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HIGH COURT OF JUDICATURE AT ALLAHABAD
CRIMINAL APPEAL No. - 2417 of 1984

Kammu and 11 others

.....Appellant(s)

Versus

State of U.P.

.....Respondent(s)

Counsel for Appellant(s)	: I.M. Khan
Counsel for Respondent(s)	: A.G.A.

Court No. - 43

HON'BLE SIDDHARTH, J.
HON'BLE VINAI KUMAR DWIVEDI, J.

(Delivered by Hon'ble Vinai Kumar Dwivedi, J.)

1. Heard Mr. I.M. Khan, learned counsel for the surviving appellants, Mr. G.N. Kanaujiya, learned A.G.A.-I for the State/opposite party and perused the record.
2. This criminal appeal has been preferred by accused-appellants, Kammu, Baddu, Mohd. Ali @ Mohd. Dhol, Shafiullah, Zafar, Ghulam, Hidayatullah, Aslam, Azizullah, Manzar Ali, Atiqullah and Babu @ Munna against the judgment and order dated 31.08.1984 of learned Trial Court passed in Sessions Trial No. 619 of 1981 (State v. Kammu and others) connected with Sessions Trial No. 284 of 1982 (State v. Kammu and others), Sessions Trial No. 284 of 1983 (State v. Babu @ Munna)

and Sessions Trial No. 341 of 1982 (State v. Atiqullah) arising out of one Case Crime No. 143 of 1981, under Sections 148, 302, 379, 404 IPC, Police Station Khakhreru, District Fatehpur.

3. Brief facts of the case are that informant Riyaz Ahmad (PW-1) got scribed the written report, Exhibit Ka-1, by Hamid Ali Khan and by that lodged an F.I.R., Exhibit Ka-2, on 19.09.1981 at 09:30 P.M. against Kammu, Baddu, Mohd. Ali @ Mohd. Dhol, Shafiullah, Zafar, Hidayatullah, Ghulam, Saif Ullah, Aslam, Azizullah, Manzar Ali, Atiqullah and Babu @ Munna alleging inter alia that “this morning my son Sarfaraz had gone from home carrying his tractor, his licensed gun and a belt of cartridges for ploughing the field of my relative Shaukat Ali at Singwahar, which is situated near village Kot. Along with my son, Moid Ahmad, son of Syef, resident of village Shahnagar, was also on the tractor. Shaukat Ali was getting his field ploughed by my son with the tractor, then Shabbir son of Siddique, resident of village Shahnagar, who had gone for hunting carrying his licensed double-barrel gun and a belt of cartridges, came there and sat with Moid Ahmad and Shaukat on the southern boundary (medh) of the field. At about 05:00 p.m., the accused Kammu son of Najabtayar Khan, resident of village Kot, carrying his licensed double-barrel gun; Baddu son of Najabtayar Khan, carrying his licensed rifle; Mohd. Ali @ Mohd. Dhol, who is police pensioner, carrying his licensed 12-bore gun; Shafiullah son of Najabtayar Khan; Zafar son of Hasmat; Ghulam son of Sarafal; Hidayatullah alias Hiddu son of Ahmadullah; Saifullah son of Ahmadullah, carrying a stolen gun in their hands; Aslam son of Islam, resident of Badanmau; Azizullah son of Nasrullah, resident of Shipuri; Manzar Ali son of Rahmat Ali, resident of Nasirpur; Atidullah son of Rafiqullah, resident of Shahnagar, Police Station Khakhreru, carrying his licensed gun; and Babu @ Munna, resident of Mohammadpur, Police Station Thariyav, presently resident of village Ajrauli, each carrying stolen guns in their hands, came from the side of village Kot and greeted Moid Ahmad and Shabbir, who were sitting on the boundary (medh) of the field. Thereafter, accused Babu @ Munna very quietly took double-barrel gun of Shabbir and belt of

cartridges into his possession. In the meantime, accused Kammu exhorted the other accused persons, saying that "Sarfaraz must be killed today and he should not be allowed to escape alive. This hurdle should also be removed." As soon as accused Kammu raised this exhortation, my son got down from the tractor and, taking his gun and belt of cartridges, attempted to run away and save himself. Thereupon, all the accused persons, including Kammu, fired at my son with their guns and rifle with the intention of causing his death. As a result of the firing by the accused persons, my son sustained fire-arm injuries on side of the tractor, fell on the boundary of the field and died. My son sustained injuries on the right side of his chest, in the middle of his chest, on his back below the waist, and on the wrist of his right hand. The above-mentioned witnesses present at the spot with my son raised an alarm and shouted, whereupon, hearing the cries and the sound of gunfire, Hafeez son of Abdul Aziz, resident of Oreha, whose field is situated nearby, and Ram Asrath son of Maiku Kunwar, resident of Maqsudanpur Mujra, who was cutting fodder in the same field, came running to the spot and they too witnessed the occurrence and challenged the accused persons. Thereafter, Hidayatullah @ Hiddu took away my son's licensed gun and belt of cartridges lying near him and also took Rs. 500 from his pocket, after which the accused persons proceeded towards village Kot. The bullets fired by the accused persons struck in the three wheels of tyres of the tractor, which became punctured. Accused persons are the associates and members of the gang of Atahar Ahmad son of Nisar Ahmad of village Rahmatpur and on the advice and consultation of Atahar Ahmad, the accused persons committed the murder of my son today. I had been making complaints against the atrocities, hooliganism and illegal acts of the aforesaid accused persons, due to which they bore an internal grudge against me and my son, and because of the said enmity, the aforesaid accused persons found an opportunity and killed my son. When I received information of this incident at my house from Moid Ahmad, I immediately rushed to the spot along with the villagers and came to know about the occurrence."

