A.F.R.

Court No. - 46

Case :- CRIMINAL APPEAL No. - 180 of 2014
Appellant :- Mahfooz
Respondent :- State of U.P.
Counsel for Appellant :- S.K. Tripathi, Ajay Shankar
Counsel for Respondent :- Govt. Advocate

Hon'ble Arvind Singh Sangwan,J.
Hon'ble Mohd. Azhar Husain Idrisi,J.

(Oral Judgment per Hon'ble Arvind Singh Sangwan,J.)

1. This appeal is preferred against the judgment of conviction dated 21.05.2013, passed by Additional Sessions Judge/ Special Judge (SC/ST Act), Kannauj in Sessions Trial No. 25 of 2008 (State Vs. Mahfooz) vide which the appellant was held guilty of offence punishable under Section 302 of I.P.C. as well as the order of sentence of the same date vide which the accused-appellant was awarded life sentence along with fine of Rs. 25,000/- and in case of default in payment of fine, to undergo further sentence of five months.

2. Heard Sri Ajay Shankar, the legal aid counsel who addressed the argument on behalf of the appellant in the main appeal and learned AGA for the State.

3. The Trial Court's record is received and paper books are ready. With the assistance of learned counsel for the parties, the entire evidence is re-scrutinized and re-appreciated.

4. Brief facts of the case, as per the complaint given to the police Ex.Ka-1, is as under :

"सेवा में,
श्रीमान कोतवाल
साहब कन्नौज,

श्रीमानजी,

निवेदन है कि प्रार्थी सुभाष कहार पुत्र सन्ना कहार ग्रा० मलिकापुर थाना कन्नौज का है मेरा बडा भाई दिनेश मछली बेचने का धंधा करता है आज दि० 19.10.06 को भाई मछली बेचने वंशीपुरवा गया था तथा वंशीपुरवा बाजार में व ग्रांव के नरेश भंगी पुत्र शम्भू के शाथ बाजार गया था मेरा भाई मछली बेचकर जल्दी चला आया मै व नरेश भी खरीददारी करके वापस आ रहे थे परमदेव मन्दिर महाचन्द्रापुर के पास समय करीब साढे पांच बजे ग्रांव अहमदपुर रौनी के महफूज पुत्र हवलदार तथा मुद्दू ने भाई को रोक कर मछली के पैसे मांगे मना करने पर मुद्दू ने भाई को पकड़ लिया तभी महफूज ने हाथो में लिए तमंचा से गोली मार दी भाई की तत्काल मौत हो गयी मैने व नरेश ने घटना को देखा व मुल्जीमान को पहचाना है हमारे शोर गुल पर ग्रा० महचद्रापुर के काफी लोग आ गये तथा गांव वालो ने मुद्दू को पकड़ने में हल्की फुल्की चोट लगी जिससे बाद में उसकी भी मौत हो गयी महफूज तमंचा फरहाते भाग गया सूचना को आया हूँ। कार्यवाही करने की कृपा करे।

दि० 19.10.06

प्रार्थी नि० अं० सुभाष
सुभाष पुत्र सन्ना कहार
नि० ग्रा० मलिकापुर
था० जि० कन्नौज

प्रदर्श क-*1"*

5. The police, thereafter, registered the chik F.I.R. and prepared the Panchayatnama of deceased-Dinesh as well as deceased-brother of the appellant-Muddu. The dead bodies were sent to the post-mortem and as per the post-mortem report of Dinesh, the following injuries were found :

"Ante-mortem Injuries
1. Fire Arm W.O.E. Gutter shaped 8.0 cm x 1.0 cm x chest cavity deep over left side upper part of chest involving axillary (ant.) fold margins inverted lacerated and relymosed. On dissection left side IIIrd fractured, left pleura & lung, diaphragms, liver & intestines lacerated, chest and abdominal cavity full of blood with faecal matter. One bullet recovered from abdominal cavity Direction – left to right & downwards and backwards."

6. Postmortem of Muddu was also conducted and as many as seven injuries on the head, abdomen and the nature of lacerated wound, multiple contusion, abrasions on the entire body were found.

