

with 120B, 307 read with 120B, 148, 302 read with 149, 307 read with 149 of IPC and Kanhaiya Singh, Bans Narain Singh, Narendra Singh, Mahendra Singh, Loknath Singh, Vijai Singh and Musafir Singh of the offence u/s 302 read with 120B and 307 read with 120B of IPC and Rakesh Singh and Vakil Singh of the offence u/s 25 of the Arms Act.

2. Brief facts of the case are that in regard to the incident that occurred in the night intervening 9/10 January, 1986, FIR (Ex.Ka-30) was lodged by PW-1 (Smt. Hirawati), resident of village Sikraura, Police Station Balua, alleging in it that on the fateful night at about 11:30 pm, when she was feeding her child, accused Pancham Singh and Devendra Pratap Singh gained entry in the house from the roof top; seeing them, she screamed and opened the door and ran outside. Two other accused persons namely, Vakil Singh and Rakesh Singh along with four other unnamed persons, were present outside carrying *gandasa*, country-made pistols and *karauli* (sharped edged weapon). It is further alleged that accused Pancham Singh and Devendra Pratap Singh were having guns and country-made pistols with them. She has alleged that there was an old enmity between deceased Ram Chandra Yadav and accused Kanhaiya Singh with regard to *Pradhani* election and land dispute. At the time of incident, her sons namely, Madan, Tuntun, Umesh and Pramod were sleeping next to each other, and her husband had returned from Banaras at 10:00 pm. Accused Pancham Singh and Devendra Pratap Singh caused gunshot injuries to Ram Chandra Yadav, resulting in his instant death and other six accused (two named and four unnamed) caused injuries by guns, *gandasa* and *karauli* to her four sons and two brother-in-laws (*devars*), resulting in their instantaneous deaths on the spot.

In the said incident, Sharda Devi, daughter of the informant and Mumtali, her niece, also suffered gunshot injuries. They were taken to the hospital by the villagers for treatment. Accused persons, after committing the crime, fled away from the spot.

FIR of the said incident was registered as Case Crime No. 28 of 1986 U/ss 147, 148, 149, 302, 380 IPC on 10.4.1986 at 1:55 am against

four named (Pancham Singh, Devendra Pratap Singh, Vakil Singh and Rakesh Singh) and four unnamed persons. After conducting the inquest on the dead bodies, the same were sent for postmortem, which was conducted on 11.4.1986, vide Ex.Ka-21 of deceased Ram Chandra Yadav, Ex.Ka-22 of deceased Ram Janma, Ex.Ka-23 of deceased Siya Ram Yadav, Ex.Ka-24 of deceased Madan Yadav, Ex.Ka.-25 of deceased Umesh Yadav, Ex.Ka.-26 of deceased Tuntun Yadav and Ex.Ka.-27 of deceased Pramod Kumar.

After concluding the investigation, charge sheet was filed against 14 persons, namely Pancham Singh, Vakil Singh, Devendra Pratap Singh, Rakesh Singh, Brijesh Kumar Singh @ Veeru Singh, Kanhaiya Singh, Bans Narain Singh, Ram Das Singh @ Dina Singh, Musafir Singh, Vinod Kumar Pandey, Mahendra Pratap Singh, Narendra Singh, Loknath Singh and Vijai Singh u/s 147, 148, 307, 149, 302, 457, 380, 120B IPC. Charge sheet was also submitted against Vakil Singh and Rakesh Singh u/s 25 of Arms Act.

3. The trial Court framed charges against accused Pancham Singh, Vakil Singh, Devendra Pratap Singh, Rakesh Singh, Brijesh Kumar Singh @ Biru Singh, Vinod Kumar Pandey, Ram Das alias Dina Nath Singh on 26.4.1988 u/s 148, 302/149, 307/149 of IPC. Against Kanhaiya Singh, Bans Narain Singh, Narendra Singh, Mahendra Singh, Loknath Singh, Vijai Singh and Musafir Singh, charge was framed on 26.4.1988 u/s 302/120B and 307/120B of IPC. On the same day, against accused Brijesh Kumar Singh, charge was framed u/s 25 (1) (b) of Arms Act; against accused Rakesh Kumar Singh, charge was framed u/s 25 (1) (b) of Arms Act; and against accused Vakil Singh, charge was framed u/s 25 (1) (a) of Arms Act. Against accused Pancham Singh, Vakil Singh, Devendra Pratap Singh, Rakesh Singh, Vinod Kumar Pandey and Ram Das @ Dina Nath Singh, charge was framed u/s 302/120B and 307/120B IPC on 6.3.1990.

4. So as to hold accused-respondents guilty, prosecution has examined 12 witnesses, whereas two defence witnesses have also been

examined. Statements of accused respondents were also recorded u/s 313 Cr.P.C. in which, they pleaded their innocence and false implication.

During trial, accused Vinod Kumar Pandey expired and accused Brijesh Kumar Singh absconded. Since accused Brijesh Kumar Singh absconded after getting parole, his trial was separated and was numbered as Sessions Trial No. 55A of 1987. Later, accused Brijesh Kumar Singh was arrested by the Delhi Police on 23.01.2001 and Sessions Trial No. 55A of 1987 was conducted against him.

5. By the impugned judgment, the trial court, after considering all the evidence, has acquitted accused-respondents, namely Pancham Singh, Vakil Singh, Devendra Pratap Singh, Rakesh Singh, Ram Das alias Dina Singh, Kanhaiya Singh, Bans Narain Singh, Narendra Singh, Mahendra Singh, Loknath Singh, Vijai Singh and Musafir Singh of all the offences. Hence this appeal by the State.

During the pendency of this appeal, accused respondent no.7-Bans Narain Singh, respondent no.9-Mahendra Singh and respondent no.11-Loknath Singh died on 11.2.2019, 20.10.2019 and 18.4.2022 respectively.

6. Learned counsel for the appellant-State submits:

- (i) that a prompt FIR was lodged in the present case;
- (ii) that during trial, eye witness Heerawati (PW-1) and injured eyewitness Sharda (PW-2) have duly supported the prosecution case and their versions are consistent, yet the trial court has disbelieved their statements on the basis of minor contradictions which the trial court has presumed itself. The eyewitnesses have categorically deposed as to the manner in which, seven persons were brutally done to death by the accused persons (four named and four unnamed);

- (iii) that there was no reason for the trial court to disbelieve the statements of PW-1 and PW-2. Minor contradictions, if any, are required to be ignored as both these eyewitnesses are rustic villagers;
- (iv) that the postmortem report of the seven deceased clearly support the statements of eyewitnesses, in particular, the mode and manner of assault. It is not the case of defence that some third person has gained entry in the house of the deceased persons and committed the offence. In fact, there was no specific defence, which was taken by the accused persons, to get themselves acquitted. There is absolutely no evidence on record to show as to why the witnesses would falsely implicate as many as twelve accused persons and would falsely depose against them;
- (v) that motive for commission of the offence is clear, as there was prior enmity between the victims and accused persons with regard to Pradhani election and land dispute.
- (vi) that the statements of PW-1 Smt. Heerawati and PW-2 Smt. Sharda Devi are intact;
- (vii) that presence of PW-1 Smt. Heerawati and PW-2 Smt. Sharda Devi, at the place of occurrence at the particular time, is not doubtful;
- (viii) that date, time and manner of assault has not been challenged by the defence;
- (ix) that the findings recorded by the Trial Court in acquitting the accused persons are totally perverse and contrary to the settled proposition of law;

7. On the other hand, supporting the impugned judgment, Shri Manish Tiwary, learned Senior Counsel assisted by Sri Atharva Dixit appearing for the accused-respondents, submits:

- (i) that a very unnatural story has been put forth by the prosecution, where it is alleged that out of four named accused persons, two have gained entry in the house from the rooftop and committed the offence;
- (ii) that question of brutality by the accused persons, while committing the offence, has not been proved by the prosecution;
- (iii) that if, as alleged, number of 14 accused persons would have assaulted the deceased the result of the same would be different and most important fact is that if the offence is committed in a manner as alleged, no prudent person can see the occurrence and he/she either run away from the spot or would hide himself/herself in a safe place;
- (iv) that there is absolutely no evidence on record as to how the weapons have been used by the accused persons;
- (v) that the postmortem reports of the deceased do not tally with the oral versions of the eye-witnesses;
- (vi) that normally, a conviction can be held on the basis of ocular evidence but the basic requirement is that evidence should inspire confidence of the Court and should be beyond all the reasonable doubt;
- (vii) that P.W.-1 Smt. Heerawati and P.W.-2 Smt. Sharda Devi have come with a version that before Prabhu Narain Yadav, scribe of the written report, came on the scene, they do not utter a single word about the identity of the assailants to anyone and Prabhu Narain Yadav, scribe of the written report, is a resident of a different village and his presence, at the place of occurrence at that point of time, is highly

improbable, therefore, the story of the prosecution that it was a case under Section 302 I.P.C. does not seem to be tenable and the Trial Court has rightly discarded their versions;

