

**RESERVED**  
**AFR**

**Court No. - 45**

**Case :-** CRIMINAL APPEAL No. - 2410 of 1985

**Appellant :-** Gulab And Another

**Respondent :-** State of U.P.

**Counsel for Appellant :-** R.R. Yadav,C.M. Yadav,K.K. Tripathi,Rajiv Sharma, Rakesh Prasad

**Counsel for Respondent :-** A.G.A.

**Hon'ble Manoj Misra,J.**

**Hon'ble Sameer Jain,J.**

**(Delivered by Hon'ble Sameer Jain,J.)**

1. The present appeal has been filed by two appellants, namely, Gulab(appellant No. 1) and Nanku @ Nanhu (appellant No. 2). The appeal of Nanku @ Nanhu (appellant No. 2) has been abated, on account of his death, vide order dated 8.12.2021. Therefore, by way of present order, we will decide the appeal filed by Gulab (appellant No. 1).

2. Appellant- Gulab and three others were convicted by the trial court under Section 302 IPC read with section 34 IPC and awarded life imprisonment vide order dated 10.9.1985. The other convicted accused- Ram Awadh and Ram Kripal filed a separate appeal i.e. Criminal Appeal No. 2408 of 1985, has already been abated on account of their death, vide order dated 10.9.2018.

**Introductory facts**

3. Prosecution case was instituted on a First Information Report (FIR) which was lodged on 4.9.1980, at about 11:15 pm by Nabi Baksh (PW-1) against the appellant- Gulab (surviving appellant) and three others, under Section 302 IPC, at P.S. Handia, District Allahabad as case crime No. 300 of 1980.

4. As per FIR, Nabi Baksh (PW-1) was the Munshi of Shekh

Mohammad Naqi (deceased) who was Ex-landlord (Zamindar) having agricultural holdings at Birapur. In respect of illegal occupation of his holdings by Mangal Yadav and his pattidars (associates) Shekh Mohammad Naqi (deceased) had filed a civil suit. Deceased had won a case up to the stage of High Court but another case was pending. As a result, Mangal Yadav and his collaterals used to threaten him. It is alleged that a day before the incident, when the informant (PW-1) had gone to Allahabad in 'pairvi' of a case, Mangal Yadav told PW-1 that it be conveyed to the deceased that he (deceased) will have to face consequences for cases filed against him. It is alleged that on 04.09.1980 due to some household work, informant (PW-1) could not go to Birapur, therefore, he sent his son Nurul Islam (PW-2) to Birapur with the deceased who used to go to Birapur on a daily basis. It is alleged that while the deceased was returning back with PW-2, near village Derha, around sunset, PW-2 stopped for urination whereas Mohd. Naqi (deceased) moved ahead; soon thereafter, PW-2 heard shrieks and saw that accused Ram Awadh, Gulab (surviving appellant), Kripal and Nanhu, who were having enmity with Mohammad Naqi (deceased), forcibly lifted the deceased and took him to the field where there was standing Jwar crop. Due to fear, PW-2 ran away and, at about 8 pm, he gave information to the informant about the incident, and when the informant (PW-1) and others arrived at the spot, they found Shekh Mohammad Naqi lying dead.

5. After lodging the First Information report (Ext. Ka 5), investigation started and police arrived at the spot. Investigating Officer lifted blood stained and plain soil from the spot and prepared recovery memo (Ext. Ka 10) and also recovered one spectacle, an umbrella and a stick (belonging to the deceased) from near the spot and prepared seizure memo (Ext. Ka 14). Thereafter, inquest report (Ext. Ka-4) was prepared and the body was sent for post mortem. On 5.9.1980, at about 3 pm, post mortem was conducted of which post-mortem report (Ex. Ka-16) was prepared and, after investigation, charge sheet was submitted against appellant- Gulab (surviving appellant) and other accused persons under Section 302 IPC.

After taking cognizance on the charge-sheet, the case was committed to the court of session and, on 16.7.1981, charges were framed against the appellant no.1 (Gulab) and other accused persons under Section 302 IPC read with Section 34 IPC. The accused including Gulab (surviving appellant) denied the charge and claimed trial.

6. Prosecution during trial examined 13 witnesses, out of them Nabi Baksh (PW-1)-the informant; Nurul Islam (PW-2)-the eye witness; Abdul Wahid (PW-3); and Jadunath (PW-4) are witnesses of fact whereas rest are formal witnesses.

7. After recording the evidence of prosecution witnesses trial court examined appellant- Gulab (surviving appellant) under Section 313 Cr.P.C. and thereafter, Umakant (DW-1) was examined as defence witness. The trial court thereafter, on the basis of the evidence available on record, convicted the surviving appellant- Gulab under Section 302/34 IPC along with other co-accused persons.

8. We have heard Sri Veeresh Mishra, learned Senior Counsel assisted by Sri Brijesh Yadav for surviving appellant Gulab (appellant no.1); and Sri Amit Sinha, learned AGA for the State- respondents.

