

RESERVED

AFR

Court No. - 45

Case :- CRIMINAL APPEAL No. - 6969 of 2008

Appellant :- Satya Prakash

Respondent :- State of U.P.

Counsel for Appellant :- Ashok Kumar Singh, Chandra Narayan Mishra, Imran Mabood Khan, J.S. Sengar, Prashant Kumar Srivastava

Counsel for Respondent :- Govt. Advocate

Hon'ble Manoj Misra, J.

Hon'ble Sameer Jain, J.

(Delivered by Manoj Misra, J.)

1. This appeal is against the judgment and order dated 18.09.2008 passed by the First Additional Sessions Judge, Kannauj in S.T. No.57 of 1998 convicting the appellant (Satya Prakash) under Section 302 IPC and sentencing him to imprisonment for life with fine of Rs.5,000/- and a default sentence of additional one month.

Introductory Facts

2. In a nutshell, the prosecution story as narrated in the first information report (FIR) is that, on 28.06.1998, at about 9 pm, the informant Harish Chandra (PW-1) and his brother Phool Chandra (the deceased) were sitting at the door of their house when Satya Prakash (the appellant), Kanhaiya (who died during trial), both sons of Shiv Balak Tripathi, Bahadur son of Jaijram Yadav and Ramu Tripathi son of Kailash Nath Tripathi came armed with country made pistols and, on exhortation of Kanhaiya, the appellant (Satya Prakash) fired from his country made pistol at the deceased, with a view to take his life, which

hit the deceased. On raising alarm, Mool Chand Raidas (PW-2), Ram Kumar Tripathi (not examined), and Shiv Sharan Tripathi (not examined) and various other persons came and witnessed the incident. The accused ran away by extending threats. The written report (Ex. Ka-1) of the incident, alleging as above, was submitted by PW-1 by adding that the brother of the informant, namely, Phool Chandra (the deceased), has been taken to the hospital and after getting him admitted in the hospital, the informant has come to lodge the FIR. This written report was registered as Case Crime No.410 of 1998 at P.S. Kannauj, District Kannauj, vide G.D. Entry No.30 (Ex. Ka-5), dated 28.06.1998, at 23.10 hrs, of which the Chik FIR (Ex. Ka-4) was prepared and both were proved by PW-6 (retired Head Constable Chhedi Lal Gupta). Initially, the case was registered under Section 307, 504, 506 IPC but, later, vide report No.3, dated 29.06.1998, at 2.15 am, the case was converted to one punishable under Section 302, 504, 506 IPC. The carbon copy of the G.D. Entry No.3 in respect of alteration of the charging section was proved by PW-6 and exhibited as Ex. Ka-6. In the meantime, a seizure memo (Ex. Ka-2), dated 28.06.1998, signed by Mool Chand Tripathi (PW-3) and Atul Kumar Tripathi (PW-4), in respect of lifting blood stained earth and plain earth as well as one empty 12 bore cartridge from the spot, was prepared which was proved by PW-3, PW-4 and the first investigating officer (I.O.) (PW-8). On 28.06.1998 itself, site plan (Ex. Ka-8) was also prepared by PW-8 and, on 29.06.1998, at about 11 am, inquest was completed at Dixit Hospital, Kannauj of which inquest report (Ex. Ka-9), witnessed by PW-1, amongst others, was prepared. Thereafter, at about 6.20 pm, on 29.06.1998, autopsy on the body of the deceased was carried out at District

Hospital, Fatehgarh of which, post-mortem report (Ex. Ka-3) was prepared and proved by Dr. S.K. Saxena (PW-5).

3. The post-mortem report (Ex. Ka-3) reveals: (i) that Rigor Mortis had passed away on upper extremities though present in lower extremities; (ii) that there was a multiple pellets entry wound on front of the head, forehead and face including both eyes and upper part neck with margins inverted lacerated and ecchymosed; and (iii) that internal examination disclosed presence of 150 gm of pasty matter in the stomach; trachea and larynx lacerated; frontal bone of the skull (occipital region) and nose fractured. The estimated time of death was half a day before.

4. After completing the investigation, the second investigating officer Om Prakash Sharma (PW-7) submitted charge sheet (Ex. Ka-7). On which, cognizance was taken and the case was committed to the court of session. All the accused were charged under section 302 read with section 34 IPC and section 506 IPC. The accused pleaded not guilty and claimed for trial.

5. In the trial, the prosecution examined:- Harish Chand Tripathi (PW-1- the informant - the brother of the deceased) as an eye witness; Mool Chand Raidas (PW-2), as an eye witness but he was declared hostile; Mool Chand Tripathi (PW-3 - the other brother of the deceased) as witness of the seizure memo (Ex. Ka-2); Atul Kumar (PW-4 - the son of the deceased), another witness of the seizure memo (Ex. Ka-2); Dr. S.K. Saxena (PW-5), who conducted the post-mortem examination of the deceased; Head Constable Chhedi Lal Gupta (PW-6), who made

GD entry of the written report of the incident as well as alteration in the charging section; Om Prakash Sharma (PW-7), the second investigating officer, who completed the investigation and submitted charge sheet; and Ganesh Bajpai (PW-8), the first investigating officer (I.O.), who proved various steps of investigation including collection of blood stained earth, plain earth and empty 12 bore cartridge from the spot; preparation of site plan; inquest proceedings; preparation of photo nash, chalan nash, etc; and the steps to arrest the accused.

