

Reserved on 18.11.2021

Delivered on 01.12.2021

Court No. 10

A.F.R.

Case :- CRIMINAL APPEAL No. - 1181 of 2008

Appellant :- Vishal Gupta

Respondent :- State of U.P.

Counsel for Appellant :- Nadeem Murtaza, Ashok Kumar Verma, Pradeep Kumar Tripathi, Ramesh Chandra Gupta, Shivaam Shaarma, Sidharth Dhaon, Subodh Kumar Shukla, Sushil Shukla, Yogesh Bhasin

Counsel for Respondent :- Govt. Advocate, Salik Kumar Srivastava

And

Case :- CRIMINAL APPEAL No. - 1479 of 2008

Appellant :- Alok Gupta

Respondent :- State of U.P.

Counsel for Appellant :- Nadeem Murtaza, Ashok Kumar Verma, Kashi Nath Shukla, Pradeep Kumar Tripathi, Ramesh Chandra Gupta, Shivani Shaarma, Subodh Kumar Shukla

Counsel for Respondent :- G.A., Salil Kumar Srivastava

Hon'ble Attau Rahman Masoodi, J.

Hon'ble Manish Kumar, J.

(Per Hon'ble Manish Kumar, J)

The aforesaid criminal appeals arising out of the same crime were heard together and are being decided by a common judgment.

1. The two criminal appeals have been filed against the common judgment and order dated 23.04.2008 passed by Additional Sessions Judge, Court No. 1, Lucknow in Sessions Trial Nos. 140 of 2007 (State Vs. Alok Gupta), 520 of 2006 (State Vs. Smt. Kalpana) and 644 of 2005 (State Vs. Vishal Gupta) relating to Case Crime No. 129 of 2004, under Sections 302, 120 B IPC, Police Station Ashiyana (CBCID), whereby, the

appellants have been convicted under Section 302 IPC and sentenced to life imprisonment and fine of Rs. 10,000/- and in default of payment of fine, they shall undergo rigorous imprisonment for a further period of one year, whereas, Smt. Kalpana was acquitted.

2. We have heard Shri Pradeep Kumar Tripathi, learned counsel, who appeared for the appellants. Shri Vaibhav Kaliya, learned counsel, on our request, volunteered to assist the Court and was permitted to do so on behalf of the appellants. Shri Umesh Verma, learned Additional Government Advocate appeared for the State. Learned counsel for the parties argued at length and took us through the record.

3. According to the prosecution case, on 29.08.2004 an FIR was lodged under Section 302/120- B IPC by the complainant, who was the father of the deceased/PW-1-Ashok Gupta, at about 5.25 P.M. stating therein that on 29.08.2004 at around 5.00 P.M., when the complainant along with his daughters namely, Alka, Anita, Aparajita, Anamika and son-Sachin were present at home, at that time the appellants namely, Alok Gupta and Vishal Gupta along with one unknown person knocked the door and on opening the door, they barged into the house having *Tamancha* in their hands. The three accused persons indiscriminately fired on his daughter namely Aparajita, wife of Ajay Gupta with the intention to kill her while she was sitting with her sisters in the second room. On shouting, they ran away. The neighbours in fear closed their windows and doors. Thereafter, the complainant took her daughter to the Awadh Hospital where the doctor declared her brought dead. Smt. Kalpana Gupta

is the first wife of the Ajay Gupta, thus, the present appellants kept enmity with the deceased and her husband Ajay Gupta. After two years of marriage of Ajay Gupta with the deceased, they had kidnapped him and for that the FIR was lodged at Sitapur. The Kalpana Gupta instigated his brothers i.e. the present appellants to murder the daughter of the complainant.

4. After investigation, the charge sheet was filed under Section 302 read with Section 120-B IPC in the Court concerned against the present appellants. Thereafter, the trial court framed charges against the appellants under Section 302 read Section 120-B IPC for hatching the conspiracy along with other co-accused namely, Kalpana Gupta.

5. The prosecution in order to prove its case had produced four witnesses of fact namely Ashok Kumar Gupta (the complainant and father of the deceased) as PW-1, Sachin Gupta (the brother of the deceased) as PW 2, Sudheer Kumar Gupta as PW -3 (private servant of Ajay Gupta), Ajay Gupta (the husband of the deceased) as PW-4 and also produced four formal witnesses i.e. Dr. Harshwardhan as PW-5, HCP Raj Kumar Srivastava as PW-6, Inspector Rangeela Singh as PW-7 and Arjun Prasad Mishra as PW-8.

6. As documentary evidences, the prosecution has proved the copy of FIR as Ext. Ka-7, the Post Mortem Report as Ext-Ka-6, Forensic Report as Ext. Ka-20, Recovery memo as Ext Ka-3, Recovery memo as Ext. Ka-4, Recovery Memo as Ext. Ka-5, Chik FIR as Ext. Ka-7, Extract of chick report in GD as Ext. Ka-8, Inquest Report as Ext. Ka-2, Preparation of

Inquest Report and got prepared other relevant papers as Ext. Ka-9, Photo Lass as Ext. Ka-10, Letter of the police form of sending the dead body to the headquarter as Ext. Ka-11, Sample seal as Ext. Ka 12, Spot where the site plan was prepared as Ext. Ka-13 and recovery seizure memo of one empty cartridge of .315 bore from the spot as Ext. Ka-5, blood stained bed sheet of the double bed and two pieces of these bed sheets as Ext. Ka-4, blood stained and plain earth from the spot as Ext. Ka-3, Charge sheet against Vishal Gupta, Alok Gupta and Kalpana under Section 302/120 IPC as Ext. Ka-19, Medical examination report of the maxi as Ext. Ka-20.

