

A.F.R.

Court No. - 67

Case :- CRIMINAL APPEAL No. - 5905 of 2018

Appellant :- Saurabh Kumar

Respondent :- State of U.P.

Counsel for Appellant :- Lav Srivastava, Anurag Pathak, Arun Kumar

Sharma, Rajan Srivastava, Randhir Singh, Sanjay Kumar Yadav, Sr. Advocate

Counsel for Respondent :- G.A., Amit

Hon'ble Rahul Chaturvedi, J.

Hon'ble Mohd. Azhar Husain Idrisi, J.

1. Heard Sri Rajiv Lochan Shukla, learned counsel for the appellant assisted by Sri K.K. Pandey as well as Sri Dileep Kumar, Senior Counsel assisted by Sri Amit Singh, learned counsel for the informant, learned A.G.A. representing the State of U.P. On account of certain gray areas in the instant appeal we have sought an assistance from the learned counsel for the appellant to further argue the case and clarify those areas in the appeal. Which was done by the counsel in the month of May, 2024 and now we are in position to decide the matter finally on merits. After hearing the rival submission we are proposing to decide this matter finally on merits.

2. From the record it reveals that there are two connected Appeals 5905 of 2018 in Re- Saurabh Kumar Vs. State of U.P. & Criminal Appeal No. 7075 of 2018 in Re- Bhanu Urf Bhanu Pratap. Both the appellants have preferred the afore-mentioned appeals. Accused-appellants namely, Bhanu Pratap and Saurabh Kumar filed these separate appeals assailing the legality and validity of judgement dated 03.10.2018 passed by Additional Sessions Judge/ FTC-2 Bijnor whereby both the aforesaid mentioned namely Bhanu Urf Bhanu Pratap and the appellant Saurabh Kumar were convicted by the concerned trial court. Now for the sake of convenience, we have clubbed the records/ memo of both the appeals and they are being jointly decided.

From the order sheet of Criminal Appeal No. 7075 of 2018, it reveals that Sri Satendra Tiwari learned A.G.A. informed the Court, that pending appeal the

appellant Bhanu Urf Bhanu Pratap died about two years back and as such his appeal Criminal Appeal No. 7075 of 2018 stood abated and consigned to record vide order dated 21.09.2023 by the Bench of this Court.

Thus, the current situation is that the only appeal No. 5905 of 2018 in Re: Saurabh Kumar is pending for final adjudication.

3. **Saurabh kumar**, the appellant before us, has preferred the instant Criminal Appeal, under section 374(2) Cr.P.C., challenging the validity and legality of the judgment and order dated 03.10.2018, passed by Additional Sessions Judge/Fast Track Court No.2, Bijnor, in Session Trial No.105 of 2016, emanating from case crime no. 381 of 2015, Police station- Mandawar, District Bijnor wherein, he has been convicted under section 302 read with section 34 I.P.C., and sentenced to life imprisonment, with a fine of Rs.50,000/- and in default of payment of fine, the appellant has been directed to undergo three years additional imprisonment, along with co-accused Bhanu alias Bhanu Pratap.

4. *Sri Rajiv Lochan Shukla, learned counsel for the appellant at the outset informed the Court that the present appellant Saurabh Kumar is neither named in the FIR nor charge sheeted accused and has been summoned by learned trial judge vide order dated 06.09.2016 in the exercise of power under Section 319 Cr.P.C.*

He further states that the name of the appellant Saurabh Kumar for the first time floated by the informant after one month and five days of the lodging of the FIR. It is submitted that, no plausible or convincing reason was forwarded by the prosecution for this unexplained delay and this sea change/ addition in the tone, tenure and texture of the prosecution story which is extremely relevant for the present case and having a potential for, far reaching repercussion upon the authenticity and vericity of the prosecution story.

5. In short conspectus, the genesis and portray of the prosecution case as mentioned in FIR and other undisputed facts and circumstances is that on 02.11.2015 at about 7:50 P.M., a Tehrir (report) was given by Kamesh Singh (informant/complainant) at Police Station- Mandawar, District-Bijnor, divulging therein that at about 7.00 p.m. when his uncle Dr. Narendra Kumar was present in his clinic, situated in his residence at village- Kamalpur, P.S.

Mandawar, District Bijnor, Bhanu Pratap Singh (since dead), resident of Kamlapur, came at his clinic for having the medicine. His uncle asked him to sit and wait. It caused great annoyance and irritation to him. Bhanu could not squeeze his ire and fury and opened firing, with an intention to eliminate Dr. Narendra Kumar (uncle of the complainant). Consequently, he sustained fatal fire-arm injury over his abdomen. The complainant took prompt step of informing, by giving a Tehrir (Ext Ka-1), regarding the said incident, alongwith the injured in a precarious condition to the police station Mandawar, where a letter to the District hospital, Bijnor was prepared and sent along with the injured to the hospital for the treatment and necessary medico legal action.

6. On the basis of the above stated scribe (Tehrir), dated 02.11.2015 at about 7.50 p.m. a Criminal Case No. 381 of 2015, under Section 307 IPC was registered against accused Bhanu Pratap alone, at P.S. Mandawar, District Bijnor. Particulars of which were entered into chik FIR Ext ka-21 and G.D. Kaimi Ext Ka-22 Initially, the investigation of the case was entrusted to S. I. Guru Pal Singh.

7. Injured Narendra Kumar was admitted at District Hospital Bijnor and was medically examined there. Since there was fatal injury on the vital part of his body i.e. abdomen, his condition was not improving, rather deteriorating. Hence, he was referred to Meerut on the same day for better and proper treatment at about 8.30 p.m. While the family members of the injured Narendra Kumar was taking him to Meerut, he scummed to his injuries on the way, at about 11.25 pm.

DEVELOPMENTS DRUING INVESTIGATION

**** The information to this effect Ext Ka-2 was given by Kamesh Singh (Complainant) on 03.11.2015 to the police station concerned. Accordingly, the case was converted into Section 302 IPC. In addition to this revelant information regarding the demise of the deceased on account of gunshot injury, the informant has tried swell the number of witnesses for the obivious reasons and as such he himself along with his aunt Dinesh Devi w/o late Narendra Kumar Rajput has become two eye witnesses of the incident who have seen Bhanu alias Bhanu Pratap while running away from the place of occurrence, carrying illegal tamancha in his right hand.**

It is strange, that the name of appellant Saurabh Kumar does not find place

even in the application dated 03.11.2015.

**** Sri Shukla, learned counsel for the appellant has drawn our attention to an application dated 01.12.2015, addressed to S.P. Bijnor signed by the informant annexing the two affidavits of Sandeep and Amit who have given their own affidavits. By this application the informant is of the view that those applications should be kept on record and taken into consideration while investigation done by Sri Shyam Singh Negi I.O. of the Crime Branch.**

**** In addition to above learned counsel for the appellant has drawn our attention to yet another application on behalf of first informant Kamesh, addressed to S.P. Bijnor dated 07.12.2015 (Ext. No. Ka- 3) whereby for the first time the informant states that in witch he was in the stage of shock and mental trauma and turbulence, while lodging of the parent FIR dated 02.11.2015 but now after gethering the infomration from the various quarters, the informant Kames states that, the main auther of the incident is Bhanu alias Bhanu Pratap with the help and aid of Saurabh Kumar (present appellant) has committed this offence. He further states after lapse of more than one month period that this unfortunate incident was witnessed by the Amit and Sandeep who shared this information to the first informant that they have seen the assaulants and the appellant Saurabh Kumar running away from the place of occurrence after comming of offence. He further accuses that the local police is trying to save the present appellant Saurabh Kumar from this offence. It has been mentioned that the present Saurabh Kumar have actively participated in the commission of the offence as he was nurturing enimical relationship qua his uncle Narendra Singh, the deceased. Sri Shukla further states that the name of the present appellant has surfaced after one month and five days after lodging of the original FIR on 02.11.2015. That is how the name of the present appellant Saurabh Kumar came into light after much an inordinate delay, admittedly after collecting the information from various quarters. Under circumstances embellishment in the prosecution story cannot be completely ruled out. However, this aspect of the issue would be well considered in the subsquent paragraph of the judgement.**

Learned counsel for the appellant, drawn our attention to the Ext. Ka- 5, 16.12.2015 whereby the first informant after one month and fourteen days, realising his blunder that no motive has been attributed to the present appellant in the FIR, in order to fill in the blank, and after having the legal advice for the

first time have tried to insert the motive in the present offence.

