, the prosecution sought to establish its case on the basis of MLC prepared by Dr. V.K. Jain at the time of examination of the deceased on 4.4.1988 when the deceased had allegedly stated before this doctor the present appellants and other persons to be the assailants. That MLC was relied upon as a dying declaration.

5. Learned Additional Sessions Judge in his judgment under challenge discarded the dying declaration out of the prosecution story and while discarding it, came to the conclusion that the names of the assailants in the MLC had been introduced later on by the police in connivance with the doctor who examined the injured and it has also been held by the learned Trial Court that the doctor had introduced the names of the assailants in the MLC, which were not earlier recorded by him, for consideration. However, placing reliance on the testimony of the eye-witness PW 5 Mahesh Chand, he found the appellants guilty as aforesaid while two accused, namely, Rakesh Kumar son of Mohender and Dinesh Kumar @ Dinesh were acquitted of all the charges. The State has not come up in appeal against their acquittal while other appellants have preferred separate appeals. As noticed already, all the appeals have been heard together and the same are being disposed of by this common judgment.

6. It has been submitted on behalf of the appellants by their respective Counsel that PW 5 Mahesh Chand cannot be said to be an eye-witness because of various deficiencies in his evidence. It was contended that despite the fact that the claims to be very well known to the deceased right from his childhood, he did not bother to help him when he was being stabbed. Not only this, he did not even accompany the injured to the hospital when the police officials took him from the spot. The explanation given by him for not going to the hospital with the injured is that he had gone to the house of *Tau* of the injured to inform him but that explanation also, according to the learned Counsel, does not inspire confidence because the prosecution has not examined that *Tau* of the injured. Another submission made for disbelieving the testimony of PW 5 is that the prosecution has examined brother of the deceased as PW 10, Narender Kumar. Although, he has claimed that on 4.4.1988 he had came to know about the incident at about 10.30 p.m. and that he had been admitted in the hospital but even he did not claim that the information about the incident was passed over to him either by PW 5 Mahesh Chand or by his uncle to whom Mahesh claims to have informed

about the incident. Learned Counsel submitted that from the statement of PW 10 it becomes clear that PW 5 did not even inform the family of the deceased as claimed by him. Another deficiency in the prosecution case as highlighted by all the learned Counsel has been that even though PW 5 Mahesh Chand had allegedly informed the names of the assailants to the Investigating Officer on 5.4.1988 in the morning, the Investigating Officer after the injured had succumbed to his injuries, had made an application for post-mortem examination but he had not given the names of the assailants in that application and not even earlier to that in the inquest form. Absence of names in these vital documents clearly show that even by the time these documents were prepared by the Investigating Officer the names of assailants were not known to him as otherwise those names would have definitely been mentioned in those documents. It was also contended that the absence of names of the assailants in these documents also show that by that time even the statement of the so-called eye-witness had also not been recorded by the Investigating Officer. In support of the contention that absence of names of assailants in the inquest proceedings as well as in the brief facts which are required to be prepared by the Investigating Officer while making a request for post-mortem shows that by that time names of the assailants were not known, learned Counsel placed reliance on a judgment of the Supreme Court, *Rang Behadur Singh & Ors.* v. *State of U.P.*, II (2000) SLT 574=I (2000) CCR 313 (SC)=2000 II AD (SC) 103 and one judgment of this Court in *Balwant Singh* v. *The State*, 1976 CLR (Delhi) 41. Learned Counsel contended that all these facts clearly show that no reliance can be placed on the evidence of the eye-witness PW 5 Mahesh Chand and if his evidence is excluded and the dying declaration having been discarded by the Trial Court itself there remains nothing in evidence of the prosecution from which involvement of any of the appellants can be inferred. Regarding the recovery of knife at the instance of appellant Rakesh, it was contended that its recovery is doubtful and in any case the same also cannot link this appellant with the crime because it was not recovered with any blood stains nor was it even sent to CFSL and that just because the autopsy surgeon had opined that the injuries on the person of the deceased could be possible with the said knife, that knife cannot be said to be a weapon of offence used in the commission of crime.

