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**A.F.R.**

**Judgment Reserved on : 16.12.2021**

**Judgment Delivered on :31.01.2022**

**Case :-** CRIMINAL APPEAL No. - 633 of 2013

**Appellant :-** Pinkoo @ Jitendra

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

**Counsel for Appellant :-** Amit Misra,Bhavya Sahai,Brijesh Sahai,J.S. Audichiya,Pawan Kumar Bhardwaj,

**Counsel for Respondent :-** Govt. Advocate,A.K.Umrao,Imran Ullah,Mohammad Khalid,Shishir Prakash K.K. Upadhyaya,

**connected with**

**Case :-** CRIMINAL APPEAL No. - 25 of 2013

**Appellant :-** Smt. Ishwari Devi

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

**Counsel for Appellant :-** Jai Shanker Audichya,

**Counsel for Respondent :-** Govt. Advocate K.K. Upadhyaya

**Hon'ble Arvind Kumar Mishra-I,J.**

**Hon'ble Vikas Budhwar,J.**

**[Per Arvind Kumar Mishra-I,J.]**

1. Heard Sri Brijesh Sahai, learned Senior Counsel assisted by Sri Bhavya Sahai and Sri J.S. Audichya, learned counsel for the appellants, Sri Imran Ullah and Sri K.K. Upadhyay, learned counsel for the informant and learned A.G.A. for the State and perused the material on record.

2. The aforesaid two criminal appeals arise out of judgment and order of conviction dated 18.12.2012 passed by the Additional District and Sessions Judge, Court No.6, Aligarh in Session Trial No. 600 of 2006 (State vs. Pinkoo alias Jitendra and Smt. Ishwari Devi), concerning Case Crime No.04 of 2006, under Sections – 302/34 and 114 I.P.C., Police Station- Gandhi Park, District – Aligarh and connected Session Trial No.601 of 2006 (State vs.

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Pinkoo alias Jitendra), concerning Case Crime No.10 of 2006, under Section – 25 Arms Act, Police Station – Gandhi Park, District – Aligarh, whereby the aforesaid two appellants have been sentenced to imprisonment for life, under Section - 302 read with Section – 34 I.P.C., coupled with fine against each to the tune of Rs. 20,000/- and in case of default in payment of it, the concerned convict would have to suffer additional rigorous imprisonment for one year. The appellant – Pinkoo alias Jitendra has also been sentenced to three years rigorous imprisonment coupled with fine Rs.5,000/- with default stipulation to suffer additional rigorous imprisonment for four months under Section – 25 Arms Act.

3. The aforesaid sentences awarded against appellant-Pinkoo @ Jitendra have been directed to run concurrently.

4. The factual matrix of the case as reflected from the F.I.R. pertains to fact that the written report was lodged by the informant- Indrabhan Singh Saini, son of Shri Ram Prasad, resident of Mali Ka Nagla (Shyam Bihari), Gandhi Park, Police Station – Gandhi Park, District – Aligarh on 04.01.2006 at 06:15 p.m. at Police Station – Gandhi Park, District – Aligarh against four persons including the present two appellants alleging therein that on 04.01.2006, it was around 05:30 p.m., the younger brother of the informant, Narendra Saini was standing in front of his house, when Pinkoo, Sonu, Monu, sons of Nem Singh arrived on the spot and Pinkoo, with intention to kill, fired on informant's brother with licensed rifle, while Sonu and Monu each gripped one arm of the victim and the mother of the accused- Ishwari Devi-was exhorting her sons for firing. Sonu and Monu were also possessing illicit arms and they shot fire, due to which, the informant out of fear could not save his brother. The written report also includes description that the

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incident was witnessed by Chandrabhan, son of Ramroop and Vipin Kumar, son of Geetam Singh and others of the locality. After committing the offence, the assailants being pressurized by the locality secured their escape. The dead body was stated to be lying on the spot, while the informant came to lodge the report.

5. The relevant entry of this written report (Ext. Ka-1) was noted in the concerned Check F.I.R. on 04.01.2006 at 06:15 p.m. at Case Crime No.04 of 2006 at Police Station – Gandhi Park, Aligarh, the same is (Ext. Ka-4) and it was entered by S.I. Naresh Pal (P.W.-3). He also registered case against the present appellant and others named in the F.I.R., vide Rapat No. 39 at 6:15 p.m. on 04.01.2006 at aforesaid police station under Sections – 302, 114/34 I.P.C.

6. The investigation ensued and was entrusted to the investigating officer, Jasvir Singh (P.W.-10), who took note of the contents of the documents, say the F.I.R., recorded statement of Head Moharrir, Naresh Pal (P.W.-3) and proceeded to the spot along with S.I. Arvind Kumar Gautam (P.W.-4) and entrusted him (S.I. Arvind Kumar Gautam) the task of preparing inquest report. Bare perusal of the inquest report and the testimony of S.I. Arvind Kumar Gautam is reflective of fact that the inquest was prepared around 09:00 p.m. after appointing inquest witnesses and it was decided that for ascertaining the real cause of death, let the dead body of the deceased- Narendra Saini be sent for postmortem examination. Consequently relevant papers for the same were prepared. The inquest report is Ext. Ka-6, police form no.13, (challan dead body), photonash, letter to R.I. and letter to C.M.O. etc. are Ext.Ka-7, Ext. Ka-8, Ext. Ka-9 and Ext. Ka-10, respectively. The dead body was sealed on the spot and was entrusted to

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Constable Pramod Kumar and Rajveer Sharma for sending it to the mortuary.

7. Perusal of the postmortem examination report is indicative of fact that the postmortem examination was conducted in the night intervening 04/05.01.2006 (as per order of District Magistrate, Aligarh and C.M.S., District Hospital), Aligarh, wherein the following ante-mortem injuries were noted upon postmortem examination :-

*“Gun shot injury of entry of size 3 c.m. x 3 c.m. x bone deep on the left side present of lower lip, extending from left upper lip to lower part of chin part clotted blood present. Blackening, tattooing, charring present. Underlying bones broken muscle tendon are severely lacerated. One wadding piece and seven pellets were recovered from post pharyngeal wall.”*

8. Cause of death was stated to be on account of shock and haemorrhage, as a result of ante-mortem injuries. The duration was noted to be 1/3 days. The postmortem examination report is Ext. Ka-11.

9. As the investigation proceeded further, the investigating officer recorded statement of the informant, inspected the spot, prepared site plan of the occurrence (Ext. Ka-21) and prepared memo of simple and blood stained clay (Ext. Ka-3). He prepared memo of recovery of two empty cartridges i.e. 315 bore and 12 bore from the spot, the memo of the same is Ext. Ka-2. He arrested appellant- Ishwari Devi on 06.01.2006. He recorded statement of witnesses Chandrabhan and Vipin Kumar on 08.01.2006.

10. Thereafter, the investigation was handed over to Surendra Pal Singh (P.W.-7), the S.O. of Police Station – Gandhi Park, Aligarh, with whom he (P.W.-10) formed a team and upon tip off information arrested accused- Pinkoo alias Jitendra on 09.01.2006 at spot Gate No.1 of Mandi Samiti and upon arrest

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being effectuated, got recovered weapon of assault SBBL gun which the accused allegedly took out from the iron tank (for keeping grain) kept in his house in a room whereupon a case was lodged against accused- Pinkoo alias Jitendra vide Check F.I.R. No. 8/06 at Case Crime No. 10 of 2006, under section – 25 Arms Act, at Police Station – Gandhi Park, Aligarh and entry was made in concerned G.D., whereby a case was registered at Rapat No.58 at 23:45 hours on 09.01.2006. The Check F.I.R. of this case (Crime No.10 of 2006) is Ext. Ka-16, whereas the copy of general diary entry, whereby the case was registered is Ext. Ka-17 and the same has been proved by Constable Bharat Singh (P.W.-8).

11. However, the memo of arrest and recovery was prepared by Jasvir Singh (P.W.-10) on the dictation of S.O. Surendra Pal Singh (P.W.-7), the same is Ext. Ka-15. This witness Surendra Pal Singh (P.W.-7) also recorded statement of various witnesses including that of S.I. Arvind Kumar Gautam, Constable Pramod Kumar and Constable Rajveer Sharma. He prepared spot map of the place of recovery (Ext. Ka-13) and after completing the evidence filed charge sheet (Ext.Ka-12) against the accused-appellant under aforesaid sections of I.P.C. (302/114/34 I.P.C.) at aforesaid case crime number (04 of 2006).