We have perused Ext. Ka-5 dated 16.12.2015 whereby he has mentioned that in fact the present appellant Saurabh Kumar was having the serious differences and tangle with son of the deceased namely Harsh. On this account the deceased went to Saurabh Kumar's place and have scolded him and has given to two-three slap to the him. This is the reason attributed for the alleged enimical relationship between the appellant and the deceased. This information was shared by the informant Kamesh after one month and sixteen days of the lodging of the FIR.

This piecemeal improvement in the prosecution story and the every stage of investigation casting a serious doubt and shift from the primary prosecution story, which considerably corrodes the authenticity and veracity of the prosecution story. The informant at every stage is move an application inserting new fact and feature in the prosecution story just to fill up the lacunas as per legal advice received to the informant.

8- On being informed about demise of Dr. Narendra Kumar, the police administration came into action and ensued investigation. The investigating officer took into custody the corpse of the deceased Narendra and carried out the requisite formalities and arranged to keep the corpse at mortuary. On 03.11.2015 after completion of requisite formalities like appointment of panchan, I.O. got prepared *panchnama (Inquest)* of the dead body of the deceased. It is opined in the inquest report, marked as Ext Ka-8, that cause of death of the deceased is fire-arm injury sustained by him in his abdomen, nevertheless in order to ascertain the exact cause of death autopsy of the dead body was proposed. In Post Mortem Report, Ext Ka-9, the doctor opined that the death of the deceased Narendra Kumar has occurred due to profuse bleeding and asphyxia, as a result of gun shot injury. Meanwhile, the investigation was transferred to S.O./S.I. Surendra Kumar Pachori.

9. The I.O./S.I. Surendra Kumar Pachori inspected the place of occurrence, prepared the site plan at the instance of complainant and recorded the statements of the witnesses u/s 161 Cr.P.C. and on getting the tip off and clue from the police sympathizer with respect to presence of accused Bhanu, arrested him on 04.11.2015 at about 7.00 p.m. and recovered a country-made pistol with a empty cartridge in its barrel, allegedly used in the incident, at his instance, from a plastic sack filled with paddy, from the room of a tube-well.

Recovery memo Ext Ka-17 and site plan of place of recovery Ext Ka-26 was prepared in the presence of witnesses and recovered weapon physical Ext-6 & cartridges physical Ext-7,8,9, was sealed on the spot. The recovered weapon was sent to Forensic Science Laboratory for forensic examination.

10. It transpires from the record that on arrest of the accused Bhanu and recovery from him, a Case Crime No.382 of 2015, under Section 25 of Arms Act was also registered, against him.

11. In view of the applications moved by complainant, I.O. strived to collect evidence about involvement of Saurabh in the crime, but he found no such evidence against him. However, I.O. after due investigation collecting sufficient material and evidence, showing the complicity of accused Bhanu only, submitted charge sheet against him ,under Section 302 I.P.C. and 25 Arms Act in the court of learned C.J.M., Bijnor. Even after holding the thorough investigation the I.O. of the case could not collect anything incriminating against the appellant Saurabh Kumar and therefore the charge sheet No. 02 under Section 302 I.P.C. was submitted only against the Bhanu alias Bhanu Pratap and not against the appellant which has led to the creation of S.T. No. 105 of 2016.

Similarly, Case Crime No. 382 of 2015 under Section 25 of Arms Act the IO of the case has submitted the charge No. 2145 of 2015 against the co-accused Bhanu alias Bhanu Pratap which has eventually given rise to S.T. No. 106 of 2015.

As mentioned above, name of the appellant Saurabh Kumar does not find place in both the charge sheets but was summoned in the excersise of power under Section 319 Cr.P.C. in S.T. No. 105 of 2016 under Section 302 I.P.C.

12. Learned C.J.M. took cognizance of the case. Being exclusively triable by the court of sessions, committed it to the Sessions vide its order dated 24.02.2016 for trial, where the case was registered as S.T. No. 105 of 2016 and S.T. No. 106 of 2016 against Bhanu under Section 302 I.P.C. and Section 25 Arms Act respectively and later transferred it to the court of Additional Sessions Judge/ Fast Tract Court No. 2, Bijnor.

13. Learned Sessions Judge framed charges under Section 302 I.P.C. and Section 25 Arms Act against the Bhanu (since deceased) on 29.03.2016 and accused Saurabh was charged under Section 302/34 I.P.C. on 21.10.2016. The accused appellant Saurabh, including co-accused, abjured the charges,

“plead not guilty, and claimed to be tried”.

14. The prosecution, in order to bring charges home, against accused persons / appellant, examined following witnesses in the ocular evidence as under:-

Sr no.	Name	PW Nos.	Remarks
1.	Kamesh Singh	P.W.-1	(nephew of the deceased)
2.	Dinesh Devi	P.W.-2	(wife of the deceased)
3.	Sandeep Kumar	P.W.-3	(nephew of the deceased)
4.	Dr. Yogendra Tirkha	P.W.-4	conducted post -mortem
5.	S.I. Gurupal Singh	P.W.-5	I.O.
6.	S.I. Surendra Singh Pachori	P.W.-6	I.O.
7.	S.I. S.S. Negi (Cr. Branch)	P.W.-7	I.O.
8.	Dr. Ram Singh	P.W.-8	Dr.(issued Reference Slip)
9.	Dr. Prem Prakah	P.W.-9	Conducted-medico legal
10.	S.I. Satish Kumar	P.W-10	I.O.

15. In order to further substantiate the charges levelled against the appellant, prosecution has also adduced the documentary evidence as under:-

Sr no.	Documents Exhibited	Proved by	Ext Nos.
1	Tehrir	P.W.-1	Ext. Ka- 1
2	Application after demise of deceased dated 03.11.2015 to S.O. Mandawar	P.W.-1	Ext. Ka- 2
3	Application dated 07.12.2015 to S.P. Bijnor	P.W.-1	Ext. Ka- 3
4	Application dated 01.12.2015 to S.P. Bijnor	P.W.-1	Ext. Ka- 4
5	Application dated 16.12.2015 to S.P. Bijnor	P.W.-1	Ext. Ka- 5
6	Affidavit of Sandeep	P.W.-3	Ext. Ka- 6
7	Recovery Memo of country-made pistol	P.W.-3	Ext. Ka- 7
8	Panchayatnama of Dead body	P.W.-3	Ext. Ka- 8
9	Post-mortem Report	P.W.-4	Ext. Ka- 9
10	Letter to R.I., Letter to Doctor, Photo Lash, Challan Lash, Photo Bullet, Sample Seal	P.W.- 5	Ext. Ka- 10 to Ka- 14
11	Site Plans regarding place of occurrence, recovery of the weapon and chakroad	P.W.-6	Ext. Ka-15,Ka-16
12	F.S.L Reports	P.W.-7	Ext. Ka-17,Ka18
13	Call Detail Report	P.W.- 7	Ext. Ka-19
14	Charge-Sheet U/S 302 IPC	P.W.- 7	Ext. Ka-20
15	Chik FIR	P.W.-7	Ext. Ka- 21
16	Kaimi G.D.	P.W.-7	Ext. Ka-22
17	Place of occurrence Plan	P.W.-7	Ext. Ka- 23
18	Reference Slip	P.W.- 8	Ext. Ka- 24
19	Medical Report	P.W.-9	Ext. Ka- 25
20	Site plan with Khsra	P.W.-10	Ext. Ka- 26
21	Charge-Sheet U/S 25 Arms Act	P.W.-10	Ext. Ka- 27
22	Application forchange of the I.O.toC.O. Bijnor	P.W.-10	Ext. Ka- 28
23	Chik FIR regard Arms Act	P.W.-10	Ext. Ka- 29
24	Dakhila G.D.	P.W.-10	Ext. Ka- 30
25	Chik FIR regard Crime No. 381/2015 u/s 307 IPC	P.W.-10	Ext. Ka- 31
26	Entry G.D.	P.W.-10	Ext. Ka- 32
27	Carbon copy Tarmimi G.D	P.W.-10	Ext. Ka- 33

16. Besides, in further corroboration to prosecution case, it has also exhibited physical objects in its evidence as under:-

Sr no.	Objects Exhibited	Pws: who proved	Ext Nos.
1	Four Images on the time of Postmortem and One photo of bullet which came out of the body.	P.W.-4	Physical Ext 1 to 5
2	Contry Made Pistol (Tamancha)	P.W.-5	Physical Ext.- 6
3	Three Cartridge	P.W.-5	Physical Ext.- 7,8,9
4	Bullets recovered from dead body	P.W.-5	Physical Ext.- 10, 11
5	Paper Coverd Bullet	P.W.-5	Physical Ext.- 12
6	Bundle	P.W.-5	Physical Ext.- 13
7	White Polythene	P.W.-5	Physical Ext.- 14
8	C.D. which could not be played	P.w.-6	Physical Ext.- 15
9	Cloths	P.w.-6	Physical Ext.- 16

17. On conclusion of the prosecution evidence, the appellant was examined under Section 313 Cr.P.C., with reference to prosecution evidence on record. As many as 42 queries were put to him by the learned trial court. In his statement he denied that renounced the prosecution story and stated that complainant got prepared wrong and false affidavits of various persons, which contains not even an iota of truth. He know, nothing about the incident as stated in prosecution. He denied his presence on the place of occurrence at the time of incident, firing by Bhanu upon the deceased with a country made pistol in his abdomen, his medical treatment at district hospital Bijnor or Meerut. He stated that FIR is based on a wrong facts. Incident was not seen by the complainant Kamesh and his aunt Dinesh Devi who reached there on hearing the fire. In answer to a suggestive query he stated that it is wrong to say, that PWs saw fleeing him along with Bhanu Pratap after fire. He did not comment that the post mortem of the deceased conducted on 03.11.2015 in district hospital Bijnor. He stated that the site plan was wrongly prepared and nothing incriminating was recovered from him.

