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RESERVED ON 28.08.2023

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Court No. - 13

Case :- CRIMINAL APPEAL NO. - 1791 OF 2002

Appellant :- Rajesh

Respondent :- The State

Counsel for Appellant :-Kailash Kumar Singh, Vimal Kishor Singh

Counsel for Respondent :- Govt. Advocate

Hon'ble Karunesh Singh Pawar, J.

1. Heard Shri Vimal Kishor Singh, learned Counsel for the appellant and Ms. Mamta Pandey and Shri Alok Tiwari, learned A.G.A. for the respondent/State.

2. This criminal appeal under Section 374 (2) of the Code of Criminal Procedure, 1973 has been preferred by the appellant, **Rajesh**, challenging the judgment and order dated 16.11.2002 passed by the Additional Sessions Judge/Fast Track Court no.3, Sitapur in Sessions Trial No. 414 of 2001: *State of U.P. vs. Rajesh*, arising out of Case Crime No. 117 of 2000, under

Sections 452/307 Indian Penal Code, Police Station Ataria, District Sitapur, whereby the appellant was convicted and sentenced as under :-

“(a) under Section 452 I.P.C. to undergo 2 years’ rigorous imprisonment and a fine of Rs.500/-. In default of payment of fine to undergo additional one month’s simple imprisonment; and

(b) under Section 307 I.P.C. to undergo 5 years’ rigorous imprisonment and a fine of Rs.1000/-. In default of payment of fine to undergo additional two month’s simple imprisonment.

(c) All the sentences were directed to run concurrently.”

3. The prosecution case, as per the written report dated 4.8.2000 (Ext.Ka-1), is that in the intervening night of 3/4th August, 2000, the daughter of the informant-Vidyadhar (P.W.1), namely, Kusma (P.W.2) and Sona Devi (P.W.3) were lying in the courtyard and his son, namely, Makhan (P.W.4) was lying on the terrace and other members of the family were lying outside. Around 1 O'clock in the night, accused-Rajesh break through into his house, upon which both his

daughters (Kusma and Sona Devi) woke up after hearing the sound and started raising alarm. Consequently, accused-Rajesh opened a fire from his country-made pistol, which hit on the right shoulder and temples (*kanpati*) of his daughter Kusma (P.W.2). On the noise of fire everyone woke up and then the accused-Rajesh ran away from his house. Vishambhar, Baburam and other people of the village had chased the accused-Rajesh, however, due to night, they could not catch the accused-Rajesh. The informant Vidyadhar (P.W.1), his family members and villagers saw the accused-Rajesh in the torch light clearly and identified him. It has also been alleged that accused-Rajesh is thief and has went several times to jail for committing theft.

4. The evidence of P.W.9-Mohd. Musheer shows that on 04.08.2000, he was posted as Constable Moharrir at police station Ataria, district Sitapur. On that date, at about 06:15 a.m., informant-Vidyadhar (P.W.1), his injured daughter (P.W.2-Kusuma), his brother Sridhar and Suresh etc. came at police station Ataria, district Sitapur and P.W.1-Vidyadhar filed his written FIR on the basis of which he prepared the chik FIR (Ext. Ka.1). He, thereafter, sent the injured Kusma (P.W.2) along with Constable Ram Kumar Rawat for medical examination.

5. A perusal of the chik FIR shows that the distance between the place of incident and Police Station Ataria was 12 kilometer. It is

significant to mention that a perusal of the chik FIR also shows that on its basis a case under Sections 452, 307 I.P.C. was registered against appellant-Rajesh.

6. The evidence of SI Dhruv Dutt Tripathi (P.W. 8), in short, shows that on 03.08.2000, he was posted as Sub-Inspector at police station Ataria, District Sitapur. On 04.09.2000, after registration of the F.I.R., investigation was entrusted to him. He immediately commenced the investigation and proceeded to the place of incident where he recorded the statements of the informant-Vidyadhar (P.W.1), Smt. Sita Devi, Vishambar, Babu Ram. On the pointing out of P.W.3-Sona Devi, he inspected the place of occurrence and prepared the site plan (Ext. Ka.5). On 05.08.2000, he received the injury report of injured Kusma (P.W.2). Thereafter, he was transferred to police station Hargaon, district Sitapur.

