

REPORTABLE

Reserved on 04.11.2020

Delivered on 04.03.2021

Court No.- 40

Case:- CRIMINAL APPEAL No. - 1876 of 2009

Appellant:- Mukesh Tiwari

Respondent:- State of U.P.

Counsel for Appellant:- Lav Srivastava, Adhya Shankar Chaturvedi, I. K. Chaturvedi, Pradeep Kumar Mishra, Ranjan Kumar, Sanjay Kumar, V. P. Srivastava

Counsel for Respondent:- Govt. Advocate

With

Case:- CRIMINAL APPEAL No. - 1541 of 2009

Appellant:- Indrajit Mishra and Another

Respondent:- State of U.P.

Counsel for Appellant:-

Counsel for Respondent:- Govt. Advocate

Counsel for Appellant:- Amit Mishra, Krishna Mohan Singh, Viresh Mishra

Counsel for Respondent:- Govt. Advocate

Hon'ble Manoj Misra, J.

Hon'ble Sanjay Kumar Pachori, J.

(Delivered by Hon'ble Sanjay Kumar Pachori, J.)

1. The present appeals are filed against the judgment and order passed by Special Judge/Additional Sessions Judge, Ballia, on 28.2.2009 in Sessions Trial No. 51 of 2008 by which the appellants Indrajit Mishra, Sanjit Mishra and Mukesh Tiwari have been convicted for the offences punishable under Section 452, 302 read with section 34 Indian Penal Code (in short "I.P.C."). The punishment awarded to the appellants for their conviction noticed above is as follows; imprisonment for life with a fine of Rs. 5,000/- each and default sentence of six months under

section 302 read with section 34 I.P.C., and five year's rigorous imprisonment with fine of Rs. 5000/- each and default sentence of six months additional imprisonment under Section 452 I.P.C. The sentences were directed to run concurrently. Since the abovementioned appeals arise from a common judgment of the trial court, it will be proper for us to deal with these appeals in a common judgment.

PROSECUTION CASE

2. The Prosecution case in brief, as could be elicited from the First Information Report (in short FIR) lodged by Smt. Manorama Devi (PW-1) is that Smt. Manorama Devi and her husband Pratap Shankar Mishra (deceased) were sleeping in a room of their house on the intervening night of 29/30.7.2007. Her brothers Ajit Narayan Pathak (PW-2) and Lalit Narayan Pathak (not examined) were also sleeping in the courtyard at that time. At around 2:00 a.m., she woke up hearing a rattle upon entry of persons in her room. At that time door of the room was open and a lantern was lit. She saw the appellants Indrajit Mishra with a hockey stick, Sanjit Mishra with a knife and Mukesh Tiwari with a *Katta* in their hand. Indrajit Mishra attacked her husband with a hockey stick. Her husband got up from the cot and tried to run towards the courtyard but Indrajit Mishra and Sanjit Mishra caught him at the door of the room and Mukesh Tiwari shot at point-blank range on his neck, her husband fell down after receiving firearm injury. Ajit Narayan Pathak (PW-2) and Lalit Narayan woke up on hearing her cries. They tried to catch the appellants, but they fled away by jumping over the boundary wall. The injured was taken to the hospital, where he died. Due to enmity between the appellants and her husband, on account of civil and criminal litigation as well as a family partition, her husband was killed.

3. After the incident, CP-337 Kanhaiya Yadav (PW- 4) along with Sub-Inspector¹ Surendra Yadav (not examined) while on

1. S.I.

patrol duty, reached the place of occurrence on hearing the gunshot and noise. The injured Pratap Shankar Mishra was brought from the spot to District Hospital Ballia by Tata 407 vehicle with *Mazarubi Chitthi* (not proved). In the District Hospital, at about 3:50 a.m., he succumbed to the injuries. Ajit Narayan Pathak (PW-2) informed Smt. Manorama Devi, at 4:30 a.m., about her husband's death.

4. The First Information Report dated 30.7.2005 (Ex.Ka-2) was registered as case crime No. 117 of 2007 under section 302 I.P.C. against the appellants at Police Station-Reoti, District Ballia, at 5:20 a.m. by CP-598 Deo Nath Singh (PW-3), on the basis of a written complaint (Ex.Ka-1) of Smt. Manorama Devi (PW-1) which was scribed by Ajit Narayan Pathak (PW-2). The distance between the place of occurrence and the Police Station is 1/2 Km.

5. On 30.7.2007, S.I. Hasmat Khan (PW-7) started the investigation of the case and after inspecting the place of the incident, as pointed out by the informant (PW-1), he prepared a site map (Ex.Ka-8) of the place of the incident. He also recovered blood-stained and plain earth from the place of the incident and prepared a seizure memo (Ex.Ka-9). The proceedings of the inquest were completed at about 1:30 p.m. by S.I. Hari Prasad Vishwakarma (PW-8) at the mortuary of District Hospital Ballia and inquest report (Ex.Ka-7) was prepared on the basis of death information Memo (Ex.Ka.-5) received from the Hospital. He also prepared other police papers (Ex.Ka- 13 to Ex.Ka-17) for getting a post-mortem of the body of the deceased.

6. PW-5 Dr. B. Narayan conducted the post-mortem examination of the body of the deceased on 30.7.2005 at 4:45 p.m. The post-mortem report (Ex.Ka.-6) disclosed the presence of 4 ante-mortem injuries on the corpse of Pratap Shankar Mishra (aged about 35 years). These are as under:

1. Wound of entry of firearm size 0.6 cm x 0.6 cm x cavity

deep present on the middle of neck 3 cm above from Supra external notch, margins inverted, burning & blackening present around the wound, sign of tattooing present on the front of chest, both upper arms and face 10 inches all around the wound, abrasion collar present.

2. Wound of exit of firearm size 2 cm x 1.5 cm present on right side of back of chest just below the scapula bone edge of the wound were everted, 15 cm below the right shoulder, injury no. 1 & 2 are interconnected to each other.

3. Abrasion 2.5 cm x 2.0 cm present just below the beard.

4. Abrasion 2.5 cm x 2.0 cm present over chin anterior aspect, 3 cm behind the injury no. 3.

The doctor opined that the death was caused due to shock and haemorrhage as a result of ante-mortem injuries about one day before the post-mortem. Internal examination disclosed semi-digested food in the stomach, and 6th rib of the right side, 3rd and 4th bone of trachea fractured. The doctor further noticed that the deceased was brought dead by CP-337 Kanhaiya Yadav at 3:50 a.m. on 30.7.2007.

7. During the course of the investigation, on 4.8.2007 at 5:00 a.m., PW-7 S.I. Hasmat Khan arrested the appellant Mukesh Tiwari and recovered an unlicensed pistol (*Katta*) .315 bore with a cartridge, on the disclosure statement and pointing out of the appellant Mukesh Tiwari, from near northern wall of Bajrangbali temple at Chaubey Chhapra Dhala Road, and prepared a seizure memo (Ex.Ka-10). After completion of the investigation, PW-7 S.I. Hasmat Khan submitted a charge sheet (Ex.Ka-21) against the appellants under Sections 452, 302 I.P.C. and under Sections 25/27 Arms Act. The court took cognizance. On committal, the trial court framed charges against the appellants under Sections 452 and 302 read with Section 34 I.P.C. The appellants denied the charges and claimed trial.

8. In order to substantiate the charges against the appellants, the prosecution examined as many as 8 witnesses. PW-1 Smt. Manorama Devi, PW- 2 Ajit Narayan Pathak were examined as eye-witnesses; PW-4 CP Kanhaiya Yadav who was on patrol duty and had reached the place of the incident on hearing the gunshot and noise was examined to provide link evidence. He had taken the injured Pratap Shankar Mishra to the hospital along with the informant's brothers Ajit Narayan Pathak and Lalit Narayan Pathak. He had also informed the police station Kotwali Ballia vide Memo (Ex.Ka.-5) at 4:30 a.m. on 30.7.2007.

9. The prosecution also examined an array of formal witnesses, namely, PW-3 CP Deo Nath Singh (scribe of the F.I.R.), PW- 5 Dr. B. Narayan, PW- 6 CP 640 Virendra Rai (who took the dead body of the deceased to the Police Line, Ballia), PW- 7 S.I. Hasmat Khan investigating officer², PW- 8 S.I. Hari Prasad Vishwakarma (who prepared the inquest report), to prove the exhibited documents and material objects produced. A Forensic Scientific Laboratory report (Paper No. 33Ka/1 and 33Ka/2) has also been submitted by the prosecution. The prosecution proved certain material exhibits, namely, unlicensed pistol (*Katta*) .315 bore as material Ex.No.-1 and used cartridge as material Ex.No.-2.

10. The accused persons were examined under section 313 of the Code of Criminal Procedure (in short 'Cr.P.C.') wherein they denied the incriminating evidence put to them and stated that they have been falsely implicated on account of enmity. The appellants Indrajit Mishra and Sanjit Mishra stated that they had been residing at Village Suremanpur with their families in the house of Sanjay Maurya (DW-1) for the last 7-8 years and were running a clinic there. On the night of the incident, wife of Sanjay Maurya was admitted to their clinic and they were treating Sanjay Maurya's wife. The police arrested them from their clinic at 4:00 a.m. on 30.7.2007.

2. I.O.

11. The appellant Mukesh Tiwari stated in his statement under Section 313 Cr.P.C that at the time of the incident Smt. Manorama Devi was doing service as Shiksha Mitra and in connection therewith had been residing in her maternal home at Village Shivpur. After the death of her husband, the Police called her from Village Shivpur to lodge the report. She had got a registered Power of Attorney of the property from the mother of the deceased which was later cancelled. The appellants filed few certified copies as documentary evidence and examined DW-1 Sanjay Maurya and DW-2 Rajendra Prasad (Sub-Registrar) in support of their defence.

