Neutral Citation No. - 2023:AHC-LKO:34441-DB

Court No. 9 AFR

Reserved

(1) Case :- GOVERNMENT APPEAL No. - 1624 of 2004

Appellant :- State of U.P.
Respondent :- Ajai Mishra @ Taini And 3 Ors.
Counsel for Appellant :- A.H.Rizvi,Avanindra Singh Parihar,Government Advocate,Nagendra Mohan,Sushil Kumar Singh
Counsel for Respondent :- S.K. Shukla,Armendra Pratap Singh,Brij Mohan Sahai,Pradeep Chaurasia,Purnendu Chakravarty,Salil Kumar Srivastava,Sumit Kumar Singh

AND

(2) Case :- CRIMINAL REVISION No. - 221 of 2004

Revisionist :- Santosh Gupta
Opposite Party :- State Of U.P.And 4 Ors.
Counsel for Revisionist :- Sushil Kumar Singh,Armendra Pratap Singh,Pradeep Chaurasia
Counsel for Opposite Party :- Govt.Advocate,Rajiva Dubey

Hon'ble Attau Rahman Masoodi,J.
Hon'ble Om Prakash Shukla,J.

(Delivered by Hon'ble A R Masoodi, J.)

A. Introduction

1. Both the State and the de-facto Complainant are before this court challenging the order of acquittal of all the four accused/ respondents by the Trial Court in Sessions Trial No. 518/2001, under section 302/34 IPC, wherein the Trial Court, while acquitting these accused persons of all the charges concluded vide an order dated 29.03.2004, as inter-alia:

> *"123. On the basis of above attempted discussion, prosecution has utterly failed to prove its case and it does not inspire any confidence. Presence of the eye witnesses on the spot is not proved and prosecution story had been developed from stage to stage to give colour to the prosecutions story. Prosecution story is inconsistent to medical evidence and prosecution story which has come later, is not in support of the FIR and for these reasons, I am of the opinion that prosecution story and evidence led in this support at*

> *all not credible and all the accused persons in this case must be acquitted of all the charges levelled against them in this case."*

While the state has filed Criminal Appeal No. 1624 of 2004 under section 378 of the Criminal procedure Code, the de-facto complainant has preferred Criminal revision No. 221 of 2004 under section 397 r/w 401 of the Criminal procedure Code.

Since, both the proceedings engaging the attention of this court, arise out of the same impugned order and lead to the same facts & circumstances, they are being dealt and disposed of vide this common judgment.

B. Facts of the case

2. The appeal at hand filed by the State under Section 378 CrPC relates to the murder of one Prabhat Gupta alias Raju of which FIR was lodged by one Santosh Gupta (father) at Tikonia Police Station, District Lakhimpur Kheri on 8.7.2000 at 3.30 pm. The hearsay information giving rise to the FIR shows presence of four culprits at the time of incident mentioned in the FIR who were identified by two eye witnesses named therein. The information states that the deceased had left from the house of the informant at 3 pm on 8.7.2000 for going to the shop. On reaching the main road, the deceased was done to death by the two named culprits and the death occurred on the spot.

3. The eye witnesses in the FIR were stated to have seen the occurrence in broad day light which according to the informant was probable in the background of some political rivalry and enmity. The registration of the FIR by the scribe Shri Krishna (HM-53) on 8.7.2000 at 3.30 pm had set the machinery of law in motion.

4. The action that followed immediately after lodging of the FIR was visiting the scene of occurrence by Investigating Officer and drawing up the site plan with reference to the dead body, noticing recovery of some articles inclusive of two empty cartridges, a pair of footwear and thereafter inquest report was prepared from 3.40 pm to 5 pm in presence of panchas. The inquest report significantly notices the injuries on the dead body and takes note of the site plan from where two empty cartridges etc were recovered. The oozing blood and the direction of fire arm injuries from right to left was also mentioned. The inquest report mentions handing over of the sealed dead body at 5 pm on 8.7.2000 to two police personnel for obtaining the postmortem report to definite the cause of death which according to the panchas had occurred due to fire arm injuries.

5. The postmortem was conducted on 9.7.2000 at 11 am and the report was accordingly drawn. The deceased had sustained

two gunshot wounds of entry and only one exit wound. Besides the deceased, who lost his life, no one was injured.

6. According to the doctor, death occurred due to shock and haemorrhage as a result of ante mortem injuries and one bullet was recovered from the dead body.

7. The investigation was conducted in piecemeal by different officers. SI T.B. Singh conducted the investigation of the case from 8.7.2000 to 15.7.2000 and from 16.7.2000 to 18.7.2000 investigation was done by the team constituted under the order of the IG Zone and investigation was headed by Balvir Singh SIS (Security and Investigation Services). On assumption of investigation by the SIS team, on one day i.e. 19.7.2000 investigation was done by Hemant Singh, member of SIS team, however, from 20.7.2000 to 28.9.2000 investigation was conducted by R.P Tiwari of CBCID. The proceedings of investigation, if any, conducted between 28.9.2000 to 6.11.2000 are not clear from the record available before this Court. It is though apparent from the record that from 6.11.2000 to 13.12.2000 another R.P. Tiwari of SIS who after collection of evidence concluded the investigation with the submission of charge sheet against the accused persons.

8. Until the stage of investigation many aspects shock to normal prudence like if the timing of FIR was so prompt then why the postmortem report was prepared a day later and why

the recording of statements under Section 161 CrPC was delayed.

9. The delay in the arrest of culprits and shifting of investigation from one agency to another speak large. The investigation officer in order to bring accuracy in the matter of place of occurrence prepared a second site plan on 26.11.2000 but the recovery made was not taken aid of to explore the truth for the two cartridges and one bullet recovered were not subjected to any ballistic report. The measured distance in footsteps from the house of informant upto the point of occurrence in the two site plans stands at variance and the directional route also varies.

10. After cognizance, when it came to the stage of framing the charge before the court of session, charge simplicitor under Section 302 IPC was framed only against the two accused persons attributed the role of fire arm injuries whereas, the other two were tried for the same offence with the aid of Section-34 IPC. The place of occurrence in the frame of charge is mentioned within the limits of Tikonia town and is not circumscribed within either of the two site plans.

11. The accused persons abjured their guilt and claimed trial. The case was thereafter transferred to the court of Addl Sessions Judge/Fast Track Court No. 4 and by order of this

Court passed on 23.2.2004, the trial was transferred to the court of Sessions Judge where day to day hearing was done and the same concluded on 24.3.2004.

12. The prosecution in order to prove the guilt, has examined as many as 12 witnesses. The informant, Santosh Gupta (PW-1), father of the deceased; the eye witnesses mentioned in the FIR Vinod Gupta, (PW-2) and Sanjeev Gupta (brother of the deceased i.e. PW-3). The other eye witnesses discovered during investigation viz. Shiv Kumar (PW-4) and Jagdish Prasad Yadav (PW-10); Gopal Verma (PW-5) and Atul Gupta (PW-6) were examined as witnesses of Panchayatnama. Dr S.K. Maneer (PW-7) who conducted postmortem, HC 53 Sri Krishna (PW-8) who prepared chik, T.B. Singh (PW-9) IO, R.P. Tiwari-I (PW-11) IO and another R.P. Tiwari (PW-12) who also investigated the case were examined as official witnesses.

