

AFR

Court No. 1

Judgment reserved on 03.04.2019

Judgment delivered on 16.05.2019

Capital Case No. 200 of 2018.

(Reference No. 05 of 2018)

Rashid @ Zakir vs. State of U.P.

Connected with

Jail Appeal No. 458 of 2018.

Smt. Shakila @ Bitta vs. State of U.P.

Hon'ble Ramesh Sinha, J.

Hon'ble Dinesh Kumar Singh-I, J.

(Delivered by Hon'ble Ramesh Sinha, J.)

1. The present appeals have been filed by appellants Rashid @ Zakir and Smt. Shakila @ Bitta from jail against the judgment and order dated 17.7.2018 passed by Additional District and Session Judge, Court No. 3, Kanpur Nagar in S.T. No. 481 of 2013 and 492 of 2013 arising out of case crime no. 29 of 2013 under section 302/34, 201 I.P.C., police station Gwaltoli, District Kanpur Nagar and S.T. No. 30 of 2013 arising out of case crime no. 30 of 2013 under Section 3/25 Arms Act, police station Gwaltoli, District Kanpur Nagar against appellant Rashid @ Zakir only. By the said judgment and order, the appellants Rashid @ Zakir and Smt. Shakila @ Bitta have been convicted under section 302/34 I.P.C. The appellant Rashid @ Zakir sentenced for death whereas appellant Smt. Shakila @ Bitta was sentenced to undergo imprisonment of life with a fine of Rs. one lac and in default of payment of fine she shall undergo further imprisonment of two years. The appellant Rashid @ Zakir was acquitted for the

offence under the Arms Act.

2. The brief facts of the case are that an F.I.R. was lodged by the informant Anand Prakash son of Late Motilal, who submitted a written report at police station Gwaltoli, district Kanpur Nagar stating that he is resident of 5D/406 Awas Vikas Hans Puram, Naubasta, Kanpur Nagar and is working in Farhat Enterprises in which saddle is made and the owner of the said factory is one Kamran son of late Sheikh Mohammad Rais resident of 7/90 B Tilak Nagar Kanpur Nagar. On 6.3.2013 at about 11 a.m. he along with his owner Kamran went to the factory and when they opened the lock of the factory, they saw that three dead bodies were lying in the factory out of which one was of a woman and two were of male persons. It appears that they were done to death by hacking their neck. Rashid @ Zakir, who used to live in the factory along with his wife Shakila @ Bitta, was not present and had fled away. By giving the said information, he prayed that necessary action be taken. The informant suspected that the said murders have been committed by Rashid @ Zakir and some other persons could also there.

3. On the basis of said written report (Ext. Ka-1) submitted by the informant at police station Gwaltoli, Kanpur Nagar, an F.I.R. was registered as case crime no. 29 of 2013 I.P.C. on 6.3.2013 at about 11:30 a.m. under section 302, 201 I.P.C.

4. The investigation of the case was entrusted to Station Officer of police station Gwaltoli. During the course of investigation, the Investigating Officer recorded the statements of the informant and other witnesses. He prepared the site plan of the place of occurrence and collected other evidences. After completing the formalities of investigation, the Investigating

Officer submitted charge-sheet against accused Rashid @ Zakir and Shakila @ Bitta for the offence under section 302, 201 I.P.C. in the Court of Metropolitan Magistrate, Kanpur Nagar.

5. The accused Rashid @ Zakir was arrested on 9.3.2013 and on his pointing out a country made pistol of 315 bore along with four live cartridges of 315 bore were recovered from his room for which a case under section 3/25 Arms Act was also registered against him and charge-sheet was submitted before the competent Court.

6. Both the cases were committed to the Court of Session on 30.7.2013. On 13.8.2013, the trial Court framed charges against the two appellants in S.T. No. 491 of 2013 under section 302/34, 201 I.P.C. and in S.T. No. 492 of 2013 under section 3/25 Arms Act against appellant Rashid @ Zakir only.

7. The accused denied the charges and claimed their trial.

8. The prosecution in support of its case has examined P.W. 1 Anand Prakash, the informant of the case, P.W. 2 Saddam, who is said to be the eye witness of the occurrence, P.W. 3 Abbas Ali, P.W. 4 Dr. Anil Nigam, P.W. 5 Mohammad Umar Javed, P.W. 6 Constable Rajesh Babu, P.W. 7 S.I. Tehsildar Verma, P.W. 8 the then Station Officer Mohammad Ashraf, P.W. 9 Head Moharrir Ramakant Yadav, P.W. 10, S.I. Atul Kumar, P.W. 11 Mohammad Kamran, P.W. 12 Nakul Singh, P.W. 13 S.I. Shiv Shankar Sharma.

9. The documentary evidence relied upon by the prosecution in support of its case are written report (Ext. Ka. 1), Panchayatnama of unknown woman (Ext. Ka. 2), Panchayatnama of unknown man (Ext. Ka. 3), Panchayatnama of unknown man (Ext. Ka. 4), Post mortem report of deceased Ibrahim (Ext. Ka-5A), Post mortem report of deceased Riyaz

(Ext. Ka-5B), Post mortem report of deceased Zinab (Ext. Ka-5C), Docket (Ext. Ka-5D), Papers relating to post mortem (Ext. Ka. 6), Photo nash (Ext. Ka-7), Sample seal (Ext. Ka-8), Challan nash (Ext. Ka-9), site plan of place of occurrence (Ext. Ka-10), Inspection report of place of occurrence by Field Unit (Ext. Ka-11), Coloured photographs of the place of occurrence (Ext. Ka-12, recovery memo (Ext. Ka. 13), recovery memo of weapon (Ext. Ka-14), Photocopy of certified copy of the judgment (Ext. Ka-15), Brief details of documents (Ext. Ka. 16), Charge-sheet (Ext. Ka-17), F.I.R. (Ext. Ka-18), Carbon copy of the G.D. (Ext. Ka-19), Letter to C.M.O. (Ext. Ka-20), Photo nash (Ext. Ka-21), Sample seal (Ext. Ka-22), Challan nash (Ext. Ka-23), Letter to C.M.O. (Ext. Ka-24), Photo nash (Ext. Ka-25), Sample seal (Ext. Ka-26), Challan nash (Ext. Ka-27), Letter to C.M.O. (Ext. Ka-28), Letter to C.M.O. (Ext. Ka-29), Application of Abbas Ali (Ext. Ka-30), Application regarding identification (Ext. Ka-31), Application regarding identification (Ext. Ka-32), Application regarding identification (Ext. Ka-33) F.I.R. of Arms Act (Ext. Ka-34), Carbon copy of G.D. (Ext. Ka-35), Site plan of Arms Act (Ext. Ka-36), Charge-sheet under the Arms Act (Ext. Ka-37), Sanction of prosecution (Ext. Ka-38), Country made pistol (Material Ext. 1), Empty cartridges (Material Ext. 2), Live cartridges (Material Exts. 3 to 6), Both rods and Rapi (Material Exts. 7 and 8, One sealed bundle and six packets (Material Exts. 9 to 14 and eight packets sealed in envelope (Material Exts. 15 to 22).

10. The statement of the accused were recorded under section 313 Cr.P.C. in which they denied the prosecution case and stated that a wrong charge-sheet has been submitted against them and further the recovery which have been made is false

and the site plan which have been prepared is also forged and a false case has been registered against them.