12. Before the trial court the appellants came with a specific case that when the police took the injured Pratap Shankar Mishra to the District Hospital Ballia from the place of the incident, at that time, and at the time of the incident, PW-1, Smt. Manorama Devi was present in her maternal home at Village Shivpur because she lived there in connection with her service as Shiksha Mitra, which is at a distance of 12-14 Km from the place of the incident. It was also the appellants' case that PW-1 and PW-2 Ajit Narayan Pathak were informed and called by the Police after the death of Pratap Shankar Mishra; and that the testimony of eyewitnesses PW-1 and PW-2 is full of contradictions and omissions. The appellants Indrajit Mishra and Sanjit Mishra further pleaded that they had been arrested at 4:00 a.m. on the day of the incident from their clinic at Village Surmanpur, wherein they were treating the wife of DW-1 Sanjay Maurya. They also took the plea that the motive assigned to Mukesh Tiwari has not been proved.

FINDINGS OF THE TRIAL COURT

13. The trial court discarded the documentary evidence filed by the defence i.e. residence certificate of the year 2001, income certificate of PW-1 Smt. Manorama Devi, and held that on the basis of such evidence it can not be held that at the time of

incident PW-1 Smt. Manorama Devi was not present at the place of occurrence.

14. The trial court found that after the incident, the injured Pratap Shankar Mishra was brought to the District Hospital Ballia by PW-2 Ajit Narayan Pathak and Lalit Narayan Pathak along with PW-4 CP Kanhaiya Yadav. The distance between the District Hospital Ballia and the place of incident is about 30 Km, where Pratap Shankar Mishra was declared dead at 3:50 a.m. and the FIR was lodged at 5:20 a.m. It found that there was ample reason for Ajit Narayan Pathak not to lodge the FIR on the way to the hospital because he had not seen the incident. Therefore, there is no such delay in lodging in the FIR, in as much as, PW-1 Smt. Manorama Devi, who had been the eye witness, lodged the FIR against the accused-appellants with full disclosure of the facts, shortly after the death of her husband.

15. The trial court further found that on the night of the incident there was a full moon and a lantern was also lit near the place of occurrence, the accused-appellants were well known to the witnesses, therefore, there was sufficient opportunity to identify the accused-appellants. It held that on account of failure of the investigating officer to recover the lantern from the place of the occurrence, it can not be presumed that there was no sufficient light. It held that even if PW- 2 Ajit Narayan Pathak had not seen the accused-appellants, PW-1 Smt. Manorama Devi, wife of the deceased, was sleeping in the room and, therefore, her testimony as eye-witness is natural.

16. The trial court observed that though the investigating officer mentioned the name of Udit Narayan in case diary in place of Lalit Narayan but since Smt. Manorama Devi (PW-1) had clearly stated that Lalit Narayan and Ajit Narayan were sleeping at her house on the night of the incident, the accused persons cannot get the benefit of the error made by the investigating officer. Thus, by placing reliance on the testimony of PW-1, the

trial court concluded that the prosecution successfully proved the charges against the appellants under Section 452, 302 read with Section 34 I.P.C., beyond all reasonable doubt and thereby convicted and sentenced the appellants as above.

17. Being aggrieved by the trial court's order, the appellants have preferred these appeals.

SUBMISSIONS BEFORE THIS COURT

18. We have heard Sri V. P. Srivastava, learned Senior counsel assisted by Sri A. S. Chaturvedi for the appellant Mukesh Tiwari; Sri Amit Mishra, learned counsel for the appellants Indrajit Mishra and Sanjit Mishra; Sri Patanjali Mishra, learned A.G.A., for the State; and Sri S. K. Chaubey, learned counsel for the informant and have perused the record.

19. Learned counsel for the appellants vehemently urged that PW-1 Smt. Manorama Devi and PW-2 Ajit Narayan Pathak had not seen the incident. The presence of alleged eyewitnesses PW-1 and PW-2 at the time of the incident is highly doubtful and unbelievable because at the time of the incident PW-1 and PW-2 were present in Village Shivpur, both of them were informed and called by the Police after the death of injured Pratap Shankar Mishra, and it is for this reason that the FIR has been lodged after 3.20 hours. This delay is fatal to the prosecution, particularly, because the distance between the place of the incident and the police station is only 1/2 Km. The minute description in the first information report also suggests that it has been lodged after legal consultation and deliberation.

20. Learned counsel for the appellants further submitted that there are material contradictions/omissions in the oral testimony of PW- 1 Smt. Manorama Devi and PW- 2 Ajit Narayan Pathak with regard to their presence at the time of the incident. There is a contradiction in the testimony of PW-4 CP Kanhaiya Yadav and PW-7 S.I. Hasmat Khan in respect of the presence of eye-witnesses. Though appellants-accused persons were alleged to

have been recognized in the light of the lantern, but the lantern was not recovered by the investigating officer. The gunshot injury could not be caused in the manner and from the place where the appellants were alleged to be present at the time of firing the gunshot. There is a material contradiction between the testimony of PW-1 Smt. Manorama Devi and PW-5 Dr. B. Narayan in respect to injury no. 1. The role of catching hold of the deceased has been attributed to the appellants Indrajit Mishra and Sanjit Mishra even though the shot has allegedly been fired from a point-blank range and the bullet entered the body from the middle of the neck just above Supra external notch and exited the body from the back of right side of the chest just below scapula bone, which renders the ocular account highly unbelievable.

21. Learned counsel for the appellants further contended that the trial court ignored the evidence of DW-1 Sanjay Maurya wherein he stated that the appellants Indrajit Mishra and Sanjit Mishra had been arrested from their clinic situated at Village Suremanpur at around 4:00 a.m., i.e. before lodging the F.I.R. In spite of that, the investigating officer did not make any effort to recover hockey stick and knife from the aforesaid appellants. The motive attributed to all the appellants in the FIR is enmity due to pending criminal and civil cases regarding family partition between the appellants and the deceased (Pratap Shankar Mishra). Whereas, the appellant Mukesh Tiwari has no concern with the family of the deceased. PW-1 admitted this fact in her cross-examination by stating that there was no case pending against Mukesh Tiwari in respect to family partition. Thus, the prosecution has failed to prove any motive against Mukesh Tiwari. It was urged that the trial court has not properly appreciated the deposition of PW- 1 Smt. Manorama Devi which is full of contradictions and omissions and, therefore, the prosecution has failed to prove the case against the appellants beyond all reasonable doubts. Hence, the impugned judgment is

liable to be set aside.

22. **Per Contra**; Learned A.G.A. submitted that PW-1 Smt. Manorama Devi and her cousin PW-2 Ajit Narayan Pathak had recognized the appellants in the light of the lantern as well as in full moonlight and the accused persons were known to PW-1 and PW-2 even before the incident. Although there is some discrepancy between the statement of PW-1 and PW-2 with regard to the presence of PW-2 but does not damage the core of the prosecution case. In the present case, though, the conviction of the appellants is based upon the deposition of sole eye-witness PW-1 Smt. Manorama Devi but there is no rule that there cannot be a conviction by relying on the testimony of a sole eye-witness. It is submitted that her presence on the spot is natural as the incident had taken place in her house and near the place where she was sleeping. It is further submitted that PW-1 is a reliable and trustworthy witness. Moreover, the presence of lantern burning at the place of the incident at the time of occurrence has been proved by eye-witnesses PW-1 and PW-2. The F.I.R. was registered against the appellants promptly (within 50 minutes of the death) at 5:20 a.m.; learned Additional Sessions Judge has rightly held the appellants guilty; the findings recorded by the trial court are on an appreciation of the evidence, which is neither perverse nor contrary to the evidence on record; that the charges levelled against the appellants had been proved beyond reasonable doubts. Thus, their conviction and sentence do not warrant any interference, the judgment of the trial court is liable to be affirmed. A prayer was, therefore, made to dismiss the appeals.

23. Learned counsel for the informant Sri S. K. Chaubey adopted the submissions made by learned A.G.A.

ANALYSIS OF THE PROSECUTION EVIDENCE:

24. Before we proceed to weigh the respective submissions it would be apposite to notice the arguments on behalf of the

appellants in detail. The appellants' arguments are: *Firstly*; that at the time of the incident, PW- 1 Smt. Manorama Devi and PW-2 Ajit Narayan Pathak were present at Village Shivpur which is around 12-14 Km away from the place of the incident; that due to strained relations between PW-1 Smt. Manorama Devi and the deceased, PW-1, working as a Shiksha Mitra, used to stay in her maternal home at Village Shivpur. After the death of Pratap Shankar Mishra, the police called her and her relatives and thereafter the FIR of the present case has been lodged after consultation and deliberation which is clearly borne out from the fact that the FIR was lodged, as alleged, after 3 hours 20 minutes of the incident, even though the distance between the place of occurrence and the Police Station is just 500 meters. The delay in lodging the FIR assumes significance and casts a complete shadow of doubt on the prosecution case for the reasons below:

(a) The delay in lodging the FIR assumes importance because admittedly the police had arrived at the scene of occurrence and they took the injured, *Chitthi Majrubi* was prepared at the police station but FIR was not lodged, which suggests that guess-work was going on to lodge a named FIR.

(b) The delay suggests that it was a blind murder. Through conjectures, all persons against whom the deceased had enmity were implicated. Two of them were assigned ornamental roles, which finds no corroboration from medical evidence as neither there is any injury of hockey stick nor of the knife, and the third is not related to the other two and shared no common motive with them therefore, why would he join them.

(c) Gunshot was allegedly fired from a point-blank range whilst two accused persons held the deceased from either side, which appears improbable because no one would take the risk of himself getting injured and, secondly, from the spread of blackening and tattooing around the wound to an extent of 10 inches, firing from a point-blank range is ruled out. Thus, no one actually witnessed the incident and everything is based on conjectures.

(d) There are two groups of accused, who are totally unrelated to each other. The appellant Mukesh Tiwari does not appear to have any concern or connection with the deceased or other appellants. In spite of that, the prosecution attributed the motive against him that he committed the murder due to enmity of family partition. The motive against Mukesh Tiwari has been changed by the prosecution.

(e) G.D.Report of the Chick FIR was not available at the time of the inquest proceedings.

(f) Conduct of PW-1, Smt. Manorama Devi, also creates doubt, inasmuch as the investigating officer stated that Manorama Devi told him that the deceased had a land dispute with Mahesh Tiwari and expressed doubt that Mahesh Tiwari might be involved in the incident.

