

Court No. - 1

Reserved

Case :- CRIMINAL APPEAL No. - 379 of 2013

Appellant :- Arun Kumar @ Bhulle Tiwari And Another

Respondent :- State of U.P.

Counsel for Appellant :- S.R. Tiwari, Ajai Kumar, R.B.S. Rathaur,, Vivek Kumar Rai

Counsel for Respondent :- Govt. Advocate

Hon'ble Attau Rahman Masoodi,J.

Hon'ble Ajai Kumar Srivastava-I,J.

(Per A. R. Masoodi, J.)

1. The instant criminal appeal raises a challenge to the judgement and order dated 23.2.2013 passed by Sessions Judge, Ambedkar Nagar, in Sessions Trial No. 138/2004, under Section 302, 302/34 IPC, Police Station Akbarpur, District Ambedkar Nagar whereby the appellant no. 1 Arun Kumar @ Bhulle has been convicted under Section 302 IPC and the appellant no. 2 Awadhesh Kumar Tiwari has been convicted under Section 302/34. Both the appellants have been sentenced to life imprisonment with a fine of Rs. 10000/- each. The appellants have been acquitted under Section 147/148/452 IPC. The other accused persons, namely, Ram Dhar Tiwari, Krishna Kumar and Surendra have been acquitted from all the charges. The amount of fine was directed to be paid to the widow of the deceased and in case there was no widow, to the legal heirs.
2. It may be pertinent to point out that the appellant-Awadhesh Kumar Tiwari expired on 26.07.2019 during pendency of this appeal and as such vide order 18.07.2024 the appeal of appellant no. 2-Awadhesh Kumar Tiwari was ordered to be abated. Now, we adjudicate upon the criminal appeal only in respect of appellant no. 1 Arun Kumar @ Bhulle Tiwari.

3. Shorn of irrelevant details, the facts of the case as put forth by the prosecution are that Bhola Yadav son of Girdhari Yadav resident of Village Narharia, P.S. Akbarpur was having enmity with Ram Dhar son of Kedar nath of village Tiwaripur, P.S. Bhati, District Ambedkar Nagar since last couple of days and from the morning of 18.8.2004 accused Arun Kumar @ Mulle and Awadhesh alongwith Surendra and Krishna Kumar of Tiwaripur armed with 12 bore firearm were roaming. At about 5 pm they came to the house of Sita Devi-complainant situated on the road side in Village Manarharia where deceased Tilthu was sitting. At the same time accused Ram Dhar Tiwari also came and threatened to kill everyone. Consequently, accused Awadhesh son of Ram Dhar Tiwari, Surendra son of Kripa Tiwari and Krishna Kumar son of Udai Raj Tiwari assaulted Tilthu with sticks and punches. Tilthu tried to escape and yelling for help went to the house of the complainant but could not succeed and was caught by the assailants. Accused Ram Dhar Tiwari exhorted his son Arun Kumar Tiwari to shoot the deceased Tilthu. Accordingly, Arun Kumar Tiwari @ Mulle fired gunshot on the deceased Tilthu which resulted into his death. Thereafter the accused persons fled away from the scene while firing in order to frighten the people present at the spot. It is said that the entire occurrence was witnessed by the villagers Ram Achal son of Chalau, Jag Ram son of Sita Ram and complainant's son Lakshman.
4. Complainant Sita Devi got the FIR (Ex. Ka-1) scribed by one Hari Bux Singh and lodged the same at the police station Akbarpur at 19:00 hours on the same day. The FIR was registered as Case Crime No. 153/2004 under Sections 147/148/149/452/323/504/506/302 IPC against Arun Kumar @

Bhulle Tiwari, Awadhesh Kumar Tiwari, Surendra Kumar Tiwari, Krishna Kumar and Ram Dhar and an entry to this effect was made in G.D. at report no. 34.

5. After registration of the case, the investigation of the case was entrusted to SHO Gorakh Singh, who visited the place of incident the next day and got the inquest report prepared by SI Jagmal Singh on his dictation. He also got prepared the recovery memos of plain and blood stained earth as well as empty cartridge recovered from the place of incident. SI Jagmal Singh also prepared photo nash, challan of dead body, letter of request for autopsy on the dictation of SHO Gorakh Singh. SHO Gorakh Singh also inspected the place of incident, prepared spot inspection report and sent the dead body of the deceased for post mortem examination.
6. That the post-mortem of the deceased was conducted on 19.08.2004 by Dr Pradeep Kumar, Incharge Medical Officer, Primary Health Center Akbarpur, District Ambedkar Nagar, who found following ante-mortem injuries on the dead body of the deceased:

"External Examination

The deceased was of average physique. Post mortem stiffness was lesser towards the lower part of the head. There were no signs of decomposition. Eyes were closed. Teeth were 16/16 on upper and lower jaw

Ante Mortem Injuries

Injury-1 – Multiple injuries on the left and back side of the scalp caused by firearm in the area of 15 cm x 12 cm, maximum size of which was 0.5 cm x 0.5 cm and minimum was 0.5 x 0.3 cm. Injuries were five in number.