**Submissions on behalf of the appellant**

9. Learned counsel for the appellant (Gulab) submitted that prosecution failed to prove its case beyond reasonable doubt and on the basis of sole eye witness testimony, conviction of the appellant (Gulab) is not justified. He submitted that FIR of the present case was lodged at about 11:15 pm i.e. after more than 5 hours and prosecution failed to explain the delay in lodging the first information report. He further contended that the FIR was lodged by Nabi Baksh (PW-1), who is not an eye witness, whereas, his son Nurul Islam (PW-2) who is stated to be an eye witness did not lodge the report, despite opportunity, this itself creates doubt as to whether PW-2 was an eye witness. Sri Veeresh Mishra further submitted that there are material omissions and contradictions between the version of the FIR and in the statement of prosecution witnesses. He contended that medical evidence also does not support the ocular evidence

and from the perusal of the entire evidence on record, it appears, the alleged eye witness Nurul Islam (PW-2) did not witness the incident and that, after due deliberations, the accused including the surviving appellant-Gulab were implicated due to previous enmity with Shekh Mohammad Naqi (deceased). Sri Mishra submitted that the trial court failed to properly appreciate the evidence on record and has wrongly convicted the appellant, therefore, the order of conviction is liable to be set aside.

**Submission on behalf of the State.**

10. Per contra, learned AGA contended that from the testimony of Nurul Islam (PW-2), it is proved that the appellant- Gulab along with other accused persons committed the murder of Shekh Mohammad Naqi. He submitted that there is no material contradiction between the FIR and the statement of prosecution witnesses. From the statement of (PW-2) Nurul Islam it is clear that he witnessed the incident and saw the appellant- Gulab having a 'Gandasa' in his hand. He also submitted that there is no conflict between the medical evidence and the ocular evidence and the testimony of Nurul Islam (PW-2) stands corroborated by the testimony of Abdul Wahid (PW-3) who saw the surviving appellant No. 1 (Gulab) at the time of incident with other accused persons when they, with their respective weapons, were coming out from the Millet (Jwar) field. Thus, the conviction of the appellant- Gulab in the present case is justified and the appeal is liable to be dismissed.

11. Having noticed the rival contentions and having perused the record of the case, before analyzing the prosecution evidence, it is necessary to briefly discuss the prosecution evidence adduced during trial.

**Prosecution witnesses**

12. Prosecution examined Nabi Baksh as PW-1. This witness is the informant of the case who lodged the first information report and is the father of alleged eye witness Nurul Islam (PW-2). This witness repeated the version of the FIR and stated that Shekh Mohammad Naqi (deceased) was Honorary Magistrate and Ex-Zamindar. He was having agricultural land in village-Birapur. PW-1 was a servant of Shekh Mohammad Naqi

(deceased) for last 40 years. This witness stated that accused-Ram Awadh and Ram Kripal are real brothers and sons of Mangal Yadav while Gulab (surviving appellant) and accused Nanhu are neighbors of accused Ram Awadh and there is long standing enmity between Shekh Mohammad Naqi (deceased) and Mangal Yadav (father of accused Ram Awadh and Ram Kripal). He stated that a day before the incident, when PW-1 was in civil court in connection with case against Mangal Yadav, father of co-accused Ram Awadh and Ram Kripal, threats were extended. This witness stated that on the date of incident i.e. on 04.09.1980, he could not go to Birapur as he had house repair work to do; therefore, he sent his son Nurul Islam (PW-2) with Shekh Mohammad Naqi (deceased). As per this witness, Shekh Mohammad Naqi (deceased) used to visit Birapur at about 3:00 pm, post noon. On the date of incident, after the 'maghrib prayer', when PW-1 inquired about Shekh Mohammad Naqi (deceased) and Nurul Islam (PW-2) he came to know that they have not returned as yet. As a result, he went on foot to Birapur. When PW-1 arrived at Birapur, Devi (not examined) and Jadunath (PW-4) informed him that Shekh Mohammad Naqi (deceased) and his son Nurul Islam (PW-2) had departed even before sunset. After receiving this information, PW-1 returned to his house; there, after some time, his son Nurul Islam (PW-2) arrived and informed PW-1 that when he and Shekh Mohammad Naqi (deceased) were returning from Birapur and were between village-Derha and Kazipur, PW-2 sat to uninate. In the meantime, appellant- Gulab (surviving appellant) and other accused Nanhu, Ram Awadh and Ram Kripal forcibly lifted Shekh Mohammad Naqi (deceased) and took him into the Millet field. According to PW-1, his son Nurul Islam (PW-2) had informed him that accused Ram Awadh was having an axe therefore, he got scared and ran away. PW-1 stated that after receiving information from his son Nurul Islam (PW-2), he, along with others, visited the spot and found body of Shekh Mohammad Naqi lying in the Jwar field. PW-1 stated that he got the report scribed by Anu, which was lodged by him. PW-1 proved the written report as Ex. Ka-1.

