

AFR

Court No. 48

Reserved on:- 23.2.2022

Delivered on:- 26.5.2022

**CRIMINAL APPEAL No. - 888 of 2016**

**Appellant :-**

Alam

**Respondent :-**

State of U.P.

**Counsel for Appellants :-**

Mukhtar Alam, Saquib Mukhtar

**Counsel for Respondent :-**

A.N. Mulla, S.N. Mishra

**With**

**CRIMINAL APPEAL No. - 639 of 2016**

**Appellants :-**

Noor Mohammad and Another

**Respondent :-**

State of U.P.

**Counsel for Appellants :-**

Mukhtar Alam, Saquib Mukhtar

**Counsel for Respondent :-**

A.N. Mulla, S.N. Mishra

**Hon'ble Mahesh Chandra Tripathi, J.**

**Hon'ble Chandra Kumar Rai, J.**

1. The present Criminal Appeals have been filed against the Judgment and Order dated 14.1.2016 passed by the Special Judge / Additional Sessions Judge, Bijnor in Session Trial No.485-A of 2011 (State vs. Alam); Session Trial No.485 of 2011 (State vs. Noor Mohammad and Others), arising out of Case Crime No.52 of 2011, under Sections 302/34, 323/34 IPC, P.S. Mandawar, District Bijnor, whereby appellants were convicted for life imprisonment under Sections 302/34 IPC and fine of Rs.20,000/- each, in default of payment of fine, six months additional R.I. and under Section 323/34 IPC, 3 months R.I. and fine of Rs.500/- each, in default of payment of fine, one month additional R.I. with a direction that all the sentences shall run concurrently.

2. Being aggrieved therefrom, accused Alam preferred Criminal Appeal No.888 of 2016 and accused Noor Mohammad, Deen Mohammad preferred Criminal Appeal no.639 of 2016 for setting aside their conviction and passing an order of acquittal.

3. Since common issues are involved in both the appeals, both are being disposed of by a common order. The facts stated in Criminal Appeal No.888 of 2016 shall be treated as the leading appeal.

4. The brief facts relating to case are that Salamat (son of deceased) submitted a written report at Police Station with the averment that he is resident of village Khirani, P.S. Mandawar, District Bijnor. His father purchased about 18 bigha land 2 years before from Hamid, son of Jamaluddin that is why Noor Mohammad, Deen Mohammad, Alam were on enemical terms to his father. On 19.3.2011 at 7.15 PM (evening), his younger brothers Riyasat and Faizan went to purchase items from the grocery shop of Habib, at that moment , Noor Mohammad, Deen Mohammad and Alam armed with countrymade pistol, came there, abused them and started altercation with Riyasat. Faizan came back from shop and told about the incident to his father, then he and his father Aslam reached at the shop of Habib and tried to protect Riyasat, at that time, Alam fired shot from his countrymade pistol on the head of his father, who died on spot. He and Riyasat tried to catch Alam, then Noor Mohammad and Deen Mohammad with an intention to kill, fired shot from their countrymade pistol but he and Riyasat were escaped narrowly. The prayer was made to register the report

and legal action be taken. Rafeeq son of Imam Shah and Others were mentioned as witness of the incident.

5. On the basis of written report, Case Crime No. 52/2011, under Sections 302/323/307/34 IPC was registered against accused Alam, Noor Mohammad, Deen Mohammad on 19.3.2011 at 8.30 PM and investigation of the case was handed over to Station Officer Sunil Kumar Sharma who went to the place of incident where S.I. Veer Singh conducted Panchayatnama of the dead body and after completing the formalities, dead body was sent for postmortem. The spot map of the place of incident was prepared, two empty cartridges were recovered by the police from the roof of the accused, the memo was accordingly prepared. During investigation, on 22.3.2011 accused were arrested and on the pointing out of Alam, countrymade pistol 315 bore, 2 live cartridges, one empty cartridge 315 bore inside the barrel and on the pointing out of Noor Mohammad, countrymade pistol 12 bore and 2 live cartridges were recovered, the memo were accordingly prepared. FIR was lodged against Alam and Noor Mohammad under Section 25 of the Arms Act on 22.3.2011 at 12.30, the investigation of the case under the Arms Act was handed over to H.C.P. Prem Singh. Respective Investigating Officer submitted charge-sheet against accused Alam, Noor Mohammad and Deen Mohammad under Sections 302/34, 307/34, 323 IPC and against accused Alam and Noor Mohammad under Section 25 of the Arms Act. Charges were framed against Alam, Noor Mohammad, Deen Mohammad under Sections 302/34, 307/34, 323 IPC and against accused

Alam and Noor Mohammad under Section 25 of the Arms Act to which they denied and claimed trial.

6. The prosecution in order to prove its case, produced as many as 12 witnesses whose particulars are as follows:

P.W.1 Salamat son of Aslam (First informant and alleged eye-witness)

P.W.2 Faizan son of Aslam (alleged eye-witness)

P.W.3 Rafeeq son of Imaam Shah (alleged eye witness as well as independent witness)

P.W.4 Dr. R.S. Ravidas

P.W.5 S.I. Veer Singh

P.W.6 Constable Jaiveer Singh (witness of the inquest)

P.W.7 Constable Narendra Sharma (FIR scribe of Case Crime No. 53 of 2011 and 54 of 2011)

P.W. 8 HCP Prem Singh (IO of Case Crime No.53 of 2014 and 54 of 2011)

P.W.9 Sub-Inspector Shishpal Singh

P.W.10 HC 139 Mahak Singh Sharma (Scribe of Case Crime No.52 of 2011)

P.W.11 Sunil Sharma ( IO of Case Crime No.52 of 2011)

P.W.12 Shailendra Pratap (Subsequent IO of Case Crime No.52 of 2011)

7. In support of the ocular testimony of the witnesses, prosecution filed following documentary evidence:

1. FIR dated 19.3.2011 (Ext. Ka 19)

2. FIR dated 22.3.2011 (Ext. Ka12)
3. Written report dated 19.3.2011 (Ext. Ka1)
4. Panchayatnama dated 19.3.2011 (Ext. Ka 3)
5. Postmortem report dated 20.3.2011 (Ext. Ka 9)
6. Site plan dated 19.3.2011 (Ext. Ka 21)
7. Site plan dated 23.3.2011 (Ext. Ka 14)
8. Site plan dated 23.3.2011 (Ext. Ka 15)
9. Charge-sheet dated 15.4.2011 (Ext. Ka 23)
10. Charge-sheet dated 23.3.2011 (Ext. Ka16)
11. Charge-sheet dated 23.3.2011 (Ext. Ka 17)

8. The accused appellants in their statements recorded under Section 313 Cr.P.C. denied the prosecution case and disputed the veracity of the evidence adduced by the prosecution.

