

IN THE HIGH COURT OF JUDICATURE AT PATNA**Criminal Appeal (DB) No.44 of 2013**

Arising Out of PS.Case No. -112 Year- 2006 Thana -null District- BHAGALPUR

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Md. Guljan @ Md. Gulshan, S/o Md. Jiyaul Haque Hussain @ Jhabbo, resident of Village- Shahjangi, Police Station- Habibpur in the District of Bhagalpur.

.... Appellant/s

Versus

1. The State Of Bihar

.... Respondent/s

Appearance :

For the Appellant/s : Mr. Sanjeev Ranjan-Advocate

For the Respondent/s : Mr. Ashwini Kumar Sinha-A.P.P.

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CORAM: HONOURABLE MR. JUSTICE SAMARENDRA PRATAP SINGH

and**HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI****CAV JUDGMENT****(Per: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI)****Date: 28-10-2016**

Appellant Md. Guljan @ Md. Gulshan along with Md. Sikandar have faced trial for an offence punishable under Section 302/ 34 of the I.P.C. and Section 27 of the Arms Act before the Adhoc Additional Sessions Judge-II, Bhagalpur in Sessions Trial No.1072 of 2007/ 41 of 2011 for causing death of Farooque @ Paroo on 21.05.2006 at 9.00 p.m. at Sahjangi, P. S. Jagdispur (Habibpur), District-Bhagalpur.

2. Vide judgment dated 08th November, 2012, Md. Sikandar has been acquitted while appellant Md. Guljan @ Md. Gulshan has been held guilty for an offence punishable under Section



302 of the I.P.C. and Section 27 of the Arms Act, consequent thereupon, vide order dated 23.11.2012, appellant, Md. Guljan @ Md. Gulshan has been directed to undergo imprisonment for life as well as also slapped with a fine appertaining to Rs.10,000/- in default thereof, to undergo rigorous imprisonment for one year additionally under Section 302 of the I.P.C. in likewise manner, has been directed to undergo rigorous imprisonment of seven years as well as also slapped with a fine appertaining to Rs.10,000/- in default thereof, to undergo rigorous imprisonment for one year additionally under Section 27 of the Arms Act. Furthermore, it has also been directed that both the sentences will run concurrently.

3. The prosecution case as is evident from the fard-bayan (not exhibited) of Bibi Ashma Khatoon (PW-2), wife of deceased Farukh @ Paru having been recorded on 21.05.2006 at about 9.45 p.m. at her house is to the effect that her husband has opened snacks (Kachri, fulauri) shop at the house itself and the same happens to be source of their livelihood. On 21.05.2006 at about 4.00 p.m., Md. Guljan, his brothers Md. Sikandar, Bablu sons of Jiyaul Haque Hussain @ Jhabbo came and directed her husband to provide Kachri-phulauri (eatable items) over which, her husband replied that on account of shortage of raw materials, same would be made available after an hour. They insisted whereupon her husband disclosed that for the present, it could not be supplied whereupon an altercation took



place. Then thereafter, all of them left the place giving threatening. Subsequently, at about 9.00 p.m., Md. Guljan, Md. Sikandar, Md. Bablu, Md. Mumtaj, Md. Chunna came and directed her husband to face dire consequence on account of non-providing of Kachri-phulauri. She tried to intervene in order to save her husband, but all of them caught hold her husband, dragged outside shop and then, Md. Guljan took out pistol and shot at. Then thereafter, all of them escaped. Her husband fell down. She saw firearm injury beneath his eye and blood was oozing out. People of the surroundings came and they were to lift her husband to hospital till then her husband died. The people of locality also searched out the accused persons, but they were absent at their houses, thereafter, police was informed. It has also been disclosed that so many persons have seen the occurrence. Md. Sabbir (PW-1) and Md. Sarwar Alam (PW-5) were shown to be F.I.R. attesting witnesses.

On the basis of the aforesaid fard-bayan, Jagdishpur (Habibpur) P. S. Case No.112 of 2006 was registered under Section 302/34 of the I.P.C. and Section 27 of the Arms Act followed with investigation and after concluding the same, chargesheet was submitted against all accused, however, remaining are still absconding whereupon cognizance has been taken and ultimately after commitment, the trial conducted and culminated in the manner as stated above, hence this appeal.



4. The defence case as is evident from mode of cross-examination as well as statement recorded under Section 313 of the Cr.P.C. is with regard to complete denial of the occurrence as well as false implication. Furthermore, though not suggested to any of the PWs, but advanced the plea that there was no shop at house-cum-Darwaja of informant and to substantiate the same, two DWS have been examined namely DW-1, Md. Izad and DW-2, Md. Israfil.

5. While assailing the judgment of conviction and sentence, it has been submitted on behalf of appellant that the learned trial Court failed to consider that the burden lies upon the prosecution to prove its case beyond all reasonable doubt. To substantiate such plea, it has been submitted that from the evidence of the witnesses, it is apparent that whoever been examined as an independent witness, they have not supported the case of the prosecution much less identifying the appellant to be author of the fatal injury. The witnesses now remain, is the family members, who are PW-2 wife, PW-3 Nisarul, daughter and PW-4 Md. Shabaz. Out of whom, there happens to be non-presence of PW-3 and PW-4 in the fard-bayan and on account thereof, it has been submitted that PW-3 and PW-4 being not cited as F.I.R. named witnesses even being family members is indicative of the fact that they were not at all present at the place of occurrence and so, their evidences are fit to be brushed aside at a first glance. In likewise manner, it has also been submitted that though

there happens to be disclosure in the fard-bayan that Mohalla people have seen the occurrence, but their names have not been disclosed, which purposely been withheld. As such, prosecution version is to be seen with suspicious eye.

6. In its continuity, it has also been submitted that aforesaid theme has got relevancy as even during course of evidence neither PW-3 had disclosed presence of PW-2 and PW-4 at the time of occurrence and in likewise manner, neither PW-4 had stated like so. Therefore, the evidence of PW-3 and PW-4 are fit to be rejected. Now, the case rests upon evidence of single witness, PW-2 (informant) whose evidence is also liable to be rejected on account of delirious deposition.

7. It has also been argued on behalf of learned counsel for the appellant that the aforesaid theme has got relevancy in the background of the fact that prosecution had failed to substantiate the place of occurrence. According to evidence of the witnesses, it is evident that they have spoken regarding presence of shop conjoint to their house and further, the fard-bayan speaks that after dragging from shop, appellant had shot at. The I.O., PW-8, during inspection of the place of occurrence found the dead body over road. From the objective finding of the I.O., PW-8 relating to place of occurrence, it is evident that he had not located the shop belonging to the prosecution as alleged in the fard-bayan and further, narrated by the



witnesses during course of evidence. Apart from this, the presence of dead body over road speaks otherwise, because of the fact that during course of evidence, PW-2, PW-3 and PW-4 have stated that accused persons came at the shop, indulged in an altercation and then, shot at. These witnesses have not divulged during course of their evidence that any of the accused had dragged the deceased outside shop and shot at. Therefore, shifting of dead body from shop to road having not been properly explained at the end of prosecution is found another circumstance which creates doubt over authenticity of status of PW-2, PW-3 and PW-4 as eye witnesses.

8. It has also been urged that apart from the fact that I.O., PW-8 had not located shop belonging to the prosecution party, in likewise manner, there happens to be no disclosure at the end of the I.O., PW-8 that blood was found beneath the dead body over road or at the shop. Although, there happens to be specific disclosure in the fard-bayan coupled with evidences of PWs with regard to profuse bleeding from the injury. As such, the place of occurrence has also become doubtful.

9. It has also been submitted that none of the witnesses had disclosed that there was any source of light. The occurrence is said to be at 9.00 p.m. and on account thereof, darkness might have fallen. In absence of source of light, it was not possible to identify the presence of so many accused as detailed in the fard-bayan as well as

deposition of the witnesses and in likewise manner, identifying the appellant to be assailant of the deceased. Therefore, the evidence of the witnesses on that very score, in light of the deficiencies as disclosed above did not justify their status to be a truthful witness.