4. On the basis of above written report, Exhibit Ka-1, dated 19.09.1981, an F.I.R., Exhibit Ka-2, was registered by Head Moharrir Prem Chandra Dubey (PW-4) at Police Station Khakhreru on 19.09.1981 at 21:30 hours against accused persons, namely, Kammu, Baddu, Mohd. Ali @ Mohd. Dhol, Shafiullah, Zafar, Ghulam, Hidayatullah, Aslam, Azizullah, Manzar Ali, Atiqullah and Babu @ Munna under Sections 147, 148, 149, 302, 406, 404 IPC. After registration of the F.I.R., Exhibit Ka-2, investigation of the case was handed over to S.I. Lal Singh Chandel (PW-6). The Investigating Officer Lal Singh Chandel (PW-6) collected papers of the F.I.R. and G.D. of the case and proceeded to the place of occurrence in the night. On 20.09.1981 in the morning, he prepared *panchayatnama* of the deceased, Sarfaraz, Exhibit Ka-5, in his writing and signatures. He prepared the papers of challan *lash*, Exhibit Ka-6, report to C.M.O., Exhibit Ka-7, report to R.I., Exhibit Ka-8, photo *lash*, Exhibit Ka-9 and sample of the seal, Exhibit Ka-10. Thereafter, he sent the dead body of the deceased for post mortem examination by Constables Amrit Lal and Shivman Singh. The Investigating Officer also took bloodstained clothes of the deceased from his body and marked the same as Exhibit Ka-11. The Investigating Officer also took from the dead body of the deceased, one pair shoes of nylon in his possession and prepared its memo as Exhibit Ka-12. The Investigating Officer also took from the place of occurrence the simple and bloodstained soil and prepared its memo as Exhibit Ka-13. The Investigating Officer Lal Singh Chandel (PW-6) has recorded the statements of the informant and other witnesses under Section 161 Cr.P.C. He also prepared the site plan of the place of occurrence as Exhibit Ka-14 on the pointing out of the witnesses. The Investigating Officer tried to arrest the accused, however, he was unsuccessful in arresting them even after issuance of the process under Section 82/83 Cr.P.C. against them. Thereafter, on 10.10.1981, after completing the investigation, he submitted charge-sheet, Exhibit Ka-15, in the court concerned against the accused persons, in which eight accused persons were absconding.

5. Dr. V.K. Tripathi (PW-5) has conducted the post mortem examination on the dead body of the deceased, Sarfaraz Ahmad, on 21.09.1981 and prepared the post mortem report, Exhibit Ka-4. According to the post mortem report, Exhibit Ka-4, which was prepared by Dr. V.K. Tripathi (PW-5), following ante-mortem injuries were found on the body of the deceased, Sarfaraz :-

“(i) Gun shot wound of entry 1/2” x 1/4” x chest cavity deep on the front side chest over the sternum 4” below the suprasternal notch. Margins lacerated and inverted. No blackening and tattooing.

(ii) Gun shot wound of exit 4” x 3 “ x chest cavity deep with margins lacerated and everted on the right side chest adjacent to axilla.

(iii) Gun shot wound of entry 1/2” x 1/2” x abdominal and chest cavity deep on the upper part left iliac area of back 2” lateral to midline. Margins lacerated and everted. No blackening and tattooing.

Course :- (A) Bullet entering through injury no. 1, fractured sternum entered in right chest cavity lacerating lungs, fracturing right third rib, passed out through injury no. 2.

(B) Bullet entering through injury no. 3, fracturing left ilium lacerating abdominal viscera diaphragm left lung, heart fracturing left second rib, lodged in pectorial muscle of left chest. Thus, four small and one big metallic piece found lodged,, taken out sealed in an envelope and sent to S.P. through proper channel.

(iv) Multiple abrasions in an area of 2” x 2” with one penetrating wound 1/2” x 1/4” x 1” deep on the flexor aspect of lower 1/4th part of right forearm.”

6. On internal examination of the dead body of the deceased, Sarfaraz, in the opinion of Dr. V.K. Tripathi (PW-5), the cause of death of the deceased is shock and haemorrhage as a result of gunshot injuries.

7. Since the case was exclusively triable by the Court of Session, learned Magistrate committed the case to the Court of Session.

8. Charges were framed against the accused-appellants by the learned Trial Court on 30.08.1983 under Sections 148, 302, 379, 404

IPC. The accused-appellants denied from the charges framed against them and claimed trial.

9. To substantiate the charges against the accused-appellants, prosecution adduced informant Riyaz Ahmad (PW-1), Moid Ahmed (PW-2) and Shabbir (PW-3) as witnesses of facts and H.C. Prem Chand Dubey (PW-4), Dr. V.K. Tripathi (PW-5), Lal Singh Chandel (PW-6) and Rahmatullah (PW-7) were adduced as formal witnesses. Apart from the above ocular evidence, prosecution also relied on documentary evidence from Exhibits Ka-1 to Ka-15.

10. Trial Court recorded evidence of the prosecution witnesses. Thereafter, accused-appellants were examined under Section 313 Cr.P.C. In their statements under Section 313 Cr.P.C., all accused have expressed ignorance and no knowledge about the questions put to them under Section 313 Cr.P.C. In addition to this, all accused have also stated that this case was registered against them due to enmity only. All prosecution witnesses have given their evidence against them due to enmity. Accused Hidayatullah has also stated that "I had given applications dated 24.04.1981 and 01.05.1981 against the Inspector of Police Station Khakhreru and also against the informant Riyaz Ahmad, etc. On the basis of this, a case was registered against the Inspector under Section 7." Accused Azizullah has also stated in his statement under Section 313 Cr.P.C. that "he approached MLA Indrajeet. All witnesses of this case are hands of MLA Indrajeet." They have also denied from all charges levelled against them. The accused-appellants adduced Mahendra Pal Singh as DW-1.

11. After recording the evidence of the prosecution and defence, Trial Court has heard the arguments of both the parties. Trial Court has delivered a finding and reasoning of conviction and sentence against the accused persons by the impugned judgment and order dated 31.08.1984. The Trial Court convicted the accused-appellants under Section 148 of the IPC and sentenced them to undergo rigorous imprisonment for one year. The accused-appellants were also convicted under Section 302 read

with Section 149 of the IPC and sentenced to imprisonment for life. Further, they were convicted under Section 379 of the IPC and sentenced to undergo rigorous imprisonment for three years. Lastly, the accused-appellants were convicted under Section 404 of the IPC and sentenced to undergo rigorous imprisonment for three years. All the sentences of the accused-appellants were directed to be run concurrently.

12. Aggrieved by the judgment and order of conviction and sentence dated 31.08.1984, the accused-appellants preferred this criminal appeal before this Court.

