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Neutral Citation No. - 2024:AHC-LKO:33831-DB

A.F.R.

Court No.3

Case :- CRIMINAL APPEAL No. - 298 of 1990

Appellant :- Banwari And Others

Respondent :- State of U.P.

Counsel for Appellant :- R. Murtaza, Aishwarya Mishra, Alok Singh, Altaf Mansoor, Ashok Kumar Singh, P K Jaiswal, Rishad Murtaza, Syed Ali Jafar Rizvi

Hon'ble Mrs. Sangeeta Chandra, J.

Hon'ble Ajai Kumar Srivastava-I, J.

1. This Criminal Appeal arises out of judgement and order dated 11.05.1990 passed by the IIIrd Additional Sessions Judge, Sitapur in Sessions Trial No.663 of 1987 whereby the Appellant no.3 Mahesh has been convicted under Sections 302 and 147 read with Section 149 of the I.P.C. and sentenced to undergo life imprisonment, the appellant no.4-Jagdish along with appellant no.1- Banwari, appellant no.2-Moti Lal and appellant no.5- Babu Ram have been convicted under Section 148 read with Section 149 and Section 302 I.P.C. with life imprisonment.

2. Only two of the original five appellants i.e. appellant nos.2 and 4, namely, Moti Lal and Jagdish are alive as the appellant nos.1, 3 & 5, namely, Banwari, Mahesh, and Babu Ram died during the pendency of the Appeal and the Appeal in respect of them has already been abated.

3. The case of the prosecution as mentioned in the prosecution story written report Exhibit Ka-1 and the F.I.R. Exhibit Ka-2 of the paper-book is that on 27.04.1987, the informant Damodar Prasad, along with his uncle Vishwanath and cousin brother, Shiv Kumar were returning

home after making a query from the Sawmill regarding cutting of logs of wood. As soon as all three reached Barhtara Taal around 6:30 P.M., the accused Jagdish son of Babu Ram along with Banwari, son of Paragdeen, Moti Lal son of Gokarna and Babu Ram son of Banwari and Mahesh son of Gokaran armed with deadly weapons appeared from the sugarcane field of Raghubar and on the exhortation of Jagdish, all of them attacked Shiv Kumar. Jagdish fired from his gun, Babu Ram attacked him on his neck with a knife and then all of them dragged Shiv Kumar to the sugarcane field of Raghubar. The informant Damodar Prasad along with his uncle Visvanath tried to shout for help but no one came and Banwari, Moti Lal and Mahesh tried to attack the informant and his uncle and also threatened them for life in case they reported the matter to the Police. As a result of such threat, the informant Damodar Prasad, along with his uncle ran to their home in the village Benipur and did not report the matter to the Police Station at night out of fear. They returned in the morning to search for Shiv Kumar and they found his body in a grove south of Barhtara Taal. The informant wrote out a written report (Exhibit Ka-1) and had gone to the Police Station to report the matter after leaving members of his family Suraj Prasad and Bhagwan Das and others near the dead body.

4. On the basis of said written report by Damodar Prasad, son of Suraj Prasad, dated 28.04.1987, F.I.R., Exhibit Ka-2 was registered as Case Crime No. 80 of 1987, on the same day at 06:25 A.M. against the accused for the offence under Sections 147/148/149 and 302 I.P.C. The Station House Officer Phool Singh Bhadoria rushed to the place of occurrence alongwith other policemen. On reaching the spot, he prepared the inquest report of the dead body and sealed it and sent it for post-mortem examination after completing other formalities and inspected the place of occurrence and prepared a site plan with index (Exhibit C-6). He then took the statements of witnesses and prepared an inquest report (Exhibit Ka-8).

On receipt of post-mortem report and completion of investigation, charge sheet was prepared against the accused persons and filed in Court.

5. Separate charges were framed by the IIInd Additional Sessions Judge against all the accused on 21.01.1988. The prosecution examined six witnesses, Damodar Prasad as P.W.-1, Vishwanath as P.W.-2, Head Constable Satendra Nath Trivedi as P.W.-3, Constable Umakant Yadav as P.W.-4, Phool Singh Bhadoria as P.W.-5 and Dr. Gopal Swaroop, who conducted the post-mortem, as P.W.-6.

6. The statements of the accused under Section 313 of the Cr.P.C. were thereafter recorded. They denied the allegations and stated that they had been falsely implicated due to family dispute and long running enmity. The accused gave documentary and oral evidence. In the documents filed by them was a certified copy of the statement of Banwari dated 02.11.1977, which was given in the court of Vith Additional District and Sessions Judge, Sitapur in Sessions Trial No. 359 of 1976 titled as *State Vs Ramavtar and others*, under Sections 147, 148, 307/149, 324, 323 of the I.P.C. This case was decided on 11.03.1978. The statement of Banwari was given in the said Sessions Trial against Vishwanath, Ramavtar, Lalta Prasad, Madhuraam and Brij Lal, who were the accused and were being prosecuted for causing injuries to one Ganeshi. Copy of the judgement in Sessions Trial No. 188 of 1986 : *State versus Jagdish son of Baburam*; decided on 14.08.1984 by the Sessions Judge Sitapur was also filed, in which, Jagdish was tried for offence punishable under Section 302 of the I.P.C. for the murder of his uncle Jagadamba on 28.12.1984. Jagadamba was the real brother of Babu Ram. The accused Jagdish had been acquitted.

7. The accused also examined Lalta Prasad as D.W.-1, who was the owner of the sawmill and he stated that Vishwanath had not come to his sawmill alongwith his son

Shiv Kumar at any time in the recent past for cutting of wood logs.

8. The Trial Court considering the evidence on record had convicted the accused appellants and sentenced them as aforesaid.

9. It has been argued by the learned counsel for the surviving appellants that the appellants have been deliberately and falsely implicated because they belong to a collateral line of the same family. Banwari and Gokaran are real brothers. Babu Ram is the son of Banwari and Jagdish is the son of Babu Ram, the grandfather, son and grandson have all been implicated. Similarly, Motilal and Mahesh are the sons of Gokaran. Thus, both sons of Gokaran, son of Banwari have also been implicated. One Jagdamba was the real brother of Babu Ram and uncle of Jagdish. Jagdish was earlier implicated in murdering his uncle Jagdamba Prasad in 1984, but was acquitted.

10. It has been argued that the motive for attacking Shiv Kumar as shown by the prosecution, was that around two months ago from the date of the murder, Jagdish had threatened Shiv Kumar of dire consequences over taking water from the public tap, where Jagdish had gone to take a bath and had an altercation with Shiv Kumar. It has been argued that the accused/ appellant Jagdish had his own well in front of his house, and there was no question of Jagdish going to the public tap to take a bath.

11. Learned counsel for the surviving appellants has submitted that the finding of guilt recorded by the learned trial court against the surviving appellants is against the weight of evidence and, therefore, the same is unsustainable. He has taken us through the entire testimonies of prosecution witnesses recorded before the learned trial court and on the basis thereof, he has submitted that a delayed first information report was lodged in this case after consultation in order to falsely

implicate the surviving appellants. The delay in lodging the first information report has not been sufficiently explained by the prosecution.

12. He has also submitted that the learned trial court has failed to appreciate the fact that the contradictions/inconsistencies appearing in the testimonies of prosecution witnesses of fact are of such nature, which materially affect the core of the prosecution story and they being material in nature could not have been ignored by the learned trial court.

13. His further submission is that by not mentioning in the written report when the deceased and prosecution witnesses went to the sawmill for getting the wood sawed, the prosecution has tried to conceal the real genesis and true prosecution story for false implication of the surviving appellants.

14. His further submission is that though the first information report is not an encyclopedia, the failure of the first informant to mention the fact of prior enmity in the written report materially affects the credibility of the content of the written report, Ext. Ka-1.

