

Neutral Citation No. - 2024:AHC-LKO:39425-DB

A.F.R.

Reserved Judgment

Reserved On : 16.04.2024

Delivered On :24.05.2024

**IN THE HIGH COURT OF JUDICATURE AT ALLAHABAD
LUCKNOW BENCH, LUCKNOW**

CRIMINAL APPEAL No. - 194 of 1989

Hari Shanker and Others Accused/Appellants

Versus

State of U.P.

.....Respondent

Present for Accused/Appellants:

Shri Nagendra Mohan

Present for Respondent :

Govt. Advocate, Ambrish Kumar

Pandey, M.L. Syal, Ram Kishore

Gupta, Sarojini Bala Yadav, Shashi Kiran

Arya, Shiv Kumar, Vijay Kumar Tewari

CORAM : Hon'ble Vivek Chaudhary, J.

Hon'ble Narendra Kumar Johari, J.

(Delivered by : Hon'ble Narendra Kumar Johari, J.)

1. Present Criminal Appeal under Section 374 (2) Cr.P.C. has been filed by the accused-appellants Hari Shanker, Lavkush and Radhey Lal against judgment of conviction dated 25.02.1989 and order of sentence dated 27.02.1989, passed by learned IInd Additional Sessions Judge, Lucknow in S.T. No.356 of 1987, arising out of Case Crime No.108 of 1987, under Section 302 I.P.C., Police Station Banthara, District Lucknow. By the impugned judgment and order, appellants have been convicted for the offence under Section 302 IPC and sentenced to undergo imprisonment for life.

2. The factual matrix of the case is that, on 20.06.1987 the informant Om Prakash Yadav had given a written Tehrir at Police Station - Banthara, District Lucknow that today, i.e. on 20.06.1987, he was washing his hands and legs at the platform of the well, situated in front of his house. A cot was also lying near the well upon which his sister Shanti and younger brother Shri Prakash were sitting. His father Raja Ram Yadav was sitting at the Thakht (wooden plank) under the thatched roof, which is adjacent to the main gate of his house. At about 7.15 P.M., accused persons Hari Shanker, Lavkush and Radhey Lal reached near the well. Hari Shanker was carrying a gun, whereas Lavkush and Radhey Lal were carrying country made pistols in their hands. Hari Shanker exhorted, abused and threatened them and all the persons reached near his father and opened fire upon him by their gun and country made pistols. Having received the bullet injuries, his father cried and fell down on the ground from the Takht (wooden plank). He died on the spot. All the three accused persons giving threat to life ran away towards east. The occurrence was witnessed by Siddh Nath and other persons of the Village along with the informant, his brother and sister. Due to the fear of firearm, nobody could resist the accused persons. The informant further mentioned that earlier accused persons were named in the occurrence of loot, which took place at the house of Cheda Yadav and Ram Kishan Yadav, and the accused were having doubt that his father Raja Ram has named them in the above occurrence. As a matter of fact, before the present occurrence, the accused Hari Shanker and Lavkush were arrested by the police of Police Station Banthara for carrying illegal arms. In that arrest also, the accused were having doubt that they were caught by the police at the pointing out of his father. Due to the above enmity, they have killed him in above manner.

3. On the basis of the above complaint/Tehrir, an F.I.R. was lodged by the police of Police Station Banthara at 23.10 hours on 20.06.1987, vide Case Crime No.180/1987, under Section 302 IPC. The distance of the Police Station from the place of occurrence has been shown as 8.00 Kms.

4. After completion of the investigation of the case, Charge sheet, against all the three accused persons was filed in the court of Chief Judicial Magistrate, who committed the case to the Sessions Court. The trial court framed the charge under Section 302 IPC against all the three accused persons. The accused persons denied the charges and claimed for their trial.

5. On behalf of the prosecution, PW 1 Om Prakash, PW 2 Shri Prakash, PW 3 S.I. Krishna Pal, PW 4 Suresh Kumar, PW 5 Arjun Singh (second Investigating Officer), PW 6 Dr. V.N. Singh gave their oral evidence.

6. After completion of the prosecution evidence, accused persons recorded their statement under Section 313 Cr.P.C., in which they denied the commission of the offence. Further, they stated that they were falsely implicated in the case by the informant due to enmity. No oral evidence has been produced by the accused persons.

7. In the oral statement, PW 1 Om Prakash has reiterated the prosecution story, as mentioned in the F.I.R. Further, he has mentioned in his examination-in-chief that Hari Shanker and Lavkush shot fire at his father by gun as well as country made pistol.