10. It has also been pleaded that from the inquest report, it is evident that deceased at the time of inquest was found wearing full-pant while PW-4 during course of his cross-examination had stated that at that very moment, deceased wore Lungi and Shirt. Furthermore, he had stated that he sustained burn injury from gun powder, but neither he was examined by the I.O. nor by the doctor. This inconsistency in the background of infirmities as pointed out impels that PW-4 could not be an eye witness of the occurrence.

11. Then, it has been submitted that natural conduct of the witnesses also to be taken note of and the same has got pivotal role in identifying the witnesses to be truthful witnesses. In order to elaborate the same, it has been submitted that husband, father was shot at, but none of the witnesses that means to say, PW-2, PW-3 and PW-4 had stated that they have gone near deceased, touched him, grappled him and began to wail. Had there been such occurrence in their presence at least PW-2, wife would not have allowed her putting in isolation rather under natural conduct would have indulged in wailing, pulling and tugging with dead body of her dear one.

12. Furthermore, it has been submitted that from the fard-



bayan, it is apparent that on account of non-providing of Kachri-Phulauri, the occurrence is alleged to have taken place while during course of evidence, it is evident that aforesaid theme has been changed and a new story has been introduced that appellant had enquired why he (deceased) had shown thumb (tesua) to his brothers. That means to say, the motive or genesis whatever been divulged at an earlier occasion is found completely changed and on that very score, prosecution version could not be relied upon.

13. It has also been submitted that from the evidence of PW-3, it is apparent that she was to serve food to the deceased which PW-2 also disclosed that her husband was sitting to take meal, but the aforesaid assertion/ contention is found completely smashed as well as unreliable in the background of the fact that during course of post mortem, the Doctor (PW-7) had found semi-digested food, which is indicative of the fact that the story of serving food and further, on that very score, presence of witnesses became doubtful.

14. In the background of aforesaid infirmities as well as inconsistency persisting in the prosecution case, it has been submitted that F.I.R. happens to be ante-timed. To substantiate such plea, it has been submitted that F.I.R. was recorded at about 9.30 p.m. on 21.05.2006, the case was registered on 21.05.2006 itself, but the F.I.R. reached at the C.J.M. Office on 23.05.2006, that means to say, beyond 24 hours and for that, prosecution has got no say and that happens to



be reason behind non-exhibit of relevant documents i.e. F.I.R., fard-bayan, inquest report. Had there been, it would have exposed malafide of prosecution whereupon prosecution case would have been exclusively discarded. Therefore, as submitted, taking into account the cumulative effect of the aforesaid deficiencies persisting in the prosecution case, it could be inferred conclusively that the finding of guilt and sentences recorded by the learned lower Court is not at all substantiated whereupon the same is fit to be set aside. Furthermore, the defence relied upon *A.I.R. 1993 SC 1469 as well as (1994) 5 SCC 155 on this score.*

15. On the other hand, the learned Additional Public Prosecutor supported the finding recorded by the learned lower Court submitted that presence of PW-2, PW-3 and PW-4 happen to be natural one being inmates of the house and further, their status to be an eye witness was natural one because of the fact that deceased was done to death by the appellant at their place. It has also been submitted that there happens to be no inconsistency with regard to place of occurrence as from the evidence of PW-2, it is apparent that road lies by the side of shop-cum-house and the objective finding of the I.O. also affirms it. Furthermore, it has also been submitted that though some sort of slackness have been perceived at the end of the I.O., during course of investigation as, the I.O. could not visit the house-cum-shop of the informant, could not locate the distance in



between, presence or absence of blood at the place where dead body was lying or any description relating to trail of blood from shop to the exact place where dead body was found and in likewise manner, the prosecuting agency failed to exhibit the relevant document though PW-2 as well as PW-8 have categorically stated with regard thereto. Non-exhibit of F.I.R. or the inquest report is not going to hamper the case of the prosecution because of the fact that its authenticity, reliability has not been challenged at the end of the defence, at the other end, the prosecution duly substantiated the same. Moreover, defence also could not be able to extract that no F.I.R. was drawn up over statement of PW-2, as neither PW-2 nor PW-8 were given any suggestion on that very score.

16. It has further been submitted that evidence of the prosecution is to be perceived in its entirety. Appreciation of evidence in piecemeal manner is not at all permitted. When the evidence of PW-2, PW-3 and PW-4 is taken in its entirety, it is evident that there happens to be consistency in all material points and further, these evidences gave only one conclusion identifying the appellant to be author of the fatal single gun shot injury which is found duly corroborated by the evidence of PW-7, the doctor.

17. It has further been submitted that mere presence of semi-digested food is not going to affect the prosecution version because of the fact that none of the witnesses have been cross-



examined on that very score, whether deceased had taken meal at the evening hour or not. At the other end, the witnesses consistently submitted that meal was to be served. No cross-examination has been made on the score whether at evening hour deceased had taken snacks or not. Therefore, time of occurrence as well as disclosure of PW-2, PW-3 and PW-4 could not be doubted.

18. It has further been submitted that the learned lower Court had rightly concluded by observing and holding that prosecution had succeeded in proving its case beyond all reasonable doubt. Apart from this, the Court has to further see whether there was any possibility to falsely implicate the appellant exonerating real culprit and for that, when the evidences have been gone through, it is apparent that there was no such occasion. Consequent thereupon, appeal is fit to be dismissed.

19. In order to substantiate its case, the prosecution had examined as many as eight witnesses viz. PW-1, Md. Sabir, PW-2, Bibi Ashma Khatoon, PW-3, Nisarul, PW-4, Md. Shabaz, PW-5, Md. Sarwar Alam, PW-6, Bibi Chunna, PW-7, Dr. Atul Kumar Mallick and PW-8, Binod Kumar, the I.O. The prosecution had also exhibited the post mortem report as Exhibit-1. In likewise manner, the defence had also examined two DWs viz. DW-1, Md. Ezaz and DW-2, Md. Israfil. No documentary evidence had been exhibited on their score.

20. Now, coming to status of the witnesses, PW-1 and

PW-5 are F.I.R. attesting witnesses. PW-2, PW-3 and PW-4 are on material points. PW-6 is the independent witness. PW-7 is the Doctor and PW-8 is the I.O. PW-1 and PW-6 were declared hostile while PW-5, another F.I.R. attesting witness have supported the occurrence, but had not named the appellant to be an assailant. Therefore, the prosecution case hinges over the evidences of PW-2, PW-3, PW-4, PW-7 and PW-8.

21. PW-7, Dr. Atul Kumar Mallick had conducted autopsy over the dead body of deceased Md. Farukh on 22.05.2006 at 1.00 p.m. and found following ante-mortem injuries:-

“1. The face was soiled with dry blood and blood clots. One wound of entry with inverted margins and tattooing around 1” x ½ was present on right side of face below right eye. The bullet after causing fracture of right Zygomatic bone and base of scalp entered cranial cavity tears brain and meninges and was found embaded in right Cerebral hemisphere posterior part. One conical metallic bullet was recovered and is being handed over under sealed cover for needful. The brain and meninges were pale. The crenical cavity contain blood and blood clots”.

As per opinion of the doctor, the cause of death happens



to be on account of aforesaid ante-mortem injury caused by firearm. Time elapsed since death within 12-24 hours and so, it speaks regarding presence of single fatal gun shot ante-mortem injury coupled with the time tallied with the prosecution version. It further speaks assault from close proximity on account of presence of tattooing injury, which also not been challenged. As per column 21 of post mortem report, it is evident that stomach contained partially digested food. Neither, quantity thereof, has been disclosed, which could have enable the Court to perceive whether deceased had already taken full meal, nor cross-examination at the end of the appellant was made on that very score. Moreover, neither the timing is under controversy nor the aforesaid finding could be perceived adverse to the prosecution case. Moreover, process of digestion depends on so many factors i.e. nature of food, digestive capacity of the person, state of the gastric mucus a (*Modi Jurisprodece Page-358*).