In cross-examination, P.W.8 has deposed that from which place Rajesh fired to Sita Devi had not been shown in the site plan and from which place witnesses saw in torch light had also not been shown in the site plan. He had not seized the torch nor he arrested the accused.

7. The further investigation of the case was conducted by P.W.7-Premchandra Katharia, who, in his deposition, had deposed before the trial Court that on 28.08.2000, he was posted at police station Ataria

and on that date, further investigation of Case Crime No. 117 of 2000, under Sections 452, 307 I.P.C. lodged against accused Rajesh was entrusted to him and prior to him, the investigation was conducted by S.I. Dhruv Dutt Tripathi (P.W.8). On 01.09.2000, he received information regarding surrender of the accused Rajesh in the Court. After that on 12.09.2000, he received the x-ray report and x-plate medical report and on receipt of it, he recorded the statement of injured Kusuma Devi (P.W.2). As incriminating evidence was found against accused Rajesh, he prepared the charge-Sheet No. 97/2000 (Ext. Ka.4) against him.

In cross-examination, P.W.7 had deposed that he only recorded the statement of injured. He had not prepared the site plan. On finding that the statement of injured was not mentioned in the case diary, then, he went to the house of injured and recorded her statement. The injured had not stated to him the way by which accused fled away. He had not seized any torch.

8. The medical examination of injured Kusum (P.W.2) was conducted on 04.08.2000 at 09:00 a.m. in Community Health Centre, Sidhauli, district Sitapur by Dr. Ajay Tiwari (P.W. 5), who found on her person injuries, enumerated hereinafter :--

“Injuries - 1. Multiple wound of entries in an area of 13x11 cm on right side of face Just below the lateral end of right eye blow size varying from 0.8 cm x 0.5 x skin to muscle deep, oval

in shape, blackening cut, injury kept under observation advised X Ray face right AP lateral view.

2. Multiple wound of entry 18 cm x 17 cm on the right shoulder & inter scapula region, just below the top of right shoulder size varying from 1 cm x 0.5 cm x skin to muscle deep oval in shape, blackening cut injury KVO adv. X-Ray chest PA view.

3- Multiple wound of entry in an area of 8cm x 5 cm. on lateral aspect of right arm. 5 cm below the top of right shoulder size varying from 0.8cm x 0.5 cm x skin to muscle deep blackening cut oval shaped. Injury KVO advised X-RAY right arm. AP & lateral

Opinion: All injuries are kept under observation for which case deferred to distt. Hospital Sitapur for radio-logical opinion and all injuries caused by some firearm duration half day old”

9. It is significant to mention that P.W.5-Ajay Tiwari, in his deposition, had reiterated the aforesaid injuries caused to injured Km. Kusma Devi (P.W.2), however, he deposed in his cross-examination that causing of injuries no. 1 and 2 by one fire or different firearm could only be opined by Ballistic Expert. The fire was opened from some distance, however, he could not opined the distance of fire. He also not opined from which angle the fire was opened. He could also

not be opined the position of the injured whether she was sleeping, standing or seating, at the time of injuries caused by her.

10. The evidence of P.W.6-Dr. S.S. Trivedi shows that on 05.08.2000, he was posted as Senior Radiologist at district hospital Sitapur. On that date, the injured was admitted to district hospital on reference of Community Health Centre, Sidhauri, district Sitapur. The x-ray of the injured was also conducted on 5.8.2000 under his supervision. He prepared the radio-logical report. On examination, he opined that multiple small rounded radio Opaque shadows of metallic density suggestive of forensic body seen in face, neck, shoulder and right side of chest upper part of the victim.

11. The case was committed to the Court of Sessions in the usual manner where the accused/appellant was charged mentioned in paragraph-2. He pleaded not guilty to the charges and claimed to be tried. His defence was of denial.

12. The prosecution, in support of this case, has produced nine witnesses. P.W.1-Vidyadhar, who is the complainant; P.W.2-Kusma Devi, the injured; P.W.3- Sona Devi who is the eye- witness; P.W.4- Makhan, the brother of P.W. 2 and 3 and son of P.W.1; P.W.5 is Dr. Ajay Tiwari; P.W.6 is Dr. S.S.Trivedi, Senior Radiologist, District Hospital Sitapur; P.W. 7-Sub-Inspector Prem Chandra Katheria; P.W.8- S.I. Dhruv Dutt Tripathi, who was the initial Investigating

Officer; P.W.9-Constable C.P.53 Mohd. Musheer, who has registered the chick First Information Report.