7. After closure of the evidence of prosecution, the statement under Section 313 Cr.P.C. attributable to all the three accused were recorded and all three accused denied their involvement in the incident. Kalpana Gupta has specifically told in her statement that she and Ajay were staying together till the date of the incident. The appellant namely Vishal Gupta has stated in his statement that he was not present at the place of incident when the incident occurred. He was busy in the departmental duty on the day of the incident.

8. After recording of the statement of the accused/appellants, they preferred to enter into the defense and examine as many as seven defense witnesses namely Dinesh Kumar Pandey, Assistant Registrar, Kanoongo, Tehsildar Puwayan, District Shahjahanpur as DW-1, Ram Sahayas DW-2, Jamun Prasad, Revenue Inspector as DW-3, Om Prakash Gupta, Ex-MLA as DW-4, Vinod Kumar Arora as DW-5, Tauhid Ahmad, Supervisor of

Avadh Hospital as DW-6 and lastly Jaswant Singh, Income Tax Inspector examined as DW-7.

9. The trial Court on appreciation of evidence placed before it had opined that the FIR was lodged by the complainant, who is an eye witness/father of the deceased, which was duly proved by evidence of PW-1. According to the trial Court, the FIR of the case is not anti time and the Crime No./Special Report was sent to the court after ten days of the incident and further observed that Court was not convinced with the arguments of the learned defense counsel because PW-1 has clarified in his cross examination that he had written the Tehrir in Police Station by taking 10 to 15 minutes. So far as the statement of PW-1 that the inquest proceeding started at 8.00 P.M. is concerned, it will also not belie the entire prosecution case.

10. Further, the trial court did not accept the argument that the inquest on the body of the deceased was not conducted in Awadh Hospital nor the body of the Aparajita was even taken to Awadh Hospital for treatment. It has also not been accepted that no death certificate was produced by the prosecution. The mere assertion of the witness that the inquest proceedings were conducted in the house of the complainant was not enough to prove that fact. The presence of Padma Thapa is not quite seriously disgranted by the learned counsel for the defence. The trial court did not accept the evidence on record that despite indiscriminate firing by three persons on Aparajita, no pellet or any firing remains were found on the spot; any sign of the fire was not on floor or furniture; no

report of the serologist was available on the record regarding the blood stain, plain earth and blood stained bed sheet; no hole with blackening were found on the Maxi worn by the deceased; that in spite of three others sisters, who were sitting close to Aparajita, none of them got fire arm injuries; that in Site Plan the Investigating Officer has not shown any *Takhat* on which the deceased would have been sitting. On the aforesaid facts on the record, the trial court did not find much force.

11. The evidence of the case was proved against the accused/appellants, thus the trial court convicted and sentenced them as mentioned above.

12. The learned counsel for the appellant has submitted that the FIR is anti time for the reason that as per the prosecution case, the incident took place at around 5.00 P.M. and the FIR was lodged at 5.25 P.M. i.e. within 25 minutes of occurrence, which is highly improbable for the reason that as according to the version in the FIR, the appellants along with one unknown person reached the house of the complainant at around 5.00 P.M. and knocked the door and when door was opened by the complainant/PW-1, the appellants along with one unknown person directly entered in the second room, where the daughters of the complainant were sitting including the deceased Aparajita and all the three started indiscriminate firing and ran away. Thereafter, the injured Aparajita was taken to the Awadh Hospital, which is around 1.5 to 2 Kms away from the house of the complainant, where the doctor declared her brought dead. After the declaration by the doctor, the complainant went to

the Police Station which was four Kms away from the hospital. On reaching Police Station, the complainant took ten to fifteen minutes in writing the *Tahreeer* and thereafter it was lodged at the Police Station. All the aforesaid exercise is not possible to be made within a short span of 25 minutes especially when the complainant does not own any vehicle by which he had gone to the Hospital. Arranging a Car for taking the injured to Hospital must have taken some considerable time.

13. It is further submitted that the crime report/special report was not enclosed with the inquest report, whereas as per Section 157 Cr.P.C. after the information of the offence, the same has to be intimated to the Magistrate forthwith.

14. It is further submitted that in the enclosures with the inquest report, two pages have been shown for the FIR and one page for GD, whereas the FIR is of three pages, so neither any FIR was in existence at the time of inquest nor any special report/ crime report was there till then. The purpose of Special Report/Crime Report is to make check or supervise over the investigation by the Magistrate.

15. As per the statement of Head Moharrir, the Special Report/Crime Report might have been forwarded but the same is not on the record. Meaning thereby, the Special Report/Crime Report was never forwarded to the Magistrate in compliance with Section 157 Cr.P.C.. It is further contended that it has been mentioned in the judgment impugned that the Special Report/Crime Report was filed after ten days. The same was never

proved and no opportunity was given to the defence to make any suggestion on the Special Report/Crime Report.

16. On the other hand, learned Additional Government Advocate has submitted that the purpose of the Special Report/Crime Report is to supervise the investigation by the Magistrate and filing it with delay will not vitiate the trial and benefit of it can not be given to the accused/appellants. In support thereof, he placed reliance upon the judgment rendered by Hon'ble Supreme Court in the cases of *State of U.P. Vs. Gokaran and others [1985 SCC (Cri) 41]*, *Pala Singh Vs. State of Punjab [1973 SCC (Cri) 55* and *Brahm Swaroop & Anothers Vs. State of U.P. [2011 CRI LJ 306]* wherein, it has been held that no adverse inference can be drawn on the ground that the Special Report/Crime Report was sent with a delay to the Magistrate, if the same has been explained.