Injury-2 – Scratch wound on the left shoulder, size 5 cm x 4 cm.

Injury-3 – Bluish mark on right clavicle, size 6 cm x 5 cm.

Injury-4 – Bluish mark on front of chest towards left side 2 cm inside the left nipple, size 3 cm x 2 cm.

Internal Examination

On the upper and back side of left parietal bone, there was an entry wound, size 0.5 x 0.5 cm, 3 pellets were found between scalp and bone, one pellet was embedded in parietal bone. Torn membranes were reddish. One pellet was embedded in brain. Blood clots were there in brain. Semi digested food was found in the stomach.

At the time of postmortem, the death of deceased had occurred one or two days back. In his opinion, the deceased died due to shock and hemorrhage caused by injury no. 1.

The death of the deceased occurred probably at 5.00 p.m evening on 18.08.2004. The injuries inflicted on the body were caused by firearm. The doctor proved the postmortem report which was prepared and signed by him at the time of medical examination. He had submitted 5 pellets recovered from the body of the deceased, bundies two clothes and police documents to the policemen accompanying, after signing."

7. The Investigating Officer after due investigation and completing the necessary formalities submitted the charge sheet against all the accused persons.
8. The appellants as well as the other accused persons denied the charges and claimed trial. After hearing the counsel for the accused persons, charges under Section 147, 148, 149, 452, 323, 504, 506, 302/149 and Section 302/34 IPC were found to be established against all the accused persons.
9. The prosecution, in order to prove the charges against the appellants and other accused persons, produced six witnesses, namely, PW-1 Sita Devi (complainant), PW-2 Bhikhi Yadav, PW-3 Bhola Yadav, PW-4 SI Jagmal Singh, PW-5 Dr Ram Dhirendra and PW-6 SHO Gorakh Singh.

10. The appellants in their statements under Section 313 CrPC stated that the allegations made against them are false and the investigation was not fairly conducted. According to them they were falsely implicated by Hari Bux Singh due to enmity.
11. PW-1 Sita Devi, the complainant and the eye witness, stated on oath that the incident had occurred two years ago. Two days before the incident an old man was coming on a bicycle. Girdhari's buffalo was grazing on the way and **Upendra** was guarding the buffalo. Some mud caused on the man's body due to tail-slap of the buffalo. Being infuriated Awadhesh beaten **Bhupendra** pinning him down. Bhupendra's grandfather reprimanded Awadhesh for beating his grandson whereupon Awadhesh got annoyed and said that he (grandfather) had gone insane and threatened to beat him with lathi. She further stated that on the date of incident Bhola Yadav son of Girdhari was going to sell Parwal (pointed Gourd) in the market. Bhola was pumping air in his bicycle in front of her house. At the same time accused Awadhesh Tiwari also came and said now he will beat him (Bhola). Bhola tried to pacify Awadhesh and said that he will leave the way, no need of beating but Awadhesh started beating Bhola and after intervention of some people, the fight broke up.
12. PW-1 seems to have been making efforts to keep her statement in line with the FIR. She further stated that in the evening at 5 O' clock Tilthu son of Sanwrey Yadav came and sat in the shed in front of her house whereafter Awadhesh, Krishna Kumar, Surendra and Arun's father Ram Dhar came there and started beating Tilthu. Tilthu in order to escape started running and went inside the house of PW-1 but Awadhesh, Krishna Kumar and Surendra dragged him out of the house at the gun

point and on the exhortation of Ram Dhar, Arun fired upon him in the Varandah where he died instantly. She claimed that she had witnessed the entire incident and that she shouted for help upon which many people gathered at the spot. However, she expressed her inability to recollect the name of any person.

13. PW-1 further deposed that she is an uneducated lady who had never been to the police station or the market. She stated that while reporting the incident she had only informed about the assault whereupon the person wrote and completed the report. She also deposed that when the SI came there was plenty of light. She had met the SI and narrated the entire information she had. After recording statement, she had not met with the SI. At the time when the dead body reached she was present there and documentation in respect of the dead body was done in her presence.
14. PW-1, however, expressed her inability to inform about the time of documentation after the incident had occurred. She guessed it was fall of night and the day had passed 1-2 hours after sunset. She later stated that she went from the police station in the morning and Pradhan came back at night after completion of documentation. According to her, **Ram Achal** was grazing the buffalo and that there was no quarrel between **Ram Achal** and the accused before the incident. The assertion regarding passer-by (old man) having received mud splash, according to her, was all hearsay and she did not see any such occurrence. She added that the information regarding buffalo hitting a man with tail was received by her in the evening at 5 pm on that day. The accused came to the village only after

the death at 5 O' Clock. She expressed unawareness about their visit to the village before that day at 5 pm.