9. P.W.1 Salamat son of deceased Aslam as well as first informant in his examination-in-chief stated that he knows accused Noor Mohammad, Deen Mohammad and Alam, they belong to his village. His father purchased about 18 bigha land 2 years before from Hamid, son of Jamaluddin that is why Noor Mohammad, Deen Mohammad, Alam were on enemical terms to his father. On 19.3.2011 at 7.15 PM (evening), his younger brothers Riyasat and Faizan went to purchase items from the shop of Habib, at that moment, Noor Mohammad, Deen Mohammad and Alam armed with countrymade pistol, came there, abusing them and started altercation with Riyasat. Faizan came back from shop and told about the incident from him and his father, then he and his father Aslam reached at the shop of

Habib and tried to protect Riyasat, at that time, Alam fired shot from his countrymade pistol on the head of his father, who died on spot. He and Riyasat tried to catch Alam, then Noor Mohammad and Deen Mohammad with intention to kill, fired shot from their countrymade pistol but he and Riyasat were escaped narrowly. Accused Noor Mohammad, Deen Mohammad, Alam, sons of Bundu ran away towards their house after fire shot. In cross-examination, he stated that he reached to police station at 8.30 PM by tractor. Rafeeq, Shafeeq, Anwar and Abid also accompanied him, they did not bring any written report with them and told incident to police so police came to the spot along with him. Police made necessary inquiry and told him to give written complaint / report, accordingly, he gave written report to police at the village after being written by Mahaboob Alam on his instruction at about 9.00 PM and the dead body of his father was sealed by the police, the same was kept on tractor trolley and he was also sitting on the tractor. He stated that altercation took place before the shop of Bundu. He further stated that his father received fire-shot in front of primary school. He stated that the person who fired was 7 step away from his father. He further stated that Noor Mohammad and Deen Mohammad fired from their roof, both of them were on their roof and remained there. Two fires were made from the roof and his father was standing when the fire was made.

10. P.W. 2 Faizan aged about 15 years, alleged eye-witness, in his examination-in-chief stated that incident is of about 10 months before at about 7.15 PM. He and his brother Riyasat went to shop of Habib for purchasing, at that moment, Noor

Mohammad, Deen Mohammad and Alam armed with countrymade pistol, came there, abusing them and started altercation with him and his elder brother Riyasat. He ran away to his home and told about the altercation to his father Aslam and brother Salamat. Having heard the same, his father and brother came to the shop and tried to protect Riyasat, at that time, Alam fired shot on the head of his father Aslam and he died on spot. His brother Salamat and Riyasat tried to catch Alam, then Noor Mohammad and Deen Mohammad fired shot with intention to kill Riyasat and Salamat but they were escaped narrowly. All the three accused run away to their home. About 2 years before his father Aslam purchased about 18 bigha land from Hamid due to which Bundu and his sons Noor Mohammad, Deen Mohammad and Alam were on enemeical terms to his father. In the cross-examination, he stated that his father did not receive fire-shot at the place where Riyasat was caught rather he received fire-shot at Chauraha.

11. P.W.3 Rafeeq alleged eye-witness, in his examination-in-chief stated that incident is of 10-11 months before, it was Holi festival and time was about 7 PM (evening). He was sitting with Aslam then Faizan son of Aslam came and told that Noor Mohammad, Deen Mohammad, Alam are beating him and his brother. He and Aslam went there along with Faizan, Aslam was on front side and he was on back side. They reached to the shop, Aslam tried to protect his son from accused then all the three accused persons started altercation with Aslam and after that Alam fired shot from his countrymade pistol on the head of Aslam who died on spot. He did not interfere and went to his house. Deen Mohammad and Noor Mohammad fired two shots

on Aslam but did not fire on Salamat and Riyasat. In his cross-examination, he stated that when he reached at the place of occurrence, Aslam was dead and Noor Mohammad, Deen Mohammad, Alam were not present at that time. He further stated that he did not go to the house of Aslam on that day. He stated that when fire shot took place, he was present in his house. He further stated that he did not see anybody who fired shot on Aslam.

12. P.W.4 Dr. R.S. Ravidas, Community Health Centre, Laharpur, District Sitapur conducted the postmortem of the dead body of Aslam on 20.3.2011 at 2.00 PM. He has proved the postmortem report as Ext. Ka 9 and has stated that following injuries were found on the body of the deceased:

1. Fire arm wound of entry 2cm x 2cm. Cavity deep on middle forehead upto root of the nose. Blackening present in some extant. On dissection one metallic piece recovered from the right side of occipital region of brain and handed over to police. Fracture of nasal bone and forehead bone, fracture of right occipital bone, brain membrane lacerated

13. P.W.-5, S.I. Veer Singh in his examination-in-chief stated that on 19.3.2011 he was posted on the post of Sub-Inspector at Police Station- Mandawar. He prepared the Panchayatnama of the dead body of deceased Aslam and handed over the deadbody after necessary formalities for postmortem, the other documents relating to panchayatnama were prepared. Panchayatnama (Ex-Ka-3), letter to R.I. (Ka-4), Chalan Lash (Ka-6), Photo Lash (Ka-7), letter to C.M.O. (Ka-5) were

prepared by him on the spot. Ex-Ka-9 is memo of recovery of plain earth and stained earth was prepared by him.