13. P.W.1 Vidyadhar, in his deposition, has stated that on the date of incident, he was sleeping in the another house and his children were sleeping in the adjacent house where incident took place. After hearing the fire, he woke up and ran inside the house. Thereafter, villagers, namely, Vishambhar, Babu and other villagers, came with torch. When he reached on the door of his house, accused-Rajesh ran away from his house. The villagers chased the accused but he ran away. He saw and identified the accused in the torch light. When he came back inside the house, his daughter Kusma and Sona Devi told that they were lying in the courtyard and their brother Makhan was sleeping on the terrace and other persons were sleeping outside the house, then Rajesh came inside the house in the night and on hearing the sound (*aahat*), they woke up and raised alarm. The accused fired from country-made pistol which hit his daughter Kusma on her back, shoulder and around her temples (*kanpati*). He got written report scribed by the villager. He proved the written report. He went to the police station on the tractor of Suresh with his daughter Kusma, Vishambar and Babu and then his case was registered. From the police station, they were sent to the government hospital where his daughter was medically examined. On the same day, the Inspector

came to his village, prepared a site plan and recorded his statement. The x-ray of daughter Kusma was also conducted at Sitapur.

In the cross, he has stated that he has two houses in the village. He was lying/sleeping in the second house. He saw Rajesh running in the torch light. He is *Brahmin* by caste. The accused is by caste *chamar*. On that day, his both the daughters were inside the house. He stated that he is not aware about the love affair of Kusma and Rajesh. The witnesses Vishambhar and Babu are of his family. He denied the suggestion that Rajesh went to see his daughter Kusma then Sridhar saw them and fired. He further denied the suggestions that Rajesh and Kusma having love affair and therefore no other person from the village has been made witnesses. He further denied the suggestions that if any villager have been made witness the correct story would have been came out. At the time of the medico legal examination of the injured, Suresh, Vishmbhar and his brother Babu were with the injured. Medico legal was conducted on second day in the morning. He denied the suggestions that since he is Brahmin by caste and Rajesh is Raidas, therefore, theft was shown against him. He further denied the suggestions that Rajesh has not committed theft on his house and there is no evidence that several cases are pending against Rajesh. He further denied the suggestions that Sridhar has fired. He also denied that the accused did not stole anything from his house.

14. Injured Kusma Devi. P.W.2, in her examination-in-chief, had stated that she along with her elder sister Sona Devi was sleeping in courtyard. Her brother was sleeping on terrace. Her parents were sleeping in the second house. In the night, Rajesh came inside her house and on the noise, she and her sister woke up and raised alarm, upon which, the accused Rajesh fired at her through country-made pistol with intent to kill. Thereafter, she said that on the *aahat* of Rajesh, she woke up and then she lit the lamp by matchstick and in the light of lamp, she saw Rajesh clearly and identified him. Due to fire by Rajesh, she sustained injury on her shoulder, temples (*kanpati*) and nearby. On hearing the noise of fire, the villagers, Vishambhar, Babu and several others came. Her brother saw Rajesh in torch light. After fire, her brother chased Rajesh, however, could not catch him and he ran away. She was medically examined at Sidhauri hospital. The x-ray was conducted on the next date in district Sitapur. The Investigating Officer took her statement after one month. She denied relationship with Rajesh.

In the cross, she stated that after having dinner, she went asleep and the door was closed by her sister from inside. No one opened the door. When Rajesh after making fire ran away, then her father called from outside and thereafter, her sister opened the door. Upon alarm, her uncle and other villagers came outside and then they came afterwards.

The Investigating Officer met with him after one month of the incident and took her statement. She expressed ignorance about the First Information Report and written report lodged by her father. She stated that when her father got open the door, then Rajesh was not inside the house. She denied the suggestion that she already knew Rajesh and he did not come inside her house and her family members fired which came upon her.