13. During pendency of this criminal appeal, appellant nos. 1, 2, 3, 4, 5, 8, 10, 11 and 12, namely, Kammu, Baddu, Mohd. Ali @ Mohd. Dhol, Shafiullah, Zafar, Aslam, Manzar Ali, Atiqullah and Babu @ Munna have died, therefore, the criminal appeal against appellant nos. 1, 2, 3, 4, 5, 8, 10, 11 and 12 stands dismissed as abated. Now, the criminal appeal is being adjudicated only in respect of surviving appellant nos. 6, 7 and 9, namely, Ghulam, Hidayatullah and Azizullah.

14. Learned counsel for surviving accused-appellants, Ghulam, Hidayatullah and Azizullah, has submitted that informant Riyaz Ahmad (PW-1) was at his home at the time of the incident. He is not an eye-witness of the incident. He received information from Moid Ahmad (PW-2). Upon receiving the information about happening of the incident from Moid Ahmad (PW-2), informant Riyaz Ahmad (PW-1) has got scribed the written report, Exhibit Ka-1, by Hamid Ali Khan and lodged the same at Police Station Khakhreru, District Fatehpur. In the evidence of informant Riyaz Ahmad (PW-1), only enmity between the prosecution on the one hand and the accused persons on the other and also among the accused persons themselves have been narrated by Riyaz Ahmad (PW-1), therefore, evidence of Riyaz Ahmad (PW-1) is not reliable and trustworthy in support of the prosecution story. It is also submitted that according to the prosecution, Moid Ahmad (PW-2) and Shabbir (PW-3) are the star eye-witnesses of the prosecution, who were said to be present at the time and place of the incident. However, from perusal of the

evidence, it is apparent on the face of the record that neither Moid Ahmad (PW-2) nor Shabbir (PW-3) were present at the place of occurrence. This fact is clear from the evidence of these witnesses that there are major and material contradictions, exaggeration and concoctions that proved this fact that Moid Ahmad (PW-2) and Shabbir (PW-3) were not present at the time and place of the incident. The prosecution with a view to support and strengthen its case against the accused persons with considerations and afterthoughts projected these two eye-witnesses Moid Ahmad (PW-2) and Shabbir (PW-3) as witnesses of the incident. However, in reality, their evidence in cross-examination have itself belied the truthfulness of their evidence about their presence at the time and place of the incident. The prosecution story has also become doubtful due to the evidence of prosecution witness Rahmatullah (PW-7). From perusal of the statement of Rahmatullah (PW-7), it is clear that prosecution with the help of police wrongly and falsely implicated the accused persons in this case for the alleged crime. It is apparent from the prosecution case that some other persons have killed the deceased, Sarfaraz, by firing upon him, in which he sustained gun-shot injuries. Later, on receiving the information about murder of deceased, Sarfaraz, informant Riyaz Ahmad (PW-1) with Moid Ahmad (PW-2) and Shabbir (PW-3) and also with collusion of the police falsely named and implicated the accused-appellants in this case for commission of the alleged crime. It is also submitted on behalf of the appellants that it is stated by Moid Ahmad (PW-2) and Shabbir (PW-3) that all accused named in the F.I.R. have fired simultaneously with their respective guns upon the deceased, Sarfaraz, but Moid Ahmad (PW-2) and Shabbir (PW-3) have not seen any pellets, bullets or empty cartridges at the place of occurrence. The Investigating Officer Lal Singh Chandel (PW-6) have not seen and found any pellets, bullets and empty cartridges from the place of occurrence, which also makes the prosecution story highly doubtful. Learned Trial Court only on the basis of surmises and conjectures and also on the basis of enmity, which is a double-edged weapon that cuts both sides, has wrongly recorded a

finding against the accused-appellants without any cogent evidence available in this regard and also against the settled principles of law. Learned Trial Court has not appreciated the evidence in this case as available on the record and only on the ground that fact of enmity is tilting in favour of prosecution has held guilty to the accused-appellants in this case. Learned Trial Court has not appreciated the evidence in proper perspective and in legal manner and recorded the finding and reasoning without any cogent and reliable evidence and against the settled principles of law, therefore, due to this reason, criminal appeal of the surviving accused-appellants, Ghulam, Hidayatullah and Azizullah is liable to be allowed and the judgment and order of conviction and sentence dated 31.08.1984 passed by the learned Trial Court is liable to be set aside.

15. Per contra, learned A.G.A. for the State has vehemently opposed the above arguments of learned counsel for the surviving accused-appellants. He has submitted that although informant Riyaz Ahmad (PW-1) is not an eye-witness of the incident, however, from the evidence, facts of enmity and rivalry between the parties are proved and established. Moid Ahmad (PW-2) and Shabbir (PW-3) are the eye-witnesses in this case, who have seen the happening of the incident with their eyes. Before the prosecution witnesses Moid Ahmad (PW-2) and Shabbir (PW-3), happening of the incident occurred and accused-appellants formed an unlawful assembly armed with deadly weapons like guns, legal and illegal, surrounded the deceased, Sarfaraz, and causing riot, killed him by firing on his body. There is no major or material contradictions in the evidence of Moid Ahmad (PW-2) and Shabbir (PW-3). The minor contradictions and omissions are likely to be crept in every evidence of prosecution in every case. Only on this ground, prosecution story could not be doubted as suspicious or doubtful. Learned Trial Court has appreciated the evidence in proper perspective and in a legal manner. The finding and reasoning of the learned Trial Court is based on cogent evidence as available on the record. Learned Trial Court has found ample, reliable and cogent

evidence against the accused-appellants and thereby found that the prosecution was able to prove its case beyond reasonable doubt against the accused-appellants, hence learned Trial Court has recorded a finding and reasoning of conviction and sentence against the accused-appellants. There is no illegality, perversity or any drawbacks in the finding and reasoning of the learned Trial Court, therefore, criminal appeal of the surviving accused-appellants is devoid of merits and therefore, is liable to be rejected.

16. We have heard the arguments of learned counsel for the accused-appellants and also the arguments of learned A.G.A. for the State, gone through the evidence as available on record and also perused the judgment and order of conviction passed by the learned Trial Court.

17. From perusal of the written report, Exhibit Ka-1, and evidence of informant Riyaz Ahmad (PW-1), we find that Riyaz Ahmad (PW-1) was at his house at the time of happening of the incident. He was sitting in the verandah of his house, then Moid Ahmad (PW-2) came to his house and informed him about happening of the incident. Upon receiving the above information as narrated by Moid Ahmad (PW-2), informant Riyaz Ahmad (PW-1) reached at the place of occurrence with his family and villagers and got the written report, Exhibit Ka-1, scribed by Hamid Ali Khan naming all accused persons in the written report and has lodged the same at Police Station Khakhreru, District Fatehpur. From perusal of the statement of informant Riyaz Ahmad (PW-1), it is quite clear that this witness is not an eye-witness of the incident. This witness has only lodged the written report naming all accused persons at Police Station Khakhreru, District Fatehpur.