7. However, no F.I.R. was registered with regard to murder of Muddu, the real brother of the appellant. Thereafter, the police conducted the further investigation, recorded statement of prosecution witnesses under Section 161 Cr.P.C. and submitted the charge-sheet against the appellant. Thereafter, the case was committed to the Court of Sessions and the following charges were framed :

> "मै डा० मंजू निगम सत्र न्यायाधीश कन्नौज आप अभियुक्त महफूज को निम्न आरोप से आरोपित करती हूँ:-
>
> *यह कि दिनांक 19.10.2006 को समय करीब 5.30 बजे शाम स्थान बरमदेव मंदिर के पास वहद ग्राम महचन्दापुर थाना कोतवाली कन्नौज जिला कन्नौज के अंतर्गत वादी के भाई दिनेश की मृत्यु कारित करने के आशय से तमन्चे से गोली मारकर मृत्यु कारित करके हत्या कर दी। इस प्रकार आपने भारतीय दण्ड संहिता की धारा 302 के अंतर्गत दण्डनीय अपराध कारित किया जो सत्र न्यायालय के संज्ञान के अंतर्गत है।*
>
> *आरोप अभियुक्त को सुनाया व समझाया गया। अभियुक्त ने आरोप को इन्कार किया एंव विचारण की मांग की।*
>
> *दिनांक – 08.04.2008*
>
> *ह०अप०*
>
> *(डा० मंजू निगम)*
>
> *सत्र न्यायाधीश, कन्नौज।*
>
> *एतद्द्वारा मैं आपक निर्देश देती हूँ कि आपका परीक्षण उक्त आरोप के लिए सत्र न्यायालय द्वारा किया जाय।*
>
> *दिनांक – 08.04.2008*
>
> *ह०अप०*
>
> *(डा० मंजू निगम)*
>
> सत्र न्यायाधीश, कन्नौज।"

8. Subhash appeared as PW-1 and his statement read as under :

> "*19.10.06* की घटना है। मेरा भाई दिनेश घर से मछली बेचने के लिये वंशीपुरवा के बाजार गया था। उसके साथ मैं तथा गांव के नरेश भी गये थे। जब मेरा भाई मछली बेचकर वापस घर आ रहा था। तो महाचन्दापुर के आगे बृहमदेव मन्दिर के पास पहुचा तो वहां पर हाजिर अदालत मुल्जिम महफूज तथा मद्दू मिले। **मै अपने भाई के *20-25* कदम पीछे चल**

रहे थे। मेरे साथ नरेश भी था। शाम के साढे *5* बजे का समय था। इन लोगो ने मेरे भाई से पैसे मांगे। पैसे दिये नही तो मद्दू ने मेरे भाई को पकड़ लिया तो महफूज ने अपने हाथ में लिये तमंचे से गोली मार दी जो मेरे भाई के बगल में लगी। तो मैने तथा नरेश ने घटना देखी व चिल्लाये तो महचन्दापुर के तथा आस पास के लोग आ गये जिन्होने मद्दू को पकड़ लिया उसे मारा पीटा जिससे उसकी मौत हो गई। महफूज तमंचा लहराता हुआ भाग गया। घटना की तहरीर मैनें एक व्यक्ति से बोलकर लिखाई थी जो मैनें बोला था वो उसने लिखा था पढवाकर सुनकर उस पर अपना निशानी अंगूठा लगाया था। गवाह को तहरीर कागज सं० *4A/2* पढकर सुनाया गया तो गवाह तहरीर पर अपने निशानी अंगूठा की तस्दीक करता है। प्रदर्श क-*1* डाला गया। तहरीर लेकर थाने गया वहां मेरी रिपोर्ट लिखी गई। मेरे भाई की गोली लगने से मौके पर ही मृत्यु हो गई। रिपोर्ट लिखने में पुलिस मौके पर आई थी। मृतको का पंचायातनामा मेरे सामने भरा गया था। दरोगाजी ने अन्य लोग को पंच नियुक्त किया था। पंचायतनामा कागज सं० *8A/1* व *8A/2* व *10A/1* व *10A/2* पर मेरे निशानी अंगूठा है। इस पर क्रमशः प्रदर्श क-*2* व क-*3* डाला गया। लाशो को कपड़ो में सीलमोहर कर पुलिस के सुपुर्द कर वास्ते कराने पोस्टमार्टम भेज दिया था।"