15. He has also submitted that only two witnesses of fact, namely, PW-1, Damodar Prasad, and PW-2, Vishwanath, have been examined by the prosecution in support of its case. They are admittedly related to the deceased, being cousin brother and father, respectively. As they have introduced a new story of pre-existing enmity between the parties, the aforesaid witnesses of fact also become interested witnesses. Therefore, their testimonies, before they could be relied upon by the learned trial court, ought to have been corroborated by the testimony of an independent witness. In the absence of corroboration of the testimonies of such witnesses of fact, the finding of guilt recorded by the learned trial court against the surviving appellants is patently illegal and unsustainable.

16. He has concluded his submission by stating that the prosecution witnesses, namely, PW-1, Damodar Prasad and PW-2, Vishwanath, allegedly witnessed this incident. Their conduct of not making any efforts to save the deceased, who was closely related to them, is quite unnatural. Furthermore, they did not attempt to return to the place of incident to save and ascertain the whereabouts of the deceased in the evening. They did not attempt to contact the village chaukidar nor did they contact other residents of their village. They went to the place of occurrence on the next morning only, i.e., on 28.04.1987. Such unnatural conduct gives rise to the only conclusion that neither the witnesses of fact, namely, PW-1, Damodar Prasad and PW-2, Vishwanath had seen the incident nor did they know about such incident till the morning of 28.04.1987 when the dead body of the deceased was recovered.

17. In support of his aforesaid submissions, learned counsel for the surviving appellants has placed reliance on the judgments of Hon'ble Supreme Court rendered in the cases of **Vadivelu Thevar vs. State of Madras** reported in **AIR 1957 Supreme Court 614**, **Khem Chandra @ Khema and others vs. State of U.P.** reported in **(2023) 10 SCC 451**, **Mohammed Jabbar Ali and others vs. State of Assam** reported in **2022 SCC Online Supreme Court 1440** and **Maruti Rama Naik vs. State of Maharashtra** reported in **2003 (10) SCC 670**.

18. Sri Umesh Chandra Verma, learned A.G.A. has argued that P.W.-1 is a wholly reliable witness. He was young and educated and he remembered everything clearly. He has made a very fair admission at the time of cross-examination regarding long running enmity between the members of the same family. He also admitted that the appellants and the deceased had a common ancestor. He has also argued that the postmortem report

corroborated the injuries that have been mentioned in the F.I.R. and the deceased was beaten up brutally and body dragged away. It has also been noted that insofar as the occurrence of the incident is concerned, P.W.-1 and P.W.-2 have both given a concerted clear and reliable version. There may be certain discrepancies in the statement of P.W.-2 as he is old and he was the father of the victim and, thus, emotionally disturbed. However, there were no such discrepancies, which were so material as to affect the veracity of the entire statement made by P.W.-2. It has also been stated that P.W.-1 and P.W.-2 had enough time to fill up the lacunae in the story set up by them in case they had cooked up the story, as the F.I.R., according to the appellants, was lodged with a delay of 12 hours. They had enough time to have thought it over and over again and then got the F.I.R. lodged. It has also been argued that under Section 134 of the Evidence Act, the quality of evidence given by a witness has to be looked into and no particular number of witnesses are required to prove a fact. It has also been argued that medical evidence has corroborated the injuries found on the body of the deceased with statement made by the eye-witnesses and it cannot be said that P.W.-1 and P.W.-2 had fabricated a false case only because of old enmity running between the parties. With regard to the motive, which is allegedly lacking in the murder of the deceased, it has been argued that the prosecution is not required to prove an impossibility and it cannot possibly enter the minds of the accused to know the exact reason for the attack on the deceased. It was not necessary for them to have dragged the deceased from one sugarcane field to another grove, which was 250 paces away and only because the body was found at such a distance from the original place of attack, it cannot be said that the deceased was not attacked near the sugarcane field of Raghubar. It is possible that they had dragged the body during the course of brutally beating up Shiv Kumar.

19. Sri Rishad Murtaza, in rejoinder, has submitted that the prosecution must prove its case beyond reasonable doubt and in this case, the appellants have been convicted without looking into the reasonable story put up by the defence counsel. The reasonable doubt created in the minds of the Court cannot be said to be without reason. Suspicion howsoever grave cannot take the place of proof. It has been reiterated that it was a blind murder and the entire story that has been cooked up by the prosecution is only because of old running enmity between the accused and the deceased's family as it has been admitted by both prosecution witnesses that they trace their pedigree to a common ancestor. Three generations of all male relatives in the collateral line have been implicated falsely. Jagdish had a well of his own, where he could have taken a bath and it is not explained by the prosecution witnesses as to why he would go to a public tap some 50 meters away from his house to take a bath, where he would have had an altercation with the deceased, which was also around two months ago and then waited for such a long time to murder him in revenge.

20. We have also gone through the judgement of the Trial Court, wherein it has discounted the various arguments relating to delayed F.I.R., discrepancies in the statements of the alleged two eye witnesses, discrepancy in the recording of the inquest report and the F.I.R., the discrepancy in Medical and ocular evidence, the unnatural behaviour of the witnesses, who are close relatives of the deceased, and has observed that it was natural for the witnesses/relatives of the deceased, not to have pursued the assailants in the evening of 27.04.1987, when the deceased was attacked in front of their eyes as the assailants were armed and they had threatened them.

21. The Trial Court has observed that the Police Station was 6 km away and night having fallen, it was not possible for the prosecution witnesses to have shown courage to search out the dead body of Shiv Kumar on the same

night. They had no arms with them. It was natural for them to remain silent in the night. The Trial Court has, therefore, rejected the argument regarding F.I.R. being delayed and the explanation for the same not being given in a satisfactory manner.

22. The Trial Court has rejected the argument regarding F.I.R. appearing to have been lodged after deliberation and consultation as in the inquest report in the opinion of the Investigating Officer, it is mentioned that a murder was committed by some miscreants. The Trial Court has observed that the Investigating Officer had admitted his mistake that the word "*Badmashon*" should not have been written.

23. The Trial Court has further observed that non-mention of motive in the written report, Exhibit Ka-1 shows that the prosecution witnesses had no idea in their mind that the accused persons and specially Jagdish would commit murder of Shiv Kumar simply because of an incident of a quarrel over taking of water from a public hand-pump.

24. The Trial Court disbelieved the argument regarding false implication of Banwari only because Banwari had given evidence against Vishwanath P.W.-2 in another case. The Court observed that Banwari had given evidence against Vishwanath in favour of Ganesh Paasi about ten years ago and there was a cross case also. It was difficult to believe that Vishwanath had been waiting to implicate the accused Jagdish and Banwari for ten years. If he had a grudge against Banwari, he would not have implicated falsely the other accused persons.

25. The Trial Court has also discounted the contradictions in the evidence of Damodar Prasad and his uncle Viswanath and found that there was no material contradictions in the evidence of these two witnesses led by the prosecution. Both the witnesses had supported the

story of the prosecution with regard to material facts on record.

26. The Trial Court has explained the non-mentioning of the details of taking the wood to the sawmill at Hargaon and then going again to collect the same by saying that Damodar Prasad had stated in his evidence that he had not given the details in the morning to avoid a lengthy written report.

27. The Trial Court has also discounted the discrepancies in ocular and medical evidence as it has assumed that once Shiv Kumar was fired upon and attacked with a knife and dragged into the field of Raghubar, Damodar Prasad and Vishwanath had run away and, therefore, did not see the other injuries inflicted upon Shiv Kumar.

28. The Trial Court has disbelieved the statement of Lalta Prasad D.W.-1 that Vishwanath and Damodar had not come to the sawmill to get their Wood logs cut either on 27.04.1987 or at any time before that day on the ground that Lalta Prasad had admitted that his son and his uncle also sat at the sawmill in his absence.