22. PW-2, who happens to be informant, had stated that on the alleged date and time of occurrence while she along with deceased Farukh were sitting at the shop and at that very moment, meal was going to be served to the deceased Md. Farukh, accused persons came out of whom, Guljan enquired why he had shown thumb (tesua) to his brother, which was controverted by the deceased. Immediately thereafter, Guljan took out pistol and shot at. She had also narrated about the incident having taken place during afternoon

period.

23. PW-3, Nishrul, daughter of the informant, who at the time of her evidence was aged about 18 years, had stated that on the alleged date and time of occurrence while she was to serve food to her father, accused persons came. Guljan enquired from her father why he had shown thumb (tesua) to his brother. Having been denied at the end of Farukh, her father, Guljan took out pistol and shot at causing instantaneous death. She had also divulged about the incidence having taken place at afternoon whereunder they had threatened on being refused to serve Pakauri by her father due to absence of raw-material.

24. PW-4 is Md. Shahbaz, the son whose age at the time of his examination was 15 years. He had also stated that at the time of occurrence, he was sitting by the side of his father. His mother was also sitting there. At that very time, accused persons came, out of whom, Guljan enquired from his father why he had shown thumb (tesua) to his brother, being denied whereupon he took out pistol and shot at his father, who after sustaining injury fell down and died. Police came soon thereafter and took statement of his mother whereupon case has been registered, police also took his statement.

25. PW-8 is Binod Kumar, the Investigating Officer, who had stated that on 21.05.2006, he was posted at Habibpur P. S. On that day, he received telephonic information regarding commission of occurrence at Mohalla-Sahjangi whereupon he registered Sanha Entry



and proceeded towards P.O. After reaching there, he recorded fard-bayan of Bibi Ashma Khatoon. He took up investigation whereunder prepared inquest report. Recorded statement of Md. Sabbir. He also recorded further statement of Bibi Ashma Khatoon. He inspected place of occurrence which happens to be the road lying in front of house of informant Ashma Khatoon. He identified the P.O. North-Md. Afroz, South-Gali, East-Md. Rustam, West-house of informant. He also recorded statement of Md. Sarwar, Sahbano. As he was transferred, consequent thereupon, he handed over charge of investigation to Sri Ganesh Thakur. After his transfer, the chargesheet was submitted by A. Prasad, A.S.I.

26. Conduction of trial has got a purpose. During said course, the material being collected by the Court is subject to scrutiny to find out the truth. In ***Daya Ram and others vs. State of Haryana reported in (2015) 12 SCC 373***, it has been observed:-

“23. As the eventual objective of any judicial scrutiny is to unravel the truth by separating the grain from the chaff, we are of the opinion that in the face of clinching evidence on record, establishing the culpability of the appellants, their conviction and sentence as recorded by the courts below does not call for any interference at this end. The participation



in the gory brutal attack of the appellants with the lethal weapons resulting in death of two persons Ashok and Rohtash is proved beyond reasonable doubt not only by the testimony of PW 3, the eyewitness, but also by other evidence collected in course of the investigation and adduced at the trial. On an overall appreciation of the materials on record, we find ourselves in complete agreement with the findings recorded by the courts below.”

27. In order to appreciate the submissions having made on behalf of appellant that there was no source of light and so, proper identification of the assailant was not at all plausible. Consequent thereupon, identifying the appellant to be assailant of the deceased was not at all reliable. In this context, right from fard-bayan to the evidences of PW-2, PW-3 and PW-4 have been gone through. It is apparent that neither in the examination-in-chief, the prosecution divulged the source of light nor during cross-examination, the defence cross-examined on that very score. However, there happens to be no controversy with regard to status of the accused including the appellant being a co-villager and further, having indulged in an altercation with the deceased, would not give any possibility of mistaken identification. Although, presence of prosecution party at

their shop-cum-house apart from the fact that it was month of May and the occurrence is alleged to have taken place about 9.00 p.m. as well as food was to be served, inspires that there would have been some source of light. Even considering that there happens to be complete absence of source of light, the manner of identification, when accused being co-villager, had indulged in an altercation that too, in close proximity, rules out such assertion. In ***Kedar Singh & others vs. State of Bihar reported in 1999 Cri.L.J. 601***, it has been held:-

“3. It has also to be observed that even on a full dark night there is never total darkness. There can be other means to identify another through the shape of his body, clothes, gait, manner of walking etc. etc. Identification possible by voice too.”

28. In ***Dalbir Singh vs. State of Haryana reported in 2008 Cri.L.J. 3061***, it has been held:-

“6. The stand of the appellant that in dark night recognition would not have been possible from voice is clearly untenable. In a dark night ocular identification may be difficult in some cases but if a person is acquainted and closely related to another, from the manner of speech, gait and voice identification is possible.

7. In *Anwar Hussain v. The State of U.P. and Anr.* (AIR 1981 SC 2073) it was observed that even if there is insufficient light, a witness can identify a person, with whom he is fairly acquainted or is in intimate terms, from his voice, gaits, features etc. Therefore, there is nothing to discard the evidence of PW-8 so far as his claim to have recognized the appellant is concerned.”

29. In *State of U.P. v. Sheo Lal & others reported in 2009 Cri.L.J. 1762*, it has been held:-

“7. In *Nathuni Yadav v. State of Bihar* [1998(9) SCC 238] this Court observed that under what circumstances the lack of moonlight or artificial light does not per se preclude identification of the assailants. It was noted as follows: (SCC p. 242, para 9)

"Even assuming that there was no moonlight then, we have to gauge the situation carefully. The proximity at which the assailants would have confronted with the injured, the possibility of some light reaching there from the glow of stars, and the fact that the murder was committed on a roofless terrace are germane factors to



be borne in mind while judging whether the victims could have had enough visibility to correctly identify the assailants. Over and above those factors, we must bear in mind the further fact that the assailants were no strangers to the inmates of the tragedy-bound house, the eyewitnesses being well acquainted with the physiognomy of each one of the killers. We are, therefore, not persuaded to assume that it would not have been possible for the victims to see the assailants or that there was possibility for making a wrong identification of them. We are keeping in mind the fact that even the assailants had enough light to identify the victims whom they targeted without any mistake from among those who were sleeping on the terrace. If the light then available, though meagre, was enough for the assailants why should we think that the same light was not enough for the injured who would certainly have pointedly focussed their eyes on the faces of the intruders standing in front of them. What is sauce for the goose is sauce for the

gander."

8. *The position was reiterated in Bharosi v. State of M.P. [2002(7) SCC 239] and S. Sudershan Reddy v. State of A.P. [2006(10) SCC 163]."*

Therefore, question of mistaken identification goes out of controversy.

30. Now, coming to non-exhibit of the relevant documents such as fard-bayan, formal F.I.R., inquest report are concerned, that has gone out of consideration in the background of the fact that informant had categorically stated that police had come, who recorded her fard-bayan whereupon she put her thumb impression. During course of cross-examination, aforesaid theme has not been challenged. In likewise manner, PW-4 had also stated that police had come, recorded statement of his mother and then thereafter, his statement as well as statement of his sister Nishrul was taken. No cross-examination has been made on that very score. PW-8 is the I.O., who had categorically stated that he had recorded fard-bayan of PW-1, Ashma Khatoon. Proceeded with the investigation and during course thereof, prepared inquest, recorded statement of the witnesses, inspected place of occurrence and after having been transferred, handed over investigation which he reiterated in his cross-examination at Para-8. That being so, the factum of recording of



F.I.R., preparation of inquest report is found out of controversy and further, during course of proper appraisal of the event, we are of the view that aforesaid event visualized on account of slackness, inefficiency of the prosecuting agency otherwise those documents would have been exhibited at the end of PW-8, who happens to be the maker of the document and further, substantiated the same during course of evidence. However, as the genuineness, reliability of the document has not been challenged, on account thereof, its authenticity would not be doubted. In likewise manner, its non-exhibit is not at all found adverse to the prosecution case in the background of the fact that F.I.R. on its own is not a substantive piece of evidence. Its relevance is only to corroborate or to contradict the informant. It has no probative value unless affirmed by the informant.