12. However, up to this stage/period, the forensic examination report regarding the SBBL gun and the cartridges had not been obtained. The forensic report dated 12<sup>th</sup> March, 2007 was subsequently obtained at the instance of the defence, when it moved application before the trial court for calling the forensic report in question, which was signed by the concerned authority of Vidhi Vigyan Prayogshala, Agra on 09.02.2007. The same is marked as Kha-1.

13. The case (Crime No.10 of 2006) pertaining to arms act

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against accused-appellant- Pinkoo alias Jitendra was investigated by S.I. Vinod Kumar (P.W.-9), who took note of the contents of Check F.I.R. on 10.01.2006, recorded statement of the informant and the witnesses and prepared the site plan (Ext. Ka-18). He also obtained sanction for prosecuting the accused-appellant- Pinkoo alias Jitendra from District Magistrate, Aligarh, the sanction is Ext. Ka-20 and after completing the investigation he filed charge-sheet under Section – 25 Arms Act at Case Crime No.10 of 2006, which charge sheet is Ext. Ka-19.

14. Consequently, the Trial Court heard the accused-appellants and the prosecution on the point of charge and it was prima facie satisfied with the case against the accused-appellants, therefore, framed charges against both the accused- Pinkoo alias Jitendra and Smt. Ishwari Devi under Sections – 302 read with Section - 34 I.P.C. and 114 I.P.C. in Case Crime No.04 of 2006. Accused Pinkoo alias Jitendra was also charged under Section – 25 Arms Act at Case Crime No.10 of 2006. The charges were read over and explained to the accused-appellants, who abjured the charges and opted for trial.

15. In turn, the prosecution produced in all ten witnesses. A brief sketch of the same is as here under :-

16. Indrabhan Saini (P.W.-1) is the informant and eyewitness. Chandrabhan (P.W.-2) is also eyewitness. Naresh Pal is P.W.-3, he has prepared the Check F.I.R. and noted entry in the concerned General Diary of date 04.01.2006 at Police Station – Gandhi Park. S.I. Arvind Kumar Gautam is P.W.-4, who prepared the inquest report. Dr. R.P. Sharma is P.W.-5, who conducted autopsy on the dead body of the deceased Narendra Saini. S.I. Siya Ram Sharma (P.W.-6) has got nothing to do with the case

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of the present appellants, namely, Pinkoo alias Jitendra and Smt. Ishwari Devi because he arrested another co-accused, Sonu son of Nem Singh, which has got no reference with the merit of the case of the present two appellants, as such need not be looked into in this case. The Inspector Surendra Pal Singh P.W.-7-is the Second Investigating Officer of this case. Constable Bharat Singh is P.W.-8, who prepared the check F.I.R. pertaining to Case Crime No. 10 of 2006, under Section – 25 Arms Act at Police Station – Gandhi Park, District Aligarh and noted entry of its content in the concerned general diary of date on 09.01.2006 and got registered case against accused- Pinkoo alias Jitendra. S.I. Vinod Kumar (P.W.-9) is the Investigating Officer of case pertaining to Case Crime No.10 of 2006, under Section – 25 Arms Act. After completing the investigation, he filed charge-sheet (Ext. Ka-19) against accused-appellant- Pinkoo alias Jitendra. S.I. Jasvir Singh is P.W.-10 who is the first investigating officer pertaining to Case Crime No.04 of 2006.

17. Thereafter, the evidence for the prosecution was closed and statement of both the accused-appellants was recorded under Section – 313 Cr.P.C. Pinkoo alias Jitendra claimed to have been falsely implicated in this case and stated in reply to Question No.17 that his father is employed as constable in the police department at Aligarh. He was working as such at the time of this occurrence. The investigating officer of this case (Jasvir Singh P.W.-10) was also posted at Police Station – Lodha with his father and thereafter he was posted to Police Station – Gandhi Park and he had certain scores to settle with his father, on account of personal as well as departmental grudge, he colluded with the informant and cooked up a false case against him. The accused opted for adducing evidence for his defence.

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18. So far as accused- Ishwari Devi is concerned, she refuted charge framed against her and claimed to have been falsely implicated in this case and in her statement in reply to Questionnaire No.17. She adopted statement of Pinkoo alias Jitendra as stated by him in reply to questionnaire no.17 as above. She also wished to adduce her testimony in her defence.

19. The Trial Court after appraisal of facts and circumstances of the case and after evaluating evidence on record and vetting merit of the case, returned finding of conviction and passed sentence against the aforesaid two appellants to imprisonment for life, under Section - 302 read with Section – 34 I.P.C., coupled with fine against each to the tune of Rs. 20,000/- and in case of default in payment of it, the concerned convict was directed to suffer additional rigorous imprisonment for one year. The trial court also sentenced the appellant – Pinkoo alias Jitendra to three years rigorous imprisonment coupled with fine Rs.5,000/- with default stipulation to suffer additional rigorous imprisonment for four months under Section – 25 Arms Act.

20. Consequently, this appeal.

21. It has been vehemently claimed on behalf of the appellants that in fact, no one saw the occurrence. The informant in collusion with the police has concocted and set up a false story in order to falsely implicate the appellants in the commission of the offence in question. The face value of the F.I.R. itself is doubtful and it is suspicious on account of description in it of various aspects of the case, in particular that the informant is acquainted with specific weapons used in the commission of the offence. The written report (Ext. Ka-1), describes, *inter-alia*, that accused- Pinkoo alias Jitendra fired with licensed rifle, whereas two co-accused are stated to have



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been in possession of illicit countrymade weapon. The F.I.R. is almost cryptic and silent about any motive being assigned to the accused-appellants. When the very import of the F.I.R. is gathered from the above three dimensions, then things appear to have been cleverly articulated, fishy and managed in order to falsely implicate the present accused-appellants in this case.

22. Now, it so happened that in order to give colour to this false case, a false motive was subsequently introduced and it was suggested by the prosecution that the appellant-accused-Pinkoo alias Jitendra was a drunkard, he used to demand money from the persons of the locality, which was opposed by the brother (deceased) of the informant, which factual aspect, the prosecution, if asserted, subsequently was required to strictly prove it and to establish it reasonably and satisfactorily, but that is miserably wanting in this case.

23. Further, we have been persuaded to the ambit that the entire proceeding was initiated after it was decided to falsely implicate the accused-appellants in this blind case. F.I.R. is ante time. There are interpolations and cuttings in the dates on various prosecution papers. Neither the inquest was prepared by the investigating officer himself nor was he present on the spot during course of preparation of inquest but the proceeding was conducted by another police personnel, S.I. Arvind Kumar Gautam (P.W.-4). The memo of recovery (Ext. Ka-2) regarding recovery of two empty cartridges one 315 and the another 12 bore was wrongly prepared and is admitted to the Investigating Officer, Jasvir Singh (P.W.-10).

24. Now, it so happened that the postmortem examination on the dead body of Narendra Saini, aged about 23 years was conducted the very intervening night 04/05.01.2006 at 01:00 a.m., as per the order of District Magistrate, Aligarh and C.M.S.,

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Aligarh as has been endorsed upon the post-mortem examination report by Dr. R.P. Sharma (P.W.-5). No bullet of any sort was ever recovered from the body of the deceased, which may indicate that any rifle was used in the commission of the offence, instead the doctor recovered one wadding piece and seven pellets and this startled both the police and the informant, therefore, description of use of weapon was twisted and the weapon rifle was tried to be obviated by managing the statement of the informant under Section – 161 Cr.P.C. by divulging that the informant per chance described the weapon of assault used by the appellant- Pinkoo alias Jitendra as licensed rifle, whereas, it was 'licensed gun'. This aspect serves as additional link. Now, it so happened that in the night intervening 04/05.01.2006 autopsy was conducted at 01:00 a.m., which revealed use of gun instead of rifle and this being so the matter was tried to be winced in statement made under Section – 161 Cr.P.C. Further, the F.I.R. is ante timed and it is not believable, as such.