The Trial Court observed that Lalta Prasad appeared to be an interested person and gave evidence to defend the accused because of his affinity with them. He also knew Vishwanath very well, that is why he had stated that Vishwanath had told him on the very next day about the murder of his son, Shiv Kumar. The Trial Court, therefore, did not place any reliance on evidence of the Defence Witness Lalta Prasad.

29. We have gone through the evidence of the P.W.-1 and 2, the alleged eye witness and that of the S.H.O. Phool Singh Bhadauria, the Investigating Officer, and Dr. Gopal Swaroop who had conducted the post-mortem.

30. Dr. Gopal Swaroop, who had conducted the post-mortem on 29.04.1987 while being posted at District Hospital Sitapur, had stated that the deceased was around 25 years of age and his death had taken place around two days ago. At the time of post-mortem, green discolouration was present on the dead body. The left side parietal, occipital and temporal bones of the skull were fractured into pieces, and the glands were lacerated. Left pelvic girdle was also fractured. Both the intestines were lacerated. The following antemortem injuries were found on the body :-

1. Lacerated wound 3.5 cm x 1.5 cm bone deep over the chin.
2. Multiple abraded contusions in an area of 17 cm x 17 cm side to side and up and down from chin to forehead, all over the face.
3. Lacerated wound 4.5 cm x 1.5 cm bone deep over the back of the skull 9 cm above the transverse process of the seventh cervical vertebra
4. Lacerated wound 2 cm x 0.5 cm muscle deep over the back of the skull 1 cm away and laterally to injury number three.
5. Incised wound 4 cm x 1 cm bone deep over the back, on the back 3 cm above the transverse process of the seventh cervical vertebrae.
6. Multiple firearm wounds of entry in an area of 5 cm x 5 cm cavity deep margins inverted. Blackening present around the margins. Each measuring 0.5 cm x 0.5 cm, just above the upper border of the left pelvic bone.
7. Multiple abrasions in an area of 27 cm x 24 cm (up down and sign to side) over the front of the chest and upper part of the abdomen, 8 cm below the suprasternal notch above and 7 cm above the umbilical lower margins.

In the opinion of the Doctor, the ante-mortem injuries were caused on 27.04.1987 at about 06:30 P.M. Injury no.

6 was caused by some firearm. Injury no.5 was caused by some sharp cutting weapon like knife. Injury no.1, 3 and 4 by some blunt object like lathi. Injury nos.2 and 7 were caused by friction. The deceased had taken his food about four hours prior to his death. His death was caused due to ante-mortem injuries.

31. We have gone through the evidence of P.W.-1 and find that his written report at the P.S. Hargaon and his statement recorded under Section 161 Cr.P.C. did not contain any details. During evidence of P.W.-1, he had stated that Jagdish was a criminal and he was the son of Baburam who in turn was the son of Banwari. Jagdish had killed his paternal uncle Jagdamba Prasad in 1984 but he was acquitted during trial. Before the murder, around one month ago Shiv Kumar had an argument with Jagdish on a public tap at around 11:00 AM and he had witnessed the said incident. Shiv Kumar was filling his bucket of water from the public tap when Jagdish came and told him that he wanted to take a bath and that Shiv Kumar should fill his bucket after Jagdish had taken his bath. An argument took place and Jagdish had threatened to seek revenge from Shiv Kumar. P.W.-1 stated that he alongwith his paternal uncle Vishwanath and his paternal cousin Shiv Kumar had gone to Hargaon to the sawmill of Lalta Prasad to get the logs of wood cut at around 09:00 A.M. and they returned home because some other person's wood was being cut at the time. They returned to the sawmill at around 03:00 P.M., but at that time, there was no electricity and the wood logs could not be cut. They waited for around one hour and then they started from the sawmill for their home at around 06:00 P.M. and at around 06:30 P.M., when they reached near Barhatara talab, the accused came out of the sugarcane field of Raghubar and attacked Shiv Kumar on the exhortation of Jagdish.

32. P.W.-1 also admitted that he had written a report and signed the same before submitting it at Police Station Hargaon at around 06:00 A.M. The Sub-Inspector had

taken the statement of Damodar at the Police Station. In his evidence before the trial court, Damodar gave in detail his pedigree and his relation to the accused appellants and admitted that they had a common ancestor, but all of them had been living in separate houses for a long time.

P.W.1 also stated that Shiv Kumar used to work at a Halwai shop, but he had left the same two months before he was murdered. He used to go early in the morning to Hargaon on a cycle to Bedhab Halwai shop and returned in the evening. Damodar Prasad admitted that the public tap was around 20 to 25 metres South of his house. His house was around 150 to 200 paces away from Jagdish's house. Jagdish had his own well around 10 to 15 paces in front of his house. The well had a concrete slab to facilitate washing and taking a bath adjacent to it.

33. P.W.1 also admitted that he had not stated in the F.I.R. about the incident of quarrel between Jagdish and Shiv Kumar at the public tap that occurred around one month ago before the murder because he was too emotionally disturbed at the time of writing the report, which he submitted at the Police Station at around 06:00 A.M., on 28.04.1987.

34. P.W.1 was put a specific query as to since when he was emotionally disturbed and he gave a reply that from the very time of the incident around sunset the previous evening. By the time they had reached home night had fallen and they had told their family members and other villagers about the incident. The village Chowkidar lived in another village Vijaypur which was 2 to 3 furlongs from their village and there was a big pond in between. If one wanted to avoid the pond, the distance between Vijaipur and their village would be around five furlongs and the road to Vijaipur was running in front of the house of Banwari and Banwari had threatened them with dire consequences. (One furlong is about 200 meters and even if longer route would have been taken by the P.W.1, he

would not have had to cover more than 1 kilometer to inform the village Chowkidar).

35. This Court has noticed that P.W.1 had said that the villagers as well as their family members did not report the matter to the Police Station at night because of fear of the accused attacking them also. On the one hand, P.W.1 said that he had written in the report that he had not reported the incident at night out of fear and that he did not inform the Chowkidar on the next morning because he was flustered and disturbed about the incident that had occurred the previous night. They started looking for Shiv Kumar much before sunrise the next day along with 10 to 15 people from the village. On the other hand, P.W.1 also said he had no knowledge that the village chowkidar had to be informed, therefore, he, did not think of informing the village Chowkidar. When they had gone to search for Shiv Kumar, they were carrying Lathis and Kanta with them. When they found the body of Shiv Kumar, sunrise had not taken place, but because of dawn, they could see clearly though they did not take any source of light with them. Vishwanath, Suraj Prasad and Bhagwan Das had stayed with the body of Shiv Kumar, whereas he along with his other uncle Hari Shankar had gone to the Police Station Hargaon for lodging the report. He had walked on foot to the Police Station, which took him about half an hour. He also stated that the police station was around 3 K.M. and that he could normally walk 5 to 6 K.M. in an hour.

36. P.W.1 stated that he had taken paper and pen from Bhagwan Das, who resided in the village Benipur, and he had taken a file cover from his own house along with him to the Police Station. He had no idea whether Shiv Kumar was dead or alive when he started from home, therefore, he did not write the report at home but wrote it on his way to the Police Station. The handwritten report was shown to P.W.-1 who admitted that it was in his handwriting. Two Sub-Inspectors and a Constable had accompanied him on

cycles to the place of occurrence. He had not written in the report that they could not find the dead body in Raghubar's field, but had found it to the south of the road with the help of blood trail on the way and signs of dragging although he had stated such facts while giving his oral statement to the Sub-Inspector at the Police Station and he did not know as to why the same had not been written in his statement recorded under Section 161 Cr.P.C. at the Police Station in the report. He had only stated that while searching they had found the body of Shiv Kumar to the south of Bartara talaab in his written report to keep it brief.

