

(2008) 09 DEL CK 0037

In the Delhi High Court

Case No : Criminal A. 278 of 1998 and 127 of 1999 & Criminal Appeal 127 of 1999

Om Singh @ Ombir

APPELLANT

Vs

State
 Rajesh @ Bhondu Vs State Delhi Admn.

RESPONDENT

Date of Decision : 26-09-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 465
Delhi High Court Rules and Orders — Rule 7
Evidence Act, 1872 — Section 106, 32
Penal Code, 1860 (IPC) — Section 302, 307, 34

Citation : (2008) 09 DEL CK 0037

Hon'ble Judges : Vikramajit Sen, J;V.K. Shali, J

Bench : Division Bench

Advocate : Sanjay Jain, Amicus Curiae, Nitika Mangla, in Criminal A. 127/1999 and Mukesh Kalia, in Criminal A. 278/199, for the Appellant; Sunil Sharma, APP, for the Respondent

Judgement

V.K. Shali, J.—These two appeals bearing CrI. A. No. 127/1999 titled as Om Singh v. State and CrI. A. No. 278/1998 titled as Rajesh @ Bhondu v. State Delhi Admn. were heard together. Accordingly, a common order is passed disposing of both these appeals. Both the appellants were convicted by Sh. H.P. Sharma, the then Additional Sessions Judge, Delhi for an offence u/s 302/34 IPC vide judgment dated 29th April, 1998 and sentenced to life imprisonment and a fine of Rs. 5,000/- (Rupees Five Thousand) each vide order dated 30th April, 1998.

2. The facts of the prosecution case are that on 29th October, 1993 at about 10.00 p.m., the appellant Om Singh @ Ombir visited the shop No. A-1/8 in Block A-1 Market, Nand Nagri of the deceased Shankar and started a murderous attack on him. It was the case of the prosecution that Om Singh attacked Shankar with a knife as a consequence of which the deceased Shankar, received 32 injuries on different parts of his body. The deceased came on the road while bleeding and ran up to about 40 paces before falling. So far as the appellant Rajesh @ Bhondu

is concerned, the role attributed to him was that while Om Singh was attacking the deceased Shankar, he had exhorted the latter by uttering the words "Maar Sale Ko. Isko Pata Chale Ki Gawahi Kaise Dee Jaati Hai". He was also carrying a screw driver in his hand. Both Om Singh and Rajesh were alleged to have fled in a three wheeler scooter from the spot while as on the basis of information received at the police station a DD entry No. 17A is purported to have been recorded by the local police and handed over to ASI Balkishan PW-13 who along with Constable Chander Prakash PW-8 came to the spot i.e. shop bearing No. A1-6, Nand Nagri where he saw a pool of blood not only in the shop of the deceased but a trail leading up to the main road. PW-13, ASI Balkishan learnt about the factum of injured having been taken to the GTB Hospital by a PCR Van. He deputed Chander PW-8 to remain on the spot and proceeded to the GTB Hospital where he obtained MLC of the deceased who was injured at that point of time. In the MLC, it was recorded by PW9 Dr. Lalita Sharma who had prepared the same that the injured Shankar, (since deceased) was fit to make statement. The injured had been referred to the Operation Theatre for surgery. ASI Bal Kishan PW-13 went to the Operation theatre where he is purported to have recorded the statement of the injured Shankar Ex.PW13/A in the presence of Dr. Umesh Madan. The injured Shankar in his statement had categorically stated that Ombir had made a murderous attack on him and inflicted several knife blows with the intention to eliminate him. The reason for making such an attack was that injured"s son was a witness in a criminal case against Ombir. Shankar also made a mention about the fact that number of persons had seen Ombir fleeing from the spot. On the basis of this statement, PW-13, ASI Balkishan came to the spot and sent a Rukka Ex.PW13/A to the police station on the basis of which an FIR bearing No. 442/93 u/s 307 IPC is registered, which was subsequently converted into Section 302/34 IPC on account of the death of the injured Shankar on the same night at about 12.05 a.m. i.e. 30th October 1993.

3. After investigating into the matter and arrest of both Om Singh and Rajesh on 19.5.94 & 1.12.94 respectively charge sheet was filed against them. A charge u/s 302/34 IPC was framed against both Om Singh @ Ombir and Rajesh @ Bhondu on 27th October, 1995.

4. The prosecution in support of its case has examined 18 witnesses namely: PW-1 Prem Singh, PW-2 Vijay Kumar, PW-3 Dr. K.K. Tyagi, PW-4 Sh. Thomson Massey, PW-5 SI Mohan Singh, PW-6 Sh. H.C. Srinivas, PW-7 ASI Harkesh, PW-8 Constable Chander Prakash, PW-9 Dr. Lalita Sharma, PW-10 Constable Raj Kumar, PW-11 SI Mahesh Kumar, PW-12 Constable Parmod Singh, PW-13 ASI Balkishan, PW-14 Head Constable Shivji Singh, PW-15 Dr. Rajesh Kumar, PW-16 Constable Pramod Kumar, PW-17 Om Prakash and PW-18 SI Yogesh.