9. In cross examination, this witness stated that his brother used to sell fish and used to bring the same in the market on a bicycle. He further deposed as under :

"घटना वाले दिन मै मछली खरीदने अपने भाई के साथ नही गया लेकिन बाजार भाई के साथ गया था। मछली खरीद कर मेरे भाई करीब दिन के *12* बजे घर आ गया था। जब मेरा भाई घर पर आया तब मै घर पर मौजूद था। मल्लिकापुर से वंशीपुरवा पश्चिम दिशा में है। यह करीब *2-1/2 Km* दूर है। मल्लिकापुर से वंशीपुरवा पहुचने में साइकिल से पौन या करीब *1* घण्टा लगता है। घटनास्थल से वंशापुरवा पश्चिम दिशा में करीब *1 Km* दूर है। मेरे गांव से अहमदपुर रौनी उत्तर दिशा में एक-सवा *km* दूर होगा। घटना स्थल से अहमदपुर रौनी उत्तर दिशा में करीब *2-1/2 Km* दूर है। **घटना वाले दिन मेरा भाई दिनेश एक बजे दिन में घर से बाजार गया था। मै मृतक दिनेश एक बजे दिन में घर से बाजार गया था। मै मृतक दिनेश के साथ नही गया था। बल्कि उनके बाद बाजार गया था। मै दो बजे बाजार गया था। पौने दो बजे करीब मेरा भाई बाजार पहुच गया होगा। "**

10. In further cross examination, he stated that he had no knowledge whether Mahfooz had any money dispute with his brother or that he had demanded money from his brother as this fact is not mentioned in the F.I.R. He further stated that the bullet was fired from a very close range. The public had caught hold of Muddu and, thereafter, the mob killed him by giving beatings and then they brought the dead body near the place where his brother was murdered. About five hundred people gathered at the spot. He further stated that he has no knowledge when appellant Mahfooz was arrested and only one firearm injury was caused.

11. Dr. Narendra Kumar (PW-2), who conducted the post-mortem of Muddu and Dinesh deposed as under :

"साक्षी डा० नरेन्द्र कुमार वरिष्ठ परामर्शदाता डा० राम मनोहर लोहिया अस्पताल फर्रूखाबाद ने आज दि. *16.3.10* को सशपथ साक्षय दिया कि-

दि० *20.10.06* को मैं जिला चिकित्सालय फर्रूखाबाद में बतौर वरिष्ठ परामर्शदाता तैनात था। इस दिनांक को मेरी पोस्टमार्टम हेतु ड्यूटी लगी थी। उस दिन समय *2.00* पी.एम. पर **मुद्दू** *S/O* अज्ञात *R/O* अहमदपुर *(Sic) P.S.* कोत० कन्नौज जि० कन्नौज की की बाडी सर्वमुहर एक सील्ड बंडल में प्राप्त हुई। जिसे *S.H.O.* कन्नौज द्वारा भेजा गया था जिसे *C.P. No. 230* बंकेश कुमार व *C.P. 362* महावीर लेकर आए थे। मेरे द्वारा समय अपराह्न *2.45* बजे शव परीक्षण किया गया। मृतक की आयु करीब *36* वर्ष थी। मृतक औसत कद काठी का था।

मृत्यु पूर्व चोटे

शव के शरीर पर आई चोटों का मृत्यु पूर्व का विवरण निम्नवत है।

1. बहुसंख्यीय फटे घाव सिर चेहरे तथा बांए कान के ऊपर जिसका आकार *6* सेमी *x 1* सेमी से लेकर *3* सेमी *x 1.5* सेमी तथा हड्डी तक गहराई के घाव थे। विच्छेदन करने पर बाई टेम्पोरल, पैराइटल, मैन्डिबल तथा मैक्सिलरी हड्डी टुकडों में टूटी हुई थी। मैनेन्जीज व ब्रेन भी फटे हुए थे।

2. बहुसंख्यीय खरोंच के साथ नीलगू चोटें जो गर्दन पर सीने पर दोनों तरफ तथा पेट पर पाई गई जिनका आकार *22.0 Cm x 11.0 Cm* से लेकर *15.0 Cm x 3.0 Cm* तक था। विच्छेदन करने पर दाई ओर की दूसरी से दसवीं तक पसलियां व बाई ओर तीसरी से नौंवी तक पसलियां टूट हुई थी। स्टर्नम भी टूटी मिली। दोनों तरफ प्लूरा फेफडों तथा लीवर स्पलीन फटे हुए मिले। सीने तथा पेट की कैविटी खून से भरी मिली।