37. P.W.1 stated that the Sub-inspector had stayed on the spot for around two hours after reaching around 08:00 A.M. The sealed body was taken to the District hospital at around 10:00 A.M. after inquest report was prepared in his presence. The statement of Vishwanath, his paternal uncle, was also taken by the Sub-Inspector in his presence.

38. It was stated by P.W.-1 that at the time when Jagdish exhorted the other accused to kill the enemy, Shiv Kumar turned and ran towards the south of the road, but Jagdish fired upon him from around two and a half arms length. Shiv Kumar was hit in his back, but P.W.-1 did not see exactly where he was hit as at the moment he was hit he fell down. Baburam then attacked Shiv Kumar with his knife on the neck. It was not clear from the distance as to whether he was stabbed more than once with the knife.

After being shot and being attacked by the knife Shiv Kumar was dragged by the assailants into the sugarcane field and they could not see what happened thereafter, he may have been attacked by knife more than once or even by *lathi* but they could not see.

39. P.W.-1 also stated that he lived in a separate house from Vishwanath and his son, Shiv Kumar. He had

accompanied Vishwanath and his son in taking 2 to 3 wooden logs to Hargaon sawmill in a bullock cart, which they had borrowed from the nephew of Vishwanath and Hari Shankar. It took them around one and half hours to reach the sawmill from the village. The wood logs were big and needed more than two persons to be transported. The wood logs were not weighed at the sawmill. There were two or three or four wood logs, but not six, that were taken by them. Each of such wood logs would be around one quintal in weight.

40. P.W.1 stated that he had not written about transporting the wooden logs to the sawmill by bullock cart in the morning as he thought that all applications / written reports need to be brief. P.W.-1 stated that neither he nor Vishwanath nor Shiv Kumar had gone out to work as labourers on that day, because they knew that they had to get the wooden logs cut at the sawmill and to take them back home. They eventually had gone to the sawmill some one month later where the wooden logs were already cut and they took them back to their village without giving the sixty rupees cutting charges to the sawmill owner because he had not returned the leftover wood which could have been used for other purposes.

41. The P.W.-1 further stated in his evidence that he did not mention this fact in the written report because he did not think it was necessary to mention each and every fact that was witnessed by him in his report. He had seen the accused appearing on the road from Raghubar's sugarcane field and they were around 25 paces away from them. P.W.-1 also stated that he had shown the spot where Shiv Kumar was attacked by the accused to the Sub-inspector and also the place where he had fallen down and also the place where Shiv Kumar's body was found later on during the spot inspection by the Police.

42. The P.W.-2, Vishwanath stated that Shiv Kumar was his son and Damodar Prasad was his nephew. He also

stated that he had gone along with Shiv Kumar and Damodar to Hargoan to get some six, seven or eight wooden logs cut at the sawmill of Lalta Prasad in the morning. Total weight of the logs would be around twenty quintals. There was no electricity, and therefore, the logs could not be cut. They were returning home at around 6 P.M. and as they reached Barhtara Taal the accused appeared from the sugarcane field of Raghubar and attacked Shiv Kumar. He alongwith Damodar had shouted for help, but because the place was lonely, nobody came to help. Banwari, Moti and Mahesh threatened them with their weapons. As a result, they had run away to the village where they had sought help from other villagers, but nobody was ready because night had fallen. He had not approached the Police Station at night out of fear of the accused.

43. P.W.2 stated that they had gone to search for Shiv Kumar's body at dawn and when he was not found in the sugarcane field of Raghubar, they traced the blood drops towards the south of the road and found Shiv Kumar's body in the grove of Hardayal. Suraj Prasad, Bhagwan Das, and he himself waited near the body, while, Damodar and Hari Shankar went to the Police Station to get the report lodged.

44. P.W.-2 also stated about the argument that had taken place near the public tap between Jagdish and Shiv Kumar in which he has intervened and taken Shiv Kumar back home. At that time Jagdish had threatened Shiv Kumar of taking revenge. He also stated that the wooden logs were eventually taken back about ten days after the incident and that he had not given the charges for cutting of wood at the sawmill because the sawmill owner had sold some of his wood for which a quarrel had taken place.

45. P.W.2 stated that he had not mentioned to the Sub-inspector in his statement under Section 161 of the Cr.P.C. about wooden logs not being cut at the sawmill and about

them returning home on foot at around 06:00 P.M. P.W.-2 stated during his cross-examination that he did not remember as to what he had told the Sub-Inspector at the time because he was too flustered and disturbed sitting next to the dead body of his son. He did not remember whether he had told the Sub-Inspector about taking the wood in the morning to Hargaon and then going again at around 03:00 P.M. in the afternoon to collect the cut wood. He also stated that he had gone to Hargaon in the morning and stayed there for about one hour. When they had gone again in the afternoon, they had stayed there for around two hours. P.W.-2 also stated that they had not taken the bullock cart for carrying the wood home as they had told the sawmill's owner not to cut the wood in their absence. If the wood had been cut, they would have hired a cart at Hargaon. The wood was not cut because there was no electricity. He had not tried to take the wood to any other sawmill in Hargoan, because he was familiar with the sawmill's owner, Lalta Prasad. Shiv Kumar used to work at sweet shop of Bedhab Halwai in Hargaon, but he had left the job around two months prior to the dated of incident. While he was working in the Halwai Shop, Shiv Kumar used to commute daily from home to Hargaon, either on his cycle or on foot.

46. P.W.-2 denied the suggestion that Shiv Kumar was working in the Halwai shop at Hargaon on the day he was murdered, and when he did not return home, they started searching for him in the morning and after finding the dead body they had cooked up the story of taking wooden logs to Hargaon day before. P.W.-2 denied any suggestion of enmity with the family of the accused or of any proceeding initiated under section 107/116, Cr.P.C. some ten to twelve years ago, but admitted that a case under Section 307 I.P.C. had been instituted, some nine years ago where Banwari had given evidence in favour of Ganesh Pasi and against Vishwanath and his brother Ramavtar. He denied having previous enmity with the

accused but stated that after his son Shiv Kumar was killed by them enmity has resulted.

47. Vishwanath also expressed ignorance about the names of owners of fields lying on either side of the chak road except for Raghubar's sugarcane field. Later on when the dead body of Shiv Kumar was discovered, he also came to know that the grove belonged to Hardayal. The Sub-Inspector had taken his statement in the morning at around 08:00 A.M. when he was sitting near the dead body of his son. He did not remember as to whether he was made to put his thumb impression on the inquest report, as he was not in his right mind, when the statement was taken, he did not know what was written in the report. He did not know also as to why the police had written "Badmaashon" instead of "Mulziman" in the inquest report. P.W.-2 stated that at the time of the attack Shiv Kumar was some twenty paces ahead of him. He was followed by Damodar and Vishwanath was trailing behind them. His son was fired upon from a distance of around two arms length while he was walking towards the village on the east. After receiving gunshot injury, he fell upon his face to the south of the chak road. Both P.W.-1 and P.W.-2 had rushed to save him, but they could not save him because the accused were carrying arms and had threatened them. They remained on the spot where Shiv Kumar was attacked for around 15 minutes and they saw Shiv Kumar being dragged into the sugarcane field of Raghubar. They ran away to their village Benipur in order to save their lives. P.W.-2 also stated that they witnessed the beating up of Shiv Kumar with Lathis as they had stood there for around 15 minutes. After Shiv Kumar was dragged into the sugarcane field, they could not see him because it was dark. P.W.-2 also stated that Shiv Kumar had received only one gun shot injury and was stabbed only once at that time.