13. During cross examination, PW-1 stated that he told the scribe of the FIR, namely, Anu (not examined), that before arrival of Nurul Islam (PW-2), he went to search for Shekh Mohammad Naqi (deceased) but, if this fact was not written by Anu, he can not provide an answer. PW-1 further stated that when he first went to search for the deceased, it was dark and the sun had already set. PW-1 also stated that between 6:45 and 7:00 PM he went in search of the deceased and in 20-25 minutes had arrived at Birapur and after 15 minutes, he departed from Birapur. PW-1 stated that during this search he did not meet anybody on the way. According to this witness, Village Derha is adjacent to the place of incident. In respect of weapons assigned to the respective accused, he stated that in the FIR, he mentioned that co-accused Ram Awadh had an axe but if it is not written, he cannot give reason. PW-1 in his cross examination also stated that he did not notice the dead body of Shekh Mohammad Naqi (deceased) lying in the field while he was going towards Birapur in search of him. He admitted that if one stood on that chak road, the dead body would have been visible. PW-1 stated that the face of deceased was flattened because of the injuries. PW-1 denied the suggestion that he got to know about the death of Shekh Mohammad Naqi (deceased) next morning. In respect of pending litigation, PW-1 stated that he is not aware whether there is any case pending between surviving appellant- Gulab and Shekh Mohammad Naqi (deceased). In respect of presence/non presence of blood on the spot, PW-1 stated that due to rain, blood was washed out. He later clarified that it started to rain when he returned from the police station. He also denied the suggestion that his son did not inform him about the murder of Shekh Mohammad Naqi (deceased). He admitted that he had send his son (PW-2) with Shekh Mohammad Naqi (deceased) to ensure safety of Shekh Mohammad Naqi (deceased) as the deceased never used to go alone. PW-1 (Nabi Baksh) in his cross-examination also stated that 'Maghrib' prayer (Namaz) is read after sunset.

14. From above, it is clear that Nabi Baksh (PW-1), the informant, is not an eye witness of the incident.

15. Prosecution next examined Nurul Islam as PW-2. He is the sole eye witness of the incident. According to him, he, on the date of incident, had gone with Shekh Mohammad Naqi (deceased) to Birapur because his father Nabi Baksh (PW-1) was busy in repair work. He and Shekh Mohammad Naqi (deceased) went to Birapur around 3:00 to 3:15 PM and they departed from Birapur before sunset as Shekh Mohammad Naqi (deceased) used to offer 'maghrib prayer' (namaz) at home. According to PW-2 between 6 and 6:30 PM, on way back, he stopped to urinate whereas Shekh Mohammad Naqi (deceased) moved ahead. Soon thereafter, he heard cries of Shekh Mohammad Naqi (deceased); he saw the surviving appellant No. 1-Gulab and other accused persons, namely, Nanhu, Ram Kripal and Ram Awadh, forcibly taking away, Shekh Mohammad Naqi (deceased) into the Millet (jwar) field. There, he saw the surviving appellant- Gulab assaulting the deceased and co-accused Nanhu holding his leg. As per PW-2, appellant- Gulab had 'gandasa' in his hand whereas co-accused Ram Awadh and Ram Kripal had axe and spear, respectively. According to PW-2, accused persons threatened him and due to fear, he ran away via Katehra road to come to his house. He stated that due to the fear of the accused persons he did not take the usual 'pagdandi' route to home. According to this witness, he arrived at his house by about 8:00 to 8:15 PM and narrated the entire incident to his father PW-1 (Nabi Baksh); thereafter, they arrived at the spot with others and saw the dead body of Shekh Mohammad Naqi (deceased) lying in Millet (jawar) field. Thereafter, his father Nabi Baksh (PW-1) went to the police station to lodge the first information report. PW-2 further stated that Abdul Wahid (PW-3) and Abdul Moin (not examined) also arrived at the place of incident and informed that they also witnessed the accused persons running away from the spot after committing the murder of Shekh Mohammad Naqi (deceased). As per this witness, surviving appellant No. 1-Gulab and Nanhu had no enmity with the deceased. PW-2 identified articles of the deceased, namely, umbrella, one pair of spectacles and other belongings of deceased, recovered from the spot as material Exhibit Nos.

1 to 6.

16. In his cross-examination, PW-2 stated that his house is about 1-1.5 miles away from the place of incident and Birapur is about 1-1.25 miles away from the village-Kajipur whereas, Birapur is about 2 to 2.5 miles away from his home. According to PW-2, from Village Derha his house is about 1 to 1.5 miles away. As per this witness, from the place of incident, village Birapur is about 1 to 1.25 miles. As per this witness, though he heard shrieks of Shekh Mohammad Naqi (deceased) but he did not witness the accused assaulting the deceased. According to PW-2, he did not notice any other person near the place of incident. PW-2 in his cross-examination further stated that he went straight to his home via Katehra and did not stop in between. In respect of the height of the Millet crop, he stated that at the time of incident, height of the Millet (jwar) crop was around 5 to 6 feet. According to this witness, from the 'pagdandi' (narrow foot-path) dead body lying in the field was noticeable. In his cross-examination, PW-2 denied the suggestion that he did not witness the incident and was not present at the place of incident. He added that from the place of incident he arrived at his house in 1.5 to 2 hours. PW-2 admitted that one side of the face of the deceased was flattened as if it was compressed by a heavy item. PW-2 however denied the suggestion that Shekh Mohammad Naqi (deceased) was having several enemies and, therefore, somebody killed him and he did not witness the incident.

17. Abdul Wahid was examined as PW-3. According to this witness, on 4.9.1980 at about sunset, he was going to Birapur alongwith his friend Abdul Moin (not examined) to visit his niece and when they crossed village-Derha, he witnessed that surviving appellant No. 1-Gulab and other accused persons were coming out from Millet (jwar) field; at that time Gulab had 'gandasa' in his hand and co-accused Ram Awadh and Ram Kripal had axe and spear, respectively, in their hands. This witness also states that when he asked them as to what happened, they went away without saying anything. PW-3 further stated that in between 9 and 9:30 pm, when he was sitting in his relative's house, he came to know that



Shekh Mohammad Naqi (deceased) was murdered on his way back home; he arrived at the spot and saw the body of Shekh Mohammad Naqi (deceased) lying in the field. There, Nurul Islam (PW-2) was present who informed him about the incident. PW-3 also stated that he informed Nurul Islam (PW-2) that he also witnessed the accused persons running away from the spot. PW-3 being one of the inquest witnesses proved the inquest report (Ext. Ka-4). In his cross examination, PW-3 stated that he did not see Nurul Islam (PW-2) at the spot nor he heard his shrieks. PW-3 further admitted that he did not witness commission of the crime; he only saw the accused persons including appellant-Gulab running away from the place of incident.