5. After examination of these witnesses, statement of the accused persons were recorded u/s 313 of the Cr.P.C. Both the accused persons expressed their ignorance about the incident and alleged their false implication in the present case. Om Singh @ Ombir stated that he has been falsely implicated by one

Constable Rohtas Singh who was inimically disposed towards him. None of the accused persons adduced any defence witness.

6. The learned Additional Sessions Judge after hearing the arguments of both the sides pronounced both the accused persons guilty of having committed an offence u/s 302/34 IPC in furtherance of their common intention on 29th April, 1998 and sentenced them to life imprisonment and fine of Rs. 5,000/- (Rupees Five Thousand) each after affording them a hearing on question of sentence on 30th April, 1998.

7. The present appeal has been preferred by the appellants who are in custody. The Court had appointed Mr. Sanjay Jain, learned senior advocate as amicus curiae for Ombir vide order dated 24th April, 2008 while as the appellant Rajesh @ Bhondu was represented by Mr. Mukesh Kalia, learned Advocate and the State was represented by Mr. Sunil Sharma, learned Prosecutor.

8. Sh. Jain, learned senior counsel appearing for the main accused Om Singh challenged the conviction and the sentence of the accused on the ground that the identity of accused Om Singh had not been established, inasmuch as the statement of Shankar since deceased makes a mention in his statement that he was attacked by one Ombir brother in law of Chaman. It was contended that the prosecution had failed miserably to adduce any evidence on record to show that Om Singh was related to Chaman and, therefore, the very identity of the appellant Om Singh becomes doubtful. The learned Counsel further urged that even the statement of the deceased Shankar could not be said to be a dying declaration inasmuch as it was not recorded by a Magistrate as envisaged by Chapter 13(A) of Volume III of the Delhi High Court Rules and Orders which specially enjoins that as far as possible the dying declaration ought to be recorded by the Judicial Magistrate so far as to confer some amount of authenticity and credibility on the same and even if it is to be recorded by police officer or a medical officer it has to be got attested by one or more persons who happen to be present at that time. As against this, in the instant case, the so-called statement attributed to the deceased Shankar is not only a fabricated document but also does not inspire confidence so far as to take it as a dying declaration. The reasons given by the learned senior counsel are that Dr. Umesh Madan whose signatures are purported to be on the said statement has not been named as a witness. Further he has not made an endorsement that the deceased was in a fit state of mind at the time of making the statement. On the contrary, it was contended by Sh. Jain that the number and the nature of injuries especially the injury No. 29 to 32, which were suffered by the injured at the time when he was brought to the hospital, were of such a nature that any person in such a condition would not have been in a fit state of mind to make any statement. This contention was sought to be further strengthened by referring to the testimony of PW-9 Dr. Lalita who in her cross examination has stated that the injured did not tell as to how the injuries were received by injured and further he was in a state of shock. It was also urged by Sh. Jain, learned senior counsel that the

statement attributed to the deceased was not recorded in a question answer form.

9. So far as Rajesh @ Bhondu is concerned, Sh. Mukesh Kalia, learned Counsel also made the submission of the same lines attacking the dying declaration. In addition, to this, Mr. Kalia contended that so far as Ramesh is concerned, he is not specifically named by the deceased in the said statement Ex PW13/A and merely on account of the fact that the deceased has stated that the incident was seen by a number of persons would not mean that presence of Rajesh @ Bhondu is established. On the contrary the absence of the name of Rajesh leads to a very serious doubt as to whether Rajesh was present at the spot or not.

10. Per contra, Sh. Sunil Sharma, learned Counsel for the State vehemently contended that there is no infirmity in recording the statement of the injured Shankar by PW-13 ASI Bal Kishan on the night of 29th October, 1993. It is also urged by him that there is no hard and fast rule that in each and every case the dying declaration ought to be recorded by a Magistrate and this is evident from Rule VII of Chapter 13A which is relied upon by the appellant, Om Singh himself. The only rule of prudence enunciated therein is that it must be attested by one witness. So far as the question of non-production of Dr. Umesh Madan by the prosecution is concerned, it has been stated by Dr. Rajesh PW-15 that Dr. Umesh Madan could not be produced as a witness on the ground that Dr. Madan had left the services of the hospital. Dr. Rajesh Kumar, PW-15, Sr. Resident GTB Hospital has also identified the handwriting and signatures of Dr. Madan on the dying declaration Ex.PW13/A. It was urged that there is absolutely no reason as to why the statement Ex.PW13/A ought not be treated as a dying declaration on account of the fact that it gives the cause of death of the deceased.