7. On the other hand, learned Additional Public Prosecutor for the State while supporting the conviction of the appellants, submitted that despite the fact that the evidence of dying declaration relied upon by the prosecution stands rejected by the Trial Court and about which he has nothing to comment so as to persuade us to reverse that finding, the prosecution case still stands fully established on the basis of evidence of PW 5, Mahesh Chand. He contended that this witness had no reason to depose falsely against any of the appellants nor any motive has been attributed to him when he was cross-examined. It was also submitted that if this witness wanted to falsely implicate the appellants, he could have very well attributed some role even to the acquitted accused persons also which he did not and, therefore, the veracity of the testimony of PW 5 Mahesh Chand is beyond any challenge. He has placed reliance on one judgment of Supreme Court reported in *Rana Partap & Ors.* v. *State of Haryana*, AIR 1983 Supreme Court 680, in support of his submission that evidence of PW 5 cannot be viewed with suspicion because of his having not accompanied the injured to the hospital when he was removed from the spot by the police ambulance or not even helping him despite his being a childhood friend. He drew our attention to

that part of the judgment wherein it has been held that different persons react differently in different situations and just because someone behaves in a particular manner, the incident may not be considered to be doubtful by holding that he should have acted or reacted in some other way.

8. As already noticed, the Trial Court has rejected the dying declaration part of the prosecution case and that finding has not been challenged before us on behalf of the State and since we also have not found any infirmity in that finding we are also excluding that piece of evidence from consideration against the appellants. As far as the evidence of the sole eye-witness PW 5 Mahesh Chand is concerned, we are in full agreement with the submissions made on behalf of all the appellants that in the facts and circumstances of this case, he cannot be said to be an eye-witness at all. Since learned Trial Court has found that the Investigating Officer has indulged in fabrication of evidence against the appellants by getting the names of the assailants introduced in the MLC at a subsequent stage, the possibility of his introducing even PW 5 into the case for deposing falsely cannot be ruled out. In any case in the facts and circumstances of this case some doubt does crop up in the mind of the Court about the veracity of the prosecution case benefit of which has to go to the accused. We are also of the view that if at all PW 5 had witnessed the incident and had named the assailants before the Investigating Officer Arjun Singh on the morning of 5.4.1988, which delay in reporting the matter to the police also in any case remained unexplained from the prosecution side, the Investigating Officer would have mentioned these names, firstly, in the inquest form and then in the brief facts which he had prepared at the time of making an application for post-mortem examination. In these documents, as noticed already, names of the assailants were not mentioned and, therefore, the only inference which we can draw is that by 6.4.1988, the names of the assailants were not known to the police and even PW 5 Mahesh Chand had not made himself available to the police by that time claiming himself to be an eye-witness of the incident. In this view, we get fortified by the decision of the Supreme Court in *Rang Behadur Singh's* case (supra), cited by the Counsel for the appellants.

9. We also find from the record that the evidence of PW 5 is not corroborated also from any other evidence, either direct or circumstantial so as to persuade us to ignore the aforesaid deficiencies in his evidence. Although, it is well settled that conviction of accused can be based on the sole testimony of a single eye-witness even without corroboration but in the facts and circumstances of this case and for the various deficiencies noticed by us in the prosecution case, we do not think that in this case evidence of PW 5 could be relied upon without any corroboration. We, therefore, discard his evidence from consideration and thereafter nothing remains against any of the appellants to sustain their conviction for any of the offences of which they were found guilty by the Trial Court. Therefore, the judgment dated 21.5.1999 and the order on sentence cannot be sustained and deserve to be set aside.

10. In the result, we allow all the five appeals. All the appellants stand acquitted of all the charges of which they have been found guilty.

Appellant Rakesh Chaudhary only is stated to be in custody and he is directed to be released forthwith from jail, if he is not required to be detained in any other case. Jail Superintendent be informed accordingly.

Appeals allowed.