

AFR**Court No. - 45****Case :- CRIMINAL APPEAL No. - 2709 of 1983****Appellant :- Balloo And Ors.****Respondent :- State of U.P.****Counsel for Appellant :- V.C. Tewari, Diwakar Shukla, Rajiv Lochan Shukla****Counsel for Respondent :- A.G.A.****Hon'ble Siddhartha Varma, J.****Hon'ble Syed Qamar Hasan Rizvi, J.**

1. This criminal appeal has been filed against the judgment and order dated 27.10.1983 and the sentence and conviction dated 29.10.1983 passed by the IInd Additional Sessions Judge, Fatehpur.

2. Upon an alleged incident having taken place on 15.01.1981 at 8.00 a.m., the first information report in this regard was lodged at 1.30 p.m.. Thereafter, police got into action and started the investigation. The police took into its possession the plain soil and the soil laden with blood and prepared a memo, which was exhibited as Ex. Ka-12. Similarly, Spade (Farsa) was also taken into custody, the memo of which was prepared as Ex. Ka-13. Similarly, a Lathi of Baans was also taken into custody and a memo of which was prepared as Ex. Ka-14. Thereafter the Panchayatnama of the deceased was done. Along with the Panchayatnama and the first information report, which was lodged, the body was sent for post mortem on 16.01.1981. The dead body reached the mortuary at 3.45 p.m. and the post mortem thereafter was conducted on 17.01.1981 at 2.00 p.m. The police thereafter concluded its investigation and submitted its report. Upon the receipt of the report, the court of Sessions Judge, Fatehpur had framed the charges against the appellants, namely, Balloo, Pramod, Raja Babu and Anil on 28.04.1983 under Section 302 IPC read with Section 34 IPC. When the charges were denied, trial had commenced, which when ended in a conviction of the accused, the instant appeal was filed.

3. As per the First Information Report, the case of the first informant was that the uncle of the first informant, namely, Girdhari had gone to the eastern side of the village near the canal (Bamba Hall) for the purpose of irrigating his agricultural fields and while he was irrigating the fields, the appellant Balloo of the very same village, of which the first informant was came out from the side of the canal and called the uncle of the first informant towards the canal. Upon being so called the uncle of the first informant went up to Balloo and when the talks were over and the uncle was returning, it is the case of the first informant, from under the canal, where Lahi was growing Raja Babu, Anil and Pramod, the brothers of Balloo came out and they exhorted Balloo to kill his uncle-Girdhari as he was instrumental in getting the father of the appellants killed by Chandrapal etc.

4. It is stated in the first information report that they had exhorted each other to kill the uncle of the first informant Girdhari and to take the required revenge. It has further been stated that when the uncle upon being openly threatened by these accused persons started running towards the first informant, then Balloo, who was having a countrymade pistol fired upon the deceased. At that point of time Raja Babu also took out his countrymade pistol and fired upon the uncle of the first informant. Thereafter, the uncle of the first informant fell down. Not satisfied with just the firing, Pramod one of the accused persons also attacked the uncle with his Spade. It is still further the case of the first informant that when the first informant tried to save his uncle, he was also beaten by Anil with his Lathi. After the incident had occurred, the first informant raised a hue and cry. He has stated in the first information report that when the countrymade pistol was fired then Shivraj son of Puran, Kandhai son of Balkishan, Sukhdev son of Sundar and Chunnu Pasi came to the spot. He has stated that many others, who were present there to answer the call of nature near the canal also reached

the place of incident. It has also been stated that thereafter the accused persons ran away.

During the trial as many as seven witnesses were produced by the prosecution. Since the testimonies of PW- 4, 5 and 6 were heavily relied upon by the learned Amicus Curiae-Sri Raj Kumar Sharma for the appellants, the Court is reproducing the crux of the testimonies of these three witnesses.

