

**High Court of Judicature at Allahabad
(Lucknow)**

Neutral Citation No. - 2024:AHC-LKO:18730-DB

Reserved on:03.11.2023

Delivered on:01.03.2024

Court No. - 9

Case :- CRIMINAL APPEAL No. - 820 of 1983

Appellant :- Shyam Behari And Another

Respondent :- State of U.P.

**Counsel for Appellant :- I.B. Singh,A.K. Shukla,Amarjeet
Singh,Chandra Shekher Pandey,Seraj Ahmad**

Counsel for Respondent :- Govt. Advocate,Sushil Kumar Singh

Hon'ble Rajan Roy,J.

Hon'ble Ajai Kumar Srivastava-I,J.

(Per : Rajan Roy, J.)

1. Heard Shri Seraj Ahmad, learned counsel for the appellants as also Shri Chandra Shekhar Pandey, learned amicus, whom we had appointed for our assistance, Shri Sushil Kumar Singh, learned counsel for the informant and Shri Prabhat Adhauya, learned A.G.A. for the State.

2. This is a Criminal Appeal under Section 374 Cr.P.C. preferred by the appellants challenging their conviction and sentencing vide judgment dated 08.11.1983 passed in Sessions Trial No. 374 of 1982 (State Vs. Shyam Behari and Anr.), arising out of Case Crime No. 108 of 1981, under Sections 302/34, 323 IPC, Police Station - Sidhau, District - Sitapur.

3. The appellants have been convicted for the offence punishable under Section 302/34 IPC and sentenced to life imprisonment. The appellant no. 1- Shyam Behari has also been convicted for the offence punishable under Section 323 IPC and sentenced to undergo rigorous imprisonment for one month.

4. The prosecution case in nutshell is that the incident occurred on 03.05.1981 at 03.40 p.m. at Village Lahuriwan, Police Station- Sidhauli, District- Sitapur while Ram Prakash Diwedi was repairing his wall near his house. Shyam Behari objected to it, however, Ram Prakash Diwedi insisted on fixing and strengthening the wall. This led to an altercation which lasted for about 15-20 minutes. Ultimately, Shyam Behari exhorted his son to bring his licensed gun. The son brought the gun and on the exhortation of Shyam Behari shot upon Ram Prakash Diwedi thereby injuring him. It is said that when Shyam Behari exhorted his son to bring the gun Ram Prakash Diwedi ran away. Ultimately, when he came in front of house of Munna which is situated just across the house of Shiv Nath, father of the informant, Rajesh Kumar the son of Shyam Behari shot from the licensed gun of his father. Consequent to it, he got injured and fell down. Shyam Behari is also said to have beaten him with 'Lathi'. When Shiv Nath the informant's father tried to save him he was also beaten with 'Lathi'. The injured- Ram Prakash Diwedi was taken to Balrampur Hospital, Lucknow and was admitted there at 07.30 p.m. in the night. F.I.R. was lodged by PW-1 Anil Kumar S/o Shiv Nath next day i.e. 04.05.1981 at 03.10 p.m. at Police Station- Sidhauli, District- Sitapur. The injured was operated at Balrampur Hospital, Lucknow, twice. His general condition remained low and ultimately he died on 14.05.1981 at 03.50 p.m. due to Septicemia.

5. The inquest took place at the mortuary, Barlampur Hospital, Lucknow on 14.05.1981 from 16.15 to 16.55. Information of death was

received from wardboy of the concerned department of Balrampur Hospital. Informant is a signatory to the inquest report.

6. Investigation of the case was conducted firstly by Shri Durga Prasad and thereafter by Shri G.D. Satti (PW-5). Charge sheet was filed by Shri G.D. Satti (PW-5) against the accused under Section 304, 302 IPC, however, after committal to the Sessions Court charges were framed against the accused under Section 302, 34 IPC with additional charge under Section 323 IPC being framed against Shyam Behari for assault upon the informant's father Shiv Nath.