(g) There is no evidence on record whether the injured Pratap Shankar Mishra was alive enroute to the hospital at the time of preparation of *Mazrubi Chitthi* (Paper no. 8Ka/1). The prosecution case is totally silent on this account. But according to PW-5 Dr. B. Narayan as well as Memo (Ex.Ka.-5), Pratap Shankar Mishra was brought dead at District Hospital at 3:50 a.m.

(h) PW-7 S.I. Hasmat Khan in his cross-examination admitted his signature on *Mazrubi Chitthi* but he stated that he does not remember when and where the *Mazrubi Chitthi* was prepared. He also could not remember whether it was prepared after or before the lodging of the FIR. This *Mazrubi Chitthi* has not been proved.

(i) The prosecution failed to prove the dispatch time of the Special Report however, PW-3 CP Deo Nath in his cross-examination stated that the special report has been sent at 7:10 a.m. on 30.7.2007.

Secondly; the prosecution case wholly depends on the testimony of solitary witness, PW-1 Smt. Manorama Devi. The incident occurred in the night and nobody witnessed the incident, which is borne out from the contradictions/omissions present in the

testimony of PW-1 and PW-2. The ocular version of PW-1 does not appear reliable and does not inspire confidence in the prosecution case. In support thereof, it has been pointed out that:

(a) PW-2 Ajit Narayan has not supported the prosecution case. In spite of that, the prosecution has not examined Lalit Narayan (real brother of PW-1), who was sleeping along with PW-2 in the courtyard.

(b) There are contradictions with regard to; the place where PW-2 Ajit Narayan and Lalit Narayan slept in the house of the deceased on the night of the incident; the presence of PW-2 Ajit Narayan and Lalit Narayan in the intervening night at the place of the incident; the arrival of PW-4 CP Kanhaiya Yadav and PW-7 S.I. Hasmat Khan at the place of the occurrence, after the incident, before lodging the FIR.

(c) There are contradictions in the testimony of PW-1, PW-2, PW-4 with regard to the place of the incident.

(d) There are omissions with regard to the role of appellants Indrajit Mishra and Sanjit Mishra.

(e) There is material inconsistency between the ocular and medical evidence. More so, the prosecution has failed to prove injury no. 3 and 4 received by the deceased.

(f) Behaviour (conduct) of PW-1 Smt. Manorama Devi and PW-2 Ajit Narayan Pathak after the incident cast a shadow on their alleged presence at the time of the incident.

Thirdly; false implication of the appellants, Indrajit Mishra and Sanjit Mishra, due to enmity on account of property dispute is writ large as there appears no injury of a hockey stick or of a knife on the body of the deceased. The motive against the appellant Mukesh Tiwari as narrated in the FIR has not been proved. The Prosecution has failed to prove the motive against the appellant Mukesh Tiwari.

Fourthly; the appellants Indrajit Mishra and Sanjit Mishra were

arrested by the police at around 4:00 a.m. after the incident from their clinic situated at Village Suremanpur and were implicated due to enmity.

25. At this stage, it would be useful for us to notice the topography of the house where the incident took place (as depicted in the site-plan Ex.Ka-8). It appears from the site plan that the house of the deceased is north facing. In front of the main door of his house is a '*Sahan*' (front courtyard/open place in front of house) thereafter, a constructed road. There is a Shiv Temple in the '*Sahan*'. A gallery connects the '*Sahan*' and the courtyard (*Angan*/back courtyard), which is an open place in the back portion of the house. Adjacent to the gallery there are two rooms. The doors of these rooms open in the courtyard as well as in the gallery. The incident took place in one of the rooms, located on the western side of the gallery. Two other rooms are situated on the western side of the courtyard. The southern boundary wall of the house is made of bricks. This wall is five feet high. On the eastern side of the house, there is an open land of the deceased and on the western side, there is the house of appellants Indrajit Mishra and Sanjit Mishra. On the southern side of the house, there is a field belonging to the deceased.

26. Before we proceed to dwell upon the merit of the contentions raised before us, it will be apposite to have a close scrutiny of the entire ocular evidence, which is as follows:-

27. **PW-1** Smt. Manorama Devi (wife of the deceased) in her testimony has deposed that the incident took place on the intervening night of 29/30.7.2007. On the night of the incident, she was sleeping next to her husband in a room located on the northern side of her house, of which the exit door opens towards the south in the courtyard (*Angan*), the door of the room was half open; her brothers (PW-2 Ajit Narayan and Lalit Narayan) who had come to her house, were sleeping near the hand pump in the courtyard (*Angan*) and her mother-in-law, who is deaf and of

unsound mind, was sleeping towards the north in an open terrace room. It was a full moon night, at around 2:00 a.m. she heard some sounds and woke up to see the appellants with weapons in the light of the lantern, which was lit at the door of the room. As soon as Indrajit hit her husband with a hockey stick, he woke up, stood up from the cot and tried to escape towards the courtyard (*Angan*), then Indrajit and Sanjit caught hold of her husband and Mukesh Tiwari shot at him from point-blank range on his neck due to which her husband fell on the ground. On hearing her cries and gunshot, her brothers woke up and saw the incident; they tried to catch them, but they ran away by jumping over the south-eastern corner of the boundary wall of the courtyard. She had given the report to the scribe at the police station, the case was registered and he gave her its copy.

PW-1 Smt. Manorama Devi in her cross-examination stated that Indrajit Mishra and Sanjit Mishra were holding her husband's waist from both sides, one was holding from the back and the other was holding from the side. At that time her brothers were not awaking. Therefore, they could not come to his rescue. She further stated that Indrajit Mishra and Sanjit Mishra caught her husband at the door of the room and at the same time, Mukesh Tiwari shot him from a point-blank range on the right side of his neck. At that time her brothers were still sleeping. They woke up after hearing the gunshot and tried to catch the appellants but by that time, they fled away. She further stated regarding the registration of the case that she did not remember how long after the incident the report was written.

It is noteworthy that PW-1, even while witnessing her husband being caught and shot by the appellants, neither screamed nor cried for help. Her brothers (PW-2 Ajit Narayan and Lalit Narayan) woke up only after hearing the gunshot.

At this stage, it would be appropriate to highlight that even Pratap Shankar Mishra (deceased) did not make any noise nor

did he call his two brothers-in-law for help, who were sleeping at a distance of just 9-10 feet from the door of the room in the courtyard (*Angan*). He also did not call his mother (who was sleeping in the adjacent open terrace room) and wife for help. Pratap Shankar Mishra woke up after receiving an injury from the hockey stick, stood up from the cot and ran towards the door of the room. He had enough time and opportunity to call his wife, mother and brothers-in-law for help.

Moreover, the most surprising aspect is that there has been no scuffle between the assailants and the deceased before firing, and till the very last, the deceased, his wife, and the assailants, did not let out a single noise. This entire situation seems to be extremely improbable and impractical.

Even the post-mortem report reveals no wound on the body of the deceased by the hockey stick. Further, the injury no. 1, wound of entry of firearm, was present on the middle of neck 3 cm above from Supra external notch whereas injury no. 2, wound of exit, was present on right side of the back of chest just below the scapula bone, which suggests that shot travelled from upper part of the body to the lower part. Moreover, blackening, burning and tattooing was found around injury no. 1 up to an area of 10 inches, which is possible only if one fires from a short distance and not from point-blank range. The direction of the bullet travelling from upper part to lower part rules out possibility of two persons catching hold the victim.

After analysing all of the above circumstances, it rounds off to the following probabilities: *firstly*, PW-1 was not present in the room at the time of the incident and did not see its occurrence. *Secondly*, the incident has not occurred in the manner as alleged by the prosecution. *Thirdly*, the incident has been a split second affair i.e. it occurred in an extremely short period of time. *Fourthly*, PW-2 Ajit Narayan and Lalit Narayan were not sleeping in the courtyard at that time. *Fifthly*, statement of PW-1 Smt.

Manorama Devi that she does not remember how long after the incident the report was written casts a serious dent to the credibility of the prosecution case.

28. **PW-2** Ajit Narayan (brother-in-law of the deceased) in his statement in chief stated that he went along with his cousin Lalit Narayan, to meet their sister at her house. They ate food at around eleven o'clock and slept on a wooden plank in the courtyard (*Angan*). His sister and brother-in-law were sleeping in the room located in the northern side of the house, the door of which opens towards the south in the courtyard. At around 2:00 a.m., on hearing the cries and gunshot, they woke up. They saw the appellants with weapons and, his brother-in-law lying near the door of the room. They tried to catch them but they ran away by jumping over the south-eastern boundary wall of the courtyard.

Though, in his cross-examination, he stated that he did not see the shot being fired and did not see the accused-appellants jumping over the boundary wall.

After analysing the testimony of PW-2, there are two possible situations arising- *firstly*, PW-2 Ajit Narayan and Lalit Narayan were not sleeping in the courtyard that night and that is why they did not see anything. *Secondly*, they were planted as an eye-witness by the prosecution after due deliberation.

29. **PW-3** CP 598 Deo Nath Singh (scribe of FIR): According to him, he had registered the FIR on the basis of a written complaint of Manorama Devi at 5:20 a.m. on 30.7.2007 as Crime No. 117 of 2007 under Section 302 IPC and endorsed in the G. D. Report No. 4 at 5:20 a.m. He has proved G.D. Report No. 15 timing 9:40 a.m. by which, S.I. Surendra Yadav and CP 337 Kanhayia Yadav, departed from the police station for maintaining law and order.

He stated in his cross-examination that the Special Report of the present case has been sent at 7:10 a.m. on 30.7.2007.

After considering the testimony of this witness, it clearly shows that the despatch time of the Special Report has not been proved by the prosecution.

30. **PW-4** CP Kanhaiya Yadav (who reached at the spot after hearing gunshot and noise, along with S.I. Surendra Yadav) has deposed that he and S.I. Surendra Yadav were on patrol duty. They heard the sound of gunshot and noise at around 2:00 a.m. on the night of 29/30.7.2007. They ran towards Pratap Shankar Mishra's house from where the sound came and saw his two relatives and some villagers present there, his mother and wife were crying. He immediately informed the Station House Officer from his mobile and asked for a vehicle from the police station. They took the injured Pratap Shankar Mishra with the help of his relatives and villagers, firstly, to the police station Reoti by TATA 407 vehicle and got a *Mazrubi Chitthi*, then reached Sadar Hospital Ballia and got him admitted.