18. From perusal of the evidence of informant Riyaz Ahmad (PW-1), this fact emerges that there were bitter enmity and rivalry between the prosecution side on the one hand and the accused-appellants on the other. Both sides usually were in habit of making complaints against each other and they never missed any opportunity in making complaints and humiliating each other. From the evidence of Riyaz Ahmad (PW-1),

this fact also emerges from the evidence that both sides were related to each other through old matrimonial relations. It is also revealed that a number of murders had taken place, in which members of one party were witnesses while members of the other party were accused persons in criminal cases against each other. It is also revealed that both parties were involved in several cases against each other, and various criminal proceedings were pending before the Court. Informant Riyaz Ahmad (PW-1) was Village Pradhan for ten years continuously. It is natural that many residents of the village may be supporters and rivals of the Pradhan of the village, therefore, from perusal of the evidence of informant Riyaz Ahmad (PW-1), only the fact of enmity and rivalry between the prosecution side and defence side emerges, however, it is settled principle of law that only on the ground of enmity, no accused person could be held guilty for commission of the heinous crime like murder.

19. Moid Ahmad (PW-2) is an eye-witness of the incident. It is said that this witness was present with deceased, Sarfaraz, when Sarfaraz was ploughing the fields of Shaukat and the incident happened. According to the prosecution, Moid Ahmad (PW-2) witnessed the incident with his own eyes. From perusal of the evidence of Moid Ahmad (PW-2), we find that according to this witness, he had gone with Sarfaraz on his tractor on 19.09.1981 from the morning about 08:30-09:00 A.M. to plough the fields of Shaukat of Singwahar. According to Moid Ahmad (PW-2), Sarfaraz has also taken and carried his licensee gun and belt of cartridges with him when he departed for Singwahar to plough the fields of Shaukat. When Moid Ahmad (PW-2) along with the deceased, Sarfaraz, on his tractor reached at Singwahar at the fields of Shaukat then Shaukat has also reached there and he was empty handed. He further states that Sarfaraz began to plough the fields of Shaukat by tractor and he (PW-2) and Shaukat sat on the boundary (*medh*) of the fields. Then about 04:00 P.M. in the evening from the direction of Kot, accused Kammu with gun, Baddu with rifle, Mohd. Ali @ Mohd. Dhol with gun, Saif with gun, Shafiullah with gun, Zafar with gun, Ghulam with gun, Hidayatullah

with gun, Azizullah with gun, Atiqullah with gun, Manzar with gun, Aslam with gun and Babu @ Munna with gun came at the spot in the fields of Shaukat. According to this witness before coming of the accused persons, Shabbir (PW-3) with this licensee gun and belt of cartridges had also come and sat near him. When accused persons arrived there, then they greeted each other. According to this witness, accused Babu @ Munna had quietly and suddenly took the gun and belt of cartridges from Shabbir (PW-3), then accused Kammu exhorted that Sarfaraz has been found today by chance, so kill him today. Thereafter, this hurdle shall also be removed. According to this witness, Kammu had also said that his father also does politics. On this point, Sarfaraz stopped his tractor and wanted to run away then *“all accused have fired upon him from their weapons. Sarfaraz has received gun-shot injuries. After receiving the injuries, Sarfaraz with his gun and belt of cartridges fell on the ground.”* According to this witness, when hue and cry was made by this witness, then Hameez and Ram Asre have also come. Thereafter, Hiddu @ Hidayatullah took the guns and belt of cartridges from Sarfaraz and also took Rs. 500/- from his pocket. Thereafter, all accused persons have gone towards Kot. After that, according to Moid Ahmad (PW-2), information about the incident was given to the father of Sarfaraz about 4:45-5:00 p.m. From Shahnagar, Adhaiya is situated towards east at a distance of one km. According to this witness, he reached Adhaiya in the morning on the date of incident about 7-7:30 a.m. This witness states that his fields were also to be ploughed. Due to this, he had gone to Adhaiya. This witness also deposed that field of this witness is situated in the riverine lowland (*kachhar*) area of Shahnagar. His fields could be about 4-6 bigha. Sarfaraz had ploughed a few fields measuring about 2–2.5 bighas, and thereafter, he had gone to Singwaha to plough the fields.

20. From the perusal of the statement of Moid Ahmad (PW-2), Sarfaraz has requested him to accompany him to go to Singwaha with him. This witness has also stated that he directly from Shahnagar proceeded to Singwaha and has not gone in any other village. Thus, from the above evidence about reaching at the place of occurrence and at

the house of the deceased, Sarfaraz, at village Adhaiya, two different versions have been stated by this witness. At one place, this witness has stated that he from his home at Shahnagar went to village Adhaiya at the house of Sarfaraz. Informant Riyaz Ahmad (PW-1) has also stated that Moid Ahmad (PW-2) has also went with Sarfaraz on the tractor. At other place, in his deposition, this witness Moid Ahmad (PW-2) has deposed that he is resident of Shahnagar. He clearly stated that *he from Shahnagar directly had gone to Singwahar and never went in any other village*. The above two versions of the statements about reaching at the place of occurrence at Singwahar and at the village Adhaiya of deceased, Moid Ahmad (PW-2) has stated two different and distinct story. That contradictory statements which have been deposed by Moid Ahmad (PW-2) are very material contradictions which create a doubt about the presence of this witness at the place of occurrence. Doubt about the presence of this witness at the place of occurrence is also indicated by the statement of this witness in which he has deposed that he has not given this statement that since morning, fields of Shaukat was being ploughed. If the Investigating Officer has written in my statement that from the early morning, he has gone to the fields of Shaukat and his field was being ploughed, I could not state the reason that how the Investigating Officer has written this fact in my statement. In this way, two different and contrary versions which are material and major contradictions in this regard have been deposed by this witness in his evidence, that creates strong and reasonable doubt about presence of this witness at the place of occurrence. From this, it appears that this witness had not gone with the deceased, Sarfaraz, on his tractor on the date of the incident to Singwahar to plough the fields of Shaukat. After happening of the incident, this witness was projected and produced by the prosecution to support its case. From the testimony of this witness, it is apparent that accused Babu @ Munna, along with the other accused persons, came before Shabbir (PW-3), and they greeted each other. Thereafter, Babu @ Munna came to Shabbir and he quietly took the gun and also snatched the belt of cartridges from him but Shabbir could not

say anything. According to this witness, on the exhortation of accused Kammu, all 12 accused persons fired simultaneously upon the deceased, Sarfaraz.