5. PW-4 is the first informant who, in his testimony, has stated that he was an eye witness. He has stated in his testimony that he had come to the court in police custody and had stated that he knew Balloo, Raja Babu, Anil and Pramod, who were the real brothers and sons of Siddhgopal, who had been murdered a few days earlier. He had stated that his uncle Girdhari had been murdered on 15.01.1981 at around 8.00 a.m.. He has in his statement-in-chief stated that he alongwith his uncle Girdhari was irrigating the agricultural fields from the water, which came from the canal and has stated that the accused Balloo had called his uncle and had stated that he had some important work about which he wanted to talk. He has thereafter stated that along the boundary of the agricultural field, which runs from east to west, the accused had come towards the agricultural field of Girdhari/deceased and he had thereafter stated that at that point of time at the place which was marked as "B" in the site plan the incident occurred. PW-4 had stated that there was also an agricultural field, which was near the canal in which Lahi (mustard) was grown and from that Lahi, Raja Babu, Pramod and Anil, who had hidden themselves came out and Raja Babu had exhorted the others to kill the uncle of the first informant. Upon this, Balloo had fired upon Girdhari, uncle of the first informant and when the uncle had fallen down because of the gun shot injury, Raja Babu had also fired the second shot and thereafter Pramod, the third accused had with his spade attacked upon the body of the deceased. Similarly, Anil the fourth accused had wielded a lathi blow and had tried to bring further injuries over the body of the uncle. It has

been stated that when the first informant PW-4 ran towards the place of incident then Anil had hit him also with his lathi and the right hand of PW-4 was injured. He has categorically stated that apart from he himself Shivraj, Kandhai, Sukhdev and Chunnu also had seen the incident. He has thereafter stated that at the place of incident, while the accused had run away, the spade they had used along with Saria was left behind. He has stated thereafter that he had got the first information report written by one Rajendra Singh and had taken the same to the police station for lodging of the first information report. He has also stated that from the police station the injured i.e. the first informant was sent to the hospital to get his injuries examined.

6. In the cross examination, he has stated that he had been in jail for the murder of one Girja Shankar. Upon being further questioned as to whether, because of the fact that the first informant was an accused in the case of murder of Girja Shankar there was false implication of Balloo, Pramod, Raja Babu and Anil in the murder of Girdhari, PW-4 had stated that the deceased Girdhari had absolutely no enmity with any body. In fact he states that even in the murder of Siddhgopal, who was the father of the accused persons, nowhere it was mentioned that Girdhari was in any manner inimical to Siddhgopal. He has thereafter, stated in paragraph 8 of the cross examination that his uncle Girdhari had no enmity whatsoever with the accused persons. He only states that the accused persons somehow had a hunch that Girdhari was responsible for the death of their father Siddhgopal and he states that since at no point of time earlier, the element of enmity between the Girdhari and Siddhgopal was there, he only suspected that the accused persons were having a feeling that Girdhari was inimical to Siddhgopal. He states that it could be the reason that is why the accused persons killed Girdhari. In the cross examination upon being questioned, he has mentioned about caste politics in the village. Upon being questioned as to in what sequence the firing was done, he has stated that first Balloo had

fired and thereafter Raja Babu had fired upon the deceased. Upon being further cross examined that earlier the first informant had said that firstly Balloo had fired and thereafter when his uncle had fallen down then Raja Babu had fired, he had said that he stated a falsity. He has however stated that he had seen that Raja Babu had fired on the buttocks of the deceased after he had fallen down. He states that he had also got reported about the same in the first information report and if that was not mentioned in the first information report, he did not know the reason why it was not mentioned. Upon being questioned as to whether the accused were hiding at the relevant point of time behind the canal, he had stated that in fact they were not hiding behind the canal but they were hiding elsewhere in the agricultural field where Lahi (mustard) was being grown. In the cross-examination, he has very categorically stated that he had not, in fact, seen Anil hitting his uncle. He has also stated that Balloo had also come out from the lahi fields and had fired upon the deceased and thereafter the second fire was shot by Raja Babu. He has upon being questioned on the basis of the site plan, whether there was any agricultural field, which was lying vacant in between canal and the agricultural fields of the deceased Girdhari, he has stated that in fact there was no agricultural field which was lying vacant.

7. When the defense wanted a clarity as to at what time the uncle of the first informant and the informant had reached the place of incident, the first informant had stated that before the incident had occurred i.e. before 8.00 a.m. they had reached the place of incident around 1-1/2 hours earlier and that was for the purposes of irrigating the fields.