8. The witness PW 2 Shri Prakash has also reiterated the prosecution story as mentioned in the F.I.R. and supported the evidence of PW 1. So far as the occurrence of firing is concerned, he has mentioned in his examination-in-chief that first of all Hari Shanker shot fire at his father by his gun. Having received the

injury of that bullet, his father fell down on floor from wooden plank (Takhat). He further stated that the accused Lavkush also shot fire at his father by his country made pistol. He has further stated in his cross-examination that the accused Lavkush and Hari Shanker shot total three fires at his father. As a result of fire, some pallets also struck onto the wall of his house and some pallets were scattered on the floor. Further, he has stated that Hari Shanker shot first fire at his father, who sustained the bullet injury on his chest. Hari Shanker also fired (third bullet) at his father. Further, he has stated that Hari Shanker shot two fires at his father. He also stated that the above fact was told by him to Investigating Officer, if he has not mentioned it in his statement under Section 161 Cr.P.C., he cannot say its reason.

9. PW 3, Krishna Pal has proved the proceedings of Inquest, Spot Memos, Recovery Memos of pallets and blood stained soil and clothes of deceased. He also proved the recovery memo of two empty cartridges of 12 bore from the place of occurrence.

10. PW 4, Suresh Kumar has proved the Chik F.I.R. as well as G.D. Entry.

11. Witness PW 5 Arjun Singh has proved the statement of witnesses under Section 161 Cr.P.C. He has also proved the interrogation of the accused persons.

12. Dr. V.N. Singh deposed as PW 6. He has conducted the autopsy of the deceased on 22.06.1987. He has stated that deceased had received two firearm wounds, which were as under :-

- (i) One firearm (wound of entrance) 4 C.M. X 3 C.M. X chest cavity deep, on left side of the chest of deceased, just below the nipple. At the place of wound,

blackening, tatooing and charring was also present. The margins of wound were inverted and torn.

(ii) Firearm (wound of entry) 3 C.M. X 2.5 C.M. X abdominal cavity deep, towards right side of the back of the abdomen, at 6 'O' Clock position. Charring and tatooing were present at the place of wound. Its margins were inverted and raptured. He has also recovered 03 piece of wads and 20 small piece of pallets from left lunge and chest cavity of the deceased. He has also recovered two piece of wads and 36 small pallets from abdominal cavity, liver and intestine of deceased. Total 05 piece of wads and 56 piece of pallets were recovered from the body of the deceased Raja Ram Yadav.

The cause of death was mentioned as shock and hemorrhage, as a result of antemortem injuries. He has further opined that the above injuries may be caused by the fire from gun.

13. Learned trial court, after considering the facts and evidence as well as arguments of both the sides, convicted and sentenced all the named accused persons, under Section 302 I.P.C., which has been assailed by the accused/appellants in the present appeal.

14. Learned counsel for the appellants has submitted that the trial court has wrongly assessed the evidence of prosecution. None was the eye witness of occurrence. The evidence of witness PW 1 and PW 2 is not reliable as they are related witnesses. The dead body was sent by police for post mortem with inordinate delay. There are discrepancies and exaggerations in the statement of prosecution witnesses. There was no proof of third fire. The Investigating Officer has not found any sign of bullet on the wall of the house of deceased. Witness PW 2 has

specifically stated that deceased was hit by two bullets. It has been stated by the prosecution witnesses that Hari Shanker fired on deceased twice. From the spot, 02 empty cartridges of 12 Bore were found, which show that the deceased was hit by bullet fired by the gun. Learned trial court has mechanically assessed the evidence and convicted all the accused persons. The conviction as well as sentence of the accused persons is bad in the eye of law, hence, the order of conviction is liable to be set aside, and the appeal deserves to be allowed.

15. Learned A.G.A., replying the arguments advanced by learned counsel for the appellants, has submitted that eye witnesses of fact PW 1 and PW 2 have proved the prosecution case. They were present at their house at the time of occurrence and are eye witnesses of the occurrence. Their presence at their house is natural. The motive of the offence is proved as there was previous enmity between the assailants and the deceased. The evidence of prosecution has no contradiction on substantial points. The prosecution story is supported with the medical as well as the documentary evidence filed by the prosecution. There is no ground to implicate the accused persons falsely. The order of the trial court is just and proper. The appeal has no force and is liable to be dismissed.

16. We have heard the arguments of both the sides and perused the record.

17. At the very outset, learned counsel for the appellants has submitted that there was delay in lodging the F.I.R. On the above point, the record shows that the date and time of occurrence has been shown in the First Information Report as approximately 7.15 P.M. on 26.06.1987 and the F.I.R. of the occurrence was lodged at police station on the same day at 11.10 P.M. The distance from the place of occurrence to the Police