48. In his statement of P.W.-5, the Investigating Officer, Phool Singh Bhadauria has clearly stated that after

recording statement under Section 161 of the Cr.P.C. of Vishwanath, and some 5 to 6 other villagers, efforts were made to arrest the accused. Banwari Lal was arrested from his house in the early morning hours on 03.05.1987 alongwith his licensed rifle. Moti Lal was arrested on 05.05.1987. The statement of sawmill's owner, Lalta Prasad Sharma was recorded on 07.05.1987. The accused Jagdish, Mahesh and Babu Ram had surrendered on their own in the Trial Court. P.W.-5 stated that he did not mention in the site plan prepared by him about the place, from where, the accused had fired upon the victim as he was not told about it by the witnesses. He admitted that at the end of the inquest report, the word "*Badmaashon*" had been written in his own handwriting. He had mentioned the name of Vishwanath as eye witness both in the inquest report and in the charge sheet. He denied having arrested Banwari alongwith his rifle from his home on 29.04.1987 itself and having kept him illegally in the lock up before showing his arrest on 03.05.1987. He could not give any reason as to why he did not mention the name of Lalta Prasad the sawmill owner in the charge sheet as a witness, although he had taken his statement on 07.05.1987.

P.W.-5 has stated very clearly that neither Damodar nor Vishwanath had told him anything about leaving wood logs at the sawmill of Lalta Prasad in the morning of 27.04.1987, and of having gone to Hargaon to collect their wood in the afternoon on the same day. Vishwanath had also not told him that Shiv Kumar had fallen to the ground on receiving the gunshot injury, and that the accused had dragged Shiv Kumar into the field of Raghubar.

49. P.W.5- Phool Singh Bhadoria, the Investigating Officer, while preparing the inquest report, had given a description of the place, where the body was found, and also the condition of the body when it was found by the Investigating Officer. The body was found with its face down in the grove of Hardayal, some 250 paces away from the Chak road. A description of the bloodstained clothes

on the body had been given. During description of the condition of the body, it had been mentioned by the Investigating Officer that blackening alongwith pellets injury was noticed on the back. Injury was also noticed on the back of the neck. Injuries were noticed on the face, and on the head. On the rest of the body, there were abrasions caused due to dragging. The cause of death as mentioned in the inquest report was injuries caused by miscreants "*badmashon*".

50. We have noticed that P.W.-1 has stated at one place that when Jagdish had exhorted the others to kill Shiv Kumar he had turned to his right and started running away but was hit on his back by the shot fired by Jagdish and he fell face down on the side of the road and was attacked by knife, thereafter, by the other accused. At another time during giving his statement he had stated that as Shiv Kumar was walking ahead of them they crossed Barhtara Taalab the accused appeared and Jagdish fired upon Shiv Kumar while exhorting others to kill him. There is a discrepancy in the two versions by the same witness.

51. We have also noticed that while P.W.-1 has stated that the quarrel over the public tap occurred some one month ago near the time of Holi. P.W.-2 has stated that the quarrel took place around two months ago and that he had intervened between Shiv Kumar and Jagdish and taken his son home.

52. There is a lot of improvisation in the initial statement made under Section 161 Cr.P.C. before the Police and the evidence given by P.W.-1 and P.W.-2 during the course of Trial. This Court feels that there is a concerted effort on the part of both witnesses, P.W.-1 and P.W.-2 to impress upon the Trial Court that they were extremely disturbed by what they had witnessed on 27.04.1987 while returning from Hargaon. However, it is not clear as to why having been so disturbed they did not try and reach the Police

Station at Hargaon in the night of 27.04.1987 itself while there is an admission on their part that there was another route, though a little longer, from their village to Hargaon which was known to them as they had taken the wooden logs on a bullock cart by the longer route to Hargaon in the morning. There was at least one bicycle at home which Shiv Kumar used while commuting to Halwai shop at Hargaon when he was working.

53. It also raises a doubt in the mind of the Court that admittedly there were a large number of male members in the extended family of Vishwanath and they all lived in the same village though in separate houses, as to why Vishwanath and Damodar the eye witnesses, did not try and contact any of their family members and start a search for Shiv Kumar on that night itself as the village was only one and a half kilometres away from the place of the occurrence and it was only late evening and not the dead of the night when they reached their village.

54. There is no recovery of countrymade guns from either Jagdish or Baburam. Although Banwari was arrested from his house along with his licensed rifle, it was not the weapon used for killing Shiv Kumar. There is a specific description made by P.W.-1 and P.W.-2 regarding Jagdish extorting the other accused to kill the enemy and then firing a shot on Shiv Kumar from his gun, which led to his death. A few of the large pellets were recovered from the body of the deceased during post-mortem as has come out in the statement of Dr. Gopal Swaroop.

55. Another doubtful factor is the delayed lodging of F.I.R. The learned counsel for the appellant has highlighted this fact. Here it is worthwhile to refer to ***Tulia Kali versus State of Tamil Nadu, (1972) 3 SCC 393*** in which the delayed filing of F.I.R. and its consequences have been discussed in paragraph 12 of the report. The Supreme Court has observed thus:-

"First Information Report in a criminal case is an extremely vital and valuable piece of evidence for the purpose of corroborating the oral evidence produced at the trial. The importance of the above report can hardly be overestimated from the standpoint of the accused. The object of insisting upon prompt lodging of the report to the police in respect of commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of the actual culprits and the part played by them as well as the names of eye witnesses present at the scene of occurrence. Delay in lodging the first information report quite often results in embellishment, which is a creature of afterthought. On account of delay, the report not only gets bereft of the advantage of spontaneity, danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of deliberation and consultation. It is, therefore, essential that the delay in lodging of the first information report should be satisfactory explained."

56. It was also stated by P.W.-2 that when they went looking for Shiv Kumar's dead body at dawn they did not find the dead body in the sugar cane field of Raghubar. This statement made by P.W.-2 shows that he was certain that Shiv Kumar was dead by the time when they went looking for him in the morning. He has repeatedly referred to "dead body", instead of referring to his son as Shiv Kumar during the time he and other villagers went looking for him next morning. The Investigating Officer while preparing the site plan of the place of occurrence has stated that no blood was found in the grove of Hardayal where Shiv Kumar's dead body was lying, or at the place on the road where Shiv Kumar was hit by gunshot fired by Raghubar.

57. Vishwanath in his a statement under Section 161 Cr.P.C. told the Investigating Officer that Jagdish and Moti

were carrying country made pistols(Tamancha). Banwari was carrying rifle(Bandook) Babu Ram was armed with a knife, and Mahesh was armed with a lathi. Jagdish extorted others that their enemy Shiv Kumar had come and opened fire on Shiv Kumar. Babu Ram attacked him with a knife on his neck from behind. He also stated that when they returned home they did not go to the Police Station at night because they were afraid. He did not say that he asked his neighbours/other family members for help. Vishwanath also stated that they started looking for the dead body of Shiv Kumar in the morning in the sugarcane field of Raghubar. He has repeatedly used the word "laash" instead of Shiv Kumar in his statement under Section 161 Cr.P.C. He along with Sarju Prasad and Bhagwandas stayed behind near the dead body and sent Damodar and Harishanker to the Police Station for reporting the incident. All the other villagers who were present during the preparation of report supported the version of Vishwanath given to the Investigating Officer but the Investigating Officer did not produce any of such independent witnesses to corroborate the prosecution witnesses story in Trial Court. Banwari was arrested from his house in Benipur at 5:30 A.M. on 03.05.1987 along with his licensed SBBL rifle.

58. According to the settled legal position as held by the Hon'ble Supreme Court in **Dahari and others vs. State of Uttar Pradesh** reported in **(2012) 10 SCC 256**, the testimonies of related witnesses or interested witnesses cannot be discarded solely on the ground of their relation to the deceased. However, their testimonies need to be carefully examined before they are relied upon to convict the accused/ appellant.