13. In their statements recorded under Section 313 CrPC the accused respondents denying the charges of murder, stated that they have been implicated due to political rivalry and enmity erupted due to panchayat elections. They denied the prosecution story and submitted that the witnesses have given false statements in order to implicate them in the case.

14. The case set out by defence in extenuation of the charges, as already stated, is that the accused-respondents have been

falsely roped in the case. They, however, adduced no evidence in support of their defence.

C. Appeal / Revision

15. The Sessions Judge after scrutinizing and appraisal of evidence, recorded the verdict of acquittal of the accused-respondents of the charge under Section 302 IPC read with Section 34 IPC, giving rise to this State appeal under Section 378 CrPC which on leave being granted was admitted by order dated 3.2.2005.

16. Sri Umesh Chandra Verma, learned AGA has argued this appeal for the State whereas the complainant who had instituted the criminal revision no. 221 of 2004 against the same very judgment having passed away during the pendency of criminal revision, was heard through his legal representatives as victims. This opportunity was granted by passing an order on the connected criminal revision on 13.2.2023 and the relevant part of the same is reproduced as under:

> *"…….In the present case, however, the connected appeal i.e. Criminal Appeal No.1624 of 2004 instituted by the State is pending against the same very judgment, therefore, the consequence of abatement of the present revision is inconsequential and does not leave the legal heirs of the revisionist as remediless. The legal heirs of the revisionist have an opportunity of participating in the pending criminal appeal instituted by the State as victim, for which, a similar application has been made by the applicants in the connected criminal appeal.*
>
> *Having regard to the scope of Section 397 read with Section 401 CrPC juxtaposed to Section 394 CrPC, we dispose of this application permitting the legal heirs or any one of them to*

participate in the connected criminal appeal as victims to which there is no objection by the accused respondents."

17. Learned AGA for the State argued the matter very ably and taking us through the material on record, has reprehended the trial court for not having proceeded with the case in the correct perspective. The appreciation of evidence according to the prosecution being seriously faulty, renders the acquittal of the accused respondents as illegal and perverse.

18. According to the learned counsel for the State, it was a case of broad day light murder, duly witnessed by eye witnesses and the prosecution having successfully proved the evidence as wholly reliable, therefore, the acquittal recorded by the trial court is against the weight of evidence.

Learned counsel for the prosecution, however, conceded to the preposition that an acquittal through the process of law safeguards the presumption of innocence doubly and the prosecution in order to make out a case for conviction, is duty bound to prove its stand beyond a reasonable doubt and show that the acquittal recorded by the trial court was not a possible view.

19. The frame of the prosecution case having been set on the testimony of star-witness Sanjeev Gupta (PW-3) brother of the deceased, it is argued that the corroborative evidence when read correctly does not leave any doubt in the pyramid of prosecution case and the resultant opinion in any view of the matter is none other than the conviction of culprits spotted at

the place of occurrence, therefore, the judgement of the trial court deserves reversal.

20. Elaborating on the foundational testimony of Sanjeev Gupta (PW-3) who was the real brother of the deceased, it was argued that his oral testimony being natural was wholly reliable and the corroborative evidence fully supports the case of prosecution.

This Court while dealing with the case is conscious of the fact that the commission of an offence and complicity of the offenders are two different realities. The complicity of an offender must provenly be established connected to the commission of charged offence, then only it is permissible for a court of law to derive the product of conviction failing which the acquittal is the rule.

D. Analysis of evidence

21. The law stands settled that any acquittal order cannot be lightly interfered with by the Appellate Court, though this Court has wide powers to review the evidence and to come to its own conclusion. However, the power to grant leave must be exercised with care and caution because the presumption of innocence is further strengthened by the acquittal of an accused. The Apex Court in **Chandrappa & Others v. State of Karnataka (2007) 4 SCC 415**, this Court held:

"(1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

22. The Hon'ble Apex Court recently in the case of **Ravi Sharma V. State (Government of NCT of Delhi & Anr. (2022 SCC Online 859)** and **Jafarudheen and Others V. State of Kerala (2022 SCC Online SC 495**), which was passed after following earlier precedents like (i) **Mohan alias Srinivas aliwas Seena Alias Taialor Seena V.**

State of Karnataka (2021 SCC Online SC 1233), (ii) **N. Vijayakumar V. State of Tamil Nadu (2021) 3 SCC 687),** reiterated the scope of section 378 of the Code of Criminal Procedure while dealing an appeal against acquittal by the High Court in the following words;

> *"25. While dealing with an appeal against acquittal by invoking Section 378 of the Cr.PC, the Appellate Court has to consider whether the Trial Court's view can be termed as a possible one, particularly when evidence on record has been analyzed. The reason is that an order of acquittal adds up to the presumption of innocence in favour of the accused. Thus, the Appellate Court has to be relatively slow in reversing the order of the Trial Court rendering acquittal. Therefore, the presumption in favour of the accused does not get weakened but only strengthened. Such a double presumption that enures in favour of the accused has to be disturbed only by thorough scrutiny on the accepted legal parameters."*

23. Further, it is a cardinal principle of criminal jurisprudence that the guilt of the accused must be proved beyond all reasonable doubt. The burden of proving its case beyond all reasonable doubt lies on the prosecution and it never shifts. Another golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. [V***ide Kali Ram Vs. State of Himachal Pradesh, (1973) 2 SCC 808; State of Rajasthan Vs. Raja Ram, (2003) 8 SCC 180; Chandrappa & Ors. vs. State of Karnataka, (2007) 4 SCC 415;***

Upendra Pradhan Vs. State of Orissa, (2015) 11 SCC 124 and Golbar Hussain & Ors. Vs. State of Assam and Anr., (2015) 11 SCC 242].

24. Keeping in mind the aforesaid position of law, we shall examine the arguments advanced by the parties as also the evidence and the materials on record and see whether in view of the nature of offence alleged to have been committed by the Respondents, the findings of fact by the Trial Court call for interference in the facts and circumstances of the case.

25. Now coming to the case at hand it is to be noted that the very presence of the eye witnesses for the purposes of proving complicity of the accused at the place of incident begins from the residential place of the informant. The star witness (PW-3) according to the story of prosecution shows his presence started from his father's residence alongwith Vinod Gupta (PW-2) and were following the deceased Prabhat Gupta alias Raju who had left the same house, after having meal, for shop nearly about the same time in the afternoon. It was from a close distance from the place of occurrence that they spotted all the four accused possessed with small fire arms and saw two of them firing on the body of the deceased in the day light at 3 pm on 8.7.2000. For proving the presence of these two eye witnesses, the prosecution owes a burden of proof not only to establish that the two witnesses were present at the place of occurrence but they were also present at the residential place of the informant where they joined together.