25. No doubt, the F.I.R. is claimed to have been lodged on 04.01.2006 at police station Gandhi Park at 06:15 p.m., but the special report (SR) of the same was sent to the Chief Judicial Magistrate, Aligarh on 18.01.2006 and the entire prosecution story is silent about this considerable delay and there is no whisper as to when the special report was in fact sent to the Magistrate from the police station. Another vital aspect of this case is that the F.I.R. pertains to lodging of a cognizable case but it does not bear signature of the informant on check F.I.R., whereas the informant- Indrabhan Saini (P.W.-1) claims to have appended his signature on the check F.I.R. The aforesaid aspects create a series of discrepancies committed both by the police and the informant, thus the F.I.R. becomes vulnerable

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and suspicious and is proved to be result of deliberation and collusion with the police. The circumstances so created throw away the very foundation of the case set up by the prosecution. The very statement of the investigating officer in that regard is evasive. Nicety of lodging of F.I.R. and follow up action speaks louder than the reality.

26. Apart from that, it has been claimed that neither Indrabhan Saini (P.W.-1) nor Chandrabhan (P.W.-2), the two witnesses of fact were present on the spot nor have they seen the occurrence. Indrabhan Saini himself admits that he arrived on the spot after the witnesses named in the F.I.R. had arrived on the spot, whereas, his testimony belies his own version when he says that P.W.-2 followed him, when he rushed to the spot. The statement of prosecution witnesses of fact as well as that of the investigating officers are cryptic, contradictory and not inspiring confidence but give way to lot of confusion and irregularities. The place of occurrence has also been substantially changed by the prosecution. Both the witnesses of fact are highly interested witnesses.

27. As per the F.I.R., the incident took place in front of the house of informant, whereas, in the description of the prosecution witnesses, the incident is stated to have taken place at the corner of '*chabutra*' of Devi Ram. The site plan of the place of occurrence has been changed as such. The house of the appellant has not been sketched or marked in the site plan (Ext. Ka-21). Besides, site plan is silent about specific positions of all the accused. The recovery of SBBL gun was planted by the police which is absolutely fake. The recovery memo contains description that SBBL gun when kept under seal was in working condition, whereas, at the time when the SBBL gun was received by the forensic laboratory the alleged gun

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was found to be not functional. It can be seen with convenience and ease that the houses of a number of persons were located in the neighborhood of the accused- Pinkoo alias Jitendra but not a single witness was obtained or tried to be obtained by the police to give thrust to the point of recovery of the SBBL gun. The entire prosecution testimony lacks corroboration of occurrence by independent source of evidence. Apart from that, learned counsel for the appellants also explained various inconsistencies vis-a-vis facts and circumstances emerging in the case, which they claimed to pose serious question to the entire occurrence. The recovered gun was stated to have not been used in the commission of the crime.

28. The learned counsel for the appellant further proceeded to claim that the trial Judge failed to take stock of the aforesaid factual and legal aspects of this case which were very much apparent to it, but it erroneously recorded conviction against the accused-appellants, which finding of conviction is not based on material on record. The prosecution has failed to prove its case beyond all reasonable doubt. The judgment of conviction is illegal and perverse.

29. Per contra, Mr. Imranullah, learned counsel for the informant, while retorting to the aforesaid argument has claimed that so far as the testimony of both the prosecution witnesses of fact- P.W.1, Indrabhan Saini and P.W.-2, Chandrabhan is concerned - the same is pin pointing, consistent, unflinching and direct on the point of occurrence which gives coherence to the description about the manner and style of the occurrence as it took place on 04.01.2006 at 05:30 p.m. at Nagla Mali. Now, in so far as the point of F.I.R. being

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ante time as claimed by the defence is concerned, this much can be pointed out that the F.I.R. is prompt one. No time was left for deliberation. Each prosecution paper, in particular the inquest report and the papers prepared on the spot bear case crime number. The F.I.R. was lodged soon after the occurrence at 06:15 p.m. at the police station concerned, which is one kilometer away from the place of occurrence. In so far as point of charge in the use of weapon of assault is concerned, the same was licensed gun, which was inadvertently described as licensed rifle in the F.I.R. and that aspect stood corrected by the informant at the first opportunity, when his statement was recorded in the same night intervening 04/05.01.2006 by the investigating officer and the fact stands substantiated even by the testimony of the investigating officer (P.W.-10) Jasvir Singh.

30. In so far as the story of motive not being described in the F.I.R. is concerned, then it is claimed that F.I.R. is not an encyclopaedia and the motive brought forth subsequently by the informant has sufficient nexus with the crime has been proved satisfactorily. Not only the witnesses of fact (P.W.-1 & P.W.-2) but also the formal witness say - Dr. R.P. Sharma (P.W.-5) have proved the factum of death being caused by ante mortem gun shot injury and death in his opinion might have been caused around 05:30 p.m. Presence of witnesses of fact on the spot is natural and their testimony inspires confidence. The factum of recovery of licensed gun has been proved cogently by the prosecution witness Surendra Pal Singh (P.W.-7) and he has identified it before the trial court.

31. As regards the distortion in functioning of the recovered gun as pointed out by the defence, it is stated by P.W.-7 in the recovery memo that the recovered gun was functioning, however, while the gun was sent for forensic examination, it

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was found to be non functional on account of mechanical defect in firing pin. That being so, how can the investigating officer/sub inspector be supposed to have skilled knowledge of internal mechanism and its functioning, particularly, in case of the recovered gun. Therefore, only external examination of gun was done at the time of its recovery and whatever was found on the spot of recovery was noted in the recovery memo. Therefore, recovery of gun is satisfactorily proved. Moreover, it has also been proved that 12 bore empty cartridge was found on the spot may have been fired from the recovered gun. That being the case, the prosecution has proved guilt of the appellant beyond all reasonable doubt. Appellant-Pinkoo alias Jitendra has criminal antecedents and he committed the offence inter-alia under Section – 307 I.P.C., while he was on bail during the trial and the learned trial judge has taken note of all the aforesaid aspects and the evidence adduced on record and it passed the just order.

32. Learned A.G.A. has submitted that the eye account testimony inspires confidence and there is no reason to disbelieve the same as that would amount to brushing aside cogent testimony merely on suspicion. It is established law that mistake committed during investigation by the Investigating Officer would not be sufficient justifying to throw away the entire case of the prosecution. Evidence on record profusely indicates involvement of the accused-appellant in the occurrence. The trial court has taken correct view of law and facts and has justifiably recorded conviction against the accused-appellant.

33. In the light of rival submission and the claim raised by both the sides, the following question crops up for our

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consideration, as to whether the prosecution has been able to prove satisfactorily the charges against the accused-appellants beyond all reasonable doubt ?

34. To begin with, a bare perusal of the F.I.R. would be appropriate.

35. We gather from the perusal of the F.I.R. as described in it by the informant- Indrabhan Singh Saini that the incident took place in front of his house on 04.01.2006 at 05:30 p.m. at place Mali Ka Nagla within Police Station – Gandhi Park, District – Aligarh. The younger brother of the informant- Narendra Saini (deceased) was standing in front of his house, when the accused-appellants arrived on the spot and Pinkoo alias Jitendra fired from his licensed gun with intention to kill his brother, while Sonu and Monu each held one arm of the deceased and the mother of the aforesaid accused- Ishwari Devi was exhorting them. The first information report further contains description that Sonu and Monu also fired with their illicit arms, which created panic and due to which, the deceased could not be saved.

36. The written report proceeds on to say that the incident was seen by a number of persons of his locality including Chandrabhan, son of Ramroop and Vipin Kumar, son of Geetam Singh. Pressure of the locality on the spot compelled the accused to secure their escape from the scene. This is the fact position as narrated in the written report (Ext. Ka-1). The written report is stated to have been scribed by one Sardar Mukesh Saini, resident of Mohalla - Gandhi Nagar, Aligarh, who is claimed to have been one among the persons/crowd gathered on the spot after the occurrence. However, the scribe has not been examined by the prosecution. As we proceed

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further, we gather that this information was given at Police Station – Gandhi Park, where it was taken down in the concerned Check F.I.R. at Case crime No.04 of 2006 on 04.01.2006, under Sections – 302, 114, 34 I.P.C. This Check F.I.R. is Ext. Ka-4.