31. In *Zahira Habibulla H. Sheikh and another vs. State of Gujarat and others reported in (2004) 4 SCC 158*, it has been held:-

“43. The Courts have to take a participatory role in a trial. They are not expected to be tape recorders to record whatever is being stated by the witnesses. [Section 311](#) of the Code and [Section 165](#) of the Evidence Act confer vast and wide powers on Presiding Officers of Court to



elicit all necessary materials by playing an active role in the evidence collecting process. They have to monitor the proceedings in aid of justice in a manner that something, which is not relevant, is not unnecessarily brought into record. Even if the prosecutor is remiss in some ways, it can control the proceedings effectively so that ultimate objective i.e. truth is arrived at. This becomes more necessary where the Court has reasons to believe that the prosecuting agency or the prosecutor is not acting in the requisite manner. The Court cannot afford to be wishfully or pretend to be blissfully ignorant or oblivious to such serious pitfalls or dereliction of duty on the part of the prosecuting agency. The prosecutor who does not act fairly and acts more like a counsel for the defence is a liability to the fair judicial system, and Courts could not also play into the hands of such prosecuting agency showing indifference or adopting an attitude of total aloofness.

56. *As pithily stated in Jennison v. Backer (1972) 1 All ER 997, (All ER p. 1006d)*

"The law should not be seen to sit limply, while those who defy it go free and, those who seek its protection lose hope".

Courts have to ensure that accused persons are punished and that the might or authority of the State are not used to shield themselves or their men. It should be ensured that they do not wield such powers which under the Constitution has to be held only in trust for the public and society at large. If deficiency in investigation or prosecution is visible or can be perceived by lifting the veil trying to hide the realities or covering the obvious deficiencies, Courts have to deal with the same with an iron hand appropriately within the framework of law. It is as much the duty of the prosecutor as of the Court to ensure that full and material facts are brought on record so that there might not be miscarriage of justice. (See [Shakila Abdul Gafar Khan \(Smt.\) v. Vasant Raghunath Dhoble and Anr.](#) (2003) 7 SCC 749.

32. In ***Sidhartha Vashisht alias Manu Sharma vs. State (NCT of Delhi)*** reported in (2010) 6 SCC 1, the Apex Court held:-



“188. It is also important to note the active role which is to be played by a court in a criminal trial. The court must ensure that the prosecutor is doing his duties to the utmost level of efficiency and fair play. This Court, in [Zahira Habibulla H. Sheikh and Anr. v. State of Gujarat and Ors.](#), (2004) 4 SCC 158, has noted the daunting task of a court in a criminal trial while noting the most pertinent provisions of the law. It is useful to reproduce the passage in full:

"43. The Courts have to take a participatory role in a trial. They are not expected to be tape recorders to record whatever is being stated by the witnesses. [Section 311](#) of the Code and [Section 165](#) of the Evidence Act confer vast and wide powers on Presiding Officers of Court to elicit all necessary materials by playing an active role in the evidence collecting process. They have to monitor the proceedings in aid of justice in a manner that something, which is not relevant, is not unnecessarily brought into record. Even if the prosecutor is remiss in some ways, it can control the proceedings effectively so



that ultimate objective i.e. truth is arrived at. This becomes more necessary the Court has reasons to believe that the prosecuting agency or the prosecutor is not acting in the requisite manner. The Court cannot afford to be wishfully or pretend to be blissfully ignorant or oblivious to such serious pitfalls or dereliction of duty on the part of the prosecuting agency. The prosecutor who does not act fairly and acts more like a counsel for the defence is a liability to the fair judicial system, and Courts could not also play into the hands of such prosecuting agency showing indifference or adopting an attitude of total aloofness.

44. The power of the Court under [Section 165](#) of the Evidence Act is in a way complementary to its power under [Section 311](#) of the Code. The section consists of two parts i.e. (i) giving a discretion to the Court to examine the witness at any stage and (ii) the mandatory portion which compels the Courts to examine a witness if his evidence appears to be essential to the just decision of the Court. Though the discretion given to

the Court is very wide, the very width requires a corresponding caution. In Mohan Lal v. Union of India, this Court has observed, while considering the scope and ambit of Section 311, that the very usage of the word such as, "any Court" "at any stage", or "any enquiry or trial or other proceedings" "any person" and "any such person" clearly spells out that the Section has expressed in the widest possible terms and do not limit the discretion of the Court in any way. However, as noted above, the very width requires a corresponding caution that the discretionary powers should be invoked as the exigencies of justice require and exercised judicially with circumspection and consistently with the provisions of the Code. The second part of the section does not allow any discretion but obligates and binds the Court to take necessary steps if the fresh evidence to be obtained is essential to the just decision of the case - 'essential', to an active and alert mind and not to one which is bent to abandon or abdicate. Object of the Section is to enable the court to arrive at the truth



irrespective of the fact that the prosecution or the defence has failed to produce some evidence which is necessary for a just and proper disposal of the case. The power is exercised and the evidence is examined neither to help the prosecution nor the defence, if the Court feels that there is necessity to act in terms of [Section 311](#) but only to subserve the cause of justice and public interest. It is done with an object of getting the evidence in aid of a just decision and to uphold the truth.

45. It is not that in every case where the witness who had given evidence before Court wants to change his mind and is prepared to speak differently, that the Court concerned should readily accede to such request by lending its assistance. If the witness who deposed one way earlier comes before the appellate Court with a prayer that he is prepared to give evidence which is materially different from what he has given earlier at the trial with the reasons for the earlier lapse, the Court can consider the genuineness of the prayer in the context as to whether the party concerned had a



fair opportunity to speak the truth earlier and in an appropriate case accept it. It is not that the power is to be exercised in a routine manner, but being an exception to the ordinary rule of disposal of appeal on the basis of records received in exceptional cases or extraordinary situation the Court can neither feel powerless nor abdicate its duty to arrive at the truth and satisfy the ends of justice. The Court can certainly be guided by the metaphor, separate the grain from the chaff, and in a case which has telltale imprint of reasonableness and genuineness in the prayer, the same has to be accepted, at least to consider the worth, credibility and the acceptability of the same on merits of the material sought to be brought in.

46. Ultimately, as noted above, *ad nauseam* the duty of the Court is to arrive at the truth and subserve the ends of justice. [Section 311](#) of the Code does not confer any party any right to examine, cross-examine and re-examine any witness. This is a power given to the Court not to be merely exercised at the bidding of any one party/person but the



powers conferred and discretion vested are to prevent any irretrievable or immeasurable damage to the cause of society, public interest and miscarriage of justice. Recourse may be had by Courts to power under this section only for the purpose of discovering relevant facts or obtaining proper proof of such facts as are necessary to arrive at a justice decision in the case.

47. [Section 391](#) of the Code is another salutary provision which clothes the Courts with the power of effectively decide an appeal. Though [Section 386](#) envisages the normal and ordinary manner and method of disposal of an appeal, yet it does not and cannot be said to exhaustively enumerate the modes by which alone the Court can deal with an appeal. [Section 391](#) is one such exception to the ordinary rule and if the appellate Court considers additional evidence to be necessary, the provisions in [Section 386](#) and [Section 391](#) have to be harmoniously considered to enable the appeal to be considered and disposed of also in the light of the additional evidence



as well. For this purpose it is open to the appellate Court to call for further evidence before the appeal is disposed of. The appellate Court can direct the taking up of further evidence in support of the prosecution; a fortiori it is open to the court to direct that the accused persons may also be given a chance of adducing further evidence. [Section 391](#) is in the nature of an exception to the general rule and the powers under it must also be exercised with great care, specially on behalf of the prosecution lest the admission of additional evidence for the prosecution operates in a manner prejudicial to the defence of the accused. The primary object of [Section 391](#) is the prevention of guilty man's escape through some careless or ignorant proceedings before a Court or vindication of an innocent person wrongfully accused. Where the court through some carelessness or ignorance has omitted to record the circumstances essential to elucidation of truth, the exercise of powers under [Section 391](#) is desirable.