3. नीलगू चोट आकार *18.0 Cm x 3.0 Cm* दाई जांघ के सामने पाए गए।

4. नीलगू चोट जो संख्या में आठ थी। बाई जांघ पर सामने और बाहर के हिस्से पर पाई गई जिनका आकार *16.0 Cm x 3.0 Cm* से *12.0 Cm x 2.5 Cm* तक था।

5. बहुसंख्यक खरोच के साथ नीलगू चोटें दोनों चूतड़ के पीछे जिनका आकार *15.0 Cm x 10.0 Cm* से *13.0 Cm x 4.0 Cm* था।

6. खरोंच सहित नीलगू चोट आकार *5.0 Cm x 3.0 Cm* बांए हाथ के पीछे की ओर।

7. नीलगू चोट *6.0 Cm x 4.0 Cm* दाए हाथ के पीछ था।

विच्छेदन से पूर्व शव की दशा आंखे बंद मुँह थोडा खुला हुआ सूखा जमा खून सिर पर व चेहरे पर मिला हुआ था। पेट थोडा फूला हुआ था तथा शरीर पर डस्ट मौजूद थी। पी.एम. स्टेनिंग डिवेन्डेन्ट पार्ट पर मौजूद थी तथा राइगर मार्टिस ऊपर लिम्ब से जा चुकी थी तथा लोअर लिम्ब पर मौजूद थी।

आंतरिक परीक्षण

सिर तथा ग्रीवा ऊपर बताया जा चुका है। करोटि का आधार फ्रैक्चर पाया गया। रीढ तथा वर्टिब्रा सामान्य, स्पाइनल कार्ड नही खोला गया। थोरेक्स, वाल्स, कार्टिलेज, रिब्स प्लूरा ऊपर बताए जा चुके है। पैरीकार्डियम में हीमेटोमा पाया गया। हृदय खाली था। पैरीटोनियम हीमेटोमा कैविटी खून से भरी हुई । आमाशय खून से मिला हुआ, पेस्टी फूड *200 M.L.* पाया गया जिसमें एल्कोहल की गंध पाई गई। बडी आंत

गैसयुक्त, फीकल मेटर के साथ जगह जगह हीमोटोमा पाया गया। जननांग सामान्य व सरकमसाइज्ड मिला।

मेरी राय में मृत्यु का कारण मृत्यु पूर्व आई चोटों से रक्त बहने व शाक के कारण हुई। शव परीक्षण की रिपोर्ट की एक कापी एक संलग्नक के साथ *S.P.* फतेहगढ को भेजी गई। एक प्रति जिसके साथ एक सीलड बंडल था जिसमें बनियाइन एक अंडरवियर एक पैन्ट एक टोटल तीन कपडे जो शव पर पाए गए थे *S.H.O.* कोतवाली कन्नौज को भेजे गए।

एक प्रति सी.एम.ओ. फर्रूखाबाद को भेजी गई। यह पी.एम.आर. कागज सं. *7A/1* मेरे द्वारा शव विच्छेदन के समय ही तैयार की गई थी जो मेरे लेख व हस्ताक्षर में है। इस पर प्रदर्श क-*4* डाला गया।

उसी दिन *2.00 PM* पर ही मृतक **दिनेश** *S/O* सन्ना *R/O* मलिकापुर *P.S.* कोत० कन्नौज की *Dead* बाडी *S.H.O.* कन्नौज द्वारा भेजी गई थी जिसे का० *230* लोकेश कुमार व *362* महावीर ही लेकर आए थे उक्त का शव विच्छेदन मेरे द्वारा *3.30 P.M.* पर किया गया था मृतक की उम्र करीब *30* वर्ष थी। मृतक की कद काठी औसत थी।

दशा- आंखे तथा मुँह थोडा खुला व पेट थोडा फूला हुआ था। पीछे की ओर *P.M.* स्टेनिंग मौजूद थी। राइगर मार्टिस ऊपर तथा दोनों लिम्बस पर मौजूद थी। सीने में बाई ओर सूखा जमा खून मौजूद था।