17. After hearing the learned counsel for the appellant and the learned AGA, it is found that the prosecution story regarding the time and occurrence of the incident and lodging of an FIR within twenty five minutes is highly improbable & doubtful for the reasons that it is an admitted case of the prosecution that the alleged incident took place at around 5.00 P.M..

18. After the incident, the injured was taken to the Awadh Hospital in the Maruti Car. The Awadh Hospital is 1.5 to 2 KMs from the place of incident, where the doctor declared brought her dead. Thereafter, the complainant had gone to the police station, which is 4 Kms from the

hospital, where he taken 10 to 15 minutes to write down the long *Tehreer* and some time would have been in arranging the vehicle for taking the deceased to the hospital. All this could not been done within a short period of 25 mintues and it makes the story of the prosecution doubtful.

19. The non forwarding of the Special Report/Crime Report forthwith by the Police to the Magistrate, as mandated by Section 157 Cr.P.C. also deprives Magistrate to supervise the investigation and creates credibility about the FIR. The only inference, which can be drawn from the statement of Head Moharrir is that no Special Report/Crime Report was forwarded to the Magistrate though in the judgment, it has been recorded that it has been filed with delay of ten days but there is no finding that any reason for delay was indicated by the Investigating Officer while filing the Special Report/Crime Report nor at any point of time any opportunity was provided to the defence side to make their submissions either in support or against the Special Report/Crime Report. The same has not been proved nor made exhibit. The judgments cited by the learned AGA are not applicable in the present case for the reason that the Hon'ble Supreme Court in the judgment of **Gokaran (supra)** has relied upon the judgment of **Pala Singh (Supra)**. The relevant extract of **Pala Singh (Supra)** is being quoted hereunder for ready reference:-

"Shri Kohli strongly criticised the fact that the occurrence report contemplated by S. 157, Cr.P.C. was sent to the magistrate concerned very late. Indeed, this challenge, like the argument of interpolation and belated despatch of the inquest report, was developed for the purpose of showing that the investigation was not just, fair and

forthright and, therefore, the prosecution case must be looked at with great suspicion. This argument is also unacceptable. No doubt, the report reached the magistrate at about 6 p.m. Section 157, Cr. P.C. requires such report to be sent forthwith by the police officer concerned to a magistrate empowered to take cognisance of such offence. This is really designed to keep the magistrate informed of the investigation of such cognizable offence so as to be able to control the investigation and if necessary to give appropriate direction under s. 159. But when we find in this case that the F.I.R. was actually recorded without delay and the investigation started on the basis of that F.I.R. and there is no other infirmity brought to our notice (emphasis laid by us), then, however improper or objectionable the delayed receipt of the report by the magistrate concerned it cannot by itself justify the conclusion that the investigation was tainted and the prosecution insupportable. It is not the appellants case that they have been prejudiced by this delay."

20. After going through the aforequoted judgment, the position, which emerges out is that the aforesaid judgment is not applicable in the present case, as there was no other infirmity brought to the notice of the Court whereas there are many in the present case, as already mentioned above. The another judgment relied upon by the learned AGA i.e. ***Brahm Swaroop (supra)*** is also not applicable in the present case, as in the said judgment, the Hon'ble Apex court has relied and quoted the judgment rendered in the case of ***State of Rajasthan Vs. Teja Singh and others [2001 3 SCC 147]*** wherein it has been held that, if the Special Report/Crime Report has been forwarded with delay then the explanation so furnished by the prosecution must be convincing and acceptable. The para nos. 13 and 16 of the said judgment is being quoted hereunder :-

" 13. In *State of Rajasthan v. Teja Singh & Ors.*, (2001) 3 SCC 147, this Court held that the receipt of special report by the Magistrate is a question of fact and the prosecution may explain the delay in sending the special report. However, the explanation so furnished by the prosecution must be convincing and acceptable. (emphasis laid by us) The same view has been re-iterated in *Ramesh Baburao Devaskar & Ors. v. State of Maharashtra*, (2007) 13 SCC 501."

"16. In *State of Kerala v. Anilachandran @ Madhu & Ors.*, AIR 2009 SC 1866, this Court placed reliance upon its earlier judgments in *Pala Singh v. State of Punjab*, AIR 1972 SC 2679; and *Sarwan Singh v. State of Punjab*, AIR 1976 SC 2304 and held that the police should not unnecessarily delay sending the FIR to the Magistrate as the delay affords the opportunity to introduce improvement and embellishment thereby resulting in a distorted version of the occurrence (emphasis laid by us). However, in case the prosecution offers a satisfactory explanation for the delay, the court has to test it. An un-explained delay by itself may not be fatal, but it is certainly a relevant aspect which can be taken note of while considering the role of the accused persons for the offence.(emphasis laid by us)

A similar view has been re-iterated in *Pandurang Chandrakant Mhatre & Ors. Vs. State of Maharashtra*, (2009) 10 SCC 773 (2010 AIR SCW 236; 2010 (2) AIR Bo R 209 (SC)"

21. The Hon'ble Supreme Court in the case of *Brahm Swaroop (supra)* has also relied upon the judgment rendered in the case of *Badam Singh vs. State of Madhya Pradesh [(2003) 12 SCC 792]* wherein, it has been held that if the Investigating Officer categorically states that he is not in a position to give any explanation for the delay in sending the special report, it may be fatal to the prosecution case.