The definite allegation of togetherness of two witnesses in the FIR read with the examination in chief of PW-3 shows that both of them started together from the house of informant and had followed the deceased up to the place of occurrence when they saw the deceased shot at by the two named accused and thereafter brandishing their weapons alongwith two more known accused, all ran away from the place of incident towards old kotwali in the west. It is significant to note that when the two eye witnesses reached the deceased, they found him dead.

26. It was nowhere stated by the witness PW-3 in his examination in chief that any other person had witnessed the occurrence and no such person was named.

27. The whole story of complicity of the accused persons revolves around the oral evidence of PW-1, PW-2, PW-3, PW-4 and PW-10 who are the witnesses of facts to establish the complicity of the four accused. The rest of evidence is the corroborative evidence.

28. The togetherness of the informant (PW-1), the eye witness (PW-3) and the deceased at their home on the date of occurrence is natural as they all were residing in the same house but once it is stated that PW-3 accompanied Vinod Gupta (PW-2) from the same very house upto the place of

incident, the burden of proof multiplies and accords equal respect to the testimony of PW-2.

29. The informant in the first place altered his version in his examination-in-chief regarding the purpose of going out of the deceased. The statement of going to shop was altered and to attend the *'dharna'* instead of shop was introduced but such a diversion deserves scrutiny and the purpose thereof needs to be understood. This diversion was introduced to establish the presence of Pw-2 whose presence otherwise at the house of the informant was unnatural. The informant in order to explain the presence of PW-2 at his house on 8.7.2000 introduced this fact of which there is no explanation by PW-3 in his testimony. It is in order to justify the contradiction that a new version was introduced by the informant contrary to what was stated in the FIR. The improvement of 'dharna' was liable to be proved to free the testimony from being untruthful. This contradiction has a bearing on the movement and presence of witnesses PW-2 & PW-3 together which clouds the truthfulness of testimony of PW-1 and PW-3 both. The presence of PW-2 and PW-3 when analysed from the oral testimony of PW-3 in depth does not give any clue as to how PW-2 reached the place of informant and as to when the two witnesses joined each other so as to follow the deceased on that fateful day.

30. As per the case of the prosecution, the statement of PW-4 and PW-10 was significant to prove the guilt but there is no justification as to what prevented the eye witnesses named in the FIR to disclose the identity of above witnesses before lodging the FIR and to introduce them at the time when, prima facie it appeared to the prosecution that the evidence on record was not strong enough to bring home the guilt. It is though trite that an eye witness is not necessarily to be named in the FIR but the circumstances in which these two witnesses have been introduced put a question mark on the manner of investigation and it may clearly be inferred that these witnesses have been brought in to strengthen the prosecution case which otherwise may have weakened the story set up by them and the same could not be of any assistance to get the accused implicated and convicted. Such an act cannot be said to have been taken in natural course in a bona fide manner as the same goes to the root of the matter with an intention to fill the loopholes in the investigation.

31. Having focused on the aforesaid fact, it is extremely doubtful that the alleged eye witnesses have either seen the occurrence or were present at the spot.

32. PW-3 Sanjeev Gupta, brother of the deceased, who is the star witness and whose evidence alongwith PW-1 and PW-10 has been heavily relied upon by the prosecution, deposed

in his statement that on the date of occurrence i.e. 8.7.2000, there was 'dharna' organised by a political party (Samajwadi Party) alongwith the Vyapar Mandal and he alongwith the deceased brother (Prabhat Gupta) left the home at about 3 pm after having meals. The deceased was ahead proceeding towards his shop whereas he alongwith Vinod Gupta were walking behind while having a chat. When the deceased reached the main road from the lane *(Gali)*, he suddenly saw all the four accused there. All of them were holding in their hands small size weapons which either were revolver or pistol. At the spur of moment Ajay Misra Teni fired gunshot on the temple of the deceased. Immediately Subhash alias Mama fired on Kokh (between stomach and chest). Deceased collapsed after sustaining two gunshots and succumbed to death on the spot. Rakesh alias Dalu, Shashibhushan alias Pinki displaying their weapons uttered, let Prabhat be not spared and if anyone comes in between, fire gunshot on him too. The assailants ran towards old Kotwali. When he and Vinod Gupta reached upto the deceased, he had already died. Thereafter he alongwith Vinod Gupta came back to his house and informed his father that Prabhat has been killed by Teni and went to the place of incident alongwith his father and narrated him the entire incident on the way.

33. He also deposed that on the date of incident his shop was closed due to dharna. He, however admitted that there was no call for closing the market by the Traders' Association. He also stated that he had informed this fact to IO T.B. Singh but had no idea as to why this fact was not mentioned in his statement. Though holding of dharna on the date of incident was a crucial fact, he submitted that he does not remember as to whether he stated this fact before the CBCID officers when the investigation was taken over by them, or not. He also expressed his inability to recollect as to whether he informed the CBCID officer that his shop was closed that day and that he was going towards the place of demonstration from his house. With regard to the presence of Vinod Gupta at his place on the date of incident, he deposed that Vinod Gupta had come to his house at 1-2 pm and after having meals he, Vinod Gupta and deceased Prabhat left together. Vinod Gupta was residing at Lakhimpur city and that he had not met Vinod Gupta before the date of incident.

34. Replying to the query made by the Court PW-3 stated that the site of dharna was at a distance of 40-50 steps from the place where gunshot was fired and the place of dharna was partially visible from the place of gunshot. He further stated that at the protest site 100-150 persons were present. Regarding audibility of the gunshot, he prudently deposed that the sound of fire shot was neither very loud nor low.

According to the learned counsel for the appellant, to strengthen his stand that the sound of gunshot could not have reached the place of protest. he has also deposed during his statement that all the assailants immediately after firing left the scene and ran towards one and the same direction and that no one chased or went after them. It is no where mentioned that any person tried to raise alarm so as to reach to the place of dharna where according to the own statement of PW-3,100-150 people were present and was at a distance of 40-50 steps, moreso when most of the persons belonged to the same political party of which the deceased was a designatory. Even a man of ordinary prudence would have raised an alarm in order to gather some people and defend himself particularly when, as is the case of the prosecution, a dharna at a very short distance was being staged by a large number of persons. In the above background the very holding of dharna on the date of occurrence becomes doubtful. The fact regarding dharna being held on the date of occurrence also stands specifically belied by the statement of PW-8 HC 53 Shri Krishna discussed onwards.

35. It is thus clear that PW-3 while replying the query of the court has stated that he was at a distance of 40-50 steps from the place of occurrence whereas in the cross examination he has stated that he was at a distance of 20-25 steps from the place of occurrence which though may be said to be a

minor discrepancy but since both the versions were recorded on the same day and during a continued statement hence such an anomaly cannot be a natural variation of guess but may be due to pressure and zeal of making the statement in order to prove his case.