PW-4 stated in his cross-examination that the mother and wife of the deceased were shouting and telling the names of assailants.

After considering the testimony of PW-4, the following inferences can be drawn: (a) that mother and wife knew about the assailants at the time of his arrival, (b) mother of the deceased was not deaf and dumb or of unsound mind, (c) he took the injured with the help of his relatives first to the police station and then to the hospital.

31. **PW-5** Dr. B. Narayan (who conducted the post-mortem) has deposed that injury no. 1, wound of entry of firearm was present on the middle of neck 3 cm above from Supra external notch and injury no. 2, wound of exit present on right side of the back of chest just below the scapula bone. At the time of post-mortem, semi-digested food was present in the stomach. He also found one abrasion just below the beard and another abrasion over the chin, anterior aspect, as injury nos. 3 & 4 respectively.

PW-5 stated in his cross-examination that injury no. 1 can possibly be caused from a distance of 10- 12 feet by a standard gun. The time and date of death of the deceased were not mentioned in Form No.-13. On the basis of ante-mortem injuries, the death might have also been possible on 29.7.2007 between 8 - 9 p.m.

32. **PW-7** S.I. Hasmat Khan (Station House Officer/I.O.): According to him, the FIR was registered in his presence. He inspected the place of occurrence at the instance of Smt. Manorama Devi and prepared a site plan. He took blood-stained and plain earth from the place of incident in presence of Pramod Kumar Upadhyay and Sanjeev Kumar Upadhyay and prepared a memo. He arrested the appellants, Indrajit Mishra and Sanjit Mishra. Further, he arrested Mukesh Tiwari on 4.8.2007 and recovered a *Katta* at his instance. After completing the investigation, he submitted the charge sheet against the appellants.

PW-7 in his cross-examination stated that he arrested Indrajit Mishra and Sanjit Mishra near the Suremanpur Railway Station around 6 o'clock in the evening. Manorama Devi told him in her statement that her brothers, Udit Narayan and Ajit Narayan were present at the place of the incident in the night and saw the occurrence. She, though, did not tell him that Lalit Narayan was present at the time of the incident. He reached the spot within 30 minutes after the incident. On questioning Manorama Devi, he got the names of the assailants from her while she was crying and he also orally enquired about the incident from the people present there. After that, he returned back to the Police Station. During the course of the investigation, no such fact came to his knowledge that Mukesh Tiwari had any land dispute with the deceased. He further stated that Manorama Devi told him that the deceased had a land dispute with Mahesh Tiwari and expressed doubt that Mahesh Tiwari might be involved in the incident.

After considering the evidence of PW-7, it is observed that; (a) he reached the place of occurrence within 30 minutes of the incident, (b) Manorama Devi told him that her brothers, Udit Narayan and Ajit Narayan were present at the time and place of the incident and saw the occurrence, (c) she knew the names of the assailants, though she suspected the involvement of Mahesh Tiwari in the murder of Pratap Shankar Mishra, (d) the motive against Mukesh Tiwari could not be established.

33. **PW-8** S.I. Hari Prasad Vishwakarma (who prepared the inquest report): According to him, he was posted at Police Chowki Satni Sarai, PS. Kotwali Ballia on 30.7.2007 as Chowki Incharge. On the same day at 11:30 a.m., he commenced the inquest proceedings at the Mortuary of District Hospital Ballia on the basis of G. D. Report No. 4 timing 4:30 a.m. (PS- Kotwali). This G. D. Report has been prepared on the basis of a Memo which has been filed in PS – Kotwali Ballia by CP 337 Kanhayia Yadav.

In his cross-examination, he stated that he did not get any G.D. Report of Chick FIR at the time of preparing the inquest report and that he had mentioned the cause of death in the inquest report on the basis of FIR.

Through the above consideration, it can be observed that till the time of conducting the inquest (i.e. 11:30 a.m. on 30.7.2007), G.D. Report of Chick FIR had not been endorsed in the General Diary of the Police Station Raoti.

34. Having noticed the contentions of learned counsel for the parties and having taken a glimpse of the evidence on record, now we shall weigh the argument of learned counsel for the appellants that the FIR of the present case was lodged after an unexplained delay of 3 hours 20 minutes of the incident because of consultation, guess-work and deliberation.

35. Noticeably, as per the prosecution case, the Police were present at the door-step, immediately after the incident, the

police arranged a vehicle, a *Mazrubi Chitthi* was prepared at the Police Station yet, PW-1 Smt. Manorama Devi and PW-2 Ajit Narayan who claim themselves as eye-witnesses of the incident chose not to immediately lodge the report. The wife and mother of the deceased were naming the assailants before PW-4 CP Kanhaiya Yadav and PW-7 S.I. Hasmat Khan on the spot but they did not disclose their names to the police and the FIR has not been lodged promptly, because either PW-1 and PW-2 were not present at the time of the incident or they did not witness it and were, therefore, deliberating to name the accused merely on conjecture.

36. It would be useful to notice the law with regard to the importance of prompt lodging of FIR. In **Meharaj Singh & Ors. v. State of U. P. & Ors, (1994) 5 SCC 188** the Supreme Court has observed: (SCC p. 195-96, para 12)

"12. FIR in a criminal case and particularly in a murder case is a vital and valuable piece of evidence for the purpose of appreciating the evidence led at the trial. The object of insisting upon prompt lodging of the FIR is to obtain the earliest information regarding the circumstance in which the crime was committed, including the names of the actual culprits and the parts played by them, the weapons, if any, used, as also the names of the eye witnesses, if any. Delay in lodging the FIR often results in embellishment, which is a creature of an afterthought. On account of delay, the FIR not only gets bereft of the advantage of spontaneity, danger also creeps in of the introduction of a coloured version or exaggerated story. With a view to determine whether the FIR, was lodged at the time it is alleged to have been recorded, the courts generally look for certain external checks. One of the checks is the receipt of the copy of the FIR, called a special report in a murder case, by the local Magistrate. If this report is received by the Magistrate late it can give rise to an inference that the FIR was not lodged at the time it is alleged to have been recorded, unless, of course the prosecution can offer a satisfactory explanation for the delay in despatching or receipt of the copy of the FIR by the local Magistrate. Prosecution has led no evidence at all in this behalf. The second external check equally important is the sending of the copy of the FIR along with the dead body and its reference in the inquest report. Even though the inquest report, prepared under Section 174 Cr. P.C. is aimed at serving a statutory function, to lend credence to the

prosecution case, the details of the FIR and the gist of statements recorded during inquest proceedings get reflected in the report. The absence of those details is indicative of the fact that the prosecution story was still in embryo state and had not been given any shape and that the FIR came to be recorded later on after due deliberations and consultations and was then ante timed to give it the colour of a promptly lodged FIR..."

37. In **Thulia Kali v. The State of Tamil Nadu, (1972) 3 SCC 393**, the Supreme Court, emphasising the necessity of explaining the delay in lodging FIR, has held as follows: (SCC p. 397, para 12)

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

38. In **Satpal Singh v. State of Haryana, (2010) 8 SCC 714** the Supreme Court has observed: (SCC p. 720, para 15)

"15. This Court has consistently highlighted the reasons, objects and means of prompt lodging of FIR. Delay in lodging FIR more often than not, results in embellishment and exaggeration, which is a creature of an afterthought. A delayed report not only gets bereft of the advantage of spontaneity, the danger of the introduction of a coloured version, an exaggerated account of the incident or a concocted story as a result of deliberations and consultation, also creeps in, casting a serious doubt on its veracity. Thus, FIR is to be filed more promptly and if there is any delay, the prosecution must furnish a satisfactory explanation for the same of the reason that in case the substratum of the evidence given by the complainant/informant is found to be unreliable, the prosecution case has to be

rejected in its entirety. [Vide: State of Andhra Pradesh v. M. Madhusudhan Rao (2008) 15 SCC 582]

39. It is well-settled position of law that delay in lodging the FIR does not make prosecution case improbable when such delay is properly explained, but a deliberate delay in lodging the FIR may prove fatal. In cases where there is a delay in lodging the FIR, the court has to look for a plausible explanation for such delay.

40. According to the prosecution case, PW-4 CP Kanhaiya Yadav and S.I. Surendra Yadav upon hearing the gunshot and noise immediately arrived at the spot where PW-1, PW-2, Lalit Narayan and the mother of the deceased were present. According to PW-4, he immediately informed the SHO (PW-7) from his mobile and asked for a vehicle from the Police Station. Thereafter, PW-4, two relatives of the deceased and some villagers took the injured, first, to the police station Reoti by TATA 407 vehicle and got a *Mazrubi Chitthi*, then reached Sadar Hospital Ballia and got him admitted. PW-4 stated in his cross-examination that the mother and wife of the deceased were shouting and telling names of the assailants. According to PW-7 S.I. Hasmat Khan, as stated in his cross-examination, he reached the spot within 30 minutes of the incident. Upon enquiring Manorama Devi, she disclosed to him the names of the assailants while crying.

41. From the prosecution case itself as noticed above, it can be logically inferred that, *firstly*, PW-1 (wife of the deceased), PW-2 Ajit Narayan and Lalit Narayan (brothers-in-law) including the mother of the deceased knew the name of the assailants and PW-4 CP- Kanhaiya Yadav, S.I. Surendra Kumar Yadav and PW-7 S.I. Hasmat Khan (I.O.) also came to know the name of the assailants through the mother and wife of the deceased. *Secondly*, the police arrived at the place of occurrence immediately after the incident and arranged a vehicle for taking the injured to the hospital for medical assistance. *Thirdly*, the injured kept lying on the spot until the vehicle was arranged,

which must have taken some time. *Fourthly*, the said eye-witnesses (PW-2 and Lalit Narayan) were present at the police station before they reached the hospital. *Fifthly*, the mother of the deceased does not seem to be of unsound mind since as soon as she witnessed the incident, she shouted and took names of the assailants, this conduct of her is the sign of a person whose cognitive responses are intact.