15. PW-1 also stated that in case it is written that the accused were roaming in the village since morning, the reason must be known to the person who wrote the same. She saw the assailants only when they came to execute the incident.
16. Narrating the incident she stated that at the time of incident she was at 2-4 arms' distance from the accused persons. She alleged to have seen the accused when the assailants fired gunshot upon Tilthu. She stated that the accused had fired three gunshots, one bullet hit the temple, one hit Khamiya and third one hit the face of Tilthu. The gunshot was fired from a close range. After firing upon the deceased, the accused immediately ran away.
17. In cross examination PW-1, the complainant stated that after firing there was dark for some time due to smoke. She was not hit by any shrapnel. Tilthu was shot upon and not she, as she was little away from Tilthu. According to her there was no one from the family of the deceased at the place of occurrence. She further stated that Pradhan had come after the deceased was fired upon and then police also reached. Then the complainant-Sita Devi went to the police station alongwith the police and the dead body and that time Pradhan was not with her. She was with the dead body of Tilthu. She also stated that when Tilthu came at her door, he was wearing Lungi, vest and brief. She also clarified that she knew Krishna Kumar by no other name and that Krishna Kumar was a resident of Tiwaripur. At the time of incident Ramkrishna was present at the spot and not Krishna Kumar.

18. She reiterated that when Tilthu was sitting in the shed of her house, the accused came running and fired gunshots then said that they dragged him out of the house and fired shots. The Investigating Officer had dug up the blood and took it away from the spot where blood had fallen inside the shed. She further denied the suggestion that Tilthu was previously spotted inside the shed at night and because of enmity she had implicated the accused. She denied of having any knowledge whether the mother of Ram Krishna was a member of BDC and due to election rivalry she falsely implicated Ram Krishna at the behest of Hari Baksh Singh.
19. The statement of PW-1 from a bare perusal loses the ground and seems to have been tutored. Even while mentioning the name of the person who was grazing the buffaloes she spelled three names at different points viz. Upendra, Bhupendra and Ram Achal. The names Upendra and Bhupendra may have been transcribed due to some mishearing but in the latter part of the judgement she deposed that one Ram Achal was grazing the buffaloes. More interestingly, PW-2 the next witness who is husband of PW-1 stated in his statement that Bhola was grazing the buffalo whereas PW-3 Bhola Yadav who is the Uncle of Bhupendra himself stated that it was Bhupendra who was grazing the buffalo.
20. The next witness i.e. PW-2 Bhikhi Yadav is the husband of PW-1 Smt. Sita Devi. In nutshell, he supported the statement of PW-1. He submitted that 2-3 days before the incident, Girdhari Yadav's grandson **Bhola** was grazing buffalo. The mud sprinkled from the buffalo's tail and fell upon a passerby. Awadhesh Tiwari was also present at the spot. He did beat Girdhari's grandson. Bhola had reproached the accused and

that is why the accused were searching for Bhola and when Bhola was not found, they killed Tilthu.

21. PW-2 Bhikhi in his cross-examination stated that he knew Bhola and admitted that the accused had no differences with Tilthu. The accused persons had strained relations with Bhola. Tilthu had no close relation or association with Bhola.
22. P.W.-2 Bhikhi Yadav deposed that he was present at his home at the time of incident. Tilthu Yadav, the deceased was sitting in the shed in front of his house. At the same time, two sons of Ram Dhar Tiwari-Arun Kumar and Awadhesh Kumar came alongwith Surendra Tiwari and Krishna Kumar with sticks and Arun Kumar with gun and were strolling near his shed. As soon as Ram Dhar Tiwari came, he asked his son whether the work was done or not. Then Ram Dhar Tiwari said, kill whosoever is found, then all the accused started kicking and hitting Tilthu with sticks with the intention to kill him. Tilthu got scared and came inside his house. All the four accused entered his house and dragged Tilthu under the shed. Then Ram Dhar Tiwari challenged, Arun Kumar to shot Tilthu. He tried to intervene but the accused also kicked and punched him. In nutshell he tried to keep his statement in line with PW-1 interestingly according to him at the time of the incident his wife PW-1 Sita Devi, who is alleged to be an eye witness, was outside and she came a minute before Tilthu was fired upon and that there was no one else at the spot.
23. There is thus a clear contradiction in the statement of PW-1 and PW-2 as PW-1 in her statement nowhere said that she came a minute before the incident, rather, she clearly stated that when Tilthu was sitting in the shed of her house, the

accused came running and fired gunshots meaning thereby she was at her house itself when the alleged incident occurred.