36. Likewise, the statement of PW-8 HC 53 Shri Krishna who prepared chik may also be relevant for unraveling the intricate evidence and bring home the true facts. PW-8 in his statement has clearly stated that on 8.7.2000 i.e. the date of occurrence he was posted as Head Moharrir at PS Tikonia and that on the same day he registered the chik FIR as Case Crime No. 41-200 under Section 302 against the accused persons on the basis of written complaint of Santosh Gupta but has not stated anything about protest or dharna being organised on the date of occurrence. He, however, during cross examination has stated in unambiguous terms that the Rail Roko Dharna (protest) was called at Tikonia Railway station on a day before i.e. 7.7.2000 and in order to ensure law and order, SI R.N. Singh, SI C.P. Bahuguna, Manoj Pandey etc were deputed for duty at the place of protest. To buttress his statement, he stated that this fact is stated by him by duly verifying and going through Report No. 12 registered at 10.05 on 7.7.2000 which is a part of the original GD. He further clarifies the scenario by stating that after the protest at Tikonia railway station was concluded, he had registered his return on the

same day i.e. 7.7.2000 in Report no. 19, at 18.30. He denied the suggestion that FIR was registered after long gap of time and was shown after making improvement therein.

37. The above statement of witness of prosecution itself which is proved by documentary evidence, encompasses the entire story set up by the prosecution in the zone of strong suspicion regarding holding of dharna on the date of occurrence.

38. Now coming to the testimony of PW-1, if it is believed that the inquest report was drawn on 8.7.2000 at 5 pm whereafter the dead body was handed over to two police constables who alongwith the said witness left by tractor to reach the District Hospital at a distance of 80 km, the witness has revealed surprises in response to the queries in the cross examination than truth.

39. The untruthfulness multiplies when we look at the statements of hostile witnesses viz. PW-2, PW-4 and the statements of the inquest witnesses.

40. PW-2 Vinod Gupta the hostile witness in his deposition has stated that he was acquainted with the accused Ajay Misra alias Teni, Subhash alias Mama, Dalu and Pinky before the occurrence in question took place. He stated that Ajay Misra was a worker of Bhartiya Janta Party and other three persons were engaged in business at Tikonia. The house of Ajay Misra was situated in Tikonia and his Mill (factory) was situated in vilage Banbirpur. Before the incident he was State Secretary of

Samajwadi Yuvjan Sabha and the deceased Prabhat Gupta was State Secretry of his own party.

41. Narrating the incident he stated that at 3 pm he went to Tikonia in connection with his business but he changed his mind and decided to meet deceased Prabhat Gupta whom he found on the road itself while going to shop from his house and he was also proceeding towards deceased's house to meet the deceased. He further deposed that before he met the deceased, he had seen the accused walking near the State Bank. As soon as when Prabhat came on the road, the accused persons started abusing him and they all exhorted to kill the deceased. According to him all the accused were carrying fire arms. Now the deposition which, at the first instance, seems to have led the prosecution to declare him hostile is that he in unambiguous terms stated that two gunshot were fired on the deceased by Subhash alias Mama while others were abusing and exhorting to do away the deceased. According to him the accused-assailant had also abused him and threatened to life. After sustaining the gunshot, he stated that Prabhat collapsed on the spot only then out of the four assailants two ran away in one direction and two towards other direction.

42. A bare reading of the aforesaid deposition, it is apparent that PW-2 who is claimed to be a eye-witness of the prosecution has stated that it was Subhash Mama who had

fired both the gunshots on the deceased which caused fatal injuries to him and he was done to death on the spot. In the entire prosecution case, there is no mention of any third gunshot fired by anyone, though it is said that all the assailants were armed with guns. On the other hand, the informant who was admittedly not an eye witness deposed in his statement that first gunshot was fired on the temple of the decased by Ajay Misra alias Teni while the second was fired by Subhas alias Mama. This statement was based on the information received from Sanjeev (PW-3) and Vinod (PW-2). Now as aforesaid Vinod Gupta (PW-2) the eye witness who is alleged to have given the information of the incident to PW-1 himself has stated that both the gunshots were fired by Subhash Mama and this fact has very conveniently been discarded by the prosecution by declaring the PW-2 as hostile. Thus, there appears to be material discrepancy in the testimony of the both the named eye-witnesses, be it in terms of the no. of accused, who gave the gunshots or the manner and direction in which they ran away in the presence of these witnesses.

43. In a recent judgement rendered in the case of ***Rajesh Yadav and another v. State of U.P.***, reported in ***2022 SCC OnLine SC 150***, the apex court has dealt with the term 'hostile witness' and has specifically observed that a court is well within its powers to make an assessment of the matter, which

includes the statement of a hostile witness for reaching to a correct conclusion. Relevant paragraphs 21 and 22 of the judgement are reproduced as under:

> *"21. The expression "hostile witness" does not find a place in the Indian Evidence Act. It is coined to mean testimony of a witness turning to depose in favour of the opposite party. We must bear it in mind that a witness may depose in favour of a party in whose favour it is meant to be giving through his chief examination, while later on change his view in favour of the opposite side. Similarly, there would be cases where a witness does not support the case of the party starting from chief examination itself. This classification has to be borne in mind by the Court. With respect to the first category, the Court is not denuded of its power to make an appropriate assessment of the evidence rendered by such a witness. Even a chief examination could be termed as evidence. Such evidence would become complete after the cross examination. Once evidence is completed, the said testimony as a whole is meant for the court to assess and appreciate qua a fact. Therefore, not only the specific part in which a witness has turned hostile but the circumstances under which it happened can also be considered, particularly in a situation where the chief examination was completed and there are circumstances indicating the reasons behind the subsequent statement, which could be deciphered by the court. It is well within the powers of the court to make an assessment, being a matter before it and come to the correct conclusion.*
>
> *22. On the law laid down in dealing with the testimony of a witness over an issue, we would like to place reliance on the decision of this Court in C. Muniappan v. State of T.N., (2010) 9 SCC 567:*
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> > *"81. It is settled legal proposition that:*
> >
> > *"6. … the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent their version is found to be dependable on a careful scrutiny thereof." (Vide Bhagwan Singh v. State of Haryana, (1976) 1 SCC 389, Rabindra Kumar Dey v. State of Orissa, (1976) 4 SCC 233, Syad Akbar v. State of Karnataka, (1980) 1 SCC 30 and Khujji v. State of M.P., (1991) 3 SCC 627, SCC p. 635, para 6.)*
> >
> > *82. In State of U.P. v. Ramesh Prasad Misra [(1996) 10 SCC 360: 1996 SCC (Cri) 1278] this Court held that (at SCC p. 363, para 7) evidence of a hostile witness would*