42. But despite all that the FIR was not lodged till return of information from the hospital. In fact, the FIR was lodged after about lapse of 50 minutes from the return of PW-2 Ajit Narayan from the hospital via police station at 4:30 a.m. Thus, the FIR was lodged with a delay of 3 hours 20 minutes. The prosecution explained the delay by stating that PW-2 Ajit Narayan did not know the whole incident, therefore his sister (PW-1) lodged the FIR. Whereas, PW-2 Ajit Narayan claimed in his examination-in-chief that he witnessed the incident and identified the assailants. PW-1 Smt. Manorama Devi also supported his version and stated the same in her examination-in-chief. We are of the opinion that the explanation put forth by the prosecution is not satisfactory because PW-1 and PW-2 had sufficient time and opportunity to lodge the FIR promptly.

43. In addition to the above, there are other circumstances also which generate a doubt regarding the time of lodging of FIR, these are; *firstly*, PW-1 does not remember how long after the incident the report was lodged, *secondly*, the inquest report was prepared on 30.7.2007 at 11:30 a.m. without receiving the copy of the G.D. Report of the Chick FIR, as PW-8 S.I. Hari Prasad Vishwakarma conducted the inquest on the basis of Memo (Ex.Ka.-5); he stated that he had not received the copy of Chick FIR, *thirdly*, the prosecution did not prove the dispatch time of the Special Report, *fourthly*, the prosecution also did not prove the *Mazrubi Chitthi* (Paper no. 8Ka/1).

44. A conspectus of the evidence noticed above indicates that

the FIR in the present case was lodged with an 'unreasonable delay' and after deliberation. Normally, a delay of few hours, particularly in night incidents, might not be considered significant but here the police were at the doorstep of the informant and the injured (Pratap Shankar Mishra) was carried to the hospital by the police, with *Mazrubi Chitthi*, and a so-called witness, who was there at the place of incident and happens to be the brother of the eye-witness, yet prompt reporting of the incident was withheld, which suggests that either the incident was not witnessed or if witnessed, the identity of the assailant was not certain, therefore, the guess-work delayed the FIR.

45. Now we shall deal with the motive behind the incident. It was argued that the prosecution failed to establish presence of motive for the crime against Mukesh Tiwari.

46. It would be useful to notice the law with regard to the role of motive in assessing the credibility of the prosecution case. In **Darbara Singh v. State of Punjab (2012) 10 SCC 476**, the Supreme Court has observed as under: (SCC, p. 482, para 16)

"16. Motive in criminal cases based solely on the positive, clear, cogent and reliable ocular testimony of witnesses is not at all relevant. In such a fact situation, the mere absence of a strong motive to commit the crime, cannot be of any assistance to the accused. The motive behind a crime is a relevant fact regarding which evidence may be led. The absence of motive is also a circumstance which may be relevant for assessing evidence." (Vide: Gurcharan Singh v. State of Punjab, AIR 1956 SC 460, Rajinder Kumar & Anr. v. State of Punjab, AIR 1966 SC 1322, Datar Singh v. State of Punjab, AIR 1974 SC 1193 and Rajesh Govind Jagesha v. State of Maharashtra, (1999) 8 SCC 428)

47. In **The State of U. P. v. Hari Prasad & Ors., (1974) 3 SCC 673**, the Supreme Court observed as under: (SCC, p. 674, para, 2)

"2. ..This is not to say that even if the witnesses are truthful, the prosecution must fail for the reason that the motive of the crime is difficult to find. For the matter of that, it is never incumbent on the prosecution to prove the motive for the crime. And often times, a motive is indicated to heighten the probability that the

offence was committed by the person who was impelled by that motive. But, if the crime is alleged to have been committed for a particular motive, it is relevant to inquire whether the pattern of the crime fits in with the alleged motive..."

48. It is trite law that even though the existence of motive loses significance when there is reliable ocular account but where the ocular testimony appears to be suspect the existence or absence of motive acquires some significance regarding the probability of the prosecution case. [vide **Badam Singh v. State of M. P., (2003) 12 SCC 792**]

49. In the present case, PW-1 Smt. Manorama Devi stated in her cross examination that her husband's land was situated on the *Kachchi* road leading to Sahatwar. Ram Pravesh Tiwari and his son Mukesh Tiwari wanted to buy this land. Her husband had sold this land to Arjun Pal. For this reason, Mukesh Tiwari was annoyed. Her husband had told her that Mukesh Tiwari has threatened him. The prosecution, however, has not proved as to when the deceased executed sale-deed in favour of Arjun Pal and no evidence has been offered as to when the deceased was threatened.

50. It is an admitted fact that Dina Nath (father of the deceased) had instituted a suit under section 229-B of U. P. Z. A. & L. R. Act, against Suresh Dutt, Ramesh Dutt, Govind Dutt, Indrajit and Sanjit, which he had won. Against this judgment, Suresh Dutt and 4 others had filed a case before the Commissioner, Azamgarh. In connection with that dispute, a Police Challani case under section 151/107 Cr.P.C. was also there and the deceased was assaulted and threatened by Indrajit, Suresh, and Sanjit but the report was not registered and a complaint case was filed before the Magistrate.

51. Another important aspect of the case is that there are two sets of accused who are completely unrelated to each other and, therefore, why would they join hands to finish off the deceased. Appellants Indrajit Mishra and Sanjit Mishra are real brothers and

are cousins of the deceased whereas, appellant Mukesh Tiwari is not related to the family of the deceased as well as other appellants Indrajit Mishra and Sanjit Mishra. The Appellant Mukesh Tiwari does not appear to have any concern or connection with the deceased or the members of their family. In spite of that, it is alleged that the appellants Indrajit Mishra, Sanjit Mishra, and Mukesh Tiwari have committed the murder of Pratap Shankar Mishra due to enmity arising out of family partition. All this leaves us to believe that it being a split second night incident, no one got opportunity to witness the incident and, therefore, all persons with whom the deceased had enmity or were suspected to have had a hand in the incident were implicated.

52. Now we shall proceed to examine contradictions and omissions in the testimony of the witnesses which have been highlighted during the course of arguments.

53. As to what would be the consequence of such discrepancy in the testimony of the eye-witnesses, it would be useful to notice few decisions of the Apex Court. In **Yogesh Singh v. Mahabeer Singh and Others, (2017) 11 SCC 195**, the Apex Court has observed as under; (SCC p. 212, para 29)

"29. It is well settled in law that the minor discrepancies are not to be given undue emphasis and the evidence is to be considered from the point of view of trustworthiness. The test is whether the same inspires confidence in the mind of the Court. If the evidence is incredible and cannot be accepted by the test of prudence, then it may create a dent in the prosecution version. If an omission or discrepancy goes to the root of the matter and ushers in incongruities, the defence can take advantage of such inconsistencies. It needs no special emphasis to state that every omission cannot take place of a material omission and, therefore, minor contradictions, inconsistencies or insignificant embellishments do not affect the core of the prosecution case and should not be taken to be a ground to reject the prosecution evidence. The omission should create a serious doubt about the truthfulness or creditworthiness of a witness. It is only the serious contradictions and omissions which materially affect the case of the prosecution but

not every contradiction or omission.” (See: Rammi @ Rameshwar v. State of M. P.³; Leela Ram (dead) through Duli Chand v. State of Haryana & Anr.⁴; Bihari Nath Goswami v. Shiv Kumar Singh & Ors.⁵; Vijay @ Chinee v. State of Madhya Pradesh⁶; Sampath Kumar v. Inspector of Police, Krishnagiri⁷; Shyamal Ghosh v. State of Bengal⁸ and Mritunjoy Biswas v. Pranab @ Kuti Biswas and Anr.⁹)

54. In **Balaka Singh and Others v. State of Punjab, AIR 1975 SC 1962**, the Apex Court observed:

“8...It is true that, as laid down by this Court in Zwinglee Arivel v. State of Madhya Pradesh¹⁰, and other cases which have followed that case, the Court must make an attempt to separate grain from the chaff, the truth from the falsehood, yet this could only be possible when the truth is separable from the falsehood. Where the grain cannot be separated from the chaff because the grain and the chaff are so inextricably mixed up that in the process of separation the Court would have to reconstruct an absolutely new case for the prosecution by divorcing the essential details presented by the prosecution completely from the context and the background against which they are made, then this principle will not apply...”

55. In **Vadivelu Thevar v. The State of Madras, AIR 1957 SC 614**, the Apex Court held that if the testimony of a sole witness is found by the court to be entirely reliable, there is no legal impediment in recording the conviction of the accused on such proof. It has been further laid down that the law of evidence does not require any particular number of witnesses to be examined in proof of a given fact. However, faced with the testimony of a single witness, the court may classify the oral testimony into three categories, namely, (i) wholly reliable, (ii) wholly unreliable, and (iii) neither wholly reliable nor wholly unreliable. In the first two categories there may be no difficulty in accepting or discarding the testimony of the single witness. The difficulty arises in the third category of cases. The court has to be circumspect and look for corroboration in material particulars by

3. (1999) 8 SCC 649

4. (1999) 9 SCC 525

5. (2004) 9 SCC 186

6. (2010) 8 SCC 191

7. (2012) 4 SCC 124

8. (2012) 7 SCC 646

9. (2013) 12 SCC 796

10. AIR 1954 SC 15

reliable testimony, direct or circumstantial, before acting upon the testimony of a single witness. A similar view has been expressed in *Kusti Mallaiah vs State of A.P.*¹¹, *Lallu Manjhi and Anr. v. State of Jharkhand*¹², *Jhapsa Kabari and Ors. v. State of Bihar*¹³.