Station has been shown as 08 Kms. In his oral evidence Witness PW 1 has stated that after 4- 4 ½ hours of the occurrence, he had gone to Police Station to lodge the F.I.R. The above statement corroborates the timing as mentioned in the F.I.R. Further, he has stated that he had gone police station by foot and it took 1 ½ – 2 hours' time in reaching the police station. Witness PW 1 is the eldest son of the deceased Raja Ram Yadav. In the year 1987 he was about 20 years old. The occurrence of firing took place in his presence, naturally at that teen age the power of thinking of the informant must have been ceased to take appropriate decision quickly. He might be under fear that if he would go to police station by covering the distance of 8 Kms. in darkness of night he might be attacked by the accused persons on the way. Therefore, some time must have been passed in taking decision for going to police station for lodging the F.I.R. The entry of G.D. indicates that along with informant Prem Kumar Yadav, S/o Shri Gajram Yadav, Mihi Lal, S/o Bhoop Yadav also accompanied him to Police Station. Definitely along with other two persons he couraged to go to the Police Station. In the cross examination the informant has not stated anything contrary. The statement of witness PW 1 is supported by the statement of witness PW 2, who is the brother of the informant as well as eye witness of occurrence, he has stated that his brother Om Prakash had gone to the Police Station at about 8.00 P.M. There might be some difference in estimating time, which is natural. Witness PW 4 HCP Suresh Kumar has proved Chik F.I.R. and G.D. entry as well as timing of lodging F.I.R., which corroborates the statement of PW 1. The accused/appellants could not point out any contradiction in the cross examination of witness PW 4 on the above point. Hence, in absence of any proof otherwise or any discrepancy in the statement of witness, it cannot be said that F.I.R. has been lodged by informant with any inordinate delay.

18. Learned counsel for the appellants has further submitted that no one was the eye witness of the occurrence and the occurrence took place in the darkness of night and there is no statement regarding the presence of light at the place of occurrence.

19. According to the F.I.R. the occurrence took place on 20.06.1987 at about 7.15 P.M. It was the month of June when in general till 7.30 P.M. the sky remains lighter. The accused persons were already known to the informant. No question has been asked from the accused side in the cross examination of the witnesses of fact regarding the absence of light or identification of the accused persons. Hence, the above objection of learned counsel for the appellants has no substance.

20. In the F.I.R. the witness PW 1 and PW 2 have shown their presence at the time of occurrence. The witness PW 1 has stated that on the date of occurrence, he had not gone to his work place. The reason for his absence from workplace has not been asked by the lawyer of defence in his cross examination. The witness PW 1 has also supported the statement of PW 2 by saying that at the time of occurrence Shri Prakash was also present there. He has rightly not shown presence of his other brothers Ram Prakash and Umesh as they were not present at the time of occurrence. The reason has been shown that his mother was suffering from *Cholera* and she had gone to the doctor with Sunder Lal, Raj Karan, Prem and Umesh. The going of four persons with informant's mother for treatment indicates that she might have been in critical condition due to *Cholera*. His father had not gone with his mother due to the reason that he had given fire to the dead body of informant's grand mother. As per the rituals and customs prevail in Hindu community, the person who gives fire to the dead body does not move anywhere from his

house and passes his time for 10 days separately. Hence, it is apparent that PW 1 never tried to enhance the number of eye witnesses falsely. The above statement of PW 1 and PW 2 strengthens the credibility of their statements/evidence and makes their presence at the time of occurrence probable.

21. Further, witness PW 2 has also corroborated the statement of PW 1 and he has shown the presence of PW 1 along with him at the time of occurrence. Witness PW 2 has also stated that on the date of occurrence witness PW 1 had not gone to his service as he had complain of pain in his stomach. In his cross examination PW 1 also took the constant stand that he had not gone to place of his work on the date of occurrence. Therefore, in absence of specific reply in their cross examination otherwise as well as taking into consideration the positive assertion of witness PW 1 and 2, more particularly, in absence of any doubtful circumstance or evidence, it cannot be said that witness PW 1 and PW 2 were not present at his residence or were not eye witnesses of the occurrence.

22. Learned counsel for the appellants further argued that post mortem of deceased Raja Ram Yadav took place on 22.06.1987 at 1.00 P.M. It should have been done on 21.06.1987. The reason of delay has not been shown, such delay makes the prosecution story doubtful. On the above point the record indicates that the occurrence of murder took place at 7.15 P.M., F.I.R. was lodged at 11.10 P.M. Thereafter, the Investigating Officer has reached on the spot in the darkness of night. That is why the proceedings of inquest could not be started in night. The memo of inquest (Ext – Ka-2) indicates that on 21.06.1987 at about 6.00 A.M. the inquest proceeding was started which was completed by 7.45 A.M. on 21.06.1987. Thereafter, the collection of evidence on the spot, taking the statement of witnesses,