> *not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. A similar view has been reiterated by this Court in* ***Balu Sonba Shinde v. State of Maharashtra [(2002) 7 SCC 543: 2003 SCC (Cri) 112], Gagan Kanojia v. State of Punjab [(2006) 13 SCC 516: (2008) 1 SCC (Cri) 109], Radha Mohan Singh v. State of U.P. [(2006) 2 SCC 450: (2006) 1 SCC (Cri) 661], Sarvesh Narain Shukla v. Daroga Singh [(2007) 13 SCC 360: (2009) 1 SCC (Cri) 188] and Subbu Singh v. State [(2009) 6 SCC 462: (2009) 2 SCC (Cri) 1106]****.*
>
> *83. Thus, the law can be summarised to the effect that the evidence of a hostile witness cannot be discarded as a whole, and relevant parts thereof which are admissible in law, can be used by the prosecution or the defence."*

44. Similarly in the case of ***Arjun and another v. State of Chhattisgarh*** reported in ***(2017) 3 SCC 247***, following observations have been made in paragraphs **15** and **16** of the judgement:

> "15. Though the eye witnesses PWs 1, 2, 7 and 8 were treated as hostile by the prosecution, their testimony insofar as the place of occurrence and presence of accused in the place of the incident and their questioning as to the cutting of the trees and two accused surrounding the deceased with weapons is not disputed. The trial court as well as the High Court rightly relied upon the evidence of PWs 1, 2, 7 and 8 to the above said extent of corroborating the evidence of PW-6 Shivprasad. Merely because the witnesses have turned hostile in part their evidence cannot be rejected in toto. The evidence of such witnesses cannot be treated as effaced altogether but the same can be accepted to the extent that their version is found to be dependable and the court shall examine more cautiously to find out as to what extent he has supported the case of the prosecution.
>
> 16. In Paramjeet Singh alias **Pamma vs. State of Uttarakhand (2010) 10 SCC 439**, it was held as under:-
>
> "*16. The fact that the witness was declared hostile at the instance of the Public Prosecutor and he was allowed to cross-examine the witness furnishes no justification for rejecting en bloc the evidence of the witness. However, the court has to be very careful, as prima facie, a witness who makes different statements at different times, has no*

regard for the truth. His evidence has to be read and considered as a whole with a view to find out whether any weight should be attached to it. The court should be slow to act on the testimony of such a witness; normally, it should look for corroboration to his testimony. (Vide State of Rajasthan v. Bhawani (2003) 7 SCC 291.)

17. This Court while deciding the issue in Radha Mohan Singh v. State of U.P. (2006) 2 SCC 450 observed as under: (SCC p. 457, para 7) "7. … It is well settled that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witness cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent his version is found to be dependable on a careful scrutiny thereof."

18. In Mahesh v. State of Maharashtra (2008) 13 SCC 271, this Court considered the value of the deposition of a hostile witness and held as under: (SCC p. 289, para 49) "49. … If PW 1 the maker of the complaint has chosen not to corroborate his earlier statement made in the complaint and recorded during investigation, the conduct of such a witness for no plausible and tenable reasons pointed out on record, will give rise to doubt the testimony of the investigating officer who had sincerely and honestly conducted the entire investigation of the case. In these circumstances, we are of the view that PW 1 has tried to conceal the material truth from the Court with the sole purpose of shielding and protecting the appellant for reasons best known to the witness and therefore, no benefit could be given to the appellant for unfavourable conduct of this witness to the prosecution."

19. In Rajendra v. State of U.P. (2009) 13 SCC 480, this Court observed that merely because a witness deviates from his statement made in the FIR, his evidence cannot be held to be totally unreliable. This Court reiterated a similar view in Govindappa v. State of Karnataka (2010) 6 SCC 533 observing that the deposition of a hostile witness can be relied upon at least up to the extent he supported the case of the prosecution.

20. In view of the above, it is evident that the evidence of a person does not become effaced from the record merely because he has turned hostile and his deposition must be examined more cautiously to find out as to what extent he has supported the case of the prosecution." The same view is reiterated in Mrinal Das and Ors. vs. State of Tripura (2011) 9 SCC 479 in para (67) and also in Khachar Dipu alias Dilipbhai Nakubhai vs. State of Gujarat (2013) 4 SCC 322 in para (17)."

45. The use of term 'small weapons' is also a vague and calculated, just in order to create corroboration between the statement of PW-1 and PW-4 and also to show ignorance

about the name and description of the firearm. Though PW-4 has stated that the firearm could be a revolver or pistol but in the statement of PW-2 regarding the identity of weapon, he only used the term 'pistol'. The declaration of PW-2 as hostile insofar as the identity of the persons who had fired gun shot is concerned, also creates suspicion in the wake of the fact the empty cartridges recovered from the site of occurrence were not sent for forensic examination which could have revealed the firearm from which they were shot. Now the use of term small weapon by PW-1 and PW-3 becomes more interesting as in the case of identification of the firearm, the term small weapon or expression of uncertainty regarding the type of the firearm could have helped in controverting the report but the Mention of "pistol" by PW-2 by a certain degree of certainty has further complicated the issue. Although, PW-2 stated that Subhas Mama has fired two pistol shots, but apparently there is no recovery of any fire-arms from the said Subhas Mama or for that matter from any accused person. We need not comment on the aspect that non-recovery of weapon is sine-quo-non for proving the guilt of any accused, but the fact remains that there is huge contradiction in the version of oral witness as to whether the gun-shots could be attributable to one accused or two accused. Further, admittedly, two empty cartridges were found on the spot and there is no investigation on the point as to whether they were fired by same weapon

or by different weapon. Obviously, a ballistic report would have played wonders in that regard and would have cliched the issue as far as the prosecution story is concerned, however the same was not obtained and the only explanation comes from PW-9, that the investigation was transferred from him to some other Investigator.

46. With respect to the dharna/demonstration having been held on the date of occurrence, PW-2 has very specifically stated that there was no such demonstration on 8.7.2000 i.e. the date of occurrence and the protest which was continuing last several days had ended on 7.7.2000 itself and on that very day he and various designatories from the districts reached there and returned to Lakhimpur in the night. There is one more fact narrated by PW-2 which controverts the deposition of PW-3 is that the PW-3 in his statement had stated that all the accused assailants after committing the murder of the deceased ran towards one and the same direction whereas according to the statement of PW-2 out of the four assailants two ran away in one direction and two towards other direction.

47. PW-1 in his statement has also stated that he had informed the CID inspector that Anurag Patel and Vinod Gupta had come to participate in the dharna on 8.7.2000 and if T.B. Singh and the IO deputed after T.B. Singh had not mentioned

the fact regarding Rail Roko Dharna on 8.7.2000 in his statement, he cannot tell the reason. It thus appears that the dharna was not called on 8.7.2000 but on 7.7.2000 and this truth rolled off his tongue in a minute after he said that Anurag Patel and Vinod Gupta had come to participate in dharna on **8.7.2000**.

48. This fact is also fortified by the statement of IO T.B. Singh discussed in the earlier part of the judgement as well as the statement of PW-2 as aforesaid.

49. PW-4 Shivkumar who on his statement under Section 161 CrPC being read over to him, has flatly refused to have given any such statement and expressed an ignorance about the reason for such a statement being recorded and placed on record. However, the statement of PW-4 recorded under Section 161 CrPC said to have been discarded by him, is not on record before us nor there is any explanation regarding this omission. This also creates a suspicion as in the absence of the 161 CrPC statement, it cannot be brought to light as to what PW-4 initially deposed and what facts he denied in his cross-examination.