मृत्यु पूर्व आई चोटें

1. गोली के घुसने का घाव गटर के आकार का *8 Cm x 1.0 Cm x* चेस्ट कैविटी तक गहरा था। सीने पर बाई ओर ऊपरी हिस्से पर एग्जिलरी फोल्ड तक मौजूद थी। किनारे अन्दर को झुके हुए फटे हुए तथा इकाई कोस्ट था। विच्छेदन पर बाई ओर की तीसरी पसली टूटी थी बांए प्लूरा, फेफडा, डायफ्राम लिवर तथा छोटी व बडी आंते फटी पाई गई। चेस्ट तथा एब्डामिन कैविटी खून व फीगस मैटर से भरी थी। एक गोली एब्डामिन कैविटी से रिकवर की गई। घाव की दिशा बाई ओर से दाई ओर नीचे की ओर तथा पीछे की ओर थी।

आंतरिक परीक्षण-

1. सिर तथा गर्दन सामान्य

2. थोरेक्स में उपरोक्त के अलावा बाकी सब सामान्य।

3. एब्डामिल उपरोक्त के अलावा आमाशय में लगभग *120* ग्राम पेस्टी फूड मौजूद पाया गया। बाकी सब सामान्य था।

मेरी राय में मृत्यु का कारण मृत्यु पूर्व आई आग्नेयास्त्र से आई चोटों से होने वाले हेमरेज, शाक के कारण हुई थी। पी.एम.आर. कागज सं० *9A* मेरे द्वारा शवविच्छेदन के समय ही तैयार किया गया था जो मेरे लेख व हस्ताक्षर में हैं। प्रदर्श क-*5* डाला गया। इस शव परीक्षण की रिपोर्ट की एक प्रति एस.पी. फतेहगढ को आठ संलग्नक सहित भेजी गई तथा एक प्रति मय एक सील्ड बंडल जिसमें मृतक के कपडे शर्ट एक, बनियान एक, पेन्ट एक, अंडरवियर एक, मोजा एक जोडा, पीले कंग की धातु का एक छल्ला कुल छः आइटम *S.H.O.* कन्नौज को भेजे गए।

सीलबंद एक लिफापा जिसमें एक गोली थी एस.पी. फतेहगढ को भेजा गया तथा शव परीक्षण रिपोर्ट की एक प्रति सी.एम.ओ. फतहेगढ को भेजी गई।

x x x x By Defence Sri Ramendra Singh Katara Ad.

दोनों शव परीक्षण हेतु एक साथ लाए गए थे। मृतक मुद्दू के मृत्यु पूर्व चोटों में भाले की चोट नहीं हो सकती है बल्कि सरिया की चोट हो सकती है।

मृतक मुद्दू व दिनेश की मृत्यु लगभग एक ही समय में हुई होगी। इक्ज क-*5* में शव परीक्षण के समय मैनें सरिया की चोट से आंतरिक अंगों का चुटहिल होना नही पाया गया। प्रदर्श क-*5* में भाले की चोट बाह्य तथा आंतरिक चोटों में मैनें नही पाई। शव परीक्षण से लगभग *24* घंटे पूर्व चोटें आना संभव है। मृतक दिनेश के शव पर जो चोट मैनें दर्शाई है उस चोट के अलावा कोई अन्य चोट नही पाई गई थी। मृतक दिनेश का मुह थोडा खुला हुआ था यह जरूरी नही है कि उसके चिल्लाने से खुला रह गया हो। **दिनेश के बाह्य चोट में कालिमा मौजूद नही थी। घाव के पास बारूद की कोई दुर्गन्ध नही थी।** दिनेश के जो घाव है कितनी दूर से फायर किया गया हो यह मैं नही बता सकता। दिनेश का परीक्षण बाद में किया गया। चोट नं० *2* मुद्दू की एब्रेडिड कन्टूजन है। कोई कट नही पाया गया। मुद्दू की चोट नं० *1* के कारण ही मृत्यु होना संभव है। *"*

12. PW-3, SI Bhagwat Singh Hundal, stated that on 19.10.2006, the investigation was handed over to him and he prepared the Panchayatnama of Muddu at about 6.45 PM which was witnessed by Prabhashchand, Gajodhar, Ram Pratap, Radheyshyam and Subhash. Thereafter, he prepared the challan (Ex.Ka-6) and sent a letter to Chief Medical Officer (Ex. Ka-7 and 8) for conducting post-mortem of Muddu. He also stated that he has given a letter to Chief Medical Officer to give the cause of death vide Ex.Ka-9 to Ex.Ka-11.