14. PW.-6, Constable Jaiveer Singh in his examination-in-chief stated that on 19.3.2011, he was posted at Police Station- Mandawar on the same post and place. On the information of murder of deceased Aslam he reached along with force to place of incident situated in village- Khirani. After completion of proceeding of Panchayatnama, he received the dead body of Aslam in a sealed position at 22:00 hours from homeguard Ashraf and constable-Randhir Singh and kept the dead body in the morgue of district hospital, after postmortem, dead body was handed over to family members. In the cross-examination, he stated that dead body was given to him on 19.3.2011 at 8:00 P.M. He carried dead body from village-Khirani through tempo to hospital and 30-45 minute was taken in covering the distance from Village-Khirani to hospital.

15. P.W.-7, Constable Clerk, Narendra Sharma in his examination-in-chief stated that on 22.3.2011, he was posted as constable clerk at Police Station- Mandawar. He proved chik F.I.R. as well as Ex-Ka-12 and Ex-Ka-13. In the cross-examination, he stated that original G.D. is not on record nor he brought the same with him on that day.

16. P.W.-8, H.C.P. Prem Singh has stated in his examination-in-chief that on 22.3.2011, he was posted as H.C.P. at Police Station- Mandawar. He received investigation of Case Crime No.53 of 2011 (Alam Vs. State) and Case Crime No.54 of 2011 (Noor Mohammad Vs State) from police station office. Necessary entry were made in the case dairy. Statement of

witness, S.I., Sheeshpal Singh, Constable Tejpal Singh and Constable Sukhpal Singh were recorded in the case diary on 23.3.2011. After that on the pointing out of S.I. Shamim Haider inspected the place of incident and prepared the spot map under Section 25 of Arms Act which are Ex-Ka-14 and Ex-Ka-15, the charge-sheet was also submitted by him under Section 25 of Arms Act, which are Ex-Ka-16 and Ex-Ka-17.

17. P.W.-9, S.I., Sheeshpal Singh, has stated in his examination-in-chief that on 22.3.2011, he was posted as Sub-Inspector at Police Station- Mandawar. He arrested the accused-Noor Mohammad and Alam on 22.3.2011 at 7:45 A.M. On the pointing out of Noor Mohammad and Alam, a country made pistol as well as live and empty cartridges were recovered at 10:45 A.M. on 22.3.2011. The memo was prepared by I.O. in his presence and the same is Ex-Ka-18 which is signed by him also. In the cross-examination, he reiterated the same.

18. P.W.-10, Head Constable, Mahak Singh in his examination-in-chief stated that on 19.3.2011, he was posted on the post of Head Moharir at Police Station- Mandawar. On that day at 8:30 P.M., on the basis of report of Salamat Chik No.30/11, Case Crime No.52/11, under Sections 323/ 302/ 307/ 34 I.P.C. was registered by him against Noor Mohammad, Deen Mohammad and Alam. The same is Ex-ka-19. He mentioned about the incident on same day in G.D. through report no.39, time 8.30 PM. He brought the original G.D. with him on that day which is in his hand writing. He filed the correct and attested photo copy of the same, which is Ex-Ka-20. In the cross-examination, he stated that he sent the special report of the

case through Constable, Tarachand but in G.D. time of Rawangi of Tarachand is not recorded. He sent the Tarachand on the oral instruction of station officer without recording his rawangi in the G.D. In Report No.39, there is no mention of sending special report. He further stated that there is no copy of special report on record. He further stated that he prepared seven copies of special report but nothing was kept at the police station.

19. P.W.-11, Station Officer, Sunil Sharma in his examination-in-chief stated that on 19.3.2011, he was posted as station officer at Police Station- Mandawar. He was investigating officer of Case Crime No.52/11, under Section-323, 302, 307,34 I.P.C. which was registered in his presence. He reached to place of incident along with force, statement of first informant Salamat was recorded in case diary and on the pointing out of first informant inspected place of incident and prepared site plan (Ex-Ka-21). Two empty cartridges of 12 bore were recovered from the roof of the accused and sealed in white clothes. The memo was prepared, which is Ex-Ka-22, memo was copied in case diary. On 20.3.2011 statement of Mahak Singh scribe of first information report was recorded. On 22.3.2011 accused Noor Mohammad and Alam were arrested and their statements were recorded, at their instance country made pistol and cartridges were recovered, memo was accordingly prepared which is Ex-ka-18 statement of witnesses Riyasat, Faizan and Rafeeq were recorded.

20. P.W.-12, Shailendra Pratap, Inspector In-charge stated in his examination-in-chief that from 3.4.2011 to 6.6.2011, he was posted at police station- Mandawar. He was handed over investigation of Case Crime No.52/11, under Sections 302, 307,

323, 34 I.P.C. of witnesses which was being investigated by earlier investigating officer. He started investigation on 5.4.2011 statement of witnesses of recovery, postmortem, panchayatnama were recorded on 15.4.2011, charge-sheet no.53/11 was submitted in Court which is Ex-ka-23.

21. The learned Sessions Judge, Bijnor after hearing the parties and perusal of the record, acquitted the accused-Noor Mohammad, Deen Mohammad and Alam under Section 307/34 IPC as well as acquitted accused Noor Mohammad and Alam under Section 25 of the Arms Act but convicted accused Noor Mohammad, Deen Mohammad and Alam under Section 302/34, 323/34 IPC, hence this appeal.

22. Heard Mr. Mukhtar Alam & Mr. Saquib Mukhtar, learned counsel for the appellants, Mr. A.N. Mulla, learned A.G.A. for the State and perused the record.

23. Learned counsel for the appellant submitted that following points for determination are involved in the present appeal:-

1. Whether the occurrence was occurred in presence of alleged eye-witnesses i.e. P.W.1, P.W.2 & P.W.3 and there evidence is reliable?
2. Whether prosecution has not produced the best evidence to prove its case and deliberately withheld the material witnesses and evidence without any justification?
3. Whether the postmortem report does not support the prosecution case and as per autopsy, single fire-arm has been used for the commission of an offence and the shot was fired at a close range.

4. Whether the FIR is ante-timed and absolutely there was no proper and fair investigation and the investigation of the case is defective.
5. Whether trial court has completely misread the evidence and passed the impugned judgment and order without appreciating the evidence available on record in its right perspective and the same is not sustainable in the eyes of law?