50. In his statement before the court he has stated that he knew the accused Ajay Misra alias Teni, Subash alias Mama, Rakesh alias Dalu and Shahibhushan alias Pinky but he has denied to have witnessed any of the accused murdering the deceased. He stated that at the time of incident he was

present in his hotel. He deposed that he had heard about the murder but had not seen the deceased sustaining any gunshot.

51. In order to cover up the story regarding the distance of 90 kms to Lakhimpur having been covered in a long 12 hours journey on tractor trolley for the purpose of autopsy of the dead body of the deceased, PW-1 has deposed that after getting the dead body loaded on the tractor trolley after 5 pm he came with the dead body and reached Lakhimpur at 5 am and the reason as specified by PW-1 was that the since the driver of the tractor had worked in the fields throughout the day, he started taking rest. The deposition regarding the delay having been caused as the driver had taken rest on the way with the dead body loaded on the tractor does not inspire confidence, more interestingly, when PW-1 stated that he did not know as to who was the driver driving the tractor trolley. He also showed ignorance about the fact that the driver was resident of Tikonia or any other village. He also had no knowledge whether it was brought on rent or not. He stated that the tractor was brought by his son, however, neither his son nor the Constable who accompanied the dead body were produced or examined. He also admitted that he has not told this fact to anyone nor anyone asked about it. The statement of the PW-1 to the above extent also stands controverted by the statement of PW-2 who had stated that dead body of Gupta (the deceased) was sent to Lakhimpur for postmortem

on a DCM or Mazda Mini truck, as also supported by the testimony of both panchayatnama witnesses (PW-5 & PW-6).

52. From the above it is clear that ample time was consumed on the way while travelling to Lakhimpur and during this period the witnesses sketch out the narration to be deposed by them so as to avoid any contradiction and to make out a foolproof case to entrap the accused Ajay Misra @ Teni in the commission offence but to their dismay PW-2 spilled the beans and their annoyance with the PW-2 resulted in declaration of PW-2 as a hostile witness.

53. From consideration and appraisal of the statements of the hostile witnesses PW-2 and PW-4, it appears that the facts deposed by the hostile witnesses which were not in keeping with the statement of other witness and were not in keeping with the case set up by the prosecution could have, in all probabilities, weakened the implication of convict respondent Ajay Mishra alias Teni and in order to allay this apprehension the two key witnesses were declared to be hostile.

54. The hostile witness PW-4 who is stated to be running a hotel near the place of occurrence had taken a somersault and went even to the extent of denying the fact that his statement under Section 161 was ever taken. He might have done so under some threat or in order to save his skin and distance himself from a case of murder involving major political parties.

55. In the above scenario, it would be apt to refer to a judgement rendered by the apex court in the case of ***Masalti v. State of Uttar Pradesh, AIR 1965 SC 202***, wherein the Court observed as under:

> *"... under the Indian Evidence Act, trustworthy evidence given by a single witness would be enough to convict an accused person, whereas evidence given by half a dozen witnesses which is not trustworthy would not be enough to sustain the conviction. That, no doubt is true; but where a criminal court has to deal with evidence pertaining to the commission of an offence involving a large number of offenders and a large number of victims, it is usual to adopt the test that the conviction could be sustained only if it is supported by two or three or more witnesses who give a consistent account of the incident. In a sense, the test may be described as mechanical; but it is difficult to see how it can be treated as irrational or unreasonable."*

56. Likewise in the case of ***Balaka Singh v. State of Punjab, AIR 1975 SC 1962***, the apex court Court observed as under:-

> *"It is true that, as laid down by this Court in Zwinglee Ariel v. State of Madhya Pradesh, AIR 1954 SC 15, and other cases which have followed that case, the Court must make an attempt to separate grain from the chaff, the truth from the falsehood, yet this could only be possible when the truth is separable from the falsehood. Where the grain cannot be separated from the chaff because the grain and the chaff are so inextricably mixed up that in the process of separation the Court would have to reconstruct an absolutely new case for the prosecution by divorcing the essential details presented by the prosecution completely from the context and the background against which they are made, then this principle will not apply."*

57. In another case, namely, ***Ugar Ahir & Ors. v. State of Bihar, AIR 1965 SC 277***, Hon'ble the Supreme Court while dealing with the maxim *'falsus in uno, falsus in omnibus'*, has made the following observations :

> *"The maxim falsus in uno, falsus in omnibus (false in one thing, false in every thing) is neither a sound rule of law nor a rule of practice. Hardly one comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggerations, embroideries or embellishments. It is, therefore, the duty of the court to scrutinise the evidence carefully and, in terms of the felicitous metaphor, separate the grain from the chaff. But, it cannot obviously disbelieve the substratum of the prosecution case or the material parts of the evidence and reconstruct a story of its own out of the rest."*

58. To the same effect is a recent judgment passed by the Hon'ble Apex Court in ***Arvind Kumar @ Nemichand & Ors. vs. State of Rajasthan (2021 SCC Online SC 1099)*** , wherein Justice M.M. Sundresh J. speaking for the bench crystallized this principle as follows:

> *"49. The principle that when a witness deposes falsehood, the evidence in its entirety has to be eschewed may not have strict application to the criminal jurisprudence in our country. The principle governing sifting the chaff from the grain has to be applied. However, when the evidence is inseparable and such an attempt would either be impossible or would make the evidence unacceptable, the natural consequence would be one of avoidance. The said principle has not assumed the status of law but continues only as a rule of caution. One has to see the nature of discrepancy in a given case. When the discrepancies are very material shaking the very credibility of the witness leading to a conclusion in the mind of the court that is neither possible to separate it nor to rely upon, it is for the said court to either accept or reject."*

E. <u>Findings</u>

59. On a careful analysis of the evidence available on records, we do not find that the statement of star

witnesses PW-3 about the meeting of PW-2 at his house can be believed to be true, therefore the testimony of PW-3 to have met at home and accompanied with PW-2 by following the deceased, after having meal, remains doubtful. The facts of dharna was introduced to make the presence of PW-2 at the house of the informant as natural but the truth of the matter is that no such dharna was called on 08.07.2000 as is corroborated by the statement of PW-8.

