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Reserved

Court No. - 40

Case :- CRIMINAL APPEAL No. - 148 of 2004

Appellant :- Rupa & Others

Respondent :- State Of U.P.

Counsel for Appellant :- Brijesh Sahai

Counsel for Respondent :- Govt. Advocate, Aklank Jain, Rudreshwari Prasad, S.K. Singh, S.M.G. Asghar, S.P. Sharma, S.P. Singh, Shamimullah Shah

Hon'ble Bala Krishna Narayana, J.

Hon'ble Arvind Kumar Mishra-I, J.

(Delivered by Hon'ble Bala Krishna Narayana, J.)

- 1.** Heard Sri Brijesh Sahai and Ms. Katyayni, learned counsel for the appellants, Sri V.M. Zaidi, learned Senior Advocate assisted by Sri Aklank Jain for the complainant, Sri J.K. Upadhyay, Kumari Meena, learned AGAs and Smt. Manju Thakur, brief holder for the State.
- 2.** The appellants Rupa A1, Ghanshyam A2 and Jaipal A3 have preferred this criminal appeal against the judgment and order dated 5.1.2004 passed by Additional Session Judge Court No. 4, District Mathura in ST No. 106 of 1995 (State Vs. Rupa and others) by which all the appellants have been convicted and sentenced to undergo life imprisonment and fine of Rs.

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10,000/- each and in default of payment of fine, one year additional rigorous imprisonment under Section 302/34 IPC.

3. Briefly stated, the facts of the case are that on the basis of the written report Ex. Ka1 lodged by PW1 (complainant) Kishori Lal at P.S. Mathura Kotwali, Mathura on 25.10.1994 at about 3:30 PM, case crime no. 706 of 1994 under Section 302 IPC was registered against the appellants Rupa, Ghanshyam and Jaipal. In the written report Ex. Ka1 which was lodged by PW1 (complainant) Kishori Lal it was alleged that he was a resident of Village Sihora, P.S. Jamunapar, District Mathura. Civil case between him and A1 Rupa son of Gopal Jat was pending before the Civil Court and on the date of the incident he had gone to the Court for attending the date in the aforesaid case along with his brothers Sunehri Lal, Ganga Prasad and Moti Ram, brother-in-law (Saadhu) of Sunehri Lal and when while returning from the Court after attending the date in the aforesaid case they reached the old bus stand on a three wheeler, PW1 saw A1 Rupa, A2 Ghanshyam and

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A3 Jaipal coming on a motorcycle. Since PW1 Kishori LaL had to go to his sister's home in Hathras his brothers and brother-in-law also decided to accompany him upto the Cantt. Railway Station and when at about 3:30 PM they reached the gradience near Malgodam, A1 Rupa, A2 Ghanshyam and A3 Jaipal came on a motorcycle from behind and after stopping the complainant and his two companions all three of them exhorted to finish of Sunehri Lal who was doing very effective pairavi in the case and thereafter A1 Rupa and A2 Ghanshyam caught hold of complainant's brother and shot him with their fire arms. In the meantime A3 Jaipal turned the motorcycle and all the three assailants escaped on the motorcycle after committing the murder of his brother Sunehri Lal. The incident was witnessed by the complainant, his companions and several other persons. Leaving behind his brother Ganga Prasad and Moti Ram the complainant left for police station to lodge the FIR of the occurrence. Chek FIR was prepared by Head Moharrir Lian Singh who also made the relevant GD entry Ex. Ka10 vide rapat no. 39 at about 16 hours.

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4. The investigation of the case was taken over by PW5 Dharam Chand, S.O. Kotwali Mathura himself who reached the place of incident and prepared the inquest report of the deceased on 25.10.1994 and other relevant documents. He got the dead body of the deceased sealed and dispatched it to the district hospital for conducting the post mortem. He also inspected the place of incident and prepared the site plan Ex. Ka . The post mortem on the cadaver of the deceased Sunehri Lal was conducted by PW2 Dr. O.P. Parik, Medical Officer, District Hospital Mathura on 26.10.1994 at about 3:30 PM who prepared his post mortem report which is on record as Ex. Ka2. After completing the investigation, the Investigating Officer of the case submitted charge sheet against all the three accused-appellants under Section 302 IPC on 9.11.1994 before CJM Mathura.

5. Since the offence mentioned in the charge sheet was triable exclusively by the Court of Session, CJM Mathura by his committal order dated 1.2.1995 committed the case for the trial of the accused to the

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Session Court where it was registered as ST No. 106 of 1995 and made over to the Court of Additional Session Judge for trial. After hearing the accused-appellants on the point of charge the learned Additional Session Judge framed charge under Section 302/34 IPC against all the accused-appellants who pleaded not guilty and claimed trial.