24. Learned counsel for the appellants on the points for determination no.1 submitted as follows:-

P.W.-1, P.W.-2 and P.W.-3 alleged eye witnesses are unreliable witnesses as all the three were not present nor they have seen the incident.

The relevant portion of examination-in-chief of P.W.-1 is as follows:-

दिनांक 19.3.2011 को समय करीब शाम के सवा सात बजे मेरे छोटे भाई रियासत व फैजान हबीब की दुकान पर सामान लेने गये थे। तभी नूर मोहम्मद, दीन मोहम्मद व आलम अपने हाथों में तमचे लिये हुये गाली देते हुये आये और रियासत को पकड़कर मारपीट करने लगे तभी फैजान जो मेरा छोटा भाई है दुकान से भागकर आया और घटना के बारे में मुझे व मेरे पिता असलम को बताया मैं तथा मेरे अब्बा असलम, हबीब की दुकान पर पहुंचे और रियासत को बचाने लगे तभी आलम ने अपने हाथ में लिये तमचे से मेरे अब्बा के माथे पर गोली मार दी, जिससे उनकी मौके पर मृत्यु हो गयी थी। मैंने व मेरे छोटे भाई रियासत ने आलम को पकड़ना चाहा। तभी नूर मोहम्मद व दीन मोहम्मद ने जान से मारने की नियत से अपने हाथों में लिये तमचे से हमारे उपर फायर किये गये जिससे हम बाल बाल बच गये। मैं अपने पिता असलम की लाश को मौके पर छोड़कर थाने आये और महमूद आलम से रिपोर्ट लिखकर थाने पर दी जो मैंने बोला था वही महमूद आलम ने लिखा था मैंने सुनकर तहरीर पर अपना अंगूठा लगाया था। पत्रावली पर तहरीर कागज सं० 11/2 दाखिल है

जिस पर एकज क-1 डाला गया। मुलजिमान नूर मोहम्मद, दीन मोहम्मद व आलम पुत्रगण बुन्दू गोली मारकर व फायर करके अपने घर की ओर भाग गये थे।

25. The relevant portion of cross-examination of P.W.-1 is as follows:-

हबीब की दुकान उत्तर सामनी है। और उसके सामने पूरब पश्चिम रास्ता है। पश्चिम को हमारी तरफ को रास्ता जाता है और पूरब को गांव मे जाता है। जब मेरे वालिद को गोली लगी तो उस समय वह प्राईमरी पाठशाला के सामने थे। प्राईमरी पाठशाला के उत्तर में आटा चक्की बुन्दू है। यह प्राईमरी पाठशाला इस पूरब पश्चिम वाले रास्ते के उत्तर में है। पाठशाला की बाउण्डरी नही है खुला है। पाठशाला की पूरब पश्चिम चौड़ाई करीब 60 फीट है। पाठशाला का जो पश्चिम वाला कोना है उसके पास गोली लगी थी और दक्षिण से चलाई गई थी। गोली चलाने वाला करीब 7 कदम मेरे वालिद से दूर था। पाठशाला के सामने रास्ता करीब 20-22 फिट चौड़ा है।

नूर मोहम्मद व दीन मोहम्मद ने फायर अपने मकान की छत पर से किये थे ये दोनो लोग अपने मकान की छत पर थे और वहीं रहे। छत पर से दो फायर हुये थे जब फायर हुये थे मेरे पिता उस समय खडे थे। बुन्दू के मकान जिस की छत पर से फायर होना बता रहा हूँ रास्ते के दक्षिण मे है और उससे पश्चिम में राशिद की दुकान है। राशिद की दुकान से उत्तर मे मै 5 पहरे दूर था। इनकी छत 12 फिट ऊँची है।

26. From the perusal of entire statement (Chief and cross) of P.W.-1, Salamat alleged eye witness, as well as son of deceased, it is established that P.W.-1 is changing his stand with respect to place of incident. In his examination-in-chief, he stated that incident has taken place before shop of Habib, where all the three accused were present and fired but in cross examination he stated that incident has taken place before primary school and Noor Mohammad and Deen Mohammad fired from the roof of their house, who remained present on

their roof. These are material contradiction in the statement of P.W.-1 and has not been explained by prosecution, as such, evidence of P.W.-1 cannot be relied upon.

27. So far as P.W.-2, Faizan is concerned, he is son of deceased and minor at the time of incident, his statement is also not consistent. In the cross-examination, he stated that hundred people were assembled at the place of incident, the place where Riyasat was caught hold his father, had not received fire-shot, rather at Chauraha his father received fire shot, the relevant portion of cross-examination of P.W.-2 is as follows:-

मुझे अपने पिता व भाई को बुलाकर लाने में पन्द्रह बीस मिनट लगी होगी। उस समय भी रियासत को मुलजिमान मारपीट कर रहे थे। सैकड़ों आदमी वहां इकट्ठा हो गये थे। घटनास्थल पर वे सब आदमी रियासत को चारों ओर हो रहे थे। उन सैकड़ों आदमियों में से मैं किसी का नाम नहीं बता सकता। मुझे दिशाओं का ज्ञान नहीं है जब हम लौटकर आये तो रियासत को हबीब की दुकान से 5 पहटे हमारे घर की तरफ को था। जहां रियासत को पकड़ रखा था। उससे बुन्दू का घर उत्तर की तरफ था। जहां रियासत को पकड़ रखा था। वहां मेरे पिता को गोली नहीं लगी थी। बल्कि चौराहे पर लगी थी।

28. From the perusal of examination-in-chief and cross-examination of P.W.-2 who was minor at the time of incident, it is established that statement of P.W.2 is not consistent with respect to place of incident as well as evidence of P.W.2 is not corroborated by evidence of P.W.1, thus, evidence of P.W.2 is also not reliable and trustworthy.