60. Further, PW-3 was present along with the informant/PW-1 at the time of lodging of FIR and this fact has been noted in G.D, however his statement was not recorded at that time, but only on 10.07.2000. Although delay in recording of statement of eye-witness may not be fatal to the prosecution story, however the delay in recording of his statement would have to be viewed cautiously in the wake of other overwhelming factors like the statement of PW-2, another eye-witness named in the FIR, which is at stark difference to the testimony of PW-3. The statement of both these eye-witness are at variance to each other, relating to the gun-shots, as PW-3 names both Ajay Misra @ Teni and Subhas Mama as assailant, whereas PW-2 names only

Subhas Mama as assailant. Further, there is material discrepancy in the version of how these accused persons flee away from the place of occurrence. PW-3 says that four accused persons ran away toward the Old kotwali, whereas PW-2 says that two accused flee away on one direction and the other two flee in the opposite direction. It has also come in evidence of PW-2 that it was he who had told about the incident to PW-3 and that PW-3 reached the spot after the deceased was done away. Further, PW-3 claimed that he along with the deceased and PW-2 had meals at the house of the deceased, whereas PW-2 says that he met the deceased at the place of occurrence and never went to the deceased house for meals. This court cannot be oblivious of the fact that the story of having meals as put forth by PW-3 and PW-1 is also at variance to the testimony of PW-8 and the post mortem report, which says that nothing was found in the stomach of the deceased and stated that the deceased would had meals at least 5-6 hours before he sustained the fatal injury. Thus, the story of having meal together by PW-2 & PW-3 with the deceased at the house of PW-1 is also highly unlikely.

61. Besides, PW3 & PW-2, the other eye witness of the incident as per the prosecution story is stated to be PW-10. Admittedly, PW-10 is not named as an eye witness in the FIR, although his name was known to the informant prior to lodging of the FIR. It has come in the testimony of PW-1 that on the spot of occurrence of incident, some persons including Shiv Kumar (PW-4) & Jagdish prasad (PW-10) told him about the said incident. Apparently, the statement of PW-1, makes both PW-4 & PW-10 as an eye witness to the incident but both of them were not named as an eye witness in the FIR nor their statement was recorded immediately. PW-4 has stated in his evidence that he reached the place of occurrence after 20 minutes and did not support the case of the prosecution and as such was declared hostile, whereas PW-10 as being found to be working for the last 20 years on the shop of the real brother-in-law of the informant supported the case of the prosecution. However, the statement of both PW-4 & PW-10 came to be recorded only after two months on 03.09.2000. The said delay is unexplainable and it is also not explained as to why PW-10 was not named in the FIR as an eye witness. Further, PW-10 in his statement says that he saw PW-3 along with one other person coming at

the place of occurrence and on seeing the gun shot ran away to their house, whereas PW-3 has deposed that after the gun shot, he came to the spot and saw that his brother is dead and thereafter he rushed to his house to tell the informant (PW1). Thus, there are marked variance in the testimony of the witness. All these facts does not inspire any confidence in the statement of PW-10, which also shows that he was not present at the time of incident. Inordinate delay in recording his statement vitiates the investigation and creates serious doubt about correctness of his statement. Reliance is placed on **(1971) 3 SCC 192 (Balakrushna Swain vs. State of Orrisa), (1976) 4 SCC 288 (State of Orrisa vs. Mr. Brahmananda Nanda), (1978) 4 SCC 371 (Ganesh Bhavan Patel & another vs. State of Maharashtra), (2016) 16 SCC 418 (Harbeer Singh & another vs. Sheeshpal and others).**

62. Apparently, the Trial court has returned a finding that the FIR is ante-timed for cogent reasons. Anurag Patel, the scribe of the FIR & PW-2 are resident of Lakhimpur, which is at distance of 80 Km from the place of incident. The theory of Dharna pradashan on 08.07.2000 could not be proved by the prosecution. The presence of Anurag Patel and PW-2 is attributable to dharna pradashan,

otherwise their presence at the place of occurrence would be highly unlikely. Thus, when the theory of dharna pradashan failed, obviously both PW-2 and Anurag Patel would had been called from Lakhimpuri after 3 PM i.e after the incident. Hence, FIR could not had been lodged at 3:30 PM, whose scribe is Anurag Patel.

63. Further, both panchayatnama witnesses i.e PW-5 & PW-6 have stated in their testimony that the panchayatanama was prepared in gas light at 11 PM in the night as the informant was somewhere outside. PW-6 has also repeated the same story and additionally told that at the time of panchayatnama the MLA of Lakhimpur Kaushal Kishore and several other leaders including PW-2 arrived from Lakhimpur. He also told that after the panchayatnama the body of the deceased was taken for post motem on a vehicle, which belonged to the deceased. Evidently, it has come on record that the time of reaching of the body at Lakhimpur for post mortem was 5 AM on 09.07.2000. However, when the PW1 was asked as to the aspect of taking of the body for post mortem, although he says that the body was taken after the panchayatnama at about 5 PM on a tractor, however he was neither able to recall the name nor the manner in

which the said vehicle was brought to take the said body. Even this fact seems to be a made up story of PW1 as firstly, both PW5 & PW6 have stated that PW1 was somewhere outside and the panchayatnama was delayed because of delay in coming of PW1 and certain politician who had to come from Lakhimpur. Secondly, the distance of the place of occurrence and Lakhimpuri is 80 KM and PW1 could not explain as to how and in what manner the tractor could have taken 12 hours to travel a short distance of 80 km and that too with a dead body. There is no cogent reasons to not believe the testimony of PW-5 & PW-6.

64. Further, from the testimony of PW-5 & PW-6, the presence of PW-2 at the place of occurrence also become highly improbable as it has come in evidence that PW2 is a politician based in Lakhimpur and he did not have any business to be done at the place of occurrence on the fateful day, especially when there was no dharna pradashan on that particular day. The entire facts apparently seemed to be a cooked up story. PW-2 apparently seems to be planted as a witness and that is why the story of dharna pradashan was brought into the picture, which miserably failed. Unfortunately, PW2

although declared hostile, but he has already spilled the beans and he stated in his evidence that PW-3 was not on the spot of occurrence, but it is he who has told PW-3 about the incident when he reached the place of occurrence. When the very presence of PW-2 becomes doubtful the entire story of the prosecution based on the testimony of hearsay evidence of PW-3 and PW-1 also crumbles down.

65. Further, according to the site-plan, the gun-shot fires were made from the range of within one step by the accused persons. If the same is considered to be correct, then certainly blacklining and charring must had been on the deceased, but the post mortem report does not reveal any such blackening or charring. According to statement of PW-7, fires were not made from close range because around the wounds there was no blacklining and charring. According to him, gunshot ought to have been fired from a distance. Thus, the testimony of PW-2, PW-3 and PW-10 relating to firing of gunshot falls flat as they are at variance to the scientific report.