wrapping of dead body in cloth and fixing seal on the dead body would have been consuming considerable time, then after that the S.I. arranged to bring the dead body to police station. The distance of mortuary has been shown as 24 Kms., accordingly it can be presumed that the day hours as well as the timing for conducting post mortem would have been over for that day. The Form-13 of police paper only shows that the dead body was sent to mortuary on 21.06.1987. The time of its arrival at mortuary has not been mentioned. Usually after sun set or in darkness of night the autopsy of the body is not done in mortuaries, except by specific order of district administration. In such a scenario, if the post mortem of the deceased took place on 22.06.1987, it cannot be said that the delay was manipulated for any doubtful reason. Witness PW 2 has stated in his evidence that he reached in about 3 – 3½ hours at Medical College along with dead body. Certainly after reaching at Medical College some time would have been elapsed in paper work for handing over and taking over the dead body for autopsy and in completing the above formalities the time for conducting the post mortem of the deceased would have passed. The witness PW 6 has also opined that the fatal injury would have been caused to the deceased at about 7.15 P.M. on 20.06.1987. Nothing has been cross examined by the counsel for the appellants with the above witness. Therefore, it cannot be said that the prosecution story has been falsely drafted with any manipulation or doubtful circumstance. If the autopsy of the deceased was started at 1.00 P.M. on 22.06.1987 it cannot itself prove that prosecution story is false.

23. Learned counsel for the appellants has submitted that the witnesses of fact PW 1 and PW 2, both are sons of deceased. They are related witnesses. No independent witness has been examined by the prosecution. The person Sidhnath, S/o Shivdeen who has been alleged as the eye witness of the occurrence in the

F.I.R. and is the neighbour of the informant, has not been produced in evidence, therefore, in the absence of any independent witness, the evidence of PW 1 and PW 2 as well as prosecution story cannot be relied upon. Apart from that, in the charge-sheet also, so many independent persons, namely, Ram Lal, Babu Lal, Radhey Lal, Parmeshwar, Shripal have been mentioned as the prosecution witnesses but none of them have been produced by the prosecution in support of the prosecution story.

24. In reply, learned A.G.A. has submitted that it is very common, particularly, in the rural areas, where most of the people are backward and illiterate. If any independent person had seen any criminal offence/occurrence, they would not prefer to give their evidence as witness. Generally they did not want to be enmity with the accused persons, who are known to them also. Our police enquiries are also not much friendly with such witnesses. In the present case, witnesses PW 1 and PW 2 have stated in their evidence that they were present at the time of occurrence. Both the persons are sons of the deceased and their presence at the place of occurrence is natural. Deceased was having other sons, namely, Ram Prakash and Umesh. The witness PW 1 fairly stated in his statement that at the time of occurrence they were not present at the place of occurrence. Both the witnesses, PW 1 and PW 2, have described the occurrence properly. There is no substantial discrepancy in their evidence. If the witnesses are narrating the occurrence truly, some discrepancies are bound to occur and exaggerations in their statements are also natural.

25. (i) In the case of **Marwadi Kishor Parmanand and another Vs. State of Gujarat, (1994) 4 SCC 549**, it has been held in paragraph 31 as under :-

"31. The evidence of a witness deposing about a fact has to be appreciated in a realistic manner having due regard to all the surrounding facts and circumstances prevailing at or about the time of occurrence of an incident. Some contradictions and omissions even in the evidence of a witness who was actually present and had seen the occurrence are bound to occur even in the natural course. It is a sound rule to be observed that where the facts stated by an eyewitness substantially conform to and are consistent on material points from the facts stated earlier to the police either in FIR or case diary statements and are also consistent in all material details as well as on vital points there would be no justification or any valid reason for the court to view his evidence with suspicion or cast any doubt on such evidence. In the present case as discussed above we find that the solitary witness Ranchhodbhai, PW 1 is a wholly reliable witness and his evidence in itself, without any further corroboration is enough to sustain the conviction of the two appellants for the crime they are charged with, but we find that the evidence of the sole eyewitness Ranchhodbhai finds corroboration on material aspects from the evidence of Jayantilal PW 6, Makkar PW 8, Dr Nathani PW 10, Dr Avasia PW 11, Dr Joshi PW 12 and the Head Constable Moolchand PW 18. Thus the corroboration is also not lacking in the present case and there was hardly any ground or any possibility of taking the view which is unfortunately taken by the learned trial Judge. In our considered opinion the trial court clearly fell in serious error in rejecting the truthful version made by the sole eyewitness PW 1 whose evidence does not suffer from any infirmities, much less the unwarranted criticism made by the trial court. The High Court was therefore, in exercise of its powers under Section 378 and 386, Criminal Procedure Code, fully justified to reverse the erroneous findings recorded by the trial court. We find ourselves wholly in agreement with the view taken by the High Court and the conclusions recorded by it. Consequently the appeal deserves to be dismissed."