The appellant stated that the evidence of PW- 1 Kamesh, PW-2 Dinesh Devi, PW-3 Sandeep Kumar, is wrong and not believable. He further stated that evidence of PW-4 doctor Yogendra Tirkha. PW-5 Gurupal Singh, PW-6 S.I. Surendra Singh Pachori, PW-7 Shyam Singh Negi, PW-8 Ram Singh, PW-9 doctor Prem Prakash, PW-10 S.I. Satish Kumar is wrong and reports are wrongly prepared by them. He was falsely implicated due to enmity and he is innocent.

18. The accused/ appellant did not adduced any oral or documentary evidence in his defence.

19. The Learned Trial Court after examining and evaluating the testimony of the prosecution witnesses, oral and documentary, and other material on record, came to the conclusion that there is a complete chain of evidence showing the complicity of accused appellant in the commission of the said crime and the prosecution has successfully been able to prove its case beyond reasonable doubts, pointing the guilt against the accused persons and as such convicted Bhanu alias Bhanu Pratap under Section 25, Arms Act and sentenced him for one year imprisonment along with fine of Rs.1,000/-. The appellant Saurabh too was convicted in Session Trial No.105 of 2016, under Section 302 read with 34 IPC for life imprisonment with fine of Rs.50,000/- with default clause. Thus, it is evident that the learned trial judge after taking the recourse of Section 34 I.P.C., have roped the appellant under Section 302 read with 34 I.P.C.

20. Broadly speaking learned counsels for the appellant putforth following arguments in his favour:

A- **Appellant Saurabh Kumar is not named in the FIR:-** It has been argued by the counsel for the appellant that appellant is not named in the FIR dated 02.11.2015 nor his name figure in the application given by the informant to the S.P. Bijnor on very next date dated 03.11.2015. Nor any role attributed to the appellant in his 161 statement given to the police. As mentioned above at the very belated stage about one month and five days name of the appellant has figured along with his so called accomplice Bhanu alias Bhanu Pratap. From the application it is evident that the actual role of firing has been attributed to the co-accused Bhanu alias Bhanu Pratap and it is alleged that when actual offence was taken place the present appellant was standing over the channel and after the incident both of them fled away from the place of occurrence. Interesting feature of the case is that informant and his aunt Dinesh Devi both of them claims that they are the eye witness of the incident but surprisingly neither in the FIR nor in the statement 161 Cr.P.C. nor given application to the S.P. Bijnor has even wisper the name of the present appellant. It is only after gathering information from the various quarters friends and relatives have tried to stigmatize

falsely implicate the appellant in this offensive.

B- **Appellant is not charge sheeted accused:-** that it is pertinent to point out that though the information vis-a-vis and other witnesses have tried to figured the name of the appellant as a perpetrator of the crime but during the course of the investigation no active participation of the appellant was found hence after thoroughly investigated the matter the investigating officer submitted the chaege sheet against the Bhanu Pratap but no charge sheet have filed against the appellant.

C- **No motive to the appellant:-** That though during the course of investigatio the enmity was established between the co-accused Bhanu Pratap and the deceased i.e. Ext. Ka- 23 but neither the appellant is having any motive nor having any concerned with the Bhanu Pratap.

D- **No Recovery from the appellant:-** That it is also pertinent to point out that there is no connecting material against the appellant to connect in the present crime in question even the alleged weapon of crime was also recovered from the alleged co-accused Bhanu Pratap whereas no recovery of any weapon or any incrementing material was recovered from the possession or pointing out of the appellant.

E- **Appellant Summoned u/s 319 of Cr.P.C.** That it is also pertinent to point out that after filing the police report and during the course of trial the prosecution have filed an application u/s 319 of Cr.P.C. but without considering the material the then available on record and without prpoerly appreciated the evidence the learned Court concerned have summoned the appellant vide its order dated 06.09.2016.

F- **Disputed Place of Occurrence:-** That it is also pertinent to point out that the place of occurrence is higly doubtful which create a serious shadow of doubt on the testimony of the P.W.- 1 & P.W. - 2.

G- Referring the evidence and other relevant material placed by the prosecution on record, learned counsel for the appellant, Sri Rajiv Lochan Shukla, has assiduously argued that appellant was neither named in the tehrir (Ext Ka-1) nor in first information report (Ext Ka-21). Nothing incriminating material recovered from his possession or pointing out. There is no eye witness of the incident or who have seen the accused Saurabh committing the crime and running away from the scene of occurrence. The witnesses examined by the prosecution are

interested and partition. There are material contradictions in their statements. Place of occurrence is also disputed. The name of the appellant for the first time came on the surface in an application dated 07.12.2015 (Ext Ka-3) moved to SP Bijnor.

The application contains concocted, deliberated and after thought story. He was not charge sheeted by the I.O. Appellant was erroneously summoned u/s 319 Cr.P.C., to face the trial. Above all, no motive is attributed to the appellant although during the course of investigation, the enmity was established between the co-accused Bhanu Pratap and the deceased regarding chak road but neither the appellant is having any motive nor having any concerned with the Bhanu Pratap. statements of PW-1 complainant Kamesh , PW-2 Dinesh Devi and PW-3 Sandeep Kumar are not reliable and believable. He finally argued that prosecution has failed to prove its case beyond reasonable doubts. There is no justification to convict and sentence to a person against whom there is no complete chain of evidence pointing towards the guilt. The learned trial judge failed to take into account and appreciate the discrepancies occurring in the evidences. The finding of guilt recorded by the court below are not based on proper and correct evaluation and appreciation of evidence, rather the learned trial judge has drawn adverse inference while there is no evidence worth name available against the appellant showing his complicity. Therefore, the impugned judgment and order convicting and sentencing the appellant in the aforesaid crime is not sustainable in the eyes of law and the same is liable to be set aside and the appellant deserves to be absolved of the charges of murder under Section 302 read with section 34 IPC. These arguments have been further elaborated in the course of evaluation of evidence.

Per contra, learned counsel for the informant as well as learned A.G.A. representing the State, and learned private counsel for the complainant opposed the submissions advanced by the learned counsel for the appellant and contended that evidence has to be weighed and not counted. If the evidence is cogent, credible and trustworthy having a ring of complete chain of incident, it cannot be jettisoned. The emphasis is laid on value, weight and quality of

evidence rather than on quantity, multiplicity or plurality of witnesses. It is submitted that there are sufficient materials to depict the involvement of the appellant in the commission of said offence. The fatal injury to Dr. Narendra Kumar has been caused in a very brutal and horrific manner with the sole object of taking away his life. The prosecution has fully proved that the accused appellant has shared in the commission of said offence. It is compatible to illustrate here that Dr, Narendra Kumar (deceased) has been shot in a very diabolical and gruesome manner with the sole object of taking vengeance. The execution of crime has been carried out in a pre-planned and pre-concerted manner, which is conspicuous on record. If there is any defect in investigation or inconsistencies in the testimony of prosecution witnesses, the entire prosecution story cannot be discarded. The findings of guilt recorded by the trial court are based on correct appreciation and evaluation of evidence on record. Blackening of the wound can be found only when the shot is found from a distance of three to four feet and not beyond the same.