6. The incriminating circumstances appearing in the prosecution evidence were put to the accused persons including the appellant for recording their statement under Section 313 CrPC. The accused claimed that they are innocent; the prosecution story is false; and that they have been implicated on account of previous enmity.

7. The trial court by placing reliance on the ocular evidence of PW-1 and upon finding that no specific role was attributed to other accused except the present appellant, convicted and punished the appellant and acquitted the remaining accused.

8. We have heard Sri Kamal Krishna, learned Senior Counsel, assisted by Sri Chandra Narayan Mishra, for the appellant; Sri Rajendra Prasad Mishra and Ms. Arti Agrawal, learned AGA, for the State; and have perused the record.

Submissions on behalf of the Appellant

9. The learned counsel for the appellant has submitted as follows:-

(a) That no serious motive for the crime has been proved as against the appellant to kill the deceased because the motive, if any, to commit crime was as against PW-1 (the informant), inasmuch as informant's wife's niece, who was married to the appellant, had left the appellant and, therefore, the appellant bore a grudge against the informant as, despite requests, he failed to ensure restitution of appellant's conjugal rights.

(b) That the presence of the informant i.e. sole eye witness of the incident (PW-1) at the spot appears doubtful because if he had been present, the motive being against him, he would not have been spared; that PW-3 is not an eye witness; and that though, PW-4, in his deposition in Court, stated that he saw 4 persons including the appellant running away from the spot but, that was an improvement on what he stated under section 161 CrPC. Thus, no one witnessed the incident.

(c) That the testimony of PW-1 does not inspire confidence for the following reasons:

(i) In his examination-in-chief he states that he and the deceased were sitting on a *Takhat* (wooden cot) placed in the verandah of their house when the accused arrived with pistol and, on exhortation of Kanhaiya, the appellant fired at the deceased, which hit the deceased on the face and he fell on the spot whereas, the body of Phool Chandra was not found inside the house but on the road. This suggests that the deceased had not witnessed the incident. However, later, to make his testimony in sync with the spot position, during cross examination, by way of improvement, he stated that when the accused arrived and were abusing, the deceased went out and

thereafter, shot was fired. This improvement was during the course of trial and that too, after examination-in-chief, whereas, such stand was not there even in the statement recorded under section 161 CrPC.

(ii) PW-1 stated that after the deceased was hit by gunshot, the deceased was rushed, in an injured condition, to Vinod Hospital in a cart. There, the doctor, seeing deceased's condition, advised to take him to Kanpur, upon which, while PW-3, the other brother of PW-1, was making arrangements to take the deceased to Kanpur, PW-1 came to the police station to lodge the FIR. This story narrated by PW-1 is at variance with the statement of PW-4, the son of the deceased, who stated that when he heard the gunshot he came out to the spot, saw a gathering of people at the spot and his father lying on the road; the police arrived within half an hour, and took away his father. PW-4 also stated that he had gone to the police station with the body of his father and from there, they had taken the deceased to Vinod Dixit Hospital where Dr. Vinod told that his father is no more alive; thereafter, they all waited with the body at the police station and in the morning, the inquest report was prepared and the body was sent for postmortem. If PW-4 testimony, which finds corroboration in the testimony of PW-8, is to be accepted, the deceased had died at the spot therefore, rushing the deceased to the hospital and, thereafter, returning back to the police station to lodge the FIR appears to be a ploy to buy time to explain the delay in lodging the FIR as this delay was utilised to contrive the prosecution story.

(iii) PW-1's testimony is unreliable also for the reason that in his statement made during cross examination on 15.02.2005,

he stated as follows:-

“मैंने रिपोर्ट में यह बात नहीं लिखायी थी कि फूलचंद तखत से उतरकर सड़क पर गये। मैंने दरोगा जी को भी यह बात नहीं बतायी। न मैंने 4.6.01 को मैंने न्यायालय में भी यह बात नहीं बतायी। जैसा कोर्ट साहब ने समझा वैसा लिखवाया। मैंने न्यायालय में दिनांक 4.6.01 के बयान में यह बात नहीं कही कि “मैं व मेरे भाई फूलचंद मकान के बाहर तखत पर बैठे थे तभी चार अभियुक्त इतना कहते ही सत्यप्रकाश ने फूलचंद पर तमंचे से फायर कर दिया। जो मेरे भाई के चेहरे पर लगा व मेरे भाई तुरंत लड़ खड़ाकर गिर गये।” सही बात यही है कि मेरे भाई गोली लगने पर सड़क पर गिरे थे। सत्य प्रकाश के अलावा किसी ने न कोई फायर किया न कोई बात कही। फूलचंद से सत्यप्रकाश के कोई रंजिश नहीं थी। जो भी रंजिश थी वह सत्यप्रकाश की मुझसे थी। सत्यप्रकाश के पिता ने मेरे पिता को लाठियों से मारा था। यही पुरानी रंजिश थी। इसी रंजिश की वजह से मनमुटाव थे।”

The above extracted statement of PW-1 reflects that PW-1 narrated what he was tutored to narrate and not what he actually witnessed.