- (viii) that P.W.-3 Suresh (wrongly transcribed as Mahesh) in his deposition has clearly stated that on 09.04.1986, a dacoity took place at the house of deceased Ram Chandra Yadav and the Investigating Officer did not inquire anything from him, but questioned some of the co-villagers;
- (ix) that it was in fact a case of dacoity, but later converted it into a case under Section 302 I.P.C.;
- (x) that each and every inquest report of the deceased contains Section 396 I.P.C., which is later turned into Section 380 I.P.C. Every inquest report also contains a slash (/) and Section 147, 148, 149 and 302 I.P.C. were added;
- (xi) that scoring out such entries and adding something in the inquest report, demolishes the case of the prosecution;
- (xii) that P.W.-1 Smt. Heerawati and P.W.-2 Smt. Sharda Devi have categorically stated that they have visited several jails to identify the accused. However, the test identification parades were not made in accordance with law;
- (xiii) that witnesses of the inquest and other police paper say that their signatures were obtained over a period of one week;
- (xiv) that there are three sets of accused – four named, four not named and four conspirators. Second part of Section 120A I.P.C. clearly mandates that in furtherance of part of the talks, if there is no further action, then it cannot be termed as a conspiracy. There is no proof of the fact that they were in touch with the accused persons;
- (xv) that the learned Magistrate, who conducted the test identification parade has not been examined; and

(xvi) that the Trial Court has disbelieved the statements of the prosecution witnesses for right reasons and the prosecution story does not inspire confidence.

(xvii) that interference of the Court in the appeal against acquittal is very limited and it is a settled proposition of law that if two views of the evidence are reasonably possible, one supporting the acquittal and other indicting conviction, the High Court, should not in such a situation, reverse the order of acquittal recorded by the trial court.

8. We have heard the leaned counsel for the parties and perused the record.

9. P.W.-1 (Smt. Heerawati) is wife of deceased Ram Chandra and the first informant. She has stated that Ram Janam and Sitaram were her brother-in-law (Devars), Madan, Umesh, Tuntun and Pramod (all minors) were her sons, Sharda is her daughter whereas Multali is her niece. In the incident, Sharda (P.W. 2) and Multali also suffered injuries. Duija was wife of Ram Janam and in relation she was her sister-in-law (Devrani). She has described the map of her house and has stated that there is a courtyard inside the house and one ladder on the north side. She has further stated that she knew the accused Kanhaiya singh who is a resident of her village. Likewise, accused Pancham Singh is son of accused-Kanhaiya Singh. She also knew accused Vakil Singh from before, who is also related to accused Kanhaiya. She is also acquainted with accused Pancham, Devendra and Rakesh. Thus, according to her, all five accused persons were known to her. She has stated that there was old enmity between accused Kanhaiya and her husband with regard to land and election of Pradhan. She has given description of various incidents between the two families. On the date of occurrence, her brother in law Siyaram, who was sleeping inside the house, Ram Janam, her brother in law was sleeping outside whereas her sons Madan, Tuntun and Ramesh were sleeping on the same cot whereas her son Pramod was sleeping in a separate cot near the door. Her husband was working as a contractor. On

the date of incident, after returning to house, he informed her that he is having Rs. 10000/- in his pocket. She replied that let the money remain in Kurta and the said Kurta was then hung on the wall. He took his dinner and slept on the cot of Pramod. She has further stated that inside the house a lantern was burning/lightening and as soon as her husband had gone to sleep, she closed the door. While she was feeding her child at about 11:30 pm she saw that accused Pancham Singh and Devendra were coming down from stairs and after seeing them, she shouted. Upon hearing her cries her husband and brother-in-law woke up, likewise, Pancham and Devendra also came out from the house, Pancham was having gun in his hand whereas Devendra was having country-made pistol. Pancham exhorted to eliminate the entire family and ensure that nobody survives. Outside the house, accused Vakil and Rakesh and four others were assaulting the other family members, Vakil was having country-made pistol whereas Rakesh was having 'Karauli'. The other four unknown persons were carrying 'Gandasa' and other weapons. When her husband tried to run away towards east and thereafter towards south, accused Devendra and Pancham caused gun shot injury upon him, as a result of which he fell down. She stated that accused Vakil also gave a blow of country-made pistol on the temple of her husband. While accused persons were running away, she and her husband raised their voice and hearing upon the same, Rama, Gajraj, Faujdar and others reached at the place of occurrence. Likewise, Sharda and Multali also reached there and both of them sustained injury. She states that accused persons were chased by the villagers and, her daughter and niece (injured) were taken to hospital by some of the villagers. She further states that when she checked the Kurta of her husband, she found that the money was missing. She further states that when accused persons fled away from the place of occurrence, Prabhu Narayan (scribe of the written report) and Ram Ji came to her house to whom she narrated the entire incident, thereafter, on her narration, Prabhu Narayan prepared the written report. She further states that it is Ram Ji who took the report to

the police station and after half an hour Sub Inspector came to her house along with two arrested persons, out of whom, one was accused Rakesh and another person, whose name was disclosed in her house by the Police as Brijesh Kumar Singh.

After pointing out towards Rajendra Pandey and Devendra she identified both of them inside the Jail. She stated that incident took place in the night and in the courtyard of the house, a lantern was burning/lightening and she saw the incident in the torch light.

In the cross-examination she happens to be a shaken witness at various places and also appears to be confused. She states that Prabhu Nath came to her house after 10-15 minutes of the incident. She states that she narrated the events to Prabhu Narayan, who prepared the written report. She also presumed that Prabhu Narayan was having paper and pen because neither she nor any person of her village had given the paper and pen to him. She also does not remember under which light Prabhu Narayan had written the report. She further states that after half an hour of the incident, Sub Inspector came to her house along with constables and two accused persons also and out of two accused persons, one was having injury on his person, but she does not know his name. She also states that when Sub Inspector along with constables and two accused persons came to her house, Sub Inspector and constables were having 'Gandasa', apart from their weapons.

She categorically stated that when Sharda and Multali were on the roof they did not receive any gun shot injury and when they came down from the roof they received gun shot injury. She states that at the time of narrating the incident to Prabhu Narayan, she informed him that Pancham told that bastard Ram Chandra is still alive. Thereafter, accused Vakil caused gun shot injury by a country-made pistol on the temple of Ram Chandra and Rakesh assaulted him with a Karauli. If this fact has not been mentioned in the report, she does not tell the reasons. She states that the four persons to whom she does not know were having country-made pistol, gun, 'Karauli' and 'Gandasa' in their hands and these four persons

were beating her husband by these weapons. She also states that she has mentioned the name of accused Rakesh in the report, who belongs to her village and used to come to the house of Kanhaiya, who was known to her from before and if this fact is not mentioned in the report, she does not tell the reason.

She states that she does not know how many gun shots were fired upon her sons and brother-in-laws. Her three sons were sleeping on a cot and she did not see from which side Vakil Singh opened fire. She also states that she narrated in her report that Vakil Singh caused gun shot injury to her husband but if this fact is not mentioned in the report, she does not tell the reason. She has also mentioned in the report that Vakil Singh has caused death of her husband, if this fact is not mentioned in the report, she does not tell the reason.