8. PW-5 Sri Ram Pratap Tripathi was the Investigating Officer, who had stated the manner in which he had investigated. He has in his examination-in-chief clearly stated that he had got the site plan prepared in the presence of Shivraj and Kandhai and had done the inspection himself. He has thereafter stated that from the spot he had recovered a blood stained spade, and had also recovered a lathi. He has stated that after he had done the

inspection, he reached the village (Abadi) where he had taken the statements of Shivraj and Kandhai. He has stated that after he had done his bit of the investigation till the 29.01.1981, the same was taken over by Sub-Inspector Sri Lalta Prasad Tiwari who had completed the investigation by 16.03.1981 and submitted a charge sheet before the court. The Investigating Officer/PW-5 when was confronted with the statement which he had recorded of the first informant Amrit Lal, he had stated that he had recorded just as much as was told to him by PW-4. During cross-examination, when he was asked, as to why he had not mentioned the position from where the first informant had seen the incident, he had stated that by mistake, he had not asked the first informant, as to where he was standing and admitted that this issue actually was missed out by him. He has thereafter stated that on the date when he had gone for inspection, the first informant was present at the place of incident. He has stated that since he had never asked the first informant as to where he was standing, therefore he had not amended the site plan. The PW-5, upon being asked as to whether he had mentioned about the vacant plot of agricultural land between the canal and the plot of Girdhari/deceased, he had stated in-fact he had stated so in the site plan and that it was a correct fact.

9. PW-6 is Dr. G.S.Gaur and he has stated about the ante-mortem injuries, which were found on the body of the deceased. He has in his cross-examination stated that even though the bladder of the deceased was empty and large intestine had faecal matter, he has very categorically stated that the death had occurred on 15.01.1981 at around 5-6 a.m..

10. PW-7 is the doctor, who had examined the PW-4, the first informant and had given his statement with regard to the injuries sustained by PW-4.

11. PW-1 is the chik writer and he has proved the chik. PWs-2 and 3 were Shivraj and Kandhai, the two witnesses, who according to the first informant and also according to the Investigating officer PW-5 were present

at the place of incident and had seen the incident. They had however turned hostile.

12. The accused persons had got their statements recorded under Section 313 Cr.P.C. and thereafter upon the evaluation of the evidence as was brought on record, the trial was concluded and when the Second Additional Sessions Judge, Fatehpur on 27.10.1983 convicted the four accused persons with life imprisonment under Section 302/34 IPC, the instant criminal appeal was filed.

13. During the pendency of the criminal appeal, appellant no.1 Balloo, appellant no.2 Pramod and appellant no.4 Anil had died. As per the office report appellant no.3 Raja Babu had not been found and he was also not represented by any lawyer. The Court, therefore, on 30.07.2024 appointed Sri Raj Kumar Sharma as an Amicus Curiae to argue the case.

14. Learned Amicus Curiae, who has argued the case, has submitted that appellant Raja Babu was wrongly implicated along with all the other accused-appellants, who had died during the pendency of the appeal and has made the following submissions :-

(i) Learned Amicus Curiae has submitted that the entire prosecution case is based on the eye witness account of PW-4. He however states that the manner in which the PW-4 had deposed, it becomes evident that he was not present on the spot and that in a case of blind murder, that had occurred, he had been planted by the prosecution so as to make it appear that he was there on the spot and had seen the entire incident. To substantiate this argument, learned Amicus Curiae submits that PW-4 states that the accused persons had been hiding in the canal from before the time the deceased Girdhari and the first informant had reached the place of incident, i.e., 1-1/2 hours before the incident had actually occurred. He submits that in that case they should have shot at the deceased much earlier when it was early morning and when not many people could have seen the incident. He

further submits that the PW-4 becomes a doubtful witness as in first information report he had stated that the accused-Balloo had called deceased near the canal and near the canal there was an agricultural field of Lahi in which Raja Babu, Anil and Pramod were hiding and from where they had come out and attacked on the deceased. Learned counsel for the appellant, however, states that after the site plan was prepared and it was found that there was, in fact, no agricultural field on the western side of the canal where Lahi (mustard) were grown, the PW-4 had changed the statement in his statement-in-chief and has stated that in fact the deceased Girdhari and Balloo had walked up to point "B" and from the agricultural field which actually had Lahi (mustard) the other accused persons had came out of their hiding and had assaulted upon the deceased.

(ii) Learned counsel for the appellant therefore states that first informant had absolutely taken a somersault from the case, which he had taken in the first information report and, therefore, to bring his case in conformity with the site plan, had given an improved version in his statement before the trial court. Learned counsel for the appellant still further states that the incident had actually occurred at around 6.00 a.m. as per version of doctor/PW-6. He states that in villages normally agricultural work is done after the farmers answer their call of nature. However, in the instant case, the dead body had fecal matter in its large intestine and therefore, it meant that in fact the deceased had gone to answer the call of nature, where some body had killed the deceased and first informant was not present there on the spot, and had thereafter concocted the entire story, so as to plant the four accused at the place of incident. Learned counsel therefore submits that PW-4 was not there at the spot and only to create the entire story, he had lodged the first information report in a most doubtful manner, which did not match with the time of the incident and also with the site plan.