18. Jadunath was examined as PW-4. He was servant of Shekh Mohammad Naqi (deceased). According to him, on the day of his murder Shekh Mohammad Naqi (deceased) arrived at Birapur with Nurul Islam (PW-2) and about an hour before sunset, Shekh Mohammad Naqi (deceased) and Nurul Islam (PW-2) left Birapur. As per PW-4, Shekh Mohammad Naqi (deceased) visited Birapur daily. PW-4 denied the suggestion that being servant of the deceased, he lodged a false report against the accused Ram Awadh 3-4 days before. In his cross-examination, PW-4 stated that he came to know about death of Sheikh Mohd. Naqi (the deceased) between 10 and 11 PM though he does not remember as to who informed him. He, however, visited the spot next day morning.

19. Ramji Mishra, Head Constable was examined as PW-5. He prepared the chik report after receiving the written report (Ext. ka 1). He proved the chik report as Ext. Ka 5. He also proved the G.D. Entry of 'kayami mukadma' as Ext. Ka 6. PW-5 also proved sealed item which was kept in malkhana as Ext. Ka 7-8.

20. Constable Duryodhan Singh (PW-6) gave his statement through an affidavit. According to this witness in the night of 4/5.9.1980, S.I. Ameer Ali handed over the dead body of Shekh Mohammad Naqi (deceased) to him and constable Salik Ram Chaubey (not examined) for post mortem along with other documents. According to this witness, on 5.9.1980, he

kept the body in the mortuary and identified it at the time of autopsy.

21. Nanhu Singh, Assistant Clerk (Malkhana, Sadar, Allahabad) gave his statement through an affidavit as PW-7. According to this witness, on 11.2.1981 the sealed blood stained and plain soil was kept in the malkhana and on 25.3.1981, the above bundle, in a sealed condition, was sent to Agra for analysis.

22. Ameer Ali was examined as PW-8. He is the first investigating officer. According to this witness, on 4/5.09.1980, at about 1.00 AM, in the night he prepared the inquest report (Ex. Ka-4); he made recovery of blood and blood-stained as well as plain soil from the spot. PW-8 stated in his examination-in-chief that in column Nos. 2 and 3 of 'chalan lash' due to mistake the date was mentioned as 5.9.1980 in place of 4.9.1980. In his cross-examination, this witness has stated that by the time he received the documents of the present case, he was not aware as to who was the scribe of the FIR. According to this witness, in the FIR, it was not mentioned as to what weapon was used by which accused. PW-8 stated that he recorded the statement of Nabi Baksh- informant (PW-1) under Section 161 of Cr.P.C. PW-8 also stated that during investigation, he did not come to know whether there was an eye witness of the incident. He added that till the time he was investigating the matter, he did not come to know as to who committed the murder. PW-8 in his cross-examination admitted that police dog squad was called. PW-8 further added that the head of deceased appeared pasted to the earth as if it was compressed by some heavy item.

23. PW-9, Ram Tripathi gave his statement on an affidavit and the defence did not cross examine him. This witness stated that on 11.2.1981 two sealed boxes of blood stained and plain soil were kept in the malkhana on 25.3.1981. These items in sealed condition were sent for Forensic Analysis to Agra.

24. Dr. S.T. Imam, Physician at District Hospital, Gorakhpur, was examined as PW-10. This witness conducted the post mortem of the body of the deceased-Shekh Mohammad Naqi on 5.9.19980 at about 3:00 pm. According to this witness, deceased died a day before and rigor mortis

was present on both the extremities. PW-10 noticed following injuries on the body of the deceased:-

1. Incised wound 2" X ½" X Complete cut of Mandible on the chin.
2. Incised wound right side temporal region 3" above the right ear with fracture of temporal bone.
3. Incised wound on the right side of the forehead just above the right eye-brow 2 and 1/2" X 1" with complete out of the frontal bone.
4. Incised wound 1/2" X 1/4" on the forehead just above the root of the nose.
5. Incised wound 1/2" X 1/4" on the right side neck.

25. In internal examination of the body, Doctor-(PW-10) found scalp and brain lacerated. According to this witness deceased could have died at about 6:00 pm in the evening and the injuries found could have been caused by axe, farsa and spear. This witness proved post mortem report as Ext. Ka-15. In his cross-examination Dr. Imam stated that deceased sustained only incised wounds and there was no punctured wound. PW-10 denied the suggestion that under the pressure of Collector and S.S.P. concerned, he prepared a wrong post mortem report. PW-10 also stated that the right eye of deceased was not compressed; if any such injury existed, it would have been noticed by him.