22. The judgments cited hereinabove, by the learned AGA are on the point that if the special report is submitted with delay and it has properly been explained, which is convincing and without infirmity, then it could not be fatal, whereas in the present case, neither any reason for delay has been furnished nor it has been explained.

23. In view of the facts placed before us as mentioned in preceding paragraphs, it is evident that the delay without any explanation in submitting the special report makes the prosecution case doubtful, when the same is read along with other infirmities brought before the Court.

24. We have seen from the facts stated as mentioned hereinabove that all that what is said to have been done till the actual lodging of the report in no case probably could be done within 25 minutes. It leads to the inference that the report has been ante-time which fact also stands supported by not sending the Special Report/Crime Report forthwith or promptly to the Magistrate for which no explanation comes forward from prosecution side.

25. Learned counsel for the appellants has further submitted that when the prosecution witnesses are near relative/interested witnesses, then their statement needs corroboration and close scrutiny by the Court. In the present case, it has been contended that PW. 1 & 2 are the interested witnesses, as the PW-1 is the complainant/father of the deceased/eye witness while PW 2 is the brother of the deceased. The statements of the PW-1 and 2 do not corroborate with the prosecution story. The prosecution also failed to disclose the facts that as to why the vehicle used

for taking the deceased to the hospital was never taken into the custody. Further, it has also not been disclosed by the prosecution that what is the number of the vehicle and who was owner & driving it at that time.

26. In support of his submission, learned counsel for the appellant relied upon various judgments of Hon'ble Apex Court in the cases of *Meharaj Singh vs. State of U.P. [(1994) 5 SCC 188]*, *Bir Singh & Ors. vs. State of Uttar Pradesh [(1977) 4 SCC 420]*, *Shaikh Nabab Shaikh Babu Musalman & Ors. vs. State of Maharashtra [(1993) Supp. (2) SCC 217]*.

27. It has further been submitted that no blood stained clothes of the prosecution witnesses were ever recovered, which makes the presence of the appellant at the time of incident doubtful. In support of his submission, he placed reliance on the judgments rendered by the Hon'ble Supreme Court in the cases of *Meharaj Singh (supra) and State of Punjab Vs. Harbans Singh and another [(2003) 11 SCC 203]*. The para no. 9 of the said judgment is being reproduced hereunder for ready reference:-

"9. It is the prosecution case itself that Darshan Singh who was one of the witnesses to the incident who also helped PWs.4 and 11 to carry the injured to the hospital and remained with them almost right through has not been examined by the prosecution. The explanation given is that he has been won over by the accused. But then it is also to be noted that there were many neighbours also who came to the place of incident but none of them have been examined as witnesses leaving only PWs 4 and 11 as the sole eye- witnesses in this case. Further it is to be noticed that these two witnesses along with Darshan Singh carried both the

injured persons in the vehicle and thereafter helped in carrying the injured persons to the Primary Health Centre but no blood stained clothes were recovered from the possession of these witnesses which also throws considerable doubt about the presence of these witnesses at the time of incident (emphasis laid by us). PW-11 though says that there was a little blood stain on his cloth, he washed the same in the hospital which explanation, in our opinion, is highly artificial. "

28. It has further been submitted that no blood trail was found from the place of incident, which makes the alleged incident doubtful. In support of his submissions, he placed reliance on the judgments passed in the cases of *Meharaj Singh (supra)* and *Bir Singh (supra)* .

29. It has also been submitted that as per the prosecution witnesses, indiscriminate firing was done by the appellants but no one got injured especially when the three daughters of the deceased were sitting along with the deceased. It makes the prosecution case doubtful. In support thereto, he placed reliance in the case of *Harbans Singh (supra)*.

30. Learned counsel for the appellants has next contended that, as per the admitted case of the prosecution that there was an indiscriminate firing but no bullet mark was found either on the furniture in the room or on the walls of the room, where the incident as alleged had occurred. It makes the place of occurrence doubtful. It is an admitted case of the prosecution witnesses that the deceased was wearing a saree at the time of incident but as per the inquest report, she was wearing maxi and there is no explanation for the same. During the cross-examination, the P.W. 2 had stated that he is not aware about the clothes of her sister. It is further

submitted that there is a major contradiction in the statements of PW 1 & 2 as far as the fact that body of the deceased was taken to the Awadh Hospital and inquest was made there. The PW-1 in his examination in chief as well as in cross examination has stated that he took her daughter to the Awadh Hospital where the inquest was done, whereas, PW 2 in his cross examination has stated that the investigating officer along with constable came to the house and made the inquest at 8.00 P.M.. It belies the prosecution story. It is further submitted that there are same contradictions in the statements of Investigating Officer who had given the statement that inquest was prepared in the Hospital which started at till 5.50 P.M. and the statements of PW 2, who had given statement that police came to house and inquest was made at 8.00 P.M.

31. It is further submitted that as per the admitted case of the prosecution that when the appellants along with one unknown person were firing indiscriminately on the daughter of the complainant, she was sitting and could not get up. The said statement does not corroborate with the medical evidence, as in the post mortem report, one gun-shot injury is in upwards direction, which is highly improbable.