29. P.W.-3, Rafeeq alleged eye-witness as well as independent witness in his cross-examination clearly stated that he was at his home when firing took place. He further stated

that he had not seen anybody who fired shot to Aslam, the relevant portion of cross-examination of P.W.-3, Rafeeq is as follows:-

जब मैं पहुंचा तो असलम को मैंने मरी हुई हालत में देखा सैकड़ो आदमी इकट्ठा थे सब एक दूसरे से पूछ रहे थे कि असलम कैसे मर गया और किसने गोली मार दी उस समय नूर मौहम्मद, दीन मौहम्मद, व आलम उस समय घटना स्थल पर नहीं थे जब मैं वहां घटना स्थल पर पहुंचा उस दिन मैं सलामत के घर भी नहीं गया था जब गोली चली मैं अपने घर पर था। सलामत अपने बाप के पास होगा।

सलामत का घर पूरब में हवीब की दुकान से है। हवीब की दुकान से पूर्व को रास्ता जा रहा है। हवीब की दुकान के पास कोई चौराहा नहीं है। हवीब की दुकान के पूरब मे रास्ते के बाद इस्माईल का घर है। इसके बाद पंचायत घर है। पाठशाला हवीब की दुकान से 50-60 कदम की दूरी पर है जो पूरब में है।

यह बात सही है कि असलम को गोली मारते हुए मैंने किसी को नहीं देखा।

यह कहना गलत है कि पाठशाला हवीब की दुकान से 100 गज से अधिक फासले पर हो।

30. From the perusal of statement of P.W.-3, it is fully established that P.W.-3 is not eye-witness of the incident and his evidence is also not reliable and trustworthy.

31. On the point for determination no.2, learned counsel for the appellants contended that prosecution has not produced Riyasat who was alleged to be throughout present on spot and even beaten by accused but prosecution has failed to produce Riyasat which makes the prosecution case doubtful. Constable, Tarachand, special report messenger was also not produced by prosecution and copy of special report was also not on record of the case and there is no mention of sending special report of the case in report no. 39 which demonstrate that special report

of the case has not been sent. Accordingly, non-production of Tarachand by prosecution makes the prosecution case doubtful.

32. On the point for determination no.3, learned counsel for the appellants contended that according to postmortem report, blackening was present in the injuries but P.W.1 in his cross-examination stated that person who fired shot was 7 steps away from his deceased father Aslam. P.W.4 Dr. R.S. Rabidas in his cross-examination stated that deceased received fire shot from the distance of some inch.

33. On the point of blackening and charring, following judgment of the Apex Court will be relevant. Paragraph no. 12 of 2007(57) ACC 1099, **Raj Kumar Prasad Tamarkar vs. State of Bihar and Others** is as follows:

12. The autopsy report shows that 'a blackening and charring' existed so far as Injury No. (i) is concerned. The blackening and charring keeping in view the nature of the firearm, which is said to have been used clearly go to show that a shot was fired from a short distance. Blackening or charring is possible when a shot is fired from a distance of about 2 feet to 3 feet. It, therefore, cannot be a case where the death might have been caused by somebody by firing a shot at the deceased from a distance of more than 6 feet. The place of injury is also important. The lacerated wound was found over grabella (middle of forehead). It goes a long way to show that the same must have been done by a person who wanted to kill the deceased from a short distance. There was, thus, a remote possibility of causation of such type of injury by any other person, who was not in the terrace. Once the prosecution has been able to show

that at the relevant time, the room and terrace were in exclusive occupation of the couple, the burden of proof lay upon the respondent to show under what circumstances death was caused to his wife. The onus was on him. He failed to discharge the same.

34. Now, at this stage, we shall proceed to examine whether the medical evidence renders the ocular account completely unacceptable or improbable. In this regard, the submission of learned counsel for the appellants is that the ocular account is not acceptable because the medical evidence has ruled out possibility of the shot being fired from seven steps away from the deceased as per PW-1 in his cross-examination but the same is ruled out as per PW-4-Dr. R.S. Rabidas in his cross-examination, who stated that deceased received fire shot from the distance of some inches. There is also contradictions in the examination-in-chief and in cross examination of witnesses of fact i.e. PW-2 and PW-3 vis-a-vis in the medical evidence.

35. At this stage, we may notice few decisions of Hon'ble the Apex Court on the issue as to when a conflict between medical evidence and ocular account would render the ocular account untrustworthy and unreliable. In **Thaman Kumar v. State of Union Territory of Chandigarh**, (2003) 6 SCC 380, in paragraph 16, it was observed as follows:

"16. The conflict between oral testimony and medical evidence can be of varied dimensions and shapes. There may be a case where there is total absence of injuries which are normally caused by a particular weapon. There is another category where though the injuries found on the victim are of the type which are possible by the weapon of

assault, but the size and dimension of the injuries do not exactly tally with the size and dimension of the weapon. The third category can be where the injuries found on the victim are such which are normally caused by the weapon of assault but they are not found on that portion of the body where they are deposed to have been caused by the eye witnesses. The same kind of inference cannot be drawn in the three categories of apparent conflict in oral and medical evidence enumerated above. In the first category, it may legitimately be inferred that the oral evidence regarding assault having been made from a particular weapon is not truthful. However, in the second and third category no such inference can straightaway be drawn. The manner and method of assault, the position of the victim, the resistance offered by him, the opportunity available to the witnesses to see the occurrence like their distance, presence of light and many other similar factors will have to be taken into consideration in judging the reliability of ocular testimony."

36. Hon'ble the Apex Court in **Punjab Singh v. State of Haryana**, 1984 Supp SCC 233 and **Anil Rai v. State of Bihar**, (2001) 7 SCC 318 has considered in detail that (1) if direct evidence is satisfactory and reliable, the same cannot be rejected on hypothetical medical evidence, and (2) if medical evidence when properly read shows two alternative possibilities but not any inconsistency, the one consistent with the reliable and satisfactory statements of the eye witness has to be accepted. The similar view has also been taken by Hon'ble the Apex Court in **Abdul Sayeed v. State of Madhya Pradesh**, (2010) 10 SCC 259. No doubt the legal principle, which has been pronounced by Hon'ble the Apex Court, is that ocular

evidence has greater evidentiary value vis-a-vis medical evidence. In the present matter, we also find that there is inconsistency of the prosecution witnesses of fact and after close scrutiny of the medical evidence, we find that ocular evidence may be discarded.