59. If we scan the testimonies of witnesses of fact i.e. P.W.-1, Damodar Prasad and P.W.-2, Vishwanath having regard to the aforesaid legal position, we find that P.W.-1 and P.W.-2 are relatives of the deceased being cousin and father of the deceased respectively. Having developed a

subsequent story of prior enmity between the appellants and the deceased, they can also be termed as interested witnesses.

60. Hon'ble the Supreme Court in **Periyasamy vs. State, rep. by the Inspector of Police**, reported in **2024 SCC OnLine SC 314**, has held that the testimonies of interested witness cannot be relied upon in want of corroboration of their testimonies by any other independent witness.

61. According to the written report, Ext. Ka-1, this incident occurred on 27.04.1987 at about 06:30 PM, when the appellants including two surviving appellants, namely, Moti Lal and Jagdish sprang from an agricultural field while the first informant, Damodar Prasad, his uncle, Vishwanath and the deceased, Shiv Kumar were returning to their village. The appellant, Jagdish exhorted and shot the deceased from a firearm, which he was carrying. The appellant, Baburam inflicted injuries to the deceased by a knife. The appellants thereafter dragged the deceased into an adjoining sugarcane field of Raghuvar and also threatened P.W.-1, Damodar Prasad and P.W.-2, Vishwanath of dire consequences, if they intervened or they go to police station to get the case lodged, which led P.W.-1 and P.W.-2 to return to their homes. It is only in the next morning i.e. on 28.04.1987, when they again went to trace the whereabouts of the deceased, where they found Shiv Kumar dead lying at place 'D' as shown in the site plan, Ex. ka-6. It is to be remembered that the incident occurred in the month of April and the alleged time of occurrence is stated to be 06:30 PM. If we take the prosecution story to be true for the sake of argument, we find it quite unnatural that P.W.-1, Damodar Prasad and P.W.-2, Vishwanath, being cousin and father of the deceased respectively, who had seen the deceased being shot by the appellant, Jagdish and stabbed by the appellant, Baburam, on returning to their home immediately after the incident on 27.04.1987, but neither

informing other residents of the village about the incident nor making any efforts return to the spot to save the deceased or to know his whereabouts. We fail to understand as to what prevented the first informant to go to police station, which is situated at a distance of about six kms. from the place of occurrence to report the matter, because admittedly when the witnesses, P.W.-1, Damodar Prasad and P.W.-2, Vishwanath returned to their home, they were not prevented or obstructed by the appellants. According to the prosecution story, the accused, Jagdish, Banwari and Motilal were armed with firearms, accused, Baburam was armed with knife and accused, Mahesh was armed with *lathi*. The first informant, P.W.-1/ Damodar Prasad did not try to contact village *chaukidar* in order to inform him about this incident. Therefore, the conduct of of P.W.-1, Damodar Prasad, and P.W.-2, Vishwanath, who chose not to return to the crime scene along with the other residents of the village on 27.04.1987 in the evening to save the deceased, Shiv Kumar or to trace his whereabouts, lends support to the submission advanced by the learned counsel for the appellant that, in fact, P.W.-1, Damodar, and P.W.-2, Vishwanath had not witnessed the incident.

62. The submission advanced by learned A.G.A. that the first informant and other residents did not return to the place of occurrence in the late evening of 27.04.1987 nor did they go to the police station because of threat extended by the appellants, does not appear to to us to be sound for the reason that P.W.-1, Damodar Prasad has stated in his testimony that in the morning of 28.04.1987, when the first informant and other residents went to trace whereabouts of the deceased, they were armed with *kantas* and *lathis*. When the prosecution witnesses had in their possession *kantas* and *lathis*, the normal course of conduct would have been to go to crime scene on 27.04.1987 itself to save Mayaram or to trace whereabouts of the deceased, which the prosecution witnesses did not do and the explanation offered by the

prosecution as discussed above, appears to us to be far from being convincing.

63. We find the presence of P.W.-1, Damodar Prasad and P.W.-2, Vishwanath at the place of occurrence doubtful for one more reason. In the postmortem report, Ex. Ka-14, there are seven ante-mortem injuries reported on the body of the deceased as stated above. Injury No.6 is a firearm injury where as injury No.5 is an incised wound, which could be inflicted by a knife. However, we have noticed also that the postmortem report, Ex. Ka-14 reveals fractured pelvic girdle and temporal base of skull was also found to be fractured into pieces, which suggest that the manner of assault was quite different from what has been stated by P.W.-1, Damodar Prasad and P.W.-2, Vishwanath.

64. We have also noticed that that in the site plan, Ex. Ka-6, the place, where the deceased was allegedly shot, has been shown as "A". According to prosecution witnesses, after the deceased was shot and injured by knife, the deceased was dragged into nearby sugarcane field of Raghuvar. Thereafter, according to prosecution witnesses, they returned to their home. However, site plan, Ex. Ka-6 also reveals that the dead body of the deceased was found at place "D", which is about 246 paces away from place "A" and still more distant from the sugarcane field of Raghuvar. If according to prosecution witnesses, the deceased was shot at place "A" and was thereafter dragged into nearby sugarcane field of Raghuvar, then, in that case, we do not see any reason as to why the dead body of the deceased would be dragged to place "D" from where it was finally recovered. It is quite unnatural to do so because half of the distance between the sugarcane field of Raghuvar wherein Shiv Kumar was pulled into after being shot at and point "D", where the dead body of the deceased was recovered, is a *chakroad*, where movement of villagers is very common. There was always a possibility of the appellants having been noticed

by local residents passing by on a summer evening. There is no prosecution witness, who had seen the appellants shifting the dead body of the deceased from the sugarcane field of Raghuvar to place point "D" or killing the deceased at point "D". This give rise to a reasonable suspicion about exact place of occurrence of this incident.

65. Hon'ble the Supreme Court in **Darshan Singh vs. State of Punjab**, reported in **(2024) 3 SCC 164**, in paragraph No.31 has observed as under :-

"31. If the PWs had failed to mention in their statements under Section 161CrPC about the involvement of an accused, their subsequent statement before court during trial regarding involvement of that particular accused cannot be relied upon. Prosecution cannot seek to prove a fact during trial through a witness which such witness had not stated to police during investigation. The evidence of that witness regarding the said improved fact is of no significance. [See : (i) Rohtash v. State of Haryana [Rohtash v. State of Haryana, (2012) 6 SCC 589 : (2012) 3 SCC (Cri) 287] , (ii) Sunil Kumar Sambhudayal Gupta v. State of Maharashtra [Sunil Kumar Sambhudayal Gupta v. State of Maharashtra, (2010) 13 SCC 657 : (2011) 2 SCC (Cri) 375 : (2011) 72 ACC 699] , (iii) Rudrappa Ramappa Jainpur v. State of Karnataka [Rudrappa Ramappa Jainpur v. State of Karnataka, (2004) 7 SCC 422 : 2004 SCC (Cri) 1954] and (iv) Vimal Suresh Kamble v. Chaluverapinake Apal S.P. [Vimal Suresh Kamble v. Chaluverapinake Apal S.P., (2003) 3 SCC 175 : 2003 SCC (Cri) 596]"

(emphasis supplied by us)

66. P.W.-5, Phool Singh Bhadauriya, the Investigating Officer, in his testimony, has stated that the first informant, P.W.-1/ Damodar Prasad had not stated in his statement under Section 161 Cr.P.C. that there were marks of dragging from place "A" to the sugarcane field of Raghuvar. P.W.-1 had also not stated that on the date of incident, he had gone to sawmill for getting the wood logs

sawed at about 03:00 PM in the afternoon. P.W.-2, Vishwanath had also not stated in his statement under Section 161 Cr.P.C. that the accused persons had dragged the deceased into the sugarcane field of Raghuvar. We also find that it is the P.W.-1, Damodar Prasad, who has deposed that the dead body of the deceased was found in the grove of Hardayal. However, he, for reasons best known to him, did not mention this fact in the written report, Ex. Ka-1 and he has tried to offer an explanation thereof by saying that he did not mention this fact in the written report, Ex. Ka-1 as it would have made the written report lengthy. We find this explanation to be untenable for the reason that inclusion of such an important fact would have hardly rendered the first information report to be lengthy; rather inclusion of such fact in the written report, Ex. Ka-1 would have made it more trustworthy.