(d) That not only the FIR but all police papers prior to inquest appear to have been prepared at one go therefore, the FIR appears ante-timed. This is so, because the FIR, as per record, was registered at 23.10 pm on 28.06.1998 under Sections 307, 504, 506 IPC but the fard recovery of blood-stained earth, plain earth and the empty cartridge, which is stated to have been prepared on 28.06.1998, at about 9.30 pm, not only bears the details of the case i.e. Case Crime No.410 of 1998, but, also Sections 302/307/504/506 IPC, which means that the GD entry made on 29.06.1998 at 2.15 am converting the case into one punishable under Section 302 IPC from Section 307 IPC is a sham document. This suggests that the deceased was killed by an unknown assailant, he died at the

spot and, later, the entire prosecution story that the deceased was rushed to the hospital and, on return from the hospital, the FIR was lodged has been contrived on guess-work and past enmity.

(e) The learned counsel for the appellant further submitted that, according to the doctor (PW-5), the deceased ate his meal about 3 to 4 hours before; therefore, testimony of PW-1 that he and the deceased have had dinner 15 minutes before is falsified. Further, PW-1 is an interested witness as, admittedly, his wife's niece, married to the appellant, had left the appellant and therefore, he had a motive to implicate the appellant. Thus, looking to the circumstances narrated above, in absence of corroboration from an independent witness, his testimony is not of that unimpeachable category as to form basis of conviction. Further, there is no recovery of the murder weapon to connect the appellant to the crime. Hence, it is a fit case where the appellant be extended benefit of doubt and acquitted. More so, when he has already suffered incarceration of over 15 years.

Submissions on behalf of the State

10. **Per contra**, learned AGA submitted that it is well settled that the first information report need not be an encyclopaedia therefore, even if PW-1 (the informant) had not stated in the FIR that the deceased went out and was shot when he was on the road, the substratum of the prosecution story that the deceased was shot by the appellant remaining intact, and the medical evidence indicated that the appellant died on account ante-mortem gunshot injury, the prosecution story is not liable

to be disbelieved merely because all the details of the manner in which the incident occurred were neither disclosed in the FIR nor in the statement recorded under section 161 CrPC. He further submits that the site plan prepared by the I.O. refers to the spot as the place where the injured was found lying, which means that the deceased was not dead at the spot. Thus, the story that he was rushed to the hospital and on return therefrom, the FIR was lodged appears natural and not contrived. Otherwise also, when a person is injured, even if he may be dead, there is always an attempt to rush him to the hospital to save him, even if there is no possibility of him surviving the injury. Hence, the statement of PW-1 that the deceased was rushed to the hospital does not at all dents the reliability of PW-1's testimony. Learned AGA further submits that assuming that in the seizure memo prepared on 28.06.1998, case crime number and section 302 IPC is mentioned at the top that, by itself, is not sufficient to discard the first information report as ante-timed or bogus because it could be possible that the seizure memo may have been completed afterwards. He further submits that assuming that there may be some lapses in the investigation and due care was not taken while filling the papers that, by itself, is not a ground to discard the ocular testimony of PW-1 whose presence in the house has not been questioned and no suggestion has been put to PW-1 that he was not present in the house at the time of the incident. He further submits that the testimony of PW-1 is reliable and the conviction recorded by the trial court is justified, more so, because the testimony of PW-1 finds corroboration from the medical report. Hence, he prayed that the appeal be dismissed.

11. Having noticed the rival submissions, before we proceed to analyse the weight of the respective submissions, it would be appropriate to notice the testimony of the prosecution witnesses in brief.

Testimony of Prosecution Witnesses

12. **PW-1 (Harish Chandra)**. In his examination-in-chief, on 04.06.2001, stated that the accused Satya Prakash and Kanhaiya are real brothers. The accused Ramu is cousin of Satya Prakash whereas accused Bahadur is Satya Prakash's neighbour. Satya Prakash is married to PW-1's wife's niece. As Satya Prakash used to ill treat his wife, she left her matrimonial home and went to her *Maika* (parents house); to have her back, Satya Prakash used to pressurise PW-1. For that reason, Satya Prakash had a grudge against PW-1 and his family.