The learned A.G.A. as well as learned counsel for the complainant further argued that First Information Report as noticed herein above was lodged at the quickest possible time. As per prosecution case the incident has occurred on 02.11.2015 at about 07.00 p.m. and tehrir (Ext Ka-1) of the same was presented to P.S. Mandawar at 07.35 p.m. on the same day. The first information report is not supposed to be an encyclopedia of the entire event. The learned trial judge has found sufficient materials to take cognizance against the appellant by allowing the application under Section 319 Cr.P.C. The findings recorded by the trial court cannot be said to be erroneous or perverse. (P.W.-1) Kamesh Singh and (P.W.-2) Dinesh Devi, who are the eye witnesses of the case, have fully supported the prosecution version. The ballistic report also supports the prosecution version, as the country made pistol, which was used in the commission of crime, was recovered on the pointing out of accused Bhanu. Thus, learned trial judge has sifted and weighed entire evidence on record and has rightly convicted and sentenced the appellant.

Learned counsel for the informant, has further elaborated these

arguments of during the course of analysis of evidence.

22. In view of the rival submissions made by learned counsels for the parties and having gone through the material available on record and having regard to entire gamut of the case, the only question that falls for our consideration is whether the trial court committed any error in passing the impugned judgment and order. Therefore, their submissions will be tested on the touchstone of the given evidence, undisputed facts and circumstances and legal scenario.

Analysis of the issues involved

21. Now, we propose to analyse ocular evidence adduced by the prosecution. PW-1 complainant Kamesh, PW-2 Dinesh Devi, are the witnesses of facts. They were examined twice by the prosecution. Once when appellant was not made an accused and second time when he has been summoned u/s 319 Cr.P.C.

22 **PW-1 Kamesh Singh** is the complainant of the case. He claimed himself to be an eyewitness of the incident. He has deposed that on 02.11.2015 he was sitting in the residence of his uncle Dr Naraendra Kumar at about 07.00 p.m. Bhanu along-with his companion saurabh, came at the clinic of his uncle, which is situated in his residence. Bhanu entered in the clinic, while Saurabh stood near Chanel. As soon as Dr. Narendra got up to give the medicine, Bhanu shot him by country made pistol, with the intention of killing him. The bullet hit the abdomen of his uncle. As soon as he and his aunt ran outside to catch the accused, Bhanu and Saurabh, ran away waving the pistols in their hands. He has also stated that about 8-9 months before the incident, some hot altercation had taken place between Saurabh and his uncle's son Harsh kumar then his uncle had gone to the residence of Saurabh and reprimanded and scolded him and even slapped Saurabh three four times. Since then appellant Saurabh was nurturing animus and grudge against his uncle Dr. Narendra. Saurabh and Bhanu are the teaching in the same school and are close friends. A few days before the incident, Saurabh had told Dhyan Singh and Ankur of Basi that Dr. Narendra to be killed. After the incident they took injured to the police station, where he gave a scribe (Therir), Ext. Ka-1, about the incident, which is in his writing and signature. The witness proved the scribe as Ext. Ka-1. At the time of occurrence he was sitting with his aunt Dinesh Devi in the

Varandah in side her residence. Thereafter injured Dr. Narendra was brought to District Hospital Bijnor, where viewing his pitiable condition doctor refereed him to Meerut. He died on the way to Meerut. They return to police station, and gave the information in writing, Ext Ka-2. about demise of Dr. Narendra Kumar. This application is also in his writing and his signature. The witness proved it. He further stated that on 07.12.2015 he gave an application to the S.P. Bijnor to take appropriate action against the police officers because Saurabh was arrested by the police and after keeping for one night in the police station, set him free. He further stated that before 05.11.2015 he has given an other application. Similarly on 01.12.2015 and 16.12.2015, he gave other applications along-with the affidavits, to S.P. Bijnor. He proved these applications as Ext Ka 4 and Ka 5. Besides he, Sandeep and Amit are also witnessed, Bhanu and Saurabh, after shooting his uncle Dr. Narendra, both of them has country made pistol in their hands, while running Bhanu was saying to Saurabh that he has shot Narendra, as per your direction, save me.

23. PW-1 complainant Kamesh has been thoroughly cross examined by the learned counsel for the defence. In his cross examination he stated that earlier he had been a doctor, but now has left the medical practice and running the business of RCM and forming. On the day and time of the incident he was sitting in the Varandah of the residence of his uncle. He had gone there by chance, just to meet his uncle at about 6.30-7.00 p.m. His aunt was also there. He reached at police station at about 7.30-7.45 pm where on the dictation of Daroga Ji he wrote the tehrir Ext Ka-1. He had told to Daroga ji that he was present at the spot at the time of the occurrence but it is correct that the same has not been scribe in Ext Ka-1. I have seen the incident. When he gave the tehrir, it was well with in his knowledge that the fact that he was present at the time of incident and witnessing the evidence, is not written in the tehrir. When he inquired about this daroga ji answered that complete the formalities and take the injured for treatment. At an other place he confessed that he has not communicated to any one that he have seen the incident. At that time, he never gave in writing to any one that he witnessed the occurrence. He has not made any complaint about. The fact that daroga ji Surendra Singh Pachauri restrained him in writing his statement in this regard in the tehrir. When the investigation handed over to the crime branch, he had not disclosed to them that FIR was written as per dictation of Surendra Singh Pachauri and not

voluntarily by him. He had given a first application on 05.12.2015 regarding the incident, which is not on record. However, photocopy of the same was annexed by him to his application u/s 319 Cr.P.C. He had orally informed about the demise of his uncle on the very day of his death, he do not remember the date. It is true that in Ext Ka-3, it is not mentioned that he witnessed the incident, even in Ext Ka 4 dated 01.12.2015, it was not mentioned that he witnessed the incident. He, his uncle and aunt were sitting in the Verandah of the residence. There is only a window between the clinic and residence. Uncle had gone to the clinic room to give medicine, he and his aunt remained sitting in the Verandah. When the fire took place, he was sitting near aunt. On hearing fire he got up and ran to see as to what has happened. He ran towards uncle and found him hit by a bullet in his stomach. When he reached, the aunt came with him, the doctor was standing after being shot, both of us made him sit on the chair. He had motor cycle with him. Uncle was taken to the hospital to the car. His uncle's son had gone to call Gaurav, the car owner. It would have taken 20-25 minutes for the car to arrive. He did not give any first aid to the injured uncle during that time. Even uncle did not ask to give him any medicine. There was no bleeding when my uncle was shot. No blood had poured on the ground at the scene of the incident. Only a little bit of blood was on the clothes. He spent about 20 minutes in the police station concerned. Thereafter went to District hospital, Bijnor. He admitted the injured uncle, but his signature is not obtained in this behalf. His injured uncle was sent from Bijnor to Meerut. He has never told to any police officer, that there was a dispute between his uncle and Bhanu regarding chak road. There was no dispute between them. If the inspector did not mention this in his statement, he cannot tell the reason. He saw Saurabh and Bhanu running. Apart from him Sandeep and Amit of his village also saw Bhanu and Saurabh running away after shooting his uncle Narendra. He was not refrained from telling this to crime branch. Such a statement was not written by any previous officer or in any application that while running away, Bhanu was telling Saurabh that he had shot Dr. Narendra as per his instructions, save him.

24. In his further cross-examination PW-1 has stated that the incident took place at about 7.00 p.m. It was dark. Electricity was being supplied and tube light was on in the clinic room and street light of the village was also supplied. Injured went up to vehicle by foot but no bloodstained found there in

the car. He has not named Dinesh Devi as witness, in the application by which he informed the death of his uncle. In the application dated 07.12.2015 he has not mentioned that he had seen Saurabh on the spot. While going to Meert by ambulance police personnel were with them. On returning they managed to keep the dead body in the mortuary. The witness has referred the narration between him and his injured uncle. He told to I.O. that he and his aunt reached on the spot and both of them saw Bhanu running with a pistol. He further stated that he has shown the place where he his uncle and aunt were sitting and having tea. He did not pointed out the place from which he saw the Bhanu. They were having tea sitting in the Varandah and not in the courtyard. This Verandah is situated towards south from the courtyard. If these places are not exhibited by the I.O. in the site plan he cannot say anything about it. After the incident nobody of the vicinity reached at the place of occurrence after hearing the sound of fire and running the accused. It was known to me prior to lodging of FIR that there is an enmity between the Saurabh and the deceased due to which he wants to take revenge. He denied the suggestion that he has named Saurabh after deliberation with the relatives. At the time of occurrence noon of the village or vicinity present on the spot. The person running after committing the crime was wrapped with a loi.