10. P.W.-2 (Sharda Devi) is an injured eye-witness. She states that Ram Chandra was her father, Siyaram and Ramjanam were her uncles whereas Pramod, Madan, Umesh and Tuntun were her brothers. On the date of incident, she was sleeping on the roof along with daughter of her aunt (Fuwa) namely, Multali. At about 11:30 in the night, on hearing the cries of her mother Heerawati, she and Multali woke up and saw that accused Pancham and Devendra were chasing her father. Accused Pancham was having a gun in his hand whereas accused Devendra was having a country-made pistol. Her mother was running behind them having a torch in her hand and was crying. The accused Pancham shouted that all family members should be eliminated and to ensure that no body was left alive. She knows accused Pancham and Devendra from before. After seeing and hearing this, she and Multali came down from the roof and reached near the well and saw her father running. Accused person were assaulting her uncle and brothers, who were sleeping in the hut with 'Karauli', country-made pistol and 'Gandasa'. When her father rushed towards south of hut, accused Pancham and Devendra opened fire upon him, as a result of which he fell down. Then accused Pancham said that the bastard is still alive then accused Vakil Singh caused gun shot injury

from point blank range on the temple of her father and Rakesh caused injury by 'Karauli'. She knew Rakesh and Vakil since before. She also states that apart from accused Pancham, Devendra, Vakil and Rakesh, there were four other accused persons, who were also assaulting her family members. At the time of occurrence, villagers reached there carrying torch-lantern in their hands and after seeing them, the accused persons fled away towards north and thereafter, east and while running away, accused Pancham and Devendra fired at her and Multali due to which both of them suffered injuries. Thereafter, both of us were taken to Chahaniya hospital by the villagers from where they were shifted and admitted in Kabir Chaura Hospital. She has witnessed the entire incident in the light of torch and accused Pancham and Devendra while making escape, fired upon her due to which she and Multali sustained gun shot injury. Thereafter, both of them were brought to the hospital by the villagers.

In her cross-examination, she has stated that after eight days of the incident, the investigating officer recorded her statement wherein she has stated that she has passed B.A. and at the time of recording her statement, she described the appearance of the accused to the I.O. but if this fact is not recorded by the I.O., she does not tell the reason. Further, this witness remained firm in stating the entire incident, except some minor contradictions.

11. P.W. 3 (Suresh) (wrongly transcribed as Mahesh) is a villager, in his deposition, has stated that he knows very well Kanhaiya Singh, Loknath Singh, Vijai Singh, Vans Narain Singh, Narendra Singh, Mahendra Singh. He also stated that on 09.4.1986 a dacoity took place at the house of victim Ram Chandar Yadav, thereafter, the Investing officer questioned some of the co-villagers but did not enquire anything from him.

In his cross-examination, this witness turned hostile.

12. P.W. 4 (Ram Dhiraj) is a villager, in his deposition, states that on the date of incident, he was sleeping in his 'Khalihan' and on hearing cries and noises, he woke up and reached at the spot. He further states that he does not see as to which accused was having which weapon. He states that he also saw Ram Chandar, Ram Janam, Siya Ram and sons of Ram Chandar lying dead. He further states that he did not see that the villager were chasing the accused persons. The villagers caught accused Brijesh Kumar Singh and brought him to the police station.

In his cross-examination, this witness turned hostile in toto.

13. P.W. 5 (Basant Lal) is also a villager and a witness 'Panchnama'. He has proved his signature on 'Panchnama'. Nothing could be elucidated from him.

14. P.W. 6 (Kanhaiya) is a neighbour of deceased Ram Chandar and also a witness of 'Fard Supurdgi' of lantern as Ex. Ka. 19 & 20.

15. P.W. 7 (Kashinath) is a villager and has stated that he has gone to civil court on 09.04.1986 in relation to case and saw that in front of CJM Court, below a tree, there were persons sitting and were discussing that they have hatched a conspiracy to eliminate the entire family of Ram Chandar Yadav.

16. P.W. 8 (Dr. C.B. Tripathi) is an autopsy surgeon and has proved the postmortem reports.

17. P.W. 9 (Dr. A.K. Gupta) has proved the injury report of P.W. 2 Sharda Devi and Multali as Ex. Ka 28 & 29 respectively. He examined P.W. 2 Sharda Devi at 4.15 a.m. and Multali at 4.30 a.m. on 10.04.1986.

18. P.W. 10 (Ram Lakhan) was Head Muharrir and prepared Chik FIR vide Ex. Ka 30.

19. P.W. 11 (Suryabhan Rai) was the SHO of P.S. Balua and first investigating officer of the case. On the date of incident, he was posted at P.S. Balua and started investigation of this case from 10.04.1986. He further states that on the date of incident, while he was patrolling he saw

a person running towards canal and thereafter, he chased him and on being asked, the person disclosed his name as Rakesh who was carrying a bloodstained 'Karoli' in his right hand. Thereafter, when he reached near the canal, also saw a person lying near the canal, who has an injury in his leg and blood was oozing. On being asked, injured person disclosed his name as Brijesh Kumar Singh @ Biru and also disclosed that he is coming after killing the entire family of Ram Chandar Pradhan of village Sikraur. He also states that he has also recovered a 'Farsa' from Brijesh and 'Karauli' from Rakesh and prepared 'Fard' and put his signature.

In cross-examination, this witness remained firm.

20. P.W. 12 (Ram Prasad) was Sub Inspector at P.S. Balua at the relevant time and was a witness of recovery of country made pistol recovered from accused Vakil Singh.

21. D.W. 1 (Sitaram Yadav) has stated that around 15 years back at about 5.00 a.m. in the morning, when he was going for 'Darshan' of 'Kina Ram Baba', on the way, he saw accused Rakesh Singh was being taken by two Constables and on being asked, where he is being taken, the Constables stated that Sub Inspector has called him. The Jeep was stationed at the school. Accused Rakesh Singh was put inside the Jeep by the two Constables. Next day, he came to know that Rakesh has been falsely implicated in the case.

22. D.W. 2 (Shobha) has stated that around 15-16 years back, there was a dacoity in the house of Ram Chandra Yadav. As his house is in front of the house of Ram Chandra Yadav, in the same lane, he woke up and saw the dacoits committing the offence. He further states that no one of the village was involved in the offence and outsiders may have involved to whom he did not identify.

In the cross-examination, he stated that there was enmity between Ram Chandra Yadav and Pancham & others.

23. Close scrutiny of the evidence makes it clear that there is sufficient material against accused Pancham Singh, Vakil Singh, Devendra Pratap

Singh and Rakesh Singh. P.W. 1 (Heerawati) and P.W. 2 (Sharda Devi) have categorically stated as to the manner in which, these accused persons have committed the offence. Though there appears to be some doubt regarding presence of these accused persons at the place of occurrence, but as per P.W. 1, she knew all of them from before and had given sufficient evidence to this effect.

24. In the court statement, P.W.-1 Smt. Heerawati has stated that Ram Janam and Sitaram were her brother-in-law (Devars), Madan, Umesh, Tuntun and Pramod (all minors) were her sons, Sharda is her daughter whereas Multali is her niece. She has further stated that she knew the accused Kanhaiya Singh, who is a resident of her village. Likewise, accused Pancham Singh is son of accused-Kanhaiya Singh. She also knew accused Vakil Singh from before, who is also related to accused Kanhaiya. She is also acquainted with accused Pancham, Devendra and Rakesh. Thus, according to her, all five accused persons were known to her. She has stated that there was old enmity between accused Kanhaiya and her husband with regard to land and election of Pradhan. She has given description of various incidents between two families. She has further stated that on the date of occurrence, her brother in law Siyaram was sleeping inside the house and Ram Janam, her another brother-in-law was sleeping outside, whereas her sons Madan, Tuntun and Umesh were sleeping on the same cot whereas her another son Pramod was sleeping in a separate cot near the door. Her husband was working as a contractor. On the date of incident, after returning to house, her husband informed her that he is having Rs. 10,000/- in his pocket, however, she replied that let the money remained in Kurta and the said Kurta was put on the wall. He took his dinner and slept on the cot of Pramod. She has further stated that inside the house, a lantern was burning/lightening and as soon as her husband had gone to sleep, she closed the door. While she was feeding her child at about 11:30 pm, she saw that accused Pancham Singh and Devendra were coming down from stairs and after seeing them, she shouted. Upon hearing her cries, her husband and brother-in-law woke

up, likewise, Pancham and Devendra also came out from the house, Pancham was having gun in his hand, whereas Devendra was having country-made pistol. Pancham exhorted to eliminate the entire family and ensure that nobody survives. Outside the house, accused Vakil and Rakesh and four others were assaulting the other family members, Vakil was having country-made pistol and Rakesh was having 'Karauli'. The other four unknown persons were carrying 'Gandasa' and other weapons. When her husband tried to run away towards east and thereafter towards south, accused Devendra and Pancham caused gun shot injury to him, as a result of which he fell down. She stated that accused Vakil also gave a blow of country-made pistol on the temple of her husband. While accused persons were running away, she and her husband raised their voice and hearing upon the same, Rama, Gajraj, Faujdar and others reached to the place of occurrence. Likewise, Sharda and Multali also reached there and both of them were attacked and sustained injuries. She states that accused persons were chased by the villagers and, her daughter and niece (injured) were taken to hospital by some of the villagers. She further states that when she checked the Kurta of her husband, she found that the money was missing.