21. From the perusal of the evidence of Moid Ahmad (PW-2), We find that after accused Babu @ Munna had snatched the gun and belt of cartridges from Shabbir, Shabbir did not demand the return of his gun, because if he had done so, he would have been killed. This witness has also stated that “all the accused persons were abusing us and threatening that they would spare us, but if we gave evidence, we would be killed.” However, this witness has also stated that “I had not told these things to the Investigating Officer. I could not state any reason for this.” According to this witness, he has not seen any pellets, bullets and cartridges lying at the place of occurrence. However, on the point of snatching the gun by accused Babu @ Munna, prosecution witness Shabbir (PW-3) has stated a totally different fact about this. Shabbir (PW-3) has stated that “at the time of firing, I stood up from that place where I was sitting. On making hue and cry by us, accused persons have not threatened to kill us.” The above statement of the other so-called eye-witness, Shabbir (PW-3), regarding the alleged threats and intimidation by the accused persons to kill the witnesses, Moid Ahmad (PW-2) and Shabbir (PW-3), as narrated by Moid Ahmad (PW-2) in his testimony, creates a doubt regarding the veracity of such allegation and renders the same as suspicious and unreliable. Thus, this fact emerged that Moid Ahmad (PW-2) was not present at the place of occurrence when the incident happened and his presence at the place of occurrence is highly doubtful.

22. Prosecution also produced Shabbir (PW-3) as an eye-witness of the incident. From the perusal of the deposition of this witness, we find that he had gone to hunt the francolin bird (*teetar*) by his licensee gun along with the belt of cartridges on the day of the incident towards Kot. According to this witness at 03:30 p.m., he reached at Singwahar then this witness has seen Sarfaraz ploughing the fields of Shaukat by tractor and Moid Ahmad and Shaukat were sitting on the boundary (*medh*) of

the field. This witness has also went and sat near Shaukat. Thereafter, according to this witness, accused persons have come at the place of occurrence. From the perusal of evidence of Shabbir (PW-3), it is revealed that this witness has also stated in the same way and style as has been stated by Moid Ahmad (PW-2) in his evidence. However, from perusal of the deposition of Shabbir (PW-3) and Moid Ahmad (PW-2), one common and same thing is being stated by the two witnesses in the same way and style. Both Moid Ahmad (PW-2) and Shabbir (PW-3) have stated in their evidence that all accused persons have fired simultaneously with their gun and rifle upon Sarfaraz. According to the deposition of these two prosecution witnesses, total 12 accused persons have come at the place of occurrence holding in their hands guns and rifles and all the 12 accused persons simultaneously targetting the deceased, Sarfaraz, at the same point of time fired upon him. In this situation, if 12 accused persons will target and fire simultaneously upon the deceased, Sarfaraz, then in this condition, more than 12 and minimum 12 gun-shot injuries must be present at the body of the deceased, Sarfaraz. However, from the perusal of the evidence of Dr. V.K. Tripathi (PW-5), who conducted the post mortem examination of the deceased, Sarfaraz, and prepared the post mortem report, Exhibit Ka-4, we find that according to the post mortem report, Exhibit Ka-4, only three entry wound of gun-shot injuries are found on the body of the deceased, Sarfaraz, and one injury of exit wound of the gun-shot was found on the dead body of the deceased, Sarfaraz. One injury of abrasion was also found on his body.

23. From the perusal of the post mortem report, Exhibit Ka-4, in reality, only two entry wounds of gun-shot have been found on the dead body of the deceased, Sarfaraz, and one injury of exit of the gun-shot wound are found. According to the prosecution story, three tyres of the tractor were also punctured. Even if, for the sake of argument, it is assumed that three bullets fired by the accused persons struck the three tyres of the tractor, it would appear that only five shots were fired by the culprits. However, it is also amazing fact that 12 accused persons fired

simultaneously targetting the deceased, Sarfaraz, then in this mass firing by 12 persons, there was no pellets, bullets, tiklis or cartridge lying found at the place of occurrence. Moid Ahmad (PW-2) has also clearly stated that there he has not seen any pellets, bullets, tiklis or cartridge lying at the place of occurrence. This fact also creates a reasonable doubt about presence of prosecution witnesses at the place of occurrence. In this way, medical evidence does not found support from the oral evidence of Moid Ahmad (PW-2) and Shabbir (PW-3). Thus, there is a major and material contradictions between the medical and ocular evidence about this fact. From this major and material contradictions and variation between the medical and ocular evidence of Moid Ahmad (PW-2) and Shabbir (PW-3), prosecution story also becomes doubtful and suspicious.

24. On the point of discrepancies between the medical and ocular evidence, Hon'ble Supreme Court in the case of **Khambam Raja Reddy and another v. Public Prosecutor, High Court of Andhra Pradesh, (2006) 11 SCC 239** has held in para 19 that;

“19. The present case is an example of contradiction between the ocular evidence and the medical evidence, where the medical evidence is not borne out by the ocular evidence. In such a situation it was suggested on behalf of the appellants on the authority of a decision of this Court in State of M.P. v. Dharkole, (2004) 13 SCC 308 where the medical evidence was at variance with the ocular evidence, the testimony of the eye-witness should be decided independently and if found trustworthy, the same could not be discarded merely because it is at variance with medical opinion. While there can be no difference of opinion with the principle explained in the aforesaid decision, the application thereof will depend on whether the story as made out by the prosecution is trustworthy and can be related to the injuries suffered by the victim in the manner as sought to be projected. If the ocular testimony is such that it is not possible to relate the injuries with the circumstances in which they were said to have been inflicted, the court has the discretion not to accept the ocular evidence. The principle enunciated in Dharkole case may be

applied in an appropriate case, but each case has to be determined having regard to its own set of facts.”