15. P.W. 3-Sona Devi stated that when she was sleeping along with her sister Kusma on a cot in the courtyard, both of them realised *aahat* and then her sister Kusma lit the lamp from matchstick and then both of them in the light of the lamp saw accused Rajesh, which is from their village, carrying country-made pistol in his hand. They raised alarm. Thereafter, their brother Makhan woke up who was on the terrace and Rajesh with intent to kill fired which came on her younger sister Kusma on her right shoulder, temples (*kanpati*) and got injured and fell down. Upon their alarm, her father Vishamber and other villagers came. Thereafter, accused Rajesh ran away. The villagers and her family members chased him but they could not catch him. Vishambhar, Babu, her father and villagers saw Rajesh in the torch light properly. Her sister Kusma was taken on tractor of Suresh to Police Station on the same day. After the noon, her father came to the village, however, Investigating Officer came before her, who prepared the site plan. Investigating Officer inquired the incident on

the same day. On the second day, Kusma was taken to the Sitapur for x-ray.

In the cross-examination, she stated that when her father called then her brother opened the door upon the noise. Her uncle whose house is adjacent to her did not come on the terrace. She denied the suggestion that her uncle came on the terrace.roof. Her family members as well as other villagers came on the spot. She denied the suggestions that name of the other villagers were not mentioned as witnesses as the truth will be revealed. When the door was opened Rajesh was there. She knew Rajesh. She saw the Investigation Officer, however, did not met and no enquiry/investigation was done by the Investigation Officer from her. She denied the suggestion that Rajesh did not come inside her house and neither fired. She further denied that she has not spoken truth in the court today. She denied her statement under Section 161 Cr.P.C. written by the Investigation Officer. She denied the suggestion that Rajesh did not come inside her house for committing offence. She further denied the suggestion that bullet was fired by her uncle which came on her sister.

16. P.W. 4 Makhan has stated that upon hearing the fire, he woke up and saw Rajesh was running with country-made pistol, in the torch light. He stated that he closed the door and put the chain upon it. When his father and other villagers came then the door was opened.

He was on the terrace/roof. After that he told that he did not know who opened the door. He stated that after they went to Police Station, the Investigating Officer came after 3-4 days. He denied the statement recorded under Section 161 Cr.P.C. that when he got open the door then Rajesh was not inside the house. He already ran away. By that time he could not see from where he ran away. He denied the suggestion that Rajesh did not enter in his house and somebody already made a fire due to which his sister got injured. He denied that Rajesh has been falsely implicated and they have concealed the real truth and given false statement.

17. The accused, in his statement under Section 313 Cr.P.C., has denied the prosecution case and has stated that between the informant and his brother, few months ago challan under Section 107 and 116 Cr.P.C. was made and due to enmity, he has been falsely implicated.

18. Learned trial Court believed the evidence of P.W.1-Vidyadhar as also that of injured Kusma (P.W. 2), her sister Sona Devi (P.W.3) and her brother Makhan (P.W. 4), and convicted and sentenced accused Rajesh in the manner stated in paragraph-2.

19. Hence the instant appeal.

20. Learned Counsel for the appellant submits that the appellant has been falsely implicated due to enmity by the upper caste *Brahmin* as accused was in relationship with the younger daughter of the

informant Vidyadhar (P.W.1). He submits that there are contradictory statements of the two eye-witnesses i.e. P.W.2 and 3, who were the real sisters regarding the fact that when the door was opened, whether accused Rajesh was present inside the house or he ran away. The independent witnesses Vishmabhar, Babu Ram and other villagers, who came on the spot, have not been examined rather have been withheld by the prosecution. No investigation has been conducted at all. The Investigating Officer has not collected any blood stained soil/ plane soil, blood stained cloths of the prosecutrix from the place of occurrence. No cartridge or weapon of assault has been seized by the Investigating Officer nor he had seized torch or diya (oil lamp).

21. Learned A.G.A. for the respondent/State, has opposed the appeal and has submitted that testimony of the injured Kusma Devi is enough to convict the appellant. The testimony is corroborated by the injury report as well as the statement of P.W.1 and P.W.3. It has further been submitted by learned A.G.A. that if some witnesses have not been examined that will not make any difference on the prosecution case as the quality of the evidence matters and not how many witnesses have been examined by the prosecution nor the prosecution can be compelled to produce all the witnesses.