25. **PW- 2 Dinesh Devi**, is the wife of the deceased Dr. Narendra Kumar. In her testimony she has attributed role of firing to the alleged accused Bhanu Pratap. She deposed that she knows accused Saurabh and Bhanu. They are close friends and both of them teach in same school. At the time of incident they were posted in the village- Teetarpale. Bhanu was Prerak and Saurabh was teacher. She further stated that about 5-6 months before the incident, there was a altercation in between her son Harsh and Saurabh. At this, her husband Narendra Kumar went to the residence of the Saurabh, scolded and slapped him. Since then Saurabh was nurturing enmity with her husband. On 02.11.2015 at 7.00 p.m. She was in her home with Dr. Narendra. Kamesh had also come there and was sitting in her residence. Dr. Saheb was sitting next to them near the window of the clinic. Bhanu and Saurabh came there. Bhanu entered inside the clinic and Saurabh stood near the Chanel. As soon as her husband Dr. Narendra got up to give medicine to Bhanu, he immediately shot him. We took care injured Dr. Saheb picked him up and

brought him to the police station in the vehicle. Thereafter he was brought to Bijnor hospital. There from, he was being taken to Meerut hospital, but on the way he succumbed. Amit and Sandeep have told her that they have seen Bhanu and Saurabh running with country made pistol and Bhanu was saying to Saurabh that he has killed the doctor, save him.

26. The witnesses was thoroughly cross examined. In her cross examination she deposed that when she reached near his husband she saw running the person who has hit him with bullet. He was not wrapping any loi. When doctor shaheb went to give medicine. He was fired upon after 10-15 minutes. She do not know whether he has given medicine before the firing. This is true that a shutter opens outside in the clinic room. There is open place between the shutter and the road. The road is in the south of his residence at the distance of 6 to 7 fit. Accused after coming out the shutter firstly ran towards east and then towards south then there is jungle. It is also true that at the time of incident, it was dark but lights were on. She do not know whether the site plan was prepared as per his indications or on some other basis. Varandah means a roofed structure and court yard means open place. The door of the room, where the incident occurred, opens towards east in the place under the roof. She denied the suggestions put-forth to her.

27. **PW- 3 Sandeep Kumar** has deposed in his examination that he know the accused Bhanu and Saurabh. Both of them are resident of the same village. On 02.11.2015 at about 07.00 P.M. He was returning from Jungle. His co-villager Amit met him in front of his house. When they reached near the residence of Dr. Narendra, they heard the sound of fire. They approached towards of the residence of the Dr. Narendra. and saw running away Saurabh and Bhanu, holding country made pistol in their hands, from the front of the residence of the deceased. Bhanu was saying to Saurabh that I have shot Dr. Narendra on your direction, save me. They were frightened. Injured Dr. Narendra was taken away to district hospital by his nephew Kamesh. 5-6 months before the incident, there was a scuffle in between Harsh son of Dr. Narendra and Saurabh. At this, Narendra Kumar went to the residence of the Saurabh, scolded and even slapped him. Since then Saurabh had harbored hostility with Dr. Narendra Kumar. He has given an affidavit, Ext Ka 6, to S.P. Bijnor on 01.12.2015. The witness further stated that on 04.11.2015 accused Bhanu was arrested and a country made pistol was recovered, at his instance.

The recovery memo was prepared at the spot, which bears his signature also. The witness proved it as Ext Ka-7. He further stated that on 03.11.2015 inquest of the dead-body of the Narendra was conducted . He was a witness to inquest report, Ext Ka -8.

28. The witnesses is also cross examined. In his cross examination, he admitted that deceased Dr. Narendra was his real uncle and the complainant Kamesh is his real cousin. On the day of occurrence he was coming from jungle, he saw Saurabh and Bhanu fleeing from a distance of 2-3 meters, from the residence of Dr. Narendra. He saw them from 25-30 meters from the residence of the deceased. He saw them in the light installed in the balcony of the house of the deceased. When accused were passing him, he did not ask them, where from they are coming. Then he came to his residence, thereafter he reached to the residence of doctor saheb. Kamesh was taking doctor out his residence. He did not accompanied them. He do not know who had gone with doctor then he did not went inside doctor's residence. He received the news in the village that the doctor has expired. Latter he went to the hospital but Doctor saheb did not met him in the hospital. So he returned at about 10-12 o' clock to his residence. He remained in his residence next day throughout the day. He has told next day to Kamesh that he saw Saurabh and Bhanu going. He him self gave affidavit, Ext. Ka-6, to S.P. Bijnor. In the affidavit he has not written that deceased and Bhanu have some dispute regarding chak road and if it is there in the affidavit, it is wrong. The affidavit was given after one month of the incident. He confessed that it is true that they have taken doctor to the hospital, before he reached. He has stated to the investigating officer that Saurabh and Bhanu were running with pistols in their hands and Bhanu was saying to Saurabh that he has shot doctor as per his instruction, now save me. He has signed the recovery memo of Bhanu but he do not know from where Bhanu was arrested and where from recovery was made. He was not informed by anyone about the incident. He had no talk with aunt till next day. He had not gone inside the residence of his uncle nor he accompanied him while he went for treatment to Meerut. He attended the postmortem of his uncle. Other relatives were also present there, except his aunt Dinesh Devi at the postmortem house. His residence is situated only two meters away from the residence of the deceased.

29. **P.W.-4 Yogendra Tirkha** conducted the postmortem of the deceased on 03.11.2015. During autopsy he found following ante-mortem injuries on the body of the deceased doctor Narendra Kumar:-

(1)- Gunshot entry wound 3 x 1.5 cm. x 1 x depth could not be measured during examination, with inverted margin on the right side of the wall in front of the chest and abdomen at the 5 o'clock position of the clock, 12 cm below the right nipple, the edges of the scar were bent downwards. There were marks of blackening and tattooing of marked 30x24 cm around the wound.

(2)- A metallic bullet was recovered, embedded in the flesh on the posterior abdominal wall.

Opinion:- In the opinion of the doctor, the above injuries may have been caused on 02.11.2015 at about 07.00 P.M. by fire arm.

In his opinion **Cause of death** was shock and hemorrhage, as a result of ante-mortem fire-arm injury of the deceased. The witness proved the post-mortem report as Ext. Ka-9.

The witness also deposed that at the time of autopsy he got prepared four photographs of the dead body and one photo was also photographed the bullet which was recover from the body of the deceased. He proved these photographs and bullet as physical Exts. 1 to 5.

30. PW- 4 is also put to cross examination wherein he stated that only one bullet was hit to the deceased which was embaded in the body. No pellets were recovered from the dead body. He was shot from the distance of 2-3 fit.

31. **PW- 8 Doctor Ram Singh**, deposed that Doctor V.K. Shukla prepared the reference slip referring the injured doctor Narendra Kumar to the medical collage Meerut for further treatment. The reference slip is in the hand writing and signature of doctor of doctor V.K. Shukla. He is conversant with his writing. Thus, he proved the reference slip, in secondary evidence, as Ext. Ka- 24

32. **P.W.- 9 Dr. Prem Prakash**, medico-legally examined the injured

Narendra Kumar on 02.11.2015 at about 8.25 pm. He found the following injuries upon the body of the injured:-

1. Lacerated wound 03 x 1.5 cm. x depth could not ascertained on right abdomen, 10 cm. below right nipple at 5 o' clock position. There was reddish blackening tattooing in 25 cm. x 16 cm. surrounding the wound.

The doctor further stated that the injury was kept under observation and x-ray was advised. Doctor has opined that the injury could have been caused by some fire-arm that includes tamancha at about 7.00 p.m. on 02.11.2015. The witness proved the injury report as Ext. Ka- 23. In his examination, he has deposed that he cannot tell the distance between injured and place wherefrom the fire was opened. In his opinion it was approximately 10 fit. He found the injury fresh.

33. **P.W.-5 S.I. Gurupal Singh, P.W.-6 S.I. Surendra Singh Pachori, P.W.-7 S.I. Shyam Singh Negi** are I.O.s of the case, who deposed that they conducted the investigation the matter and proved various prosecution documents like request for PM, site plan, chik, charge sheet and kaimi G.D. from Ext. Ka-10, to Ext. Ka-23. and physical Ext. from Ext. 6, 7, 8, 10, 11 to 16. and P.W.-10 Satish Kumar proved chik FIR, Kaimi G.D. and G.Ds. from Ext. Ka-26 to Ext. Ka-33. and various other documents. These witnesses were put under detailed cross examination also.

In the nutsell above is the material relied upon by the prosecution to establish the guilt of the appellant Saurabh Kumar. After examining the aforementioned material critically and in a reasonable prosepective it is highly unlikley that for a insignificant and severe incident said to have been taken place about 7-8 months back, the accused appellant would nurture the anamosity for aforesaid period and implicate his friend to commit the offence and he remain a silent spectator of the incident. It is most unlikely that while fleeing away from the place of occurrence, the accmplice Bhanu alias Bhanu Pratap would say to the accused appellant that commondng your direction I have committed the offence as per your commond and guidance, now you (the accused appellant), he has to save him from the clutches of the police and this conversation would be overheard by Sandeep and Amit. This narration is picturised the absuerdity of the prosecution story would be apparent.