25. Thus, in the light of the legal principles as enunciated by Hon’ble Supreme Court in the case of **Khambam Raja Reddy (supra)**, it becomes clear that in case of difference and discrepancy between the medical and ocular evidence, if on appreciation of the evidence of ocular evidence, evidence of the prosecution witnesses inspires confidence, then in this condition, ocular evidence of eye-witnesses could be accepted in support of the prosecution story. However, in case, testimony of ocular witnesses are found suspicious and surrounded with doubtful circumstances and facts, then ocular evidence of the prosecution could not be believed in support of the prosecution case. In the present case, as discussed above, upon perusal of the evidence of the prosecution witnesses Moid Ahmad (PW-2) and Shabbir (PW-3), it appears that all the accused persons simultaneously targeted and fired at the deceased, Sarfaraz. However, as we find, only three gunshot injuries were found on the body of the deceased, Sarfaraz. This fact creates major and material contradictions as we have discussed above, presence of the prosecution witnesses Moid Ahmad (PW-2) and Shabbir (PW-3) at the time and place of the incident makes the prosecution story highly doubtful. In this circumstances and when we see the evidence of the prosecution witness in totality, we find that evidence of the prosecution witnesses Moid Ahmad (PW-2) and Shabbir (PW-3) are not reliable and believable and do not inspire confidence. Due to this reason, evidence of Moid Ahmad (PW-2) and Shabbir (PW-3) are not reliable and believable in support of the prosecution case.

26. From perusal of the evidence of Shabbir (PW-3), it is revealed that there were also bitter enmity between the prosecution witness Shabbir and accused persons. On one side, Shabbir was a witness in several cases against the defence, and on the other side, many of the accused persons are also witnesses in the case against Shabbir (PW-3). There were also bitter enmity with regard to the license of the fair price shop. From the evidence of this witness, it is also revealed that each side were in habit of

instigating and implicating each other in cases. There were different gangs on the prosecution side as well as on the defence side. Each party was in the habit of implicating the other in cases wherever they found any opportunity to do so. In this way, we find that informant Riyaz Ahmad (PW-1), Moid Ahmad (PW-2) and Shabbir (PW-3) have also stated elaborately about the enmity and rivalry between the prosecution on the one hand and the defence/accused persons on the other. However, it is also a settled principle of law that only on the ground of enmity and rivalry and on suspicion, without cogent and reliable evidence, no accused person could be held guilty for commission of any heinous crime like murder. Enmity is one thing, and cogent evidence is another. For the conviction of a person in respect of a heinous crime like murder, cogent and reliable evidence beyond reasonable doubt must be available on the record to hold the persons arrayed as accused guilty of the commission of the crime. On the ground of enmity, no person could be convicted for commission of the heinous crime like murder. Hon'ble Supreme Court in the case of **Sushil and others v. State of Uttar Pradesh, 1995 SSC (Cri.) 388** and in the case of **State of Punjab v. Sucha Singh, (2003) 3 SCC 153**, has held that;

“enmity is a double edged weapon which cut both ways. It may constitute motive for the commission of the crime and at the same time it may also provide a motive for false implication.”

27. It is also a settled principle of law that suspicion and doubt, however, so grave and strong, could not take the place of proof and evidence. Meaning thereby, on the ground of doubt and suspicion, no accused person could be convicted for commission of the crime. For conviction of any person for commission of any crime against them, cogent evidence beyond reasonable doubt either in the form of direct evidence or in the form of circumstantial evidence must be present on the record of the file. However, in any circumstance, suspicion and doubt could not become a basis in the place of evidence for conviction of any accused person for commission of the alleged crime. Hon'ble Supreme

Court in the case of **Sujit Biswas v. State of Assam, (2013) 12 SCC 406**

has also held in para 13 that;

“13. Suspicion, however grave it may be, cannot take the place of proof, and there is a large difference between something that “may be” proved, and something that “will be proved”. In a criminal trial, suspicion no matter how strong, cannot and must not be permitted to take place of proof. This is for the reason that the mental distance between “may be” and “must be” is quite large, and divides vague conjectures from sure conclusions. In a criminal case, the court has a duty to ensure that mere conjectures or suspicion do not take the place of legal proof. The large distance between “may be” true and “must be” true, must be covered by way of clear, cogent and unimpeachable evidence produced by the prosecution, before an accused is condemned as a convict, and the basic and golden rule must be applied. In such cases, while keeping in mind the distance between “may be” true and “must be” true, the court must maintain the vital distance between mere conjectures and sure conclusions to be arrived at, on the touchstone of dispassionate judicial scrutiny, based upon a complete and comprehensive appreciation of all features of the case, as well as the quality and credibility of the evidence brought on record. The court must ensure, that miscarriage of justice is avoided, and if the facts and circumstances of a case so demand, then the benefit of doubt must be given to the accused, keeping in mind that a reasonable doubt is not an imaginary, trivial or a merely probable doubt, but a fair doubt that is based upon reason and common sense.”

28. In criminal matters involving heinous crime like murder, a Court can held guilty to accused persons for commission of the alleged crime. The prosecution may prove its case by adducing direct evidence, circumstantial evidence, or incriminating articles, materials, objects, or other evidence connecting the accused with the commission of the crime. A conviction can be recorded only if such evidence establishes the guilt of the accused beyond reasonable doubt. Conversely, if the prosecution fails to adduce direct evidence, circumstantial evidence, or any incriminating material, object, or other evidence linking the accused to the crime beyond reasonable doubt, the Court cannot record a finding of

guilt or convict the accused. In other words, if the prosecution is unsuccessful to prove its case either by direct evidence or ocular evidence or by circumstantial evidence, then any accused person could not be held guilty and convicted for the alleged crime against them. In every situation, prosecution is legally duty-bound to establish and prove its case beyond reasonable doubt by their evidence which may be direct evidence or circumstantial evidence.