56. PW-1 Smt. Manorama Devi in her statement-in-chief stated that her brothers Ajit Narayan and Lalit Narayan were sleeping in the courtyard (*Angan*) near the handpump; whereas in her cross-examination she stated that they were sleeping in the *Sahan* (front courtyard of the house) just east of the handpump in the midst of which there is a Shiv temple. She stated: "सहन मे मंदिर है जिस पर पुजारी नहीं है। हैंड पंप सहन मे बीच मे है। दच्छिनी पूर्वी किनारे पर नहीं है। हैंड पंप से पूर्व मे एक दो हाथ की दूरी पर भाई सोये थे। "

57. There appears contradiction in the testimony of PW-1 Smt. Manorama Devi with regard to the presence of Lalit Narayan. She stated in her examination-in-chief that PW-2 Ajit Narayan and Lalit Narayan were sleeping in the courtyard (*Angan*); whereas she stated in her cross-examination that she had not told the I.O. that Udit Narayan was at home. PW-7 S.I. Hasmat Khan (I.O.) stated that Smt. Manorama Devi told him that Udit Narayan and Ajit Narayan were present in her house. She did not state that her brother Lalit Narayan was present at the time of the incident.

58. PW-2 Ajit Narayan Pathak in his examination-in-chief stated that at around 2 o'clock at night he and his brother Lalit Narayan Pathak woke up on hearing cries and gunshot whereupon they saw Indrajit Mishra, Sanjit Mishra and Mukesh Tiwari. He stated that Indrajit Mishra had a hockey stick; Sanjit Mishra had a knife, and Mukesh Tiwari had a *Katta* and they jumped over the boundary wall to escape. Whereas, in his cross -examination he stated that he did not see the shot being fired, and he did not see the accused persons jumping over the boundary wall. After careful consideration of his testimony, we are of the firm opinion

11. (2013) 12 SCC 680

12. (2003) 2 SCC 401

13. (2001) 10 SCC 94

that PW-2 Ajit Narayan Pathak had neither witnessed the incident nor did he see the accused-appellants escaping by jumping over the boundary wall.

59. There appears contradiction in the testimony of PW-2 Ajit Narayan with regard to the presence of his cousin brother Lalit Narayan on the night at the place of the incident. PW-2 Ajit Narayan Pathak in his cross-examination stated that Udit Narayan is his brother. Udit Narayan had not gone to Reoti with him on the evening preceding the incident and he had not slept beside him that night. He had not told the I.O. that on the night of the incident Udit Narayan had slept beside him. He told that he had gone with Lalit Narayan and slept beside him. On the above fact, PW-7 S.I. Hasmat Khan (I.O.) stated that Ajit Narayan had told him that he had gone with Udit Narayan to her sister's house and witnessed the incident there and Lalit Narayan was not with him.

60. There appears contradiction in the testimony of PW-1 Smt. Manorama Devi regarding the place of the presence of her brothers Ajit Narayan and Lalit Narayan, as already noticed above, at the time of the incident. This suggests that either they were not present at the place of the incident or that the culprits escaped from the southern side of the courtyard, while they were sleeping on the northern side of the house. A close and comparative scrutiny of the testimony of PW-1 Smt. Manorama Devi and PW-2 Ajit Narayan as well as the site plan would suggest that PW-2 was not sleeping on the wooden cot in the back courtyard from where the assailants allegedly escaped by jumping over the wall. This shakes our confidence in the prosecution case.

61. There is another important aspect which we have noticed in the testimony of PW-2. PW-2 Ajit Narayan claimed that he reached the place of the incident immediately, at that time Pratap Shankar Mishra was lying in an injured state near the door of the room; he brought the injured (along with PW-4 CP Kanhiya Yadav

and his brother Lalit Narayan) to District Hospital Ballia; on the way a *Mazrubi Chitthi* was prepared at Police Station Reoti; and at 3:50 a.m. on 30.7.2007 at District Hospital Ballia Pratap Shankar Mishra was declared dead; whereas, in his cross-examination, PW-2 stated that he does not remember at what time he left for Ballia hospital from the house. He also could not remember the time when he reached there. This is quite surprising because PW-2 Ajit Narayan admitted himself to be a graduate and his statement has been recorded within 10 months of the incident, therefore, it cannot be said that due to a long time gap his memory faded.

62. There appears contradiction between the testimony of PW-2 Ajit Narayan, on one hand, and PW-5 Dr. B. Narayan and the Memo (Ex.Ka-5) on the other, with regard to the presence of PW-2 at the District Hospital Ballia. PW-2 Ajit Narayan deposed that Pratap Shankar was alive in the hospital, however, the doctor did not give any medicine; whereas PW-5 Dr. B. Narayan stated that on 30.7.2007 at 3:50 a.m. CP 337 Kanhaiya Yadav brought the injured in a dead state. Memo (Ex.Ka-5) prepared by Dr. V. K. Gupta, which has been proved by PW-5, also corroborates the stand of PW-5. PW-4 CP 337 Kanhaiya Yadav also proved his signature on the Memo (Ex.Ka.- 5).

63. In addition to that, there appears another discrepancy in the evidence which is that according to PW-4 CP 337 Kanhaiya Yadav, he along with S.I. Surendra Yadav was on patrol duty in Reoti town and, after hearing gunshot and noise they ran to the house of the deceased; whereas PW-7 S.I. Hasmat Khan stated that no policeman reached upon hearing the gunshot rather they reached on sensing commotion. This discrepancy holds importance with respect to the time of arrival of the police and the incident.

64. With regard to the arrival of police at the place of occurrence, there is discrepancy between the testimony of PW-1

Smt. Manorama Devi, PW-2 Ajit Narayan and PW-7 S.I. Hasmat Khan. PW-1 Smt. Manorama Devi stated that the Inspector (PW-7) came at between 5:00 a.m. and 5:30 a.m., PW-2 Ajit Narayan stated that the Inspector (PW-7) came on the spot at 6.00 a.m.; whereas PW-7 S.I. Hasmat Khan stated in his cross-examination that he had reached the place of the incident within half an hour of its occurrence, which if taken literally would mean at 2:30 a.m.

65. It is noteworthy that PW-2 Ajit Narayan stated in his cross-examination that he did not remember at what time he left for Ballia hospital from the house; and that he did not remember at what time he reached there. According to PW-4 CP Kanhaiya Yadav, he took the injured Pratap Shankar Mishra with the help of his relatives and villagers, first, to the police station Reoti by TATA 407 vehicle, got the *Mazrubi Chitthi*, and then he reached Sadar Hospital Ballia, where the doctor declared him dead. Whereas, PW-7 S.I. Hasmat Khan stated in his cross-examination that he does not remember when the *Mazrubi Chitthi* was prepared. He also could not remember whether it was prepared after or before lodging of the FIR; and when and where the *Mazrubi Chitthi* was prepared, is not mentioned in the case diary. However, he admitted his signature on *Mazrubi Chitthi*. This fact is quite important because PW-7 claimed that he reached the spot after half an hour of the incident. The *Mazrubi Chitthi* (Paper No. 8Ka/1) has not been proved by the prosecution. PW-3 CP Deo Nath in his cross-examination stated that Special Report has been sent at 7:10 a.m. on 30.7.2007, but the prosecution failed to prove the dispatch time of the Special Report.

66. Further, PW-1 Smt. Manorama Devi with regard to the role of the appellants Indrajit Mishra and Sanjit Mishra, that is of catching hold the deceased before he was shot at, in her cross-examination, stated that she had given a statement to the investigating officer that her husband was caught hold by Indrajit and Sanjit when he was shot by Mukesh Tiwari but if the investigating officer did not write this fact in her statement then

she cannot disclose the reason. PW-5 S.I. Hasmat Khan stated that it is not in her statement that Indrajit Mishra and Sanjit Mishra caught hold the deceased Pratap Shankar Mishra when he was shot by Mukesh Tiwari; if told, it would have been written.

67. With regard to the persons initially named by the witnesses on the spot, PW-4 CP Kanhaiya Yadav stated in his cross-examination that the mother and wife of the deceased were shouting and telling the names of the assailants, he had told this fact to the investigating officer, if he has not written in his statement then he cannot disclose the reason. PW-7 S.I. Hasmat Khan however stated that CP Kanhaiya Yadav did not tell him the names of the relatives who were present there. He also did not tell him that the mother and wife of the deceased were screaming and telling names of the assailants.

68. Now we shall deal with the next contention of the learned counsel for the appellants that the gunshot injury found on the body of the deceased could not have been caused in the manner alleged and the same renders the testimony of the eye-witness PW-1 Smt. Manorama Devi unreliable. It has been urged that if the medical evidence is taken to be correct, the mode and manner in which the occurrence took place, according to the prosecution, cannot be said to have been proved.

69. It is noteworthy that PW-1 Manorama Devi stated in her examination-in-chief that Indrajit Mishra attacked her husband with a hockey stick, her husband got up from the cot and tried to run towards the courtyard but Indrajit Mishra and Sanjit Mishra caught him at the door and Mukesh Tiwari shot at him from a point-blank range on his neck. Whereas PW-5 Dr. B. Narayan stated in his examination-in-chief that blackening, burning and tattooing was found around injury no. 1 up to an area of 10 inches. He stated in his cross-examination that looking at injury nos. 1 and 2, it seems that the shot travelled at an angle from high to low; and that injury no. 1 could possibly be caused from a

distance of 10 to 12 feet.

70. Dr. B. Narayan (PW-5) found injury no. 1, wound of entry of firearm present on the middle of neck 3 cm. above from Supra external notch and injury no. 2, wound of exit present on right side of the back of chest just below the scapula bone. We have noticed that the direction of injury no. 1 of Pratap Shankar Mishra was from upwards to downwards, blackening, burning and tattooing was found around injury no. 1 up to an area of 10 inches, therefore, injury no 1 is possible if somebody is lying or in a squatting position and one fires from some distance at a position higher in height to the target.