6. The prosecution in order to prove the charge against the accused-appellants examined PW1 (complainant) Kishori Lal as solitary eye-witness of the occurrence, PW2 Dr. O.P. Parik, PW3 Constable Chandrika Prasad PW4, Mahipal Singh Parekh and PW5 Investigating Officer of the case, Dharam Dev as formal witnesses. A1 Rupa in his statement recorded under Section 313 Cr.P.C., denied the prosecution case against him and alleged that prosecution witness had given false evidence against him. A2 Ghanshyam denied that he was a party to any civil case and stated that he had been falsely implicated by the police. Similarly A3 Jaipal also denied in his statement that either he was party to any civil case between the parties or he had any

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knowledge about the pendency of same. The police had falsely implicated him in the present case and the witness had given false evidence against him due to enmity. He also stated that neither he had any motorcycle nor he was present at the place of incident on the date of occurrence.

7. The accused-appellants examined one Mukesh Sharma as DW1.

8. Additional statements of the accused-appellants Rupa and Ghanshyam under Section 313 Cr.P.C., were recorded on 20.11.2003. A1 Rupa in his additional statement denied that he was either party to any civil suit or he was doing pairavi in the said case. He admitted having been convicted in ST No. 245 of 1979 but stated that he was acquitted by the High Court. He also admitted that appeal filed by him against the conviction order passed against him in ST No. 232 of 1986 was pending before the High Court. A2 Ghanshyam in his additional statement denied that he was convicted in any criminal case. The prosecution also adduced documentary evidence comprising of written

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report filed by PW1 Ex. Ka1, post mortem report of the deceased Ex. Ka2, Inquest report of the deceased Sunehri Lal Ex. Ka3, Challan lash Ex. Ka4, Photo lash Ex. Ka5, Report to the CMO Ex. Ka6, Letter for confiscating clothes Ex. Ka7, Recovery memo of plain and blood stained earth collected from the place of incident Ex. Ka8, Chek FIR Ex. Ka9, Copy of the GD entry Ex. Ka10, Site-plan of the occurrence Ex. Ka11, Charge sheet Ex. Ka12 and Report of the Vidhi Vigyan Proyogshala of the blood stained clothes of the deceased and the plain and blood stained earth recovered from the place of incident Ex. Ka13.

9. Learned Additional Session Judge, Mathura after considering the respective submissions advanced before him by the learned counsel for the parties and examining the evidence on record convicted all the three accused-appellants under Section 302/34 IPC and awarded aforesaid sentence to them.

10. Hence this appeal.

11. Sri Brijesh Sahai, learned counsel for the appellants submitted that the Trial Court committed a

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patent error of law in convicting the accused-appellants on the basis of the testimony of solitary eye-witnesses PW1 (complainant) Kishori Lal who is not only the real brother of the deceased but also inimical towards the accused-appellants on account of the pending civil litigation between the parties and hence highly interested in seeing the accused-appellants convicted for the murder of the deceased so that he may gain an upper hand in the civil litigation and whose presence at the place of the incident at the time of the occurrence was highly doubtful and unnatural. There are glaring contradictions in his evidence on various material aspects of the incident and he also does not appear to be acquainted with the road map of the area. He next submitted that the FIR in the case is ante-timed. It is proved from the evidence on record that the FIR had not come into existence at the time when the dead body of the deceased was dispatched to the district hospital for conducting the post mortem. He further submitted that the motive attributed to the accused-appellants for committing the murder of the deceased that there was

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on going litigation between the parties and deceased Sunehri Lal was doing effective pairavi in the aforesaid case which had infuriated the accused-appellants as a result they murdered him with the object of preventing him from doing pairavi in the civil case pending between the parties. Advancing his submissions in this regard further he submitted that it is evident from the perusal of the recitals contained in the FIR that civil litigation was essentially between PW1 and the accused-appellants and in case the accused-appellants had committed the murder of Sunehri Lal with object of gaining an upper hand in the civil litigation there were no reason for them to spare PW1, the real brother of the deceased more so when he was standing next to the deceased, as by eliminating him they would have wiped out the entire opposition. The conduct of accused-appellant is not harming PW1 appears to be extremely unnatural and belies his presence at the place of occurrence. Non signing of any of the documents prepared on the spot by the police after the murder of Sunehri Lal, his not making any attempt or effort to

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save the life of his real brother Sunehri Lal when he was assaulted by the accused-appellants which coupled with the facts deposed by PW3 Chandrika Prasad who had taken the dead body of the deceased to the post mortem house in his evidence that neither at the time of holding of the inquest at the crime scene nor at the mortuary any close relative of the deceased was present, are some of the factors which create a doubt about the veracity of the claim of PW1 that he had witnessed the murder of his brother Sunehri Lal. He further submitted that there is evidence on record showing that wireless message regarding the occurrence had been received at the police station before 4 PM and the police had reached the place of occurrence on receiving the aforesaid message and not on the lodging of the FIR in this case and the papers which were sent along with the deceased's dead body to the hospital for conducting the post mortem did not include the FIR. The aforesaid facts establish that the FIR in this case is ante-timed. He further submitted that another factor which ifs and buts the claim of PW1 of being an eye-