24. PW-2 also admitted that he knew Haribux Singh who was the Pradhan of his village. The police had arrived within an hour of the incident but he had not gone to the police station for which he did not assign any reason. PW-2 also did not go alongwith dead body to the police station and sent his wife (PW-1) alongwith Haribux Singh and the police with the dead body up to the police station. This is also not an act expected from a man of ordinary prudence to send his wife with the dead body and the police and himself go back to home and rest.
25. PW-2 in his cross-examination stated that the accused were searching for Bhola Yadav early in the morning and that he saw Arun Kumar and Awadhesh Kumar with gun in their hands. To his knowledge there was no unrest or panic in the village due to the accused walking with the gun. He had seen the accused on the road but not in the village. He saw only Arun and Awadhesh (appellants) coming and going and it was 9 or 9.30 in the morning. However, he avoided mentioning other co-accused and interestingly they have been acquitted from all the charges by the trial court for the lack of evidence. He also stated that when he raised alarm, the accused caught him by throat and even punched and pushed him away. PW-2 stated that he is Yadav by caste and that the accused persons did see him.
26. PW-2 further deposed that the accused did not shot him. After Tilthu was fired upon, He did not go to his house to inform. Tilthu's house and the house of PW-2 were in the

same village. Tilthu's house was at a distance of 30 Bighaas from his new house. There is also no clarification for not revealing the information to the family of the deceased who lived in the same village.

27. PW-2 also clarified that his wife who had gone to the police station with the dead body and the police, came back the next day at 10.00 A.M.
28. Bhola Yadav (PW-3) is the Uncle of **Bhupendra who was grazing the buffalo** when the incident of sprinkling of mud over the clothes on a passerby due to waving of tail by buffalo had occurred. Bhola Yadav (PW-3) deposed that at the time when the said incident occurred, one of the accused persons, namely, Awadhesh was going to Harivanshpur for imparting tuition and due to the said incident he stopped to beat his nephew (Bhupendra). Bhupendra told the entire story to his family on return. Consequently his father went to the house of the accused to question the conduct of Awadhesh. Next day on 18.8.2004, when he was going to Shahzadpur market to sell Parwal (Pointed Gourd) Awadhesh came and abused and beat him with a stick in the presence of Tilthu (deceased), Hadwa and Om Prakash. He was rescued by the inhabitants of village Harivanshpur. He attended the rally of the Chief Minister on airstrip after selling the vegetables whereafter he reached the Shrawan Kshetra where people told him that accused Awadhesh and Arun Kumar armed with gun were searching him to kill. He later sat at a tea shop and saw the accused coming towards him with a gun to kill him, therefore, he rushed to the house of Hari Bux Singh. The accused came and shouted to kill whosoever is found.

29. In cross examination, this witness stated that neither he nor his family members know the passerby who got hit by the buffalo's tail. The said passerby did not complain about the incident to Bhola or his family members or Tilthu. He further stated that at the time when he met Awadhesh accused Ram Krishna was not present and that there was no quarrel with Ram Krishna.
30. It is also noteworthy that the identity of the person who was hit by buffalo's tail is not known to anybody and no efforts seem to have been made by anyone including the police or IO to trace and question him which could have easily untangled the entire story. At the same time, there are different statements regarding the identity of the person who was grazing the field, as already observed above, which also brings the entire story set up by the prosecution under suspicion.
31. PW-3 denied the suggestion that he did not disclose his injury to the police because he did not sustain the same and further that he was deposing falsely at the behest of the complainant Sita Devi, her husband and Hari Bux Singh.
32. It is worthwhile to note that though PW-3 claimed that he sustained fracture in his ribs during the scuffle but surprisingly he did not get his injury medically examined nor did he disclose his injury to the police though it was not a common scratch or bruise but a fracture.
33. PW-4 Dr Pradeep Kumar, Medical Officer, PHC, Tarakhurd, District Ambedkarnagar, is the doctor who conducted autopsy on the dead body of the deceased. He stated on oath that on 19.8.2004 he was working on the post of Medical Officer at PHC, Akbarpur. He conducted portmortem on the dead body

of the deceased Tilthu Yadav which was brought wrapped in a white cloth sealed by SHO Akbarpur through Constable Amarbahadur Yadav and Panch Bahadur Yadav. He in his deposition proved the post mortem report.

34. The doctor describing the injuries sustained by the deceased deposed that injury no. 1 lies in the area of 15 x 17 cms. from the wound. The size of wound of entry 15 x 12 cms is different. Only one pellet was found inside the brain. Injury no.1 is at the back of head. This injury no.1 seems to be inflicted upon victim (deceased) from his back and left side. ***There is no possibility that this injury was caused from front.*** If someone turns his head while being shot from front, then this injury can be inflicted. If gunshot is fired from front or from anywhere, then injury can be caused anywhere and if any person is shot in head and consequently falls on face on front side, then above mentioned 3,4 injuries can be caused. Injury no. 2 is not possible due to rubbing of any foreign body. In injury no.1, **blackening and tattooing are not noted when firearm injuries are written** on these facts only. PW-4 denied the suggestion that he intentionally did not mention description of blackening and tattooing in postmortem report.
35. Jag Mal Singh (PW-5) was posted as SI in the Police Station Akbarpur on the date of occurrence. He deposed that investigation of Crime No. 153/04 was done by SHO Gorakhnath Singh. He was a part of the team constituted to assist him. On the date of incident, he prepared the memo relating to blood stained and plain earth on the dictation of Gorakhnath. He also prepared memo of empty cartridge in the presence of witnesses on the direction and dictation of

Gorakhnath. He further deposed that in the sequence of investigation, he on the dictation of SO prepared 'Panchayatnama' in his handwriting on the date same day, whereon witnesses, SHO and he himself put their signatures. He also prepared photo lash, challan lash, letter for post mortem, letter to CMO in his writing and signatures which also bear the signatures of SHO Gorakhnath Singh. After preparation of case papers, the dead body of Tilthu was sealed in a cloth and sample stamp was prepared by PW-5 in his handwriting and signatures on which Gorakhnath Singh also made his signatures.