26. Ram Ratan Ram PW-11 was the third Investigating Officer. According to this witness, on the order of Circle officer, he started investigation of the case on 6.9.1980. He recorded the statement of Nurul Islam (PW-2); inspected the spot and prepared the site plan (Ext. Ka 16). On 7.9.1980, he recorded the statements of Abdul Wahid (PW-3) and other witnesses and on 3.10.1980, he submitted charge sheet (Ext. Ka 17). In his cross-examination, this witness stated that Amir Ali, S.I. (PW-8) started investigation of the case on 4.9.1980, at about 11.15 PM, after the FIR. He stated that Nurul Islam (PW-2) was an eye witness of the incident. According to PW-11, on 5.9.1980 investigation of the case was handed over to Shankar Sharan Upadhaya (PW-13). PW-11 stated that till 6<sup>th</sup> September, it was not mentioned in the case diary that Nurul Islam (PW-2)

was an eye witness. PW-11 stated that Nurul Islam (PW-2) had told him that he witnessed the accused persons running away after committing the murder of Shekh Mohammad Naqi (deceased). PW-11 denied the suggestion that the investigation of the case was handed over to him only to generate an eye witness account by manipulating the investigation. Upon further suggestion, PW-11 stated that he is not aware whether the Collector was annoyed as there was no eye witness in the FIR.

27. A.S.I., Subedar Yadav as PW-12 filed an affidavit. Defence did not cross examine him. This witness proved that S.I. Amir Ali (PW-8) handed over to him sealed bundle of blood stained and plain soil which was entered by him in the malkhana in a sealed condition.

28. Shankar Saran Upadhyay, S.I. (PW-13) is the second Investigating Officer of the case. He stated that on 4.9.1980 while he was posted as S.O. at P.S.-Handia he could not investigate, as he was ill. He, however, recorded the statements of accused Kripal, Gulab (surviving appellant) and Nanhu after their arrest. According to this witness, S.I. Amir Ali (PW-8) arrested the accused persons and Amir Ali started the investigation of the case and, thereafter, Ram Ratan Ram (PW-11) investigated the matter. Ameer Ali (PW-8) investigated the matter on 4.9.1980 only and Ram Ratan Ram started investigation on 6.9.1980. According to this witness, as per Report No. 90 dated 05.09.1980, at 6.40 hours, written by Ramji Mishra, Constable, there was a report in respect of dog squad and Report No. 19, at 13:10 hours, indicates arrival of dog squad, this report too, is written by Head Constable Ramji Mishra. PW-13 submitted and proved these reports as Ext. Kha 1, Kha 2 and Kha 3.

**Analysis:-**

29. Having noticed the prosecution evidence, it is clear that there are four witnesses of fact, namely, Nabi Baksh (PW-1)-the informant, Nurul Islam (PW-2), Abdul Wahid (PW-3) and Jadunath (PW-4).

30. Nabi Baksh PW-1 is the informant of the case. He lodged the FIR to the effect that on 04.09.1980 at about 8.00 PM his son Nurul Islam (PW-2) informed him that when he (Nurul Islam) was returning back along with

Sheikh Mohd. Naqi (deceased) from Birapur and arrived near village Derha, the accused persons including the surviving appellant no. 1 (Gulab) committed the murder of Sheikh Mohd. Naqi. PW-1 stated that he used to accompany the deceased to Birapur on a daily basis but, on the date of incident, he could not go as he had some house repair work, therefore, he sent his son Nurul Islam (PW-2) along with the deceased. PW-1 proved the enmity between co-accused Ram Awadh and Ram Kripal with the deceased Sheikh Mohd. Naqi but, stated specifically that the surviving appellant no. 1(Gulab) had no direct enmity with the deceased.

31. Thus, PW-1, the informant, Nabi Baksh, is not an eye witness. He only proved the motive for the crime and that Nurul Islam (PW-2) went along with the deceased to Birapur on 04.09.1980 i.e. the date of the incident.

32. Abdul Wahid (PW-3) is also not an eye witnesses of the murder but is a witness of circumstance. Abdul Wahid (PW-3) stated that on or about the time of the incident he witnessed the accused persons coming out from the Millet (Jwar) field having weapons in their hands. This witness is a chance witness.

33. Jadunath (PW-4) is also not eye witness of murder but is a witness who proves that on the date of the incident, Nural Islam (PW-2) and Sheikh Mohd. Naqi (deceased) came to Birapur and they returned back an hour before sunset. This witness thus proves that Nurul Islam (PW-2) accompanied Sheikh Mohd. Naqi on way back from Birapur.

34. Consequently, Nurul Islam (PW-2) is the only eye witness of the incident and entire prosecution story rests heavily on his testimony. Before we examine the worth of the testimony of PW-2, it would be useful to notice the law as to when conviction can be based on the testimony of a solitary eye witness.