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witness is that although it is alleged that PW5 had prepared the site-plan at the behest of the PW1 yet he had neither shown the place from where he had seen the occurrence nor the place from where the accused had fired at the deceased in the site plan. He also submitted that although in the FIR it is alleged that apart from the complainant PW1, his brothers Ganga Prasad and Moti Ram brother-in-law of the deceased were also present at the place of incident but they were not produced by the prosecution before the Trial Court and of whom Moti Ram had filed an affidavit before the Trial Court. The aforesaid omission on the part of prosecution seriously effects the veracity of the prosecution case as the witnesses whose evidence is essential to the unfolding of the narrative should be called. He lastly submitted that such being the state of evidence on the record, the recorded conviction of the accused-appellants and the sentence awarded to them cannot be sustained and is liable to be set aside.

12. Per contra Sri Saghir Ahmad, learned AGA submitted that it being settled that conviction can be based on the testimony of a solitary witness, the

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recorded conviction of the appellants by the Trial Court on the basis of the testimony of the solitary witness PW1 Kishori Lal which is of sterling quality is not liable to be interfered with by this Court merely on the ground of there being few minor contradictions and infirmities in his testimony. PW1 in his evidence has supported the prosecution case on all material points which finds further corroboration from the medical evidence on record. The FIR in this case was lodged by PW1 promptly within half an hour of the incident leaving no room for the complainant to hold any discussion or deliberation with the object of falsely implicating the accused-appellants. The argument of the learned counsel for the applicant that the FIR in this case is ante-timed is without any basis. The prosecution has further fully succeeded in establishing by cogent evidence the motive for the accused-appellants to commit the murder of Sunehri Lal. The incident had taken place in broad day light and hence there was no possibility of PW1 having mistaken the identity of the accused. The non examination of the two other

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witnesses by the prosecution who as per the FIR version were present at the place of the incident during the trial would not be fatal to the prosecution case which was fully proved from the evidence of PW1. His evidence is not liable to be discarded either on account of his being a close relative of the deceased or his being inimical towards the accused-appellants due to on going litigation between the parties. The conviction of the accused-appellants recorded by the Trial Court is based upon cogent evidence and the sentence awarded to them is supported by relevant considerations. The impugned judgment and order do not suffer from any illegality or infirmity warranting any interference by this Court.

13. We have very carefully considered the submissions advanced before us by the learned counsel for the parties and scanned the entire lower Court record.

14. The only question which arises for our consideration in this appeal is that whether the prosecution has been able to prove its case against the accused-appellants beyond all reasonable doubts. The

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accused-appellants in this case have been convicted for having committed the murder of Sunehri Lal real brother of PW1 (complainant) Kishori Lal at about 3:30PM on 25.10.1994 near Cantt. Railway Station Malgodam, Mathura while he alongwith his brothers Sunehri Lal, Ganga Prasad and Moti Ram brother-in-law of deceased was going to Cantt. Railway Station Mathura after attending the date in the civil case. In the FIR it was alleged that as soon as PW1 (complainant) Kishori Lal, deceased Sunehri Lal, Ganga Prasad and his brother-in-law reached near Malgodam, accused-appellants came from behind on a motorcycle which was driven by A3 Jaipal and A1 Rupa and A2 Ghanshyam after stopping them shot his brother Sunehri Lal with their fire arms and escaped on the motorcycle.

15. Although from the facts narrated in the FIR it appears that apart from PW1 Kishori Lal his brother Ganga Prasad and Moti Ram brother-in-law of the deceased had also witnessed the incident but except PW1 (complainant) Kishori Lal no other eye-witnesses of the incident was called as eye-witness by the

prosecution.

16. Learned counsel for the appellant has submitted that the evidence of PW1 is liable to be discarded on the following grounds :

(i) PW1 Kishori Lal having admitted in his evidence on page 14 of the paper book that he had been residing in Karnal since last 10 years his presence at the place of incident at the time of the occurrence was highly unnatural.

(ii) PW1 in his evidence had deposed that after completion of inquest deceased's dead body was dispatched for post-mortem at 6 PM whereas PW3 deposed that the dead body was sent for post-mortem at 5PM. The aforesaid discrepancy with regard to the time at which the cadaver of the deceased was dispatched for post-mortem creates a further doubt about the present of PW1 at the place of incident.

(iii) PW1 Kishori Lal being real brother of the deceased is a highly interested witness and also inimical towards the accused-appellants on account of pendency of civil case between the parties.

(iv) His evidence is full of glaring contradictions and discrepancies which go to the core of the prosecution case rendering the prosecution story wholly unreliable.