67. We also find it very strange that P.W.-1, Damodar Prasad, who lodged the F.I.R., had stated in the written report, Ext. Ka-1 that the deceased was shot by the accused, Jagdish whereas the accused, Baburam had inflicted injury on the back of head of the deceased by a knife. However, this witness, in his cross-examination as P.W.-1, has stated that when he saw the dead body of the deceased in the morning of 28.04.1987, he had not seen any injury on the body of the deceased. It also shows that P.W.-1, Damodar Prasad neither had seen the incident nor had he gone to the grove of Hardayal, where the dead body of the deceased was found, because the postmortem report, Ex. Ka-14 reveals as many as seven visible injuries on the body of the deceased, which are of such nature, which cannot escape any ordinary man's attention. Therefore, P.W.-1, Damodar Prasad appears to us to be unreliable.

68. Thus, for all the aforesaid reasons, we find the presence of P.W.-1, Damodar Prasad and P.W.-2, Vishwanath on 27.04.1987 at around 06:30 PM at the

place of occurrence to be doubtful and their testimonies to be unreliable.

69. The possibility of false implication of appellants in this case cannot be ruled out because of a subsequently developed story of existence of prior enmity between the parties. Prior enmity is always held to be a double edged weapon, which can also be a tool of false implication. In this regard, the judgment of Hon'ble the Supreme Court in *Nagaraj Reddy vs. State of Tamil Nadu* may be usefully referred to.

70. In ***Md Jabbar Ali and others Vs. State of Assam***, reported in **2022 SCC OnLine SC 1440**, decided on 17.10.2022, the Supreme Court was considering an appeal against judgement of the Guwahati High Court, affirming conviction of all the nine appellants. The case of the prosecution was that on 19.11.1999 at about 7 A.M. when P.W.-6 had gone to his land an altercation took place between him and accused No.11. At that time other accused armed with deadly weapons surrounded the victim and one of them stabbed him in the abdomen. As a result of which the deceased Akbar Ali fell unconscious and succumbed to his injury shortly. P.W.-1 and P.W.-4 were also injured, though not fatally. Thereafter, the other accused present at the place of the occurrence who were armed with deadly weapons surrounded the deceased and so no other person could come and prevent the commission of all offences.

The Trial Court on consideration of evidence on record came to the following conclusions: –

The evidence of P.W.-1 and P.W.-2, both injured witnesses lent support to each other and were corroborated with medical evidence and the presence of these witnesses at the place of the occurrence could not be doubted, on basis of minor variations in the evidence of P.W.-6 who was the informant in the case. There was no

ground to disbelieve the version of P.W.-6 which corroborated the evidence of P.W.-1 and P.W.-2.

Discrepancies were due to normal errors of memory and due to lapse of time. The defence had failed to establish that persons accused were not present at the place of the occurrence at the time of the incident and that they did not kill the deceased. The F.I.R. was lodged promptly, all the accused were named in the F.I.R. The parties were known to each other, and the fact that all the accused had come to the place of occurrence, armed with deadly weapons clearly indicates that the accused had intention to kill the deceased.

71. The High Court considered the submissions made on behalf of the appellant as well as the State and affirmed the judgement mainly because the deceased as well as other prosecution witnesses had received injuries caused by sharp weapons and it observed that there is settled law that evidence tendered by different prosecution witnesses have to be considered as a whole and such evidence could be put in different compartments and considered separately.

72. The counsel for the respondent-State had supported the judgement of the High Court and of the Trial Court and argued that the case was of clinching evidence and the involvement of the accused had been proven beyond reasonable doubt by the prosecution on the strength of deposition of injured witnesses, P.W.-1, P.W.-2, P.W.-4 and P.W.-5 which was corroborated by medical evidence duly proved on record. The minor discrepancies in the evidence of some of the prosecution witnesses could not demolish the consistent evidence of P.W.-1 and P.W.-2 and P.W.-5. The State-respondent placed reliance upon *Sohrab Vs. State of Madhya Pradesh*, 1972 (3) SCC 751; *Bharwada Bhoginbhai Hirji Bhai Vs. State of Gujarat*, 1983 (3) SCC 217; *State of U.P. Vs. M.K. Anthony*, 1985 (1) SCC 505; *Prithu @ Prithi Chand Vs. State of Himachal Pradesh*, 2009

(11) SCC 588; and *State of Madhya Pradesh Vs. Chhaakki Lal*, 2019 (12) SCC 326.

73. The Supreme Court on re-appreciation of evidence of the prosecution witnesses noted that P.W.-1 who was also an injured witness stated that on the day of the occurrence Shahid Ali had extorted the other accused to attack Akbar Ali and Jabar Ali had stabbed Akbar Ali with a spear. P.W.-3 was not an eye witness but on information he had deposed that he went to the place of the occurrence and found Akbar Ali lying dead and P.W.-4 had informed him that Moin Ali had killed Akbar Ali. P.W.-4 stated in his evidence that he saw injuries on the abdomen of Akbar Ali who was assaulted by Hassan Ali but he had not seen Hassan Ali assaulting Akbar Ali. The Court on analysis of evidence came to the conclusion that there were variations in the evidence of P.W.-6, who was the first informant with the evidence of P.W.-1 P.W.-2 and P.W.-4, as to who gave the fatal blows that caused the death of Akbar Ali. When it was not clear as to who stabbed the deceased Akbar Ali, the Trial Court as well as the High Court should not have relied on the evidence of such witnesses which was highly inconsistent with each other in holding the accused guilty. The Court also noted that all the witnesses that had been examined were related to each other and to the deceased and there were inherent contradictions in their evidence.

74. The Supreme Court noted that great weight had been attached to the testimonies of related witnesses. In the said case and the credibility of such witnesses who were related witnesses ought to have been examined with greater care to rule out any tainted evidence given in the Court of law. It is true that just because witnesses are related/interested/partisan witnesses, their testimonies cannot be disregarded, but it is also true that their testimonies have to be scrutinized with greater care and circumspection. The Supreme Court placed reliance upon *Gangadhar Behera and Others Vs. State of Orissa*, 2002 (8) SCC 381; *Raju @ Balachandran Vs. State of Tamil*

Nadu, 2000 (12) SCC 701, Dileep Singh Vs. State, AIR 1953 Supreme Court 364, Sarvan Singh Vs. State, 1976 (4) SCC 369, Ganpati and Another Vs. State of Tamil Nadu, 2018 (5) SCC 549, where the Supreme Court had observed that evidence of related or interested witnesses should be meticulously and carefully examined and the rule of prudence requires that evidence of such witnesses should be scrutinized with greater care. When only family members are present at the time of the incident and the case of the prosecution is based only on their evidence, Courts have to be cautious in evaluating their evidence during trial. The evidence of related witnesses can be rejected if there are material contradictions and inconsistencies found in their evidence. The Court also noted that the witnesses had given contradictory versions as to who gave the fatal blow to the deceased. The Court relied upon *State of Rajasthan Vs. Kalki and Another, 1981 (2) SCC 752*, where the Supreme Court had distinguished between normal discrepancies and material discrepancies and that the Courts have to label as to in which category a discrepancy can be categorised. Material discrepancy will corrode the credibility of the prosecution case while insignificant discrepancies do not do so. The Supreme Court thereafter noted that there being material discrepancies in the testimonies of witnesses, the prosecution had failed to prove the guilt of the accused beyond doubt. Additionally, the prosecution had examined only related witnesses and not a single independent witness. The injuries caused to P.W.-1 P.W.-2 and P.W.-4 and P.W.-5 were simple in nature caused by blunt objects and the Trial Court as well as the High Court had grossly erred in convicting and sentencing the accused, only on the basis of evidence of such injured witnesses.