25. We find substance in the argument of the appellant that the trial Court has wrongly discarded the statements of eyewitness Heerawati (PW-1) and injured eyewitness Sharda (PW-2) who have duly supported the prosecution case and have categorically deposed as to the manner in which, seven persons were brutally done to death by the accused persons of the present case. Though there are some minor contradictions in the statements of witnesses, the same are required to be ignored considering the fact that they are rustic villagers and their statements were recorded after lapse of a considerable period.

26. We find no substance in the argument of the defence that a very unnatural story has been put forth by the prosecution. In their statements, PW-1 (Heerawati) & PW-2 (Sharda) have categorically deposed as to the

manner in which seven persons were brutally done to death by the accused persons in the present case.

27. In the present case, even identification parade has not been conducted in accordance with law and thus, except four accused persons, namely Pancham Singh, Vakil Singh, Rakesh Singh and Devendra Pratap Singh, involvement of other accused persons namely, Ram Das @ Dina Singh, Kanhaiya Singh, Narendra Singh, Vijay Singh, Musafir Singh has not been proved by the prosecution in accordance with law.

28. This conclusion of ours is guided by the basic and well-settled principles of appreciation of evidence which, the Apex Court in the case of **Balu Sudam Khalde & Anr. vs. State of Maharashtra**, (2023) SCC Online SC 355, has summarized as principles of appreciation of ocular evidence in a criminal case, which reads as under:

“APPRECIATION OF ORAL EVIDENCE. The appreciation of ocular evidence is a hard task. There is no fixed or straight-jacket formula for appreciation of the ocular evidence. The judicially evolved principles for appreciation of ocular evidence in a criminal case can be enumerated as under:

“I. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the Court to scrutinize the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief.

II. If the Court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the Trial Court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details.

III. When eye-witness is examined at length, it is quite possible for him to make some discrepancies. But Courts should bear in mind that it is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the Court is justified in jettisoning his evidence.

IV. Minor discrepancies on trivial matters not touching the core of the case, hyper technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole.

V. Too serious a view to be adopted on mere variations falling in the narration of an incident (either as between the evidence of two witnesses or as between two statements of the same witness) is an unrealistic approach for judicial scrutiny.

VI. By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.

VII. Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.

VIII. The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind whereas it might go unnoticed on the part of another.

IX. By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.

X. In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such

matters. Again, it depends on the time- sense of individuals which varies from person to person.

XI. Ordinarily, a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.

XII. A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross examination by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him.

XIII. A former statement though seemingly inconsistent with the evidence need not necessarily be sufficient to amount to contradiction. Unless the former statement has the potency to discredit the later statement, even if the later statement is at variance with the former to some extent it would not be helpful to contradict that witness.”

29. In view of the aforesaid and also considering the overall facts and circumstances of the case, we are of the view that the acquittal of four accused persons namely, Pancham Singh, Vakil Singh, Rakesh Singh and Devendra Pratap Singh, is not in accordance with law and while acquitting them, the trial court has erred in law.

30. Accordingly, the present appeal is **partly allowed**.

31. The acquittal of aforesaid four accused namely, Pancham Singh, Vakil Singh, Rakesh Singh and Devendra Pratap Singh, is set aside. They are convicted under Section 302 read with Section 34 of IPC and Section 307 read with Section 34 of IPC and sentenced to undergo life imprisonment, with a fine of Rs.50,000/- each under Section 302/34 of IPC, in default of payment of fine, they shall undergo one year additional imprisonment and to undergo rigorous imprisonment of 10 years, with a fine of Rs.25,000/- each under Section 307/34 of IPC, in default of

payment of fine, they shall undergo six months additional imprisonment. They be taken into custody forthwith and be sent to jail for serving the sentences.

32. So far as the remaining alive accused persons namely, Ram Das @ Dina Singh, Kanhaiya Singh, Narendra Singh, Vijay Singh, Musafir Singh are concerned, the evidence against them is not clinching and sufficient to hold them guilty for committing the murder of the deceased persons and applying the settled principle of law that, if two views are possible on evidence adduced in the case, one binding to the guilt of the accused and the other is to his innocence, the view which is favourable to the accused, should be adopted.

A bare perusal of the entire evidence available on record, it is clear that the trial Court has wrongly acquitted the aforesaid four named accused persons, namely, Pancham Singh, Vakil Singh, Rakesh Singh and Devendra Pratap Singh, giving them benefit of the evidence adduced by the prosecution against the aforesaid alive acquitted accused persons, namely, Ram Das @ Dina Singh, Kanhaiya Singh, Narendra Singh, Vijay Singh, Musafir Singh.

In this view of the matter, the appeal filed by the State against the acquittal of accused persons, namely, Ram Das @ Dina Singh, Kanhaiya Singh, Narendra Singh, Vijay Singh and Musafir Singh, is **dismissed**, being devoid of merits, and their acquittal is affirmed.

JUDGMENT/ORDER

IN

Government Appeal No.856 of 2018

State of Uttar Pradesh ---- Appellant

Vs

Brijesh Kumar Singh ---- Respondent

For Appellant : Sri P.C. Srivastava, Additional
Advocate General, assisted by

Sri Amit Sinha & Sri J K Upadhyay
AGA.

For Respondents : Sri Surendra Singh, Senior
Advocate assisted by Sri Kapil
Pathak, Advocate.

WITH:

Criminal Appeal u/s 372 Cr.P.C. No. 369 of 2018

Smt. Heerawati ----- Appellant/complainant

Vs

1. State of U.P.

2. Brijesh Kumar Singh ----- Respondents

For Appellant : Sri Dileep Kumar, Senior Advocate
assisted by Sri Devendra Kumar
Upadhyay, Advocate and Sri
Ajay Srivastava.

For Respondents : Sri Amit Sinha, AGA
(for respondent no.1)
Sri Surendra Singh, Senior
Advocate
(for respondent no. 2)

Order on

Criminal Misc. Application No.7 of 2023 (U/s 391 of Cr.P.C.)

In re:

Criminal Appeal u/s 372 Cr.P.C. No. 369 of 2018

1. In the midst of hearing of this appeal, present application has been filed under Section 391 of Cr.P.C. on behalf of the appellants/complainant in Criminal Appeal No. 369 of 2018, seeking following relief:

“It is, therefore, most respectfully prayed that this Hon’ble Court may kindly be pleased to allow this application and take the evidence of PW-11 Suryabhan Rai – Station Officer and first Investigating Officer, in the proceeding of Sessions Trial Nos. 55, 56 and 57 of 1987 – State Vs. Pancham and

others, which is available on the record of Government Appeal No. 5588 of 2002 – State of Uttar Pradesh Vs. Pancham and 11 others, in the present Appeal Against Acquittal No. 369 of 2018 – Smt. Heerawati Vs. State of Uttar Pradesh & Brijesh Kumar Singh, filed by the applicant/complainant/first informant and after considering the said evidence, the present appeal may be finally decided, in accordance with law, or pass any other order, which this Hon’ble Court may deem fit and proper under the circumstances of the present case, failing which the applicant/complainant/first informant, shall suffer irreparable loss and injury for no fault on her part.”

2. To consider and decide the aforesaid application, it would be apposite to extract the provisions of Section 299 of Cr.P.C., which reads as under:

“299. Record of evidence in absence of accused.-(1) *If it is proved that an accused person has absconded, and that there is no immediate prospect of arresting him, the Court competent to try [or commit for trial,] such person for the offence complained of may, in his absence, examine the witnesses (if any) produced on behalf of the prosecution, and record their depositions and any such deposition may, on the arrest of such person, be given in evidence against him on the inquiry into, or trial for, the offence with which he is charged, if the deponent is dead or incapable of giving evidence or cannot be found or his presence cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable.*

(2) If it appears that an offence punishable with death or imprisonment for life has been committed by some person or persons unknown, the High Court or the Sessions Judge may direct that any Magistrate of the first class shall hold an inquiry and examine any witnesses who can give evidence concerning the offence and any depositions so taken may be given in evidence against any person who is subsequently accused of the offence, if the deponent is dead or incapable of giving evidence or beyond the limits of India.”