22. Having regard to the submissions advanced by the learned Counsel for the parties and going through the record available before

this Court, it is required to be noted that a perusal of the written report shows that the incident took place in the intervening night of 3/4th August, 2000. First Information Report was lodged promptly, however, a perusal of the chik First Information Report shows that the information of the First Information report was placed before Judicial Magistrate, Sitapur only on 10.8.2000. The delay in sending the report to the Magistrate empowered to take the cognizance of the alleged offence creates doubt on the prosecution case particularly when there is no explanation regarding the delay in sending the special report to the Magistrate. P.W.1 is not the eye-witness. P.W.2 is the injured witness, who has stated that on hearing *aahat* of Rajesh, she wake up and she lit the lamp from matchstick and saw Rajesh clearly in the light of the lamp. She further stated that her statement under Section 161 Cr.P.C. was recorded by the Investigating Officer after one month of the incident. In the cross-examination, she has stated that she went asleep after taking dinner and the door was locked by her sister from inside by chain (*kundi*). The door was opened after her father called from outside by her sister. She further stated in the cross-examination that when the door was opened, Rajesh was not inside the house. She denied the suggestion that Rajesh did not enter inside the house and her family members fired and the fire came upon her.

On the contrary, P.W. 3-Sona Devi, who is also the eye-witness, has stated that after hearing some sound (*aahat*), both she and her sister woke up and when they raised alarm, Rajesh fired which came on her sister. After hearing fire, her father Vishambhar, Babu Ram and other villagers came inside. She gave statement that the injured was taken to the Police Station and on the same day after the medical examination, her father came in the village. The Investigating Officer came and took her statement.

23. A co-joint reading of the depositions of P.W.2-Kusma and her sister Sona Devi (P.W.3) shows that the statement of P.W.3 is in contradiction to the statement of P.W. 2 where she stated that the Investigating Officer took her statement after one month from the incident. In cross-examination, P.W.3 stated that when the door was opened, Rajesh was very much present. There is again in contradiction with the statement of P.W.2. Both i.e. P.W.2 and P.W.3, are eye witnesses, however, on these material aspect, the statement of both the eye witnesses i.e. P.W. 2 and P.W.3 are totally contradictory. The presence of accused Rajesh inside the house was not seen by any other witness other than P.W. 2 and P.W.3. The presence of accused Rajesh inside the house become doubtful in view of the contradictory testimony of P.W.2 and P.W.3. P.W.3 has denied her statement recorded under Section 161 Cr.P.C. The Investigating Officer has

recorded the statement of the injured witness after a delay of one month.

24. The case of the prosecution appears to be doubtful inasmuch as it is alleged by the prosecution that other witnesses namely Vishambar, Baburam and other villagers also came at the place of incident after hearing the sound of fire and also saw Rajesh running away from the house of the complainant, however, the prosecution had not produced them in witness box for testifying the incident nor any explanation for non-production of them as a witness even though they appears to be a material/important witnesses of the incident, has been given by the prosecution.

25. This Court has noticed that no investigation at all has been conducted by the Investigation Officer to cull out the truth. The Investigating Officer has not taken any blood stained soil/plain soil to fix the place of the occurrence. No empty cartridge or cartridges or weapon of assault, torch by which so many persons saw accused Rajesh running or diya (oil lamp) by which P.W. 2 and P.W. 3 saw Rajesh or blood stained clothes of prosecution have been seized by the Investigating Officer.

26. According to the statement of P.W.1, he got the written report scribed by somebody, however, the scribe of written report has also not been examined. The uncle of PW2 and PW 3 and brother of P.W.1

Sridhar whose house is adjoining to the house of the complainant and who also heard the fire alarm and came on the terrace/roof, has also not been examined. The suggestion of the defence that since Rajesh was having affair with Kusma (injured) and went to meet her and was seen by Sridhar, the uncle of the injured who fired which came on injured, carries force. The possibility of the false implication of the accused cannot be ruled out. The prosecution has not produced the number of witnesses who were present and have seen Rajesh running away from the spot. The place of occurrence becomes doubtful as no blood stained earth or plain soil has been collected by the Investigating Officer to fix the place of the occurrence. No explanation has been given by the prosecution as to why the statement of the injured has been taken after one month from the date of incident. Although the injured was medically examined on 4.8.2000 itself and on 5.8.2000 her x-ray was conducted . All this makes the testimony of the injured witnesses as well the eye-witnesses i.e. P.W.2 and P.W3 doubtful. The possibility of the false implication of Rajesh cannot be ruled out as the prosecution is silent as to why such important witnesses who has seen Rajesh running away from the house of the injured have been withheld.