11. P.W. 1 Anand Prakash, who is the informant of the case has deposed before the trial court that he was working in Farhat Enterprises and still working there. The owner of Farhat Enterprises is Kamran, who lives in Tilak Nagar, district Kanpur Nagar. In the factory, work of making saddle is done. The said factory is in House No. 14/57C, Machhli Wala Hata, Gwaltoli, Kanpur Nagar. On 6.3.2013 at about 11 a.m. when he reached the factory then the owner of the factory had also arrived. There was a lock in the factory one key of which was with the Watchman Rashid @ Zakir and one key was used to be with the owner of the factory Kamran. When he opened the lock of the factory with the key which was with Kamran, he saw three dead bodies in the factory out of which one was of a woman and two were of male persons. They were murdered by hacking their neck. All the three dead bodies were lying in a pool of blood. In the factory Rashid @ Zakir used to live along with his family in a room situated on the top floor of the factory and when they entered in the factory, they found that Rashid @ Zakir had disappeared along with his family on which they suspected that the murders were committed by him. A written report about the said murders was given by him at police station Gwaltoli. The panchayatnama of all the three dead bodies were conducted in his presence and he had also signed the same. The witness and Panchas have opined that as the names of the dead persons could not be known, hence panchayatnama of theirs be done as unknown persons. Afterwards, he came to know that the dead persons were Riyaz, Ibrahim and Zainab, who were brother-in-law and mother-in-law of accused Rashid @ Zakir

and were resident of Bahraich. Rashid @ Zakir along with his wife had absconded and both of them have committed the three murders together. The original report is in his hand writing. He proved the same as Ext. Ka-1. The panchayatnama of the deceased Zainab was proved by him as Ext. Ka-2. The papers of panchayatnama, i.e., paper nos. 90 and 110 were exhibited as Exts. 4 and 5. The police had interrogated him twice and both the time he had given the information about the incident. The witness identified the accused present in the Court as Rashid @ Zakir and Shakila @ Bitta, who work in the factory of Kamran.

12. In his cross examination, the witness has stated that on the day of incident, he had left his house at 9 a.m. At that time, it was light winter. He had gone from his house to the factory on Auto. Where he worked, neither any identity card is being given nor there is any attendance registered. In the factory, the work of making saddle is done. His duty is from 10 a.m. in the morning to 7 p.m. in the evening. It takes one hour to reach the factory from his house. On the day of incident, he had reached the factory between 10-11 a.m. In the factory, he takes the contract and get the work done through labourers and also makes payments to the labourers for which he keeps his books. The said fact was neither asked by the Investigating Officer nor he told him. He stated that neither the Investigating Officer asked for any proof nor he had given the same. He used to keep the register and books of account at his house. He has 7-8 labourers as he takes the work of contract, hence he makes payments to the labourers accordingly. He gets the work done by the labourers under his supervision. The owner of the factory is Kamran and his brother. When he reached the factory on the day of incident then it was locked. One key of the main gate of

the factory used to be with the owner of the factory. When he reached the factory, the owner had also arrived and the lock of the factory was opened with the key of the owner. The incident was not witnessed by him. The police had taken his statement twice and on both the occasion, he had signed the same. He denied the suggestion that the murders were got committed by the owner of the factory and under his pressure, he is falsely deposing against the accused persons.

13. P.W. 2 Saddam, who is a child witness aged about six years and is the son of deceased Zainab and real brother of two deceased, namely, Ibrahim and Riyaz, had deposed before the trial court that he did not remember the day and date of the incident. He along with his mother and two real brother Ibrahim and Riyaz had gone to the factory of Rashid @ Zakir where Rashid and his sister Shakeela @ Bitta had met. They have gone to the factory in the afternoon. His sister Shakila @ Bitta had prepared food and all of them sat together and taken the food. After taking the meal, his mother and both brothers and sister Shakila had gone to sleep. His mother was murdered by Zakir and two brothers were also murdered by Zakir, who had murdered them with knife. He has witnessed the incident. He was made to lie down in a blanket. After committing the murder Zakir had fled away from the place of occurrence. Shakila is his sister. When Zakir was assaulting his mother and two brothers by knife then Shakeela was facilitating in the crime. Zakir and Shakila after committing the murder had fled away and he was lying there. Zakir had committed the murder in the night. The police interrogated him and what he had deposed today had stated about the same to the police.

14. In his cross examination, he has stated that he knows the

festival of Eid. He further stated that Eid is celebrated after seeing the moon. In the Court, there was a person, who had put a Gamchha his name is Abbas. The witness stated that he has seen the incident. The witness could not tell the colour of sweater which he was wearing. He stated that the Sun comes out in the day and the Moon comes in the afternoon. His mother is not present in the Court today. His mother Zainab used to live in Gudaiya No. 2. He takes food and in the food he take meat. He does not know that whether in Eid all persons goes to the house of each other. On the day of Eid, pulse and rice were made in his house. He does not understand the feeling of good and bad. He has seen the incident. The murder was committed by Rashid. Rashid is related to him. Rashid has blood relationship with him. Rashid had murdered his mother and two brothers in the night and cut them down beyond this, he did nothing and thereafter there was quarrel. He was not frightened. The trouser which he wore is jeans and not pant. He could not tell the colour. The sweater which he was wearing under it he is wearing shirt.

15. P.W. 3 Abbas Ali, who is the father of P.W. 2 Saddam and two deceased Ibrahim and Riyaz and husband of deceased Zainab, has stated that his daughter's name is Shakeela. The accused Rashid @ Zakir is resident of village Rasoolpur, police station Pakharpur, District Bahraich. The marriage of accused Zakir prior to enticing away his daughter, was solemnized with one Kalimun. Zakir had murdered his earlier wife Kalimun and buried her under the cot. The parents of Kalimun had lodged a case for the murder of their daughter against Zakir in which he had been convicted and was confined in Lucknow jail and while confinement he absconded from jail. At that time, he used

to do the work of labourer. When his children were at the house, Zakir had enticed away his daughter Shakeel and brought her to Kanpur. He made a search of his daughter Shakeel for about 4-5 months but she could not be traced out. His sons Ibrahim and Riyaz were working in a hotel at Kanpur and they informed him that Zakir is living along with Shakeel at Gwaltoli, Kanpur in a factory. On the said information, his wife and his sons Ibrahim and Riyaz along with Saddam went to Kanpur and had gone to the factory at Machhli ka Hata. On the next day, the police had informed that his wife and two sons have been murdered. On the said information, he went to Kanpur and reached at mortuary and saw the dead body of his wife and two sons Ibrahim and Riyaz. After post mortem, he brought the dead bodies of his wife and two sons to his village. On the day of incident, his youngest son Saddam had also gone along with his wife and two sons Ibrahim, Riyaz, who was hidden by his daughter Shakila by wrapping him in a blanket on account of which he was saved. Saddam told him and the police about the whole incident that Rashid had murdered his wife and two sons separately and cut down them with Gandasa. He also told him that his daughter Shakila in order to save him wrapped him in a blanket and thrown him in another room. The police had interrogated him about the incident.

16. In the cross examination, he deposed that he know Zakir as he had earlier married with Kalimun and thereafter he murdered her and had buried her in his house. In the said case, Zakir was confined in Lucknow jail. The said fact was told to him by the parents of Kalimun and they have lodged a case at police station Pakharpur against him. He know the parents of Kalimun as their relative reside in his village. On a question

being put to him in his cross examination as to when he had married Shakila with Zakir, he answered that Zakir when absconded from jail then used to do the work of labourer and he had enticed away his daughter from his village. Zakir used to come to his house as he was resident of his village. He was the uncle of his 'Samdhi'. Prior to 7-8 months of the incident, he had enticed away his daughter Shakila. He had not lodged any report against him about the said incident. His two sons live at Kanpur and gradually they got an information that Shakila was living at Gwaltoli along with Zakir. On receiving the said information, he did not lodge a report at police station. He did not lodge the report as he firstly he want to see whether she was living or not then thereafter the report could be lodged by him. He deposed that he has not seen the incident and also not seen the place of occurrence where the incident had taken place. His youngest son Saddam had narrated about the manner of incident. The dead bodies of his wife and two sons Riyaz and Ibrahim were handed over to him at mortuary. He cannot disclose the reason as to why his wife and sons were murdered. He denied the suggestion that Zakir had not enticed away his daughter Shakila. He denied the suggestion that he had married Shakila with Zakir. He did not remember after how many days the Investigating Officer had recorded his statement under section 161 Cr.P.C. He denied the suggestion that he is falsely deposing that his wife and two sons were murdered by Rashid. He denied the suggestion that only because of suspicion, he has levelled allegation against Rashid @ Zakir. He denied the suggestion that he is falsely deposing in the Court against him.