In further examination, this witness stated that on the same day, he prepared the Panchayatnama of deceased Dinesh at about quarter to 8.00 PM.

13. S.H.O. V.P. Singh (PW-4) stated that the panchayatnama of deceased Muddu and Dinesh was conducted by SSI B.S. Hundal and site plan was prepared which is Ex.Ka-12. He further stated that accused-Mahfooj was not arrested till 23.11.2006 and further investigation was handed over to S.H.O. T.P. Singh.

14. Raj Kumar Srivastava (PW-5) stated that he was posted as Constable Moharrir and on receiving the complaint, he registered Chik F.I.R. (Ex.Ka-13) and prepared G.D. which is Ex.Ka-14. He stated that the complainant came at 6.40 PM on 19.10.2006 for registration of the case.

15. Naresh (PW-6) stated that he along with Dinesh and Subhash were coming from the market. He was 20-25 steps behind when he saw

that Dinesh and Mahfooz were having altercation. Muddu was also along with Mahfooz. He and Subhash were 20-25 feet behind. In the meantime, Mahfooz fired upon Dinesh who died. People caught hold of Muddu and gave him beatings, however, Mahfooz escaped from the spot.

16. In cross examination, this witness stated that he is working as Sweeper in Delhi and he has been brought to the Court by Subhash. He pleaded ignorance about the time when deceased-Dinesh had taken the fish to the market and further stated that he had not seen Muddu prior to the incident though he knew Mahfooz. He further stated that he did not remember the date of incident and also stated that he do not know about the shops abutting the shop of Dinesh, where people sell fish. He further stated that Muddu and Subhash had a scuffle at the spot and on the date of incident, he did not meet any other person except Dinesh and Subhash as people were busy in planting potato and groundnuts crops. He stated that at the place of incident, only three persons were present. He further stated when accused person fired and then he had seen towards the place of incident. He stated that three shots were fired by the accused person and deceased-Muddu did not receive any firearm injury because he was running. This witness stated that he had not seen any empty cartridge at the spot and deceased – Muddu ran towards North of the place of incident. He pleaded ignorance about the colour of the clothes worn by the deceased. He also pleaded ignorance as to who had come to report the matter to the police. However, he stated that the police came at the spot after about half an hour. He further stated that due to firing he ran away from the spot. He denied the suggestion that he along with Subhash had killed Muddu and he had gone to Delhi to save his skin. He further pleaded ignorance that he has no knowledge whether Muddu was killed by Subhash or any other person as after 4 days of the incident, he had gone to Delhi.

17. Tejpal Singh (PW-7) stated that he conducted the further investigation of the case and obtained the Non-bailable warrants of Mahfooz which is Ex.Ka-15 and thereafter the investigation was transferred to S.H.O. Dayanand.

18. Thereafter, the statement of the appellant under Section 313 Cr.P.C. was recorded, in which all the incriminating evidence was put to him. He denied all the allegations and stated that due to party faction he had been falsely implicated in the present case. No defence evidence was led.

19. Thereafter, the Trial Court vide impugned judgement convicted the appellant and sentenced him to life imprisonment as mentioned above.

20. Counsel for the appellant has argued that strangely two persons were murdered i.e. Dinesh who is brother of the informant and Muddu who is the brother of the accused-appellant, however, despite the fact that the panchayatnama of Muddu was conducted, his post-mortem was conducted as per the statement of PW-2 but despite a cognizable offence being committed, no F.I.R. was registered regarding the murder of Muddu and defence set up by appellant is that PW-1 and PW-6 murdered Muddu and police did not register F.I.R. to save them.