37. The above being the information regarding the occurrence, certain aspects of the case need be inquired into carefully; firstly the place of occurrence, secondly the use of weapon, thirdly the manner of assault being caused on the deceased and the claim regarding the F.I.R. being ante-timed and suspicious. Now insofar as testimony in regard to the place of occurrence is concerned, we come across testimony of two witnesses of fact namely P.W.-1 the informant- Indrabhan Singh Saini and P.W.-2 Chandrabhan. Rest of the witnesses of this case are formal witnesses. Testimony of these two witnesses is in line with the description of the occurrence as contained in the first information report with difference that the weapon used by appellant- Pinkoo alias Jitendra for killing the deceased is stated to be licensed gun, whereas, use of rifle has been described in the F.I.R.

38. Explanation has come forth from the testimony of Indrabhan Saini - P.W.1 that the scribe inadvertently wrote in the F.I.R. name of the weapon used as licensed rifle, whereas, it was licensed gun. However, he admits that after the occurrence, he was sure that the weapon used is gun and not rifle, which fact he had told the investigating officer, who recorded his statement as such, under Section – 161 Cr.P.C.

39. At this stage, a suggestion was made to the informant (P.W.1) by the defence that in fact, he was not present on the spot and he did not see the occurrence. The witnesses are



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highly interested, tutored and their testimony regarding the manner of occurrence is highly improved. The suggestion so put forth by the defence has been denied. However, it has been testified by the informant - P.W.1 that in the very night of the occurrence i.e. 04.01.2006 around 12:00 mid night or at about 12:30 a.m., his statement was recorded. Now, in order to assess properly the veracity and truthfulness of aforesaid specific piece of testimony and the attendant circumstances, we upon perusal of Parcha No.1 (of date 04.01.2006) pertaining to this case come across the fact that the investigation proceeded on after lodging of the F.I.R. and took practical shape after arrival of the police on the spot around 07:15 p.m. - the very same day on 04.01.2006 and the inquest was prepared by S.I. Arvind Kumar Gautam (P.W.-4), for which instructions were given to him by the investigating officer, Jasvir Singh (P.W.10). Inquest was completed by 9:00 p.m. the same night.

40. As per the description contained in the case diary (in Parcha No.1 of date 04.01.2006) regarding night activity, it invariably shows that after doing certain work connected with maintaining the law and order situation in the area where the offence took place, the investigating officer (P.W.-10) tried to apprehend the culprits but could not succeed in apprehending them. Further the Parcha proceeds on to contain description that it being late hours of night, the investigation for the day (04.01.2006) was closed. This Parcha No.1 ends with the noting that rest of the investigation shall be taken, the "next morning" i.e. on 05.01.2006 and Parcha No.2 pertaining to the date 05.01.2006 reflects that the statement of the informant P.W.1, Indrabhan Saini was recorded on that date i.e. 05.01.2006, but not in the midnight or at 12:30 a.m. as stated by PW-1.

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41. Apparently, reading of Parcha No.1 (04.01.2006) of the case diary explicitly shows that it is no denying fact that after the inquest was prepared in the night of 04.01.2006 at about 09:00 p.m. the dead body was sent for postmortem examination and no statement was recorded and night activity of the Investigating Officer was confined to apprehending culprits and maintaining the law and order situation and it being late hours of night, there is no whisper in it (case diary Parcha No.1) that statement of informant was recorded in the night i.e. 04.01.2006 or thereafter upto the next morning after 12:00 midnight up to 06:00-07:00 a.m. in the morning of 05.01.2006. Certainly the next course of investigation was adjourned for 05.01.2006 and Parcha No.2 starts with the statement of the informant (P.W.-1) Thus P.W.-1 Indrabhan Saini is not telling the truth, when he says that his statement was recorded under Section – 161 Cr.P.C. around 12:00 midnight of 04/05.01.2006 - the same night. Obviously, P.W.-1 has tried to fill vital loophole on point of use of weapon and cleverly hid the truth which he first stated in the F.I.R. to be licensed rifle. Therefore, statement of P.W.1 before the trial court that he got his statement recorded under Section – 161 Cr.P.C. at 12:00 midnight (04.01.2006) or 12:30 a.m. (05.01.2006) (in the very night of the occurrence) is found to be highly improved and full of embellishment. This aspect of the case connotes to fact that it was not known up to and till the time of conduction of postmortem examination as to what weapon, in fact, has been used in committing the offence. His testimony in this regard is tutored. We can conveniently observe that the postmortem examination was done the same night of the occurrence (04/05.01.2006) at 01:00 a.m. which proves that one wadding piece along with seven pellets were

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recovered from the body – thus negating use of any rifle in the commission of the offence.

42. In view of above discussion, it becomes relevant that in case P.W.-1 was present on the spot and saw the occurrence, then the description of occurrence as has been given by P.W.-1 in his statement to the police regarding the manner of occurrence is at great variance to the impact that there is no whisper of fact that he saw two accused each holding one arm of the deceased, while Pinkoo fired on the deceased. But his statement (under Section 161 Cr.P.C.) discloses fact that Pinkoo was chased, surrounded and killed near '*chabutra*' (terrace) of Devi Ram, which place is far away (at a distance of 35-40 steps) from the house of the informant. In the F.I.R. the place, where the incident took place is stated / described to be in front of house of the informant. This aspect of the case throws doubt on the veracity and genuineness of the witness and establishes that he is not believable.

43. The manner of the assault has been contradicted by the defence by putting specific question to both the prosecution witnesses of fact (PW-1 and PW-2) to the ambit that the incident took place in manner that the accused tried to catch/over power the deceased, however he tried to save himself by running away and while he reached to the corner of '*chabutra*' (terrace) of Devi Ram, he was surrounded by the accused and in the meanwhile, accused-appellant- Pinkoo alias Jitendra fired with licensed gun. Both the witnesses have denied any such statement given to the Investigating Officer. This statement of P.W.-1, under Section – 161 Cr.P.C. is in utter contrast to the one recorded by the trial court. Positively the above scrutiny of evidence is fair enough to show that the

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witness either did not see the occurrence or came to know about the occurrence after it had occurred.

44. The veracity of the testimony of P.W.-1 becomes highly doubtful the moment it is found that he is not telling the truth about the manner of occurrence, for specific reason that he tried to manipulate things existing and articulated by prevarication to show that prior to the conduction of postmortem examination of the dead body of the deceased- Narendra Saini,- his statement had been recorded by the Investigating Officer Jasvir Singh (P.W.10), whereas, Parcha No.1 exposes falsity of the claim that nothing of the sort like recording the statement of the informant took place in the night intervening 04/05.01.2006, whereas, the next course of investigation of the case, which began with the recording of the statement of the informant Indrabhan Saini took shape on 05.01.2006 - either in the morning of 05.01.2006 or afterwards but not prior to that. This being the case and the witness P.W.1 being brother of the deceased is found to be interested witness on this point and he is improving his version in order to show that the use of licensed rifle was, in fact, inadvertently described in the written report (Ext. Ka-1). We may gather that the description of occurrence – in manner and style – given by Chandrabhan PW-2 in the trial court is in utter contrast to the statement given to the Investigating Officer under Section 161 Cr.P.C. This contrast emerges in cross examination in paragraph no.8 of the testimony. More or less PW-2 is toeing same line of of action as PW-1 Indrabhan Saini.

45. The Investigating Officer, Jasvir Singh (P.W.-10) has categorically testified to the ambit that the statement of the informant was recorded on 05.01.2006, which testimony qua

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noting made in Parcha No.1 of date 04.01.2006 signifies that the statement of the informant was recorded in all eventuality either in the morning of 05.01.2006 or after-wards and it is admitted fact and circumstance of this case that the postmortem examination of the deceased - Narendra Saini was conducted at 01:00 a.m. in the night intervening 04/05.01.2006, which disclosed fact that one wadding and seven pellets were recovered from the body of the deceased and that confirmed, to all intents and purposes, use of gun in the commission of the offence but not the rifle. Thus, the suggestion of the defence that the theory of gun was tried to be inserted in collusion with the investigating officer only after the postmortem examination report (Ext. Ka-11) was available and seen by the investigating officer as that was very much in existence prior to the recording of statement of informant-Indrabhan Saini, carries force. This innocuous circumstance is self explanatory of real facts and exposes falsity of the prosecution case.