32. Learned counsel for the appellants has further submitted that as per the prosecution case, the three sisters of the deceased were accompanied her in the room at the time of incident, they covered her but no one got injured. Their statements was recorded under Section 161 Cr.P.C. and their names were also in the charge-sheet but they were not produced as a

prosecuting witnesses during the trial nor any application for discharge has been moved.

33. On the other hand, learned AGA has submitted that these are the minor contradictions and will not adversely affect the prosecution case. In support thereof, he placed reliance on the judgment of Hon'ble Apex Court rendered in the case of *Bharwada Bhoginbhai Hirjibhai vs State of Gujarat [(1983) 3 SCC 217]* wherein it has been held that discrepancies, which do not go to the root of the matter and shake the basic version of the prosecution, will not vitiate the trial. He further placed reliance on the judgments of the Hon'ble Supreme Court in the cases of *Gangadhar Behra and others Vs. State of Orissa [2003 SCC (Cri) 32]*, *Vinay Kumar Rai and anothers Vs. State of Bihar [2008 CRI. L. J. 4319]*. It has been argued on behalf of the State that it is not necessary to produce all the witnesses, it is the choice of the prosecution to choose and produce the witnesses. It is the quality of the evidence which matters not the quantity. It has lastly been submitted that the defence has been failed to demolish the prosecution case that the prosecution witnesses had not seen the incident and the Court has to separate the grain from the chaff to find out the truth.

34. After hearing the learned counsel for the respective parties and going through the record available, the position which emerges out in the present case is that mere making a statement that appellants made indiscriminate firing and killed her daughter is not sufficient to prove the prosecution case beyond reasonable doubt, especially, when the

prosecution witnesses are close relatives of the deceased. Where the prosecution witnesses are the interested witnesses, their testimonies or statements require close scrutiny, as per the law laid down by the Hon'ble Apex Court in the cases of **Meharaj Singh (supra)**, **Bir Singh (supra)** and **Shaikh Nabab Shaikh Babu Musalman (Supra)**. The para nos. 13 and 15 of the judgment passed in the case of Meharaj Singh (supra) is being quoted hereunder :-

"13. It appears that it was a blind murder and none of the eyewitnesses were actually present at the scene. The ante-timing of the FIR was obviously made to introduce eyewitnesses to support the prosecution case. We may demonstrate this by noticing that though PW 3 Smt Kamlesh the widow of the deceased claimed that she was present with her husband at the time of the occurrence, her conduct was so unnatural that not only she did not try to save her husband by trying to provide a cover but even after her husband fell down and was inflicted repeated injuries with the knife by the appellant Meharaj Singh, she did not even try to go anywhere near her husband and even later on hold his head in her lap and try to provide some comfort to him. This becomes obvious from the absence of any bloodstains on her clothes. She admitted that she had not even received a scratch during the occurrence. In a situation like this,(emphasis laid by us) the normal conduct of any wife would be firstly to make an effort to save her husband even by taking the blow on herself and if that is not possible then at least to go so close to his person, at least after the assailants had left that there would be no escape from the blood oozing out of the injuries of the deceased to come on to her clothes. Similar criticism is also available against Balbir PW 2, Shiv Charan PW 4 and Satkari PW 5. It is not the case of the prosecution that the clothes of any of them had got bloodstained. The very fact that none of these witnesses went to lodge a report and instead left it to the father of the deceased to lodge

the FIR would also go to show that the witnesses in all probability were not present at the spot. The absence of any blood in the field of Kirpal Singh as also the absence of blood trail from the field of Kirpal Singh to the place where the dead body was found, as admitted by PW 8, also suggests that the occurrence did not take place in the manner suggested by the prosecution and that the genesis of the fight has been suppressed from the court.

.....That being the position, it is obvious that the ocular testimony does not fit in with the medical evidence and instead it contradicts it. (emphasis laid by us)"

"15. The alleged eyewitnesses are undoubtedly deeply interested in the prosecution but that by itself cannot be a ground to discard their testimony. It, however, certainly puts this Court on its guard to scrutinise their evidence more carefully and keeping in view their unnatural conduct, as noticed above, it appears to us that none of the alleged eyewitnesses had actually seen the occurrence and they were introduced as eyewitnesses after thoughtful deliberations and consultations. (emphasis laid by us) It appears, that since it was a blind murder, the appellants have been roped in on account of misguided suspicion because of the previous enmity. Our independent analysis of the evidence on the record coupled with the infirmities which we have noticed above has created an impression on our minds, that the prosecution has not been able to bring home guilt to either of the appellants beyond a reasonable doubt. The trial court was, therefore, right in acquitting them and the High Court even after noticing the infirmities, in our opinion, fell in error in convicting the appellants. The reasons given by the High Court, to set aside the order of acquittal do not commend to us. They are neither sufficient nor adequate or cogent much less compelling."

35. The para nos. 8 ,9 and 18 of the judgment passed in the case of **Bir Singh (supra)** are being quoted hereunder for ready reference:-

"8. P.W. Vidya Devi is the daughter of the own uncle of Surajpal Singh and deeply interested. P.W. 4 Roshan Singh is the own brother of Hira Singh who was an accused in a case under Section 307 which was started against him for shooting Sheo Shankar Singh Bhanja a nephew of Ramoo Singh. P.W. Sughar was also a co-accused along with Hira Singh the brother of this witness. It would thus appear that all the eye-witnesses are interested, inimical and belonging to the faction of the deceased and have taken sides with them and against the accused in earlier litigations. The learned Additional Sessions Judge, therefore, rightly thought that it was not safe to rely on the evidence of these witnesses unless their evidence was corroborated by independent witnesses (emphasis laid by us). In this connection it may be noted that in the F.I.R. it is clearly mentioned that while the altercation between Bans Gopal and the accused was taking place Shambhu Bhujwa and Bhikari apart from Roshan Singh had come to the scene of occurrence. Both Shambhu Bhujwa and Bhikari were independent witnesses and bore no animus against the accused. Even from the evidence it would appear that these two persons had seen the entire occurrence."