11. We have considered the respective submissions of the parties. The first question which arises for consideration of this Court is the identity of the appellant Ombir. The deceased Shankar at the time when his statement was recorded had very categorically mentioned that it was Ombir brother-in-law of Chaman living in A-2 Block, Nand Nagri who had made murderous attack on him. PW-2 Sh. Vijay Kumar was examined as an eye witness who has identified Om Singh as the person who had attacked the deceased Shankar. PW-13 ASI Balkishan in his examination in chief has categorically stated that Ombir is the alias name of the accused Om Singh. All the documents which have been prepared and signed by the appellant Om Singh are bearing name of the accused Om Singh @ Ombir. Even at different places, the cross examination which has been conducted by the appellant name of the accused has been shown as Om Singh @ Ombir. No suggestion has been given by the appellant Ombir to either, PW-2 Vijay Kumar or to ASI Bal Kishan, PW-13 that Ombir and Om Singh are two different persons or that the appellant was or was not the brother in law of Chaman. Even in the statement of the appellant Om Singh, which has been recorded u/s 313 of the Cr.P.C., he does not say that Ombir and Om Singh are two different persons. To test this proposition further, the deceased had

categorically stated in his statement dated 29th October, 1993 that Ombir is the brother in law of one Chaman who resides at A-2 Block, Nand Nagri. The factum as to whether Om Singh was actually the brother in law of one Chaman who was alleged to be residing at A-2 Block, Nand Nagri was a fact which was specially within the knowledge of the appellant himself and, therefore, the onus according to Section 106 of the Indian Evidence Act, 1872 was on him to establish that Om Singh; appellant was not related to Chaman. He could have either examined Chaman as a witness or entered into the witness box himself or for that matter examined any other witness to establish that he is not related to Chaman. This has not been done. We are not drawing any adverse inference on account of these facts or steps which according to us ought to have been taken by the appellant Om Singh in order to differentiate between Ombir and Om Singh but this was only to show the fallacy of the submission made by the learned Counsel for the appellant. We are convinced that so far as the appellant Om Singh is concerned, he is no person other than Ombir and, therefore, the identity of the appellant is fully established as the person who attacked deceased Shankar.

12. The law regarding dying declaration has been settled in an off cited judgment of the Supreme Court in Khushal Rao Vs. The State of Bombay, , where various tests have been enunciated. In the said judgment, it has been categorically laid down that after subjecting the dying declaration to a close scrutiny if it is found to be genuine and truthful then even conviction can be based on the sole dying declaration itself. Various tests which have been propounded in the said judgment are essentially to test the mental fitness of the person making the statement, occasion and the opportunity of the deceased to see the assailant and thereafter his capacity to reproduce the same by way of a statement later including the time frame within which such a statement is made so as to eliminate the possibility of tutoring or false implication of any innocent person. We do not agree with the submission of Sh.Jain, learned senior counsel that as a matter of course or law unless and until a statement is recorded by the Magistrate in a manner as envisaged under Chapter 13A of the Delhi High Court Rules and Orders, it could not be treated as a dying declaration. Rule VII of the said Chapter 13A itself envisages at least one contingency where the dying declaration could be recorded by the police officer or by a medical officer. The only requirement is that there must be as far as possible one attesting witness so as to lend credence to such a statement. Another aspect of the matter is that u/s 32(a) of the Indian Evidence Act, 1872 any statement written or verbal, of relevant facts made by a person, when the statement relates to the cause of his death, or as to any circumstance of the transaction which resulted in his death, in a case in which the cause of that person's death comes into question, such statements are relevant whether the person who made such a statement was or was not at the time when the statement was made, under expectation of death. Thereby meaning that at the time when such a statement with regard to the cause of his death or any part of the transaction resulting in his death, the maker of the statement need not be under imminent danger or threat of death.

13. Coming back to the facts of the present case, the incident is purported to have taken place at 10.00 p.m. The injured has been rushed to the hospital and MLC Ex.PW9/A shows that injured arrived at 10.50 p.m. on 29th October, 1993 in the Hospital where he is examined and since he was declared fit to make the statement by Dr. Lalita Sharma, PW-9 the injured was sent to the Operation Theatre for surgery and in the meantime when PW-13 ASI Balkishan who had been given the DD 17A for investigation arrived at the spot, learnt about the fact that the injured had been removed to the hospital. He went to the hospital and obtained the MLC of the then injured Shankar, went to the Operation Theatre and recorded the statement in the presence of Dr. Umesh Madan. It was neither necessary nor required of the ASI Balkishan to obtain the certification of Dr. Umesh Madan that the injured was fit to make the statement because he was already declared so by PW-9 Dr. Lalita. Further, at the time of recording the statement of the injured, ASI Balkishan was not recording the dying declaration of the injured. He was only recording the statement for the purpose of registering a case and setting into motion the criminal investigation machinery, which he actually did by getting the FIR registered u/s 307 IPC on the basis of this statement. It is a sheer chance and misfortune of the injured that he succumbed to these injuries after an hour or so i.e. at 12.05 a.m. on 30th October, 1993 that it attains the shape of a statement of a dead person. Under these circumstances to urge that it ought to have been recorded by a Magistrate is an argument which is bereft of any sense and logic. So, therefore, there was nothing wrong inherently in recording the statement of the deceased by the police official. It is not as if the police official has tried to fabricate or manufacture a document. He was following the natural course of official discharge of his duties. Yet we will examine the two other aspects regarding the certification by the doctor and the capacity of the injured to make the statement.