Presence of the appellant at the place of occurrence

34. The first question to be scrutinized is as to whether the appellant was named in the first scribe (tehrir), Ext. Ka- 1, on the basis of which chik FIR Ext. Ka-21, was lodged at the police station concerned and his presence on the place of occurrence at the time of incident and participation in the occurrence. Learned counsel for the appellant Sri Rajiv Lochan Shukla has assiduously contended that appellant is not named either in tehrir Ext Ka-1, or chik FIR Ext Ka 21, or any other evidence. FIR was launched against Bhanu Pratap only u/s 307 I.P.C. His name did not surface any where. No incriminating article is recovered from his possession or at his pointing out. He was introduced for the first time in an application moved by the complainant on 07.12.2015 i.e. after a delay of one month and five days, from the incident. As a matter of course appellant's name has been introduced by the complainant after due consultation and deliberation, with a view to implicate him . Learned G.A. and private counsel of the appellant refuted the argument of the learned counsel for appellant.

35. Per contra, learned G.A. contended that FIR is not supposed to be encyclopedia of the entire facts therefore, it is not necessary to mention each and every thing pertaining to the case. The complainant was in a state of shock at the time of occurrence and in a hurry to report and carry the injured to hospital for treatment, so while writing the scribe he could miss the fact that Bhanu and his associate Saurabh both, went to the clinic of the deceased in the pretext of taking medicine. Bhanu entered in the clinic and fired at the deceased, while Saurabh remain stood near the channel. This fact has been deposed by PW-1 Kamesh and PW-2 Dinesh Devi who are eye witnesses of the occurrence and Sandeep Kumar and Amit also, who saw both of them running, waving the country made pistols in their hands. They also heard Bhanu while running saying to Saurabh that he has shot Dr. Narendra as per his direction, save him. PW-3 Sandeep has been examined by the prosecution. He confirms it by stating that while running Bhanu was saying to Saurabh "मैंने तुम्हारे कहने से डॉ. नरेंद्र को गोली मार दी है, मुझे बचा लेना" In these conditions, the factum of participation of the Saurabh in the crime is amply clear. Therefore, anonymizing the name of the appellant in the FIR is not fatal to the prosecution case.

36. It is well established proposition of law and jurisprudence that FIR

is not an encyclopedia of entire case wherein each and every, minor or major, fact is to be mentioned, yet it must state skeletal features, there by disclosing the commission of the offence. As for as the argument, that FIR does not contains the names of the all the accused persons, is concerned it has to be kept in the mind that if any overt act is attributed to a particular accused among the assailant, it must be given greater assurance about his participation in the crime. In this context reference to certain authorities would be fruitful .

In, **State of Uttar Pradesh v. Naresh and Others (2011) 4 SCC 324**, placing reliance on **Rohtash vs State of Rajasthan (2006) 12 S.C.C. 64** and **Ranjeet Singh Vs state of M.P. (2011) 4 S.C.C. 336**, the Apex Court held as under:-

“It is settled legal proposition that FIR is not an encyclopedia of the entire case. It may not and need not contain all the details. Naming of the accused therein may be important but not naming of the accused in FIR may not be a ground to doubt the contents thereof in case the statement of the witness is found to be trustworthy. The court has to determine after examining the entire factual scenario whether a person has participated in the crime or has falsely been implicated. The informant fully acquainted with the facts may lack necessary skill or ability to reproduce details of the entire incident without anything missing from this. Some people may miss even the most important details in narration. Therefore, in case the informant fails to name a particular accused in the FIR, this ground alone cannot tilt the balance of the case in favour of the accused.”

37. In view of the above legal scenario the question is whether appellant Saurabh has been implicated indeed owing to his participation in the said crime or he has been falsely implicated by way of after-thought or not. It must be judged having regard to the entire factual scenario of the case. In this regard it is worth quoting the tehrir Ext. Ka-1 which reads as under:-

“ महोदय निवेदन है कि मेरे चाचा जी डा० नरेंद्र कुमार अपने क्लीनिक पर जो घर पर ही है, मौजूद थे । समय करीब 7 बजे सांय गाँव का भानू S/O राम किशन निवासी कमालपुर क्लीनिक पर आया तथा मेरे चाचा से दवा लेने के लिए आया तथा मेरे चाचा ने कहा बैठो अभी दवा देता हूँ। इसी बात पर नाराज होकर जान से मारने की नियत से मेरे चाचा के गोली मार दी, जो उनके पेट मे लगी है। इन्हें उपचार हेतु अस्पताल ले जाना है रिपोर्ट दर्ज कर कानूनी कार्यवाही करने की कृपा करें।

(02.11.15)”

38. Since, chik FIR Ext. Ka- 21 has been registered on the basis of the tehrir, Ext. Ka- 1, hence, it is the ditto version of tehrir as mentioned above.

39. As discussed above, the complainant moved several applications on different dates to the S.O. Mandawar and S.P. Bijnor. An birds eye view of these applications will be helpful in finding out the actual fact.

(i)- On 03.11.2015 complainant Kamesh gave an application to the S.O. Mandawar, Bijnor, which read thus:-

महोदय,

निवेदन इस प्रकार है दिनांक 02.11.2015 को मेरे चाचा डॉ. नरेंद्र कुमार राजपूत पुत्र स्वर्गीय तेजराम सिंह निवासी ग्राम कमाल पुर थाना मंडावर को जान से मारने की नियत से भानु पुत्र रामकिशन निवासी कमाल पुर थाना मंडावर जिला बिजनौर ने गोली मार दी थी जो गंभीर रूप से घायल हो गई थी मैं उन्हें थाने लेकर आया था और मुकद्दमा लिखवाया था गंभीर रूप से घायल होने के कारण जिला अस्पताल बिजनौर उपचार हेतु लेकर गए थे डॉक्टरों ने उन्हें इलाज हेतु जनपद बिजनौर से मेरठ को रेफर किया था मैं अपने चाचा जी को इलाज हेतु मेरठ लेकर जा रहा था रास्ते में ही उन्होंने अपना दम तोड़ दिया है उनका मृत शरीर सदर अस्पताल की मोर्चरी में रखा है थाना सूचना देने के लिए पुनः आया हूं कानूनी कार्यवाही करने की कृपा करे आपको बताना चाहता हूं कि मेरे चाचा को भानु पुत्र रामकिशन ने जब गोली मारी थी तो गोली कि आवाज सुनकर के मैं तथा मेरी चाची दिनेश देवी पत्नी नरेंद्र कुमार राजपूत के साथ मौके पर आ गए हम दोनों ने मौके से भानु पुत्र रामकिशन को भागते हुए देखा है जब भानू मौके से भागा था उस समय इसके दाहिने हाथ में तमंचा भी था मेरे चाचा की मृत्यु दिनांक 02.11.2015 को समय करीब 11.25 बजे रात्रि में हो गई है

अतः आपसे अनुरोध है कि उक्त संबंध में आवश्यक कानूनी कार्रवाई करें!

(03.11.2015)

(ii) On 01.12.2015 the complainant Kamesh singh gave another application Ext Ka-4 to SP Bijnor divulging therein that some important witnesses were inquired by the IO. These witnesses are important to reach at right conclusion of the case. Hence, the annexed affidavits of the deponents sandeep and Amit, be sent to IO Inspector Shyam Singh Negi.

(iii) On 07.12.2015 he moved another application before S.P., Bijnor which reads thus:-

महोदय,

निवेदन है कि दिनांक 02.11.2015 को शाम समय लगभग 7 बजे गांव के भानु वा सौरभ ने प्रार्थना के चाचा डॉ नरेंद्र की हत्या गोली मार के कर दी थी।

जिसकी रिपोर्ट प्रार्थी ने थाना मंडावर में अपराध क्रमांक 381/2015 धारा 307 आईपीसी के तहत लिखाई थी। जिसे बाद में धारा 302 में तरमीम कर दिया गया। प्रार्थी ने भानू के विरुद्ध रिपोर्ट लिखाई थी। चुनकी वह परेशान व सदमे में आ गया था और रिपोर्ट लिखने से पूर्व उसकी किसी से बात नहीं हुई थी। वास्तव में यही है कि प्रार्थी के चाचा की हत्या भानु द्वारा सौरभ पुत्र शेर सिंह के सहयोग से की गयी है। इस घटना को अमित वा संदीप ने भी देखा है। लेकिन थानेवा पुलिस सौरभ को बचा रही है और जनबूझकर सौरभ के विरुद्ध कार्यवाही नहीं कर रही है। जबकी सौरभ पूरी तरह से प्रार्थी के चाचा की हत्या में संलिप्त रहा है। और सौरभ से प्रार्थी के चाचा मृत डॉ नरेंद्र सिंह की दुश्मनी थी अगर सौरभ के विरुद्ध कार्यवाही नहीं होती है तो अपराधी साफ बच निकलेगा सौरभ के विरुद्ध पर्याप्त साक्ष्य है। परिस्थितियों में सौरभ को गिरफ्तार किया जाना वा उसके विरुद्ध भी कार्यवाही होना अति आवश्यक है इसके बाद से सौरभ ने प्रार्थी के परिवार और गवाहों को धमकाना शुरू कर दिया है। इस से पूर्व भी प्रार्थी श्रीमान जी को प्रार्थना पत्र प्रेषित कर चुका है।