46. Vulnerability of the prosecution case is self-exposed when we analyze and come across prevailing circumstance (availability of postmortem report and recording of statement of the informant P.W.-1 on 05.01.2006) that are as explicit as anything and self-explained and leave no room for doubt that the prosecution witnesses - both P.W.1 and P.W.2 are tutored on this (manner of occurrence) point and their testimony on this aspect is fraught with embellishments. It being so, we cautiously scanned the testimony of the other prosecution witnesses, say the formal witnesses as well as the witnesses of fact, whereupon we notice that the place of occurrence as claimed by the prosecution to be in front of the house of the

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informant at Nagla Mali in District – Aligarh, is not found to be in front of house of the informant, but it is found to be at the corner of '*chabutra*' (terrace) of one Devi Ram of Nagla Mali.

47. As we proceed further and peruse the site-plan (Ext. Ka-21), we do not come across any house of the informant existing on the spot and it has emerged in the testimony of the prosecution witnesses of fact P.W.1 Indrabhan Saini and P.W.2 Chandrabhan, respectively, that in between the place of incident and the house of the informant, there are located four houses with specific names but the place of occurrence is admittedly the corner of '*chabutra*' (terrace) of Devi Ram, which location (spot) is the meeting point of the main road of Nagla Mali with the street running opposite to the eastern side of '*chabutra*' of Devi Ram, which leads to the house of the informant, which house as per the testimony of P.W.1 and P.W.2 is located at a distance of about 40 steps away in the eastern side from the place of occurrence - (terrace of Devi Ram). Very perusal of the site plan (Ext. Ka-21) reveals that there are located four houses in all. House of Prem Pal Sharma and Devi Ram on the one side of the main road Mali Nagla, whereas, opposite to these houses on the other side of the road, are situated houses of Bhoop Singh and Devi Singh.

48. It is claimed by P.W.1 (Indrabhan Saini) that no one from these houses was present and certain reasons have been attributed for the absence of the inmates of the aforesaid houses. Plea has been taken (by prosecution witnesses of fact) that they were outside/away from home. Bhoop Singh was stated to be working for Dainik Jagran, Prempal was '*lekhpal*' and claim was that Devi Ram resides in village and he makes occasional visit to his house. Though, this witness has tried his

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best to cleverly save the situation but it stood exposed reason being that it will hardly be expected, moreso in the absence of cogent reason /cause, that not a single person was residing (in the four houses Devi Ram, Prem Pal Sharma, Bhoop Singh and Devi Singh), at that point of time, when the occurrence took place because the testimony of P.W.1 or PW-2 does not show that these houses were locked from outside.

49. Therefore, to claim that in all the above four houses, no one was residing, therefore, no one came to the spot is doubtful testimony and it does not inspire confidence. Assuming it to be that Bhoop Singh was stated to be working for Dainik Jagran and Prempal was '*lekhpal*' and Deviram was stated to be residing in the village and he occasionally visited Mali Nagla, but, the house of Devi Singh, son of Late Pooran Singh - which is located across the Road Mali Nagla opposite to the house of Devi Ram has not been clarified by these witnesses regarding presence or absence of the inmates of this house. In case, any such incident had occurred at that spot (corner of terrace of Devi Ram) at 5:30 p.m. on 04.01.2006 then the presence of any member from the house of Devi Singh, at least, would have been most natural on the spot. But it is woefully wanting. This particular aspect further creates lots of doubt in the ocular testimony of both the witnesses of fact.

50. In this perspective, as we proceed further with the testimonial account of both the witnesses of fact - P.W.1- Indrabhan Saini and P.W.2- Chandrabhan – we notice that as per the description contained in the F.I.R. that under pressure of locality the assailants fled away from the scene, but testimony of both the witnesses of fact say - Indrabhan Saini P.W.-1 and Chandrabhan P.W.-2 - is absolutely silent on this

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point that because of pressure of locality the assailant fled away from the scene. Conversely, their testimonial account in regard to above aspect goes to claim that after the commission of the offence, the accused threatened them and secured their escape. What, in fact, was the pressure of locality remains a mystery. May be that a number of person of the locality thronged on the spot at the time of the occurrence but except for two – Chandrabhan and Vipin who are relatives of the deceased, name of no one else has been spelt in the testimony of both the witnesses of fact.

51. Now insofar as the description of the incident being caused by use of licensed rifle appearing in the written report (Ext. Ka-1) is concerned, facts and circumstances reflects that reality has been tried to be shielded by P.W.-1- Indrabhan Saini, while he gave statement under Section – 161 Cr.P.C. that this was due to inadvertence committed by the scribe - Sardar Mukesh Saini -, who instead of writing licensed gun wrote licensed rifle. However, the claim regarding inadvertence of the scribe remains a fact shrouded in intriguing mystery in the absence of non production of the scribe of the report before the trial court. The scribe though interrogated by the investigating officer was a prosecution witness and his name figures at serial no.4 of the charge sheet, but he was not produced before the trial court, his non production *ipso-facto* raises presumption that had he been produced, his testimony would have been adverse to the prosecution. As a matter of fact, testimony of the scribe in that regard was pivotal and relevant to the claim of inadvertence regarding mention of the use of weapon rifle, but due to inaction by the prosecution that has not been properly explained and particularly for the specific reason that the



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statement of the informant was in fact recorded (discussed above) only after the postmortem examination report had been made available to the prosecution, prior to the morning of 05.0.1.2006 and not around mid-night 12:00 or 12:30 a.m. in the night intervening 04/05.01.2006. This particular aspect and relevant fact has not been testified by P.W.-1 in his examination-in-chief that the scribe inadvertently wrote weapon used as rifle in place of 'gun', before the trial court. Had the scribe been produced, then falsity of his (PW-1) statement under Section – 161 Cr.P.C. would have been exposed. Surprisingly, the informant nowhere says in his entire testimony that after the report had been written by the scribe it was either read by him or the scribe read over the contents of the same to him only then he appended his signature on the report. The report was not readover to him by the prosecution even in the trial court. PW-1 Indrabhan Saini merely identified his signature on the report and nothing more. These particular aspects when viewed and analysed in its wholesomeness create impression that the incident was not seen in any manner by the witnesses of fact P.W.-1 and P.W.-2, - Indrabhan Saini and Chandrabhan, respectively. Therefore, their testimony under prevailing facts and circumstances of this case requires independent corroboration. Here, it would not be safe to work on the uncorroborated testimony of both the witnesses of fact.

52. No doubt in criminal jurisprudence, there is no necessity that every piece of testimony should be scrutinized on line that there should be an independent corroboration of it. In normal circumstances criminal jurisprudence discards such approach. However, in cases where the attendant facts and circumstances raise serious doubt in the testimony of prosecution witnesses

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on point / manner of occurrence and use of weapon in it, then independent corroboration of the same becomes *sine qua non*. In this case, there is neither independent corroboration to the version of the manner and style of the occurrence or is reflected from attendant facts and circumstances and it is admitted that both the witnesses are relative of the deceased. P.W.-1 is brother and P.W.2 is son of "tau" (uncle) of deceased. Possibility of their being interested witnesses cannot be ruled out.

53. Now, we proceed on to take note of the very motive for committing the offence. In that context, the appellants' claim that the F.I.R. is silent about any motive, but motive has been assigned subsequently during course of trial before the trial court by PW-1 in his examination-in-chief in paragraph no.5 of his testimony. The reply to it by the prosecution / informant is that an F.I.R. is not encyclopedia of the occurrence and it being a case based upon eye account testimony, the requirement of specific motive for committing the offence has got no relevance in this case. It has been argued vehemently by the defence that no doubt, a case which is based upon eye account testimony, motive need not be mentioned but in those particular cases, where the F.I.R. is silent about any motive but the prosecution introduces any motive subsequently, then the degree of motive and its relevance qua the offence has got to be tested. We sustain this argument by the defence for specific reason that motive was introduced in this case subsequently and it being so, we also find it proper to scrutinize the aspect of motive as set up by the prosecution, subsequently during course of proceeding before the trial court.