7. The trial Court on a consideration of the evidence before it convicted the appellants of the offence punishable under Section 302, 34 IPC. Shyam Behari was additionally convicted of the offence punishable under Section 323 IPC. They were sentenced as already stated above in the earlier part of the judgment.

8. The contention of the appellant's counsel was that the F.I.R. was delayed by 23 hours. The injured Ram Prakash Diwedi died after 11 days, after medical treatment. The cause of death was septicemia and not the injuries caused by the appellant no. 2. There is no mention of entry wound from firearm in the injury report dated 05.05.1981. The X-ray report merely mentions multiple radio opaque shadows but no pellets were seen. The injured was operated upon twice and ultimately died of septicemia. Admittedly, firing was preceded by an altercation between the parties and in the heat of the moment without there being any premeditation gun shot was fired and it can not be said that the accused took undue advantage and were cruel in this regard considering the non vital part on which firearm injury was caused, therefore, trial Court erred in convicting the appellant no. 2 of the offence of murder under Section 302 IPC. There are many inconsistencies and contradictions in the testimony of PW-1 and PW-2.

There are inconsistencies inter se as also vis-a-vis the site plan prepared. Though, the shot is said to have been fired from licensed gun but there is no recovery of such gun. There is no forensic examination of the pellets in the absence of the gun. There is no forensic report regarding the plain and blood soaked soil having matched. There is no forensic examination of the blood soaked 'dhoti' recovered from the body of the deceased as to whether the blood was that of the deceased. The Investigating Officer Shri Durga Prasad did not even enter the witness box. The testimony of PW-2 was recorded by the police two months after the incident. F.I.R. itself having been lodged after 23 hours there was enough scope for deliberation and consultation in view of prior enmity as spoken of by PW-1. The doctor has opined that it can not be said with certainty that the death would be caused by such injuries had septicemia not set in. The trial Court has ignored to consider the matter in proper prospective and has perversely and erroneously convicted the appellant no. 2 and sentenced him for the offence punishable under Section 302 IPC.

9. Learned A.G.A. has opposed the appeal. He submitted that the death was due to injury caused by the gun shot which resulted in septicemia. The case of prosecution is based on direct evidence of PW-1 and PW-2 who are eye-witnesses and are wholly reliable. As the house of PW-1 and PW-2 is situated near the scene of crime, therefore, their presence at the time of commission of the crime is quite natural and probable. There is no reason to disbelieve their testimony. Minor inconsistencies and contradictions are liable to be ignored. The gun shot was fired with the intention to kill as is evident from the exhortation by the father Shyam Behari to his son Rajesh Kumar to bring the gun whereupon he brought the gun from the house and shot Ram Prakash Diwedi resulting in his death albeit subsequently. The fact the appellant no. 2- Rajesh Kumar brought the gun from the house itself proves his intention to kill the deceased and hence murder. The

shot was fired at the stomach knowing that it could caused death and with the intent that it could. The fact that the gun was not recovered is inconsequential in a case of direct evidence. Motive is also not of much relevance in such a case. The lapse on the part of the investigation should not ennure to the benefit of the accused to acquit him. The delay in lodging of the F.I.R. has been explained and is reasonable. For all these reasons, according to him, the appeal deserves to be dismissed.

10. Shri Sushil Kumar Singh, learned counsel for the informant also opposed the appeal on the same grounds as the learned Additional Government Advocate.

11. During pendency of appeal the appellants were on bail. The appellant No. 1- Shyam Behari has died, therefore, the appeal has abated and has been dismissed as such against him, however, the appellant no. 2- Rajesh Kumar is alive and the appeal survives only against him.

12. The case of the accused was one of denial and false implication on account of prior enmity.

13. Ram Prakash Diwedi- injured was examined while he was alive and his X-ray report is Ex. Ka-6. His medico-legal examination report is Ex. Ka- 5, according to which, the following injuries were noticed on his body:-

"(1) Contusion 3 cm X 2 cm on mid of Rt. arm outer aspect 6 cm above from Rt. elbow.

(2) Contusion (3) in area of 12 cm X 8 cm on Rt. thigh, outer aspect 12 cm below from Rt. outer super iliac spine.