(iii) Learned counsel for the appellant thereafter has submitted that the statements of the witnesses become doubtful and they cannot be believed and definitely conviction cannot be based on such statements.

(iv) Learned counsel for the appellant, thereafter has submitted that if the site plan did not match with the statements of witnesses, the case of the prosecution becomes absolutely doubtful. In this regard, he has relied upon a judgement of Supreme Court in ***Kailash Gaur and others Vs. State of Assam*** reported in ***2012Vol.(1)SCC(Crl.)717*** and he has stated that in that case also the Investigating Officer had prepared the site plan of the occurrence before taking of the statement under Section 161 Cr.P.C. but had not mentioned certain important features, which subsequently were revealed in the statement under Section 161 Cr.P.C.. He submits that in the instant case also, the first information report had stated the incident in such a manner that it could be taken that the accused were hiding immediately in the agricultural field which were contiguous to the canal but in the site plan agricultural fields neighbouring the canal were vacant. He, therefore, submits that the case becomes doubtful and should not be for that reason believed. In this regard, learned counsel for the appellant relied upon the judgement of the Supreme Court in the case of ***Singhara Singh Vs. State of Haryana and anothers*** reported in ***(2003) 12 SCC 758***.

(v) Learned counsel for the appellant thereafter has relied upon the judgement of ***Mehraj Singh Lance Nayak Vs. State of Uttar Pradesh*** reported in ***1994 SCC Vol.5 188*** and relying upon paragraph 12 of it, has submitted that if the inquest report had stated something else and things had happened in a different manner, then also prosecution story becomes doubtful. He submits that in the inquest report, the first informant had reported that death had occurred because of firing and because of the attack the deceased by Kaanta and Saria but in-fact learned counsel for the appellant states that there was no trace of any Saria on the spot as has been

stated by PW-5. Since, the learned counsel for the appellant relied upon paragraph 12 of the judgement, the same is being reproduce hereinunder :-

“12. FIR in a criminal case and particularly in a murder case is a vital and valuable piece of evidence for the purpose of appreciating the evidence led at the trial. The object of insisting upon prompt lodging of the FIR is to obtain the earliest information regarding the circumstance in which the crime was committed, including the names of the actual culprits and the parts played by them, the weapons, if any, used, as also the names of the eyewitnesses, if any. Delay in lodging the FIR often results in embellishment, which is a creature of an afterthought. On account of delay, the FIR not only gets bereft of the advantage of spontaneity, danger also creeps in of the introduction of a coloured version or exaggerated story. With a view to determine whether the FIR was lodged at the time it is alleged to have been recorded, the courts generally look for certain external checks. One of the checks is the receipt of the copy of the FIR, called a special report in a murder case, by the local Magistrate. If this report is received by the Magistrate late it can give rise to an inference that the FIR was not lodged at the time it is alleged to have been recorded, unless, of course the prosecution can offer a satisfactory explanation for the delay in despatching or receipt of the copy of the FIR by the local Magistrate. Prosecution has led no evidence at all in this behalf. The second external check equally important is the sending of the copy of the FIR along with the dead body and its reference in the inquest report. Even though the inquest report, prepared under [Section 174 CrPC](#), is aimed at serving a statutory function, to lend credence to the prosecution case, the details of the FIR and the gist of statements recorded during inquest proceedings get reflected in the report. The absence of those details is indicative of the fact that the prosecution story was still in an embryo state and had not been given any shape and that the FIR came to be recorded later on after due deliberations and consultations and was then ante-timed to give it the colour of a promptly lodged FIR. In our opinion, on account of the infirmities as noticed above, the FIR has lost its value and authenticity and it appears to us that the same has been 'ante-timed and had not been recorded till the inquest proceedings were over at the spot by PW 8.”

(vi) Learned counsel for the appellant further states that the case also becomes doubtful inasmuch as when the first informant was saying that he had an injury in his right hand and he had stated so in the first information report, then the case also should have been registered under Section 323 IPC. The case of the learned counsel for the appellant is that in-fact the injuries which were subsequently somehow inflicted upon the first

informant and thereafter were also got examined were in fact not there at all. Learned counsel for the appellant states that even if the first information report is perused, it states that lathi as was wielded by the accused Anil was only used to beat the first informant. There is no specific allegation as to where the injuries had occurred on the person of the first informant.