(ii) In the case of **Jai Shree Yadav Vs. State of U.P., 2004 SAR (Criminal) Supreme Court**, the Apex Court has held in paragraph 21 as under :-

"21.It is also true that PW1 was not available to the Police for nearly 10 days after the incident but the explanation given by this witness is quite plausible that his family was afraid for his safety hence he went to his in-laws' place and remained there and it is only when things settled down he decided to come out and give a statement to the Police. The possibility of his fear of retaliation is supported by the evidence of PW-8 I.O. who stated that there was tension in the village and at the time of funeral of the deceased he had to make Police bandobust which indicates the possibility of PW-1's apprehension and his consequent non-availability to the investigating agency. There is one other aspect of this case which will have to be borne in mind while considering the evidence of PW-1. His name has been mentioned in the FIR as a person who was present at the time the incident took place. It is also stated in the FIR that in the said incident PW-1 was injured. We have already noticed that the prosecution has established that this complaint was filed in the Salempur Police Station at 5.30 p.m. If really this witness was not present at the time of incident in question we do not think PW-3 would have included his name without even knowing the whereabouts of this witness on that day and by attributing an imaginary injury to him. In his examination in chief this witness has clearly narrated the incident involving the named accused persons as also the overt acts attributed to them. Of course in the cross examination the defence has brought out that this person is closely connected with deceased Abid Ali therefore a suggestion was made that he was deposing falsely. This suggestion has been denied by the appellant. In the cross examination defence has brought about certain omissions, contradictions and improvements in the evidence of this witness. These shortcomings in the evidence of this witness will have

to be considered in the background of the fact that this witness was subjected to nearly 217 questions over a period of 14 months i.e. his cross examination starting on 14.8.1994 and ending on 28.11.1995. Both the courts below have taken judicial notice of this fact, not only in regard to this witness but in regard to other witnesses also and have come to the concurrent conclusion that when a witness is subjected to such lengthy arduous cross examination over a lengthy period of time there is always a possibility of the witnesses committing mistakes which can be termed as omissions, improvements and contradictions therefore those infirmities will have to be appreciated in the back ground of ground realities which makes the witness confused because of the filibustering tactics of the cross examining Counsel."

(iii) In the case of **Kaki Ramesh and others Vs. State of Andhra Pradesh, 1994 SCC (Cri) 1214**, the Apex Court has held that *it is well established rule that exaggerations, embellishments and inconsistencies on the fringe do not make witnesses unreliable.*

26. As per law, the family members as well as interested witnesses are also competent witnesses for giving evidence.

(i) It has been held by Apex Court in the case of **Gajoo v. State of Uttarakhand, 2013 CRI.L.J. 88 (SC)**, in paragraph 15 as under :-

"15. Once, the presence of PW2 and PW3 is shown to be natural, then to doubt their statement would not be a correct approach in law. It has unequivocally come on record through various witnesses, including PW4, that there was a 'Satyanarayan Katha' at the house of Chetu Ram which was attended by various villagers. It was on their way back at midnight when PW2 and PW3 had seen the occurrence in dark with the help of the torches that they were carrying. The mere fact that PW2 happens to be related to PW1 and to the deceased, would not result in doubting the statement

of these witnesses which otherwise have credence, are reliable and are duly corroborated by other evidence. In such cases, it is only the members of the family who come forward to depose. Once it is established that their depositions do not suffer from material contradictions, are trustworthy and in consonance with the above-stated principles, the Courts would not be justified in overlooking such valuable piece of evidence."

(ii) In the case of **Brahma Giri Vs. State of U.P., [2004 (2) JIC 723 (All)]** it has been held that *evidentiary value of testimony of the interested witness/statement of family member of the deceased is not to be rejected on the ground of his relation with victim. However, Court is required to scrutinized his statement with care.*

(iii) In the case of **Narendra and others Vs. State of U.P., [2006 (56) ACC 288]**, a Co-ordinate Bench of this Court has held in paragraph 18 as under :-

*"18. We have considered the submission and in our opinion there is no substance in this submission. It is a settled position that there is no proposition in law that relatives are to be treated as untruthful witness, just because the witnesses are related to the deceased would be no ground to discard their testimony, if otherwise their testimony inspires confidence. Being relatives, it would be their endeavour to see that the real culprits are punished and normally they would not implicate wrong person in the crime, so as to allow the real culprits to escape unpunished. The submission of the non-examination of other witnesses is concerned, mere failure to examine all the witnesses who may have witnessed the occurrence will not result in outright rejection of the prosecution case if the witnesses examined by the prosecution are found to be truthful and reliable. Moreover, we cannot ignore the reality that many eye-witnesses shy away from giving evidence for obvious reasons. In the case of **Ravi v. State, 1988 (25) ACC 168 (SC)**, it has been observed that "It is settled by a catena of cases by this Court that the evidence of eye-witnesses cannot be rejected merely because*

they are related. In such a situation, the evidence of PW 2 in the present case, there is no strong motive or ill will on the part of PW 2 to exonerate the real person who caused the injuries to her son and to implicate the accused."