54. No doubt, the F.I.R. is silent about any motive for the

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occurrence, but the testimony of P.W.1 and P.W.2 explicitly puts forth specific motive behind the occurrence alleging that the accused - Pinkoo alias Jitendra was a drunkard and he used to quarrel with the people of the locality and used to demand money from them which was opposed by the deceased Narendra Saini. But that aspect, except for the bald allegation / averment made by the informant (PW-1), this fact remains unfounded from any other testimony or circumstance that in fact, Pinkoo alias Jitendra used to demand money from the people of the locality and the deceased used to object to the same. This piece of testimony as emerging in paragraph no.5 of the testimony of P.W.-1 remains a bald statement not supported on the same line by Chandrabhan PW-2. Nothing concrete emerges on that point in support of claim of the prosecution.

55. We may add here, at the cost of repetition that, regarding motive, we don't come across any corroborative fact, circumstance or testimony, which may connote to the above claim of the prosecution in shape of allegations against accused- Pinkoo alias Jitendra that in fact it was so. Except verbal allegations, there is nothing of the sort on record either in the shape of any complaint or any case being registered against Pinkoo alias Jitendra on that count. Moreso, the prosecution witness of fact (PW-1) has testified to the ambit that no written complaint was ever made to anyone against act of Pinkoo alias Jitendra on that count. Surprisingly, both the witnesses of fact (PW-1 and PW-2) have gone to the extent of stating that the relation between the families of the informant and the accused was cordial and good and the informant never imagined that any such occurrence could have been caused by the accused. That being the position, to claim that the motive

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behind the occurrence was mooted by the deceased by opposing act of accused- Pinkoo alias Jitendra, without there being supporting material worth its salt, the point of motive goes into oblivion and cannot be said to be a cause sufficient in itself that almost the entire family of accused - two brothers and the mother (of Pinkoo) apart from Pinkoo were allegedly involved in the commission of the offence and were bitterly inimical to the deceased and they had decided to eliminate the deceased.

56. We also come across Lot of contradictions occurring in between the testimony of the prosecution witnesses of fact P.W.1 and P.W.2 qua their statements recorded under Section – 161 Cr.P.C. are also indicative of fact that their testimony is full of improvement and embellishments and it would be hard for us to place reliance on the same. Further, their testimony is not corroborated from any independent source. The attendant circumstances of this case are so strewn as to require proper explanation of substantive point like use of weapon in the incident and the manner of assault and the contents of written report neither read by him nor readover to the informant prior to his signature on it; and in the absence of any satisfactory explanation, lot of doubts have crept in, in the prosecution story. A person can tell a lie but the circumstances cannot.

57. Now insofar as the other aspects of this case, in particular pertaining to the lodging of the report at Police Station Gandhi Park, District Aligarh, investigation is concerned, we gather that a copy of the Check F.I.R. as per the entry made in the concerned general diary of date 04.01.2006 relating to Case Crime No.04 of 2006 of Police Station – Gandhi Park, Aligarh, it is mentioned that a carbon copy of F.I.R. was given to the

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informant- Indrabhan Saini. Now, the general procedure that was required to be followed in that regard would be to obtain an endorsement of the informant for the same as a token of receipt in proof of copy being given to the informant. Therefore, an endorsement should normally be obtained either on the Check F.I.R. itself or on carbon copy of the same but there is no endorsement appended either on the Check F.I.R. or on the carbon copy of the Check F.I.R. Though this aspect is trivial but thus sort of omission is sufficient to give rise to some doubt about fact of copy of Check F.I.R. being given to the informant at the time of lodging of the F.I.R.

58. The informant has testified to the ambit that he had appended his signature on the Check F.I.R. No doubt, there is no necessity that after the report regarding any cognizable offence has been lodged, an endorsement should be made on the Check F.I.R. by the informant but the usual practice prevailing at the various police stations of the State of Uttar Pradesh would show that the signature/thumb impression of the informant is usually obtained by the police personnel on the Check F.I.R. or copy thereof and this common practice has fructified into rule. Once the concerned G.D. Entry at Serial No. 39 pertaining to Case Crime No.04 of 2006, indicated that a carbon copy was given to the informant, then an endorsement in token of receipt thereof from the person who received the copy, becomes practical approach to be adopted, but it is not so in this case.

59. Description contained in the F.I.R discloses fact that due to pressure of locality, the assailants secured their escape from the place of occurrence. Now it was incumbent upon the prosecution to have satisfactorily explained away this aspect of

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“pressure of locality” but nothing of its sort has been testified or explained by the two witnesses of fact, say P.W.-1 and P.W.-2. Presence of some people might have been created by their arrival on the spot during the incident. However, name of not a single person of the locality has been spelt who saw the occurrence except the two relatives of the informant and the deceased described in the F.I.R. as Chandrabhan and Vipin. Neither in the testimony of the prosecution witnesses of fact nor in their statement recorded under Section – 161 Cr.P.C. name of any person has been opened/specified in support of the prosecution case. Further, it is worth consideration that the two brothers of appellant Pinkoo, each is stated to have held one arm of the deceased and the fire was shot as per testimony of witnesses from a distance of three steps on the deceased with gun (or rifle as described in report exhibit Ka-1) and the shot hit on the mouth, say upper, lower lips and chin of the deceased, then the possibility of pellets hitting the other two co-accused, (two brothers of accused Pinkoo) were imminently there but no injury of any sort, whatsoever, was found on their person, which aspect casts doubt on their presence on the spot besides contradicting statement of Indrabhan Saini PW-1 recorded under Section 161 Cr.P.C. It appears that all the sons of Nem Singh and wife of Nem Singh - Ishwari Devi have been tried to be roped-in for specific reason that has been given when suggestion by the defence that the investigating officer of this case Jasvir Singh (P.W.-10) and the father of accused- Pinkoo alias Jitendra and husband of accused- Ishwari Devi say, Nem Singh (Constable), both were posted at Police Station – Lodha of District – Aligarh prior to this incident and due to official rivalry with Nem Singh, the investigating officer (P.W.-10) falsely got involved the accused-appellants in this case.

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This suggestion cannot be ignored in view of the serious discrepancies creeping in the testimony of the prosecution witnesses of fact, which do not match with the attendant facts and circumstances of this case. Therefore, reason advanced for false implication gathers force for our approval to it.

60. On Page No.35 of the paper book, it is stated in the testimony of P.W.1, Indrabhan Saini that Chandrabhan is son of his '*tau*' (uncle), whereas Vipin Kuma is his nephew, they are witnesses to the incident and no other person was named as witness in the F.I.R. Surprisingly, it is claimed by P.W.1 that the aforesaid two persons, namely, Chandrabhan and Vipin Kumar had arrived on the spot prior to him and saw the whole occurrence but his testimony on the point contradicts his own version. He testified by stating that as soon as he (P.W.1) rushed to the spot, these two also followed him. This testimony is self contradictory, if Chandrabhan and Vipin Kumar were already present prior to the arrival of informant Indrabhan Saini then how is it possible that the informant, while rushing to the spot was followed by the aforesaid two witnesses. One cannot easily imagine as to how it might have happened in the present case.

61. After prolix discussion of various facts, circumstances of this case and the testimony on record, now it would be appropriate to weigh the claim raised by the appellants regarding fact that the F.I.R. is ante timed. In support of the same, our attention was engaged to Paragraph No.4 of the testimony of P.W.1, Indrabhan Singh Saini, the same is extracted as here under :-

*"घटना की रिपोर्ट भीड़ में उपस्थित सख्तार मुखेश सैनी से बोलकर लिखाई फिर मैंने उस तहरीर पर अपने दस्तखत किये और थाने पर ले जाकर दे दिया । रिपोर्ट देखकर कहा कि यही वह तहरीर है इस पर मेरे*

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हस्ताक्षर है। इस पर एक्जिबिट क-1 उला गया। रिपोर्ट लिखने के बाद मैंने पढ़ी नहीं थी।"

**English version of the above extract:-**

*Report of the incident was got scribed by dictating it to one Sardar Mukesh Saini, who was present amongst the crowd, then the report was signed by him and given at the police station. After looking the report, he verified his signature on it. It was marked as Ext. Ka-1. The report was not read by him after it was scribed.*

62. This testimony is as explicit as anything and hits to the core that the written report (Ext. Ka-1) was neither read over to the informant nor he himself read it while he gave it at the police station. Meaning thereby, that the informant was unaware of the facts as to what was stated or described in the written report itself. If the written report was not read over and explained to him and he did not read its contents but it was only signed by him, then this aspect in all fairness supplies clue to the magnitude that signature of the informant was obtained on the written report, whereas he did not know the particulars and the contents described in the Written Report (Ext. Ka-1). That way, as it may be, the very foundation of this case i.e., the written report becomes suspicious paper and it loses its legal significance and renders doubtful the whole prosecution story. It shakes the foundation of the prosecution case to the hilt.