In respect of the incident, in his examination-in-chief, PW-1 stated that on 28.06.1998, at about 9 pm, he and the deceased were sitting in their verandah on a Takhat (wooden cot) when all the four accused came with country made pistols and, on exhortation of Kanhaiya, Satya Prakash fired at the deceased, which hit him on the face, as a consequence whereof, the deceased fell on the spot. Upon which, PW-1 raised alarm, where after Mool Chand Raidas (PW-2), Shiv Sharan (not examined) and Ram Kumar Tripathi (not examined) arrived and the accused escaped by extending threats. Thereafter, PW-1 made arrangement for a cart to carry the deceased to Vinod Dixit Hospital where he was admitted for treatment. There, the doctor told that his condition is serious therefore he be taken to Kanpur. While PW-1's brother Mool Chandra Tripathi (PW-3)

was making arrangement to take the deceased to Kanpur, PW-1 went to lodge the FIR. PW-1 also stated that PW-3 took the deceased to Kanpur but on way, near Chaubeypur, the deceased died therefore, he returned with the body to the hospital. On receipt of information regarding death of the deceased, oral information thereof was given to the police. Next day, inquest was conducted. He stated that in the night of the incident itself, the I.O. had come to the spot; recorded his statement; inspected the spot; and recovered blood stained earth and empty cartridge. He stated that at the time of the incident, there was light from electricity bulb.

In his cross examination, held on 14.02.2005, he disclosed the dimensions of the verandah where PW-1 and the deceased were sitting on a Takhat at the time of the incident. He also disclosed that the main door of his house opens towards east on that very verandah; whereas, just after the verandah there is road.

In his cross-examination, held on 15.02.2005, he disclosed that the marriage of Satya Prakash (the appellant) with PW-1's wife's niece was held in the year 1996 and that Satya Prakash's wife remained in her matrimonial home for about two years. Describing the spot, he stated that outside the door there was bulb, which had been shown to the investigating officer and that in the street also, there was an electricity pole having a bulb; and he had informed the investigating officer about the source of light, though, it was not written in the report or in his statement. He also stated that at the time of the incident, the deceased was sitting on right side of PW-1 and that no other person was present at that time. On suggestion that he was

sleeping inside the house, he stated that though, they used to sleep inside the house but, as they had meal (dinner) 10-15 minutes before, they (i.e. PW-1 and the deceased) were sitting on the wooden cot in the verandah. On further cross-examination, in respect of the manner in which the incident occurred, he stated that Satya Prakash and the other accused came hurling abuses and when he first saw the accused, they were at a distance of 4-5 meters from the verandah. Leading them was Satya Prakash. PW-1 stood there at the verandah whereas the deceased stood up from the wooden cot and came out on the road; there, the deceased was shot at from a distance of about 3 meters. Before the shot was fired, hot words were exchanged for 1-2 minutes. As soon as the gunshot hit the deceased, PW-1 raised alarm. On raising alarm, several neighbours arrived. The first three to arrive were Ram Kumar Tripathi, Shiv Sharan and Mool Chand Raidas (PW-2). When they arrived, the deceased was lying injured; they all lifted the deceased and took him on a cart to the hospital. Atul (PW-4) also arrived at the hospital. They reached the hospital at about quarter to 10 pm. At the hospital, doctor gave some treatment and told that the condition of the deceased is serious and he should be taken to Kanpur. At this stage, PW-1 stated as follows:-

“मैने रिपोर्ट में यह बात नहीं लिखायी थी कि फूलचंद तखत से उतरकर सड़क पर गये। मैने दरोगा जी को भी यह बात नहीं बतायी। न मैने 4.6.01 को मैने न्यायालय में भी यह बात नहीं बतायी। जैसा कोर्ट साहब ने समझा वैसा लिखवाया। मैने न्यायालय में दिनांक 4.6.01 के बयान में यह बात नहीं कही कि “मैं व मेरे भाई फूलचंद मकान के बाहर तखत पर बैठे थे तभी चार अभियुक्त इतना कहते ही सत्यप्रकाश ने फूलचंद पर तमंचे से फायर कर दिया। जो मेरे भाई के चेहरे पर लगा व मेरे भाई तुरंत लड़

खड़ाकर गिर गये।” सही बात यही है कि मेरे भाई गोली लगने पर सड़क पर गिरे थे। सत्य प्रकाश के अलावा किसी ने न कोई फायर किया न कोई बात कही। फूलचंद से सत्यप्रकाश के कोई रंजिश नहीं थी। जो भी रंजिश थी वह सत्यप्रकाश की मुझसे थी। सत्यप्रकाश के पिता ने मेरे पिता को लाठियों से मारा था। यही पुरानी रंजिश थी। इसी रंजिश की वजह से मनमुटाव थे।”

In addition to above, PW-1 stated that 45-46 years before also, some incident had taken place as a result of which there was enmity between the families of the deceased and Satya Prakash.

In respect of light, PW-1 stated that it was a dark night and the Moon had come out late.