17. P.W. 4 Dr. Anil Nigam stated that on 7.3.2013 he was posted as Senior Consultant at U.H.M. Hospital, Kanpur and on

the said date he conducted the post mortem of the dead body of deceased Ibrahim at 15.40 p.m. which was brought by Constable Aleem Ahmad and Home-guard Brijesh Kumar of police station Gwaltoli in a sealed condition and found the following injuries on his person:-

1. *Incised wound 5 cm. x 1 cm. x bone deep underlying bone cut 1 cm. above left ear temporal*

2. *Incised wound 5 cm. x 1 cm. x bone deep underlying bone cut mark on left parietal region 4 cm. above left ear.*

3. *Incised wound 7 cm. x 1 cm. x bone deep left side skull 10 cm. left ear penetrating.*

4. *Incised wound 5 cm. x 1 cm. x bone deep, left occipital region, 8 cm. behind left ear underlying bone has cut mark.*

5. *Incised wound 3 cm. x 05. cm. x through and through left pinna.*

6. *Contusion 6 cm. x 3 cm. on left side face just above to left ear.*

7. *Incised wound 2.5 cm. x 0.5 cm. x bone deep on left side face just lat to left eye underlying bone fractured.*

8. *Abraded contusion 3 cm. x 1 cm. right side forehead just above rt eye brow.*

9. *Abraded contusion 4 cm. x 1 cm. right side face 1 cm. below right eye.*

10. *Incised wound 5 cm. x 1.5 cm. x bone deep on left side chin.*

11. *Incised wound 1 cm. x 05. cm. on bone deep on left side face 1 cm. lat to left area of nose.*

12. *Incised wound 6 cm. x 1 cm. x bone deep underlying bone cut right side chin.*

13. *Incised wound 3 cm. x 1 cm. x bone deep underlying bone cut on lower part of chin.*

14. *Incised wound 1.5 cm. x 1 cm. x bone deep right side face, 1 cm. anterior right ear.*

15. *Incised wound 9 cm. x 2.5 cm. x bone deep vertebra right side neck just below right angle of mandible. All str. fractured, esophagus & great vessel out through & through.*

16. *Incised wound 6 cm. x 1.5 cm. x muscle deep left side neck 2.5 cm. below left mandible.*

17. *Incised wound 10 cm. x 2 cm. x muscle left side neck 1 cm below injury no. 16.*

18. *Incised wound 7 cm. x 7 cm. x bone deep back of neck 4 cm. below occipital*

19. *Incised wound 4 cm. x 1 cm. x bone deep back side of neck 1 cm. below injury no. 18.*

In the opinion of the doctor, the deceased died on account of shock and hemorrhage as a result of ante mortem

injury and he has proved the post mortem report as Ext. Ka-5.

18. On the same day, he conducted the post mortem of deceased Riyaz at 16:43 p.m. and found following injuries on his person:-

- 1. Abraded contusion 2 cm. x 1cm on left part of right eye.*
- 2. Incised wound 3 cm. x 0.5 cm. x bone deep on right ear inner occipital.*
- 3. Incised wound 2 cm. x 0.5 cm. x skin deep just behind right ear in temporal region*
- 4. Abraded contusion 5 cm. x 1 cm. right side chin*
- 5. Incised wound 10 cm. x 2.5 cm. x vertebra C2 deep on front of neck 3.5 cm. below chin. All str. on neck cut through & through.*
- 6. Incised wound 7 cm. x 2.5 cm. x vertical deep C 4 to 5 on left lat part of neck 3 cm. below left mandible.*
- 7. Incised wound 5 cm. x 1 cm. x muscle deep on left lat part of neck 1 cm. below injury no. 6.*

19. In the opinion of the doctor, the deceased died on account of shock and hemorrhage as a result of ante mortem injury and he has proved the post mortem report as Ext. Ka-5B.

0. On the same day, he conducted the post mortem of deceased Zainab and found following injuries on her person:-

- 1. Incised wound rt. side forehead 4 cm. x 2 cm. x bone deep, 2 cm. above rt eyebrow.*
- 2. Incised wound 4 cm. x 2 cm. x bone deep 1 cm. below injury no. 1.*
- 3. Incised wound 2 cm. x 1 cm. x bone deep on the left part of left eyebrow.*
- 4. Incised wound 2 cm. x 1 cm. x bone deep left side face, 4 cm lat to rt eye.*
- 5. Incised wound 1 cm. x 1 cm. x bone deep on left cheek 3 cm. below lat part of left eye.*
- 6. Incised wound 5 cm. x 5 cm. x bone deep on left parietal region 4 cm. above left pinna.*
- 7. Incised wound 4 cm. x 2 cm. x bone deep left temporal 4 cm. above left ear.*
- 8. Incised wound 5 cm. x. 2 cm. x bone deep in occipital area, 10 cm. below occipital.*
- 9. Incised wound 2 cm. x 1 cm. x bone deep on right cheek, 2 cm. below right eye.*
- 10. Incised wound 2 cm. x 1 cm. x bone deep just above*

of nose right side.

11. Incised wound 11 cm. x. 7 cm. x. vertebra bone deep on front of neck, 5 cm. below chin. All underlying str. cut through and through upto cervical vertebra no. 3 and 4.

12. Incised wound 2 cm. x. 1 cm. x muscle deep on left hand finger in left between index and middle finger.

13. Incised wound through & through skin attached on left index finger tip.

14. Incised wound 4 cm. x 1 cm. x muscle deep on left right finger whole lat side.

15. Incised wound 3 cm. x 1 cm. x muscle to bone deep on left little finger lat aspect.

16. Incised wound on right little finger in middle phalanx 3 cm. x. 2 cm. x bone deep only skin attached.

21. In the opinion of the doctor, the deceased died on account of shock and hemorrhage as a result of ante mortem injury and he has proved the post mortem report as Ext. Ka-5C.

22. It was further stated by him that the death may be caused on 5.3.2013 in the mid night by iron rod and sharp edged weapon Rapi.

23. In the cross examination, the said witness has stated that the post mortem which was conducted by him of the dead body of Ibrahim, he found that he received as many as 20 ante mortem injuries on his person and injury nos. 1 to 4, injury nos. 16 to 18 and many other injuries were grievous in nature. All the injuries could not be caused by one weapon and it could be caused by several other weapons. He could not tell whether the deceased was assaulted by many persons. He further deposed that on the post mortem of the dead body of deceased Zainab he found three injuries on her frontal occipital bone. The injuries which were caused on her neck and face were sufficient in the ordinary course of nature to cause death and possibly the death of her may be caused on 5.3.2013 after 6-7 p.m. So far as post mortem of Riyaz is concerned, he has stated that he has received in all seven injuries on his persons and injury nos. 2, 3,

5, 6 and 7 all were on vital part of the body and the injury which was found on his neck were sufficient in the ordinary course of nature to cause death. All the injuries may be caused by sharp edged weapon. Possibly the death was caused on 5.3.2013 after 6 p.m.

24. P.W. 5 Mohammad Umar Javed had deposed before the trial court that he is Chartered Accountant. On 6.3.2013, panchayatnama of one unknown woman aged about 55 years and two unknown male persons aged about 35 years and 25 years, who were Muslim, were conducted at 3 p.m., 11:55 p.m. and 1:30 p.m. respectively at Farhat Enterprises situated at House No 14/57-C at Nawab Compound, police station Gwaltoli, Kanpur Nagar and at the time of panchayatnama of three deceased besides him, Anand Prakash, Faisal Ahsan, Mohammad Saleem and Firoz Alam were present and the three deceased, who were Muslims were done to death by iron rod and sharp edged weapon. The Sub Inspector had conducted the inquest proceedings in his presence and he had also signed the inquest report as one of the Panchas and proved the three panchayatnama as Exts. Ka-2, 3 and 4.