3. A bare perusal of the aforesaid provisions discloses that evidence can be recorded in absence of the accused if the pre-requisites of the provisions are satisfied. The aforesaid pre-requisites are mandatory, in

nature, and the said provisions have been interpreted by the Supreme Court in a number of cases. The holding of the Supreme Court in **Jayendra Vishnu Thakur Vs. State of Maharashtra and Another**, 2009 (7) SCC 104 (18 & 23-25) shall guide the decision of the instant application. The said judgement was also relied upon in **A.T. Mydeen And Another Vs. Assistant Commissioner, Customs Department**, 2022 (14) SCC 392 (Para 28, 29, 43 & 44).

4. Sri Dileep Kumar, learned Senior Counsel, on behalf of the applicant, submits that the accused was admittedly absconding and an inference has to be drawn that there was no possibility of his arrest in future. The said argument shall fail as, admittedly in the instant case, the mandatory pre-requisites of Section 299 Cr.P.C. as contemplated in the aforesaid two judgments are not satisfied. In the instant case, the trial court has failed to record a finding that it was proved to its satisfaction that there was no immediate prospects of arresting the accused.

5. Opposing the prayer made in the aforesaid application, it has been further argued by learned counsel for the accused/respondent that as per the basic principle of criminal law, each and every piece of evidence has to be recorded in the presence of accused barring exception of Sections 299 of Cr PC and Section 33 of the Evidence Act. He further submits that such contention of reading the evidence of PW-11 cannot be raised at this stage when previously, at the time when the trial was going on, no such application was filed or no such plea was taken and as such, the present application is devoid of merits. A reliance has been placed on the judgments of the Apex Court in **Jayendra Vishnu Thakur** (supra) and **A. T. Mydeen & Anr.** (supra).

6. Considering the rival submissions made by the learned counsel for the parties and also considering the law laid down by the Apex Court in **T. Mydeen & Anr** (supra), wherein it has been observed that ‘the right to fair trial encompasses two important facets along with others, firstly the recording of evidence in the presence of accused or his pleader and secondly, the right of accused to cross-examine the witnesses, and thus,

the culpability of any accused cannot be decided on the basis of any evidence which was not recorded in his presence or his pleader's presence and for which, he did not get an opportunity of cross-examination, we are of the view that the present application is misconceived for the reasons that the evidence of PW-11 was recorded in a separate trial in which, the present accused-respondent was not under trial since his trial was separate on account of his absconding.

7. Considering the facts and circumstances of the case, in particular the fact that the mandatory provisions of Section 299 of Cr PC have not been complied with, the instant application is devoid of any substance and the same deserves to be rejected. The same is, accordingly, **rejected**.

Order on Appeals:

1. As both the appeals arise out of a common judgment and order dated 16.8.2018 passed by VIIth Additional Sessions Judge, Varanasi in Sessions Trial No. 55-A of 1987 (State Vs. Brijesh Kumar Singh) arising out of Case Crime No.28 of 1986, Police Station Balua, District Varanasi, acquitting the accused-respondent Brijesh Kumar Singh of the offence under Sections 147, 148, 302 read with 149, 307 read with 149, 120B I.P.C. and Section 25(1) (b) of the Arms Act, they are being disposed of by this common judgment and order.

2. Brief facts of the case are that in regard to the incident that occurred in the night intervening 9/10 January, 1986, FIR (Ex.Ka-22) was lodged by PW-1 (Smt. Hirawati), resident of village Sikraura, Police Station Balua, alleging in it that on the fateful night at about 11:30 pm, when she was feeding her child, accused Pancham Singh and Devendra Pratap Singh gained entry in the house from the roof top; seeing them, she screamed and opened the door and ran outside. Two other accused persons namely, Vakil Singh and Rakesh Singh along with four other unnamed persons, were present outside carrying *gandasa*, country-made pistols and *karauli* (sharped edged weapon). It is further alleged that accused Pancham Singh and Devendra Pratap Singh were having guns

and country-made pistol with them. She has alleged that there was an old enmity between deceased Ram Chandra Yadav and accused Kanhaiya Singh with regard to *Pradhani* election and land dispute. At the time of incident, her sons namely, Madan, Tuntun, Umesh and Pramod were sleeping next to each other and her husband had hardly returned from Banaras at 10:00 pm. Accused Pancham Singh and Devendra Pratap Singh caused gunshot injuries to Ram Chandra Yadav, resulting in his instant death and other six accused (two named and four unnamed) caused injuries by guns, *gandasa* and *karauli* to her four sons and two brother-in-laws (*devars*), resulting in their instantaneous death on the spot.

In the said incident, Sharda Devi, daughter of the informant and Mumtali (niece) also suffered gunshot injuries. They were taken to the hospital by the villagers for treatment. Accused persons, after committing the crime, fled away from the spot.

3. FIR of the said incident was registered as Case Crime No. 28 of 1986 u/s 147, 148, 149, 302, 380 IPC on 10.4.1986 at 1:55 am against four named (Pancham Singh, Devendra Pratap Singh, Vakil Singh and Rakesh Singh) and four unnamed persons. After conducting the inquest on the dead bodies, the same were sent for postmortem, which was conducted on 11.4.1986, vide Ex.Ka-25 of deceased Ram Chandra Yadav, Ex.Ka-26 of deceased Ram Janma, Ex.Ka-27 of deceased Siya Ram Yadav, Ex.Ka-28 of deceased Madan Yadav, Ex.Ka.-29 of deceased Umesh Yadav, Ex.Ka.-30 of deceased Tuntun Yadav and Ex.Ka.-31 of deceased Pramod Kumar.

After concluding the investigation, charge sheet was filed against 14 accused persons including the present accused respondent Brijesh Kumar Singh, u/s 147, 148, 307, 149, 302, 457, 380, 120B IPC and u/s 25 of the Arms Act.

4. While framing charge, the trial Court has framed charge against accused persons including accused respondent Brijesh Kumar Singh @

Biru Singh on 26.4.1988 u/s 148, 302/149, 307/149 of IPC and under Section 25 (1) (b) of Arms Act.

5. So as to hold accused-respondent Brijesh Kumar Singh guilty, prosecution has examined 13 prosecution witnesses. Statement of accused respondent was also recorded u/s 313 Cr.P.C. in which, he pleaded his innocence and false implication.

6. Sri P.C. Srivastava, learned Additional Advocate General, appearing for the appellant - State in Government Appeal No. 856 of 2018 and Sri Dileep Kumar, learned Senior Counsel, appearing for the complainant in Criminal Appeal u/s 372 Cr.P.C. No. 369 of 2018 submit:

(i) that a prompt FIR was lodged in the present case;

(ii) that during trial, eye witness Heerawati (PW-1) and injured eyewitness Sharda (PW-2) have duly supported the prosecution case and their versions are consistent, yet the trial court has disbelieved their statements on the basis of minor contradictions which the trial court has presumed itself. The eyewitnesses have categorically deposed as to the manner in which, seven persons were brutally done to death by the accused persons (four named and four unnamed);

(iii) that there was no reason for the trial court to disbelieve the statements of PW-1 and PW-2. Minor contradictions, if any, are required to be ignored as both these eyewitnesses are rustic villagers;

(iv) that the postmortem report of the seven deceased clearly support the statements of eyewitnesses, in particular, the mode and manner of assault. It is not the case of defence that some third person has gained entry in the house of the deceased persons and committed the offence. In fact, there was no specific defence, which was taken by the accused persons, to get themselves acquitted. There is absolutely no evidence on record to show as to

why the witnesses would falsely implicate as many as twelve accused persons and would falsely depose against them;

(v) that motive for commission of the offence is clear, as there was prior enmity between the victims and accused persons with regard to Pradhani election and land dispute.