अतः श्रीमान जी प्रार्थना है कि विवेचक अपराध शाखा को आदेश देने की कृपा करें कि वह सौरभ पुत्र शेर सिंह.....के विरुद्ध कार्यवाही करे। (07.12.2015)

(iv) On 16.12.2015 the complainant Kamesh gave yet another application to the SP Bijnor, the relevant part of the application may be reproduced here under :-

"मुझे ज्ञात हुआ है कि पूर्व विवेचक थाना प्रभारी मंडावर द्वारा भानु वा नरेंद्र सिंह के बीच चकरोड का विवाद अपनी विवेचना में अंकित किया है जबकी वस्तुविकता ये है कि उनके मध्य चकरोड का कोई विवाद नहीं था मेरे गांव के सौरभ पुत्र शेरसिंह वा मेरे चचेरे भाई हर्ष पुत्र डॉ नरेंद्र सिंह के बीच आपसी कहा सुनी हो गई थी जिसपर डॉ नरेंद्र सिंह (मृतक) ने सौरभ को उसके घर जाकर डाट डपट व मारपीट कर दिया था जिस से सौरभ नरेंद्र सिंह से रंजिस रखने लग गया था जिस से सौरभ ने भानु से मिलकर एक षड़यंत्र रचकर डॉ नरेंद्र सिंह की हत्या की है मैं सत्यता से श्रीमान जी को अवगत करना चाहता हूं इसलिए मैं अपने गांव के मौजिज लोगो/ गवाहान के शपथ पत्र श्रीमान जी की सेवा में प्रस्तुत कर रहा हूं जिनका विवेचना में शामिल कराया जाना न्यायहित में अत्यन्त आवश्यक है।

अतः श्रीमान जी से प्रार्थना है प्रार्थी के प्रार्थना पत्र के साथ संलग्न शपथ पत्र को उपरोक्त शपथ पत्र को विवेचना में शामिल करा कर कार्यवाही कराये जाने के आदेश पारित करने की कृपा की जाए!"

(16.12.2015)

40. A bare perusal of the scribe, Ext. Ka-1, reveals that appellant Saurabh has not been named in it. Similarly the name of the appellant is anonymized in the chik FIR, Ext. Ka 21, there is not even a whisper in these documents about the complicity, presence and participation of the present appellant in the crime. In the application dated 03.11.2015 Ext. Ka-2, which is

intended to furnish information to PS concerned, about the demise of Dr Narendra Kumar, complainant added that when his uncle was shot by Bhanu, on hearing the sound of fire, he and his aunt Dinesh Devi, came to the spot, both of them saw Bhanu running from the spot having a pistol in his right hand. Thus, Pw- 1 and Pw- 2 has introduced a new story before the court that at the time of incident Bhanu entered into the clinic whereas Saurabh remain standing near the channel. PW-2 who is the wife of the deceased, in her testimony has attributed role of firing to the alleged accused Bhanu. On the basis of this application it could safely be inferred that PW-1 Kamesh and his aunt PW-2 Dinesh Devi, has not witnessed any assailant firing on the deceased and as such they are not eye witness. At the most what they witnessed after reaching on the spot, only running away one and only one Bhanu with a pistol in his right hand. Thus, Kamesh and Dinesh Devi were introduced for the first time as the eye witness, while they do not saw appellant Saurabh on the spot or running him. No other witness was named in the application.

41. It is for the first time the complainant introduced the name of the Saurabh as an author of the crime who assisted Bhanu in committing the crime, by moving an other oft quoted application dated 07.12.2015, Ext Ka-3, wherein he divulged that Bhanu with the assistance of the appellant Saurabh killed the deceased Dr. Narendra. But he further improved the prosecution version by saying that at the time of launching the FIR, on account of shock and disquiet of his mantel faculty, he could not disclose the name of co-accused Saurabh in the written scribe, but this explanation seems is not acceptable. Because the name of the appellant was brought on surface afterthought and at a very belated stage.

42. The complainant also introduced Sandeep Kumar and Amit as eye witness of the incident in application dated 7.12.2015. Prosecution has not examined Amit as a witness. However, as the statement of Pw- 3 Sandeep Kumar reveals that he saw Saurabh and Bhanu from a distance of 25-30 meters running and talking. Thus, he is also not an eye witness of the commission of crime. This story of overhearing the conversation between these two assailants was floated by PW- 3 after more than one and half month.

43. Since the woes and throes of the complainant remain unattended by the authorities and complainant has been running from pillar to post agitating his grievances. He moved an other application (Ext Ka-5) on 16.12.2015, to

the SP Bijnor, wherein he stated that Saurabh in association with named co accused Bhanu committed said crime. He spelled out the details of enmity or reasons (motive) for rendering assistance to Bhanu to commit the incident. Thus, none of the witnesses of the prosecution saw committing/ firing at the deceased. It follows that no active overt act of committing the crime is attributed to the appellant and his name was introduced with a view to implicate him at a belated stage. The testimonies of the prosecution witnesses is not believable, in this regard and create doubts about the truthfulness of these witnesses.

44. Now the question is that whether there was any possibility of witnessing and identifying appellant standing near channel or running away after the commission of crime in conspiracy with each other.

45. In his deposition PW-1 complainant Kamesh admitted that he was sitting in side the residence of the deceased in Verandah having a cup of the tea with his aunt and the deceased. When assailant came, his uncle went in his clinic room to give him medicine. In the spur of movement the assailant fired and ran away. Although in the site plan, Ext Ka-15, proved by the IO PW-6 S.I. Surendra Kumar Pachauri, the said Verandah is not shown. Neither the exact point where from PW-1 and PW-2 witnessed the incident is exhibited. Only a open court yard has been depicted. IO has not shown the existence of window in said to be in the northern wall of the clinic room. It may be omission on the part of IO but it is enough to conclude that it is improbable to see the incident sitting in the court yard by these witnesses. Whatever it may be, one thing is certain that a person standing near the channel in the southern wall of the clinic, who was trying to hide himself could not be seen by witnesses sitting in the court yard attached to clinic room. Thus deposition of PW-1 and PW-2 in this regard is not believable. PW-3 Sandeep is also not an eye witness to the incident. Even if his statement is believed at all even then he has not seen appellant committing the crime. It transpires that it is by way of improvement of the prosecution case, his name was introduced as an eye witness. In his deposition he admitted that he has seen Saurabh and Bhanu from a distance of 25-30 meters fleeing with pistol. He heard Bhanu saying to Saurabh that he has fired Dr. Narendra you save me. It is highly improbable that any person involved a heinous crime like murder, would so loudly cry that he has committed murder and it is also not believable if he was whispering the

said statement and a person standing away 25 to 30 meters to hear away. That too, he has not disclose this to complainant at an earliest, while the person murdered was his real uncle and the statement PW-1 and PW-2 are nothing but hearsay statement, not admissible in evidence. As for as PW-3 Sandeep is concerned he is also not an eye witness of occurrence and his presence at the spot is also doubtful. For the shake of argument, if their statement is considered to even then, they only saw assailant fleeing away from the scene of the occurrence with pistol with their hands. It was not possible for the witnesses to identified the person running, from his back or hearing the statement of Bhnaui to Saurabh that he has shot Dr. Narendra as per your instructions, now you save me. The above discussion leads the one and only conclusion all these witnesses is eye witnesses and there presence at the spot at the time of the occurrence is highly doubtful.

46. Thus, unname the appellant Saurabh in the FIR and in the applications moved by the complainant as well as doubtfulness of witnessing him at the spot is important and creates a question mark before the truthfulness of the prosecution case and thus the roots of the prosecution case turns lax. In these circumstances it may be safely concluded that the factum of presence of the appellant on the spot or other wise has not been proved by the prosecution beyond shadow of doubts. In these conditions unname of the appellant in FIR is fatal to the prosecution case.