25. In his cross examination, the witness has stated that on the date when the panchayatnama was prepared, he was Chartered Accountant in a bank and he is resident of Meston Road, Kanpur. The Sub Inspector had prepared the panchayatnama. He did not remember his name. He denied the suggestion that Exts. Ka-2, 3 and 4 were signed by him at police station. He further denied the suggestion that the factory owner is his relative and at his instance, he signed the panchayatnama. He further denied the suggestion that all the proceedings were done in a wrong manner.

26. P.W. 6 Constable 262 C.P. Rajesh Pathak has stated that on 12.5.2013 he was posted as Constable at police station Gwaltoli and the case property of case crime no. 29 of 2013 under section 302/34, 201 I.P.C. of police station Gwaltoli was received in a sealed condition. He took the same under the orders of the C.O. Colonelganj Raghvendra Singh to Forensic Science Laboratory, Lucknow and has submitted the said case property Ext. No. 4069 at Forensic Science Laboratory on 13.5.2013 and further endorsed information about the same on 14.5.2013 in G.D. No. 56 at 9:30 p.m. on his return to police office. He has further proved the docket No. 220 on which he has signed and proved the same as Ext. Ka-5.

27. P.W. 7 S.I. Tehsildar Verma stated that on 6.3.2013 he was posted as Sub Inspector at police station Gwaltoli and on the said date at about 3:30 p.m., he prepared panchayatnama of female dead body as unknown. Information about the death of the deceased was given by Anand Prakash. The deceased was done to death in Farhat Enterprises factory Gwaltoli and her panchayatnama was conducted on 6.3.2013 at 3:30 pm. to 4 p.m. The dead body of the deceased was handed over to Constable Pradeep Shukla and lady Constable Rakhi Devi for post mortem. The dead body of the deceased was found on the second floor of House No. 14/57 C Nawab ka Hata and he has appointed the Panch witnesses Anand Prakash, Mohammad Umar Javed, Faisal Rahman, Firoz Alam and Mohammad Salik and panchayatnama of the deceased was prepare by him as Ext. Ka-2 in his hand writing and signature and proved other police papers with respect o the said dead body as Exts. Ka-6, 7, 8 and 9.

28. P.W. 8 Mohammad Ashraf has stated that he was posted

as Station Officer of police station Gwaltoli on 6.3.2013. On the said date at 11:30 p.m. Anand Prakash had given a written report at the said police station with respect to murder of a lady and two male persons on the basis of which an F.I.R. was registered as case crime no. 29 of 2013 under section 302/34, 201 I.P.C. against accused Rashid @ Zakir. He was entrusted with the investigation of the said case and he took over the same. He inspected the place of occurrence and recorded the statements of Sabban @ Saddam Hussain and further with the assistance of Field Unit received ten bundles of material and further made an inspection report of the place of occurrence which was given by the Field Unit. He also took the colour photographs of the dead bodies, prepared the site place on 6.3.2013 in his hand writing and signature and the proved the same as Ext. Ka. 10. At the pointing out of accused Rashid @ Zakir, iron rod and Rapi were recovered. Accused Rashid @ Zakir has confessed that on 5/6.3.2013 in the night, he had committed the murder of his mother-in-law and two brother-in-laws by the said rod and Rapi. He has committed the said murders with his wife Shakila @ Bitta after cutting their neck and concealed the rod and rapi in the factory. He has proved the recovery memo of the same as Material Exs-7 and 8. He also recovered the country made pistol of 315 bore and three live cartridges and one empty cartridge at the pointing out of accused appellant Rashid @ Zakir and prepared it's Material Exts. 1, 2 and 3 and the sealed the same.

29. In his cross examination, the witness has deposed that the said case was registered at the police station in his presence on the written report submitted by Anand Prakash son of Moti Lal. At the place of occurrence, he found three dead bodies out of

which two were of male and one was of female and has also taken the blood stained earth and simple earth, broken bangles, pair of slippers, pillow and woolen shawl. The identity of the three deceased were not known and after some time identity was disclosed as female was Zainab and two males were Ibrahim and Riyaz. He has arrested the accused Rashid @ Zakir and Shakila at 10:50 p.m. from Jhakarkati bus stand, Kanpur and on the arrest the accused Rashid @ Zakir was having Rs. 530/- and two mobiles and his wife was having Rs. 510/-. The factory was in two floors. The weapon of assault was hidden in the cuttings of leather. In the F.I.R. which was lodged against Rashid @ Zakir, two dead bodies of male persons were recovered from first floor near the steps and the dead body of female was recovered from the second floor. The eye witness of the occurrence is Saddam aged about 8 years and beside him there is no eye witness of the occurrence. He denied the suggestion that Rashid had gone to his village 6-7 days prior to the incident and was not present at the place of occurrence nor he has committed the murder. He further denied the suggestion that he has not arrested the accused Rashid @ Zakir and Shakila @ Bitta from Jhakarkati bus stand. He denied the suggestion that accused Rashid @ Zakir was implicated in the case as he had married Shakila @ Bitta against the wishes of her family. He denied the suggestion that Rashid has no connection with the present incident and further denied the suggestion that a forged charge-sheet was submitted against the accused persons.

30. P.W. 9 Head Moharrir 278 Ramakant Yadav deposed before the trial court that on 6.3.2013, he was posted as Constable at police station Gwaltoli and on the said date at 11:30 a.m., the informant Anand Prakash son of Moti Lal had

submitted a written report on the basis of which F.I.R. of case crime no. 29 of 2013 under section 302 I.P.C. was registered against Rashid @ Zakir and a chik F.I.R. was also prepared which was endorsed in G.D. No. 24/11 at 11:30 a.m. on 6.3.2013. The original chik F.I.R. and carbon copy of the G.D. original of which was produced by him in the Court and he has proved the same which is deto to the carbon copy of the original G.D. Chik F.I.R. and has been proved as Ext. Ka-18 and carbon copy of the G.D. as Ext. Ka-19. He has further proved his signature on the chik F.I.R. and stated that thereafter he informed the higher officials on R.T. set.

31. In the cross examination, the witness has stated that he was posted at police station Gwaltoli in the year 2012 and at about 11:30 a.m. two persons had come along with the person, who has submitted a written report and that he had given the written report with respect to the incident and prior to it no information was received about the incident. As the informant did not reside at the place of occurrence and was not present there, hence on the basis of suspicion he lodged the F.I.R. against accused Rashid @ Zakir naming him in the report. The informant of the case had not written the report at police station and he had brought the same after writing the same. He denied the suggestion that the report was written at police station after due consultation and deliberation. He also denied the suggestion that the incident has not taken place in the manner in which it has been stated and at the police station a false report was prepared and lodged. He did not remember how much time it took to prepare the F.I.R. After preparing the chik F.I.R., he had written the G.D. in which 11:30 was mentioned as in the G.D. and F.I.R. some time is written, hence he mentioned the

same. He denied the suggestion that as no one was found to be involved in the incident, the name of Rashid @ Zakir was mentioned in the F.I.R. as he used to live there due to which he was falsely roped in the present case as an accused.

32. P.W. 10 Sub Inspector Atul Kumar, who was examined by the trial court has stated that on 6.3.2013 he was posted at police station Gwaltoli as Inspector. On receiving the information at the police station, he visited House No. 14/57C Farhat Enterprises Nawab ka Hata in connection with the murder which had taken place for which a written report was given by the informant Anand Prakash on the basis of which case crime no. 29 of 2013 under section 302 I.P.C. was registered and thereafter he being the Inspector of the concerned police station along with other police personnel reached the place of occurrence. At the place of occurrence, three dead bodies were found out of which two were of male persons and one was of female whose names and address were not known. Panchayatnama of two male persons were prepared at the place of occurrence and Panchas were appointed. Both the panchayatnama were available on record which he proved to be in his hand writing and signature as Exts. Ka-3 and 4. For both the dead bodies separate letters to C.M.O., photo nash, sample seal and challan nash were prepared which were in eight enclosures which are in his hand writing and proved the same as Exts. Ka-20 to 27. A letter was sent by the R.I. to C.M.O. of unknown deceased aged about 35 years and unknown deceased aged about 25 years respectively and the original letter is available on record on which R.I. and Inspector had signed the being Exts. Ka-27 and 29. The dead bodies which were kept in the mortuary of the post mortem house, were identified by

Abbas Ali son of Mohammad Gani resident of Gudiya No. 2, Mangermela, police station Faisalganj, District Bahraich to be of Ibrahim aged about 35 years, Riyaz aged about 25 years and Zainab aged about 55 years, who were stated to be his wife and sons. A written application in this regard was given to the S.O. which is available on record and marked as Ext. Ka-30. On the said application all the three unknown dead bodies were kept in the mortuary registered to be of Ibrahim aged about 35 years, Riyaz aged about 25 years and female Zainab aged 55 years. The said application dated 7.3.2013 given by him which is available on record has been marked as Exts. Ka-31 to 33.