35. The Apex Court in case of **Bhimapa Chandapa Hosamani and others Vs. State of Karnataka (2006) 11 SCC 323** observed as follows:-

*“This Court has repeatedly observed that on the basis of the testimony of a single eye witness a conviction may be*

*recorded, but it has also cautioned that while doing so the Court must be satisfied that the testimony of the solitary eye witness is of such sterling quality that the Court finds it safe to base a conviction solely on the testimony of that witness. In doing so the Court must test the credibility of the witness by reference to the quality of his evidence. The evidence must be free of any blemish or suspicion, must impress the Court as wholly truthful, must appear to be natural and so convincing that the Court has no hesitation in recording a conviction solely on the basis of the testimony of a single witness.”*

36. Again, the Apex Court in case of **Parvat Singh and others Vs. State of Madhya Pradesh (2020) 4 SCC 33** observed as follows:-

*“However, at the same time, the evidence/deposition of the sole witness can be relied upon, provided it is found to be trustworthy and reliable and there are no material contradictions and/or omissions and/or improvements in the case of the prosecution.”*

37. Recently, the Apex Court in case of **Amar Singh Vs. State (NCT of Delhi) AIR 2020 SC 4894** observed in paragraph 16 as follows:-

*“Thus the finding of guilt of the two accused appellants recorded by the two Courts below is based on sole testimony of eye witness PW-1. As a general rule the Court can and may act on the testimony of single eye witness provided he is wholly reliable. There is no legal impediment in convicting a person on the sole testimony of a single witness. That is the logic of Section 134 of the Evidence Act, 1872. But if there are doubts about the testimony Courts will insist on corroboration. It is not the number, the quantity but quality that is material. The time honoured principle is that evidence has to be weighed and not counted. On this principle stands the edifice of Section 134 of the Evidence Act. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy or otherwise (see Sunil Kumar V/s State Government of NCT of Delhi)”*

38. Thus, the law as it stands is that conviction on the basis of testimony of sole eye witness is permissible provided his evidence is free of any blemish or suspicion and impresses the Court as wholly truthful, reliable and natural.

39. From a perusal of the evidence of Nurul Islam (PW-2) and other witnesses, it is proved that he accompanied Sheikh Mohd. Naqi (deceased) to Birapur on 04.09.1980 and was with the deceased at Birapur at or about 3.00-3.15 PM. The testimonies of Nurul Islam (PW-2) and Jadunath (PW-4) also proves that the deceased and Nurul Islam (PW-2) departed from Birapur before sunset. The question that arises for our consideration is whether at the time of the incident, say at about 6-6.30 PM, Nurul Islam (PW-2) was present at the spot with Sheikh Mohd. Naqi (deceased) or not; and whether his testimony is wholly reliable and truthful.

40. Having gone through the entire evidence of the witnesses of fact what transpires is that PW-2, according to his own stand, as soon as he saw the accused persons with arms, having bodily lifted the deceased into the Millet field and assaulting him, he effected his escape from the spot and ran for his life. According to PW-2, he did not take the usual Pagdandi, but the road to reach home. The distance between Birapur and Handia (home of the deceased) has come on record to be between 2 and 2 and ½ mile whereas the distance between the place of incident and PW-2's house is about a mile and a half. PW-2 states that he reached home at about 8.00-8.15 PM. Importantly, the deceased used to offer Magreeb Prayer (Namaz) on a daily basis. This is at sunset. The sunrise and sunset chart of 04.09.1980 for Allahabad would indicate that the sunset on 04.09.1980 was at 6.18 PM. Meaning thereby that the deceased had a target to reach before 6.00 PM or about. As per PW-4, he left Birapur for home an hour before sunset. According to PW-1, when the deceased did not arrive home for Magreeb prayer, he went to Birapur from that Pagdandi adjoining which, in a field the deceased was lying dead. According to PW-1, he left at about 6.45-7.00 PM to Birapur in search of the deceased and reached Birapur in about 25 minutes and after staying there for 15 minutes came back. All of this suggest that the place of occurrence was not that far from the residence of the deceased as to take PW-2 two hours to reach home, whatever the route he might take. This throws serious doubt whether he

was with the deceased or loitering some where else. Another aspect noteworthy is whether the incident occurred between 6-6.30 PM, as stated by PW-2 or earlier. Ordinarily, if a devout muslim is used to offer Magreeb Prayer, which is at sunset, he would not like to miss it. Sunset as per the chart was at 6.18 PM on 04.09.1980, hence, the probability is high that the incident may have occurred before 6.00 PM. Be that as it may, what is important is that if PW-2 ran away from the spot to the safety of his home why he took about 2 hours to reach, when even elderly persons could cover double the distance, that is between Birapur and the home of the deceased in 20 to 25 minutes. Thus, there arises a serious doubt as to whether PW-2 was with the deceased at the time of the incident.

41. As per PW-2, Nurul Islam, surviving appellant no.1 Gulab was having '*Gandasa*' in his hand while accused Ram Awadh and Ram Kripal were having axe and spear respectively and they all assaulted Sheikh Mohd. Naqi (deceased) whereas co-accused Nanhoo Singh caught hold his legs.

42. According to Dr. S.T. Imam (PW-10), who conducted post mortem, Sheikh Mohd. Naqi (deceased) sustained as many as five incised wounds. Injury no.1 was on his mandible on the chin, injury no.2 was on the temporal region, injury no.3 and 4 were on the forehead and injury no.5 was on the neck. Thus, all the five injuries sustained by Sheikh Mohd. Naqi (deceased) were on his face and head. It is hard to believe that if three persons having deadly weapons assault a person then all the injuries sustained by him would be on the face and head and not elsewhere, particularly, when the victim is pinned down and whole of his body is available to inflict wounds. In case of indiscriminate assault by weapons like Gandasa, axe and spear, ordinarily, injuries would be found all over the body and not only on face and head more so, when one of the accused persons had pinned down the deceased. Further, there is no punctured wound relateable to a spear, which, as per Nurul Islam (PW-2), was used by co-accused Ram Awadh while assaulting Sheikh Mohd. Naqi (deceased). Further, the maximum size of injuries (incised in nature)



mentioned in the post mortem report is 2 and ½ x 1 (i.e. injury no.3), which is not relatable to a Gandasa, which, if used, would leave a big cut wound.