(vi) that the statements of PW-1 Smt. Heerawati and PW-2 Smt. Sharda Devi are intact;

(vii) that presence of PW-1 Smt. Heerawati and PW-2 Smt. Sharda Devi, at the place of occurrence at the particular time, is not doubtful;

(viii) that date, time and manner of assault has not been challenged by the defence;

(ix) that the findings recorded by the Trial Court in acquitting the accused persons are totally perverse and contrary to the settled proposition of law;

(x) that P.W. 1 Smt. Hirawati is fully reliable witness who had seen occurrence and even in the trial court she has identified the accused persons;

(xi) that there is specific version by P.W. 1 Smt. Hirawati against accused Brijesh Kumar Singh in the court;

(xii) that even if it is taken to be correct that incriminating material has not been proved or put to the accused, the benefit cannot be given to the accused for the lapse committed by the investigating officer;

(xiii) that the trial court has wrongly held that the FIR is ante time;

(xiv) that the findings recorded by the trial court regarding use of ink cannot be made basis for acquittal of the accused;

(xv) that statement of Smt. Sharda Devi, who received bullet injuries, is fully reliable and cannot be ignored;

(xvi) that non production of 'Gadasa' after 30 years is a fault of the investigating officer and the accused cannot draw any advantage from this and this may be done intentionally to help the accused;

(xvii) that accused Brijesh Kumar Singh is a habitual offender and has a criminal history of 41 heinous crime, out of which 24 cases are under Section 302 I.P.C.; and

(xviii) that there was no reason for the trial court to disbelieve the statements of the witnesses.

7. Sri Dileep Kumar, learned Senior Advocate assisted by Sri Devendra Upadhyay and Sri Ajay Kumar Srivastava, learned counsel for the appellant/complainant in Criminal Appeal u/s 372 Cr.P.C. No. 369 of 2018 submits that a very improbable story has been put forth by the defence that the presence of accused respondent Brijesh Kumar Singh at the place of occurrence is highly doubtful. Relying on a document, which has not been exhibited, he submits that the presence of accused Brijesh Kumar Singh at the place of occurrence, at the relevant time, is beyond all reasonable doubt since on the date of incident, when he was arrested by the police near Dak Bunglow, he had a bullet injury in his leg, which shows that accused Brijesh Kumar Singh was present at the place of occurrence where indiscriminate firing was going on wherein he received bullet injury on his leg. Brijesh Kumar Singh was brought to the hospital by CP 1447, where he was examined and thereafter, X-ray was also done and foreign body was found in his leg. Medical report of Brijesh Kumar Singh clearly mentions nature of injury on his left leg as a gun shot wound. Thereafter, accused Brijesh Kumar Singh was shifted to Mumbai for better treatment on account of which he could not appear before the trial court and an application to that effect was also filed, which is available on the lower court record, which was not made part in the first

trial. In the application, there is not a single whisper as to how he sustained the gun shot injury on the night of 09.04.1986. Therefore, there is no doubt that when accused Brijesh Kumar Singh was arrested, he had gun shot injury on his leg and the prosecution has not proved the injury of Brijesh Kumar Singh during first trial, deliberately.

8. Shri Surendra Singh, learned Senior Advocate, assisted by Sri Kapil Pathak, on the other hand, supporting the acquittal of the accused has argued:

(i) that in the examination-in-chief, P.W. 1 (Hirawati) has completely changed the prosecution case and has stated that she was inside the house whereas the incident took place outside the house;

(ii) that a lantern was burning/lightening inside the house and there was no source of light outside her house and therefore, question of identification of the accused person does not arise;

(iii) that it is impossible for any witness to see the occurrence in a torch light considering the fact that the carnage happened in an open field and all the prosecution witnesses were running helter-skelter (away from the side of incident) for their lives;

(iv) that on the date of occurrence, there was complete dark night and this fact is established from the moon visibility chart of that date drawn from Google, showing 0.04% illumination. This fact is admissible under the law.

(v) that a very unnatural story has been put forth by the prosecution where after half and hour of the incident, the respondent accused was brought by police carrying 'Gandasa' in his hand.

(vi) that in the FIR, P.W. 1 (Heerawati) talks about eight persons and has not given description of the accused and thus, question of her identifying the accused persons does not arise, especially when the accused is not known to her;

(vii) that while improving in the court, in the subsequent trial, she states that she saw accused Brijesh Kumar Singh getting down from the ladder and cutting her sons;

(viii) that the statement of PW-1 is wholly unreliable and unacceptable;

(ix) that at the time of examination of PW-1 in the court, a lot of scene has been created by the prosecution and after much difficulty, evidence of this witness has been recorded. On various occasions, she allegedly felt sick in the court just to seek adjournment;

(x) that the brother of P.W. 1 (Heerawati) namely, Ramrati is a Sub Inspector and it is said that after hearing her cries, he came to the place of occurrence. This was nobodies case at the beginning and all of a sudden, a new story has come.

(xi) that if the entire cross-examination of PW-1 is seen, it makes it clear that she herself has demolished the prosecution case and whatever she has narrated in the Court, is not a part of her 161 Cr PC statement nor the statement given by her in the previous trial and the so called FIR lodged at her instance by scribe Prabhu Narayan.

(xii) that the medical/injury report of the accused-respondent was not put to him while recording his 313 Cr PC statement.

(xiii) that PW-1 is not even clear as to whether she lodged a report against accused Pancham, Devendra, Rakesh and Vakil. Thus, she became a wholly unreliable witness. While, she was being cross-examined, there are material omission/contradictions in her statement.

(xiv) that while PW-1 was confronted from her diary statement, she has stated that all the facts were informed by her to the police, but if the same has not been recorded in her diary statement, she cannot tell any reason.

(xv) that PW-1 is even not aware as to what information she disclosed to the scribe.

(xvi) that PW-1 was not even sure as to which weapon accused persons were carrying, including that of the accused respondent herein;

(xvii) that when PW-1 was confronted with her statement made in the earlier trial, she has completely failed to justify as to how she made a different statement in the earlier trial not only in the court but in 161 Cr.P.C. statement as well. The material contradictions in the statement of said witness discredit the prosecution case against the accused; and

(xviii) that according to the prosecution, when the accused respondent was arrested, he was having 'Karauli' in his hand but there is no FSL report on record to prove the origin of the blood, likewise the said weapon has also not been produced in the Court.

9. We have heard learned counsel for the parties and perused the record.

10. P.W. 1 (Heerawati) after describing her relationship with the deceased person has stated that the main door of her house is towards east and there is a 'varanda' inside. In all the four sides of outer courtyard, seven rooms are there and one ladder was there to go on the rooftop, which is on the north side. She knew accused Kanhaiya and Pancham, who were father and son, likewise she also knew accused Vakil Singh, who was of her village. At the time of occurrence, when she was feeding her child, her daughter Sharda and niece Multali were sleeping, likewise, her other children and brother-in-law Siyaram was sleeping. On the date of occurrence, when her husband returned at about 10.00 p.m. from Varanasi, after taking his meal, he slept. Her husband had contested the election of Pradhan and there was a case between Kanhaiya, Pancham and her husband. She had two sisters-in-law, out of which Duija was living with her. After returning his Varansi, her husband hung his Kurta in

which Rs. 10,000/- was there. In the night at about 11.00 p.m., when she was feeding milk to her child, other family members were sleeping, she saw in the torch light accused Brijesh and Pancham coming down from the rooftop through ladder. At the relevant time, lantern was burning in the house. On her narration, report was written and lodged by Prabhu Nath.

In the incident, Sharda and Multali got injured whereas seven persons namely Ram Chandra, Ram Janam, Siya Ram, Madan, Umesh, Pramod and Tuntun expired. Accused Brijesh was having 'gandasa', Pancham was having country made pistol whereas accused Rakesh and Devendra were having 'karauli'. The accused persons made assault by country made pistol and 'karauli'. She states that she knew the accused persons, who assaulted the deceased.

A leading question was put to this witness, which was objected by the counsel for the defence as regards the identification of the respondent-accused. It is relevant to note here that though in the initial evidence and judgment, she states that she saw the respondent-accused Brijesh Singh getting down from the ladder but this statement has not been made by her in her 161 Cr.P.C. statement and likewise in her previous statement made in the trial court of co-accused persons. Thus, there are clear cut omission and contradiction in her statements.

The Court has also noted that without seeing the accused, a statement was made by this witness about the identification of the accused. She admits that her statement was recorded in the previous case. She has denied that she knew the accused Rakesh.