33. In his cross examination, the said witness stated that he received the information about the incident at 11:30 a.m. by the informant of the case Anand Prakash. He was posted as Inspector in police station Gwaltoli in May, 2012. After the incident upto August, 2013 he remained posted there. At the police station he was given an information that at Farhat Enterprises situated at 14/57C Nawab Ka Hata three persons were done to death by cutting their neck. The name of Rashid @ Zakir was mentioned in the written report. He went at the place of occurrence along with S.O. Mohammad Ashraf and other police personnel and reached the place of occurrence within 15 minutes on receiving the information. When he reached the place of occurrence many people were present there including the informant of the case, Kamran and other persons whose names he could not remember were present there. At the place of occurrence, the informant of the case and the owner of the factory, namely, Kamran was present and when he reached the place of occurrence, i.e., Farhat Enterprises was bolted and they opened the bolt and went inside and saw that Farhat

Enterprises was in two divisions. The panchayatnama of the two dead bodies of male person which were conducted were found at the first floor near the steps. Both the dead bodies were lying at one place. Till the conducting the panchayatnama the names of the dead bodies could not be known, hence the panchayatnama was conducted as unknown persons. The first panchayatnama of a male person aged about 35 years was started by him at 11:55 a.m. and completed at 13:20 hours and the injuries which were found on the person of the deceased were mentioned by him in the panchayatnama. His neck was found to be cut and body was in a pool of blood. In the opinion of Panchs, the injuries were caused by sharp edged weapon on account of which the deceased died. The second panchayatnama of a male person aged about 25 years was started by him at 13:30 p.m. and completed at 14:45 hours. The names and identity of the said person was also not known till that time, hence the panchayatnama was filed as unknown person. On the back side of head, there was a grievous injury and on the left side of the ear above also there were serious injuries. There were incised wounds and the neck on the right side was also cut. On seeing the dead body, it appear that the murder had taken place on the nash night. In the opinion of Panchs, the injuries were caused by sharp edged weapon on account of which the deceased died. The panchayatnama was signed by him as well as by the Panchs and proved the same as Ext. Ka-4. On the spot, papers of panchayatnama were prepared by him in his hand writing and thereafter, the two dead bodies were sealed and the face was left opened for being identified and thereafter the dead body was sent for post mortem separately through police Constables. In the post mortem house till the conducting

of the inquest of the two dead bodies their names could not be known and on the next day when the father of the two deceased, namely, Abbas Ali had come and identified the dead body of male aged about 35 years to be that of Ibrahim and dead body of male aged about 25 years to be that of Riyaz, who were his sons. He denied the suggestion that he had written the names of the dead bodies as unknown on his own nor any one had told him the identity. He further denied the suggestion that Panchas, who were appointed by him for conducting the panchayatnama of the two deceased were not of nearby area.

34. P.W. 11 Mohammad Kamran Rais, who was examined by the trial court has stated that his house number is 14/57C, Civil Lines, Nawab Compound, Machhli Wala Hata, police station Gwaltoli, Kanpur where a factory by the name of Farhat Enterprises is run by him in which the work of making saddle is done. Ten months prior to the present incident, a man came to his factory in search of work and he had employed him as Chaukidar of his factory. Thereafter he had brought his wife. At that time, the said person had disclosed his name as Rashid and the name of his wife is Shakila @ Bitta. Both of them used to live in the upper floor of his house in a room and used to guard his factory. On 5th March, 2013, in the afternoon two grown up boys and one small boy and a lady came to the house of Rashid and when he enquired from Rashid about them then he told that three boys were his brother-in-law and the woman was his mother-in-law. On that day, in the evening he in a routine manner went back to his house from the factory and on the next day, i.e., on 6.3.2013 when he reached the factory then his employee Anand Prakash had already arrived there and in his presence Anand Prakash opened the gate of the factory and both

of them went inside and saw that dead bodies of one woman and two boys were lying in a pool of blood. On the neck and face there were several injuries. Chaukidar Rashid @ Zakir and his wife Shakila @ Bitta had closed the factory by putting lock on it and had fled away. They went to police station and gave information about the incident at police station Gwaltoli. The police personnel and officials of the police arrived at the place of occurrence and all the three dead bodies were sealed after necessary proceedings being conducted and sent to mortuary. Later on it was revealed that the name of female deceased was Zainab and the names of two male deceased were Ibrahim and Riyaz. He came to know afterwards that the correct name of Rashid is Zakir and he is resident of Bahraich. Afterwards, he further came to know that Rashid @ Zakir had murdered his earlier wife and he was sentenced to life imprisonment and was a convicted accused and had absconded from jail. On 9.3.2013, the police personnel have brought Rashid @ Zakir to his factory then on his pointing out a Rapi and iron rod were recovered from the second floor of the factory from a room in which cuttings of leather were kept and he confessed before the police that he had committed the murder of two boys and of a woman. He further got a country made pistol and four live cartridges and one empty cartridge from his room and gave it to the police. For the said recoveries which were made at the pointing out of the accused Rashid @ Zakir recovery memos were prepared on which the police had made him signed and he has proved the signature on the recovery memo.

35. In his cross examination, he has stated that the incident has taken place in the night of 5/6.3.2013 and the place of occurrence is 14/57C, Civil Lines, Gwaltoli, Kanpur in which

he does not reside and in the premises of the said house there is a factory in which the work of making saddle is done. The factory was established by him in the year 1997 and in the said house the work of making saddle was started since 2005-06 and is still going on for which he keeps the employee according to the need of work. Some time there are 6 to 9 employees, who used to work in the factory. Generally, the work in the factory starts from 9:30 and go on upto 7:30 p.m. Sometime early morning the employees come. The house of the factory is of two floors. The work of making saddle is done at the ground floor and on the second floor cuttings of leather etc. are kept and at the said floor there is a room also which has been given to the accused for living. The accused has been kept on the job since 2017. The accused was kept as Chaukidar and he has kept Rashid as he has told his problem. The accused told him that he is resident of Bahraich and what does he do he does not tell. The wife of accused had come 3-4 months prior to the present incident and kept in the factory. He used to go to the factory in the morning at 10 a.m. and return after closing the factory. On 6.3.2013, when he had gone to the factory in the morning at 10-10:30 a.m. then he received the information about the incident. One key of the factory remains with him and one key remains with accused Rashid. He had opened the factory from the key which was with him and the factory was got opened by Anand Prakash, who is also an employee in the factory. After opening the factory firstly he saw blood then on the first floor dead body was found. On the first floor, there were two dead bodies which were of male persons whereas on the second floor a dead body of a woman was found. On the face, he saw the injuries and on the neck cut injuries were seen by him and both the boys have

received similar injuries. On giving the information, the police arrived. The police conducted panchayatnama of the dead bodies. On the said date nothing was recovered. According to him, the age of the woman was about 50 years. The height and colour he did not have any idea. Both the boys were aged between 22 years to 25 years. What clothes they were wearing he did not remember. The three boys and a woman had come in the afternoon at about 3 p.m. and Rashid told him that they were his brother-in-law and mother-in-law but he had not disclosed their names and when they were present there, he left the factory. He had not seen them leaving the factory on the said date. He has not seen the incident and he only suspecting that the incident must have been committed by Rashid and his wife Shakila as they had locked the factory and fled away. He denied the suggestion that prior to four days of the incident, Rashid had gone outside for some work. He further denied the suggestion that he is falsely deposing against the accused persons. He denied the suggestion that Rashid had not committed the said murders. He also denied the suggestion that many persons together have committed the murders. Rashid was brought by the police personnel on 9.3.2013 in his factory and he was in his factory at about 8 a.m. in the morning and on his pointing out the weapon of assault Rapi, iron rod and country made pistol along with four live cartridges and one empty cartridge were recovered before him. The police had sealed the said articles and prepared the recovery memo on which the police have got his signature. He denied the suggestion that in his presence, the three boys and the woman had not come. He further denied the suggestion that the recoveries which were made were not made before him. He also

denied the suggestion that at the instance of police, he is falsely deposing about seeing of three brother-in-laws and mother-in-law of Rashid.