21. It is next argued that the Trial Court has disbelieved the statement of Naresh (PW-6). The reason for disbelieving this witness is that he is not an eye-witness, therefore, he has not given any statement to the Investigating Officer during investigation. This witness has stated that immediately after the incident, he had gone to Delhi and returned after six years and, therefore, the Trial Court has disbelieved the statement of this witness. Counsel submits that however the perusal of the statement of PW-6 proves that even PW-1 is also not an eye-witness. Counsel submits that perusal of statements of PW-1 and PW-6 reveals that both of them stated that they were 20-25 feet behind the deceased, Dinesh. As

per PW-1, Muddu caught hold of Dinesh and Mahfooz fired from country made pistol and PW-6 stated that Muddu and Dinesh had first altercation with each other and they were fighting with each other. Therefore, there is material contradictions in the statements of both the witnesses i.e. PW-1 and PW-6.

22. It is next argued that the statement of PW-6, which is disbelieved by the trial court, otherwise proves the innocence of the appellant as both PW-1 and PW-6 have stated that after firing upon Dinesh, mob gathered and caught hold of Muddu, brother of the appellant and by giving him beatings, he was also murdered.

23. Learned counsel argues that it has come in the statement of PW-1 that about 500 persons gathered at the spot, who gave beating to Muddu, causing multiple injuries on his entire body, proves that it was Muddu who committed the murder and that is why he was beaten to death.

24. Learned counsel submits that this fact is also proved from the statement of PW-6- Naresh as he has stated in the cross-examination that at the spot, Muddu and Subhash had a scuffle with each other and thereafter, a shot was fired resulting into death of Dinesh. It is also argued that even this witness also stated that Muddu tried to escape but was overpowered by people and was beaten to death whereas the appellant- Mahfooz was never apprehended at the spot.

25. Learned counsel thus submits that though PW-6 is disbelieved by the trial court for a different reason, however, the material contradiction in the statements of informant- PW-1 and PW-6 show that a dispute occurred between deceased Muddu, brother of the appellant and deceased- Dinesh, brother of the informant and by firing upon Dinesh, he was murdered and later on, the mob gathered and caught hold of Muddu and he was beaten to death. PW-6 even stated that only three

persons were there at the spot. It is thus argued that the case of the prosecution is highly suspicious about both PW-1 and PW-6.

26. Learned counsel has further submitted that even PW-1, in the complaint given to the police Ex.Ka.1 stated that Muddu was also given beatings by the mob and he was also murdered, however, no FIR was registered in this regard by the police which also shows that the police has not conducted a fair and impartial investigation. Learned counsel has referred to the statement of PW-1 where he has stated on the date of incident, his brother- Dinesh had gone to the market at about 1:00 PM whereas he had gone to market at about 2:00 PM. It is argued that this fact also proves that PW-1 is also not an eye-witness.

27. Counsel has next argued that no recovery of any firearm was effected from the appellant and in fact no recovery of any weapon was effected during investigation. It is also argued that even the empty cartridges were not recovered by the police or were not sent for forensic examination.

28. It is submitted that it has come in the statement of PW-2 that there was no tattooing or blackening on the entry wound i.e. injury no.1, caused by firearm. It is submitted that the occular version of the prosecution do not corroborate the medical version as PW-1 has stated that from point-blank range, the fire was shot upon deceased- Dinesh but as per the statement of PW-2, Dr. Narendra Kumar, it is not proved.

29. Learned counsel has next argued that PW-3 who prepared the Panchayatnama of both the deceased persons i.e. Muddu, brother of the appellant and Dinesh, brother of the informant, stated that at the first instance, he has prepared the Panchayatnama of Muddu at about 18:45 PM and then the dead body was sent for post-mortem examination. Thereafter, he prepared the Panchayatnama of Dinesh at about 8:00 PM after preparing the Panchayatnama of deceased Muddu.

30. It is also argued that in the similar way as per the statement of PW-2, Dr. Narendra Kumar, who conducted the post-mortem of both the deceased persons i.e. Muddu and Dinesh, however, at the first instance he conducted post-mortem of Muddu and prepared a report at about 2:45 PM on 20.10.2006 i.e. after four days of the incident and found as many as seven multiple injuries on the body of Muddu. This witness stated that on injury no.1, there was multiple fractures on the temporal, parietal, mandible and maximal bones and even the membranes of brain were torn. Similarly, there was some other injuries on the neck, chest, stomach of the dead body and all the ribs were broken. There was injuries on the legs and back as well. It is further argued that this witness also stated that on the same day, he conducted the post-mortem of Dinesh and found a single entry wound in the chest cavity of Dinesh. In cross-examination, this witness stated that both Muddu and Dinesh have died at almost same time and there was no blackening or tattooing on the injury sustained by Dinesh and no smell of gun powder was there.