36. Dr Ram Dhirendra (PW-6) is the Medical Officer posted at PHC, Akbarpur at the relevant point of time. He stated on oath that on 18.8.2004 Bhikhi Yadav, aged 65 years son of Sri Jai Singh, resident of Narhariya Police Station, Akbarpur, Ambedkarnagar was brought by Home Guard-3794 Ramapati who had identified the dead body. He proved the medical papers.
37. Gorakh Singh Inspector (PW-7) was the investigating officer of the case. He deposed that in 2004 he was posted as Inspector Incharge. On 18.8.2004 a case relating to the incident was registered on the basis of written report lodged by Sita Devi, who had got the same scribed by Hari Bux Singh, under Sections 147, 148, 149, 452, 323, 504, 506 and 302 IPC. He assumed investigation of the case and recorded the statement of the complainant Sita Devi and thereafter visited the spot with fellow Constables and SI. It was dark and rainy night hence after deputing an employee for security of the dead body and the crime-scene, the house of the accused was raided but he could not be apprehended. On 19.8.2004 custody of the

dead body was taken and in presence of witnesses, panchnama was prepared by SI Jagmal Singh on his dictation which was read over to the witnesses and their signatures were obtained. He proved the 'Panchayatnama' and his signatures thereon which was available on the file. He further deposed that on 20.8.2004 two accused persons Ram Dhar Tiwari and Surendra Tiwari were arrested and their statements were recorded. On 21.8.2004 accused Arun Kumar Tiwari @ Bhulle Tiwari was arrested and one piece single barrel 12 bore gun was recovered from his possession.

38. In his further deposition, the Investigating Officer identified the SBBL gun which was shown to him. The said gun was recovered on the pointing out of the accused Arun Kumar. PW-7 also verified the empty cartridge recovered from the place of occurrence. He stated that he recorded the statements of the accused Arun Kumar Tiwari and Awadhesh Kumar, obtained the report of witness Bhikhi Yadav, 'Panchanama' and postmortem report and copied the same in a CD. On 29.8.2004, he recorded the statements of Bhola Yadav, Lakshman Yadav, Jagram, Ram Achal, Saroj Kumar, Santosh Kumar, Ram Lakshman Yadav, Chandrabhan Yadav in a CD. On 30.8.2004 statement of witness Girdhari Yadav was recorded and on the next day i.e. 31.8.2004 he was informed about the appearance of the accused Krishna Kumar in the court. On 4.9.2004 the permission for remand of weapon under Section 27 Arms Act was granted by the concerned Magistrate. After dispatching the articles recovered for forensic examinations, he submitted charge sheet against Awadesh Kumar, Arun Kumar, Surendra Tiwari, Krishna Kumar, Ram Dhar Tiwari under Section 147, 148, 149, 452, 323, 504, 506,

302 IPC and Section 27 Arms Act on the basis of oral and documentary evidence.

39. He also stated that Bhola did not give any statement that he got his left side rib fractured nor did he get the same medically examined though showed to the police personnel. He further denied that any statement was given by PW-3 to the effect that his rib was fractured due to the scuffle with the accused but he did not get the injury examined or showed to the police. He further went to deny that any statement was given to him that at the time of assaulting Bhola, Ram Krishna was not present with him. According to PW-7, PW-3 stated that he or his family members did not know the passerby who was hit by buffalo's tail. On 21.8.2004 at 7 pm a 12 bore gun single barrel was recovered from Arun Kumar @ Bhulley on the western side of Ungwa market. Investigation in respect the recovery was made by him alongwith the present case. The gun is licenced in the name of Arun Kumar and no separate FIR in respect of recovery of firearm was registered. No case was prepared with respect to fard recovery of firearm. The gun was recovered three days after the registration of the case under Section 302 IPC. Accoriding to the witness, no permission from the District Magistrate for registering a case under the Arms Act was required since the weapon was a licenced gun and not an illegal one and there was sufficient evidence that the death was caused by the recovered weapon. During investigation he did not record the statement of the family members of the deceased Tilthu, however, he kept mum about the reason for the same. In the earlier part of statement the IO PW-7 stated that except an empty cartridge he had not seen any sign or mark of firing but before the court there

were three cartridges out of which two had returned after laboratory examination.