14. One of the arguments which was raised by Shri Jain, learned senior counsel was to the effect that Dr. Umesh Madan had not certified that the injured Shankar was fit to make the statement. What has been recorded by him is that statement was recorded in his presence and therefore, it could not be assumed that the injured was fit to make the statement. The other point which was urged by the learned Counsel was that a person who has received 32 number of injuries which the injured had in the instant case, he could not have been in a fit mental state to make the statement. The learned Counsel drew our attention to the MLC of the injured where Dr. Lalita has stated that the patient was in a shock which is further admitted by her in her cross examination. Further the nature of injuries, especially injuries No. 29 to 32, must have caused substantial loss of blood which would not permit any person in such a state to remain fit.

15. It has specifically been recorded by PW-9, Dr. Lalita Sharma in the MLC Ex. PW9/A that the patient was conscious and fit to make the statement. Apart from this, it will be pertinent to refer to an important passage with regard to the necessity of a certification of the doctor before the dying declaration is recorded. The Hon''ble Supreme Court in Laxman Vs. State of Maharashtra, had apparently

resolved the conflict between two benches of the Hon"ble Supreme Court in case titled as Paparambaka Rosamma and Ors. v. State of Andhra Pradesh 1999(7) SCC 696 and Koli Chunilal Savji and Another Vs. State of Gujarat, . In the first case, the Supreme Court had held that in the absence of certification given by a doctor to the effect that the patient is in a fit state of mind to make the statement/dying declaration could not be accepted by the Court as such to make it sole basis of conviction while as in the later case, the Court had held that if there is material on record otherwise to indicate the deceased was fully conscious and was capable of making a statement/dying declaration, the same cannot be ignored merely on account of the absence of the endorsement having been made by the doctor regarding fitness of the state of mind of the deceased. The Supreme Court after examining the rationale of dying declaration observed that there is no particular method of making a dying declaration. It could be oral or in writing and there is no requirement of law that it has to be recorded by a Magistrate or by a doctor or even by a police officer. It is also not required to be recorded on oath nor the presence of a Magistrate is absolutely necessary. Although the presence of the Magistrate lends more authenticity and credibility to the same. The facts of each and every case will have to be seen in order to test the minute examination of the dying declaration in order to determine the truthfulness or the same and attach the evidentiary value in a given fact situation.

16. In the instant case also, it cannot be said that there was no certification of doctor that the patient was not in a fit state of mind to make the statement. The incident is purported to have taken place at 10.00 p.m. and the injured was brought to the hospital at about 10.50 p.m. when MLC was recorded by PW-9 Dr. Lalita in which the doctor made an endorsement after making elaborate entries with regard to the nature of injury suffered by the injured i.e. that the patient is fit to make the statement. It is also not in dispute that ASI Balkishan PW-13 after arriving at the spot had received DD No. 17A had rushed to the spot and thereafter came to the hospital whereupon he collected the MLC and learnt that the injured had been taken to the Operation Theatre where he went and recorded the statement of the injured in the narrative form. It was there that Dr. Umesh Madan, Senior Surgeon had appended his signature that it has been recorded in his presence which lends credence to the same. There is no suggestion to PW-9 Dr. Lalita or PW-13 ASI Balkishan that the patient was not fit to make the statement. Therefore, the deceased Shankar being in a fit condition to make the statement is so probable that any reasonable and prudent person would believe in the same.

17. Another argument which was advanced by the learned Counsel for the appellant was that as Dr. Umesh Madan has not been produced as a witness therefore this was fatal to the case of the prosecution so far as the question of attaching any credence to the dying declaration is concerned. No doubt, Dr. Umesh Madan, Sr. Surgeon in whose presence the statement has been recorded was cited as a witness but it has come in the testimony of PW-15 Dr. Rajesh