(3) Multiple L.W. in area of 25 cm X 20 cm on Lt. abdomen and back of Lt. chest, upper part of Lt. thigh at outer spine iliac spine, 19 cm below from Lt. nipple, 9 cm away from umbilicus (Umbilicus) Blackening & bleeding present. Smaller size 0.2 cm X 0.2 cm Ring size .5 cm X .4 cm (X-ray). "

14. Injured Shiv Nath was also medically examined and medico-legal examination report regarding him is Ex. Ka- 3. As Shyam Behari who was accused of the offence punishable under Section 302 IPC has already died, therefore, we need not delve any further on this aspect.

15. As per postmortem report the deceased Ram Prakash Diwedi had received following injuries:-

"1) Hospital dressing with one stitch cut open/wound on leg left just above ankle.

2) Hospital dressing with two cut open wounds on rights leg just above right ankle. The wounds 2 cm apart and posterior.

3) Surgical septic wound 1 cm X 1 cm (Partly cut open) on front of right thigh upper part 3 cm below inguinal ligament.

4) Abdominal Binder with hospital dressing soaked in bloody fluid on arterialy with 11 stitches (Eleven Stitches) left paramedical surgical wound 13 cm long 2 cm on left to umbilicus on front of abdomen.

5) Surgical septic wound 2½ cm X 1½ abdominal cavity on front left. Iliac fossa 3 cm above and internal to Iliac crest.

6) Surgical septic wound 2½ cm X cm 1½ cm abdominal cavity deep on right iliac fossa 4 cm above and internal to iliac crest.

7) Multiple innumerable small lacerated wounds 2 cm X 2 cm x muscle x cavity deep (some are scabbed) scattered in area of 27 cm X 20 cm of outer side and front of left side of abdomen lumber region and left iliac fossa and upper portion of front of left thigh.

8) Scabbed abrasion $\frac{1}{2}$ cm X $\frac{1}{4}$ cm on left Elbow.

9) Scabbed abrasion $1\frac{1}{2}$ cm X $1\frac{1}{2}$ cm on front of Right upper arm 10 cm above elbow."

16. It is worthwhile to mention that by the time of postmortem Ram Prakash Diwedi had been under treatment at Balrampur Hospital, Lucknow for almost 11 days and had also been operated twice, therefore, while there is mention about dressing etc. while detailing the injuries which is evidence of the treatment meted out to him. It is also not out of place to mention that for the aforesaid reason the injuries as born out in the medico-legal examination report Ex. Ka-5, which had taken place prior to the operation, reflect the injuries received by him appropriately. As per the ocular evidence of Emergency Medical Officer who had examined Shri Diwedi on 03.05.1981 at 07.30 p.m. Injuries no. 1 and 2 which have been mentioned in Ex. Ka-5 had been caused by blunt object such as 'Lathi', whereas, injury no. 3 had been caused by firearm. The injuries were fresh at the time of examination and could have been caused at 04.30 p.m. on 03.05.1981. The injured Ram Prakash Diwedi was brought to Balrampur Hospital, Lucknow on 03.05.1981 by his brother Hari Prasad Diwedi as is mentioned in Ex. Ka-6 (the X-ray report) and Ex. Ka-5 (the injury report). The consent/ approval for operation was given by one Laloo Prasad. Prosecution has not adduced any evidence as to who this Laloo Prasad was, but, the name of PW-1 Anil Kumar, who has testified about taking the injured Ram Prakash Diwedi to Balrampur Hospital at Lucknow, does not figure in these documents nor in the testimony of PW-6 the Doctor who had examined Shri Diwedi while he was alive.

17. PW- 7 is the Radiologist who had conducted the X-ray on Shri Diwedi. He has testified about observing opaque shadows but did not see actual pellets.

18. PW- 4 is the Doctor who had examined injured Shiv Nath, but, as Shyam Behari the assailants has died, therefore, we need not consider this aspect any further.