63. It is surprising that there is no evidence/testimony of the sort that may reflect on the point that the written report after it was scribed by Sardar Mukesh Saini, was read over and explained to the informant. After the report was written informant- Indrabhan Saini (P.W.-1) appended his signature on it. However, Paragraph No.23 of the cross examination of P.W.1- Indrabhan Saini reveals the truth that after the F.I.R. had been lodged, the report was perused by the informant the very same night (i.e. 04.01.2006). It means the contents of the report at the time of lodging of the F.I.R. were not known to the



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informant. The entire testimony on this point of the informant is altogether missing. This aspect of the F.I.R. establishes claim of the defence that the F.I.R. is ante timed. Thus, we have ample reason to hold that the F.I.R. is suspicious and ante-timed. Once the first information report becomes doubtful, the entire case falls to the ground.

64. In connection with the aforesaid aspect of F.I.R. being ante timed, argument has also been extended pros and cons, first by the appellant's side that the 'special report' of this case, which was required to be sent forthwith after the lodging of the F.I.R. to the magistrate concerned was not sent promptly but the same was highly belated. In this context, we may observe neither there is any evidence nor is there any record to show as to how and when the special report was sent to the magistrate concerned. The Check F.I.R. bears signature of the chief judicial magistrate, which is dated 18.01.2006. In between the lodging of the F.I.R. on 04.01.2006 and the report being seen by the magistrate on 18.01.2006, there elapsed 14 days. How this long gap occurred is not explained by the prosecution.

65. We upon perusal of record do not come across any testimony or circumstance of this case, which may reflect on the point as to when the special report was sent to the magistrate and how this long gap occurred. In fact, the constable or the police personnel, who took the special report to the magistrate concerned was required to be produced to explain this particular aspect, but he has not been produced before the trial court, for the reasons best known to the prosecution. Now, the only reality is that the special report was submitted before the magistrate belatedly after 14 days of the lodging of the F.I.R. This inordinate delay in sending the special

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report to the magistrate is one of the strongest proofs of the F.I.R. being ante timed and it makes serious dent in the prosecution story. In reply to it, claim of the prosecution that this would amount to laches committed during investigation would not minimize its import, as such, unless the delay occasioned is explained satisfactorily by the prosecution.

66. So far as the other important aspect of this case regarding the preparation of the site plan (Ext. Ka-21) is concerned, we come across fact that no particular place has been shown as to from where the accused-appellant- Ishwari Devi extended exhortation. Further, no place has been marked as the place where the other two accused were standing, when each of the two gripped one arm of the deceased.

67. Likewise we do not come across any spot being marked as the spot from where the empty cartridges were recovered. It is obvious from perusal of the memo of empty cartridges stated to have been recovered from the spot was prepared on 05.01.2006, whereas, Arvind Kumar Gautam (P.W.4), who prepared inquest report (Exhibit Ka-6) of the deceased on 04.01.2006 has already stated in so many words that neither any material whatsoever was seen by him lying near the dead body nor any person recovered anything at that point of time from near the body. These aspects are fair enough to castigate authenticity and veracity of the recovery memo pertaining the empty cartridges i.e. Ext. Ka.2, which also bears interpolation and cutting in the date by superimposing 5 over digit 4. It means things have been managed and dates were changed. It is obvious that figure / digit 4 has been made 5 and there are cuttings in all the dates at four places on this exhibit (Ka-2). These cuttings / interpolations are not initialled by anyone.

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68. Similar is the position with the memo of simple and blood stained clay (Ext. Ka-3). Here, also there are cuttings in the date at four places but these cuttings have neither been initialled nor properly explained as to under what circumstances, the same was done. This aspect of the case cannot be skipped merely on ground of laches committed during the course of investigation in view of testimony of Arvind Kumar Gautam PW-4 that he saw no material lying near the body at the time of preparation of inquest but all the above aspects taken into consideration by us in its cumulative connotes that things have been tried to be twisted, distorted and manipulated, for the reasons best known to the prosecution.

69. Now, we proceed to take into account the other aspects of this case that pertains to Sessions Trial No.601 of 2006 arising out of Case Crime No. 10 of 2006, under Section – 25 Arms Act, Police Station – Gandhi Park, District – Aligarh, which as per the record is stated to have its origin in the arrest of the accused-Pinkoo alias Jitendra effectuated by the investigating officer Surendra Pal Singh (P.W.7) and Jasvir Singh (P.W.10) on 09.01.2006 and after his arrest at place Gate No.1 of Mandi, while the accused was coming from Devi Nagla Road around 10:00 p.m. on 09.01.2006, it is stated that he made disclosure regarding the weapon he used in the commission of the offence. Pursuant thereto, one SBBL gun was allegedly recovered from inside his house kept in a room, which he handed over to the police after taking it out from an iron tank. It is stated that a memo of the arrest and recovery was prepared by Jasvir Singh P.W.10 and Surendra Pal Singh P.W.7.

70. However, bare perusal of the spot map regarding

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recovery of the SBBL gun, indicates that it was prepared on 21.02.2006 by P.W.7- Surendra Pal Singh. It implies and means that the spot map pertaining to the recovery of the gun was not prepared on 09.01.2006 soon after the recovery of SBBL gun was made by the police at 10:20 p.m. (on 09.01.2006). How and under what circumstances, the map pertaining to recovery of the SBBL gun from accused- Pinkoo alias Jitendra was prepared on 21.02.2006 has not been explained by the two witnesses – Surendra Pal Singh P.W.7 and Jasvir Singh P.W.10. However, during course of investigation, the spot map of recovery of SBBL gun from accused-Pinkoo alias Jitendra was prepared on 01.03.2006 by the investigating officer – Vinod Kumar - of the case pertaining to Case Crime No.10 of 2006 under Section – 25 Arms Act, Police Station – Gandhi Park, District – Aligarh and that is Ext. Ka-18 on the record.

71. As we proceed further, we notice that public witnesses were available to the police, as per the testimony of Surendra Pal Singh P.W.7 and Jasvir Singh P.W.10. However, no one was ready to stand witness to the fact of recovery and it is not the case that the house of the accused- Pinkoo alias Jitendra was situated at a lonely and secluded place without any neighborhood. Even the investigating officer of this case S.I. Vinod Kumar (P.W.9) has also not acted cautiously and he has not noted / spelt name of anyone residing in the neighborhood of the house of the accused- Pinkoo alias Jitendra or anyone of the locality concerned – Gate No.1 of Mandi. In the testimony of both the police personnel, Surendra Pal Singh P.W.7 and Jasvir Singh P.W.10, it is reflected that they failed to exercise caution and did not ask name of the person / persons, who refused to stand witness to the fact of recovery of the gun from

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the house of accused- Pinkoo alias Jitendra. The investigating officer of the case (pertaining to Case Crime No.10 of 2006) and has admitted in cross examination that the special report pertaining to the aforesaid case crime number was seen by the magistrate on 18.01.2006. Thus, inordinate delay in sending the special report to the Magistrate has not been properly explained and no evidence tendered in regard thereto besides, no circumstance exists that may allude to any workable inference.

72. In the backdrop of aforesaid fact situation, argument has been extended on behalf of the appellant- Pinkoo alias Jitendra that in fact, nothing has been recovered from his possession and police has planted false recovery of SBBL gun and he was arrested from his house, becomes relevant worth consideration. How and why the police officers involved in the operation for recovery of SBBL Gun refrained from asking names of such persons, who refused to become witness to the fact of recovery is beyond imagination. Inaction on that point in not observing precaution qua the recovery map dated 21.02.2006 throws lots of doubt on claim of fair recovery.

73. In view of above, the proceeding pertaining to recovery of the SBBL gun stands vitiated as discussed above. One particular aspect of this case (Crime No.10 of 2006) need be addressed at this stage. It is quite surprising that in this case, the SBBL gun allegedly recovered was sent for forensic examination to the Vidhi Vigyan Prayogshala, Agra but this exercise was closed here by the prosecution. In fact, charge sheet was filed in this case (Crime No.10 of 2006, under Section – 25 Arms Act), but no forensic examination report was obtained by the prosecution. The prosecution looked aloof to any forensic

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report. It is beyond reason to know the cause for avoiding the forensic report.