71. In this regard, it would be useful to extract a passage from Modi's Medical Jurisprudence and Toxicology (24th Edn. at page 540-541):

"If a firearm is discharged very close to the body or in actual contact, subcutaneous tissues over an area of two or three inches around the wound of entrance are lacerated and the surrounding skin is usually scorched and blackened by smoke and tattooed with unburnt grains of gunpowder or smokeless propellant powder. The adjacent hairs are singed, and the clothes covering the part are burnt by the flame. If the powder is smokeless, there may be a greyish or white deposit on the skin around the wound. If the area is photographed by infrared light, a smoke halo round the wound may be clearly noticed. Blackening is found, if a firearm like a shotgun is discharged from a distance of not more than three feet and a revolver or pistol discharged within about two feet. In the absence of powder residue, no distinction can be made between one distant shot and another, as far as distance is concerned. Scorching in the case of the latter firearms is observed within a few inches, while some evidence of scorching in the case of shotgun may be found even at one to three ft...At a distance of one to three feet, small shots make a single aperture with irregular and lacerated edges corresponding in size to the bore of the muzzle of the gun, as the shot enter as one mass, but are scattered after entering the wound and cause great damage to the internal tissues. The skin surrounding the wounds is blackened, scorched and tattooed, with unbrunt grains of powder."

72. In **Yogesh Singh v. Mahabeer Singh and Others, (2017) 11 SCC 195**, the Apex Court observed as under: (SCC p. 217, para

43)

"43.In any event, it has been consistently held by this Court that evidentiary value of medical evidence is only corroborative and not conclusive and, hence, in case of a conflict between oral evidence and medical evidence, the former is to be preferred unless the medical evidence completely rules out the oral evidence. (See: Solanki Chimanbhai Ukabhai v. State of Gujarat¹⁴, Mani Ram v. State of Rajasthan¹⁵, State of U.P. v. Krishna Gopal¹⁶, State of Haryana v. Bhagirath¹⁷, Dhirajbhai Gorakhbhai Nayak v. State of Gujarat¹⁸, Thaman Kumar v. State (UT of Chandigarh)¹⁹, Krishnan v. State²⁰, Khambam Raja Reddy v. Public Prosecutor²¹, State of U. P. v. Dinesh²², State of U.P. v. Hari Chand²³, Abdul Sayeed v. State of M.P.²⁴ and Bhajan Singh v. State of Haryana²⁵)

73. From the extract of Modi's Medical Jurisprudence, it appears, blackening around the wound can be found only when the shot is fired from a short distance i.e. within 3 to 4 feet. Although the presence of tattooing on the front of the chest, both upper arms and face in an area of about 10 inches may suggest that the shot may not be made with gun barrel touching the skin but in the light of the law noticed above, such variance in the medical report may not be considered totally in conflict with ocular evidence.

74. However, PW-1 Smt. Manorama Devi alleges that she saw appellant Indrajit Mishra with a hockey stick and appellant Sanjit Mishra with a knife; and that Indrajit Mishra assaulted the deceased with the hockey. Whereas, the deceased did not sustain any injury by either hockey stick or knife.

75. Now we shall deal with the next contention made on behalf of the appellants that the role assigned to appellants Indrajit

14. (1983) 2 SCC 174
15. 1993 Supp (3) SCC 18
16. (1988) 4 SCC 302
17. (1999) 5 SCC 96
18. (2003) 9 SCC 322
19. (2003) 6 SCC 380
20. (2003) 7 SCC 56
21. (2006) 11 SCC 239
22. (2009) 11 SCC 566
23. (2009) 13 SCC 542
24. (2010) 10 SCC 259
25. (2011) 7 SCC 421

Mishra and Sanjit Mishra of catching hold of the deceased at the time of firing a gunshot at deceased's neck is highly improbable and renders the ocular account unworthy of credence, especially because the bullet has travelled across the body and has made an exit wound as well.

76. The appellants Indrajit Mishra and Sanjit Mishra, from the very beginning, had denied the prosecution story and had contended that they had been falsely implicated on account of enmity due to civil and criminal cases pending between the appellants (Indrajit Mishra and Sanjit Mishra) and the deceased. We also noticed that PW-1 Smt. Manorama Devi in her statement under Section 161 Cr.PC. had omitted to attribute the role of catching hold to the appellants Indrajit Mishra and Sanjit Mishra at the time of firing the gunshot. Further, why would anyone risk injury to himself by catching hold of a person who is being shot at, particularly, when the post-mortem report suggests that the bullet exited the body. Thus, the role attributed to the appellants Indrajit Mishra and Sanjit Mishra of catching hold the deceased at the time he was shot at does not at all inspire confidence.

77. In **Ramashish Rai v. Jagdish Singh, (2005) 10 SCC 498**, the Apex Court observed: (SCC, p. 501, para 7)

"7....The requirement of law is that the testimony of inimical witnesses has to be considered with caution. If otherwise the witnesses are true and reliable their testimony cannot be thrown out on the threshold by branding them as inimical witnesses. By now, it is well-settled principle of law that enmity is a double-edged sword. It can be a ground for false implication. It also can be a ground for assault. Therefore, a duty is cast upon the court to examine the testimony of inimical witnesses with due caution and diligence..."

78. There is no dispute regarding the enmity between the deceased and appellants Indrajit Mishra and Sanjit Mishra on account of a property dispute. It thus appears to us that the appellants Indrajit Mishra and Sanjit Mishra were roped in as accused due to an inimical relationship between the parties.

79. Learned counsel for the appellants further submitted that PW-1 Smt. Manorama Devi claimed herself to be the eye-witness of the incident but the circumstances suggest that at the time of the incident she was not present. PW-1 Smt. Manorama Devi (wife of the deceased), claimed that she was sleeping in the room and she saw the entire sequence of events unfolding in front of her but there is no evidence to show that she as a wife of the deceased made any attempt to take her husband out of the clutches of the accused-appellants and in the process sustained injury. No doubt each person reacts differently in a given situation but if she had intervened, her conduct may have lend credence to her story.

80. Here, PW-1 Smt. Manorama Devi claimed that PW-2 Ajit Narayan and Lalit Narayan were sleeping in the courtyard (*Angan*) at a distance of 9–10 feet from the place of the incident but both her brothers were not awake, therefore, they did not come to rescue the deceased. But that does not inspire confidence because if PW-1 Smt. Manorama Devi and the deceased could wake up on wielding of a hockey stick why would the other menfolk sleeping close by not swing into action.

81. PW-2 Ajit Narayan Pathak (brother-in-law of the deceased) claimed that he on hearing cries and gunshot immediately reached the spot to find Pratap Shankar Mishra in an injured state, but neither he nor PW-1 Smt. Manorama Devi touched the body of the injured immediately after the incident. The above conduct of PW-1 and PW-2 appears unnatural and is not in sync with the probable conduct of a wife who has witnessed the murder of her husband in front of her eyes.

82. Learned counsel for the appellants submitted that the prosecution failed to prove that injury no. 1 on the body of the deceased was caused by the firearm alleged to have been recovered at the instance of the appellant, Mukesh Tiwari.

83. The appellant Mukesh Tiwari had been arrested on

4.8.2007 from town Reoti and at his instance, an unlicensed pistol (*Katta*) .315 bore was allegedly recovered with a used cartridge from open land, which had been sent to the FSL. As no bullet or 'empty' was recovered from the body of the deceased or the place of occurrence, the weapon recovered could not be connected with the crime.

84. There are also several lapses in the investigation of the case like non-recovery of 'bullet/empties' fired from the *Katta*; non-recovery of the lantern from the place of the incident; and non-recovery of hockey stick used by one of the appellants. However, it is well-settled that any omission on the part of the Investigating Officer cannot go against the prosecution case if it is otherwise supported by reliable and credible evidence. In **C. Muniappan and Ors. v. State of Tamil Nadu, AIR 2010 SC 3718**, the Apex Court observed as under;

"The defect in the investigating by itself cannot be ground for acquittal. If primacy is given to such designed or negligent investigation or to the omissions or lapses be perfunctory investigation, the faith and confidence of the people in the criminal justice administration would be eroded. Where there has been negligence on the part of the investigating agency or omissions, etc. which resulted in defective investigation, there is a legal obligation on the part of the Court to examine the prosecution evidence de hors such lapses, carefully, to find out whether the said evidence is reliable or not and to what extent it is reliable and as to whether such lapses affected the object of finding out the truth. Therefore, the investigation is not the solitary area for judicial scrutiny in a criminal trial. The conclusion of the trial in the case cannot be allowed to depend solely on the probity of investigation."

85. Thus, the prosecution case cannot be doubted merely on the ground of non-recovery of 'empties' fired from the *Katta* at the deceased, or non-recovery of the lantern from the place of the incident, or non-recovery of the hockey stick and the knife. But in the present case, PW-4 CP 337 Kanhaiya Yadav, S.I. Surendra Singh Yadav had allegedly reached the spot immediately and PW-7 S.I. Hasmat Khan (I.O.) allegedly reached the place of occurrence within half an hour. On the day of the

incident, as per the prosecution, the appellants Indrajit Mishra and Sanjit Mishra had been arrested, there was thus ample opportunity to recover the articles noticed above.

SUMMARY OF OUR ANALYSIS AND THE CONCLUSIONS DERIVED THEREFROM

86. On a totality of the consideration of entire evidence and keeping in mind the settled position of law, we are unhesitatingly of the opinion that the testimony of eye-witnesses PW-1 Smt. Manorama Devi and PW-2 Ajit Narayan is unreliable. The prosecution evidence is not convincing. The prosecution case appears to be based on guess-work and possibilities. In support of this conclusion regard be had to the following circumstances:

(1) The FIR was not lodged soon after the incident despite the fact that the police were present at the door-step and had arranged a vehicle to take the injured to the hospital. Wife (PW-1), brother-in-law (PW-2) and mother of the deceased were allegedly naming the assailants at that time i.e (around 2:00 a.m.) yet, they chose to wait to lodge the FIR.

(2) PW-2 (cousin of PW-1/eye witness) was present at the Police Station at the time of preparation of *Mazrubi Chitthi* but he did not lodge the FIR. He returned from the hospital via Police station but he still did not lodge the FIR. This gives rise to a serious doubt whether PW-1 and PW-2 at all witnessed the incident and generates a probability that they reached the place of occurrence later.