37. To appreciate the submission urged by the learned counsel for the appellants that P.W.1, P.W.2 and P.W.3 are not credible and reliable, we have examined their testimony threadbare. We find that these three witnesses claim themselves to be the eye witness of the occurrence but their description of the manner of occurrence and the contradiction regarding the place of occurrence, the injury sustained by the deceased from a gun shot fired from approximately seven steps and considering the statement of PW-4- Dr. R.S. Rabidas that the gun shot fired from very close range (few inches) are such circumstances which remain unexplained. Thus, the ocular testimony is wholly inconsistent with the circumstantial evidence as well as the medical evidence. The case in hand is based upon direct evidence. Therefore, in order to award or uphold the conviction of an accused in a case based upon direct evidence, the Court has of necessity to hold that the prosecution story is probable. The prosecution witnesses of fact are credible and reliable and therefore their testimony is worthy of credit. In a case of direct evidence motive cannot be said to be of much value. Therefore, in such situation, it is imperative to the Court to go into the facts and circumstances of the case and find out as to what was the cause behind the occurrence, the motive behind the occurrence and whether it has any relation with the crime or not. On a careful scrutiny of the alleged motive

assigned to the accused-appellants for the commission of crime, the Court finds, as enumerated above, that the same is too far stretched.

38. On the point of determination no.4, learned counsel for the appellants submitted that FIR is ante-timed and investigation of the case is defective. Learned counsel for the appellants further submitted that special report of the case has not been sent according to law, the reliance has been placed upon paragraph-101 of the police regulation which is as follows:

**"101. Special Report cases.- Whenever the occurrence of an offence of any of the following kinds is reported (1) dacoity, (2) robbery except unimportant cases such as snatching earrings, (3) torture by police, (4) escape from police custody, (5) forging of currency notes (6) manufacture of counterfeit coin, (7) serious defalcations of public money including theft of notes or hundis from letters, (8) important cases of murder, rioting, burglary and theft, breaches of the peace between different classes, communities or political groups and other cases of special interest, copies of the report will be sent immediately in red envelopes to the Superintendent, the District Magistrate, the Sub Divisional Magistrate and the Circle Inspector by post or hand whichever may be the quicker method of conveyance. The telephone or telegraph when available, and the department telegraphic code, copies of which have been supplied to all police stations near telegraph offices should also be used to give the Superintendent early news of such offences."**

39. The counsel further placed cross-examination of PW.10 Head Constable Mahak Singh in order to demonstrate that procedure for sending special report of the case has not been followed at all, the relevant portion of cross-examination of P.W.10 Mahak Singh is as follows:

"मैंने स्पेशल रिपोर्ट जिस जी०डी० मे मुकदमा कायम हुआ उसी जी०डी० मे भेजी मैंने सी/ताराचन्द्र को एस०आर० लेकर भेजा था परन्तु जी०डी० मे ताराचन्द्र की कोई रवानगी दर्ज नहीं है। तारा चन्द्र नक्शा नजरी के अनुसार सुबह 6.05 मिनट पर थाने पर मौजूद था फिर 8.50 मिनट पर जी०डी० संख्या 18 पर ये उसकी रवानगी सदर विजनौर के लिए हुई। फिर ताराचन्द्र की वापसी 17.40 पर थाने पर हुई। उसके पश्चात ताराचन्द्र की रवानगी मे दर्ज नहीं है। उसे मैंने बिना रवानगी दर्ज करे ही भेज दिया था एस०ओ० साहब के जुवानी आदेश मे भेजा था। मुझे नहीं पता कि तारा चन्द्र का उस दिन का एस०आर० लेकर जाने का टी०ए०डी०ए० भरा गया या नहीं यह सही है कि रपट नम्बर 39 मे एस०आर० भेजे जाने का तस्करा नहीं है। रपट नम्बर 39 मे यह लिखा है कि एस०आर० बाद करने तैयार रवाना की जायेगी। यह सही है मेरे पास उस एस०आर० की कोई कापी है। ना ही पत्रावली मे उस एस०आर० की कोई नकल है। उस एस०आर० पर जो भेजी थी उस पर एस०एच०ओ० के हस्ताक्षर कराये थे। ताराचन्द्र की कायमी थाने पर कब हुई मैं नहीं बता सकता। ताराचन्द्र आज कल थाना नजीमाबाद मे तैनात है। यह कहना गलत है कि रपट नम्बर 39 पर ओवर राइटिंग की गई हो। एस०एच०ओ० मुकदमा कायमी के समय मौजूद नहीं थे मुकदमा कायमी से पूर्व रपट नम्बर 34 16.00 बजे रवानगी हो चुकी थी एस०एच०ओ० की वापसी दिनांक 19.3.11 को थाने पर नहीं हुई अगले दिन हुई होगी।

यह कहना गलत है कि मैंने कोई एस०आर० रवाना ना की हो और यह बात मुकदमे को बल देने के लिए झूँठ बोल रहा हूँ मैंने जी०डी० रपट नम्बर 39 मे यह दर्ज किया है कि घटना की सूचना जरिये टेलीफोन क्षेत्र मे मामूर रवाना स्थल बता दिया था नकल चिक व नकल रपट उन्हे क्षेत्र मे भिजवायी थी वह कहाँ थे नहीं पता यह सूचना मैंने एस०आई० वीर सिंह को थाने पर बुलाकर उनसे भिजवायी थी। वीर सिंह इस मुकम्दे के विवेचक नहीं थे। एस०आर० पर क्रम संख्या, अपराध संख्या, धारा दिनांक घटना समय, दिनांक सूचना समय दिनांक घटना स्थल वादी प्रतिवादी नाम मृतक, विवेचक व अन्य विवरण लिखा जाता है। यह एस०आर० डी०आई०जी० महोदय, पुलिस अधीक्षक एडिं एस०पी०, डी०एम० व एस०डी०एम०, सी०ओ०