74. Now, it so happened that after both the cases (Crime No.4 of 2006 and Crime No.10 of 2006) were clubbed together and evidence for the prosecution was concluded, statement of the accused was recorded under Section – 313 Cr.P.C.. No question whatsoever was put to the accused either pertaining to the ballistic report or its outcome. In defense, accused-Pinkoo alias Jitendra opted for adducing testimony, whereupon the defence managed to bring the ballistic report on record, which is available on record as Paper No.113 kha/1 and 113 kha/2 and it is exhibited Kha-1 at the instance of the accused.

75. Learned counsel for the appellant- Pinkoo alias Jitendra has stressed on point that the recovery memo dated 09.01.2006 (Ext. Ka-15) reveals that the gun allegedly recovered and kept under seal was at that very point of time in functional condition, whereas upon receiving the aforesaid SBBL gun, the official of Vidhi Vidyan Prayogshala, Agra found it non functional (condition), which particular aspect goes to imply that after the recovery, the weapon/gun has either been changed or things have been manipulated, for reasons best known to the prosecution.

76. We upon perusal of the forensic report dated 12<sup>th</sup> March, 2007 come across fact that the SBBL gun that was sent for forensic examination was found non-functional. However, Sri Imranullah, learned counsel for the informant has tried to persuade us to the point that the forensic expert being a skilled person gave his opinion on technical ground, when he found the firing pin small. Learned counsel for the informant added that neither the police officer, who effectuated recovery

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(Surendra Pal Singh P.W.-7) was a ballistic expert nor did he test functional condition of the recovered SBBL gun.

77. We are not impressed by the argument of learned counsel for the informant for the reason that the recovery memo describes the recovered SBBL gun to be in functional condition, it does not specify about any base on which it was found functional. If it was found functional at the time of recovery, then it means that it was operational. It implies that the SBBL gun was fit for functioning when kept under seal.

78. Thus, we have ample reason to conclude that the factum of recovery of the SBBL gun (on 09.01.2006) allegedly at the instance of accused - Pinkoo alias Jitendra becomes doubtful and non production of the forensic report pertaining to the ballistic report (Ext. Kha-1) by the prosecution carries legal presumption that in case the prosecution had produced this report it would have been adverse to it. Now, it is admitted fact that defence brought it on record by moving appropriate application before the trial court. Therefore, charge under Section – 25 Arms Act against Pinkoo alias Jitendra cannot be said to have been proved beyond reasonable doubt.

79. Our consideration of the entire record of this case makes it obvious that serious doubt is created in the prosecution story because of the various material abnormalities appearing in the testimony as well as the adverse circumstances working against the prosecution which, in the absence of proper explanation by the prosecution, are sufficient for throwing away its case. The description of the occurrence as given in the F.I.R. does not match with the entirety of this case and inherently contradictory to the statement of Indrabhan Saini PW-1 under Section 161 Cr.P.C. The sequential coherence of occurrence

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becomes doubtful as one proceeds with the testimony of this case vis-a-vis prevailing circumstances of this case. The weapon used though described in the F.I.R. as rifle was later on changed after the postmortem examination of the body was conducted at 01:00 a.m., the very same night of the occurrence (i.e. 04/05.01.2006), which reveals one wadding piece and seven pellets recovered from the body of the deceased. Thus, negating the possibility of use of rifle in the offence, the statement of both the prosecution witnesses regarding the occurrence are contradicting in material particulars with their version recorded under Section – 161 Cr.P.C. The inadvertence claimed to have been committed by the scribe of the report has not been clarified.

80. Both the witnesses Indrabhan Saini P.W.1 and Chandrabhan P.W.2 are relatives of the deceased, they are found to be interested witnesses not believable and independent corroboration of their testimony is missing altogether and the motive subsequently introduced cannot be said to be of the degree and so serious that the entire family of the accused was stubbornly bent upon killing the deceased- Narendra Saini. The place of occurrence stood changed as per the version contained in the written report. The place of occurrence was stated to be in front of house of the informant, whereas, the site plan indicated the place of occurrence to be the meeting point of the street with the Road "*Mali Nagla*" at the corner of '*chabutra*' (terrace) of Devi Ram. Both the special reports pertaining to Case Crime No.04 of 2006, under Sections - 302/114/34 I.P.C. and report pertaining to Case Crime No.10 of 2006, under Section- 25 Arms Act were seen by the magistrate on 18.01.2006, for which no plausible explanation



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has come forth and no circumstance exist, that may explain the delay so occasioned in sending the F.I.R. to the magistrate.

81. The version of use of weapons is stated to have occurred on account of mistake committed by the scribe- Sardar Mukesh Saini, who has not been produced before the trial court and the testimony is woefully wanting on the point that after the report (Ext. Ka-1) was written, it was read over and explained to the informant-Indrabhan Saini and he says in his cross examination that he read the contents of the report in the night after lodging of it, whereas, the case was lodged at 06:15 p.m. on 04.01.2006. Not only this, the site plan is also deviating as it does not indicate the material particulars pertaining to the occurrence, about the respective positions of each of the accused who allegedly participated in it.

82. Similarly, testimony of Arvind Kumar Gautam (P.W.4) innocuously points to the fact that no material, whatsoever, was seen by him lying near the dead body and it is stated by the witnesses that two meters away from the dead body, empty cartridges were recovered on 05.01.2006 by the investigating officer, while he visited the spot and prepared the spot map. Arvind Kumar Gautam P.W.4 also testified to the effect that he did not see anyone finding any material from near the dead body. That being so, the consistency and coherence of the normal events become suspicious and no ordinary and prudent man would ever agree with all these abnormalities and aberrations vis-a-vis attendant facts and circumstances of the case, besides the F.I.R. being ante timed, whereas the events of the case must be consistent, clinching and inspiring confidence but it is not so in this case and these aspects of this case have not been appreciated properly by the trial court and

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the trial court was very much concerned with the face value of the testimony and it did not care to ensure about proper explanation regarding the aforesaid aspects and erroneously recorded finding of conviction, which finding of conviction does not stand the scrutiny of various aspects of this case qua facts and circumstances.

83. Thus, a cumulative analysis and scrutiny of the evidence qua facts and circumstances of this case lead us to conclude that the prosecution has not been able to prove charges under Section – 302/34 and 114 I.P.C. against accused- Pinkoo alias Jitendra and Ishwari Devi and charge under Section – 25 Arms Act against accused- Pinkoo alias Jitendra beyond reasonable doubt and serious question arises on point of their involvement in the commission of the offence.

84. It is trite law and settled principle of criminal jurisprudence that 99 guilty persons should escape the clutches of law, than one innocent should be punished. Therefore, the conviction of both the appellants recorded by the trial court is found to be perverse and illegal and it is not sustainable in the eye of law and the same is liable to be set aside.

85. Consequently, impugned judgment and order of conviction dated dated 18.12.2012 passed by the Additional District and Sessions Judge, Court No.6, Aligarh in Session Trial No. 600 of 2006 (State vs. Pinkoo alias Jitendra and Smt. Ishwari Devi), concerning Case Crime No.04 of 2006, under Sections – 302/34, 114 I.P.C., Police Station- Gandhi Park, District – Aligarh and Session Trial No.601 of 2006 (State vs. Pinkoo alias Jitendra), concerning Case Crime No.10 of 2006, under Section – 25 Arms Act, Police Station – Gandhi Park, District – Aligarh, is hereby set aside. Accused-appellants are

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acquitted of aforesaid charges, as above.

86. Accordingly, both the above appeals succeed and the same are ***allowed***.

87. In this case, the appellant Pinkoo @ Jitendra is in jail. He shall be released forthwith unless and until he is wanted in connection with any other case, whereas, the appellant Smt. Ishwari Devi is on bail, she need not surrender before the trial court. The appellants shall ensure compliance of Section - 437A Cr.P.C.

88. Let a copy of this order/judgment be certified to the court below for necessary information and follow up action.

**Order Date :-** 31.1.2022

S Rawat

[Justice Vikas Budhwar]

[Justice Arvind Kumar Mishra-I,J.]