27. The scribe of the First Information Report has also been withheld. The fact that the Investigating Officer has recorded the statement of the injured after one month further creates doubt. The

statement of P.W. 7 who stated that the injured did not told him as to from where the injured ran away further creates doubt on the presence of Rajesh.

Although P.W.2 has sustained the injury and no doubt the testimony of the injured witnesses stands on a higher side and in a special category. It is also true that the discrepancies of trivial nature cannot form basis of rejecting the evidence of a injured witness. However, in every case it cannot be treated as a gospel truth and in peculiar facts of this case, for the reasons stated hereinabove, the testimony of the injured witnesses becomes doubtful.

28. Hon'ble Supreme Court in **State of Haryana Vs. Krishan**, A.I.R. 2017 Supreme Court 3125, it was held that deposition of an injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies.

29. The same view was reiterated in **Laxman Singh Vs. State of Bihar**, (2021) 9 SCC 191 by holding that deposition of injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies therein. Evidence of injured witness is entitled to a great weight and very cogent and convincing grounds are required to discard his evidence.

30. In peculiar facts of this case, as discussed and the evidence led by the prosecution as discussed above, there is enough contradiction in the testimony of the P.W. 2 and P.W.3, who are the only eye-witnesses of the alleged fire shot made by the accused Rajesh. Both i.e. P.W.2 and P.W.3, have stated contrary version regarding the presence of the accused when the door was open inside the house which is an important circumstance and a vital discrepancy, coupled with fact that Investigating Officer has taken the statement of the injured after one month from the date of incident so also the fact that the incident took place on 4.8.2000 and special report was sent by the Magistrate on 10.8.2000 also creates some doubt in the version stated by the prosecution.

31. Hon'ble Supreme Court in the case of **Bijoy Singh vs. State of Bihar : (2002) 9 SCC 147** considering the importance of sending the copy of the special report to the Magistrate as required under Section 157 of the Criminal Procedure Code has held that sending copy of the special report is the only external check on the working of the police agency and is required to be strictly followed and delay in sending the copy of the FIR may not itself make the entire prosecution case doubtful but can put the court on guard to find out the true version of prosecution case. It has also held that delay in sending the copy of the special report is required to be explained by the prosecution and when the delay is reasonably explained no adverse inference can be drawn,

however, failure to explain the delay could require the court to minutely examine the prosecution case as no innocent person may be implicated in the crime. The relevant paragraph 7 of the judgment Bijoy Singh (supra) is extracted below:-

“Sending the copy of the special report to the Magistrate as required under [Section 157](#) of the Criminal Procedure Code is the only external check on the working of the police agency, imposed by law which is required to be strictly followed. The delay in sending the copy of the FIR may by itself not render the whole of the case of the prosecution as doubtful but shall put the court on guard to find out as to whether the version as stated in the Court was the same version as earlier reported in the FIR or was the result of deliberations involving some other persons who were actually not involved in the commission of the crime. Immediate sending of the report mentioned in [Section 157](#) Cr.P.C. is the mandate of law. Delay wherever found is required to be explained by the prosecution. If the delay is reasonably explained, no adverse inference can be drawn but failure to explain the delay would require the court to minutely examine the prosecution version for ensuring itself as to whether any innocent person has been implicated in the crime or not. Insisting upon the accused to seek an explanation of the delay is not the requirement of law. It is always for the prosecution to explain such a delay and if reasonable, plausible and sufficient explanation is tendered, no adverse inference can be drawn against it.”

32. Another vital important point is the delayed examination of the prosecution injured witnesses and un-explained delay by the Investigation Officer.