19. PW-3 is the Autopsy Surgeon who conducted the postmortem on the body of Ram Prakash Diwedi on 14.05.1981. He has spoken about septicemia having set in the wounds. In examination-in-chief he testified that in ordinary course such injuries as had been inflicted upon the deceased were sufficient to cause death but in cross-examination he has stated that if septicemia had not been caused, then, it is difficult to say that injuries received by him would have resulted in his death or not. The cause of death, according to him as mentioned in the postmortem report, was septicemia. Thus, he has not given a definite opinion as to whether the deceased could have died from the injuries inflicted upon him but for the septicemia, which, in fact was the cause of death. The death as noticed took place 11 days after the injury. PW-3 has not expressed any opinion as to whether any of the injuries were firearm injuries which is quite understandable, as, the patient had been treated for 11 days, therefore, the wounds may not have been in the situation in which they were when Ram Prakash Diwedi was firstly examined on 03.05.1981 at 07.30 p.m. by PW-6. PW-6 has, however, stated that injury no. 3 was a firearm injury. In the postmortem report apart from the fact that cause of death is mentioned as hemorrhage and shock resulting from Septicemia it also mentions about three pellets being recovered from the body and being handed over to the Police.

20. It is not out of place to mention that though, the allegation is upon the appellant no. 2 of having fired from the licensed gun of his father there is no recovery of the gun nor is there recovery of any empty cartridge etc. from the alleged scene of crime, therefore, there is no question of any forensic examination of the gun and whether the pellets recovered had been fired from it. This is a serious lapse on the

part of investigation for which there is no explanation offered by the prosecution. As per Ex. Ka-16 prepared in this regard the Police raided the house of the accused on 05.05.1981 but did not find any gun nor the accused.

21. A blood soaked 'Dhoti' on the body of the deceased was also recovered on 05.05.1981 but again there is no forensic report in this regard as to whether the blood on the 'Dhoti' was that of the deceased or not. This again is a serious lapse on the part of the investigation.

22. As regards the place of occurrence the body was not recovered by the police from the scene of crime, but, it was removed and taken to Balrampur Hospital, Lucknow which is quite natural in the circumstances narrated in the F.I.R. The Investigating Officer, however, collected blood stained and plain soil from the alleged scene of crime and prepared a recovery memo which is Ex. Ka- 17, but, there is no forensic report on record, therefore, it is only the ocular evidence which is available so far as the place of occurrence is concerned, which we will examine hereinafter.

23. As regards lodging of F.I.R., though, the incident took place on 03.05.1981 at 04.30 p.m. the F.I.R. was lodged next day i.e. 04.05.1981 at 03.15 p.m. The explanation offered by PW-1 in this regard is that he had gone to Balrampur Hospital, Lucknow along with injured Ram Prakash Diwedi. The injury report Ex. Ka- 5 mentions about Ram Prakash Diwedi being brought for medico-legal examination by his brother Hari Prasad Diwedi and not PW-1. The consent for operation was given by one Laloo Prasad and not PW-1. The trial Court has opined that merely because of this it can not be said that Anil Kumar had not accompanied the injured Ram Prakash Diwedi to Balrampur Hospital at Lucknow. The father of the PW-1 Shiv Nath was medically examined after two days i.e. on 05.05.1981 and there is

nothing on record to show that he had also accompanied the injured to Balrampur Hospital at Lucknow. Moreover, the injured had a bike, therefore, whatever the explanation offered by the PW-1 (Anil Kumar) the fact is that the F.I.R. was lodged almost 23 hours after the incident.

24. In the F.I.R. presence of Raja Ram (PW-2) and Chavi Nath Singh at the time of commission of crime is mentioned. Chavi Nath has not been examined. The statement of PW-2 (Raja Ram) was recorded two months after the incident and there is no explanation for the delay. In fact, the investigation of the case was conducted by Shri Durgra Prasad, Sub-Inspector till 26.06.1981, but, he has not been produced in the witness box. From 27.06.1981 the investigation was taken over by PW-5 Shri G.D. Satti who has stated that he had recorded the statement of Raja Ram and Chavi Nath Singh on 04.07.1981. Chavi Nath Singh has not entered the witness box. Raja Ram (PW-2) has admitted that his statement was recorded two months after the incident.