On further cross examination, he stated that he had not gone to Kanpur with the deceased; that the police informed him between 1.30 am to 1.45 am that his brother (Phool Chandra) i.e. the deceased is not alive. On receiving this information, he again went to the hospital at about 2 am where the police and the body of his brother was there. Thereafter, he returned back home and delivered information to the family. Next day, the body was taken for postmortem. On further cross examination, he stated that he gave information to the police about half an hour after his brother (the deceased) was taken to Kanpur. PW-1 also stated that his other brother Mool Chandra (PW-3) and two police personnel had accompanied his brother (the deceased) to Kanpur.

In respect of time of arrival of the I.O. at the spot, PW-1 stated that before his brother (the deceased) was taken to the hospital, though, the I.O. had not arrived but two constables

had come. PW-1 denied the suggestion that he lodged the FIR after the death of his brother on the suggestion of the police personnel. He, however, he admitted that the written report was prepared at the hospital. He also denied the suggestion that it was a dark night and some unknown person had killed his brother and that no one witnessed the incident and that with the help of police on the basis of past enmity, false implication was made.

13. **PW-2 (Mool Chand Raidas)**. He stated that he did not witness the incident. Consequently, the prosecution declared him hostile. During his cross-examination by the public prosecutor, he stated that in the night of the incident he was at his in-laws place at Bilgram, District Hardoi and that he returned after five days. When confronted with his previous statement recorded under Section 161 CrPC, he denied having given any such statement. In his cross examination by the defence, he stated that when he returned from his in-laws place, he came to know that some unknown miscreants had killed Phool Chandra (the deceased).

14. **PW-3 (Mool Chandra)**. He is brother of the deceased. He stated that at the time when the incident took place he had gone to Bazaar. When he returned back, he came to know that his brother Phool Chandra (the deceased) has been shot by Satya Prakash and that Phool Chandra's family members have taken him to the hospital. He stated that the police had arrived at the spot and had collected plain earth and blood stained earth in two separate boxes and had also lifted one empty cartridge. PW-3 stated that the inquest was conducted at the hospital and he was a signatory to the inquest report. He reiterated what PW-1

had stated in respect of the motive for the crime.

In his cross examination, PW-3 reiterated that when he arrived, just after the incident, Phool Chandra (the deceased) had already been taken to the hospital. He stated that at 9.30 p.m. the police had arrived on a Jeep. He could not tell whether I.O. was there or not, but constables were there; and a seizure memo was prepared. The police had stayed there for half an hour and had visited the house of Satya Prakash (the appellant) and had enquired from the neighbours there. He stated that his brother (the deceased) was in the hospital; and that he had taken him to Kanpur with 3-4 other persons including police men. He admitted his signature on Ex. Ka-2 and also admitted that in Ex. Ka-2, case crime No.410 of 1998 was written. He, however, denied the suggestion that the first information report was lodged after the death of Phool Chandra.

15. **PW-4 (Atul Kumar)**. He is the son of the deceased. He stated that at the time of the incident, at about 9 pm, he was having dinner. His uncle (PW-1) and his father (the deceased) were having talks. A bulb was lit there. On hearing noise and gunshot, he went out and saw four persons, namely, Satya Prakash, Kanhaiya, Bahadur and Ramu, running away. His father was lying on the road and his uncle (PW-1) and others told him that those were the four persons who have killed PW-4's father. He stated that his uncle (PW-1) had written the report. He stated that the police had arrived at the spot and had lifted the empty cartridge, blood stained earth and plain earth from the spot. He stated that he had signed the seizure memo (Ex. Ka-2). He reiterated the same motive as narrated by PW-1.

In his cross examination, he stated that at the time of the incident, he was eating food inside the house. He heard a gunshot and on noise coming from outside, he went out immediately and saw that crowd had gathered and his father (the deceased) was lying on the road, at a distance of 10 paces from the verandah. Police came within half an hour and lifted his father and before lifting his father, they lifted blood stained earth and plain earth from the spot as also the empty cartridge and got his signature on the memorandum. On being confronted with his previous statement recorded under Section 161 CrPC, PW-4 admitted that earlier he had not made a statement that he saw Satya Prakash, Kanhaiya, Bahadur and Ramu running away.

On further cross examination, he stated that he had gone with his father to the police station and from there, he went to Vinod Dixit Hospital. Where, Vinod Dixit told him that his father had died. Upon getting that information, he took back the body to the police station. He remained with the body at the police station through the night and in the morning, inquest report was prepared and the body was sent for post-mortem. PW-4 stated that they had taken the body to the police station at 10 pm. He denied the suggestion that on suggestion of the police he made the statement that he saw the accused running away. He also denied the suggestion that seizure memo was prepared on the next day at the police station.

16. **PW-5 (Dr. S.K. Saxena)**. He proved the post-mortem report, which has already been noticed above, and stated that the injury sustained by the deceased could have been caused at 9 pm on 28.06.1998 and as there was no blackening, charring or tattooing, the shot must have been fired from a distance of 6

feet or more. He also stated that he found 12 pellets embedded in the brain and the shot could have resulted in instantaneous death. He added that the nature of injuries were such that the victim could not have survived for long without medical support. He also stated that the deceased may have had his meals 2 to 3 hours before.