(v) Although PW1 Kishori Lal had alleged in the FIR that the civil litigation which was pending in the Civil Court Mathura was between him and PW1 Kishori Lal and after attending the date in the civil case he had to go to Hathras to visit his sister's place and his brothers

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deceased Sunehri Lal, Ganga Prasad and brother-in-law Moti Ram after reaching the bus stand on a three wheeler from District Court decided to reach him to Mathura Cantt. Railway Station. But in his examination-in-chief he deposed that the civil litigation was pending between him and his other brothers on one side and the accused-appellants on the other side. He also deposed that all four of them including deceased Sunehri Lal, Moti Ram and Ganga Prasad were going to his sister's place in Hathras.

17. Highlighting the contradictions and infirmities in the testimony of PW1 Kishori Lal, learned counsel for the appellants submitted that his testimony does not fall in the category of “wholly reliable evidence” and as such the conviction of the accused-appellants based on the testimony of the solitary witness PW1 Kishori Lal in the absence any corroboration cannot be sustained and is liable to be set aside.

18. Before appraising and assessing the testimony of sole eye-witness in this case, PW1 Kishori Lal with the object of ascertaining whether his evidence is reliable

and unimpeachable, we consider it appropriate to first deal with the objection raised by the learned counsel for the appellants that the evidence of PW1 Kishori Lal is liable to be discarded on the ground of his being a close relative of the deceased and inimical towards him.

*35. On the point of interested witnesses, the Hon'ble Supreme Court in **State of U.P. v. Jagdeo 2003 CrI LJ 844 (SC)**, observed that only on the ground of interested or related witnesses, their evidence cannot be discarded. Most of the times eye-witnesses happen to be family members or close associates because unless a crime is committed near a public place, strangers are not likely to be present at the time of occurrence.*

*36. In **Mst. Dalbir Kaur v. State of Punjab 1976 Cr LJ 418(SC)** following observations were made:*

Interested witness:- Relatives who are natural witnesses are not interested witnesses and their testimony can be relied upon.

(i)The term 'interested' postulates that the person concerned must have some direct interest in seeing that the accused is somehow or the other is convicted either because he had some animus with the accused or the some other reason. In the reported case the incident took place at mid night inside the house, the only natural witnesses who could be present to see the assault were the persons present in the

house at that time. No outsider can be expected to have come at that time because the attack was sudden. Moreover a close relative who is very natural witness cannot be regarded as an interested witness.

38. Regarding evidentiary value of testimony of the interested or relatives witnesses, Hon'ble Supreme Court in **Mano Dutt and another v. State of U.P. 2012 (77) ACC 2009**, has observed in paragraph No. 19 referring to the case of **Namdeo v. State of Maharashtra 2007 (58) ACC 414 (52) = 2007 (54) AIC 162**, that this Court drew a clear distance between a chance witness and a natural witness. Both these witnesses have to be relied upon subject to their evidence being trustworthy and admission in accordance with law.

40. Hon'ble Supreme Court in **Waman and others v. State of Maharashtra 2011 Crl. LJ 4827** has observed in paragraph No. 9 which reads as follows :

"In **Balraje @ Trimbak v. State of Maharashtra 2010 (70) ACC 12 (SC) = 2010 (90) AIC 32**. this Court held that mere fact that the witnesses were related to the deceased cannot be a ground to discard their evidence. It was further held that when the eye witnesses are stated to be interested and inimically disposed towards the accused, it has to be noted that it would not be proper to conclude that they would shield the real culprit and rope in innocent persons. The truth or otherwise of the evidence has to be weighed pragmatically and the Court would be required to analyse the evidence of related witnesses and those witnesses who are inimically disposed toward the accused.

After saying so, this Court held that if after careful analysis and scrutiny of their evidence, the version given by the witnesses appears to be clear, cogent and credible, there is no reason to discard the same."

*41. It has been further observed in **Waman (supra)** that relationship cannot be a factor to affect the credibility of a witness. The evidence of a witness cannot be discarded solely on the ground of his relationship with the victim of the offence. The plea relating to relatives' evidence remains without any substance in case the evidence has credence and it can be relied upon. In such a case the defence has to lay foundation if plea of false implication is made and the Court has to analyse evidence of related witnesses carefully to find out whether it is cogent and credible. The same view has been reiterated in **State of U.P. V. Naresh and others 2011 (75) ACC 215 (SC) = 2011 (106) AIC 76 (SC)**.*

19. Thus the principle which is culled out from the reading of the aforesaid authorities is that evidence of relatives who are natural witnesses can be relied upon subject to their evidence being trustworthy, admissible in accordance with law and the version given by such witnesses appears to be clear, cogent and credible.

20. We now proceed to scrutinize the evidence of PW1 (complainant) Kishori Lal solitary eye-witness produced

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by the prosecution during the trial for proving its case against the accused-appellants on the touch stone of the aforesaid principle.