43. Although, the medical evidence is only an opinion, but if it is in apparent conflict with the ocular account as to the weapons used, and the manner of assault, it casts a doubt on the reliability of the ocular account. The Apex Court in case of **Solanki Chimanbhai Ukabhai Vs. State of Gujarat AIR 1983 SC 484** in paragraph no. 12 observed as follows:-

*“Ordinarily, the value of medical evidence is only corroborative. It proves that the injuries could have been caused in the manner alleged and nothing more. The use which the defence can make of the medical evidence is to prove that the injuries could not possibly have been caused in the manner alleged and thereby discredit the eye witnesses. Unless, however the medical evidence in its turn goes so far that it completely rules out all possibilities whatsoever of injuries: taking place in the manner alleged by eye witnesses, the testimony of the eye witnesses cannot be thrown out on the ground of alleged inconsistency between it and the medical evidence.”*

44. In the light of the aforesaid legal position, on this ground also, testimony of Nurul Islam (PW-2) appears to be doubtful to us and not worthy enough as to form the sole basis of conviction.

45. For all the reasons recorded above, in our considered view, the testimony of Nurul Islam (PW-2) is not trustworthy and does not inspire our confidence as to form the sole basis of conviction.

46. Another important feature that we notice is that PW-8 Ameer Ali i.e. the first Investigating Officer of the case, stated that while he was investigating neither an eye witness came forward nor he could get an eye witness of the incident. This witness also stated that Dog Squad came after the incident. PW-8 Ameer Ali added by saying that he did not make an arrest as he was unaware as to who committed the murder. Statement of Ameer Ali (PW-8), the first Investigating Officer, surprises us because if the FIR had been lodged on 04.09.1980, at about 11.15 PM, as alleged by the prosecution, and the accused persons were named in the FIR including

surviving appellant no.1 Gulab, where was the occasion for this witness to make such statement before the trial court. PW-11 Ram Ratan Ram was also one of the Investigating Officers of the case, he also stated in his cross-examination that in the case diary till 06.09.1980 it was not mentioned that Nurul Islam (PW-2) was an eye witness of the incident. PW-13 Shankar Sharan Upadhyia was also one of the Investigating Officers of the case, he proved that a Dog Squad was called. All of this would suggest that either there was no eye witness or clue about the accused or the police never believed in the witness.

47. Further, according to the inquest report of deceased Sheikh Mohd. Naqi, inquest started on 05.09.1980 at about 1.00 AM and was completed by about 2.00 AM, but the inquest report does not bear crime number and other essential details of the case, had it been registered, as is the prosecution case.

48. Interestingly, Jadunath (PW-4) in his cross examination stated that after receiving the information of death of Sheikh Mohd. Naqi he, next morning i.e. on 05.09.1980, after sunrise, arrived at Police Station Handia and there the body of Sheikh Mohd. Naqi was lying but nobody was present. Whereas, the testimony of PW-8 Ameer Ali indicates that the body of Sheikh Mohd. Naqi was sent for post mortem in the night of 4/5.09.1980 immediately after the inquest report. Thus, there is material contradiction in the version of Jadunath (PW-4) and Ameer Ali (PW-8).

49. Admittedly, informant PW-1 (Nabi Baksh) had received information about the incident on 04.09.1980 at about 8.00 PM from Nurul Islam (PW-2) but, in spite of that, FIR was lodged at about 11.15 PM i.e. after more than three hours by tendering explanation that on receipt of information, he went to the spot to check. This throws a doubt as to whether the information received from PW-2 was convincing. It also creates a possibility that PW-2 left the deceased and when he could not find the deceased, PW-1 and PW-2 went in search of the deceased. Importantly, Nurul Islam (PW-2), who saw the incident at 6 to 6.30 PM, neither lodged the FIR nor promptly returned home to inform his father about the

incident. Rather, he informed his father Nabi Baksh (PW-1) at about 8.00 PM i.e. after about two hours.

50. In **Mukesh and another Vs. State (NCT of Delhi) (2017) 6 SCC**, a three judges Bench of the Supreme Court, in para 50 of its judgment, observed as:-

*“50. Delay in setting the law into motion by lodging of complaint in court or FIR at police station is normally viewed by courts with suspicion because there is possibility of concoction of evidence against an accused. Therefore, it becomes necessary for the prosecution to satisfactorily explain the delay. Whether the delay is so long as to throw a cloud of suspicion on the case of the prosecution would depend upon a variety of factors. Even a long delay can be condoned if the informant has no motive for implicating the accused.”*

51. Recently, a Division Bench of this Court in **Mukesh Tiwari Vs. State of U.P. 2021 (3) ADJ 446 (DB)** (in which one of us Manoj Misra, J. was a member), after noticing several judgments of Supreme Court, observed, in para 39 of its judgment, as follows:-

*“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.”*

52. In the present case, PW-1 Nabi Baksh is the informant of the case, whereas, Nurul Islam (PW-2) is the eye witness. The eye witness, who witnessed the incident at about 6:00 pm did not lodge the report, and PW-1, who was informed about the incident at about 8:00 pm did not lodge the FIR till 11:15 pm when the distance between the place of occurrence and the police station is just 2 miles. This delay of about five hours in lodging the FIR from the time of the incident, casts a doubt on the prosecution case, especially when police station was hardly two miles from the place of incident.