Kumar that Dr. Umesh Madan has now left the services of the said hospital and his present whereabouts are not known therefore he could not be produced as a witness. PW-15 Dr. Rajesh Kumar has also identified the hand writing and signatures of Dr. Madan as he stated that he has seen him writing and signing in the official discharge of his duties. There is absolutely no reason as to why the testimony of this doctor could not be relied upon with regard to the factum of Dr. Umesh Madan having left the services of the hospital and the factum of the certificate appended by Dr. Umesh Madan on the dying declaration Ex. PW-13/A having been signed by Dr. Umesh Madan as having been recorded in his presence. The handwriting and the signature of a person may be proved either by executant himself or by a person who is conversant with the hand writing and the signature of the said person. In the instant case latter course has been followed. So far as the nature of injuries are concerned, most of the injuries which have been suffered by the deceased (except injury No. 29 to 32) are either minor in nature or injuries suffered by an impact. This is evident from the facts of the case that though the attack on the injured was vicious so was his defence to ward off the attack and in the process he suffered these injuries. The contention of learned Counsel for the appellant is that no ordinary person could have remained in a fit state to make the statement is belied by a positive medical evidence of PW-9 Dr. Lalita who has recorded the certificate. Further, a person could remain fit or not in a given case would depend on his physique, will power and the quantum of the time taken in removing the injured to the hospital. In the instant case, the incident is purported to have taken place at 10.00 p.m. and the MLC is recorded at 10.50 p.m. on 29th October, 1993. This shows that he was removed to the hospital quite fast and so was his statement recorded by the PW-13 ASI Balkishan. All these facts clearly establishes that dying declaration Ex.13/A is a genuine and truthful. It does not suffer from any infirmity which will give rise to any doubt in our mind that the deceased Shankar had any reason to falsely implicate the appellant Ombir @ Om Singh as an assailant. On the contrary, it inspires the confidence of the Court. It also does not suffer from any infirmity or does not require any corroboration so far as the commission of offence of stabbing the deceased Shankar by the appellant Om Singh on the vital part of his body is concerned. The injury No. 29 to 32 are such injuries that in the ordinary course the appellant ought to have known that such injuries would cause death of such person on account of profuse loss of blood. It may be mentioned here that though Dying Declaration mentions the name of Ombir, but the name of Rajesh @ Bhondhu is conspicuous by its absence. The deceased has stated that number of persons had seen the incident but also not any specific witness. The absence of the name Rajesh @ Bhondhu has two significance. First, it belies the theory of fabrication of the Dying Declaration by PW-13 ASI Bal Kishan because if he had to fabricate the said document he would have mentioned the name of both rather than omit the name of Rajesh @ Bhondhu. Secondly there can be various explanation for the absence of the name of the name of Rajesh @ Bhondhu in the dying declaration of deceased Shankar.

18. The second submission which was made by the learned Counsel for the appellant was that the testimony of PW-2 Shri Vijay Kumar could not be relied upon on account of the fact that he was a planted witness. He was an interested witness which would be evident from the fact that the version which has been given by him to the effect that on the date of incident at about 10.00 pm, he was going to ease himself in public latrines in Kashipura when he is purported to have seen the incident of the deceased being stabbed by Om Singh. The learned Counsel for the appellants stated that not only the testimony of PW-2 Sh. Vijay Kumar is highly improbable, full of contradictions but also very unnatural. It also does not fit in with the story which has been given by him with the documents especially with regard to the site plan which has been prepared by the Investigation Officer. Elaborating this argument further, it was urged that PW-2 has specifically stated that at the time of incident, he was going for easing himself and when he had reached near A-1 Block Market, he found Om Singh attacking the deceased Shankar while as another person Rajesh @ Bhondu whom he could identify by face only at that point was exhorting by saying "Maar Sale Ko - Isko Pata Chale Ki Gawahi Kaise Di Jati Hai". It was stated that PW-2 has made a categorical statement that at the time of incident, he hid himself besides Panwari Khokha and till the time, the accused persons fled away from the scene of crime. The distance which has been given by the witness between him and the assailant was about 10 paces and the distance between the appellant Rajesh who was wielding screw driver and PW-2 Vijay Kumar was 10-15 paces. It was also admitted by the witness that it was at his instance that the site plan was prepared by the Investigating Officer ASI PW-13 Balkishan but in the cross examination his evidence was sought to be demolished by urging that the witness was not able to see the site plan and explain the position rather he refused to see the site plan. The said plan which was prepared by the IO was not showing the Panwari Khokha or the position of PW2, Vijay Kumar and, therefore, it was stated that neither the placement of the witness nor that of Khokha has been shown in the site plan, therefore, the presence of PW-2 Sh. Vijay Kumar at the scene of crime becomes doubtful.

19. It was also urged that the testimony of PW-2 Vijay Kumar could also not been relied upon as he was a planted and an interested witness inasmuch as his cross examination he has admitted that Om Singh is facing another criminal trial in FIR No. 127 of 1990 in which his nephew had been killed and therefore there was every reason and motive for him to testify falsely against Om Singh so as to ensure his conviction. The learned Counsel also tried to demolish the testimony of PW2, Vijay Kumar by urging that there was latrine at a place nearer to his residence as compared to the latrines in Kashipura where he was purportedly going to ease himself. It was urged that if a person is suffering from dysentery he would go to a nearer latrine rather than to a distant one. It was also urged by Sh. Kalra learned Counsel for Rajesh that the testimony of PW2, Vijay Kumar was not reliable as his conduct was not natural. He did not render any help to the injured or give information to police rather chose to go back to his residence and

come back later. In addition to there are contradictions in his testimony in case it is seen in the light of testimony of PW13, ASI Bal Kishan.