25. Moreover, when we peruse the testimony of PW-2 (Raja Ram) we find that there is prior enmity between him and the accused, a fact which is admitted by him in his cross-examination, wherein, he has stated that in 1976 proceedings under Section 107 had been initiated and in the said matter while the accused along with Gnesh Behari brother of Shyam Behari were one side he was on the other side. Prior to the said incident PW-2 had given an application for suspending Ganesh Behari who was the Pradhan and brother of accused Shyam Behari on which he was suspended, though, he reinstated subsequently. He has also stated that prior to the incident he had given an application against the accused and Ganesh Behari of having given 'Pattas' illegally. PW-2 wanted ceiling lease of certain land which was in the name of his maternal uncle but on account of objection of Shyam Behari the land could not be mutated in his name. Thus, several

instances of prior enmity between PW-2 and accused coupled with the fact that though he was named in the F.I.R. which in fact was lodged after about 23 hours of the incident, his statement was recorded by the Investigating Officer after two months and there is no explanation in this regard by the prosecution as to why it was so. PW-2 has stated that 'Daroga' had not inquired from him about the incident which is surprising, as, he was named in the F.I.R. Thereafter, he has stated that his statement was recorded after two months. There are inconsistencies in the narration and events at the time of commission of crime between his testimony and that of PW-1 the informant which we will consider while taking into consideration the testimony of PW-1.

26. As regards PW-1, as already stated, he has tried to explain the delay in lodging of the F.I.R. by stating that he had accompanied the injured Ram Prakash Diwedi to Balrampur Hospital at Lucknow, but, as already noticed earlier, in the medical records it is the name of Hari Prasad Diwedi the brother of Ram Prakash Diwedi which is mentioned as the person who had brought him to the Hospital and consent for surgery is also by one Lalloo Prasad. There is delay of 23 hours in lodging the Report. The explanation in this regard is not satisfactory. Therefore, the possibility of lodging of F.I.R. after consultation cannot be ruled out. The informant (PW-1) has mentioned in the F.I.R. and also in his testimony that Rajesh Kumar the son of Shyam Behari who fired from the 'licensed gun' injuring Ram Prakash Diwedi, but, in the chik report which is Ex. Ka-13 it is mentioned in the third column while mentioning the offence under Section 307, 323 IPC that the offence had been committed by firing from 'tamancha' i.e. country-made pistol and beating by 'Lathi' which is not in sync with the recital in the written 'tehrir'. A suggestion was given by the defence to PW- 8 the Head Constable then posted at Police Station- Sidhauri, District - Sitapur that initially a different 'tehrir' was submitted which mentioned about 'tamancha' and that is how the recital has been recorded in the

chik F.I.R. in this regard, but, subsequently, another written 'tehrir' was taken after due deliberation and consultation falsely implicating the accused, which of course has been denied by the PW-8, but, the aforesaid discrepancy remains.

27. Moreover, in his testimony before the Court PW-1 has stated that deceased Ram Prakash Diwedi was strengthening his wall which was objected to by Shyam Behari and an altercation took place between them. This altercation took place at the place marked as 'D' in the site plan prepared by Shri Durga Prasad, the first Investigating Officer. The distance between place of this altercation and house of Shyam Behari is more than 60 paces/steps as is mentioned in the site plan. There is no explanation as to why Shyam Behari would object to strengthening of wall by Ram Prakash Diwedi near his house if his house was situated more than 60 paces away.

28. PW-1 has further testified that during altercation which lasted about 15-20 minutes Shyam Behari exhorted his son to bring the licensed gun, Ram Prakash Diwedi ran and thereafter, when he reached the house of Munna which is across the house of PW-1- Anil Kumar son of Shiv Nath, Shyam Behari's son Rajesh Kumar the accused shot Ram Prakash Diwedi injuring him, consequent to which the latter fell there. PW-1 has feigned ignorance in his statement about the fact that when Sheyam Behari exhorted his son to bring the gun, Ram Prakash Diwedi ran around his house and around the village and came back to the house of Munna, whereas, the site plan mentions this very track taken by Ram Prakash Diwedi after the exhorted from place 'B' and that he reached place 'A' thereafter. He has stated that the deceased was shot from a distance 2-3-4-5 steps/paces. The site plan mentions the place from where the shot was fired and the place where Ram Prakash Diwedi was hit as being 10 steps/paces. The distance from which the shot was fired as stated by PW-1, does not match with the distance

mentioned in the site plan. Therefore, there is clear inconsistency in the statement of PW-1 and the site plan.