33. In **Rupchand Cindu Kathewar vs. State of Maharashtra: (2009) 17 SCC 37**, the Supreme Court has held that lodging of FIR after considerable delay and statement of eye-witness recorded after a delay of about 36 hours by itself is not fatal to the prosecution but there is a proviso to this broad principle that the evidence read as a whole must inspire confidence. The supreme court has observed in para 9 in its judgment as follows:

“It is also significant that the FIR was accordingly lodged after an inordinate delay at 4.00 p.m. on 14th May, 1999. We are cognizant to the fact that a mere delay in lodging the FIR would not be fatal to the prosecution story, but there is a proviso to this broad principle, that the evidence read as a whole must inspire confidence. As already indicated above, PW.2 was the only eye witness and his statement under [Section 161](#) was recorded after a delay of about 36 hours. Moreover, we find his conduct to be wholly unnatural. His evidence must, therefore, be looked at with suspicion. We have, therefore, gone through the medical evidence to see if the prosecution story was in any manner corroborated as it is the case of the appellant's counsel that the murder was a blind one and the entire story had been concocted after the dead body had been recovered.”

34. Hon'ble Supreme Court in the case of **Bodh Raj @ Bodha and ors. vs. State of Jammu and Kashmir** 2002 Supp(2) SCR 67 has held in paragraph 42 as under :-

“(42) was asked to investigate into the matter. It was also noticed that the road between Bari Brahamana and Samba where the court was located was dosed due to traffic on account of heavy rains. Though, the road was open from Jammu to Bari Brahamana but it was closed from Bari Brahamana to Samba. The day's delay for the aforesaid purpose (the FIR has reached the Magistrate on 5.8.1994) cannot be said to be un-usual when proper explanation has been offered for the delay. The plea of delayed dispatch has been rightly held to be without any substance.

“Another point which was urged was the alleged delayed examination of the witnesses. Here again. it was explained as to why there was delay. Important witnesses were examined immediately. Further statements were recorded subsequently. Reasons necessitating such examination were indicated. It was urged that the same was to rope in accused persons. This aspect has also been considered by the Trial Court and the High Court. It has been recorded that there was valid reason for the subsequent and/or delayed examination. Such conclusion has been arrived at after analyzing the explanation offered. It cannot be laid down as a rule of universal application that if there is any delay in examination of a particular witness the prosecution version becomes suspect. It would depend upon several factors. If the explanation offered for the delayed examination is plausible and acceptable and

the court accepts the same as plausible, there is no reason to interfere with the conclusion.”

35. It is to be seen that P.W.2, the injured witness has been examined after one month by the Investigating Officer whereas other witnesses were examined on the very next date as per the statement of the P.W.3. There is no explanation given by the Investigating Officer for delay in examination i.e. after one month. This creates suspicion on the prosecution case. Both, the unexplained delay in sending First Information report (special report) and the delayed examination of the injured witness, have not been explained by the prosecution coupled with totally contradictory testimony of the P.W.2 and P.W.3 regarding the presence of the accused inside the house. When, at the instance of the P.W.2 and P.W.3, her father got opened the door, then Rajesh was not inside the house. Also the plea of the defence that Rajesh was having an affair with P.W.2, who has been falsely implicated and in fact the fire has been made by uncle of the P.W.2 creates enough doubt on the prosecution case.

36. For the aforesaid reasons, I am of the opinion that in the peculiar facts of this case, the prosecution has not been able to prove its case beyond reasonable doubt. On the basis of such kind of shaky testimony of P.W.2 and P.W.3, which is also contradictory, coupled with the delay in sending the special report as well as one month delay in taking the statement of the injured witness by the Investigating

Officer, and also fact that the statement of the other witnesses were taken on the very next date i.e. on 5.8.2000, and also the fact that no recovery at all i.e. seizure of blood stained clothes of the prosecution, blood stained soil, plain soil, torch, oil lamp, have been done by the Investigating Officer, I am not inclined to convict the accused on this prosecution evidence.

37. For the aforesaid reasons, the instant appeal is *allowed*.

The judgment and order dated 16.11.2002 passed by the Additional Session Judge/Fast Track Court no.3, Sitapur in Sessions Trial No. 414 of 2001: State of U.P. vs. Rajesh, arising out of Case Crime No. 117 of 2000, under Sections 452/307 Indian Penal Code, Police Station Ataria, District Sitapur (supra) is hereby set-aside.

The appellant is acquitted from all charges leveled against him by the learned trial court. The accused-appellant is in jail. He shall be released forthwith, if not required in any other case.

38. Office is directed to transmit the lower court record along with a copy of the judgment to the Court concerned forthwith for information and follow up action.

Order Date :- 27.10.2023

Madhu

CRIMINAL APPEAL No. - 1791 of 2002