17. **PW-6 (retired Head Constable Chhedi Lal Gupta)**. He prepared the GD entry of the first information report. He also proved that at 2 am on 29.06.1998, upon receipt of information with regard to the death of Phool Chandra, the case was converted to that of murder.

In his cross examination, he stated that initial investigation of the case was handed over to S.I., M.D. Verma, who was present at the Thana when the report was lodged. He denied the suggestion that the deceased was killed by miscreants and information in respect of his death having been received earlier, the GD was kept vacant to enter the case later.

18. **PW-7 (Om Prakash Sharma, retired Deputy Superintendent of Police)**. He was the second Investigating Officer who, after completing the investigation, submitted charge sheet which was proved by him as Ex. Ka-7.

In his cross examination, he stated that he had not visited the spot.

19. **PW-8 (Ganesh Bajpai, Sub-Inspector, Police Lines, Lucknow)**. He stated that he was the Station House Incharge of Police Station Kannauj on the date and time of the incident. Initially, the investigation was handed over to M.D. Verma but

as the injured died in the night, he took over the investigation. He proved various stages of investigation such as collection of blood-stained, plain earth and empty cartridge from the spot vide Ex. Ka-2; preparation of site plan vide Ex. Ka 8; and preparation of inquest report (Ex. Ka 9), photo nash (Ex Ka-10), challan nash (Ex. Ka10) under his direction by S.I. M.D. Verma as well as arrest /surrender of the accused persons.

In his cross examination, he stated that he received information about the incident on RT set while he was on round in the area. Though he could not remember the time of receipt of such information but stated that immediately, thereafter, he had arrived at the spot and when he reached the spot, he saw the body there. Immediately, he inspected the spot. Existence of bulb in the verandah was not shown to him. He did not record the statement of Atul, which was recorded by O.P. Sharma. He denied the suggestion that FIR was written after inquest.

Analysis

20. On a conspectus of the entire prosecution evidence, the features that stand out are as follows:-

(i) PW-1 is the only eye witness of the incident because, though, PW-4 claims that he saw the accused running away but, the fact that he saw the accused running away was not disclosed by him in his statement recorded under section 161 CrPC with which he was confronted during his deposition. PW-2, the other eye witness turned hostile and stated that he was elsewhere and not at the spot. In so far as PW-3 is concerned, he arrived at the spot, after the body was lifted.

(ii) PW-1 states that the deceased was rushed to the hospital for treatment; there he was advised to be taken to Kanpur but, on way to Kanpur, he died. In between, PW-1 lodged the report. Whereas, PW-4, the son of the deceased, states that within half an hour of the incident, the police had arrived, they lifted the body of his father. He also accompanied the body to the police station and from there the body was taken to Vinod Dixit Hospital. There Vinod Dixit declared him dead and, thereafter, the body was taken back to the police station where it was kept overnight and in the morning, inquest was conducted; whereafter, the body was sent for postmortem.

(iii) PW-1, neither in the written report (FIR), nor in the statement recorded under section 161 CrPC, stated that the deceased, during the course of the incident, went out of the house and was shot at on the road, whereas, the site plan, as well as the evidence, suggests that the deceased was shot at on the road just outside his house. Notably, even in his statement-in-chief, during his deposition in court, it was not disclosed by PW-1 that the deceased had gone out and was shot at on the road. Rather, he stated that PW-1 and the deceased were sitting on the wooden cot (Takhat) when the accused arrived and, on exhortation of co-accused Kanhaiya, Satya Prakash (the appellant) fired at the deceased which hit the deceased on his face and he fell on the spot. Importantly, in his statement-in-chief, PW-1 did not disclose that the deceased went out on the road and, there, was shot by the accused. Interestingly, to explain this major lacuna, in the cross examination, he made an improvement by stating that the shot was fired after a brief altercation, which lasted 1 to 2 minutes; and, when the accused party arrived and hurled abuses, the deceased stood up from the

wooden cot and went out on the road, where he was shot at. To further explain his improved stand during cross-examination, he stated that what he stated earlier on 04.06.2001 was as was told to him by "*Court Sahab*". We inquired from the learned counsel for the parties as to what *Court Sahab* means, to which they responded by saying that it is a colloquial term for public prosecutor. Be that as it may, the improvement in the eye witness account noticed above, was for the first time during the course of PW-1's deposition in court and that too, at the time of cross examination.