29. It is not out of place to mention that the site plan has been prepared by Shri Durga Prasad but there is no date mentioned therein under his signatures, although, the month and year is mentioned which is intriguing, there is no explanation in this regard by the prosecution. As already stated Shri Durga Prasad, Investigating Officer has not even entered the witness box.

30. It is also pertinent to mention that PW-2, whose statement was recorded by Shri G.D. Satti (PW-5) after two months of the incident, has also spoken about Ram Prakash Diwedi having run around the village to come from place 'B' to come back to spot mentioned place 'A' in the site plan where he was shot, but, this does not tally with the testimony of PW-1 who claims to have witnessed the crime. PW-1 denies the fact that Ram Prakash Diwedi was chased by Shyam Behari and Rajesh Kumar. Further, PW-2 has stated that after Ram Prakash Diwedi ran, Shyam Behari and his son chased him which would obviously be around the village so as to come to place 'A' as that is the track taken by Ram Prakash Diwedi, but, in the site plan the presence of Rajesh Kumar the accused and Shyam Behari is mentioned towards the South at place 'B' 10 paces away from place 'A' which is highly improbable if the testimony of PW-2 and the site plan is to be believed. Now, if the altercation took place at place 'B' and Shyam Behari was present there and as per PW-1 Rajesh Kumar the other accused had not reached that place when he was exhorted by Shyam Behari to bring the gun from his house which is situated towards the North i.e. towards the place where the firing took place, then, it is inexplicable as to how Ram Prakash Diwedi reached point 'A' in the site plan, as, it would be unnatural for a person to run in the very direction in which the accused had gone to fetch the gun as the house, from which it was to be brought

was situated in the way. He would run in the opposite direction. In any case, the fact of the matter is that there is inconsistency and indiscrepancy in this regard in the testimony of PW-1 and PW-2 as also the site plan.

31. The site plan itself was prepared prior to the testimony of PW-2, therefore, it is inexplicable as to how it is shown in it that Ram Prakash Diwedi ran from point 'D' behind his house across the village and came back to point 'A', as, PW-1 who was the only witness whose statement has been recorded by then, has not mentioned this fact. The statement of Chavi Nath Singh other witness was recorded on 04.07.1981 along with Raja Ram, therefore, on whose saying the site plan was prepared, is inexplicable.

32. There is another aspect of the matter, in the injury report while noting down injury no. 3 PW-5 has mentioned, inter alia, that the said injury which was in the form of multiple lacerated wound in an area of 25 cm X 20 cm was on left abdomen and back of left chest. Now, both PW-1 and PW-2 have stated that firing took place from the front i.e. the accused were facing Ram Prakash Diwedi and Ram Prakash Diwedi was facing them. Ram Prakash Diwedi was towards the North and the accused were towards the South. It being so it is inexplicable as to how the injury was caused on back of left chest. It is impossible for such injury to be caused if the firing was from the front. There is no explanation in this regard also by the prosecution.