36. P.W. 12 Constable Nakul Singh has deposed before the trial court that on 9.3.2013 he was posted as Constable Moharrir at police station Gwaltoli, Kanpur and on the said date at 8:50 a.m., the Station Officer Mohammad Ashraf had submitted at the office of police station, the recoveries which are available on record, i.e., Ext. Ka-13 on the basis of which he registered case crime no. 30 of 2013 under section 3/25 Arms Act against accused Rashid @ Zakir. The original chik F.I.R. No. 23 of 2013 is on record which is in his hand writing and signature which is Ext. Ka-34. He has also endorsed the Chik F.I.R. in G.D. No. 19 at 8:50 a.m. on 9.3.2013 by Constable Moharrir Vinod Kumar, who was along with him. The G.D. of the police Office was brought by him in the Court which was written by Constable Moharrir Vinod Kumar in his hand writing and signature. He is conversant with his hand writing and proved the G.D. No. 19 on which he had also singed and carbon copy of which was on record and he has proved the same from original. The carbon copy of the G.D. is marked as Ext. Ka-35.

37. In the cross examination, the said witness has stated that he was posted at the said police station prior to one and half years of the incident. At the police station, two bundles of the recoveries made in which one country made pistol and four live cartridges of 315 bore and one empty cartridge which were sealed was handed over and in the second bundle the weapon of assault, i.e., iron rod and Rapi which were connected with case crime no. 29 of 2013 under section 302/34 I.P.C. which was not before him today. He had prepared the chik F.I.R. on the basis

of recovery memo of the same and under the orders of Station Officer, he has prepared the chik F.I.R. and the G.D. of the said F.I.R. was prepared by his companion Constable Moharrir Vinod Kumar Verma on which he had made his signature. He had not written the same and only made his signature on the same. He denied the suggestion that the G.D. was not written by Vinod Kumar Verma. He denied the suggestion that at the police station in his presence, the Sub Inspector had prepared the recovery memo and got the signatures of the accused on the same forcibly. He further denied the suggestion that at the police station itself the proceedings of fard recovery memo was done. He has given his statement to the Investigating Officer after 6-7 days of the incident. He denied the suggestion that he had given a wrong statement.

38. P.W. 13 Sub Inspector Shiv Shankar Sharma has stated before the trial court that on 9.3.2013 he was posted as Sub Inspector at police station Gwaltoli, Kanpur Nagar. On the said date, the Station Officer Mohammad Ashraf got a recovery made from the accused Rashid of case crime no. 29 of 2013 under section 302 I.P.C. at his pointing out country made pistol of 315 bore along with four live cartridges and one empty cartridge for case crime no. 30 of 2013 under section 3/25 Arms Act was registered and he was entrusted the investigation of the same. He has obtained the copy of Nakal chik, nakal rapat and had recorded the statements of scribe of the F.I.R. and accused Rashid @ Zakir also. On 17.3.2013, he recorded the statements of Station Officer Mohammad Ashraf and witnesses S.I. Vishnudutt, Constable Aleem Ahmad, S.I. Tehsildar Verma and on the pointing out of S.I. Vishudutt he prepared the site plan of the place of occurrence which was in his hand writing and

signature and he has proved the same as Ext. Ka-36. He submitted the charge-sheet against accused Rashid @ Zakir under section 3/25 Arms Act which was in his hand writing and signature (Ext. Ka-37). He obtained requisite sanction on 6.5.2013 from the then District Magistrate Sri Sameer Verma under the Arms Act and the District Magistrate had granted the sanction which he proved as Ext. Ka-38.

39. In his cross examination, he stated that he was posted at police station Gwaltoli one year prior to the incident. He was not a member of police team at the time of arrest of the accused and recovery of country made pistol and other things. The case was registered in his presence at the police station. At the time of recovery, Kamran was a public witness and he has recorded his statement under section 161 Cr.P.C. He has interrogated the persons of nearby area. He did not remember the names of other witnesses. The recovered country made pistol was not sent to Forensic Science Laboratory. He denied the suggestion that no recovery of country made pistol was made from the accused and he conducted a wrong investigation. He further denied the suggestion that he was under the Station Officer and under his pressure he had made a wrong investigation and is falsely deposing against the accused.

40. Heard Sri Rajrshi Gupta, Amicus Curiae for the appellants, Ms. Archana Singh, learned A.G.A. for the State, perused the lower court record and the impugned judgment and order of the trial court.

41. Learned Amicus Curiae for the appellants submits that the F.I.R. which was lodged by P.W. 1 Anand Prakash, who happens to be working in Farhat Enterprises factory which is owned by one Kamran stating that when he went along with

Kamran in the morning and opened the factory, he saw that one woman and two male persons were lying dead in the factory and there were injuries on their neck and Rashid @ Zakir-the appellant, who used to live in one of the room at second floor of the said factory was missing. It was suspected that accused appellant Rashid @ Zakir had committed the murder of the three deceased. He submits that the sole eye witness of the occurrence, who is a child witness-P.W. 2, namely, Saddam aged about 6 years stated to have been found by the police at the place of occurrence and he informed that three deceased Zainab, Ibrahim and Riyaz were murdered by the accused appellant Rashid @ Zakir with knife and his sister Shakila @ Bitta facilitated in the murder and he witnessed the incident as he was covered by a blanket by his sister Shakila @ Bitta. He submitted that the presence of P.W. 2 Saddam at the place of occurrence appears to be doubtful as from the F.I.R. itself it is apparent that when the factory in question was opened by P.W. 1 and Kamran owner of the factory with one of the key which was with the owner they did not find the said witness in the factory and secondly he pointed out that soon after the incident, the police had arrived at the place of occurrence and had conducted the panchayatnama of the three deceased which was done as unknown dead body and if the said witness was present at the place of occurrence then definitely he would have informed the police and P.W. 1 and Kamran that three deceased out of which one was his mother and other two deceased were his real brother. Moreover, the dead body of the two deceased, namely, Ibrahim and Riyaz were found on the first floor of the factory whereas on the second floor, the mother of Saddam was found murdered, hence it was not possible for the said witness

to have seen the actual assailant committing the murder of two deceased whose bodies were found on the first floor. The dead bodies of the deceased were identified by P.W. 3 Abbas Ali, who happens to be the husband of deceased Zainab and father of two deceased, namely, Ibrahim and Riyaz on the next day when he received information from the police and went to the post mortem house which is apparent from the evidence of P.W. 3. He next submits that as it appears from the evidence of P.W. 1 and 11 and admitted to the prosecution case that one of the key of the factory was with the owner Kamran and other key of the factory was with accused appellant Rashid @ Zakir, who was working there as Chaukidar, hence the conviction and sentence of the appellant by the trial court in view of Section 106 of the Evidence Act is also not correct as the premises in question which was the factory was accessible to the owner as well as to the accused and it is quite possible that some other person could have murdered the three deceased as it cannot be said that the factory where the murder took place was in exclusive possession of accused appellant Rashid @ Zakir, who was living there along with his wife Shakila @ Bitta. He submitted that as the evidence which were collected against the accused appellant Rashid @ Zakir was his confessional statement before the police recorded on 9.3.2013 when he was arrested in which he confessed the guilt of committing murder of the three deceased and at his pointing out weapon of assault, a sharp edged object called Rapi was recovered from the second floor of the factory which was also blood stained and further a country made pistol of 315 bore along with four cartridges were recovered at his instance. It was argued that the confessional statement of accused Rashid @ Zakir before the police is