21. Record shows that in the written report of the incident, Ex. Ka1 which was lodged by PW1 Kishori Lal himself he had stated that his father's name was Kishan Singh and he was resident of Village Sihora P.S. Jamunapar, District Mathura and civil litigation between him and Rupa son of Gopal Jat who was a resident of the same village as complainant was going on and in which 25.10.1994 (date of occurrence) was fixed and he along with his brothers Sunehri Lal, Ganga Prasad and Moti Ram r/o Chaurbamba PS Baldev brother-in-law (Saadhu) of Sunehri Lal had gone to the Civil Court to attend the date and when while returning from the Civil Court after attending the date, they reached the old bus stand by a three wheeler the complainant noticed accused-appellant Rupa and his son Ghanshyam and one Jaipal coming on a motorcycle which was being driven by Jaipal. Since the complainant had to go to Hathras from Mathura to meet his sister, his brothers

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and brother-in-law (Saadhu) decided to accompany him to the Cantt. Railway Station and when at about 3 PM they reached near Malgodam, accused-appellants Rupa, Ghanshyam and Jaipal came on a motorcycle which was driven by Jaipal from behind and after stopping the motorcycle near them they exhorted to finish off Sunehri Lal who was doing very effective pairavi in the case and thereafter Rupa and Ghanshyam caught hold of his brother and fired on his head with their firearms and escaped on the motorcycle which had already been turned around by Jaipal, after committing the murder of his brother. The incident was witnessed by several persons. Leaving behind his brothers Ganga Prasad and Moti Ram at the place of occurrence he left for the police station to lodge the FIR.

22. Record further shows that PW1 in his examination-in-chief recorded before the Trial Court deposed that he had six brothers of whom Sunehri Lal who was the eldest was murdered on 25.10.1994 at about 3:30 PM in front of Malgodam near Cantt. Railway Station, Mathura. He further deposed that while he along with

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Moti Ram, Ganga Prasad and Sunehri Lal was going towards the bus stand from Civil Court Mathura where they had gone to attend the date in the civil case between them and the accused-appellants Rupa and Ghanshyam, on their way to Cantt. Railway Station from where they were to catch the train for Hathras for visiting their sister's home reached near Malgodam on their three wheeler, accused-appellants Rupa, Ghanshyam and Jaipal came on a motorcycle which was driven by Jaipal. They stopped their motorcycle and exhorted to finish off Sunehri Lal who was doing very effective pairavi and thereafter Rupa and Ghanshyam got down from the motorcycle and Ghanshyam caught hold of his brother Sunehri Lal and then both the accused-appellants fired one shot each from their firearms which struck him below and above his left ear as a result of which he died on the spot. In the meantime Jaipal had already turned the motorcycle on which all the three escaped towards the bus stand. Upon the hue and cry raised by them a huge crowd gathered at the place of incident and he had left for the

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Police Station Kotwali Mathura for lodging the FIR of the incident leaving behind his brothers Moti Ram and Ganga Prasad at the place of incident. He further deposed that the written report of the incident was scribed by the Diwanji on his dictation. He proved the written report of the incident as Ex. Ka1.

23. He in his examination-in-chief also stated that about 15 years before the incident his father had given about 20 bhigas of his land to Rupa on "Batai" but after one year he forged an agreement to sale in respect of the aforesaid land in his favour purporting to have been executed in his favour by his father and filed a suit which was later dismissed. On the date of the incident he had gone to attend the date in the aforesaid case.

24. Learned counsel for the appellants has invited our attention to the Ex. Ka1 the written report of the incident which was admittedly scribed on the dictation of PW1 Kishori Lal in which he had stated that the civil case was pending between him and Rupa son of Gopal Jatt. However in his examination-in-chief on page 8 of the paper book he deposed that the accused-appellants

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Rupa and Ghanshyam had filed the civil case against all the four persons who had gone to attend the Court on 25.10.1994 namely PW1 Kishori Lal his brothers Moti Ram, Ganga Prasad and Sunehari Lal.

25. Another circumstances relied upon by the learned counsel for the appellants which according to him belies the presence of PW1 at the place of occurrence is his total ignorance about the fact that old bus stand does not fall on route from Civil Court to Mathura Cantt. In this regard he has also referred to the evidence of DW1 Shri Mukesh Sharma on page 54 of the paper book in which he has stated that if one goes from Civil Court to Cantt. Railway Station, the old bus stand comes after the Cantt. Railway Station which is situated before the railway bridge while the bus stand is located after the railway bridge. Distance between Cantt. Railway Station and old bus stand is about 300/400 metres. He further deposed that for going to Malgodam the road behind the bus stand has to be taken and there is no road which goes from Malgodam to Cantt. Railway Station and submitted that the entire prosecution story that the

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PW1 and his brothers Ganga Prasad, Sunehri Lal and Moti Ram brother-in-law Sunehri Lal while going to Cantt. Railway Station Mathura after attending the date in the Civil Court had stopped at the old bus stand and Sunehri Lal was murdered by the accused-appellants in front of Malgodam while they were going towards Cantt. Railway Station from the bus stand appears to be totally concocted. If the PW1 was actually present at the place of incident along with the deceased and he was going with them to Mathura Cantt. Railway Station he would not have deposed that while going to Mathura Cantt. Railway Station from Civil Court he along with his companions had stopped at old bus stand.