29. From the perusal of the evidence of Shabbir (PW-3), it appears that, despite the accused Babu @ Munna having allegedly snatched his licensed gun and belt of cartridges, he neither uttered a single word nor made any attempt to recover his licensed gun and belt of cartridges from the possession of the accused Babu @ Munna. Even Shabbir (PW-3) has not lodged any F.I.R. against the accused Babu @ Munna about snatching of his licensee gun and belt of cartridges by the accused Babu @ Munna. This fact was accepted by Shabbir (PW-3) in his cross-examination that "I have not lodged any report in respect of snatching of my gun. All the things have been written in the written report of Riyaz Ahmad." From the perusal of the evidence of this witness, it is revealed that Riyaz Ahmad (PW-1) has got scribed the written report before this witness in which fact of snatching his gun has been mentioned, hence this witness has not lodged a separate report in respect of snatching of his gun by the accused Babu @ Munna from his possession. It is also revealed from the evidence of this witness that till the recording of the evidence of the witness, he has not received his licensee gun and this witness has not filed any case in respect of receiving his gun. The above statements and conduct of the prosecution witness Shabbir (PW-3) also creates a reasonable doubt about his presence at the place of occurrence when the incident occurred. From the conduct as revealed from the statement of Shabbir (PW-3), we find that the manner and the way in which deposition has been given by Shabbir (PW-3) in the Court creates a reasonable doubt about credibility, trustworthy and reliability about his evidence. This fact also creates a reasonable doubt which leads towards this inference that Shabbir (PW-3) was not present at the time and place

of the incident. From the appreciation of whole evidence of Shabbir (PW-3), this fact also clearly emerged that prosecution has also projected Shabbir (PW-3) with consideration and afterthought to support the case of prosecution. However, from the whole appreciation of the statement of this witness, we find that evidence of this witness does not inspire confidence, therefore, we are of the considered opinion that Shabbir (PW-3) was also not present at the place of the incident. He was also not an eye-witness of the incident. Hence, we find that deposition of this witness is wholly doubtful and suspicious and thereby not reliable and trustworthy.

30. From the perusal of the evidence of so-called eye-witnesses Moid Ahmad (PW-2) and Shabbir (PW-3), it is evident that there was no pellets, bullets, tiklis or empty cartridges lying at the place of occurrence. The Investigating Officer Lal Singh Chandel (PW-6) who investigated this case has also not found any pellets, bullets, tiklis or empty cartridges at the place of occurrence. According to this witness, he has inspected the place of occurrence and tried to recover the above pellets, bullets, tiklis or empty cartridges from the place of occurrence, however, he could not find the same. Non-recovery of the pellets, bullets, tiklis or empty cartridges from the place of occurrence also creates doubt about the truthfulness and credibility of the prosecution story. It is a fact that according to prosecution, 12 persons simultaneously fired upon the deceased, Sarfaraz. In this condition, recovery of the pellets, bullets, tiklis or empty cartridges is necessary outcome of the incident. It is natural that if 12 accused persons fired simultaneously, some bullets, pellets, tiklis, or empty cartridges would inevitably have fallen at the place of occurrence. However, non-recovery of the pellets, bullets, tiklis or empty cartridges from the place of occurrence also creates high suspicion about the truthfulness of the prosecution story.

31. In criminal trial, if case of the prosecution is based wholly on the evidence of the eye-witnesses of the prosecution and no other circumstantial and connecting evidence is available, then in this

condition, it must be seen by the Courts that whether presence of the so-called eye-witnesses of the prosecution at the place of occurrence is true and behind any doubt. If by appreciating the evidence of the eye-witnesses, it is found that presence of the eye-witnesses at the place of occurrence is highly doubtful, then in this condition, when presence of the eye-witnesses at the place of occurrence is highly doubtful, therefore, in consequence, statement and evidence of eye-witnesses would also be regarded with doubt and suspicion. In the result, evidence of this nature of the eye-witnesses of the prosecution whose presence at the place of occurrence is highly doubtful, their deposition in Court would also become unreliable and unworthy of credence.

32. It is also a fact that the Investigating Officer not tried to recover a large number of guns and rifles, both licensed and unlicensed, which were used in the commission of the crime from the possession of the accused persons. Since, according to the prosecution case, 12 accused persons simultaneously fired at the deceased, Sarfaraz, and caused his death, the Investigating Officer was duty-bound to recover and seize the alleged murder weapons, such as rifles and guns, from the possession of, or the houses of, the accused persons. However, in this case, the Investigating Officer did not try to recover and take into possession any murder weapon such as rifles or guns from the possession of the accused persons or from their houses. This fact also makes the prosecution story suspicious.

33. The prosecution story also becomes doubtful and concocted from the evidence of the prosecution witness Rahmatullah (PW-7), who took photographs of the place of occurrence where the dead body and tractor was lying in the field. Rahmatullah (PW-7) stated in his deposition that when he has gone at the place of occurrence to take the photographs, the field where the incident happened was situated on the bank of the river. There was jungle. The tractor was lying in the field. From there at a distance of 30-40 steps, river was situated. The tractor was standing there. I went to take the photographs. Inspector has said that “stop at this moment.” Inspector has also said that “first of all, tyres must be burst.

Then photographs will be taken.” One person by firing, burst the tyres of the tractor. Then Inspector said to me that “took the photographs of the scene.” According to this witness, he took photographs of the scene and returned to his place. Although this witness was declared hostile by the prosecution and cross-examination at the length, however, in his cross-examination by the prosecution, this witness has again stated that “before me, one back wheel and one front wheel was burst.” This witness has also stated that when this witness reached at the place of occurrence for photography, after one and half hour, a policeman burst the tyres of tractor. When the evidence of this witness would be seen in totality of the whole evidence of the prosecution including Moid Ahmad (PW-2) and Shabbir (PW-3), then entire prosecution story would become highly doubtful which cast cloud of suspicion on the truthfulness and veracity of the prosecution story.

34. Thus, from the above discussion and appreciation of the whole prosecution evidence, it is clear that from the beginning of the written report, Exhibit Ka-1, the prosecution has concocted, fabricated, and, as an afterthought, developed a false story to implicate all the accused persons in this case. This fact is revealed from the statements and the language used in the written report, Exhibit Ka-1, itself. The written report reveals this fact that from the beginning, the prosecution tried to bring Moid Ahmad (PW-2) and Shabbir (PW-3) as eye-witnesses of the incident. However, after overall appreciation of the entire evidence of Moid Ahmad (PW-2), it is clear that this witness has made major and material contradictory statement about the manner in which he reached at the place of occurrence which makes the evidence of this witness unreliable.