33. The altercation at point 'D' in the site plan had taken place between Shyam Behari and Ram Prakash Diwedi. As already stated Shyam Behari's house was more than 60 paces from point 'D' towards North. No such reason has been given as to why he would object. Of course his brother Ganesh Behari's house is situated near the said point 'D' but no altercation took place between Ram Prakash Diwedi and

Ganesh Behari nor is he an accused. A suggestion was put to PW-1 that in his statement before the police he had not mentioned about exhortation by Shyam Behari to his son to fetch the gun, in response to which PW-1 has stated that he told this to the 'Daroga' and if he has not recorded it, then, he must have forgotten it. He has accepted the fact that in the first information report it is not mentioned that Ram Prakash Diwedi ran and reached in front of house of the informant where he was fired upon. He has also denied that in this process Ram Prakash Diwedi was chased by the accused. Now, if he was not chased by the accused, then, how Shyam Behari reached point 'B' and then 'A' so as to beat up Ram Prakash Diwedi with his 'lathi'. In his testimony PW-1 has feigned ignorance about Ram Prakash Diwedi running around the village and coming back to point 'A' where he was shot, which is surprising, as, if he was present at the time of the commission of crime and had seen Ram Prakash Diwedi running after Shyam Behari exhorted his son to fetch the gun, then, he would obviously see as to in which direction Ram Prakash Diwedi ran till he reached point 'A' where he has shot.

34. In view of the above discussion so far as testimony of PW-2 is concerned, he had prior enmity with the accused and has mentioned several instances of such dispute between them and has also mentioned proceedings which had taken place both civil and criminal. This coupled with the fact that his statement was recorded two months after the incident, even though, his name is mentioned in the F.I.R. which itself was lodged after 23 hours, whatever the reason given in this regard, we are of the opinion that his testimony is not reliable.

35. As regard testimony of PW-1 we have noticed several improbabilities and inconsistencies in the same as discussed hereinabove. We have also noticed inconsistency between the statement of PW-1 and the site plan. There is no explanation as to how

one of the wounds was on the back of the left chest if the firing was taking place from a short distance from the front and the accused were standing towards the South facing North while the deceased was standing towards the North facing South. PW-1 speaks of a licensed gun having been used to fire the shot, whereas, column three of the chik report mentions a 'tamancha' and there is no recovery of the licensed gun. Of course, if the ocular evidence was beyond suspicion, then, non recovery of the weapon used in the commission of crime would be irrelevant, but, in a case where there is a doubt about reliability of ocular evidence, this omission becomes important and can not be brushed aside as merely a lapse of trivial nature on the part of the investigation. There is no recovery of any empty cartridge, wade, 'tickli' etc. from the scene of crime. Three pellets were recovered from the body of the deceased, but, in the absence of recovery of any gun there was no forensic examination. There is no forensic examination pertaining to plain soil and the blood soaked soil so as to establish the place of occurrence and if ocular evidence is not reliable, then, this also becomes significant. The Investigating Officer Shri Durga Prasad did not even enter the witness box. The second Investigating Officer of course has testified. He has stated that he did not recover the gun and also that he had recorded the statement of PW-2 after two months. The injury report does not mention any entry or exit wound having been caused by gun shot injury no. 3. As regards the postmortem as already stated the injured had been treated for 11 days and therefore, there may not have been any evidence left in this regard, as such, it is the injury report which is of relevance, but, it does not mention aforesaid. All this creates a doubt on the prosecution story. The trial Court has accepted the prosecution version and the testimony of the witnesses on its face value without scrutinizing the same appropriately as was required by law.

36. In our opinion, prosecution has failed to adduce sufficient evidence to prove the guilt of the accused/ appellant no. 2 of having committed the crime punishable under Section 302 IPC beyond reasonable doubt. We, accordingly, set-aside the judgment.

37. The criminal appeal is **allowed**.

38. The appellant no. 2 is already on bail. His bail bond is cancelled. Sureties are discharged. He need not surrender, in case, he is not wanted in any other criminal case.

39. The appellant no. 2 is directed to file a personal bond and two sureties each in the like amount to the satisfaction of the Court concerned in compliance of Section 437-A of the Code of Criminal Procedure within six weeks from the date of release.

40. Learned Amicus, Shri Chandra Shekhar Pandey shall be entitled to Rs.15,000/- (Rupees Fifteen Thousand Only) from the High Court as fee for his services.

41. The original records shall be remitted back to the C.J.M. concerned for necessary action, if any.

(Ajai Kumar Srivastava-I,J.) (Rajan Roy, J.)

Order Date :-01.03.2024

R.K.P.