(iv) The FIR is stated to have been lodged at 23.10 hrs on 28.06.1998 while the deceased was in an injured state though not dead; and the conversion of the case into one punishable under Section 302 IPC is post midnight i.e. on 29.06.1998, whereas, the seizure memo (Ex. Ka 2) and the site plan (Ex. Ka 8), both dated 28.06.1998, prepared immediately on arrival of the police at the spot at 9.30 p.m., reflects not only the case crime number but also section 302 IPC. This indicates that the seizure memo as well as the site plan was not prepared at the spot as is also the finding of the trial court. But, what is interesting is that PW-4, the witness to Ex Ka-2, states that it was prepared before the body was lifted by the police, whereas, according to the PW-3, this was prepared at about 9.30, when the deceased, in an injured condition, had already been taken to the hospital. What assumes importance is that, in any case, Ex. Ka-2 and Ex Ka-8 though, on record, were prepared before lodging the FIR yet, they reflect the entry of the case crime number of the case as also the charging Section 302 IPC suggesting that these papers were prepared when the deceased was dead. It also suggests that the investigating agency had not been meticulous

and it had been preparing the records at its convenience.

(v) PW-8, the investigating officer, states that he had received information of the incident through RT set; and that he arrived at the spot without any delay and saw the body at the spot. This suggests that the deceased was dead on the spot.

(vi) PW-5, the doctor, who conducted post-mortem, on suggestion, admitted that the nature of the injuries were such that the deceased would have died instantaneously and could not have survived for long without medical support.

(vii) No evidence, either documentary or oral, of any kind in respect of treatment or admission of the deceased in an injured condition in the Hospital has been brought on record to demonstrate that the deceased in an injured condition was taken to the hospital for treatment or medical attention.

(viii) That there does not appear any evidence to demonstrate that the murder weapon was recovered and connected with the empty cartridge found on the spot.

21. Having noticed the aforesaid key features in the prosecution evidence, the issue that arises for our consideration is whether the testimony of solitary eyewitness (PW-1) is confidence inspiring and whether it could form the basis of conviction. To test the credibility of a witness, first, it has to be seen whether the presence of the witness from where he witnessed the incident at the spot is natural or is duly proved. In the instant case, the spot where the deceased was shot, by cogent evidence including the site plan, is proved to be a public road, in front of the house of the deceased. The time of the incident is

also proved to be at 9.00 pm from the testimony of the witnesses to which there is no challenge. Further, there is no challenge to the presence of PW-1 in the house where he, his family and the deceased used to reside. In fact, there is no suggestion to PW-1 that he resided elsewhere or that he was at some other place when the incident occurred. The defence did, however, make suggestion to PW-1 that no one witnessed the incident, which occurred in the darkness of night; and that some unknown person did the act; whereas, the accused were falsely implicated on the basis of past enmity. So far as enmity is concerned, that is admitted with PW-1, inasmuch as, PW-1's wife's niece had deserted the appellant; as a result whereof, the appellant had been pressurising PW-1 to send her back. This might be a reason for being inimical towards the deceased as well but not to the extent the enmity was with PW-1. Be that as it may, what needs to be ascertained is whether PW-1 was with the deceased at the time of the incident or was inside the house, like other members, and only when gun shot was heard, he, with others, rushed out to witness the deceased lying injured or dead, as the case may be.

22. To test whether a witness is trustworthy and reliable; and whether he is speaking the truth, there are no cut-and-dry formulae. Ordinarily, reliability of a witness is to be tested after going through his entire testimony and weighing it in conjunction with other material/ evidence on record so as to find out whether it has a ring of truth about it or is contrived. While testing the reliability and credibility of a witness, minor contradictions or omissions in his deposition which have no material bearing on the substratum of the prosecution case are to be overlooked, if, otherwise, the testimony is intrinsically

natural, reliable and trustworthy. But where the witness appears to be lying on material particulars and making improvements to fill up lacunae, credibility of that witness gets hit. Another important test, though not conclusive, is whether the witness at the first opportunity to make a disclosure of what he knows, has made that disclosure. Because, where, even on opportunity, the disclosure is withheld, or delayed, a doubt arises as to whether the story is contrived, based on guess-work or ill motives, particularly, where several persons are implicated with either no role or ornamental role.

23. In the instant case, the ocular account rendered by PW-1 that the deceased in an injured condition was rushed to the hospital and, there, the doctor advised to take him to Kanpur and, while that process was on, PW-1 came to lodge the first information report does not appear truthful. Rather, the deceased appears to have died on spot. This we say so, because, according to PW-4, the son of the deceased, the police had arrived at the spot within half an hour and had taken the body of the deceased to the police station and, thereafter, the body was taken to the hospital. It appears the body was taken to the hospital not for treatment or saving the life but to confirm the death. This fact gains probability also from the statement of PW-8, who states that when he arrived at the spot, the body was there on the road. The time of arrival of the police at the spot can be gathered from the testimony of PW-3 and PW-4. PW-3 fixes the time of arrival at 9.30 pm whereas PW-4 says half an hour after the incident. As, according to the prosecution story, incident occurred at 9.00 pm, police must have arrived by or about 9.30 pm. This means that the informant (PW-1) as well as deceased's son (PW-4), both had opportunity to lodge the FIR

when the body was taken to the police station. Once we accept this position, then why the FIR was not lodged then? Answer to this, holds the key to this case. To give an answer to this, by way of explanation, PW-1 takes the stand that the deceased was alive and was rushed to the hospital and there it was advised to take him to Kanpur. Under these circumstances, the explanation rendered was a material aspect on which we have found PW-1 not speaking the truth. But, this throws up another question, that is, whether the FIR was lodged at 23.10 hours or later, as suggested by the defence.