66. Moreover, it has come in evidence that one bullet was found inside the body of deceased. If bullet could not pass through the body, this shows that velocity of bullet

was not very high. This further shows that it was not possible to cause such injury from a distance of 1 step or for that matter from 3-4 steps. Apparently, if fire is made from a close range of one step, the entrance wound would be big whereas a fire made from distant range the wound would be smaller in size. In the present case, as per statement of P.W.9, the entry wound is of two categories, one being of 0.5 x 0.5 cm and another of 1 cm x I cm in size which demonstrates that story of firing from a distance of merely one step is highly unlikely and impossible. The test regarding close range gunshot wound was considered in catena of judgments. In **Noor Khan Vs. State of Rajasthan (1964) 4 SCR 521** it was held as under:-

> *"10. There is discrepancy between the estimates given by the witnesses about the distance from which the fatal shot was fired by Noor Khan. Witnesses have estimated this distance as varying between 8 and 15 poundas - each pounda being equal to a step, or two feet. It appears however from the appearance of the injury and especially the charring and blackening of the wound of entry that the barrel of the gun could not have been at a distance exceeding 3 or 4 ft."*

67. Similarly, in **Janak Singh Vs. State of U.P. (1973) 3 SCC 50** it was opined as under:-

"13. The third contention was the one which Mr Dixit elaborated. His proposition was that the medical testimony contradicted the eyewitnesses' version and that contradiction rendered their account unacceptable. According to Dr. Ghosh's evidence, none of the three entry wounds showed any blackening or tattooing. Obviously, therefore, the firing did not take place from a very close range but from some distance at least. No doubt, the three eyewitnesses gave different distances ranging from two to six paces. But they could hardly be expected to have marked at the time the precise distance at which the person shooting the firearm was. They, therefore, gave an estimate of the distance at which he was from the victim. It is no wonder that the distances they deposed varied. Nothing can therefore, turn on such variation."

68. In **A.N. Chandra Vs. State of U.P. (1990, Supp SCC 717)** the Supreme Court held that :-

"8.... If the gun was fired from such a close range, there should have been blackening and tatooing but the doctor has not noted any such sign around the injuries. Further the direction of the injuries was from upside to downward and there was a dispersal of the wounds. If the gun was fired from a close range there could not have been such dispersal of the wounds. Further, we are unable to understand as to why the gun was kept loaded already."

69. The Apex court in the case of ***Swaran Singh vs. State of Punjab (2000) 5 SCC 668*** in para 25 held that:-

"The evidence of PW 1 and the post-mortem reports was to the effect that the single wound on the right side of the chest of Shamsher Singh and several wounds on Amar Singh were

> blackened. "*Blackening is caused by smoke deposit. Smoke particles are light. They do not travel far. Therefore, smoke deposit, i.e., blackening is limited to a small range*." [See Forensic Science in Criminal Investigation & Trials (3rd Edn.), p. 280; Fisher, Svensson, and Wendel's Techniques of Crime Scene Investigation (4th Edn., p. 296).] …."

70. In the instant case, the entry wound of deceased does not show of any blackening, the doctor had opined that gunshot must have been caused from a distance. If we examine this finding on the basis of analysis made by the Apex Court, we will not be able to hold that the story of prosecution that gunshot injury was caused from a distance of merely one step to be trustworthy. Thus keeping in view the aforesaid observations of the apex court vis-a-vis the opiniion of the doctor, the gunshots must have been made from a distance of more than six feet.

71. Apparently, it has also come on record that Dharna pradarshan had been introduced at a later stage, just to show presence of Anurag Patel and Vinod Gupta (PW-2). PW-3 Sanjeev Gupta stated that shop was not opened due to Dharna Pradarshan. Hence, case of FIR that deceased was going to shop, becomes untrue and since the happening of Dharna Pradarshan has also not been

proved, the presence of both the ocular witness PW-3 Sanjeev Gupta and PW-2 Vinod Gupta with the deceased on the spot is not proved as the manner in which this presence has been told, is not proved.

72. Hence, the presence on the spot of both the witness PW-3 Sanjeev Gupta and PW-3 Vinod Gupta is doubtful and not proved. So, hardly their statement can be taken into account. Deceased was done to death on the spot. Thus, the theory which has come that some unknown assailants came and fled after committing murder of the deceased on motor cycle as has come in evidence of PW-9 and also stated by PW-4 & PW-10 to PW1 at the time of Panchayatnama as has come in the testimony of PW-1, appears to be a probable story and implication of the accused persons may be on account of Ranjish (rivalry) and also on the basis of suspicion that these accused person may have hand in the murder. However, suspicion cannot take place of proof. Recently, vide a Judgment dated 11.08.2022, a bench of Justice B R Gavai and P S Narasimha, held that *"It is settled law that the suspicion, however strong it may be, cannot take the place of proof beyond reasonable doubt. An accused cannot be convicted on the ground of suspicion, no matter how strong it is.*

An accused is presumed to be innocent unless proven guilty beyond a reasonable doubt." in the case of **Criminal Appeal No. 25 of 2012 (Ram Niwas Vs State of Haryana).**

73. Thus, the Trial court rightly disbelieving the prosecution story has acquitted all the accused persons. It would be profitable to quote a judgment of the Hon'ble Apex Court in the case of **Krishnegowda & ors Vs state of Karnataka, (2017) 13 SCC 98,** wherein the apex court held as herein under:

> *"32. It is to be noted that all the eyewitnesses were relatives and the prosecution failed to adduce reliable evidence of independent witnesses for the incident which took place on a public road in the broad day light. Although there is no absolute rule that the evidence of related witnesses has to be corroborated by the evidence of independent witnesses, it would be trite in law to have independent witnesses when the evidence of related eyewitnesses is found to be incredible and not trustworthy. The minor variations and contradictions in the evidence of eyewitnesses will not tilt the benefit of doubt in favor of the accused but when the contradictions in the evidence of prosecution witnesses proves to be fatal to the prosecution case then those contradictions go to the root of the matter and in such cases accused gets the benefit of doubt.*
>
> *33. It is the duty of the Court to consider the trustworthiness of evidence on record. As said by Benthem, "witnesses are the eyes and ears of justice". In the facts on hand, we feel that the evidence of these witnesses is filled with discrepancies, contradictions and improbable versions which draws us to the irresistible conclusion that the*

evidence of these witnesses cannot be a basis to convict the accused.”

Conclusion:

74. This court finds that all the aforesaid aspects have been considered threadbare by the Trial Court. The evidence recorded in the present case has been appreciated in its correct perspective and the Trial court has at no point of time missed the woods of the tree. Thus, we do not find any perversity in the order of acquittal passed by the Trial Court and in any case, the law presumes double presumption in favour of the accused after a due adjudication by the trial Court. Further, on recording of the findings as aforesaid, we find that the prosecution has utterly failed to establish the chain of events which can be said to exclusively lead to the one and only conclusion, i.e., the guilt of the accused persons. In that view of the matter, we find that the judgment and order of the learned Sessions Judge to be a plausible and sustainable view, especially when the Trial Court had the advantage of seeing and assessing the demeanour of witnesses.

75. This court has also recorded its independent finding and holds that the theory put forth by prosecution that

the four accused persons were liable for causing death of the deceased is unconvincing and shorn of evidence proved beyond reasonable doubt.

76. As a sequel to above, the appeal as well as the revision are therefore dismissed. The judgment and order of acquittal dated 29.03.2004 in Sessions Trial No. 518/2001, under section 302/34 IPC, acquitting all the accused/respondents is upheld and all the accused/respondents are acquitted of the charges levelled against them. The bail bonds, if any, shall stand discharged.

Dated: May 19, 2023
MFA