"9. P.W. 2 Sughar has clearly stated that at the time of altercation Roshan and Bhikari were present at that place. Similarly, P.W. 3 Vidya Devi has stated at page 29 of the paper book that while the altercation was going on Roshan and Bhikari came to the scene of occurrence. Similar is the evidence of P.W. 4 Roshan Singh at page 35 of the paper book where he says that when the altercation was going on Shambhu Bhujwa and Bhikari Khatic were at that time present there. It would thus appear from the evidence of eye-witness that Shambhu and Bhikari were exactly in the same position as the eye-witnesses and yet no reasonable explanation has been given by the prosecution for not examining them. It is true that it was not incumbent on the prosecution to examine each and every witness so as to multiply witnesses and burden the record. This rule however does not apply where the evidence of the

eye-witnesses suffers from various infirmities and could be relied upon only if properly corroborated. In the instant case all the eye-witnesses had serious animus against the accused and they were interested in implicating the accused. The substitution of Ram Dularey Singh in the general diary was a suspicious circumstance. The fact that the police was not able to re-cover any weapon or to explain how the appellants got hold of the guns was yet another circumstance that required a reasonable explanation from the prosecution. According to the finding of the learned Sessions Judge even the F.I.R. was ante-timed and although the High Court has not accepted this finding we feel, that the High Court on this aspect has entered into the domain of speculation. In view of these special circumstances it was incumbent on the prosecution to examine the two witnesses at least to corroborate the evidence and if they were not examined the Sessions Judge was justified in drawing an adverse inference against the prosecution. At any rate it cannot be said that if under these circumstances the Sessions Judge was not prepared to accept the evidence of these witnesses his judgment was wrong or unreasonable. It may be that the High Court could have taken a different view but that by itself as held by this Court is not a sufficient ground for reversing an order of acquittal."

"18. Another important argument advanced by counsel for the appellants is that there is absolutely no evidence to show that there was any blood at the place where P.W. 2 fell down. It was contended that according to the Doctor's version having regard to the injury, blood must have been oozing out. If the blood was there then the Investigating Officer could not have failed to notice the same. The fact that blood at that place was not indicated in the sketch map clearly shows that P.W. 2 did not receive injuries at the place. This is undoubtedly an important aspect which merits serious consideration. The Sessions Judge seems to have commented on the fact that P.W. 2 did not accompany the dead body but in our opinion nothing much turns on that because

P.W. 1 must have been in a hurry to rush to the Police Station and as P.W. 2 was seriously injured, he may not have thought it advisable to carry him. But the fact remains that the prosecution has not been able to show that there was any blood at the place where P.W. 2 fell down which raises a reasonable inference that P.W. 2 may have been assaulted elsewhere and once that is so then the case regarding the assault of the deceased at the place of occurrence also automatically fails because the two incidents are parts of the same transaction.

36. The para no. 6 of the judgment rendered in the case of **Shaikh Nabab Shaikh Babu Musalman (supra)** are being extracted hereunder :-

"6. Both of them did not attribute any other overt act to Appellants 2 to 5. Since both the witnesses are highly interested and partisan, their evidence has to be subjected to a greater scrutiny. In a case of this nature there is a likelihood of false implication and having regard to the version, we find it difficult to accept the evidence of these two witnesses as against Appellants 2 to 5, who are not attributed any overt acts without any further corroboration. It is not necessary in every case there should be such corroboration, but having regard to the part attributed to the Appellants 2 to 5, the possibility of false implication of one or more cannot be ruled out. Therefore, we think it is not safe to convict Appellants 2 to 5. So far as Appellant 1 is concerned, the version of these two witnesses is consistent, namely, that he was the person who inflicted the fatal injury. Therefore, his conviction need not be disturbed. But, however, in view of the fact that he died the appeal abates so far as he is concerned."

37. From the judgments quoted hereinabove, the situation which emerges out in the present case is that the statements of PWs are self contradicting and also do not corroborate with the prosecution story. On

being scrutinized the evidences carefully, it has come out that non disclosure of the facts that whose car was used, what is the number of vehicle, who was driving it, who accompanied the injured to the hospital, absence of trail of blood, the clothes of PW 1 must were not stained with blood, ,which has also not been recovered. The prosecution has put forth a story wherein it has been depicted that there was an indiscriminate firing by three persons but except one empty shell in the room and two bullets found from the body of the deceased. Apart from that, no other pellets and mark was found on the alleged place of occurrence. Thus, while taking into consideration the aforequoted judgments and scrutinizing the evidences, it appears that none of the eye witnesses was present at the time of incident. Further, the inquest report is also doubtful, as after lodging the FIR at 05.25 P.M., the Investigating Officer left the police station at the same time and he first went to the house of the complainant, where he came to know that the complainant took her daughter to the Awadh Hospital and thereafter, he proceeded to the Awadh Hospital and started the inquest at 05.50 P.M.. This prompt action of the Investigating Officer creates doubt over the prosecution story for the reason that the time of lodging the FIR i.e. at 05.25 P.M. and leaving the police station at the same time, as per the entry in the GD, is highly improbable and also that in the FIR, it has been mentioned by the complainant that the body was in the Awadh Hospital, then there was no occasion for the Investigating Officer to go first to the house of the complainant and then come to know there only the body is in the hospital, the Investigating

Officer collected the inquest witnesses. This whole exercise was done only in 25 minutes creates a shadow of doubt over the prosecution story. It is highly improbable especially when there is a statement and record produced by the defence witness-the Manager of the Hospital before the Court that the deceased was never brought to the Hospital, as it is not in there records. Further, the statement of PW-2 that the inquest was conducted at the home at 8 P.M. makes the prosecution story doubtful.