48. *The legislature intent in enacting [Section 391](#) appears to be the empowerment of the appellate court to see that justice is done between the prosecutor and the persons prosecuted and if the appellate Court finds that certain evidence is necessary in order to enable it to give a correct and proper findings, it would be justified in taking action under [Section 391](#).*

49. *There is no restriction in the wording of [Section 391](#) either as to the nature of the evidence or that it is to be taken for the prosecution only or that the provisions of the Section are only to be invoked when formal proof for the prosecution is necessary. If the appellate Court thinks that it is necessary in the interest of justice to take additional evidence it shall do so. There is nothing in the provision limiting it to cases where there has been merely some formal defect. The matter is one of the discretion of the appellate Court. As reiterated supra the ends of justice are not satisfied only when the accused in a criminal case is acquitted. The community acting through the State and the public*

prosecutor is also entitled to justice. The cause of the community deserves equal treatment at the hands of the Court in the discharge of its judicial functions."

33. In ***Rajendra Prasad vs. Narcotic Cell*** reported in ***(1999) 6 SCC 110***, it has been held:-

"8. Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be fore-closed from correcting errors. If proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified. After all, function of the criminal Court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better."



34. Now, coming to place of occurrence, certainly in the fard-bayan, there happens to be specific disclosure at the end of PW-2 that in order to save her husband, she took initiative over which all the accused persons including Md. Guljan pulled her husband Farukh from the shop and thereafter, Guljan took out pistol and shot at. In the fard-bayan, there happens to be no disclosure with regard to road lying by the side of her shop nor she spoken that firing over deceased was made at road. Moreover, during course of cross-examination, the defence also failed to cross-examine on that very score, nor her attention was drawn up towards earlier statement made in the fard-bayan to this effect. However, from the topography of the P.O., as disclosed by the I.O., road lies by the side of house-cum-shop of the informant. Though, distance in between the place (road) where dead body was found to the house-cum-shop of informant had not been disclosed by the I.O., nevertheless the defence could not raise the issue by cross-examining the PW-2 as well as PW-8 on that very score. After sustaining injury, normally the body is subject to toss, then in that event, the body might have gone away from house-cum-shop of informant.

35. In its continuity, the another circumstance whereupon much emphasis has been drawn up at the end of the appellant, happens to be with regard to absence of the blood beneath the dead body at road as well as at house-cum-shop of the informant. In fard-



bayan, there happens to be disclosure that deceased after sustaining injury began to wriggle. There was bleeding from the injury. PW-2, during course of examination-in-chief, had not disclosed. During cross-examination at Para-8 had disclosed that there was blood over the earth where her husband had fallen down. I.O. had seized the blood. She has also stated that her cloth was also seized by the police and for that, document was prepared over which she had put her thumb impression. PW-4 had disclosed in his examination-in-chief at Para-2 that blood began to ooze from the injury. During cross-examination at Para-5, he had stated that there was blood stain over apparel of his father. He is unable to say whether police had seized cloth or not. He had further stated that blood had fallen down on the earth at that very place, but he is unable to say whether police had seized the same or not. PW-3 in Para-5 had stated that she had shown P.O. to the I.O., but no cross-examination was done to the effect that whether blood was present or not.

36. During course of examination of PW-8, it is apparent that he had not mentioned those things during course of narrating objective finding regarding the P.O. which, as per his evidence, confined to road only where dead body was found. Save and except presence of house of informant by the side of the road, he had not deposed regarding presence of blood. He had not cared to see and



inspect the house-cum-shop of the informant which he was aware since before on account of recording of fard-bayan whereunder specifically the same was shown to be P.O. It is also apparent that the conducting Additional Public Prosecutor failed to draw his attention on that very score. In likewise manner, it has not been stated by the PW-8 that P.O. was inspected in sufficient light nor there was cross-examination on this score. Thus, from the aforesaid events, it is apparent that there happens to be serious lapses at the part of I.O. in getting proper investigation and in likewise manner, inefficiency of prosecuting agency during course of trial to bring relevant material on the record. During cross-examination at Para-6, he had stated that nothing abnormal was found at the place of occurrence.

37. In ***Ranjeet Kumar Ram @ Ranjeet Kumar Das and others vs. State of Bihar reported in 2015(3) P.L.J.R. 305 (SC) it has been held:-***

“21. It is well settled that in criminal trials even if the investigation is defective, the rest of the evidence must be scrutinized independently of the impact of the defects in the investigation otherwise the criminal trial will plummet to the level of the investigation. Criminal trials should not be made casualties for any lapses committed by the

investigating officer. In State of M. P. vs. Mansingh & Ors., (2003) 10 SCC 414, it was held that even if there was deficiencies in the investigation that cannot be a ground for discrediting the prosecution version. The same view was reiterated in Sheo Shankar Singh vs. State of Jharkhand And Anr., (2011) 3 SCC 654 and C. Muniappan & Ors. vs. State of Tamil Nadu, (2010) 9 SCC 567.”

38. Further, delving deep over the issue, relevant medico legal authorities have also been seen. Before coming to floor, it should be taken into consideration that no cross-examination has been made to Pw-7, Doctor, whether the nature of injury permits oozing of blood as well as whether the injured after sustaining such injury could move? As per “Parikh Text book of Medical Jurisprudence and Toxicology” when there happens to be entry wound from close range, bleeding is generally slight (Page-296). In likewise manner, at Page 301, it has been opined that “it is possible for a bullet to pass through important organs without killing and sometimes without stopping the person from performing physical or volitional acts. Unless there is gross destruction of brain or cardio vascular system, some physical activity is possible in many cases.” Therefore, absence of blood is not found adverse to the prosecution case, nor shifting of deceased from

house-cum-shop to road is found abnormal.

39. During course of argument, as perceived in forgoing paragraphs, learned counsel for the appellant laid stress over delay in dispatching F.I.R. in utter violation of Section 157 of the Cr.P.C. However, during course of submission failed to divulge what kind of prejudice the appellant suffered. Furthermore, on account of non-cross-examination of I.O. on this score, no explanation has been allowed to come. Aforesaid question has come up for consideration before the Hon'ble Apex Court in *State of Rajasthan vs. Daud Khan reported in (2016) 2 SCC 607*, wherein it has been held:-

Section 157 of the Cr.P.C.: submissions and discussion

“25. It was then submitted that there was an unexplained delay in receipt of the FIR by the Magistrate – a delay of about 36/37 hours since the copy of the FIR was received by him on 21-6-2004 at about 11.00 a.m. According to the learned counsel for Daud Khan this was in violation of Section 157 of the Code of Criminal Procedure, 1973 (for short “CrPC”) which requires a copy of the FIR (called a special report or an express report) to be sent forthwith to the Magistrate concerned (2014) 2 SCC 1 (Constitution Bench)”

26. The interpretation of Section 157 of the



*CrPC is no longer res integra. A detailed discussion on the subject is to be found in **Brahm Swaroop v. State of U.P.** (2014)2 SCC 1 which considered a large number of cases on the subject. The purpose of the “forthwith” communication of a copy of the FIR to the Magistrate is to check the possibility of its manipulation. Therefore, a delay in transmitting the special report to the Magistrate is linked to the lodging of the FIR. If there is no delay in lodging an **FIRST INFORMATION REPORT** then any delay in communicating the special report to the Magistrate would really be of little consequence, since manipulation of the FIR would then get ruled out. Nevertheless, the prosecution should explain the delay in transmitting the special report to the Magistrate. However, if no question is put to the investigating officer concerning the delay, the prosecution is under no obligation to give an explanation. There is no universal rule that whenever there is some delay in sending the FIR to the Magistrate, the prosecution version becomes unreliable. In other words, the*

facts and circumstances of a case are important for a decision in this regard.