और बी०सी०आर०पी० को भेजी जाती है। मैंने एस०आर० की सात प्रति कार्बन लगाकर तैयार की थी परन्तु थाने पर उनमे से एक भी नहीं रखी थी। ना ही न्यायालय मे भेजने हेतु कोई रखी। क्योंकि न्यायालय मे मूल एफ०आई०आर० आती है। इसलिए हम न्यायालय को एस०आर० की कापी नहीं भेजते।

यह कहना गलत है कि मैं सही व्यान ना दे रहा हूँ। और एफ०आई०आर० एन्टी टाईम लिखी गई हो बाद मे लिखकर पहले दिखा दी गई हो।"

कोर्ट सर्टिं	सुनकर तसदीक किया
ह०अपठनीय	ह०अपठनीय
स्पेशल जज विजनौर	स्पेशल जज विजनौर
8.10.13	8.10.13
ह० अपठनीय	
एच०सी० महक सिंह	

40. It is relevant to mention here that Constable Clerk Tarachand Special Report Messenger has not been produced by prosecution which also makes the prosecution case doubtful and strengthen the argument of learned counsel for the appellants on defective investigation.

41. The learned counsel for the appellant further placed statement of P.W.1 Salamat and P.W.5 Veer Singh in order to demonstrate that FIR is ante-timed, the relevant portion of cross-examination of P.W.1 is as follows:

"थाने मैं शाम को साढे आठ बजे पहुंचा था। महमूद, आलम पुत्र अमीर हसन निवासी नारायण पुर मेरे खालू लगते हैं। नारायण पुर गांव हमारे गांव से 22 किलोमीटर है। थाने हम कोई तहरीर लेकर नहीं गये थे। हम लोग ट्रैक्टर से गये थे। मेरे साथ रफीक, शफीक, अनवार, आबिद गये थे। मैंने थाने जाकर दिवान जी को घटना बताई। मेरे बताने पर पुलिस वाले मेरे साथ मौके पर आये थे दरोगा जी भी आये थे। वहां उन्होने लोगों से तहकीकात की लोगों से पूछताछ की तब मुझसे कहा था कि जैसा हुआ है लिख कर दो तब मैंने महमूद आलम से तहरीर लिखवाकर दरोगा जी को गांव में ही दे दी थी। यह बात करीब 9 बजे की रही होगी तभी पुलिस वालों ने मेरे पिता जी की लाश वही सील की थी। तभी 9 बजे जब मैंने तहरीर दी थी। पुलिस वालों ने मेरे पिता की लाश ट्रैक्टर ट्राली मे रख ली और मुझे भी बैठा लिया था। फिर लाश को लेकर

थाने गये। थाने पर लाश ट्रैक्टर ट्राली में ही रखी रही थी। वहां पुलिस वालों ने लिखत पढ़त की। वहां मेरे कोरे कागजों पर अंगूठे लगवाये। थाने पर हम लोग एक घण्टा रुके थे। यह एक घण्टा थाने पर लाश की लिखा पढ़ी के लिये रुके थे। मेरे पिता की लाश सील घर से करके ले गये थे। लिखा पढ़ी थाने पर की थी। मुझे नहीं पता कि पुलिस ने जिन कोरे कागजों पर मेरे अंगूठे लगवाये थे उन पर क्या लिखा था मुझे नहीं पता कि उन कागजों का क्या हुआ जब लाश लेकर आये थे तो महमूद आलम गांव में ही रुक गये थे। ट्रैक्टर ट्राली से हमारे गांव से थाने आने में करीब 40 मिनट लगती है। मेरे खालू महमूद आलम मेरे गांव में ही थे रिस्तेदारी के नाते आये हुये थे।

थाने हैड मोहर्रिंग की सूचना पर मौके पर गया था। ये सूचना लगभग 7 -1/2 बजे मिली थी। सूचना के बाद थाने आया था उस समय एस.ओ. थाने पर नहीं थे। कागजात लेने का इन्द्राज नहीं कराया था। घटना स्थल पर 20.30 बजे हुआ था। उस समय एस.ओ. थे। उनके पास पंचायतनामा जिल्द वगैरा नहीं थी मृतक की आयु अनुमान पर लिखी गई थी थाने पर रात में 11 बजे वापसी हुई पंचायतनामे में एक नाम बाद में बढ़ाया गया है शेष कानिं० पहले से मौके पर मौजूद थे। मुझे लाश हवीव की दुकान के सामने मिली थी।

यह कहना गलत है कि थाने पर बैठकर सारे कागजात पूरे किए हो।"

42. Learned counsel for the appellants placed reliance upon the case law reported in 2006 (3) ACR 2726 (SC), Jagdish Murav vs. State of U.P. and Others, the Apex Court in para no. 12 observed as hereunder:

“.....FIR in a criminal case and particularly in a murder case is a vital and valuable piece of evidence for the purpose of appreciating the evidence led at the trial. The object of insisting upon prompt lodging of the FIR is to obtain the earliest information regarding the circumstance in which the crime was committed, including the names of the actual culprits and the parts played by them, the weapons, if any, used, as also the names of the eyewitnesses, if any. Delay in lodging the FIR often results in embellishment, which is a creature of an afterthought. On account of delay, the FIR not only gets bereft of the advantage of spontaneity,

danger also creeps in of the introduction of a coloured version or exaggerated story. With a view to determine whether the FIR was lodged at the time it is alleged to have been recorded, the Courts generally look for certain extremal checks. One of the checks is the receipt of the copy of the FIR, called a special report in a murder case, by the local Magistrate. If this report is received by the Magistrate late, it can give rise to an inference that the FIR was not lodged at the time it is alleged to have been recorded, unless, of course the prosecution can offer a satisfactory explanation for the delay in despatching or receipt of the copy of the FIR by the local Magistrate. Prosecution has led no evidence at all in this behalf. The second external check equally important is the sending of the copy of the FIR along with the dead body and its reference in the inquest report. Even though, the inquest report, prepared under Section 174 CrPC, is aimed at serving a statutory function, to lend credence to the prosecution case, the details of the FIR and the gist of statements recorded during inquest proceedings get reflected in the report. The absence of those details is indicative of the fact that the prosecution story was still in an embryo state and had not been given any shape and that the FIR came to be recorded later on after due deliberations and consultations and was then ante-timed to give it the colour of a promptly lodged FIR. In our opinion, on account of the infirmities as noticed above, the FIR has lost its value and authenticity and it appears to us that the same has been ante-timed and had not been recorded till the inquest proceedings were over at the spot by PW.8"