53. Further, from the testimony of Investigating Officers and Jadunath (PW-4) and the omission of case details in the inquest report a strong

possibility arises that the FIR of the present case was not lodged on 04.09.1980 at 11.15 PM, as alleged by the prosecution, but later and, therefore, could be ante-timed.

54. Further, there appears inconsistency between the Inquest Report and the post mortem report in respect of the injuries noticed on the body of the deceased. In the inquest report (Ex.Ka-4), dated 05.09.1980, the deceased had sustained as many as 15 injuries and that the head of the deceased was compressed. This condition of the body, as noticed in inquest report, finds support in the testimony of Nabi Baksh (PW-1), Nurul Islam (PW-2) and (PW-8) Ameer Ali, but this fact is denied by the doctor (PW-10), who conducted the post mortem, by stating in his cross examination that if such injuries existed, he would have noticed the same.

55. Although, ordinarily, where there is inconsistency in respect of the injuries mentioned in the inquest report with those in the post mortem report then the opinion of the doctor would prevail. But, in the present case, the number of injuries mentioned in inquest report are 15 in number while in post mortem report only five injuries were noted by the doctor. There is a huge difference in the number of injuries mentioned in the inquest report and post mortem report. Importantly, the ocular evidence also shows that the head of deceased was flattened i.e. compressed, which is totally denied by doctor Imam (PW-10), who conducted the post mortem. When we notice this inconsistency as also that details of case were not mentioned in the inquest report, while keeping in mind the statement of police witnesses that initially they had no clue that there existed a witness and that a dog squad was called for, it gives us a feeling that the prosecution has not come out with clean hands and that the case has been built on strong suspicion than evidence.

56. Now, we come to the testimony of Abdul Wahid (PW-3). Although, he is not an eye witness but he stated that he witnessed the accused persons including the surviving appellant no.1 (Gulab) near the spot when they were coming out from the Millet field (Jwar) on 04.09.1980 at or about the time of sunset while PW-3 was going towards Birapur with

his friend Abdul Moin (not examined) to visit his niece, who was sick. This witness stated that he did not see Nurul Islam (PW-2) at that time. Nurul Islam (PW-2) also stated that he did not see Abdul Wahid (PW-3) and Abdul Moin (not examined) at the time of incident near the place of incident. As this witness is a chance witness, his testimony would have to be scrutinized carefully before acceptance.

57. The Apex Court in case of **Jarnail Singh Vs State of Punjab (2009) 9 SCC 719** observed that the evidence of a chance witness requires a very cautious and close scrutiny and the chance witness must explain his presence at the place of occurrence.

58. When we analyse the testimony of Abdul Wahid (PW-3), who is a chance witness, we find that his testimony does not inspire confidence. Although he tried to explain his presence at the spot with the explanation that he was going to Birapur to see his niece, namely, Bibbi, who was ill, but prosecution failed to produce Bibbi or any other witness in this regard, who could corroborate whether Abdul Wahid (PW-3) visited Birapur on 04.09.1980 at or about 6 to 6.30 PM. Even Abdul Moin, who accompanied Abdul Wahid (PW-3) to Birapur has not been examined by the prosecution. Otherwise also, the testimony of PW-3 does not inspire confidence because in ordinary course if he would notice men with arms emerging from a field, after they had left, the natural reaction would be to check the spot from where they had emerged. Admittedly, according to the prosecution evidence, the body was not dragged deep into the standing crop and would have been visible from the Pagdandi. Hence, PW-3 could have easily spotted the body if he had been curious as would be the natural reaction under the circumstances. Thus, in our view, Abdul Wahid (PW-3) fails to inspire our confidence and his testimony is not worthy enough to lend credence to the eye witness account rendered by PW-2.

59. The upshot of the discussion made above, it appears to us that there was grave enmity between Sheikh Mohd. Naqi (deceased) and co-accused Ram Awadh and Ram Kripal, therefore, accused including the surviving appellant no.1 (Gulab) were implicated. Though, we are conscious of the

law that merely on ground of enmity, the testimony of an eye witness cannot be discarded, if there is a ring of truth about it, but, in the present case, the entire prosecution case rests solely on the testimony of Nurul Islam (PW-2) who we find not wholly reliable. Therefore, in our considered view, the prosecution has failed to prove its case against the surviving appellant (Gulab) beyond reasonable doubt.

60. Consequently, the appeal is **allowed**. The judgment and order of conviction as well as sentence recorded by the trial court vide order dated 10.09.1985 passed by Special Judge/Additional Sessions Judge, Allahabad in Sessions Trial No. 43 of 1981, under Sections 302/34 IPC as against the surviving appellant (Gulab) is set aside. The appellant (Gulab) is acquitted of all the charges for which he has been tried. The appellant no.1 (Gulab) is reported to be on bail. He need not surrender, subject to compliance of provisions of Section 437-A Cr.P.C. to the satisfaction of the trial court concerned at the earliest.

61. Let a copy of this order/judgment and the original record of the lower court be transmitted to the trial court concerned forthwith for necessary information and compliance. The office is further directed to enter the judgment in compliance register maintained for the purpose of the Court.

**Order Date :- 11.02.2022**  
Ankita/Anupam