26. Record further shows that PW3 Chandrika Prasad in his cross-examination on page 20 of the paper book has stated that he along with PW4 Mahipal Singh Tarar and Constable Arvind, after receiving information of the incident, had reached the place of occurrence immediately. The inquest proceedings had commenced at about 4 PM and completed by 4:45 PM. Within ten minutes of the conclusion of inquest proceedings at about 6 PM the

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dead body of the deceased was sealed and he had taken it on a rickshaw to the District Hospital for conducting post-mortem. However neither at the time of holding the inquest nor at the post mortem house he had seen any of the deceased relatives at the crime scene.

27. Learned counsel for the appellants has also challenged the presence of PW1 at the crime scene at the time of the incident on the ground that if he was present at the place of incident and when the accused-appellants had caught hold of his brother deceased Sunehri Lal with the intention to shoot him, he and his other relatives present on the spot in the normal course of human conduct would have desperately tried to save the life of Sunehri Lal. But their failure to make any effort to save his life indicates that neither PW1 nor his other relatives were present at the place of incident. Failure of the prosecution to examine either Moti Ram or Ganga Prasad who according to the prosecution case had also witnessed the incident during the trial despite their being close relatives of the deceased is another factor which suggests that no one had seen the incident

and they had refused to give evidence against the accused-appellant.

28. It is true that there are few contradictions and discrepancies in the testimony of PW1 to which our attention was invited by the learned counsel for the appellants and of which we had taken note hereinabove but in our opinion the aforesaid contradictions and discrepancies neither go to the core of the prosecution case creating any doubt about the veracity of the entire prosecution version nor shake the credibility of PW1 Kishori Lal. His presence at the place of occurrence in Mathura is further not liable to be doubted on the ground that he has admitted in his examination-in-chief that he was living in Karnal for the last more than 9 years simply for the reason that his brothers are residing in Mathura and there was nothing unnatural about his coming from Karnal to Mathura for attending the date in the civil suit pending before Civil Court Mathura and meeting his brothers who were residing in Mathura at the relevant point of time or on account of discrepancy in the evidence of PW1 vis-a-vis that of PW3 with regard to the time at which the deceased's dead body was dispatched from the place of incident for

conducting the post-mortem after the inquest. There is no material on record which may indicate that PW1 had never visited Mathura after shifting to Karnal. Similarly the discrepancy pointed out by the learned counsel for the appellants in his evidence with regard to the route from District Court Mathura to Cantt. Railway Station Mathura also in our opinion are not so material so as to discredit his testimony. As regards his failure to save the life of his brother at the time his being shot by the accused-appellants which according to the learned counsel for the appellants very strongly indicates his absence at the time and place of occurrence also in our opinion is wholly immaterial for doubting his presence at the place of occurrence considering the fact that every human being reacts differently in a given situation. Even otherwise it required a lot of courage on the part of PW1 to have dared to save his brother's life who had been assaulted by armed assailants while PW1 was admittedly unarmed, which he appeared to lack. Similarly the failure of the accused-appellants to kill PW1 also along with Sunehri Lal who was also doing pairavi in the civil case cannot be regarded as a relevant circumstance for disbelieving the presence of PW1 at

the place of incident.

29. Thus a careful appraisal of the evidence of PW1 Kishori Lal reveals that he in his evidence fully supported the prosecution case as narrated by him in the FIR on all material points including time and place of occurrence, motive for the crime, manner in which it was committed, names of the eye-witnesses and the specific roles assigned to the different accused, weapons used in the commission of the crime and how the accused made good their escape. PW1 Kishori Lal was cross-examined at great length. But nothing substantial has been elicited to shake his credibility. Repeated suggestions were given to him by the defence counsel that he was not present at the place of occurrence at the time of the incident but he stuck to the version of the incident given by him in his examination-in-chief. His presence at the place of incident stands further proved from the fact that he was one of the inquest witnesses.

30. The incident had taken place in broad day light and there was no scope for PW1 to have mistaken the

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identity of the accused who were previously known to PW1. Moreover, we do not find any reason why PW1 would falsely implicate the accused-appellants while allowing the real culprits to go scot free. The participation of accused-appellant Jaipal in the commission of the murder of deceased Sunehri Lal also stands proved from the evidence of PW1 as it is proved from his evidence that he was instrumental in ferrying the accused-appellants A1 Rupa and A2 Ghanshyam on his motorcycle to the place of occurrence and while the ghastly crime was being committed by A1 and A2 he kept sitting on the motorcycle and then he facilitated their escape on the same motorcycle from the place of occurrence after A1 and A2 had committed the murder of deceased Sunehri Lal.