20. As against this, learned Counsel for the State Sh. Sunil Sharma urged that it was the case of the appellant himself that the Khokha was at a distance of 100 yds. from the place of incident and, therefore, the same has not been shown in the site plan. It was also urged by him that merely on account of the fact that PW2 Sh. Vijay Kumar's nephew was allegedly killed by Ombir for which he was facing trial does not mean ipso facto that the testimony of Sh. Vijay Kumar has to be discarded completely even if he is shown to be otherwise truthful. The learned Counsel has placed reliance on *Seeman @ Veeranam v. State IG of Police* AIR 2005 SC 2502 to urge that the testimony of such witness is only to be subjected to close scrutiny and if found correct and truthful, it can be relied upon and could be made basis of conviction.

21. There can be no fundamental rule or principle to the effect that merely on account of the fact that presence of the witness or of an object as stated by the witness is not reflected in the site plan would result in discarding the testimony of the said witness if otherwise it satisfies the conscience of the Courts that the witness is telling the truth with regard to the main incident or the occurrence. No doubt PW-2 Vijay Kumar has stated that he hid himself beside Panwari Khokha which was at a distance of 10 paces or the fact that the rough sketch was prepared by PW-13 ASI Balkishan which he later failed to see so as to explain the same would not make the Court to discard his testimony. This is on account of the reason that no doubt the investigating officer ought to have shown place the presence of the witnesses or the Khokha in the rough site plan prepared by him which is Ex.PW13/D but this is only a defect in the investigation, which does not seriously prejudice the appellant nor does it make the presence of PW-2 Vijay Kumar at the time of incident as doubtful. The learned Counsel has cited *Shyam Sunder and Raj Kumar Vs. State (Delhi Admn.)*, In the cases relied upon by the learned Counsel there is no absolute proposition of law laid down by the court that if the place of incident or the presence that of the witness or any other object is not shown in the plan the testimony of the witness cannot be relied upon. Rather in this case it was observed by the court that if it examines the statement of eye witness closely there appears to be discrepancy as to the place where occurrence took place. Therefore the eye witness was not relied upon. In our case there is no discrepancy in the version of PW2 Vijay Kumar and the site plan so far as the question of incident is concerned. It may be pertinent here to refer that there is another site plan which is prepared by PW-11 SI Mahesh Kumar, which is Ex.PW11/A in which khokha is purportedly shown at place "B" in concern of shop No. A-1/6, Nand Nagri which is the place of incident. What was prepared by PW-13 ASI Bal Kishan was only a rough sketch and not the site plan. Merely on account of this reason, it could not be said that PW-2 Vijay Kumar was not present at the place of incident. So far as the conduct of the witness PW-2 being unnatural is concerned, it is stated that different persons act and react differently in a given fact situation. Merely on account of the fact that PW-2 Vijay

Kumar did not inform the police or did not come forward to the rescue of the deceased would not make us believe that his presence at the place of incident was doubtful. He has given a very cogent and plausible explanation of being present at the spot. It is not disputed that Sh. Vijay Kumar PW-2 is living in A-1 Block, Nand Nagri itself. The address given by appellant Ombir Singh while recording his statement is A-1/435. Therefore, the presence of PW-2 in and around "A" block cannot be found fault with. The place of incident is a market place which is also in A-1 Block and even the appellant used to reside in a nearby area. PW-2 has stated that he knew both the deceased as well as the assailant and has given his name. The reason for not coming forward to give help to injured or to inform police is also given by him that he was himself terrified on account of the fact that his nephew had already been killed by him. As in present case, any reasonable person placed in his place would have got panicked that if the assailant sees such a person, he would be sure to meet his death. Therefore, he went to his home, kept the dabba and thereafter came to the spot on learning that police had also come to the spot.

22. So far as PW-2 being an interested witness or a chance witness is concerned, no doubt PW-2's nephew has been killed by the appellant Om Singh but that FIR is registered in the year 1990 while as the present incident has taken place in 1993. If PW-2 Vijay Kumar would have tried to falsely implicate Om Singh he would not waited for a period of almost three years. The testimony of PW-2 Vijay Kumar seems to inspire confidence as nothing except minor contradiction of his testimony with other witnesses especially PW-13 have been brought on record. Minor contradictions are bound to be there in a truthful statement more so when a person is semi-literate and the statement is being recorded after two and a half years or so. Human memory is short and with passage of time it tries to fade, if not completely obliterate. What can be remembered by a person are the broad parameters of the incident. This is a fact which in itself would not discredit his testimony. PW-2 is not interested in the sense that he is not related to the deceased in the instant case but the very fact that his nephew was also killed by the same appellant would not lead to discredit his testimony as it otherwise inspires confidence. It is common knowledge that public witnesses by and large shun away from being witnesses in criminal trial more so when such a heinous crime is purported to be committed. With the present state of affairs public witnesses feel that in case they become witnesses not only it causes harassment of going to courts endlessly but also exposes them to the threats by criminals facing prosecution. Therefore, it cannot be said that his testimony has to be discarded lock stock and barrel on account of being related to the deceased of another case in which the appellant was facing the trial. In *Seeman @ Veeranam Vs. State*, by Inspector of Police, it has laid down:

4. It is now well settled that the evidence of witness cannot be discarded merely on the ground that he is a related witness or the sole witness, or both, if otherwise the same is found credible. The witness could be a relative but that does not mean to reject his statement in totality. In such a case, it is the

paramount duty of the court to be more careful in the matter of scrutiny of evidence of the interested witness, and if, on such scrutiny it is found that the evidence on record of such interested sole witness is worth credence, the same would not be discarded merely on the ground that the witness is an interested witness. Caution is to be applied by the court while scrutinizing the evidence of the interested sole witness.

In case Sachchey Lal Tiwari Vs. State of Uttar Pradesh, , which reads as under:

7. Coming to the plea of the accused that PW-2 was "chance witness" who has not explained" how he happened to be at the alleged place of occurrence it has to be noted that the said witness was independent witness. There was not even a suggestion to the witness that he had any animosity towards any of the accused. In a murder trial by describing an independent witness as "chance witness" it cannot be implied thereby that his evidence is suspicious and his presence at the scene doubtful. Murders are not committed with previous notice to witnesses; soliciting their presence. If murder is committed in a dwelling house, the inmates of the house are natural witnesses. If murder is committed in a street, only passersby will be witnesses. Their evidence cannot be brushed, aside or viewed with suspicion on the ground that they are mere "chance witnesses". The expression "chance witness" is borrowed from countries where every man's home is considered his castle and everyone must have an explanation for his presence elsewhere or in another man's castle. It is quite unsuitable an expression in a country where people are less formal and more casual, at any rate in the matter explaining their presence.

23. Keeping in view of the aforesaid proposition of law in mind, we are of the opinion that it could not be said that the presence of PW-2 at the time of incident which was a sheer chance, is highly improbable or that merely on account of the fact that his nephew was earlier killed by the same assailant therefore, he becomes an interested witness in the incident and as a consequence of this his entire testimony ought to be disbelieved although he has been able to withstand the test of cross examination. Accordingly, we feel that the testimony of PW-2 Sh. Vijay Kumar is truthful, believable and credible on the core issue of his being present in and around the time of incident when he saw both Om Singh attacking the deceased and Rajesh @ Bhondu giving a cover to him by not only exhorting but also by holding a screw driver. But as we are using the testimony of PW-2 only for the purpose of corroboration of the dying declaration of deceased Shankar for the purpose of relying on the proof of guilt of the accused persons in this regard the presence of Rajesh @ Bhondu becomes slightly doubtful because deceased Shankar has not specifically named Rajesh @ Bhondu. To that extent the second appellant's presence at the spot becomes doubtful in the sense that his participation is not proved beyond reasonable doubt.

24. The next argument which has been urged by the learned Counsel for the appellant Om Singh, is to the effect that dying declaration Ex.PW-13A is to the effect that Ombir @ Om Singh had attacked the deceased Shankar has not been

put to him u/s 313 Cr.P.C. and, therefore, it causes a serious prejudice to him and if any fact which has come in evidence is not put to the accused then this is a serious infirmity in the case of prosecution and accordingly the entire trial is vitiated. For this purpose, the learned Counsel for the appellant Om Singh has relied on Ajmer Singh Vs. The State of Punjab, ; Kuldeep Singh and Ors. v. State of Delhi 2004 12 SCC 528; Bhagat Singh v. State of Madhya Pradesh 1953 SC 468 and Devi Ram Vs. State, .

25. There is no denying of the fact that there is a consistent string authorities that the entire incriminating evidence must be put to the accused in his statement u/s 313 Cr.P.C. (Section 342 under old Act) with a view to gather what is the response of the accused qua the said evidence and if this is not done it may be fatal to the prosecution. But there is no universal rule of law that if the evidence is not put it will result in vitiating the entire case, the accused also have to show that on account of this there has been a miscarriage of justice or a serious prejudice caused to the accused. The learned Counsel to the appellant Om Singh has cited number of judgments. Judgments are to be cited for what ratio it lays down and the facts of that case are not referred to. The contention of Sh. Jain is that Dying Declaration of the deceased Shankar has not been put to him specifically nor it has been put to him that he is in relation of Chaman. We don't agree with this submission of the appellant. As a matter of fact the second question which has been put to the witnesses with regard to the statement Ex.PW-13/A made by deceased to which his response is that he does not know. We feel that there is sufficient compliance with the provision of Section 313 Cr.P.C. On the contrary the answers of the appellant are that he is not aware of any such incident having taken place.