inadmissible under section 25 of the Evidence Act and the recovery of weapon of assault 'Rapi' is a false recovery as the place of occurrence is a factory in which sharp edged object is easily available. So far as recovery of country made pistol of 315 bore from the said factory is concerned, it was discarded by the trial court and the appellant has been acquitted under section 3/25 Arms Act. He pointed out that out of three deceased, two deceased, namely, Ibrahim and Zainab had received as many as 20 and 16 injuries on their persons respectively which includes incised wounds and the third deceased received as many as seven injuries on his persons. He argued that so far as the appellant Smt. Shakila @ Bitta is concerned, she was not named in the F.I.R. Her complicity has been disclosed during the course of investigation in the confessional statement of accused appellant Rashid @ Zakir and further from the statement of P.W. 2 Saddam that he has witnessed that his sister only facilitated in the crime with co-accused appellant Rashid @ Zakir, who has done to death the three deceased by knife, hence he submits that the conviction of accused appellant Rashid @ Zakir under section 302 I.P.C. and sentencing him to death penalty and conviction of appellant Shakila @ Bitta under section 302 I.P.C. and sentencing her for life imprisonment is wholly against the evidence on record and is liable to be set aside by this Court and the appellants be acquitted.

42. On the other hand, learned A.G.A. has vehemently opposed the arguments of learned counsel for the appellants and submitted that accused appellant Rashid @ Zakir has a bad antecedent as he is already convicted and sentenced by the trial Court in a murder case of his earlier wife and he was confined

in jail and thereafter he absconded from Lucknow jail and was living at Kanpur Nagar by concealing himself and was working in the said factory as Chaukidar for the last 10 months and he had enticed away the daughter of P.W. 3 and deceased Zainab and the two deceased, namely, Ibrahim and Riyaz, who were searching their sister Shakila @ Bitta came to know that accused appellant Rashid @ Zakir was working and living in the said factory, hence they along with their mother had come to house of accused appellant Rashid @ Zakir to take away Smt. Shakila @ Bitta. It appears that some quarrel took place between the parties on account of which three deceased were done to death by the accused appellant Rashid @ Zakir. There is an eye witness of the occurrence, who is a child witness, who has seen the incident and as per his evidence before the trial Court, it is stated that he saw the accused appellant Rashid @ Zakir killing the three deceased with knife and his sister Shakila @ Bitta was facilitating in the crime. He further pointed out that there was no occasion for any other person to kill the three deceased excepting accused appellant Rashid @ Zakir and his wife Shakila @ Bitta and it is a brutal murder. Weapon of assault, i.e., Rapi was also recovered at the pointing out of accused appellant Rashid @ Zakir from the second floor of the factory on which blood stains were also found, hence the conviction and sentence of the appellants by the trial court is absolutely in consonance with the medical report and the appeal of the appellants is liable to be dismissed by this Court.

43. Considered the submissions of learned counsel for the parties and perused the impugned judgment and order as well as lower court record.

44. It is an admitted case of the prosecution that the incident

had taken place in the factory, namely, Farhat Enterprises and all the three deceased were found murdered in the said factory and their dead bodies were lying in a pool of blood out of which dead bodies of two male deceased were lying on the first floor of the said factory whereas the dead body of woman was found on the second floor. It is further apparent from the prosecution case that on 6.3.2013 when P.W. 1 Anand Prakash along with the owner of the factory Kamran had reached in the morning at 11 a.m. and the factory was opened with the key which was with Kamran by Anand Prakash and on opening the factory, they saw there that three dead bodies lying in a pool of blood. The accused Rashid @ Zakir, who was Chaukidar in the said factory and was living there with his wife Shakila @ Bitta, was not found and it was stated that he had fled away after the incident. The F.I.R. of the incident was lodged by Anand Prakash along with Kamran suspecting that the accused Rashid @ Zakir has committed the murder of three deceased. P.W. 1 Anand Prakash and P.W. 11 Kamran, who is the owner of the factory both of them are not eye witness of the occurrence. P.W. 2 Saddam Hussain, who is said to be the eye witness of the occurrence and stated to be the real brother of two deceased Riyaz and Ibrahim and son of deceased Zainab, is said to have witnessed the incident and in his deposition before the trial Court has stated that he had seen the accused Rashid @ Zakir assaulting the two deceased, who were his real brothers by knife and also murdered his mother Zainab with knife and his sister was facilitating in the crime. It is stated by him that he was concealed and wrapped in a blanket and thrown in another room by his sister Shakila due to which he was saved. Learned counsel for the appellants vehemently argued that the presence

of P.W. 2 Saddam, who was aged about 6 years, at the place of occurrence is doubtful as had he been present there then he would have definitely been killed by the accused, who murdered his two real brothers and mother brutally. Moreover, it was further pointed out by him that panchayatnama of three deceased was conducted as of unknown persons and had the said witness being present at the place of occurrence then definitely he would have disclosed the two male deceased to be his real brother and female to be his mother. The said contention of learned counsel for the appellants appears to have force as it appears from the evidence of P.W. 10 Atul Kumar, who had conducted the panchayatnama of two male deceased as he categorically stated that he had conducted the panchayatnama of the two deceased upto 14:45 hours and the identity of two dead bodies were not known, hence he conducted the panchayatnama of the two deceased as unknown. In this regard, it is also relevant to mention here that P.W. 10 has further stated in his cross examination that on the next day the father of two deceased, namely, Abbas Ali-P.W. 3 had identified them as the person, who was aged about 35 years was stated to be Ibrahim whereas other male person, who was aged about 25 years was stated to be Riyaz. It is also significant to note that when P.W. 1 opened the lock of the gate of the factory along with P.W. 11 Kamran, he too in the F.I.R. nor in his statement before the trial court, has stated about the presence of P.W. 2 Saddam in the factory premises where the incident had taken place and it was the police, who visited the place of occurrence after receiving the information about the murders have stated that they have found P.W. 2 crying at the place of occurrence. In the site plan of the place of occurrence which

was prepared by the Investigating Officer also it was not shown that from where the said child P.W. 2 was found weeping thus the presence of P.W. 2 at the place of occurrence is doubtful. Moreover from a perusal of the statement of P.W. 2 with regard to witnessing of the incident before the trial court also goes to show that he was incompetent witness and further appears to be a tutored witness just to create the evidence against the accused persons. The Investigating Officer has also failed to show in the site plan, the place of occurrence, the place from where the said witness was witnessing the incident as the incident had taken place in two parts as the mother of P.W. 2 was murdered and her dead body was found at the second floor of the factory whereas the dead body of the two deceased, who were male persons were found at the first floor of the said factory and it is highly doubtful that P.W. 2, who has stated that he was wrapped and thrown in a room by his sister, could not have seen the murder of the two deceased which had taken place on the first floor. The evidence of the said witnesses cannot be said to be wholly reliable one and safe for the conviction and sentence of two appellants. The law regarding the competence of a person testifying as provided under section 118 of the Evidence Act, has been well settled by the Apex Court in catena of decisions. One such judgment passed by the Apex Court **on 5th March, 2019 in Criminal Appeal Nos. 428-430 of 20199 (Digamber Vaishnav & anr. vs. State of Chhattisgarh)** is relevant to be taken note of and the extract para 21 of which is quoted hereinbelow:-

"21. Section 118 of the Evidence Act governs competence of the persons to testify which also includes a child witness. Evidence of the child witness and its credibility could depend upon the facts and circumstances of each case. There is no rule of practice that in every case the evidence of

a child witness has to be corroborated by other evidence before a conviction can be allowed to stand but as a prudence, the court always finds it desirable to seek corroboration to such evidence from other reliable evidence placed on record. Only precaution which the court has to bear in mind while assessing the evidence of a child witness is that witness must be a reliable one.