31. Learned counsel for the appellants has also challenged the FIR in this case on the ground that the same is ante-timed. Record shows that in this case incident had taken place at about 3:30 PM on 23.10.1994 and the FIR of the occurrence was lodged by PW1 Kishori Lal at P.S. Mathura Kotwali, Mathura at

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16:00 hours and proved by him as Ex. Ka9. It is pertinent to note that no suggestion was given by the defence counsel to PW1 during his long drawn cross-examination of PW1 that the FIR of the incident was not lodged by him at the time recorded in the G.D. Reliance has been placed by learned counsel for the appellants on the facts deposed by PW3 Chandrika Prasad in his cross-examination on page 20 of the affidavit that Inspector Mahipal Singh Tarar had reached P.S. Bajbahadur Chowk at about 3:45 PM on receiving information of the incident and had left for the old bus stand with him and Constable Arvind and they had reached the place of incident at about 4PM which is the same time at which the FIR was registered, in support of his argument that the FIR in this case is ante-timed. The FIR in this case cannot be held to be ante-timed merely because information of the incident had been received at police outpost Bajbahadur from some other source before the lodging of the FIR as argued by learned counsel for the appellants by relying upon the facts deposed by PW3 in his cross-examination. Learned

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counsel for the appellants has not been able bring to our notice any material on record which may demonstrate that the FIR in this case was ante-timed. In view of the above, we do not find any merit in the submission of the learned counsel for the appellants that the FIR in this case is ante-timed and hold that FIR in this case was duly registered at 16 hours at P.S. Kotwali Mathura, Mathura.

32. We now proceed to examine whether the ocular testimony in this case finds corroboration from the medical evidence on record or not. The prosecution story as spelt out in the FIR and later testified by PW1 is that the deceased was shot dead by the accused-appellants at about 3:30 PM near Malgodam of Cantt. Railway Station Mathura on 25.10.1994.

33. According to PW1, accused-appellants Rupa and Ghanshyam had fired one shot each at the deceased from their firearms which had caused two injuries on his head, one above the left ear and the other below the left ear. The facts stated by PW1 in his evidence stand fully corroborated from the medical evidence on record.

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34. Dr. O.P. Parikh who was examined as PW2 had conducted the post mortem on the dead body of the deceased and prepared his post mortem report which is on record as Ex. Ka1. PW2 had noted following **ante-mortem injuries** on the dead body of the deceased :

(i) Gunshot wound of entry size 1,1/2 cm x 1,1/2 cm x through and through with injury no. (2) on the left angle of mandible 1,1/2 cm below left ear margins inverted and irregular. Blackening and tattooing present.

(ii) Gunshot wound of exit 2 cm x 3 cm x through and through with injury no. (1) on the right side of face 3 cm in front of right ear. Margins everted and irregular.

(iii) Gunshot wound of entry size 3/4 cm x 1 cm x through and through with injury no. (4) on the outer end of left eyebrow. Margins inverted and irregular. Blackening and tattooing present.

(iv) Gunshot wound of exit size 3 cm x 3 cm x through and through with injury no. (3) 3 cm below and behind right ear. Margins everted and irregular.

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35. According to PW2 the deceased had died due to comma as a result of ante-mortem injuries. From the evidence of PW1 it is apparent that two shots were fired at the deceased by accused-appellants Rupa and Ghanshyam with their firearms which had hit him on his head. The post mortem of the deceased indicates two firearm wounds of entry namely ante-mortem no. (1) and ante-mortem no. (3) which are below and above the left ear of the deceased. Ante-mortem injury no. (2) and (4) are the corresponding firearm wounds of exit of firearm wounds nos. (1) and (3). The evidence of PW1 further shows that the deceased was shot by the accused-appellants from a very close range and the presence of blackening and tattooing around the two gunshot ante-mortem firearm wounds of entry found on the dead body of the deceased fully corroborates the aforesaid aspect of the matter.

36. PW2 had further deposed that the deceased had died on 25.10.1994 at about 3:30 PM as a result of the firearm wounds found on the dead body of the

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deceased. The time of the death indicated in the FIR and as opined by PW2 in his testimony has not been challenged by the defence. Thus it stands fully proved from the medical evidence on record that deceased Sunehri Lal was shot dead by the accused-appellants at about 3:30 PM.

Learned counsel for the appellants has not challenged the place of occurrence mentioned in the FIR. Likewise, he has also not assailed the motive assigned by the prosecution to the accused-appellants for committing the murder of deceased Sunehri Lal.