26. We do not agree with the submission of the learned Counsel for the appellant that the evidence which has come on record by way of dying declaration has not been put to him specifically on the contrary question No. 2 which reads as under:-

Q 2: It is also inevidence against you that police party came to know that injured had already been removed to GTB hospital and on this SI Bal Kishan went to GTB hospital after leaving Chander Prakash at the spot and obtained the MLC of the injured Shankar @ Jaggar @ Mehtwala and the Doctor had declared him fit for statement and SI BAL Kishan had recorded the statement of injured Shankar Ex.PW13/A in the presence of Dr. Umesh Madan and his statement has been attested by Dr. Umesh Madan at point C which bears the signts. of IO at point B what have you to say?

Ans. I do not know.

27. A perusal of the aforesaid question will clearly show that the evidence which had come on record by way of dying declaration had been put to him specially and it was for him to give an explanation as to why the deceased had named him specially which the former person has failed to do so. In addition to this, we are

of the view that Section 313 gives the manner of recording the statement of the accused and it is further laid down u/s 465 that any irregularities or impropriety or for that matter illegality during the course of trial will not vitiate the proceedings, trial against an accused offender unless and until failure of justice has been occasioned. The appellant must not only show the prejudice which has been caused to him he must also show that there has been a serious miscarriage of justice. The appellant has failed to discharge this onus, accordingly, it is felt that there is no infirmity in recording the statement of the appellant as has been done in the instant case.

28. Keeping in view the aforesaid facts in mind, we are of the considered opinion that the appellant Om Singh @ Ombir was the person who had inflicted various injuries including the injury Nos. 29 to 32 on the deceased in a short span of few minutes and thereby causing probabilities, it would cause the death of the deceased which in fact actually he did on early morning of 30th at about 12.05 pm. Accordingly, we hold that the prosecution has been successful in proving the guilt of the appellant beyond reasonable doubt and accordingly the appeal of the appellant is liable to be dismissed.

29. So far as the appeal of the co-accused Rajesh @ Bhondu is concerned, the learned Counsel Mr.Kalia appearing for him had almost advanced the same arguments which were advanced by Sh. Sanjay Jain, learned senior counsel. We have considered the submissions made by Mr. Kalia also. No doubt the name of Rajesh has been taken by PW-2 Sh. Vijay Kumar and he has also been identified in the Court as the person who was exhorting the appellant by urging him "Maar Sale Ko - Isko Pata Chale Ki Gawahi Kaisa Di Jati Hai" but there is a lurking doubt that he may or may not be present at the time of incident. This is on account of the reason that although the deceased Shankar in his statement had specially taken the name of the appellant Ombir @ Om Singh, he has further stated that this episode has been seen number of witnesses. As the deceased has not specifically named Rajesh as the person who was present at the spot at the time of incident, it creates doubt about his presence at the spot at the time of incident. Needless to say that we are of the considered opinion that the dying declaration of the deceased Shankar is voluntary and truthful and it does not suffer from any infirmity on account of the fact that Dr. Madan's non-certification because the patient was declared as fit by PW-9 Dr. Lalita therefore that is the sole basis on which the conviction of Om Singh @ Ombir could be based. But we went further and relied upon the testimony of PW-2 Vijay Kumar as a corroborative piece of evidence to reassure ourselves about the guilt of the appellant but while doing so the corroborative piece of evidence and could not be the basis of conviction of Rajesh @ Bhondu whose name is missing from the Dying Declaration and for this he is given the benefit of doubt. Before we part we must express our displeasure that the investigation of the case have been conducted in a most perfunctory and unprofessional manner.

30. In the light of the aforesaid facts and circumstances of the case, we are of

the considered opinion that the prosecution has been successful in establishing the guilt of the accused Om Singh @ Ombir beyond reasonable doubt for which he has been rightly convicted u/s 302 IPC and sentenced to life imprisonment apart from fine by the learned Additional Sessions Judge, Delhi vide orders dated 29.4.1998 and 30.4.1998 which accordingly we affirm.

31. So far as the appeal of the appellant Rajesh @ Bhondu is concerned, the same is allowed and the conviction and sentence of life imprisonment awarded vide orders dated 29th April, 1998 and 30th April, 1998 u/s 302/34 IPC is set aside because it is doubtful as to whether he was present at the spot or not, on account of his name not appearing in the dying declaration. Though there is suspicion in this regard but suspicion cannot take the place of proof and obviously the benefit must go to them.

32. Accordingly, the CrI. Appeal. No. 278/1998 titled as Rajesh @ Bhondu is allowed and the appellant-Rajesh @ Bhondu be set at liberty forthwith in case he is not required in any other case. The CrI. Appeal No. 127/1999 titled as Om Singh v. State, is dismissed and the conviction and sentence awarded to him vide judgment/order dated 29th and 30th April, 1998 respectively of the trial Court is reaffirmed. A copy of the order be sent to the Ld Trial Court as well as to the Superintendent, Central Jail, Tihar so as to make it available to the appellant Ombir @ Om Singh as early as possible.