40. The only witness produced by the defence is DW-1 Chauthi Prasad who was posted as Principal, Primary School, Chandpur, Jalalpur on the date of incident. His testimony does not relate to the present appellants. He was examined in order to prove the plea of alibi raised by the accused Ram Dhar Tiwari who was posted at NPRC, Nyaya Panchayat Sabna.
41. In the backdrop of the aforesaid facts, learned counsel for the accused/appellants has vehemently argued that conviction of the appellant is wholly erroneous and unjustified as the findings of the guilt recorded by the Trial Court are not based on correct appreciation of the evidence on record. The learned Trial Judge has lost sight of the fact that there are major contradictions and omissions in the statement of eye witnesses, who are interested witnesses and have fabricated a false story to implicate the appellants in the case.
42. It has further been urged that the trial court has erred in recording the finding of the guilt on the same of set evidence in respect of the appellants and has acquitted other accused persons, referred to above, though if, the version as narrated in the FIR, has been believed to be true then all the accused persons were involved in the commission of crime and had played their respective roles. Even from the statement of the witnesses, the place of occurrence also becomes doubtful but this aspect of the matter has not been considered.
43. Refuting the assertions of the appellants, learned Additional Government Advocate has submitted that that there is no contradiction in the statement of the prosecution witnesses and

medical evidence supports the oral evidence and slight deviations in the statement of witnesses would not be of no benefit to the prosecution as it would not demolish the entire prosecution version. He further submitted that incident has been witnessed by the eye witnesses viz. P.W.1 and P.W.2, who were present at the place of occurrence and in their statement before the Court they have supported the prosecution story. In these circumstances, allegation of false implication is wholly baseless as the prosecution was successful in proving the motive of the accused persons to commit the murder of deceased.

44. We have heard learned counsel for the parties at length and carefully gone through the material on record.
45. Since much emphasis has been laid that there are material omissions and contradictions in the statement of witnesses and testimonies of such witnesses ought not to have been relied upon by the Trial Court but the learned Trial Court committed an error in recording the finding of guilt and totally discarding the testimony of the defence, we think it apt to refer to various pronouncements where this aspect of the matter has been dealt with.
46. **Blackstone's Ratio** holds that *"It is better that ten guilty persons escape than that one innocent suffer."* It is equally settled that the societal interests at the same time should not be forgotten. According to Hindu Dharma Shastras, the purpose of any trial is the desire to find out the truth. Yagnavalkya on how a decision has to be arrived at, stated that *"Discarding what is fraudulent; the King should give decisions in accordance with the true facts"*. This implies that the court should leave out any embellishments, improvisations, and minor contradictions and

should pronounce the judgment based on the remaining facts, by applying law.

47. In **Rammi alias Rameswar Vs State of MP – 1999 Law Suit (SC) 1021** – the Hon'ble Supreme Court held that: When an eye witness is examined at length, it is possible for the witness to make some discrepancies, but only when such discrepancies are so incompatible with the credibility, the court can disregard the evidence of such witness.
48. Recently, in the case of **Alauddin versus State of Assam**, (*Criminal Appeal No. 1637 of 2021 decided on 03 May 2024*), the Hon'ble Supreme Court had an occasion to explain the difference between omission and contradiction. The Court explained that when a statement is made by a witness in his evidence before the Court which is inconsistent with what was in his statement recorded by the Police, there is a contradiction. When a prosecution witness whose statement under Section 161 (1) or Section 164 of the CrPC has been recorded states factual aspects before the Court which he has not stated in his prior statement recorded under Section 161 (1) or Section 164 of CrPC, it is said that there is an omission and there will be an omission if the witness has omitted to state a fact in his statement recorded by the Police, which he states before the Court in his evidence. Further, the Court clarified that for an omission to amount to a contradiction, the explanation to Section 162 of the CrPC indicates that it may amount to contradiction when it is significant and relevant. Thus, every omission is not a contradiction. It becomes a contradiction provided it satisfies the test laid down in the explanation under Section 162. Once an omission becomes a contradiction, the procedure provided in Section 162(1) must

be followed for contradicting witnesses in the cross-examination. On perusal of Section 162 (1), the Court noted that the witness must be contradicted in the manner provided under Section 145 of the Evidence Act, 1872. The Court highlighted that this a rule of fairness, as the object of this requirement in Section 145 of the Evidence Act of confronting the witness by showing him the relevant part of his prior statement is to give the witness a chance to explain the contradiction.