43. Further reliance was placed upon the judgment of this Court delivered in Criminal Appeal No.3019/1986 (Bachhi Lal and Others vs. State of U.P.) dated 24.4.2019, this Court in paragraph no. 31 observed as hereunder:

“Testing the evidence on record on the touchstone of the principles enunciated hereinabove for ascertaining whether FAR. in this case is ante-timed, we find that neither the special report was sent by the Investigating Officer or the constable moharir promptly to the C.O. nor the original F.I.R. accompanied the dead body when it was dispatched for post mortem examination. The deposition made by PW6 that the special report was sent on 20.03.1985 and received back on 23.03.1985 but both the entries regarding the dispatch of the special report and its receipt were made on the same day i.e. on 23.03.1985 creates a doubt about the credibility of the prosecution claim that special report was sent on 20.03.1985. The total inability of the prosecution to furnish any plausible explanation for the inordinate delay of 24 hours in delivering the body of the deceased by PW-6, constable Raspal to PW4, Dr. Keshav Gupta which was given to him by the Investigating Officer on 19.03.1985 at 11:00 a.m. for post-mortem examination gives rise to only inference that is the F.I.R. had not come into existence either at the time of the inquest or till the morning of 20.03.1985. Hence, we hold that the F.I.R. in this is ante-timed. “

44. Thus, upon complete analysis of record, we find that special report of the case has not been sent according to rule and regulation which is proved from the statement of P.W.10

Mahak Singh Head Constable. The statement of P.W.1, PW.5 and P.W.11 further reveals that FIR in this case is ante-timed.

45. On the point for determination no.5, learned counsel for the appellants submitted that learned trial Judge misread the evidence of P.W.1, PW.2 and P.W.3 to the effect that they are not eye-witnesses of the incident. He further failed to notice that what will be result of non-production of material witness (Riyasat and Tarachand) by the prosecution, the trial court only say that it is not necessary that prosecution must produce every witness. It is also material that learned trial court while acquitting the accused under Section 307 IPC and Section 25 of the Arms Act recorded that accused Noor Mohammad and Deen Mohammad were present on the roof of their house from where they fired which is 400-500 yard away from the place of incident and there are no independent witness of the recovery, as such Section 25 of the Arms Act is also not made out but convicted the accused-appellants under Section 302/34 & 323/34 IPC.

46. On the point of eye-witness account as well as on interested and related witness, the learned counsel for the appellants placed reliance upon the case law reported in **1994 (Supp 2) SCC 289 Mani Ram vs. State of U.P. and (2018) SCC 435 Sudhakar @ Sudharasan vs. State**. In the aforementioned cases, the Apex Court acquitted the accused on the ground that there exists reasonable doubt in the case as the case of prosecution is unsupported by independent witnesses and filled with suspicious circumstances.

47. Learned A.G.A., Mr. A.N. Mulla and Mr. S.N. Mishra on the other hand, supported the impugned judgment of conviction and sentence dated 14.1.2016 contending that FIR is not antedated and on the ground of latches in the investigation, prosecution case cannot be doubted. Prosecution case is fully proved from the statement of PW.1, PW.2 and PW.3. The appeals filed by accused-appellants have no merit and are liable to be dismissed. On the point of defective investigation, learned AGA has cited following case laws:

- (i) **AIR 2019 SC 519, Jafel Biswas and others vs. State of West Bengal** (Relevant paras are paragraph nos. 20 to 23)
- (ii) **(2013) 10 SCC 192, Hema vs. State through Inspector of Police, Madras** (Relevant paras are paragraph nos. 10 to 18)
- (iii) **AIR 2010 SC 3718, C. Muniappan and others vs. State of Tamilnadu** (Relevant para is paragraph no. 44)
- (iv) **1972 (2) SCC 640, Pala Singh and another vs. State of Punjab** (Relevant paras are paragraph nos. 3 & 7).

48. This Court has considered the entire evidence on record i.e. eye-witness account, non-production of material evidence medical evidence as well as defective investigation while deciding the point for determination nos. 1 to 5 and the defective investigation.

49. In view of the above facts and circumstances of the case, it is borne out from the records that point for determination no.1 is answered in negative to the effect that P.W.-1, P.W.-2 and P.W.-3 were not eye-witness of the incident and their evidence are not reliable. Further, point for determination no.2 is answered in affirmative to the effect that prosecution has not produced the best evidence to prove its case and deliberately withheld the material witnesses without any justification. Point for determination no. 3 is also answered in affirmative to the effect that postmortem report does not support the prosecution case as P.W. 1 in his cross-examination stated that person who fired shot was 7 steps away from deceased father Aslam while in the postmortem report blackening was found in the injury. Point for determination no. 4 is answered in affirmative to the effect that FIR is ante-timed and investigation of the case is defective. The point for determination no.5 is also answered in affirmative.

50. In view of above, we find that the evidence of alleged eye witnesses produced by prosecution does not inspire confidence. There exists a doubt whether they are eye-witnesses of the incident or not, the place of incident is also doubtful. Oral evidence is also not consistent with the medical evidence, FIR is ante-timed and there are no independent witness of the incident. Prosecution has failed to prove the charges against the accused-appellants beyond reasonable doubt.

51. Accordingly, the Appeals are allowed. The impugned judgment / order of conviction and sentence dated 14.1.2016 are set aside. Appellants are acquitted of the charges framed

against them. The accused appellant Alam in Criminal Appeal No.888/2016 is in jail. He shall be released from jail forthwith. Accused-appellants Noor Mohammad and Deen Mohammad in Criminal Appeal No.639/2016 are on bail. Their bail bonds and sureties are discharged.

Let a copy of the judgment along with the original record be sent to the court below for compliance.

**Order Date:- 26.5.2022**

**C.Prakash**

**(Chandra Kumar Rai, J.) (Mahesh Chandra Tripathi, J.)**