On 09.03.2018, examination-in-chief of this witness could not be recorded as she showed her illness in the court and has literally refused to get her statement recorded. On 17.03.2018, examination-in-chief of this witness again began and she has stated about the details of his family including that of her husband. She states that upon hearing her scream, her brother Ram Rati, who is a Sub-Inspector came there. When she was

confronted with her previous statement and the FIR, she has stated that she does not remember as to whether in the written report, she mentioned the name of Pancham Singh, Devendra Singh, Rakesh Singh and Vakil Singh and when she was again cross-examined, she states that she does not remember as to whose name was mentioned by her. She has further stated that she does not remember, as to what she has disclosed on an earlier occasion. She states that while lodging the report, she had informed the police about description and colour of those accused persons, whose names were not disclosed by her but if the same is not recorded by the police, she cannot tell the reason. Thereafter, she states that she does not remember whether she gave description of the accused to the police or not. She states that she identified eight accused persons in the jail but this is contrary to the record. When she was confronted by the defence, she has made different statement from that of her previous statement. From her statement, it further reveals that there are material omission and contradiction in her court statement from that of her statement recorded by the police. She states that as soon as she saw the accused persons, getting down in the courtyard, she ran outside carrying torch with her. However, when she was confronted with her police statement, she denied the same. She states that she did disclose the entire story to Prabhu Narain, however when the Police has brought the accused persons before her, prior to that, report was already sent. Just a contrary statement was made by her before the police and this fact has been recorded by the learned trial judge. At one place, she has stated that she does not remember as to what was disclosed by her to Prabhu Narain. She is also confused while deposing in the court as to which weapon was being carried out by those two persons who had entered her house. She admits she might have disclosed the police about those two persons who entered her house, one was Devendra and other was Pancham, who were carrying gun and country-made pistol in their hands respectively. She has clarified that after seeing accused Devendra and Pancham, she went out from her house by screaming.

When she was confronted by her diary statement, she has stated about the fact of knowing accused Brijesh, however, if this fact is not recorded in her diary statement, she cannot tell the reason. She has further denied the fact that in her 161 Cr PC statement, she had disclosed the names of accused Pancham, Devendra, Vakil and Rajesh. She has stated that she has not shown the ladder to the Sub Inspector nor any such ladder was found at the place of occurrence. When she was confronted from her statement recorded in the FIR regarding condition of wall, she states that she is not aware about those things. She has stated that she does not remember as to what was the colour of the clothes of the accused persons.

11. PW-2 (Suresh) has turned hostile and did not support the prosecution case.

12. PW-3 (Sharda Devi) is not a reliable witness and has improved a lot while disclosing in the Court. She is not clear as to which of the weapon was used by which of the accused. Most surprisingly, she has stated that there was no light and she saw the incident in the light of lantern and torch. It has been argued that no human being can see in torch light eight accused persons at a place, where as many as seven persons have been killed. She further states that there was eight days delay in recording her diary statement and when she was confronted with her earlier statement, made in the court, she has deposed entirely different story. She is also not clear as to what role was played by which of the accused persons. She has stated that while lodging the report, she did disclose to the police about description and colour of the accused persons, but if the same is not recorded she cannot tell the reason.

13. PW-4 (Duija), who has also been examined as an eyewitness to the incident, is not a reliable witness. She allegedly woke up and saw the incident after hearing the cries of PW-1. She has categorically stated that before the incident, Rakesh and Brijesh were not known to her and on this count alone, her entire evidence is unreliable especially when no test identification parade has been conducted in her presence. It has been

argued that there are material contradiction and omission in the statement of this witness. She states that she does not know as to what was the distance between her and the accused persons. Had she not run along with her child to the house of some other person, she would not have survived.

14. PW-5 (Gulab) is a hostile witness and has not stated anything specific against the accused.

15. PW-6 (Prabhu Narain Singh) is a scribe, is not reliable witness as he has categorically stated that accused Brijesh and Rakesh were not known to him and their names were disclosed by the police by saying that these persons were involved in the commission of offence, hence, there are material contradiction in the statement of this witness also. This witness has further stated that police had informed him that two persons were arrested out of which one is Rakesh and other is Brijesh and if this fact is not recorded in the FIR and in his 161 Cr.P.C. statement, he cannot tell any reason. He has also admitted the fact that there was old political enmity between accused Brijesh and the deceased.

16. PW-7 (Muntali) is also not a reliable witness. She admits that she used to see the photographs of accused Brijesh Singh on whats app and also on news channel. There was material contradiction and omission in the statement of this witness also.

17. PW-8 (Basant Lal) is a witness of Panchnama, who has proved his signature on the Panchnama. Later on, he has been declared hostile and therefore nothing could be elicited from him. The police had asked him to sign certain documents and this continued for three days. However, according to him, some of the documents were signed by him even after a month and police had never disclosed him about the contents of the documents, some of them, were blank and some of them were half written.

18. PW-9 (Dr. A.K. Gupta) was posted as Medical Officer, Primary Health Center, District Varanasi and on 10.04.1986, at about 04.15 am,

conducted the medical examination of Sharda Devi. At 04.30 a.m. on the same date, this witness has also examined witness Premsila.

In the cross examination, this witness has stated that he had examined the injured and had prepared the medical as private medico legal as the injured was not brought before him by the police. He further states that on 10.04.1986, he has not examined any girl namely Multali.

19. PW-10 (Ram Lachchan Yadav) was Head Moharir at the time of incident and posted at P.S. Balua. He prepared chik of crime no. 28 of 1986 and on the written report furnished by the informant, he registered the FIR on 10.04.1986 at 01.55 a.m. He has proved the chik FIR as Ex.Ka. 22 and also GD entry of the FIR as Ex.Ka.23. He has further proved the signature of Surya Bhan Rai on the Panchanamas of the deceased. He further states that neither there is any endorsement by the concerned Magistrate nor there is a seal of Magistrate court on the FIR and further, a copy of chik FIR carries an endorsement by C.O. dated 15.04.1986, that the same be sent to the concerned court.

20. PW-11 (Dr. C.B. Tripathi) is an autopsy surgeon and conducted the postmortem of the deceased namely Ram Chandra, Ram Janam, Siya Ram, Madan, Umesh, Tuntun and Pramod.

21. PW-12 (Amrendra Nath Bajpai) was posted as second officer of PS Balua on the date of incident and in his presence, informant P.W. 1 Heerawati had given her written report on the basis of which crime no. 28/1986 under Section 147, 148, 149, 307, 302, 457, 380 and 120-B I.P.C. against accused Pancham Singh and others was registered. He also prepared 'Fard' of torch in the light of which accused persons were seen by the informant committing the crime. He also identified the recovery memo of cycle and 'Gandasa' prepared by first investigating officer Suryabhan Rai, which is marked as Ex. Ka 68. He also proved recovery memo of 'Kathari' and 'Gamcha' prepared by Suryabhan Rai by identifying his signature. This witness was confronted from the investigation done by him on various occasions and recorded several 161

Cr.P.C. statements. He has stated that whatever was disclosed to him by the witnesses, he recorded. On various occasions he has denied the fact of recording 161 Cr.P.C. statements of several witnesses as stated by those witnesses in the court.

In the cross-examination, this witness has stated that on the 'Panchanama' of deceased Ram Chandra, there is an overwriting above 380 and a line was drawn and 147/148/149/302 have been written. He further stated that he could not tell whether in all 'Panchnamas' 396 was described which was later changed to 380. On the photonash of deceased Ram Janam (Ex. Ka 45) there is an endorsement of Crime no.28/1986 under Section 396 P.S. Balua. He has stated that Ex. Ka 68 which relates to arrest memo of Brijesh Kumar Singh and recovery of 'Gandasa', there is no signature of Brijesh Kumar Singh. He was further confronted with 161 Cr.P.C. statements of Heerawati, Prabhu Narain, Sharda and Duija Devi, which show improvement made by these witnesses in their court statements. When confronted with their previous statements, this witness has proved the articles deposit register of 1986, which carries an endorsement of Lat Sankha 708/86 of the said register against crime no. 28/1986 P.S. Balua, District – Varanasi (State vs. Rakesh Singh, Brijesh Kumar Singh and others). The recovered 'Gandasa' from accused Brijesh Kumar Singh was kept in the Malkhana on 21.4.1986 by CP Sarju Ram Yadav.