35. The evidence of prosecution witness Shabbir (PW-3) also reveals that prosecution has also tried to accidentally project this witness to reach at the place of occurrence on the pretext of coming back after returning from hunting without any hunt of the francolin bird (*teetar*). The conduct of Shabbir (PW-3) is highly suspicious and doubtful. Shabbir (PW-3) had a double-barrel licensee gun and belt of cartridges in

his hand. However, in spite of snatching the gun and belt of cartridges by the accused Babu @ Munna, this witness has not uttered a single word against this and also has not opposed or resisted when his gun and belt of cartridges were being snatched by the accused Babu @ Munna. Shabbir (PW-3) even not tried to snatch and take possession of his gun and belt of cartridges from accused Babu @ Munna. Although according to this witness, he is a licensee gun holder but being a licensee gun holder, he has not lodged any F.I.R. in this respect against the accused Babu @ Munna and other accused persons. This witness was being satisfied only on the mentioning about his gun by the informant Riyaz Ahmad (PW-1) in the written report, Exhibit Ka-1. Apart from the above facts, this witness neither filed nor lodged any complaint or initiated any proceedings before any Court or competent authority for the recovery of his licensee gun and belt of cartridges allegedly lost in the incident. The conduct of the above prosecution witnesses Moid Ahmad (PW-2) and Shabbir (PW-3) are highly unnatural and doubtful. The conduct of Moid Ahmad (PW-2) and Shabbir (PW-3) revealed clearly this fact that although these two witnesses have stated the same prosecution story against the accused persons, however, on appreciating their evidence deeply and on scrutiny of their statement as deposed by them in the Court, it is clear that Moid Ahmad (PW-2) and Shabbir (PW-3) are not the eye-witnesses of the incident but it is revealed that there was no eye-witness in this case. Due to this reason the prosecution with afterthought and consideration projected Moid Ahmad (PW-2) and Shabbir (PW-3) as eye-witnesses of the incident. However, by scrutiny of their evidence, we find their evidence wholly doubtful and unreliable.

36. Hon'ble Supreme Court in the case of **Badam Singh v. State of Madhya Pradesh, (2003) 12 SCC 792** has held on the point of appreciation of evidence of the witness in para 16 as follows;

“16. The learned Sessions Judge after considering the evidence on record and accepting the evidence of the eyewitnesses found the appellant guilty of the offence under Section 302 IPC and sentenced him to imprisonment for life. The High Court by its impugned judgment dismissed the

appeal preferred by the appellant. We have perused the impugned judgment of the High Court. The High Court which was the first court of appeal did not even carefully appreciate the facts of the case. It mentions that the FIR was lodged by PWs 5 and 6 whereas the fact is that the FIR was lodged by PW 4, the Forest Officer. Without subjecting the evidence on record to a critical scrutiny, the High Court was content with saying that the three eyewitnesses having deposed against the appellant, the prosecution had proved its case beyond reasonable doubt. In our view, the High Court has not approached the evidence in the manner it should have done being the first court of appeal. The mere fact that the witnesses are consistent in what they say is not a sure guarantee of their truthfulness. The witnesses are subjected to cross-examination to bring out facts which may persuade a court to hold, that though consistent, their evidence is not acceptable for any other reason. If the court comes to the conclusion that the conduct of the witnesses is such that it renders the case of the prosecution doubtful or incredible or that their presence at the place of occurrence as eyewitnesses is suspect, the court may reject their evidence. That is why it is necessary for the High Court to critically scrutinise the evidence in some detail, it being the final court of fact. We have, therefore, gone through the entire evidence on record with the assistance of the counsel for the parties.”

37. In the light of the decision in the case of **Badam Singh (supra)** and the legal principles enunciated by the Hon'ble Supreme Court regarding the evaluation and appreciation of the evidence of prosecution witnesses, we find that the manner in which the so-called eye-witnesses of the prosecution, Moid Ahmad (PW-2) and Shabbir (PW-3), have narrated the prosecution story is highly improbable, unreliable, and unworthy of credence. In their evidence as is revealed in their cross-examination, we find that major and material contradictory evidence have been given by these prosecution witnesses, which makes the prosecutions story wholly unbelievable. On reading the whole evidence of the prosecution witnesses, we find that Moid Ahmad (PW-2) and Shabbir (PW-3) are projected prosecution witnesses who were adduced with a view to support the prosecution case and thereby ensure the

conviction of the accused persons. Thus, we find that evidence of prosecution witnesses Moid Ahmad (PW-2) and Shabbir (PW-3) is wholly unreliable and unworthy of credence.

38. We have also perused and gone through the finding and reasoning as delivered by the learned Trial Court dated 31.08.1984 and find that learned Trial Court has not appreciated the prosecution evidence in legal and proper manner. Trial Court only on the ground of enmity and rivalry held the accused-appellants guilty for commission of the alleged crime. Trial Court has not appreciated the evidence of the prosecution witnesses in a deep and proper manner and wrongly relied on the evidence of prosecution witnesses Moid Ahmad (PW-2) and Shabbir (PW-3) as reliable. Thus, Trial Court relied on that evidence of the prosecution witness Moid Ahmad (PW-2) and Shabbir (PW-3) which we find according to the legal principles and fact of the case as wholly unreliable.

39. Thus, we find that judgment and order dated 31.08.1984 of the learned Trial Court of conviction and sentence is perverse and without the cogent evidence and against the settled principles of law, hence the same is not sustainable in the eyes of law. Hence, we find that judgment and order of Trial Court dated 31.08.1984 is liable to be set aside and the criminal appeal of the surviving appellants, Ghulam, Hidayatullah and Azizullah, is liable to be allowed.

40. The criminal appeal is **allowed**. Accordingly, we set aside the impugned judgment and order dated 31.08.1984 of conviction and sentence passed against the accused-appellants, Ghulam, Hidayatullah and Azizullah, by Trial Court in Sessions Trial No. 619 of 1981 (State v. Kammu and others) connected with Sessions Trial No. 284 of 1982 (State v. Kammu and others), Sessions Trial No. 284 of 1983 (State v. Babu @ Munna) and Sessions Trial No. 341 of 1982 (State v. Atiqullah) arising out of Case Crime No. 143 of 1981, under Sections 148, 302, 379, 404 IPC, Police Station Khakhreru, District Fatehpur. The appellants are acquitted of the charges under Sections 148, 302, 379, 404

IPC. The appellants, Ghulam, Hidayatullah and Azizullah, are on bail. They need not surrender. Their bail bonds are cancelled and sureties stand discharged.

41. Let a copy of this judgment be sent to the learned Trial Court forthwith along with the Trial Court record for necessary compliance.

(Vinai Kumar Dwivedi,J.) (Siddharth,J.)

July 15th, 2026
SHUBHAM