49. In the aforesaid case of **Alauddin (supra)** the Hon'ble Supreme Court after scrutizing the testimony of varios witnesses came to the conclusion that two sons of the deceased said that the evidence of one of the sons that he witnessed the incident was fallacious. The Court noted that in the cross-examination of another son of the deceased, based on his prior statement recorded under Section 161 of the CrPC, he did not tell the police that at about 6.30 p.m. on the day of incident, one of the convicted persons returned with his father on a motorcycle and that followed them on his bicycle. It was also noted that it was not disclosed before the police that while coming back from a meeting on a bicycle, he saw in the flash of the headlight of a motorcycle that one of the convicted persons was running away and leaving the place with a weapon. The Court on perusal of the cross-examination of the Investigating Officer noted that the statement that he saw one of the convicted persons running away with the weapon in his hand in the flash of the motorcycle's headlight was a very significant omission, which amounts to contradiction. The Court also noted from another prosecution witness's statement that about eight to ten persons, including the present convicted

persons and the acquitted accused were assaulting the deceased. The Court said that this witness was contradicted by suggestion that he did not tell the police that about eight to ten people were assaulting the deceased by surrounding him. Thus, the Court said that there were material omissions which affected the reliability of the witness and ultimately acquitted the accused persons.

50. In the case of **Sukhar versus State of Uttar Pradesh; 2000 Cri.L.J. 29** which has been relied upon by the learned Counsel for the appellant, the apex court acquitted the accused holding that there is not an iota of corroboration either from any oral evidence or from any other circumstance and conviction of the appellant on the unreliable and shaky evidence cannot be sustained. Counsel for the appellant in order to substantiate his contention has also relied upon the decisions rendered in **Rattan Singh versus State of Himanchal; 1997 Cri.L.J.833** and **Javed Alam versus State of Chattisgarh and another (2009) 6 SCC 450**.
51. Now we have to examine the testimony of the prosecution witnesses in the light of the aforesaid legal proposition to find out as to whether there are omissions and contradiction in the statement of prosecution witnesses and its appreciation by the trial court.
52. It is alleged by the prosecution that the incident had occurred on 18.8.2004 at about 5 PM at the residence of the complainant Smt. Sita Devi (PW-1) wife of Bhikhi Yadav (PW-2). The First Information Report was lodged at 7 PM. The distance of the police station Akabarpur from the place of occurrence is about 12 Kms. PW-1 Sita Devi has stated in her statement that she dictated the application to Hari Bux Singh,

former Pradhan and thereafter went to the police station for lodging the report. She had also stated in her statement that she is illiterate. Here it is also relevant to mention that there is no description of any vehicle while going to police station. In her cross-examination, this witness stated that she went to the police station on jeep of Manglu. In the jeep there was dead body and two police personnel. Pradhan had reached to the police station on a Motorcycle. She further stated that she remained at the police station for whole night and the Pradhan had left the police station at about 4 PM after writing of papers. Thus there is major contradiction in her statement and the timing of incident as well as lodging of report also becomes doubtful that too when the complainant is said to have reached to the police station on a jeep in which police personnel were also present.

53. The contradiction in the statement of the PW-1 is also established from the statement of PW-7, Gorakh Singh, Station House Officer, who in his statement has stated that case was registered on the basis of 'Tehrir' given by Sita Devi which was written by Hari Bux Singh, former Pradhan. He further stated that he recorded the statement of Sita Devi and thereafter went to the place of occurrence but due to darkness and rain, he deputed staff for the safety of dead body and place of occurrence and thereafter searched the accused persons. On the next date, i.e. 19.8.2004 he again reached at the spot, took the dead body in possession, prepared the 'Panchnama', site plan and other papers.
54. The glaring defect in the prosecution story once again emerges out from the statement of PW-7 Gorakh Singh, who stated that he went to the place of occurrence on 19.8.2004 and took the

dead body in his possession and completed the necessary formalities whereas PW-1 Sita Devi in her statement has stated that on the same day i.e on 18.8.2004 she went to the police station on a jeep in which dead body was kept and two police personnel were also present. It may be added that at one place Sita Devi has stated in her cross-examination, that after firing Pradhan had reached and made a telephonic call and thereafter police had reached. Thereafter, she alongwith police and Pradhan together with dead body went to the police station. At the police station Pradhan had written the report on asking her and got her signature though she had clearly stated that she is an illiterate lady. Thus there is complete somersault in her statement from the version which was given in the FIR and examination-in-Chief.

55. Bhikhi Yadav (PW-2) is the husband of the complainant Sita Devi (PW-1) and is said to be an eye witness of the incident. This witness had stated in his deposition that when the incident took place, he was inside the room and his wife was outside and none was present there. He knew Hari Bux Singh, who is Pradhan of the village and the police had reached within an hour of the incident. His wife alongwith Hari Bux Singh and police personnel went to the police station. He further stated that at the time of incident he was inside the house and he cannot tell as to from which direction accused persons had come. He also added that mother of accused was BDC Member whereas Haribux Singh was Pradhan. Surprisingly, this witness himself did not go with Hari Bux Singh and the police and allowed her wife to go in the night to the police station which creates doubt and sounds fishy. His statement also goes in contradiction with the statement of PW-

7 Gorakh Singh, who had stated that he took the dead body on the next day i.e. 19.8.2004. His statement has been supported by SI Jagmal Singh, who in his deposition had stated that he was in the team constituted by the SHO and he took the dead body in possession on 19.8.2004 and prepared the panchanama on the dictation of SHO. Thus the testimony of these two police witnesses belies the testimony of complainant (PW-1) and other witnesses. Therefore, it is hard to swallow and believe the testimony of PW-1 and PW-2 and as such, in our considered opinion, the trial court has erred in convicting the appellants and in not appreciating the evidence on record in its correct perspective.