22. This Court has consistently held that evidence of a child witness must be evaluated carefully as the child may be swayed by what others tell him and he is an easy prey to tutoring. Therefore, the evidence of a child witness must find adequate corroboration before it can be relied upon. It is more a rule of practical wisdom than law."

45. The next aspect of the case which is to be examined is the evidence under Section 106 of the Evidence Act against the appellant as it is a case of the prosecution that accused Rashid @ Zakir was living along with his wife at the second floor of the factory in a room and after the incident he was not found at the place of occurrence along with his wife. It is admitted case of the prosecution that one key of the factory was with accused Rashid @ Zakir and other key was with the owner of the factory P.W. 11 Mohammad Kamran, hence the presumption under section 106 of the Evidence Act also cannot be drawn against the accused Rashid @ Zakir also as it cannot be said that the factory in which he was Chaukidar and also living in a room along with his wife, was in his exclusive possession and was not accessible to any one else has one of the keys of the factory was with P.W. 11 Mohammad Kamran, therefore, the said premises of the factory was accessible to others also. We are cautious about the fact that no doubt three persons have been done to death with large number of injuries found on their persons but to say that it was accused Rashid @ Zakir, who committed the murder of three deceased with sharp edged weapon which is a brutal murder is highly doubtful. It is well settled that suspicion howsoever, showing cannot take the place

of proof. The Apex Court in the case of **Sujit Biswas vs. State of Assam** reported in (2013) 12 SCC 406 while examining the distinction between 'proof beyond reasonable doubt' and 'suspicion' has held as under:-

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

46. In this regard para-9 of the judgment of the Bombay High Court passed in the case of **Ulhas Sudam Gorhe Taluka vs. State of Maharashtra** reported 2018 SCC Online Bom 3389 is also of great significance which is quoted hereinbelow:-

"9. The Supreme Court in the case of Shambhu Nath Mehra v. State of Ajmer reported in AIR 1956 SC 404, has held that Section 106 of the Indian Evidence Act is not a substitute for the burden of proof which rests on the prosecution. As noted earlier, in the present case, there is no evidence on record even to remotely suggest that the appellant was in fact last seen in the company of the deceased Kavit either at the time of noticing the dead body or prior thereto or he was seen in the vicinity of the scene of offence within the proximity of the relevant time. In the absence of such evidence,

the failure of the Appellant to offer any explanation under section 106 of the Indian Evidence Act cannot be used and termed as a circumstance against the Appellant nor can a presumption of guilt can be drawn on the failure of the Appellant."

47. In this regard para-19 of the judgment of the Apex Court passed in the case of ***Digamber Vaishnav & another vs. State of Chhattisgarh (Supra)*** is quoted hereinbelow:-

"It is also well settled principle that in criminal cases, if two views are possible on evidence adduced in the case, one binding to the guilt of the accused and the other is to his innocence, the view which is favourable to the accused, should be adopted. This principle has a special relevance in cases where the guilt of the accused is sought to be established by circumstantial evidence."

48. We further find from the prosecution case that it may not be possible that two deceased, who were grown ups persons aged about 25 years and 35 years and the deceased Zainab, aged about 55 years could have been overpowered and killed single handedly in such a gruesome manner by the accused Rashid @ Zakir, who was just aged about 45 years. The possibility of the incident having being taken place in some other manner by more persons cannot be completely ruled out. The recoveries which have been made from the pointing out of the accused Rashid @ Zakir, i.e., iron rod and Rapi cannot be said to be a reliable one also as it is a factory premises and the work of making saddle is done there and it is quite natural that the said tools could be available in the factory and could have been used by the persons, who would have committed the murder and left it there on the spot and recovery of the said weapon of assault has been shown at the instance of appellant Rashid @ Zakir. To say that country made pistol which is said to have been recovered along with three live cartridges from room at the pointing out of the accused Rashid @ Zakir was

found to be false as in the said case, the accused has been acquitted of the said charges by the trial Court.

49. Thus, the finding which has been recorded by the trial court for convicting and sentencing against accused Rashid @ Zakir with death sentence for an offence under section 302/34 I.P.C. by virtue of Section 106 of the Evidence Act, does not sound to reason as the trial court has convicted him taking into account the fact that he was living in the premises of the factory in which three deceased, who were his brothers-in-law and mother-in-law, were found dead and recovery of weapon of assault was made on his pointing out from the premises of the factory in which the incident had taken place, of which the appellant Rashid @ Zakir with his wife was in his exclusive possession the conviction is not at all justified as the place of occurrence is a factory premises which was accessible to P.W. 11 Mohammad Kamran also, who is the owner of the factory. Further the statement of P.W. 2 Saddam-the child witness and other prosecution witnesses, also cannot be said to be the basis of conviction and sentence as he is an incompetent witness and his evidence is not wholly reliable and further the presence of P.W. 2 also at the place of occurrence has not been established beyond reasonable doubt by the prosecution. P.W. 3 Abbas Ali, who is the father of P.W. 2 has stated that P.W. 2 had also gone with his mother and two real brothers to the house of Rashid @ Zakir to bring back his sister with him, who was enticed away by accused Rashid @ Zakir shows that he is also not an eye witness of the occurrence and he has deliberately in his evidence has stated that P.W. 2 had also gone with his real brothers and mother to the house of accused Rashid @ Zakir just to create an evidence against the accused-appellants as

there appears to be difficulty for the prosecution to prove its case against the appellants because it appears to have been realized that there was insufficient evidence against them for their conviction by virtue of Section 106 of the Evidence Act. The trial court further committed error in considering the two letters sent by the accused Rashid @ Zakir from jail which has been marked as Letter No. 12Kha dated 28.3.2018 and Letter No. 13Kha wherein he has made responsible his wife for the three murders committed on the date of incident and similarly a letter dated 12.9.2017 written by accused Shakila @ Bitta to the District Judge wherein she vice versa blamed her husband for the murder of three deceased from which it had gathered that two accused have admitted their presence but the said letters cannot be treated as admissible piece of evidence which were inappropriate to be considered by the trial court as they were sent from jail, further more it was not clear as to under what circumstances and at whose behest, the two letters were sent is not known. It has come on record that accused Rashid @ Zakir is also a convicted person as he had earlier murdered his earlier wife kalimun and has been convicted by the trial court in S.T. No. 257 of 1998 on 16.9.199 for life imprisonment and he was confined in jail and on 12.10.2005 it has been stated that he went on a holiday of 15 days but thereafter he did not return and absconded but the said fact cannot be of much relevance for his conviction and sentence in the present case as it is the duty of the prosecution to prove the present case against him by cogent and admissible evidence beyond reasonable doubt, which it has failed to do. So far as the present case is concerned, the involvement of the appellant Rashid @ Zakir appears to be doubtful and he is entitled for benefit of doubt.

50. So far as Shakila @ Bitta is concerned, she is not named in the F.I.R. her name came into light in the confessional statement of appellant Rashid @ Zakir on 9.3.2013 when the police had arrested him, though P.W. 2 has stated that she had facilitated in the crime but the testimony of the said witness has been found to be not reliable piece of evidence by us and also his presence at the place of occurrence and the presumption under section 106 of the Evidence Act also cannot be drawn against her where she was living along with her husband appellant Rashid @ Zakir in the factory where the incident had taken place, therefore, there appears to be no legal evidence against her also which may warrant her conviction and sentence by the trial court.

51. In view of the above, the conviction and sentence of both the appellants by the trial court is hereby set aside.

52. The death reference made by the trial court with respect to appellant Rashid @ Zakir is also set aside.

53. Both the appellants are in jail. They shall be released forthwith unless otherwise wanted in any other case.

54. It is further directed that the appellants shall furnish bail bonds with sureties to the satisfaction of the court concerned in terms of the provision of Section 437-A Cr.P.C.

55. Both the aforesaid appeals stand allowed.

56. Let the lower court record along with the certified copy of the present judgment be transmitted to the trial court concerned for necessary information and compliance forthwith.

(Dinesh Kumar Singh-I, J.) (Ramesh Sinha, J.)

Dated :-16.05.2019
Shiraz.