75. In ***Mahendra Singh and Others Vs. State of Madhya Pradesh***, reported in **(2022) 7 SCC 157**, decided on 03.06.2022, the Supreme Court was considering an appeal against an order of the High Court, confirming conviction under Section 148 and 302, read

with Section 149 I.P.C. The Trial Court as well as the High Court had relied upon the testimony of Amol Singh P.W.-6, who was the real brother of the deceased Bhagat Singh. The Supreme Court relied upon judgement rendered in *Vadivelu Thevar Vs. State of Madras (supra)* and observed that the testimony of a related/ interested witness was to be read with greater care and caution, and after examining it in detail found him to be a wholly unreliable witness. The Court instead relied upon evidence of D.W.-3 and D.W.-4 whose statements could not be shaken during cross examination. The Court observed that it is a settled law that same treatment is required to be given to defence witnesses as is to be given to prosecution witnesses, and from the evidence of these witnesses, it was amply clear Amol Singh P.W.-6 could not have witnessed the incident of murder of the deceased. No conviction could be based on his testimony. The corroboration from medical evidence also was not available as medical evidence could only establish that the death was homicidal. Such medical evidence could not establish that P.W.-6 had witnessed the incident. Only because prosecution has proved that motive is established, conviction cannot be sustained. The Court set aside the conviction and allowed the appeals.

76. In *Khema alias Khem Chandra and others Vs. State of U.P.*, reported in **(2023) 10 SCC 451**, the Supreme Court was considering the judgement of this Court, dismissing the appeal filed by the appellants confirming the Trial Court order convicting the appellants for offences punishable under Section 302, read with Section 149, Section 307, read with Section 149 and Section 148 of the I.P.C. and sentencing them to imprisonment for life with a fine of ₹5000 each. The prosecution story was that the deceased Prakash was going to extend invitation for his two daughters' weddings in the village and he was attacked by the accused with *Farsa* and club/*Lathi* and *Danda* and country made pistols in the morning at about 8 A.M. of 27.04.2002. Two brothers of the deceased Omveer P.W.-1 and Inder P.W.-2

along with their sister, Omvati and Kripa wife of the deceased Prakash also received injuries.

77. The Supreme Court after going through the judgement of the Trial Court and the High Court found that conviction of the accused was based on the testimonies of P.W.-1 and P.W.-2, and corroboration of such testimonies was done from the recoveries made on the basis of memorandum of accused under Section 27 of the Evidence Act. The Court thereafter analysed the testimony of P.W.-1 and P.W.-2 who were both brothers of the deceased, and as such would fall in the category of interested witnesses. However, the Court also observed that their testimony cannot be discarded only on the ground that witnesses are interested witnesses. Although their testimony is required to be scrutinized with greater care and circumspection. The Court found several discrepancies in the version of the incident given by P.W.-1 and by P.W.-2. The Court doubted their version and the possibility of some fabrication in the injury certificate could not be ruled out.

78. The Supreme Court noticed that there were material improvements in the evidence of P.W.-2. It had also come out that there was previous enmity between the accused and the deceased. The Supreme Court referred to ***Ramashish Rai Vs. Jagdish Singh, 2005 (10) SCC 498***; where it was observed *that previous enmity is a double edged sword. On the one hand, it provides motive to the crime and on the other there is a possibility of false implication.*

The Supreme Court also placed reliance upon ***Vadivelu Thevar Vs. State of Madras, 1957 SCR 981***; and observed:

"– – –. Hence in our opinion, it is a sound and well established rule of law that the court is concerned with the quality and not with the quantity of evidence necessary for proving a fact. Generally, speaking,

oral testimony in the this context, may be classified into three categories, namely:

Wholly reliable.

Wholly unreliable

Neither wholly reliable nor wholly unreliable

In the first category of proof, the Court should have no difficulty in coming to its conclusion either way – it may convict, or may acquit on the testimony of a single witness, if it is found to be above reproach or suspicion of interestedness, incompetence, or subornation. In the second category, the Court equally has no difficulty in coming to its conclusion. It is in the third category of cases, that the Court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial – –".

79. The Supreme Court found the testimony of P.W.-2 as falling under the third category and need was felt for its corroboration. For such corroboration the Trial Court had relied upon recoveries of weapons made at the instance of the accused. The Court found that such recoveries/seizure memo was not prepared in accordance with the Rules. The Court, therefore, allowed the appeal and set aside the conviction of the appellants.

80. We have gone through the original Trial Court records and Exhibit Ka-1 which is a copy of the written report submitted at P. S. Hargaon by P.W.-1. It has been pointed out by Sri Rishad Murtaza that the paper on which the written report was submitted does not have any creases on it to show that it was folded and kept in the pocket of P.W.-1 while taking it from his home in the village Benipur to the Police Station. We are of the considered opinion that although P.W.-1 had stated during his cross examination that he had taken a paper and blue refill pen from his neighbour Bhagwandas and a file cover from his own home it is quite unnatural that a person whose paternal cousin was attacked in front of his own eyes by his other

cousins, would be so meticulous and farsighted as to take a file cover along with him to keep the plain piece of paper so that it is not creased at all while submitting his report at the Police Station.

81. We have also noticed that P.W.-1 while writing the report did not mention that all the accused were close relatives of P.W.-1 and belonged to the extended family of the deceased sharing a common ancestor. P.W.-1 has mentioned in his written report that the accused belonged to the same village Benipur without mentioning their relation with the deceased or with himself. In the natural course of things if a person knows the accused well, he would not only mention their names but also the relation with the deceased.

82. After having given our thoughtful consideration to the rival submissions in the light of testimonies of alleged witnesses of fact, namely, P.W.-1, Damodar Prasad and P.W.-2, Vishwanath, we do agree that in this incident, the deceased, Shiv Kumar had died, however, for all the aforesaid reasons, we do not find testimonies of witnesses of fact, P.W.-1, Damodar Prasad and P.W.-2, Vishwanath, who are related and interested witnesses, to be fully reliable so as to base conviction of surviving appellants on their testimonies only. Therefore, we hold that the prosecution has failed to prove its case beyond reasonable doubt and the trial court committed an error in holding the surviving appellants guilty of offences under Sections 148 and 302 read with Section 149 I.P.C.

83. In conclusion, we are of the considered opinion that the present criminal appeal deserves to be allowed and the same is, accordingly, **allowed**. Consequently, the impugned judgment and order dated 11.05.1990 is set aside. The surviving accused-appellants, Moti Lal and Jagdish are acquitted of charges under Sections 148 and 302 read with Section 149 I.P.C.

84. The surviving appellants No.2 and 4, Moti Lal and Jagdish are on bail. Their bail bonds are hereby cancelled and sureties are discharged.

85. The surviving appellants No.2 and 4, Moti Lal and Jagdish are directed to file the personal bonds and two sureties each in the like amount to the satisfaction of the court concerned in compliance of Section 437-A Cr.P.C. within six weeks from today.

86. Let a copy of this judgment be also sent to the trial court concerned along with trial court record for its information and necessary compliance forthwith.

Order Date :- 3/05/2024

Rahul/ Darpan

[Justice Ajai Kumar Srivastava-I] [Justice Sangeeta Chandra]