38. It is an admitted case of the prosecution and it is also to be seen as relevant circumstances that they were residing in an EWS house having two rooms and the room in which the incident alleged to be occurred was a very small room and the presence of nine people including the appellants and other unknown person and no one got injured except the daughter of the complainant makes the prosecution story doubtful. The three sisters, who had covered the deceased at the time of alleged indiscriminate firing and as per the statement of PW-1, he reached in the room thereafter, the three sisters would be more natural and competent witnesses of the first part of the story of the assault as compared to the complainant i.e. PW-1. Suppressing these witnesses in the evidences to prove the prosecution case makes the prosecution case gravely doubtful. It is a settled law that the interested witnesses must be scrutinized with more caution and care. No other evidence corroborates with the prosecution story i.e. about the place, time and occurrence of the incident and as per the settled law of the Hon'ble Supreme Court as discussed

hereinabove, the benefit of doubt goes in favour of the accused persons, as the prosecution failed to prove the case beyond reasonable doubt.

39. The very foundation of implicating the present appellants, as per the prosecution case, is that the accused persons including Smt. Kalpana Gupta keeping grudge against the daughter of the complainant (deceased Aparajita) for the reason that husband of Smt Kalpana Gupta said to be married with Aparajita and having son from the said wedlock and on the instigation of Smt. Kalpana Gupta, the appellants murdered the Aparajita whereas Smt Kalpana was acquitted from the charge under Section 120 B IPC so the very foundation of the allegation against the appellants does not stand.

40. There are contradictions in the statement of PW-1 at various stages regarding the marriage of the Ajay Gupta with Aparajita. In the FIR, the Ajay Gupta has been shown as husband of the Aparajita but during the trial the PW-1 has stated that the daughter was living with Sri Ajay Gupta and marriage was not solemnized. There is a contradiction in the statements of PW-1 and 2 pertaining to the marriage as PW -2 during the trial has stated in his cross examination that he is not knowing the facts that whether the Aparajita was married to Ajay Gupta, when the marriage was solemnized and whether they had any child from the wedlock. It makes the prosecution story doubtful.

41. The medical evidence is also not in corroboration with the prosecution case the victim was sitting on the Takht when she was fired at by the accused persons after barging into the room, in so far one bullet

wound is through and through was found to be in upwards direction, which would normally would not be the case while victim is fired at while sitting from a higher level. True the doctor was not asked anything about this aspect of the matter but the facts that as they cannot be ignored to be seen. As the medical evidence does not support the manner of assault on the victim. It also lends support to the defence case, such a wound could not be possible looking to the position of the victim & persons firing her. It does throw a doubt on the truthfulness of prosecution story and result in some doubt about it. The whole picture of the present case except the statement of the PWs, nothing has been corroborated with the other evidences on the record either ocular or documentary evidence and makes the place and time of the incident and presence of eye witnesses doubtful.

42. Learned AGA tried to point out on the defects in the defence taken by the appellants and tried to say that the plea of *alibi* is not correct but in this connection suffice it to say that the prosecution case must stand on its own legs. It cannot sustain on the weakness, if any, in the defence case. As discussed above, it is clear that the prosecution case is highly doubtful & improbable, hence, we hold that the prosecution has failed to prove its case.

(Per Hon'ble Attau Rahman Masoodi, J.)

43. The two significant features of the trial in the present criminal appeal questioning the correctness of conviction and sentence are firstly as to whether cross examination of the star witness Ashok Kumar Gupta, father of the deceased i.e. PW-1 conducted on 26 dates, by any measure,

would amount to torture or oppression as argued by learned counsel for the prosecution while defending the impugned judgement; and secondly as to whether the oral testimony of such an eye witness who fails to prove the vital/major fact as a whole comprising of a chain of events would render the ocular evidence as inadmissible and the residual part would not be regarded as qualifying the benchmark of 'beyond reasonable doubt'.

44. In the present case involving murder of the deceased Aparajita at about 5 pm, PW-1 is relied upon as an eye witness whose presence at the place of occurrence i.e. E-479, Sector-I, LDA Colony, Ashiyana, Lucknow, on 29th August, 2004 of which the FIR was registered at 5.25 pm is essentially the foundation of the conviction and sentence for life. The occurrence was witnessed by other three daughters of the informant (PW-1) viz. Alka Gupta, Anvita Gupta and Anamika Gupta, besides his own son (PW-2), the brother of the deceased.