(iv) *In the case of **Hardev Singh, etc. Vs. Harbhej Singh and others, 1996 (4) Crimes 216 (SC)**, the Apex Court has in paragraph 16 has held as under :-*

"16. Coming to the finding as regards the non-examination of independent eye witnesses who saw the incident in question we must hasten to add that it is completely erroneous and unmerited. The prosecution has examined Hardev Singh (P.W. 2) and an injured witness Suba Singh (P.W. 3), although some other villagers did come at the place of incident but in our opinion merely because other independent witnesses were not examined could not be a ground to discredit the evidence of these two eye witnesses. This Court time and again has emphasised that the evidence of close relations who testified the facts relating to the occurrence be not rejected merely on the ground that they happened to be the relatives. All that this Court has ruled is that the evidence of such witnesses be scrutinised very carefully. We have very carefully gone through the evidence of Hardev Singh (P.W. 2) and Suba Singh (P.W. 3) who were consistent in their evidence as regards the details of assault caused by the respondents (accused). Both the witnesses have given minute details in regard to the weapons used by each of the accused and the manner in which they have assaulted Harbhajan Singh in front of the house of Chanan Singh. They also stated that A-1 fired from his gun at Harbhajan Singh causing him bleeding injuries. They further stated that the second shot fired by A-1 missed the target. It is true that the medical evidence does indicate two gun shot injuries. In the facts and circumstances of the case non explanation of the gun shot injury No.6 by these two eye witnesses would neither dilute their evidence nor their presence could be doubted. It is the positive case of both the

witnesses that Harbhajan Singh had come to the house of Chanan Singh to help him in the construction work. There is nothing in their evidence which can persuade us to disbelieve the story narrated as regards the assault on Harbhajan Singh. Coming to the assault on Baldev Singh caused by the respondents (accused), Hardev Singh (P.W. 2) and Suba Singh (P.W. 3) had stated that Baldev Singh, on noticing that the respondents (accused) were coming towards him, left the driver's seat and went to the trolley to escape himself from the probably attack by the accused. Harbhej Singh (A-1) gave a lalkara and thereupon Amrik Singh (A-3) climbed up the trolley and chopped off the leg of Baldev Singh with gandasa. Gurmej Singh (A-4) also climbed up the trolley and gave 2-3 blows on his left arm from the sharp side of gandasa. Mohan Singh (A-5) also gave a gandasa blow from the sharp side on his chest. After inflicting injuries to Baldev Singh the accused fled away. Both these witnesses were searchingly cross-examined by the defence but there is hardly any material brought on record to discredit their evidence. The evidence of both these witnesses in our considered view unmistakably proves that the respondents (accused) who were the members of the unlawful assembly having a common object to cause the murders of Harbhajan Singh and Baldev Singh did cause such bodily injuries to them as a result thereof they met with homicidal deaths."

(v) In the case of **Seeman alias Veeranam Vs. State by Inspector of Police, 2005 CRI.L.J. 2618 (SC)**, the Apex Court in paragraph 4 has held as under :-

"4. It is now well settled that the evidence of witness cannot be discarded merely on the ground that he is a related witness or the sole witness, or both, if otherwise the same is found credible. The witness could be a relative but that does not mean to reject his statement in totality. In such a case, it is the paramount duty of the court to be more careful in the matter of scrutiny of evidence of the interested witness, and if, on such scrutiny it is found that the

evidence on record of such interested sole witness is worth credence, the same would not be discarded merely on the ground that the witness is an interested witness. Caution is to be applied by the court while scrutinizing the evidence of the interested sole witness. The prosecution's non-production of one independent witness who has been named in the FIR by itself cannot be taken to be a circumstance to discredit the evidence of the interested witness and disbelieve the prosecution case. It is well settled that it is the quality of the evidence and not the quantity of the evidence which is required to be judged by the court to place credence on the statement."

(vi) In the case of **Nachhattar Singh Vs. State of Punjab, 1998 SCC (Cri) 949**, the Apex Court in paragraphs 3 and 4 has held as under :-

"3. The High Court has held that both Daya Singh and Kulwant Singh were present in the house at the time of the incident. Their presence in their own house at that time was quite natural. If they were present in their house then obviously they could have seen the assault on their mother by the appellant. Both the courts below have thought it proper to accept their evidence and we see no reason to differ from the finding recorded in that behalf.

4. The contention raised on behalf of the appellant was that the witnesses could not have been in their house at the time when the incident took place. It was late evening time and therefore their returning to the house from their shop at that time cannot be regarded as unnatural or improbable. As we are of the view that the High Court was right in confirming the conviction of the appellant on the basis of the evidence of the two eye witnesses, this appeal has to be dismissed."

(vii) In the case of **Sher Singh and another Vs. State of Haryana, 1994 CRI.L.J. 1980 (SC)**, the Apex Court has held in paragraph 5 as under :-

"5. Merely because PWs 2 and 3 are related to the deceased, that by itself is not a ground to reject their evidence. As a matter of fact PW 2 would be the last

person to implicate somebody falsely. It is to be noted that he went to the village, informed his parents and rushed to the police station which is 19 kilometres away and gave the report without any delay."