31. It is thus argued that the prosecution has failed to prove whether Muddu was murdered prior to murder of Dinesh or subsequent thereto, as no eye-witness of the vicinity was examined by the prosecution to prove this fact especially when PW-6 has been disbelieved by the trial court.

32. Learned counsel submits that in fact the appellant was not present at the spot and he was arrested after one year of incident on 13.10.2007 and no recovery of firearm was effected from him, therefore, his presence at the spot is not proved by the prosecution as no scientific investigation was conducted to prove his presence at the spot.

33. Learned counsel submits that PW-7- Tejpal Singh, SHO stated that the incident pertains to 16th October 2006 and as per PW-7, the appellant was arrested after one year on 13.10.2007, by one SHO, Dayanand Singh, however, Dayanand Singh was never examined as

witness though he concluded the investigation and submitted the charge-sheet.

34. It is thus argued that the entire investigation by the police is tainted as no FIR was registered regarding the murder of Muddu, the arrest of the appellant was made after one year, no weapon of offence was recovered, PW-6, eye-witness has already been disbelieved by the trial court and statement of doctor does not corroborate the version of PW-1- informant that from point blank range fire was shot upon the deceased and therefore, the appellant be acquitted.

35. It is worth noticing that the appellant is in custody since 13.10.2007 i.e. for a period of 17 years of actual sentence and 19 years of total sentence including remission. This appeal is being prosecuted by the High Court Legal Services Committee, by appointing a Legal Aid Counsel and the appellant has no criminal history and despite this case is being falling under the policy of the Government for premature release, as per the information supplied by the State Counsel, is not being processed by Jail Authorities.

36. After hearing counsel for the parties and on re-appreciation of the entire evidence, we find merit in the present appeal for the following reasons:

A. There are material contradictions in the statement of informant-PW-1 and eye-witness- PW-6.

B. The prosecution has failed to explain why no FIR was registered with regard to murder of Muddu, brother of the appellant, who according to PW-6 had a scuffle with deceased – Dinesh at the place of incident when, deceased Dinesh, brother of informant, was fired by the appellant and murdered.

C. It is the case of the prosecution that many people at the spot caught hold of Muddu and gave him merciless beatings with sticks and iron rods which resulted into breaking of all the bones of his body, he

was murdered at the spot but no police action was taken despite a cognizable offence was committed.

D. The appellant was never arrested at the spot and was arrested after one year of incident and no firearm was recovered from him.

E. The police did not recover any empty cartridge at the spot and never sent it for forensic examination.

F. As per PW-1, the firearm injury was caused to deceased Dinesh from point blank range whereas the statement of PW-2- Doctor who conducted the post-mortem reflects that no blackening or tattooing was found which show that the fire was shot from a distance.

G. As per the I.O., PW-3, he first prepared the Panchayatnama of Muddu, brother of appellant, and then of Dinesh, brother of the informant. Even PW-2, Dr. Narendra Kumar who conducted the post-mortem stated that he first conducted the post-mortem of Muddu and then of Dinesh, which raises a suspicion that Muddu was murdered prior to murder of Dinesh and in the absence of any FIR or investigation being conducted regarding death of Muddu who was beaten to death by the mob at the spot, it is apparent that no proper investigation was conducted by the police. Therefore, the appellant is entitled to be given benefit of doubt.

H. Lastly, the appellant is in judicial custody for 17 years of actual sentence and 20 years of total sentence with remission, having no criminal history, as per the State police is entitled to pre mature release but is case was never processed.

37. In view of above, we allow this appeal and set aside the impugned judgment of conviction and order of sentence.

38. The appellant who is in judicial custody be released forthwith, if he is not involved in any other case.

39. Record and proceedings of the Trial Court be transmitted to it forthwith.

40. The fee of Sri Ajay Shankar, learned legal aid counsel, be released by the High Court Legal Services Committee.

Order Date :- 1.10.2024
DKS/Mohini