45. The two accused persons named in the FIR and one unnamed having barged into the house were stated to have indiscriminately fired aiming at the deceased closely from the front who was sitting with her three sisters in the other room of the house where the occurrence took place. The father Ashok Kumar Gupta (PW-1)-the informant who while sitting in the front room had opened the door when knocked by the assailants, did not receive a scratch but was swift enough to take the injured to the nearby hospital, namely, Awadh Hospital by hiring the services of a car, where she was declared as 'brought dead'. Thus, the

ocular evidence of PW-1 was not only restricted to seeing the accused persons firing at the deceased but he was a concomitant witness of taking the injured to hospital single handedly where the injured was found 'brought dead'. The fact that the occurrence took place at the residence after arrival of Aparajita (deceased) on Raksha Bandhan, who was injured and was taken to Awadh Hospital is a chain of events of which the prosecution owes an unimpeachable burden to prove. No other witness except PW-1 is the author of this testimony which according to the prosecution is direct, reliable and proved beyond reasonable doubt.

46. Be it noted that PW-1 was none other than the father of the deceased. The ocular testimony was not corroborated by any other witness of the charge sheet except one, namely, Sachin Gupta (PW-2) who was the son of the informant and real brother of the deceased. Insofar as the examination-in-chief of the main witness placed on record is concerned, PW-1 has deposed the same version as was narrated in the FIR but in the cross examination when his testimony was questioned on the aspect of several probabilities, namely, as to how did the deceased travel to her parental house on the occasion of Raksha Bandhan on 29.8.2004, whether any other person present alongwith the injured received any fire arm injury or whether there was any trace of the use of fire arms on the walls, floor, on the unpierced clothes of deceased or on the body of any other person present alongwith the deceased, the evidence led by the prosecution is unconvincing and dissatisfactory. Not a drop of blood

much less than trail was found in between the place of occurrence upto the point connecting transport of the injured body to the Awadh Hospital. The prosecution on such a vital aspect of the matter failed to fill up the gaps through any corroborative evidence-forensic, recovery or any site plan. What is most surprising is that the witness kept the prosecution clueless about the manner in which Aparajita (deceased) had travelled to the parental house on 29.8.2004 and as to how her injured body was brought to the Awadh Hospital. The investigating officer took no pain to collect any information from the neighbourhood and fill up the gaps except collecting sample of the blood stained floor showing no trace of a drop of blood in the site plan at any other place in between the place of occurrence and from where the injured was transported to Awadh Hospital. The unpierced clothes recovered on the body of injured offered no support to indiscriminate firing. The ocular evidence has a primacy over the corroborative evidence. The latter plays role of strengthening the weight of direct evidence, therefore, the burden to prove the direct evidence was a fundamental duty of the prosecution by establishing a clean nexus between arrival of Aparajita (deceased) at the place of occurrence on 29.8.2004 and then taking her injured body to Awadh Hospital where she was declared brought dead and lastly to the Government Hospital where post mortem was conducted.

47. The cross examination of PW-1 in the present case has certainly taken place from 16.2.2006 to 20.4.2006 almost on alternate days but the

record available before this Court does not reveal that the prosecution at any point of time had objected to any question put to the witness which might have been irrelevant or oppressive. The defence through cross examination is a rule of fairness of which the boundaries will differ from case to case and the nature of evidence relied upon by the prosecution. In the present case, however, the Court is not taken through any question or suggestion during cross examination, of which the relevance was objected or the same was forbidden in the eye of law. Rule of fairness is the bedrock of faith in any judicial system and the courts of law are duty bound to associate with this process effectively.

48. This Court has carefully gone through the oral testimony of PW-1. It is more than evident that the witness in his cross examination has firstly evaded revealing full facts with respect to the arrival of Aparajita (deceased) on Raksha Bandhan i.e. 29.8.2004 when the occurrence took place; and secondly, the testimony as regards the transport of injured to Awadh Hospital is completely blank and the questions were sidetracked by the witness in oblivion. Failure of Investigating Officer to collect any information from densely populated neighborhood was a clear abuse of investigation once he acted so promptly as is evident from the record. The credibility of such a testimony by any stretch of imagination does not satisfy the standard of beyond reasonable doubt unless the material gaps were filled by the investigation. The case of the prosecution had no legs to stand irrespective of the fact how strong the corroborative evidence

collected by the investigation was claimed to be. Moreover, the unnamed person in the FIR could not be traced at all.

49. The trial court while dealing with the evidence of PW-1, has drawn overreaching conclusions both on the aspect of arrival of the deceased at the place of occurrence and her transport as injured to Awadh Hospital. The conclusions drawn by the trial court on these two vital facts for want of a definite stand of the witness (PW-1) belie his residual testimony. Thus, the judgement impugned heavily relying upon the direct evidence of PW-1 is erroneous, perverse and shocking to the conscious of justice. A witness whose testimony is tainted must be visited with a consequence but the issue is left open in an appropriate case.

50. Having had the privilege of going through the judgement authored by my esteemed brother, Manish Kumar, J. I fully concur with the reasoning, position of law and the conclusions drawn. The testimony of PW-1 being the main witness was peculiar hence deemed proper to be dealt with in the light of what has been recorded above.

51. For the reasons given and discussions held in the judgment as above, we hold that the prosecution case is not proved and the conviction of the appellants and the sentence awarded by the trial court is not sustainable.

52. The appeals are thus, ***allowed*** and the judgment and order dated 23.04.2008 sentencing and convicting the appellants i.e. Vishal Gupta and Alok Gupta under Sections 302 read with Section 120-B IPC is

hereby set aside. The appellants, who are in jail shall be released and set free forthwith, if not wanted in any other case.

53. A copy of this judgment shall be kept in the record of Criminal Appeal No. 1479 of 2008 as well as in Criminal Revision No. 294 of 2008.

Order Date:- 01.12.2021

Ashish/Fahim/-