24. Ordinarily, ante-timing of an FIR is to be established by gruelling cross-examination with reference to the entries made in the General Diary of the date to demonstrate that there was no case registered in between, enabling interpolation; and that the police papers prepared subsequent to the purported time of registration of the FIR bear no details of the case. Be that as it may, in this case, the defence though have made suggestion with regard to the FIR being ante-timed but have not been able to demonstrate that the FIR was ante-timed. But, what assumes importance is that according to the prosecution evidence, seizure memo (Ex. Ka-2) and site plan (Ex. Ka 8) were prepared when the police arrived at the spot, which means on or about 9.30 pm, whereas, the FIR was lodged at 23.10 hours, that is, at 11.10 pm. Yet, in Ex Ka-2 and Ex. Ka 8, not only the case crime number but also section 302 IPC is mentioned when, otherwise, there was no section 302 IPC at the time of registration of the case. This discrepancy the trial court noticed and overlooked by observing that it is a practice of the police to fill papers not on spot but later. No doubt, this does happen and, therefore, it cannot be a clinching circumstance to totally discredit the

lodging of the FIR at the time when it is purported to have been lodged but, what it does is that it taints the police investigation and therefore, much mileage cannot be derived by the prosecution from the so-called prompt FIR inasmuch as the police records appear to have been prepared at one go. Under the circumstances, we would have to be circumspect and independently assess the worth of the ocular account rendered by PW-1 so as to find out whether it is wholly reliable and trustworthy, more so, because he is the sole eye witness. At this stage, we may also observe that this is a case where the deceased was shot at on the road from a distance of over six feet thus, being a case of single gun shot, what would have to be examined is whether the incident was a hit and run kind of an incident or it occurred in the manner alleged by PW-1.

25. According to PW-1, he and the deceased were sitting on the cot when the accused arrived. Initially, in the FIR as well in the statement in chief, he stated that while PW-1 and the deceased were sitting on the cot, the accused arrived and, on exhortation of Kanhaiya, Satya Prakash fired the shot which hit the deceased on face and he fell on the spot. As per this initial statement, there was no altercation and no movement of the deceased from the cot therefore, the site where the deceased fell, after being hit, came to be inside the house in its verandah. But, as the spot from where the deceased was lifted fell on the road, outside the house, during cross-examination, PW-1 made improvement and introduced the story that when the accused party came, the deceased rose from the cot went out on the road, entered into an altercation for 1-2 minutes and then the shot was fired, as a result whereof, the deceased fell on the road. This improvement was made for the first time during

cross-examination after few years of the examination in chief; and this improved story was not there even in the statement recorded under section 161 CrPC with which PW-1 was confronted. Further, when he was asked about this improvement, PW-1 stated that what he had stated earlier, on 04.06.2001, is what the *Court Sahab* had advised him to state. This renders his testimony not wholly reliable and shakes our confidence in his deposition and when we look at it from another angle, that is, he has not been found truthful with regard to the deceased being alive and rushed to the hospital for treatment, various questions arise in our mind, that is, whether he really witnessed the incident or he also arrived at the spot, like others, when the gun shot was heard; and whether the FIR and the prosecution story is contrived, based on guess-work, or suspicion, or ill-motive. Be that as it may, the upshot of the discussion is that the testimony of PW-1 having not been found truthful on a material particular and inconsistent as well, in the sense that it improves upon the earlier statement, in respect of the manner in which the incident occurred, it is not wholly reliable and this by itself is sufficient to extend the benefit of doubt to the accused-appellant. More so, when the prosecution case is based on testimony of a solitary eye witness, who has himself not suffered any injury, and the testimony does not find corroboration from other independent evidence. At this stage, we may notice that though the prosecution had also examined PW-4 as a witness who saw the accused running away from the spot, but this deposition of his is at variance with his statement under section 161 CrPC where he did not state having seen the accused running away. We, therefore, do not propose to rely on the testimony of PW-4 to lend credence to what PW-1 deposed.

26. For all the reasons stated above, we are of the considered view that the prosecution has failed to prove its case beyond the pale of doubt and, therefore, the appellant is entitled to the benefit of doubt. Consequently, the appeal is **allowed**. The judgment and order of conviction and sentence recorded by the trial court is set aside. The appellant is acquitted of the charge for which he has been tried and convicted. The appellant shall be released from jail forthwith, unless wanted in any other case, subject to compliance of the provisions of Section 437-A Cr.P.C. to the satisfaction of the trial court.

27. Let a copy of this order be certified to the court below along with the record for information and compliance.

Order Date :- 2.2.2022
AKShukla/-