22. PW-13 (H.C.P. Chandra Shekhar Tiwari) is the Incharge of Sadar Malkhana, Varanasi. He is a formal witness.

23. Close scrutiny of the evidence makes it clear that if the evidence and judgment of the earlier trial is compared with the evidence and judgment of the present trial, two different stories come on surface. As per first story given by the prosecution, duly supported by the evidence, two persons namely Pancham and Devendra gained entry in her house from the rooftop using ladder, whereas in the second story, case of the prosecution and the statement of the star-witness Hirawati (PW-1) is that she saw accused Brijesh and Pancham getting down from the ladder. In

the FIR, four unknown persons have been shown as accused but description of those accused persons have not been mentioned in the FIR. Once description of accused persons is not known to Hirawati, on what basis she had impleaded accused respondents is a big question. On one hand she has stated that she knew accused Brijesh and on the other hand, she has denied the same. There are material omissions and contradictions in the statements of PW-1 (Hirawati). When she was confronted from her diary statement, at many places, she has denied the fact of either making statement to the police or not at all such statement. She has categorically stated that the name of accused was disclosed to her by police as Brijesh, likewise before the respondent-accused could have been brought before her, report was already sent. In fact, her entire story is full of contradictions and omissions, which makes her untrustworthy and unreliable. The most important aspect of the case is that the prosecution proceeds on the assumption of the identification of the respondent-accused, whereas no Test Identification Parade was conducted in relation to the respondent-accused and as such, his Dock Identification is also doubtful. He was the only accused in the Court and an attempt was made by the prosecution to put leading questions to the witness.

24. As per PW-1 (Hirawati), when the incident occurred, she was inside the house, whereas undisputedly, the incident occurred outside the house. She states that she saw the incident in a torch light and a lantern was burning inside the house. Thus, there is substance in the argument of the defence that neither the incident can be seen in the light of lantern nor it is possible to see the killing of different persons in different places in a torch light. Question of identification of the accused in such a condition becomes doubtful, especially when the occurrence took place in an open field and at the time of incident, the witnesses were running helter-skelter.

It is further relevant to note that the incident occurred in the night, which was completely dark and this fact is established from the moon

visibility chart drawn from the internet, showing 0.04% illumination. This fact is admissible under the law.

Yet another important aspect of the case is that within half an hour of the incident, the police is said to have brought accused-respondent Brijesh Singh before PW-1 (Heerawati) and introduced him as one of the co-accused in killing various persons.

In the FIR, there is no mention by PW-1 that she saw the accused respondent killing her sons but while improving in the court, in the subsequent trial, she states that she saw the respondent-accused Brijesh Singh killing his sons. False implication of the present accused cannot be ruled out where PW-1 has admitted the fact that her brother Ram Rati is a Sub-Inspector in the police department and after hearing her scream, he came running there. Furthermore, as per evidence, there was an old enmity between the husband of the complainant and the accused persons in respect of the land and Pradhani Election. The implication of respondent accused in a dramatic manner is nothing but an afterthought. From the evidence of PW-1 and the scribe, it is not clear as to whether all these facts were disclosed to the scribe by PW-1 or not. From the record, it appears that the test identification parade was conducted only in respect of co-accused Vinod Kumar Pandey and Ram Das @ Dina, however, no such parade was conducted in respect of the respondent-accused.

Taking overall evidence as it is, it is apparent that the same does not inspire the confidence of this Court. The evidence is not clinching and conclusive, in nature, and based on this shaky evidence, it would not be safe for this Court, to convict the respondent-accused. Witnesses do not appear to be trustworthy and the trial Court appears to be justified in disbelieving the prosecution case and acquitting the respondent-accused.

25. So far as the criminal antecedent of the respondent-accused is concerned, the same has no relevance because the trial Court has passed the judgment in a Sessions Trial of which, appeal is being decided by this Court and the said aspect has also no bearing in the present case since we

are not deciding the bail application of the accused where such conduct has some importance. (See: **Prabhakar Tewari vs. State of UP & Anr.** (2020) 11 SCC 648.

26. After considering all the evidence as adduced by the prosecution, the Court below has reached to the conclusion of acquitting the accused respondent. The view taken by the trial court is one of the possible and plausible views and it cannot be said to be perverse.

27. While considering the scope of interference in an appeal or revision against acquittal, it has been held by the Supreme Court that if two views of the evidence are reasonably possible, one supporting the acquittal and other indicating conviction, the High Court should not, in such a situation, reverse the order of acquittal recorded by the trial Court. In the matter of **State of Karnataka vs. K. Gopalkrishna**, (2005) 9 SCC 291, the Apex Court while, dealing with an appeal against acquittal, observed as under:

"In such an appeal the Appellate Court does not lightly disturb the findings of fact recorded by the Court below. If on the basis of the same evidence, two views are reasonably possible, and the view favouring the accused is accepted by the Court below, that is sufficient for upholding the order of acquittal. However, if the Appellate Court comes to the conclusion that the findings of the Court below are wholly unreasonable or perverse and not based on the evidence on record, or suffers from serious illegality including ignorance or misreading of evidence on record, the Appellate Court will be justified in setting aside such an order of acquittal."

28. In **Sudershan Kumar v. State of Himachal**, (2014) 15 SCC 666, the Apex Court observed thus:-

"31. It has been stated and restated that a cardinal principle in criminal jurisprudence that presumption of innocence of the accused is reinforced by an order of the acquittal. The appellate court, in such a case, would interfere only for very substantial and compelling reason. There is plethora of case laws on this proposition and we need not burden this

judgment by referring to those decisions. Our purpose would be served by referring to one reasoned pronouncement entitled *Dhanapal v. State* which is the judgment where most of the earlier decisions laying down the aforesaid principle are referred to. In para 37, propositions laid down in an earlier case are taken note of as under: -

"37. In ***Chandrappa v. State of Karnataka***, this Court held: (SCC p. 432 para 42), (1) An appellate court has full power to review, reappraise and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasis the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the

appellate court should not disturb the finding of acquittal recorded by the trial court."

32. Thereafter, in para 39, the Court curled out five principles and we would like to reproduce the said para hereunder:

"39. The following principles emerge from the cases above:

1. The accused is presumed to be innocent until proven guilty. The accused possessed this presumption when he was before the trial court. The trial court's acquittal bolsters the presumption that he is innocent.

2. The power of reviewing evidence is wide and the appellate court can re- appreciate the entire evidence on record. It can review the trial court's conclusion with respect to both facts and law, but the Appellate Court must give due weight and consideration to the decision of the trial court.

3. The appellate court should always keep in mind that the trial court had the distinct advantage of watching the demeanor of the witnesses. The trial court is in a better position to evaluate the credibility of the witnesses.

4. The appellate court may only overrule or otherwise disturb the trial court's acquittal if it has "very substantial and compelling reasons" for doing so.

5. If two reasonable or possible views can be reached - one that leads to acquittal, the other to conviction - the High Courts/appellate courts must rule in favour of the accused."

29. In **Dilawar Singh v. State of Haryana**, (2015) 1 SCC 737, the Supreme Court reiterated the same in paragraphs 36 and 37 as under :

"36. The court of appeal would not ordinarily interfere with the order of acquittal unless the approach is vitiated by manifest illegality. In an appeal against acquittal, this Court will not interfere with an order of acquittal merely because on the

evaluation of the evidence, a different plausible view may arise and views taken by the courts below is not correct. In other words, this Court must come to the conclusion that the views taken by the learned courts below, while acquitting, cannot be the views of a reasonable person on the material on record.

37. In **Chandrappa v. State of Karnataka**, the scope of power of appellate court dealing with an appeal against acquittal has been considered and this Court held as under: (SCC p.432 para 42)

"42...(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

Unless there are substantial and compelling reasons, the order of acquittal is not required to be reversed in appeal. It has been so stated in State of Rajasthan v. Shera Ram."

30. Recently, in **Nikhil Chandra Mondal vs. State of West Bengal**, (2023) 6 SCC 605, the Supreme Court, while dealing with similar issue, observed as under:

" 21. The scope of interference in an appeal against acquittal is very well crystallized. Unless such a finding is found to be perverse or illegal/impossible, it is not permissible for the appellate court to interfere with the same.

22. Recently, a three-Judge Bench of this Court in **Rajesh Prasad vs. State of Bihar**, (2022) 3 SCC 471, has considered various earlier judgments on the scope of interference in a case of acquittal. It held that there is double presumption in favour of the accused. Firstly, the presumption of innocence

that is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the Court. It has been further held that if two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court.”

31. From the aforesaid legal position and the judgments cited, it is clear that in a criminal appeal against acquittal, if two views are possible on evidence adduced in the case, one binding to the guilt of the accused and the other is to his innocence, the view which is favourable to the accused, should be adopted.

32. Considering the above legal position and the factual aspects of the case, we are of the view that the trial Judge was justified in acquitting the respondent-accused.

33. The appeals have no substance and the same are, accordingly, dismissed.

Dated:9.11.2023

nd/RKK/-

(Ajay Bhanot, J) (Pritinker Diwaker, CJ)