56. Here it may be pointed out that Bhola Yadav, who has been examined by the prosecution as P.W.3 has stated in clear terms in his cross-statement that he was not present when the incident took place but he learnt in the village that Tilthu has been killed. However, he added that he alongwith Santosh Yadav and Bhikhi went to the police outpost Sharvan alongwith "Dada". A wireless message was sent from the police outpost and thereafter SHO, Station Officer Bhiti and Station Officer Ahirauli reached at the spot at about 6 PM. He further added that on 18.8.2004 accused Awadhesh has assaulted him with a tree stick and his left rib was fractured but he neither got the same medically examined nor he told this fact to the police. Therefore, he cannot be termed as an eye witness and his testimony is not at all worthy to be believed.

57. It would be also relevant to point out that complainant in the FIR has stated that the incident was witnessed by villagers, namely, Ram Achal, Jagram, Sitaram and her son Lakshman. But surprisingly the alleged eye witnesses have not been

examined by the prosecution to prove their case for the reason best known to them. Not only these persons but Hari Bux Singh, former Pradhan who is alleged to have reached at the spot, scribed the report and also remained present at the police station, was not examined and no explanation has been given by the prosecution in this regard.

58. So far as testimony of the doctor is concerned, first we would again refer to the version of FIR as narrated by Sita Devi, who has stated that on the exhortation of Ram Dhar his son Arun Kumar @ Bhulley fired a shot as a consequence of which Tilthu died instantaneously. Thus only single shot from close range was fired whereas the doctors had found three pellets while conducting post-mortem but no blackening and tattooing was reported by him in the post-mortem report.
59. Apart from above contradictions and omissions, one more thing which needs mention is that Smt. Sita Devi herself went to the police station for lodging the FIR and her husband Bhikhi Yadav remained at the house. In his cross-examination Bhikhi Yadav has admitted that his house and the house of the deceased are in the same village but he did not go to the house of Tilhu to give information of such a serious happening. No explanation has been given as to why none of the witnesses informed the family members of Tilhu about his killing and why the family members did not come forward to lodge the FIR. Moreover, none of the family members of the deceased has been examined to ascertain the truth regarding enmity or otherwise.
60. In a case like the present one, where there are numerous contradictions in the statements of the witnesses and where the

witnesses are not certain about even the person who was grazing the field and cite different names and where the identity of the person who was hit by the tail-slap of buffalo which is the quintessence of the entire episode remains in dark and even the police could not trace him out to bring home the guilt, this Court cannot uphold the conviction slapped by the trial court without appreciating the entire facts and scrutinizing the evidence of the witnesses in a correct perspective.

61. Considering the evidence and other material on record in its entirety, we are of the view that the learned Trial Judge has erred in convicting the accused-appellant overlooking the fact that there are serious and major contradictions and omissions not only in the statement of eye witnesses but in the statement of police witnesses which makes the entire story doubtful and benefit thereof will go to the appellant. Moreover, no cogent reasons have been given by the learned trial court for discarding the testimony of the defence witness.
62. Learned counsel for the appellant has also argued that the motive to commit murder of deceased was not proved by the prosecution but even then the trial court had convicted the accused-appellant by incorrect appreciation of evidence adduced by the prosecution. In the aforesaid facts and circumstances of the case, we are of the considered view that there is no cogent or clinching evidence on record which proves the guilt of the accused appellant beyond reasonable doubt. Henceforth, we hold that the prosecution has failed to prove the guilt of the appellant beyond all reasonable doubt, and the benefit undoubtedly has to go to the accused-appellant herein. The impugned judgment of conviction, is thus

unsustainable and is liable to be set aside and the appellant is entitled to be acquitted by giving him the benefit of doubt.

63. The appellant is languishing in jail since his conviction in February, 2013 and thus, has already spent a period of more than 11 years in incarceration.
64. For the reasons aforesaid, the appeal is **allowed** and the conviction of accused Arun Kumar @ Bhulle Tiwari is set-aside and he is acquitted of all the charges levelled against him. The appellant Arun Kumar @ Bhulle Tiwari is in jail. He shall be released forthwith unless wanted in any other case, subject to compliance of the provisions of Section 437-A Cr.P.C. to the satisfaction of the trial Court.
65. Let a copy of this judgment be sent to the trial court alongwith lower court record for compliance and the compliance report be sent to the Senior Registrar at the earliest.

(Ajai Kumar Srivastava-I,J.) (A. R. Masoodi,J.)

Order Date :- November 22, 2024

Fahim/-