Partisan and interested witnesses

47. Now, we may consider the submission of learned counsel for the appellants that PW-1, PW-2 and PW-3 are relatives of the deceased and they are highly partisan and interested witnesses of the incident, being nephews and wife of the deceased, their statement could not relied upon. Learned AGA refuted this argument and contended that ordinarily a close relative would not spare the real culprit who has caused the death and implicate an innocent person.

48. The above submission was thoroughly considered by the Hon'ble Apex Court in case of **Daleep Singh Vs. State of Punjab AIR 1953 SC 364.** and enunciated the following principles:-

"26. A witness is normally to be considered independent unless he

or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth."

49. In a three Judges Bench of the Supreme Court of India in **Hari Obula Reddy Vs. State of A.P. (1981) 3 SCC 675** observed as under:-

"13. ...it is well settled that interested evidence is not necessarily unreliable evidence. Even partisanship by itself is not a valid ground for discrediting or rejecting sworn testimony. Nor can it be laid down as an invariable rule that interested evidence can never form the basis of conviction unless corroborated to a material extent in material particulars by independent evidence. All that is necessary is that the evidence of interested witnesses should be subjected to careful scrutiny and accepted with caution. If on such scrutiny, the interested testimony is found to be intrinsically reliable or inherently probable, it may, by itself, be sufficient, in the circumstances of the particular case, to base a conviction thereon."

50. Again in **S. Sudershan Reddy and others Vs. State of A.P (2006) 10 SCC 163**, the Hon'ble Supreme Court has held as under:-

"12. We shall first deal with the contention regarding interests of the witnesses for furthering the prosecution version. Relationship is not a factor to affect the credibility of a witness. It is more often than not that a relation would not conceal the actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the court has to adopt a careful approach and analyze evidence to find out whether it is cogent and credible.

15. We may also observe that the ground that the witness being a close relative and consequently being a partisan witness, should not be relied upon, has no substance. This theory was repelled by this Court as early as in Dilip Singh case in which surprise was expressed

over the impression which prevailed in the minds of the Members of the Bar that relatives were not independent witnesses."

51. Thus, we find that Hon'ble Apex Court in its enumerable decisions has categorically held that evidence of eye-witness, if found truthful, can not be discarded simply because the witnesses were relatives of the deceased. The only caveat is that the evidence of interested witnesses should be subjected to careful scrutiny and accepted with caution.

52. In the present case PW-1 is complainant in the matter. He is nephew of the deceased of the Dr. Narendra and PW-2 Dinesh Devi is the wife of the deceased. An other witness of PW-3 Sandeep is also the real nephew of the deceased Dr. Narendra. Thus they are closely related to the deceased, but as discussed above all these witnesses are not the eye witnesses who have seen the appellant committing the crime. Their evidence about the presence of the appellant on the spot is also doubtful and not believable. As a matter of course it is the case of circumstantial evidence. If at all their evidence it believe and relied upon, they saw appellant running with pistol from the scene of occurrence and not firing upon the deceased. Although PW-1 & PW-2 has deposed that the co-accused Bhanu was close friend of the Saurabh and both of them committed the crime in connivance but there is no inspiring evidence in this regard amidst circumstances of the case. Yet another aspect of the issue required into consideration that the alleged incident has taken place on 02.11.2015 and for the first PW- 3 Sandeep who claim himself to be a witness while runing away the assailant but he along with Amit is giving his affidavits, after considerable delay i.e. 16.12.2015. This by itself smacks foul about his presence over the site.

Appellant is not charge sheeted

53. The learned counsel for the appellant has submitted that it is pertinent to point out that though the informant vis a vis other witnesses have tried to figured the name of the appellant as a perpetrator of the crime but during the course of the investigation no active participation of the appellant was found. Hence, even after thorough and due investigation the investigating officer submitted the charge sheet only against the Bhanu Pratap, and no charge sheet have filed against the appellant Saurabh.

54. The learned counsel for the appellant has submitted that it is also pertinent to point out that after filing the police report during the course of trial the prosecution have filed an application u/s 319 of Cr.P.C. but without considering the material, then available on record and without properly appreciated the evidence the learned trial court summoned the appellant Saurabh vide its order dated 06.09.2016. Thus, the appellant Saurabh arraigned as accused in pursuant under section 319 Cr.P.C vide order dated 21.10.2016 to face the trial the co-accused Bhnanu Pratap under section 302/34 IPC passed by the trial court. It has been discussed above all the three witnesses of the facts have not seen the appellant at the spot committing the crime.

No Recovery from the Appellant

55. The learned counsel for the appellant has submitted that it is also pertinent to point out that there is no connecting material against the appellant to connect him in the present crime in question. The alleged weapon of crime are any other incriminating material was not recovered from the alleged co-accused Bhanu Pratap whereas no recovery of any weapon on any incriminating material was recovered from the possession or pointing out of the appellant.

No Motive to the Appellant

56. The learned counsel for the appellant has submitted that though during the course of investigation the enmity was established between the co-accused Bhanu Pratap and the deceased but neither the appellant is having any motive nor having any concerned with the Bhanu Pratap. However Learned G.A. refuted this argument. He contended that about 8-9 months before the present incident some hot altercation had taken place between the Saurabh and son of the deceased Harsh Kumar, then his uncle had gone to the residence of Saurabh and reprimanded and scolded him and even slapped him 3-4 times. So, Saurabh was nurturing animus and grudge against the deceased. Saurabh and Bhanu were teaching in the same school and are close friend. Bhanu killed Dr. Narendra with the assistance of Saurabh and thus he had a strong motive to commit the said crime. The learned AGA further submitted that anyway motive occupies back seat in a case of direct evidence, as the present case is. Therefore, prosecution need not prove the motive.

57. In **Jaikam Khan V/S The State of Uttar Pradesh 2022 1 Crimes (SC)**

01 and in a plethora of other cases Apex Court has observed no doubt in case of direct evidence and ocular testimony being found to be trustworthy, reliable and cogent, it will not be necessary for prosecution to prove the motive for the crime. However in the present case as be have already held herein above that testimony of the eye witnesses could not to be wholly reliable , the motive aspect would be a relevant factor.

Contradictions and Discrepancies in prosecution evidence

58. That the witnesses PW-1 Kamesh singh has admitted that statement of the deceased was recorded in the hospital in his presence and a video CD was also prepared by the then investigating officer. PW-5 in the part IO Gurupal Singh has corroborated the testimony of PW-1 in his deposition. PW-7 IO Shyam Singh Negi has specifically stated in his deposition that on 22.12.2015 he has prepared a site plan of the disputed place on account of which the Bhнау Pratap and deceased were having inimical relations and the site plan was prepared at the instance of PW-1 same in available on record as Ext Ka-23. However PW-1 has denied any animosity on this count between the too.

59. As discussed above PW-1 and PW-3 are the real nephews of the deceased while PW-2 is his wife. In the facts of the circumstances of the case Harsh son of the deceased was alleged to be present at the spot, but prosecution did not examined him. It may be mentioned that he was an important eye witness as per statement of PW-1 and PW-2., motive of hot altercation between Harsh and appellant Saurabh resulting in nurturing animus and grudge against Dr. Narendra .

60. Thus, appellant was not named in first information report. His name find no place even after due investigation by the I.O. in the police report/charge sheet . Name of the accused arraigned only in an application moved by the complainant under section 319 Cr.P.C. No active participation is established against the appellant. Prosecution has failed to establish evidence of conspiracy of the appellant with co-accused Bhanu. There is no recovery of any incriminating article or weapon from the appellant or at his instance or pointing out. In these circumstances prosecution could not establish its case beyond reasonable doubts. The truthfulness of the prosecution case in itself is highly doubtful and against the material on record.

61. From the prolix and verbose discussions, we arrive at the conclusion that the findings of guilt recorded by the Trial Court is not based on correct and proper appreciation and appraisal of evidence. The life and liberty of any person cannot be downsized on the touchstone of doubt. Regard being had to the given facts and circumstances of the case in its entirety and upon hearing the learned counsel for the parties, the conviction and sentence of the appellant on the basis of present set of evidence cannot sustain. Consequently the conviction and sentence of the appellant under section 302/34 IPC deserves to be set aside.

62. Resultantly, the appeal is **ALLOWED** and the judgment and order dated 03.10.2018 passed by the trial court in Session Trial No.105 of 2016 to the extent of appellant Saurabh is hereby set-aside. The appellant-Saurabh Kumar is on bail. He need not surrender, rather the appellant is set at liberty. The appellant who is on bail, shall stand discharged from his liabilities of bail bonds.

63. The copy of the judgment be sent to the trial court to incorporate entry with respect to result of this appeal in the relevant register. The compliance be recorded, under intimation to this Court within two months.

64. Trial Court Record be remit back.

Order Date:- 24.05.2024

Israr