(3) The prosecution could not prove the preparation of *Mazrubi Chitthi* (Paper no. 8Ka/1). Even though, according to the prosecution case, PW-4 took the injured Pratap Shankar Mishra with the help of injured's relatives (PW-2 and Lalit Narayan), firstly to the police station Reoti by TATA 407 vehicle where he got a *Mazrubi Chitthi*, then to

Sadar Hospital Ballia. Surprisingly, PW-2 stated that he does not remember at what time he left for Ballia hospital from the house and he also could not remember the time when he returned back to the spot. In addition to that, PW-7 stated that he does not remember when and where the *Mazrubi Chitthi* was prepared. He also could not remember whether it was prepared after or before the lodging of FIR, though, he admitted his signature on it. The prosecution has thus failed to prove the actual time of preparation of *Mazrubi Chitthi*.

(4) There is no convincing evidence on record whether injured (as claimed) Pratap Shankar Mishra was alive when he was taken to the police station for preparation of *Mazrubi Chitthi*. According to Dr. B. Narayan (PW-5) as well as the Memo (Ex.Ka.-5), Pratap Shankar Mishra was brought dead at District Hospital Ballia at 3:50 a.m. Time taken in arranging for vehicle (TATA 407) to carry the injured cannot be ruled out, but keeping in mind the nature of injury no. 1 and 2 sustained the deceased there is a possibility that the injured had succumbed to his injuries at the spot.

(5) PW-8 (Incharge of Police Chowki Satni, PS. Kotwali Ballia) completed the inquest report on the basis of Memo (Ex.Ka.-5) by that time (1:30 p.m. on 30.7.2007) he had not received the G.D. Report of Chick FIR. Importantly, the prosecution has not proved the dispatch time of the Special Report of the present case.

(6) The prosecution claimed that the mother of the deceased was deaf and of unsound mind. She was not enquired by the investigating officer about the incident. But from the testimony of PW-4 (CP Kanhaiya Yadav) she was named the assailants while crying on the spot. Thus, she was not deaf and dumb or of unsound mind. Under

the circumstances, one of the best piece of evidences of this case was withheld.

(7) PW-1 and PW-2 were not throughout consistent whether it was Lalit Narayan or Udit Narayan who was sleeping with PW-2 in the courtyard. Interestingly, PW-1 was not consistent whether PW-2 Ajit Narayan and Lalit Narayan were sleeping in the courtyard (*Angan/back courtyard*) or in the *Sahan* (front courtyard).

(8) Importantly, PW-2 (cousin of PW-1/eye witness) in his cross-examination stated that he could not witness the firing or see the assailants. The prosecution did not examine Lalit Narayan (real brother of PW-1/eye witness) who was allegedly sleeping with PW-2 in the courtyard.

(9) Neither PW-1 nor Pratap Shankar Mishra called for help. PW-1 made no attempt to save her husband from the clutches of the assailants.

(10) PW-1 and PW-2 had no blood-stained clothes to offer during investigation and from their testimony it appears that they did not touch the body of Pratap Shankar Mishra after the incident. This conduct of PW-1 and PW-2 appears unnatural and casts a doubt on their presence at the time and place of occurrence.

(11) As per the post-mortem report, there was no injury on the body of the deceased caused by a hockey stick or a knife. The prosecution has not explained deceased's injury no. 3 and 4 which were in the form of abrasion on the chin region.

(12) Injury no. 1, gunshot wound of entry on the neck with blackening and tattooing present in an area of 10 inches around the wound and the exit wound (injury no. 2) diagonal on the back with downward direction, renders the ocular account of catching hold the deceased by two

accused from either side of the body and the shot being fired at point-blank range doubtful and improbable.

(13) The possibility of the FIR being lodged on the basis of guess-work gets credence from the circumstance that two sets of accused who had no link with each other were made accused in this case. One set of accused, namely Indrajit Mishra and Sanjit Mishra, were implicated by assigning an ornamental role which finds no corroboration from the medical evidence and the other set, namely, Mukesh Tiwari, was implicated by attributing the main role. But the manner in which the prosecution alleges the incident to have unfolded does not inspire confidence in as much as why would two persons catch hold of the victim from two sides when he is being shot in such a way that the shot travels downwards from the neck to make a wound of exit at the back below the shoulder.

(14) PW-7 (I.O.) stated that PW-1 (wife of the deceased) told him that the deceased had a land dispute with Mahesh Tiwari and expressed doubt that Mahesh Tiwari might be involved in the incident. Whereas according to the FIR, the prosecution attributed motive against the appellant Mukesh Tiwari that he committed the offence due to enmity of family partition. But Mukesh Tiwari does not appear to have any concern or connection with the deceased or other appellants Indrajit Mishra and Sanjit Mishra. The motive against him has been changed by the prosecution by alleging that as the deceased sold his four *Kathha* land to Arjun Pal, which Mukesh Tiwari and his father wanted to buy, animosity developed resulting in the crime. However, this fact had not been investigated during the course of the investigation.

(15) The motive against Indrajit Mishra and Sanjit Mishra is that father of the deceased had instituted a suit under

Section 229-B of U.P.Z.A. & L. R. Act against Indrajit, Sanjit and 3 other brothers, which he had won. Against this judgment, Suresh Dutt and 4 others had filed a case before the Commissioner, Azamgarh. Suresh Dutt and 4 others wanted a compromise but the deceased was not ready. In connection with that dispute, a Challani case and a complaint case were filed. Though, this can be motive for the crime but whether the appellants Indrajit Mishra and Sanjit Mishra would commit the offence by joining Mukesh Tiwari, who has no connection with the other appellants (Indrajit Mishra and Sanjit Mishra), and that too without covering their faces in moonlight. All of this shows that the prosecution case is shrouded in suspicion.

87. Following aspects emerge from the discussion of the prosecution evidence:

(i) PW-2 Ajit Narayan neither witnessed the actual firing of gunshot at the deceased nor he saw the accused-appellants escaping by jumping over the boundary wall of the back courtyard. This gives rise to two possibilities. One, that PW-2 was not sleeping in that wooden cot lying in the back courtyard of the house, which was noticed by PW-7 S.I. Hasmat Khan while preparing the site plan. Two, the incident was a split-second affair, like a hit and run, therefore, by the time people got up the assailant had escaped.

(ii) Another possibility emerges from the combined reading of the evidence of PW-1 and PW-2, which is that PW-2 was sleeping in the front courtyard near the temple where the hand pump is located, which appears to be so from the testimony of PW-1. If this possibility is taken into account then, who was sleeping on the wooden cot found in the back courtyard? This question may have two answers. One, that the wooden cot was just lying there or might have been used to sleep outside in summer months. Two, the possibility of deceased himself using

that cot cannot be ruled out and therefore when he was allegedly attacked he might have rushed towards the door of his room where blood was found and he fell there resulting in injury no. 3 and 4.

(iii) The aforesaid possibilities derive strength from the delay in lodging the FIR despite the presence of police at the door-step of the informant (PW-1). It is noteworthy that PW-2 (cousin of PW-1), as per the prosecution case, had been with the deceased to the police station for *Mazrubi Chitthi* and had also been to the hospital. Moreover, after the injured was declared dead, he (PW-2) had returned home via the police station but still did not report the crime, which clearly suggests that by that time the witnesses were just guessing as to who could have been the culprits because they (PW-1, PW-2) had not witnessed the incident.

(iv) The theory that the FIR was lodged by guess-work gets further credence from the circumstance that two separate sets of accused who had no link with each other were made accused, probably, because the informant desired not to leave any possible suspect. Notably, one set was implicated by assigning ornamental role to them, which finds no corroboration from the medical evidence, and the other set was implicated by attributing the main role. But the manner in which, according to the prosecution, the incident unfolded does not inspire confidence in as much as to why would two persons catch hold the victim from two sides when he is being shot at an angle so much so that the shot travels from the neck downwards and make a wound of exit below the back of shoulder. All this shrouds the prosecution case in suspicion.

88. On the basis of the facts and circumstances discussed above, an inference can easily be drawn that this is a case of blind murder, no one actually witnessed the incident and the FIR was lodged on the basis of guess-work and suspicion and the

appellants have been implicated on account of suspicion because of the previous enmity. Even the possibility of the FIR being ante-timed cannot be ruled out as at the time of conducting inquest the G.D. Entry of the Chick FIR was not available and the dispatch time of the Special Report has not been proved by the prosecution.

89. The contrary view taken by the trial court is against the weight of the evidence. A substantial portion of the judgment of the trial court goes in narration of the prosecution story, arguments of the parties and the statement of the prosecution witnesses. We hardly find objective evaluation, analysis, or scrutiny of evidence in a proper perspective. The serious infirmities pointed out by the defence raising doubt with regard to the prosecution case have been brushed aside by the learned trial judge by simply stating that he did not agree with such contentions. The trial court, in our view, was not right and justified in lightly brushing aside the contradictions and omissions borne out from the prosecution evidence, that too, when the entire prosecution rested on a sole eye-witness, PW-1 Smt. Manorama Devi.

90. For all the reasons recorded and discussed above, we are of the considered view that the prosecution has failed to prove the charge of offences punishable under Section 302 read with Section 34 and Section 452 IPC against the appellants Indrajit Mishra, Sanjit Mishra and Mukesh Tiwari beyond reasonable doubt. As the evidence on record does not bring home the guilt of the appellants Indrajit Mishra, Sanjit Mishra and Mukesh Tiwari, beyond the pale of doubt, the appellants are entitled to the benefit of doubt. Consequently, the appellants are entitled to be acquitted of all the charges for which they were tried.

91. As a result, both of the criminal appeals are **allowed**. The judgment and order of conviction as well as sentence recorded by the trial court is set aside. The appellants are acquitted of all the

charges for which they have been tried. The appellants Indrajit Mishra, Sanjit Mishra are on bail, therefore, their personal bonds and sureties are hereby discharged. The appellant Mukesh Tiwari is in jail. He shall be set at liberty forthwith if not required in connection with any other case. The appellants Indrajit Mishra, Sanjit Mishra and Mukesh Tiwari will fulfill the requirement of section 437-A Cr.P.C. to the satisfaction of the trial Court at the earliest.

92. The trial court record be returned forthwith together with a certified copy of this judgment for compliance. The office is further directed to enter the judgment in compliance register maintained for the purpose of the Court.

Order Date:- 4.3.2021

Aks

(Sanjay Kumar Pachori, J)

(Manoj Misra, J.)