37. As far as the failure of the Investigating Officer to send the FIR to the hospital along with the dead body of the deceased upon which much emphasis has been laid by learned counsel for the accused-appellants for persuading us to hold that the FIR in this case was not in existence at the time of holding of inquest and hence the same is ante-timed is concerned, we find that it is true that it is a very material circumstances which may give rise to inference that the FIR was not in existence at the time when the dead body of the deceased was dispatched for post mortem. However in the present

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case the omission on the part of the Investigating Officer to send the FIR to the Mortuary along with the dead body would not be fatal to the prosecution case in view of the fact that we have already held hereinabove that the prosecution had fully succeeded in proving by cogent evidence that the FIR in this case was lodged at the time alleged by the prosecution and the same is not ante-timed. Moreover none of the prosecution witnesses have been cross-examined by the defence on the aforesaid aspect of the matter.

38. The conviction of the accused-appellants has been castigated by the learned counsel for the appellants also on the ground that the recovery memo of the plain blood stained earth allegedly recovered from the place of incident Ex. Ka8 neither mentioned the time nor the place from where the plain and blood stained earth was collected, the time at which the statement of PW1 was recorded by the Investigating Officer under Section 161 Cr.P.C., is also conspicuous by its absence in the case diary which stands admitted to PW5 Dharam Chand, Investigating Officer of the case and the failure of the

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prosecution to produce the case property sent to the CFSL before the Court. We do not find any merit in the aforesaid submissions as the omissions on the part of Investigating Officer during the investigation pointed out by the learned counsel for the appellants hereinabove and non production of the case property before the Trial Court during the trial are mere irregularities, under the facts and circumstances of the present case which neither go to the core of prosecution case nor amount to illegalities vitiating the conviction of the accused-appellants.

39. A full bench of this Court in the case of ***Gopal Vs. State of U.P. reported in 1999 (39) ACC*** has held as hereunder :

12. At the very outset, we want to say that it is very easy to find fault with anything. Even accurate computers are prone to commit faults and mistakes. Not only this, human mind cannot be read. Sometimes it works in the direction that it becomes adamant to help one party and tries its level best to spoil the case. It is well known, at least by the police officers, who investigate the case, also know that they should take prompt action and should immediately record the statement of

the witnesses. They should not make cuttings and over-writings etc. in the police papers so as to create suspicion about the sanctity of the papers. They should fairly prepare the inquest report and police papers and should write the case diary with accuracy and correctly. These propositions of law and facts cannot be doubted. But if the police officers deliberately sleep over the matter, try to spoil the case and do not record the evidence of the witnesses immediately, the poor dead persons who have been killed cannot come out to say why you are spoiling the case. The bereaved family and the witnesses have only to remain silent spectators to what the police officers do. If they intervene, a judicial notice of the fact can be taken that they are humiliated, even beaten and implicated in false cases. Fear of police atrocities keeps them mum. They are also ignorant of the fact that what shall be the effect of delay and discrepancy. Therefore, also, they have nothing to intervene with the investigation. In our view, investigation of the case, if faulty, even mischievous or collusive should not be a ground to reject the ocular testimony of the informant who lodged the F.I.R. promptly. If the FIR is recorded soon, or is recorded after four or five hours, why should the prosecution or the persons who have died 'suffer. Each and every case has to be decided on its intrinsic evidence. If the eye-witnesses are believable the mere weakness of the investigation should not be a ground to reject their testimonies. Our brother Sri B.K. Sharma, J. looked into

the entire case in this light ignoring the bare facts that the witnesses and the deceased were helpless if the police did not act properly.

40. What follows from the reading of the aforesaid law report is that when the evidence of the eye-witnesses is reliable the prosecution case is not liable to be thrown out on account of irregularities or deficiencies in the investigation.

41. In the present case after a wholesome appraisal and analysis of the evidence of solitary eye-witnesses examined on behalf of the prosecution for proving the charge against the accused-appellants, we find his testimony to be reliable, trustworthy and unimpeachable and which further stands fully corroborated from the medical evidence on record. Thus even if the investigation was faulty in this case and the Investigating Officer had failed to produce the case property before the Court during the trial, we are not inclined to throw out the prosecution case on that count. Non production of the other two eye-witnesses who as per the FIR version and the testimony of PW1

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Kishori Lal were also present at the place of incident at the time of occurrence and one of whom Moti Ram had filed an affidavit before the Trial Court denying his presence at the place of occurrence, in our opinion also was not fatal to the prosecution case as the prosecution case stood proved to the hilt from the evidence of PW1 who has given clear, correct and cogent description of the incident and whose presence at the place of incident is absolutely natural and stands proved from the evidence on record.

42. Thus upon a careful scrutiny of the evidence on record, both oral as well as documentary and a thoughtful consideration of the submissions advanced before us by the learned counsel for the parties, we have no hesitation in holding that the prosecution has fully succeeded in proving its case against the accused-appellants beyond all reasonable doubts. Learned Additional Session Judge did not commit any error or illegality in convicting the accused-appellants under Section 302/34 IPC and awarding life sentence to them. Hence the impugned judgment and order merit no

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interference by this Court.

43. This appeal lacks merit and is accordingly dismissed.

44. There shall be however no order as to costs.

Order Date:- 11.1.2017
SA