(viii) In the case of State of U.P. Vs. Sheo Sanehi, [2005 (52) ACC 113], the Apex Court in paragraph 16 has held as under :-

"16. So far as PWs 3 and 4 are concerned, PW 3 is nephew of deceased Devi Din whereas PW 4 is widow of the said deceased, as such they are natural witnesses and their presence at the alleged place of occurrence cannot be doubted. The names of these two witnesses were disclosed in the First Information Report itself and they supported the prosecution case in all material particulars in their statements made before the police as well as in Court and no infirmity could be pointed out in their evidence, excepting that they were related to the deceased persons and inimical to the accused. It is well-settled that merely because a witness is related to the prosecution party and inimical to the accused persons, his evidence cannot be discarded if the same is otherwise trustworthy. In the case on hand, we do not find any infirmity whatsoever in the evidence of PWs 1, 3 and 4, as such it is not possible to disbelieve them, especially in view of the fact that their evidence is supported by medical evidence as well as objective findings of the investigating officer, but the High Court has committed a serious error in discarding their testimonies on this score."

27. In the case in hand, we have considered the evidence of PW 1 and PW 2 thoroughly. They have been cross examined by the counsel for the appellants at length, but in their cross examination too, no such fact came on surface which may lead to some other story or fact. Hence, it cannot be said that in absence of any independent witness the prosecution story has not been proved.

On the above point, the Apex Court, in the case of **Amar Singh Vs. Balwinder Singh and others, 2003 (46) ACC 619 (SC)**, in paragraph 15, has held as under :-

"15. Another reason given by the High Court for acquitting the accused - respondents is that two other injured witnesses, namely, Kashmira Singh and Pritam Singh and one Ramesh, whose name was mentioned in the FIR, were not examined. Shri Ashwani Kumar, learned senior counsel appearing for the accused-respondents has vehemently urged that the purpose of a criminal trial is not to support the prosecution theory but to investigate the offence and to determine the guilt or innocence of the accused and the duty of the public prosecutor is to represent the administration of justice and therefore the testimony of all the available eye witnesses should be before the Court and in support of this contention he has placed reliance on State of U.P. & Anr. v. Jaggo alias Jagdish & Ors., AIR 1971 SC 1586. It is true that the witnesses essential to the unfolding of the narrative on which the prosecution is based must be called by the prosecution, whether effect of their testimony is for or against the case of the prosecution. However, that does not mean that everyone who has witnessed the occurrence, whatever their number be, must be examined as a witness. The prosecution in the present case had examined three eye-witnesses who were all injured witnesses. The mere fact that Kashmira Singh and Pritam Singh were not examined cannot lead to an inference that the prosecution case was not correct. The aforesaid two witnesses had been given up by the prosecution on the ground that they had been won over by the accused. These two persons are not family members of the first informant Amar Singh and it is quite likely that they did not want to get involved in any dispute between the first informant and his sons on the one hand and the accused on the other hand as they had no interest in the land belonging to Jangir Dass Sadh which was being earlier cultivated by Gurdial Singh, father of A-1

and A-2 but had been taken an year earlier by the first informant Amar Singh. The contention raised by learned counsel fails to take notice of Section 134 of the Evidence Act which provides that no particular number of witnesses shall in any case be required for the proof of any fact. A similar contention has been repelled by this Court in a very illustrating judgment in Vadivelu Thevar v. State of Madras, AIR 1957 SC 614 and it will be useful to take note of para 11 of the report, which reads as under :

".....The contention that in a murder case, the court should insist upon plurality of witnesses, is much too broadly stated. The Indian Legislature has not insisted on laying down any such exceptions to the general rule recognised in S.134, which by laying down that "no particular number of witnesses shall, in any case, be required for the proof of any fact" has enshrined the well recognised maxim that "Evidence has to be weighed and not counted." It is not seldom that a crime has been committed in the presence of only one witness, leaving aside those cases which are not of uncommon occurrence, where determination of guilt depends entirely on circumstantial evidence. If the Legislature were to insist upon plurality of witnesses, cases where the testimony of a single witness only could be available in proof of the crime, would go unpunished."

28. Section 134 of the Evidence Act says that no particular number of witnesses in any case are required for proving any fact. If two eye witnesses prove the prosecution case properly, it is sufficient to establish the F.I.R. version. In the present case, PW 1 and PW 2 have been found reliable and credible.