157. Procedure for investigation.—(1) *If, from information received or otherwise, an officer in charge of a police station has reason to suspect the commission of an offence which he is empowered under Section 156 to investigate, he shall forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence upon a police report and shall proceed in person, or shall depute one of his subordinate officers not being below such rank as the State Government may, by general or special order, prescribe in this behalf, to proceed, to the spot, to investigate the facts and circumstances of the case, and, if necessary, to take measures for the discovery and arrest of the offender:*

Provided that—

(a) when information as to the commission of any such offence is given against any person by name and the case is not of a serious nature, the officer in charge of a police station need not proceed in person or

depute a subordinate officer to make an investigation on the spot,

(b) if it appears to the officer in charge of a police station that there is no sufficient ground for entering on an investigation, he shall not investigate the case:

Provided further that in relation to an offence of rape, the recording of statement of the victim shall be conducted at the residence of the victim or in the place of her choice and as far as practicable by a woman police officer in the presence of her parents or guardian or near relatives or social worker of the locality.

(2) In each of the cases mentioned in clauses (a) and (b) of the proviso to sub-section (1), the officer in charge of the police station shall state in his report his reasons for not fully complying with the requirements of that sub-section, and, in the case mentioned in clause (b) of the said proviso, the officer shall also forthwith notify to the informant, if any, in such manner as may be prescribed by the State Government, the fact that he will not investigate the case or cause it to be

investigated.

*27. The delay in sending the special report was also the subject of discussion in a recent decision being **Sheo Shankar Singh v. State of U.P.** (2013) 12 SCC 539 wherein it was held that before such a contention is countenanced, the accused must show prejudice having been caused by the delayed dispatch of the FIR to the Magistrate. It was held, relying upon several earlier decisions as follows:*

“30. One other submission made on behalf of the appellants was that in the absence of any proof of forwarding the FIR copy to the jurisdiction Magistrate, violation of Section 157 CrPC has crept in and thereby, the very registration of the FIR becomes doubtful. The said submission will have to be rejected, inasmuch as the FIR placed before the Court discloses that the same was reported at 4.00 p.m. on 13-6-1979 and was forwarded on the very next day viz. 14-6-1979. Further, a perusal of the impugned judgments of the High Court as well as of the trial court discloses that no case of any prejudice was shown nor even raised on



behalf of the appellants based on alleged violation of Section 157 CrPC. Time and again, this Court has held that unless serious prejudice was demonstrated to have been suffered as against the accused, mere delay in sending the FIR to the Magistrate by itself will not have any deteriorating (sic) effect on the case of the prosecution. Therefore, the said submission made on behalf of the appellants cannot be sustained.

31. In this context, we would like to refer to a recent decision of this Court in Sandeep v. State of U.P. (2012) 6 SCC 107 wherein the said position has been explained as under in paras 62-63: (SCC p.132)

“62. It was also feebly contended on behalf of the appellants that the express report was not forwarded to the Magistrate as stipulated under Section 157 CrPC instantaneously. According to the learned counsel FIR which was initially registered on 17-11-2004 was given a number on 19-11-2004 as FIR No. 116 of 2004 and it was altered on 20-11-2004 and was forwarded only on 25-11-2004 to the Magistrate. As



far as the said contention is concerned, we only wish to refer to the reported decision of this Court in Pala Singh v. State of Punjab⁷ wherein this Court has clearly held that (SCC p. 645, para 8) where the FIR was actually recorded without delay and the investigation started on the basis of that FIR and there is no other infirmity brought to the notice of the court then, however improper or objectionable the delay in receipt of the report by the Magistrate concerned be, in the absence of any prejudice to the accused it cannot by itself justify the conclusion that the investigation was tainted and the prosecution insupportable.

63. Applying the above ratio in Pala Singh to the case on hand, while pointing out the delay in the forwarding of the FIR to the Magistrate, no prejudice was said to have been caused to the appellants by virtue of the said delay. As far as the commencement of the investigation is concerned, our earlier detailed discussion discloses that there was no dearth in that aspect. In such circumstances we do not find any infirmity

in the case of the prosecution on that score. In fact the above decision was subsequently followed in Sarwan Singh v. State of Punjab,(1976) 4 SCC 36, Anil Rai v. State of Bihar (2001) 7 SCC 318 and Aqeel Ahmad v. State of U.P.(2008) 16 SCC 372”

28. *It is no doubt true that one of the external checks against ante-dating or ante-timing an FIR is the time of its dispatch to the Magistrate or its receipt by the Magistrate. The dispatch of a copy of the FIR “forthwith” ensures that there is no manipulation or interpolation in the FIR.¹¹ If the prosecution is asked to give an explanation for the delay in the dispatch of a copy of the FIR, it ought to do so. ¹² However, if the court is convinced of the prosecution version’s truthfulness and trustworthiness of the witnesses, the absence of an explanation may not be regarded as detrimental to the prosecution case. It would depend on the facts and circumstances of the case. Rattiram v. State of M.P., (2013) 12 SCC 316.”*

29. *In so far as the present case is concerned, there was no delay in lodging*



the FIR. Hence the question of its manipulation does not arise. Additionally, the officer in charge of the police station, PW-21 Surender Singh was not asked any question about the delay in sending the special report to the Magistrate. An explanation was, however, sought from the investigating officer PW-25 Rajinder Parik who tersely responded by saying that it was not his duty to send the special report to the court (or the Magistrate). In the absence of any question having been asked of the officer who could have given an answer, namely, the officer in charge of the police station, no adverse inference can be drawn against the prosecution in this regard, nor can it be held that the delay in receipt of the special report by the Magistrate is fatal to the case of the prosecution. This is apart from the consistent evidence of the eye witnesses, which we shall advert to a little later.”

40. Much stress has been given over genesis of the occurrence and in likewise manner, motive so assigned by the prosecution has also been challenged on the score that dispute over showing of thumb (tesua) has been developed. First of all, it is

apparent from the evidence of PW-8, Para-9 and 11 that PW-3 and PW-4 have not spoken before him regarding showing of thumb (tesua). During course of their statement, however, all the material witnesses i.e. PW-2, PW-3 have spoken over the threatening given by the accused persons, who visited shop at 4.00p.m., and were declined to be offered Fulauri-kachri. Therefore, accused persons have got grievance on that very score. However, attention of PW-2, informant has not been drawn up relating to fard-bayan, earliest version and in likewise manner, her attention has not been drawn up over further statement. Under such eventuality, it could not be said that prosecution has deviated from earlier version. Furthermore, motive always happens to be within the mind of accused which sometimes got exposed sometimes may not. Moreover, the theme of motive looses its sanctity whenever there happens to be presence of eye witness. In *Inder Singh and others vs. State of Rajasthan reported in (2015)2 SCC 734*, it has been held:-

“19.....
.....
.....
Some argument was advanced on there being lack of any clear motive but that is not at all necessary or material when the offences have been proved by clear and cogent evidence including eye-witnesses.”

41. In ***Sanjeev vs. State of Haryana reported in (2015) 4***

SCC 387, it has been held:-

“15. On behalf of the appellant it is submitted that there was no motive on the part of the appellant to commit murder of Raj Pal, as such, in absence of motive, it cannot be said that it was only the appellant who could have committed the crime.

16. It is settled principle of law that, to establish commission of murder by an accused, motive is not required to be proved. Motive is something which prompts a man to form an intention. The intention can be formed even at the place of incident at the time of commission of crime. It is only either intention or knowledge on the part of the accused which is required to be seen in respect of the offence of culpable homicide. In order to read either intention or knowledge, the courts have to examine the circumstances, as there cannot be any direct evidence as to the state of mind of the accused.”