(vii) Learned counsel for the appellant further states that subsequent Investigating Officer, Lalta Prasad Tiwari, who was an important witness was not produced in the court at all.

(viii) Learned counsel for the appellant states that not only Shivraj and Kandhai had turned hostile, the other witnesses as were mentioned in the first information report namely, Sukhdev and Chunnu were also not produced before the court. No effort in fact was made even by the court to get them to the court to give their testimonies.

(ix) Learned counsel for the appellant further stated that even the motive, which was assigned to the accused persons was not there. He has pointed out at page 48 of the paper book and has stated that in fact the PW-4, the first informant himself had stated that there was no enmity between the deceased Girdhari and Siddhgopal and it was only on the basis of doubt which he had in his mind that he was saying that the accused persons had a suspicions that Girdhari had killed Siddhgopal and therefore he states that for an absolutely whimsical reason the accused persons had been got implicated by the first informant.

15. Sri Amit Sinha, learned AGA, however has supported the judgment of the trial court and has submitted that injured eye witness account of PW-4 could not be brushed aside lightly. He has submitted that if the cross examination of PW-2 and PW-3 is seen it would become clear that they had turned hostile as they were frightened to death because of the local politics which was existing in the village.

16. Having heard the learned Amicus Curiae-Sri Raj Kumar Sharma and the learned AGA Sri Amit Sinha, we find that the first informant has changed his statement from time to time. In the first information report he had stated that the accused were hiding in the agricultural field which had Lahi growing in it in the western neighbourhood of the canal, but when the site plan were prepared and the first informant found that in fact the agricultural fields contiguous to the canal on the westerns side were vacant, he had shifted the entire place of incident to a point "B" where in fact Lahi was being grown. We further find that the case of the first informant was that the first informant and his uncle/deceased reached the place of incident around 1-1/2 hours prior to the time of incident but the attack actually took place at 8.00 a.m.. It does not stand to reason that when accused were hiding in the place as has been alleged by the first informant why they did not attack the injured and the deceased, the moment they had reached the place of incident. This definitely creates a doubt in the mind of the court.

17. Still further the court is of the view that when the faecal matter was present in the large intestine and when the doctor was saying that the incident had actually occurred around 5-6 a.m., then the time which the first informant had given i.e. 8.00 a.m. was also not believable. In villages in India and specially in the year 1981, farmers used to first answer their calls of nature and thereafter used to proceed with the work of irrigation and farming. In the instant case, definitely it appears that the first informant had not seen the incident, which had actually occurred much earlier in point of time and therefore, the testimony of the first informant does not inspire confidence with us and we have no hesitation in saying that the testimony of first informant was not believable. Also we find that first informant had lodged the first information report and had stated that he had also been beaten by a lathi but he had not mentioned any injury in the first information report. It appears that he had after the first information report was lodged only to come in the category of "injured witness" got

manufactured some injuries on his hand and those injuries he had got examined by the doctor PW-7. Also the fact that the panchayatnama had mentioned that the cause of death was firing and injuries by "Kanta" and "Saria" makes the case of the prosecution doubtful as nowhere, the Investigating Officer had found any 'Kanta' or 'Saria' lying at the place of incident.

18. We are of the view that if the statement of PW-4 is seen then even the motive which was given in the first information report was not a motive at all.

19. Having stated our opinion in the judgement above, we are definitely of the view that the PW-4 was a got up witness. He was definitely not there at the spot and therefore, we are of the view that the charge as was levelled against the appellant Raja Babu was not proved and therefore, we are definitely of the view that the appellant Raja Babu ought to be acquitted from the charges levelled against him. For all the reasons, we have stated, we are of the view that the appeal should be allowed and the appellant Raja Babu should be acquitted.

20. For the reasons stated above, we are of the view that the appeal deserves to be allowed. Accordingly, present appeal stands allowed and the judgement and order dated 27.10.1983 passed by the IInd Additional Sessions Judge, Fatehpur is set aside. The appellant no. 3 Raja Babu is hereby acquitted of the charges levelled against him.

21. The appellant no.3 is on bail. He need not surrender. The bail bonds are cancelled and sureties are discharged.

22. Let a copy of this judgement be sent to learned trial court for necessary compliance and action together with record of trial court immediately.

23. For the hard work Sri Raj Kumar Sharma, learned Amicus Curiae has done in arguing the case, we are of the view that he be paid a fee of Rs. 25,000/- by Allahabad High Court Legal Services Authority. The payment be over seen by the Registrar General of this Court.

Order Date :- 8.11.2024

Abhishek Sri.