29. So far as the complicity of the appellants in the occurrence is concerned, it has been mentioned in the F.I.R. that all the three accused persons, namely, Hari Shanker, Lavkush and Radhey Lal were carrying firearms in their hands. Hari Shanker was carrying gun and rest of the accused persons were having country made pistols in their hands. All the three accused

persons shot fire at his father. In his examination-in-chief the witness PW 1 has stated that Hari Shanker and Lavkush fired upon his father by their gun and country made pistol respectively and having received injury his father fell down. This witness has not taken the name of third accused Radhey Lal. Witness PW 1 has further stated in his cross examination that when the accused opened fire at his father, the face of his father was towards east side. As his father received the firearm injury, he fell down from the wooden plank and thereafter another fire was shot at him by the accused. This part of statement of PW 1 is supported by Post Mortem Report, which shows one wound of entry on chest at left side. After receiving this injury his father fell down from wooden plank, in that turning the injured fell down on floor, from back side of the body, thereafter the second fire hit his abdomen towards right side. Further, PW 1 has stated that the accused persons fired three bullets but one bullet hit the wall of his house. Witness PW 2 has also stated in his examination-in-chief that first fire was shot by Hari Shanker at his father by the gun and when he fell down on floor from plank Lavkush fired at him by country made pistol. This witness PW 2 in his cross examination has stated that accused Radhey Lal was standing near him. He had told this fact to Darogaji. In this way PW 1 and PW 2 both have not assigned any role of Radhey Lal to fire at his father.

30. The witness PW 2 further stated that as the accused persons came at his house, accused Lavkush and Hari Shanker went towards his father. He further stated that he has not given the statement to Darogaji that all the three persons had shot fire at his father. He does not know how this statement was written in his statement under Section 161 Cr.P.C. by Investigating Officer. He further stated that Lavkush and Hari Shanker had shot total three fires at his father out of which one hit the wall. In this way although there is some exaggeration in the F.I.R. as well as

examination-in-chief of the witness that all the three accused persons shot fire at the victim, yet on perusal of his cross-examination and the post mortem report, it is found that his father had received only two firearm injuries. The witness further stated that one bullet hit the wall of his house but during investigation no sign or bullet mark has been noted by the Investigating Officer while making spot inspection, hence, the story of firing by all the three accused persons is not liable to be believed. Witness PW 2 has specifically mentioned in his cross-examination that accused Radhey Lal has not fired at his father. Witness PW 1 has stated that accused shot two fires at his father from very short distance. This fact stands proved by the post mortem report where in both the firearm injuries blackening, charring and tatooing was found present on the wounds. Witness PW 2 in his cross examination at page 7 has stated that Hari Shanker has shot first fire by his gun at his father, which hit the chest of his father. He has further stated that the third bullet was also fired by Hari Shanker. Further he has stated that he had told Darogaji that Hari Shanker had shot two fires at his father. During the spot inspection, the Sub Inspector found two empty cartridges of 12 bore. In general the 12 bore cartridges are used in gun and in country made pistols the offenders usually use 32 bore cartridges.

The bore is measured by the internal diameter in inches or by the number of lead balls of the size precisely fitting the barrel, which can be made from one lb. of lead. The most commonly it is 12 bore used in gun having bore diameter 0.729 inches.

The wad which has been found from the dead body of deceased Raja Ram Yadav is generally present in the shotgun cartridges, which may be made of both the cardboard and stout paper (air cushion) or plastic. The wad is impregnated with grease, which lubricates the wad.

31. Both the witnesses PW 1 and PW 2 have stated that one bullet shot (fire by Lavkush) hit the wall of his house but no sign of such bullet mark was found during the spot inspection as well as no empty cartridges of 32 bore has been found from the place of occurrence. The witness PW 6 has found two wounds of entry in the autopsy of the victim Raja Ram Yadav, for which he had opined that the injury has been caused by gun. Therefore, it is proved that only appellant Hari Shanker had fired two bullets from his gun at deceased Raja Ram Yadav. In absence of any sign of fire by country made pistol, we do not find involvement of appellants Lavkush and Radhey Lal in the offence. Thus, while convicting accused/appellants Lavkush and Radhey Lal, the learned trial court has failed to assess the evidence properly which are available on record.

32. The formal witnesses PW 3 to PW 6 have proved the documentary evidence of prosecution and in their cross examination no otherwise fact or circumstance has been found which is adverse to prosecution story. Hence, the appeal is liable to be allowed partly.

33. Accordingly, the appeal is **partly allowed**. The judgment of conviction and order of sentence passed by learned trial court in respect of both the appellants, namely, accused/appellants - Lavkush and Radhey Lal is set aside. They are on bail. They need not surrender. Their sureties are discharged.

34. So far as the appeal on behalf of accused/appellant Hari Shanker is concerned, the same is **dismissed**. The conviction and sentence order passed by the learned trial court against the appellant - Hari Shanker is affirmed. Appellant - Hari Shanker is on bail. He shall surrender before the trial court concerned immediately to serve out the sentence. In case the

appellant Hari Shanker fails to surrender before the trial court concerned, the trial court concerned shall issue N.B.W. against the appellant Hari Shanker. If appellant Hari Shanker appears or brought before the trial court concerned, he shall be sent to jail for serving out the sentence as awarded by the trial court.

35. Let a copy of this judgment along with the trial court record be sent to the trial court concerned for necessary compliance.

(Narendra Kumar Johari, J.) (Vivek Chaudhary, J.)

Lucknow :
Date : 24th May, 2024
ML/-

Whether the order is speaking:-	Yes/No
Whether the order is reportable:-	Yes/No