42. In ***Praful Sudhakar Parab vs. State of Maharashtra reported in 2016 (2) B.B.C.J. 557 (SC)***, it has been held:-



“16. One of the submissions which has been raised by the learned amicus curiae is that the prosecution failed to prove any motive. It is contended that the evidence which was led including the recovery of bunch of keys from guardroom was with a view to point out that he wanted to commit theft of the cash laying in the office but no evidence was led by the prosecution to prove that how much cash were there in the pay office. Motive for committing a crime is something which is hidden in the mind of accused and it has been held by this Court that it is an impossible task for the prosecution to prove what precisely have impelled the murderer to kill a particular person. This Court in [Ravinder Kumar and another vs State Of Punjab](#), 2001 (7) SCC 690, has laid down following in paragraph 18:

“18.....It is generally an impossible task for the prosecution to prove what precisely would have impelled the murderers to kill a particular person. All that prosecution in many cases could point to is the possible mental element which could have been the cause for the murder. In this connection we

deem it useful to refer to the observations of this Court in *State of Himachal Pradesh vs. Jeet Singh* {1999 (4) SCC 370}:

"No doubt it is a sound principle to remember that every criminal act was done with a motive but its corollary is not that no criminal offence would have been committed if the prosecution has failed to prove the precise motive of the accused to commit it. When the prosecution succeeded in showing the possibility of some ire for the accused towards the victim, the inability to further put on record the manner in which such ire would have swelled up in the mind of the offender to such a degree as to impel him to commit the offence cannot be construed as a fatal weakness of the prosecution. It is almost an impossibility for the prosecution to unravel the full dimension of the mental disposition of an offender towards the person whom he offended."

43. Coming to score of acceptability of evidence of related witness, it has conclusively been held that these are not the ground to discard their reliable testimony. Furthermore, in the

background of absence of evidence that they are inimical to the accused and have interest to implicate them, it looks highly improbable to give a passage to real assailant and instead thereof, will falsely implicate the accused. In ***Gurjit Singh @ Gora and another vs. State of Haryana reported in (2015) 4 SCC 380***, it has been held:-

“17.the High Court disagreed with the trial Court and held that there is no reason to disbelieve the statement of Mander Singh, the brother of the deceased and Sukhwinder Kaur, the widow, only because they were near relations of the deceased. It is settled law, that the statement of a relative of the deceased cannot be discarded merely on the ground that he or she is an interested party. In Anwar Ali v. State of U.P., (2011) 15 SCC 360, this Court rightly observed that once the prosecution has been able to prove its case by leading admissible and cogent evidence with reference to statements of the witnesses, the same cannot be brushed aside merely on the ground that the witnesses are relatives of the deceased. In Kartik Malhar v. State of Bihar, (1996) 1 SCC 614, this Court held that even

“ a close relative who is a natural witness cannot be regarded as an interested witness. The term "interested" postulates that the witness must have some direct interest in having the accused somehow or the other convicted for some animus or for some other reason.”

More recently, this principle was upheld in Ashok Rai v. State of U.P., (2014) 5 SCC 713, whereby this Court clearly stated that the evidence of interested witnesses is not infirm. The High Court has also disagreed with the Trial Court that the fight took place at the spur of the moment and the accused had not conspired with each other to commit the crime, since there was no evidence to that effect.”

44. Contradiction and inconsistencies, exaggeration, embellishments as pointed out by the learned counsel for the appellant persisting in the evidence of PWs compelling umbrage of its admissibility, reliability, trustworthiness, credibility, whereupon are fit to be rejected. In likewise manner, non-examination of independent witnesses along with the fact that whoever been examined, are only family members, will really axed upon prosecution version.

45. In *State of U.P. vs. Naresh and others reported in (2011) 4 SCC 324*, it has been held:-

“28. The High Court disbelieved both the witnesses Subedar (PW.1) and Balak Ram (PW.5) as being closely related to the deceased and for not examining any independent witnesses. In a case like this, it may be difficult for the prosecution to procure an independent witness, wherein the accused had killed one person at the spot and seriously injured the other. The independent witness may not muster the courage to come forward and depose against such accused.

29. A mere relationship cannot be a factor to affect credibility of a witness. Evidence of a witness cannot be discarded solely on the ground of his relationship with the victim of the offence. The plea relating to relatives' evidence remains without any substance in case the evidence has credence and it can be relied upon. In such a case the defence has to lay foundation if plea of false implication is made and the Court has to analyse the



evidence of related witnesses carefully to find out whether it is cogent and credible. [Vide Jarnail Singh (supra), Vishnu & Ors. v. State of Rajasthan, (2009) 10 SCC 477; and Balraje @ Trimbak (supra)].

30. *In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about the truthfulness of the witness and other witnesses also make material improvement while deposing in the court, such evidence cannot be safe to rely upon. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be*

rejected in its entirety. The court has to form its opinion about the credibility of the witness and record a finding as to whether his deposition inspires confidence.

"9. Exaggerations per se do not render the evidence brittle. But it can be one of the factors to test credibility of the prosecution version, when the entire evidence is put in a crucible for being tested on the touchstone of credibility." Therefore, mere marginal variations in the statements of a witness cannot be dubbed as improvements as the same may be elaborations of the statement made by the witness earlier. The omissions which amount to contradictions in material particulars i.e. go to the root of the case/materially affect the trial or core of the prosecution's case, render the testimony of the witness liable to be discredited. [Vide: State Represented by Inspector of Police v. Saravanan & Anr., (2008) 17 SCC 587, Arumugam v. State (2008) 15 SCC 590, Mahendra Pratap Singh v. State of U.P. ((2009)11 SCC 334 and Sunil Kumar

Sambhudayal Gupta (Dr.) v. State of Maharashtra (2010) 13 SCC 657].”

46. Now, coming to the evidence of PWs in order to scrutinize whether they stood to the test of an eye witness of occurrence. First of all, their status have to be taken into consideration, being rustic one. In ***Sukhwinder Singh vs. State of Punjab reported in 2014 CRI.L.J. Page-446***, it has been held:-

“9.They are rustic witnesses. Their evidence must be read bearing their simple background in mind.....”

47. In ***Govindaraju vs. State of Karnataka reported in (2009) 14 SCC 236***, it has been held:-

“27. The High Court has appreciated the evidence very deeply and in our opinion, the Sessions Judge had gravely erred in not accepting the evidence of PW 1 without any justifiable reason. It is a basic principle that the evidence of witness has to be appreciated as a whole, when the evidence is of an ordinary witness, who is not much educated and comes from a poor strata of society not having the advantage of education. The court has to keep in mind all these aspects. The witness is not

expected to remember every small thing, more particularly when he faces the shock of the untimely death of his near relative.”

48. From cross-examination of PW-2, it is evident that she has not been cross-examined on the factum of occurrence. At the other end, it is evident that she was only cross-examined on surrounding circumstances which, after minute observation is found not affecting her credibility because of non-examination of all material aspect, save and except that I.O. had seized blood, cloth, utensils or which seizure list was prepared whereupon she had put her thumb impression. PW-3 has also not been cross-examined on the score of occurrence like PW-2. In Para-5, attention has been drawn towards her previous statement that she had stated before the police that accused had taken out pistol and shot at her father, but same happens to be uncorroborated as the said question was not at all confronted to PW-8, the I.O. and so, that part of evidence, being material one, is found unshaken. PW-4 had also not been cross-examined on the factum of manner of occurrence. However, some sort of inconsistency is found in consonance with inquest report over cloth having been worn by the deceased. Furthermore, he had stated that on account of night, he is not in a position to say whether I.O. had seized blood. Further, divulging that he had sustain burn injury from smoke which was shown to I.O. Evidence of the PW-3 and PW-4 should be

seen in the background of their age at the time of occurrence as well as two years interval in getting their evidence.

49. In *S. Godindaraju vs. State of Karnataka reported in (2013) 15 SCC 315*, it has been held:-

“23. It is well settled legal proposition that while appreciating the evidence, the court has to take into consideration whether the contradictions/omissions were of such magnitude so as to materially affect the trial. Minor contradictions, inconsistencies, embellishments or improvements in relation to trivial matters, which do not effect the core of the case of the prosecution, must not be made a ground for rejection of evidence in its entirety. The trial court, after going through the entire evidence available, must form an opinion about the credibility of the witnesses, and the appellate court in the normal course of action, would not be justified in reviewing the same, without providing justifiable reasons for doing so. Where the omission(s) amount to a contradiction, creating a serious doubt regarding the truthfulness of a witness, and the other witnesses also make material

improvements before the court in order to make the evidence acceptable, it would not be safe to rely upon such evidence. The discrepancies in the evidence of eyewitnesses, if found not to be minor in nature, may be a ground for disbelieving and discrediting their evidence. In such circumstances, the witnesses may not inspire confidence and if their evidence is found to be in conflict and contradiction with other evidence available or with a statement that has already been recorded, then in such a case, it cannot be held that the prosecution has proved its case beyond reasonable doubt."

50. While challenging the reliability of evidence of PW-3 and PW-4, on the basis of their non-presence in the fard-bayan as well as during course of their evidence, they have not shown presence of other. So far non-presence of name of witness in the fard-bayan is concerned, it is not the legal criteria to discard evidence of those witnesses who shown themselves to be an eye witness to occurrence, because of the fact that for valid F.I.R. presence of names of witnesses therein is not a sine qua non. In ***State of M.P. v. Dharkole @ Govind Singh and others reported in (2004) 13 SCC 308***, it has been

observed:-

“7. A bare perusal of the judgment of the High Court shows that it has disposed of the appeal in a rather casual manner. Most of the conclusions arrived at by the High Court are per se not on sound footing. The appellate Court will not abjure its duty to prevent miscarriage of justice by interfering where interference is imperative. Where doubt is based on irrelevant grounds or where the Court allows itself to be deflected by red herrings drawn across the track, or where the evidence accepted by the Trial Court is rejected by the High Court after a perfunctory consideration or where the baneful approach of the Court has resulted in vital and crucial evidence being ignored or for any such adequate reason, the Court should feel obliged to secure the ends of justice, to appease the judicial conscience, as it were. The High Court has noted that the names of witnesses do not appear in the first information report. That by itself cannot be a ground to doubt their evidence as noted by this Court in Bhagwan Singh and Ors. v. State of M.P. (2002) 4 SCC 85

Chittar Lal v. State of Rajasthan: 2003 AIR SCW 3466) and State of Madhya Pradesh v. Man Singh and Ors. (2003) 6 Supreme 202. There is no requirement of mentioning the names of all witnesses in the first information report."

51. The evidence of the witnesses is to be taken into consideration in its totality. During course of such exercise, it is evident that they are consistent with regard to the appellant being the assailant, who caused murder of the deceased by way of shooting and which is found corroborated with the post mortem report.

52. On the factum of unnatural conduct of witness, it has been submitted that none of the PWs had stated that they tried to save the deceased, they have gone near the deceased, took pain to give any kind of help. Apart from aforesaid deficiencies, the conduct of PW-2, wife, it was expected to wail after grappling body of the deceased, had there been occurrence, as alleged committed in their presence. So, there was unnatural conduct at their end, and if take together with the other mitigating circumstances, it is crystal clear that they could not be an eye witness to occurrence. To substantiate the same, relied upon **(1991) 5 SCC 188** as well as **A.I.R. 1993 SC 1469**.

53. In order to appreciate the proposition of law as referred on behalf of appellant, it is evident that facts of the case of

both the cases reveal that there was cross-examination at the end of accused wherefrom conduct of wife was exposed, but so far present case is concerned, no cross-examination was on that score. So, Court would not imagine a sequence which never been flashed, to discard testimony of a witness.

54. In *Gian Chand and others vs. State of Haryana reported in 2013 (4) P.L.J.R. 7 (SC)*, it has been held:-

“11. The effect of not cross-examining a witness on a particular fact/circumstance has been dealt with and explained by this Court in Laxmibai (Dead) Thr. L.Rs. & Anr. v. Bhagwanthuva (Dead) Thr. L.Rs. & Ors., AIR 2013 SC 1204 observing as under:

“31. Furthermore, there cannot be any dispute with respect to the settled legal proposition, that if a party wishes to raise any doubt as regards the correctness of the statement of a witness, the said witness must be given an opportunity to explain his statement by drawing his attention to that part of it, which has been objected to by the other party, as being untrue. Without this, it is not possible to impeach his credibility. Such a law has been advanced in view of



the statutory provisions enshrined in [Section 138](#) of the Evidence Act, 1872, which enable the opposite party to cross-examine a witness as regards information tendered in evidence by him during his initial examination in chief, and the scope of this provision stands enlarged by [Section 146](#) of the Evidence Act, which permits a witness to be questioned, inter-alia, in order to test his veracity. Thereafter, the unchallenged part of his evidence is to be relied upon, for the reason that it is impossible for the witness to explain or elaborate upon any doubts as regards the same, in the absence of questions put to him with respect to the circumstances which indicate that the version of events provided by him, is not fit to be believed, and the witness himself, is unworthy of credit. Thus, if a party intends to impeach a witness, he must provide adequate opportunity to the witness in the witness box, to give a full and proper explanation. The same is essential to ensure fair play and fairness in dealing with witnesses.” (Emphasis supplied)

(See also: [Ravinder Kumar Sharma v.](#)

State of Assam & Ors., AIR 1999 SC 3571; *Ghasita Sahu v. State of Madhya Pradesh*, AIR 2008 SC 1425; and *Rohtash Kumar v. State of Haryana*, JT 2013 (8) SC 181)

12. The defence did not put any question to the Investigating Officer in his cross-examination in respect of missing chits from the bags containing the case property/contraband articles. Thus, no grievance could be raised by the appellants in this regard.”

55. Same view has again been followed in *Gangabhavani vs. Rayapati Venkat Reddy and others reported in 2013 CRI.L.J. 4618:-*

“18. Thus, it becomes crystal clear that the defence cannot rely on nor can the court base its finding on a particular fact or issue on which the witness has not made any statement in his examination-in- chief and the defence has not cross examined him on the said aspect of the matter.”

56. In *Foulmeli and another vs. State of Tamil Nadu reported in 2014 Cr.L.J. 3240*, the Hon’ble Supreme Court reiterated the same.

57. Evidence of DWs have to be seen in the background of answer having been given by the appellant during course of recording of his statement. From perusal of the same, it is apparent that he had taken plea of alibi, though DW-1 and DW-2 have been examined on that score. From perusal of their evidence, it is evident that they were examined in casual way and that happens to be reason behind having their evidence without any weightage.

58. Acquittal of co-accused will not give any legal right to the convict to be acquitted, once evidence against him is found clinching one. In ***Vutukuru Lakshmaiah v. State of Andhra Pradesh reported in (2015) 11 SCC 102***, it has been held:-

“23. At this juncture, it is worthy to note that the High Court has acquitted A-4, A-8 and A-9 on the foundation that they have been falsely implicated. Learned senior counsel for the appellants has contended that when the appellate court had acquitted the said accused persons, there was no warrant to sustain the conviction of other accused persons. On a perusal of the judgment of appellate court, we find that the judgment of acquittal has been recorded on the score that the names of A-8 and A-9 do not find mention in the evidence of PWs 1 to 3. On a similar basis, A-4 has been

acquitted. Suffice to mention here because the High Court has acquitted A-4, A-8 and A-9, that would not be a ground to discard the otherwise reliable dying declaration, for the evidence in entirety vividly show the involvement of the appellant-accused.”

59. After giving thoughtful consideration to the facts and circumstances emerging out from the record, it is found and held that prosecution has succeeded in proving its case beyond all reasonable doubt. Consequent thereupon, appeal sans merit and is dismissed. Appellant is under custody, which he will continue till saturation of the quantum of sentence inflicted against him by the learned lower Court.

(Samarendra Pratap Singh, J)

(Aditya Kumar Trivedi, J)

Vikash/-

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