A.F.R.

Chief Justice's Court
Case :- CRIMINAL APPEAL No. - 693 of 1983
Appellant :- Amar Singh
Respondent :- State Of U.P.
Counsel for Appellant :- Satya Prakash Srivastava,Lalit Singh,S.P.Srivastava,Sarvesh,Yashpal Yadav
Counsel for Respondent :- Satya Prakash,AGA

Hon'ble Govind Mathur,Chief Justice
Hon'ble Saurabh Shyam Shamshery,J.

[Per : Hon'ble Saurabh Shyam Shamshery, J.]

1. Heard learned counsel for the parties and perused the record.

2. The appellant-accused has called in question the judgment and order dated 19.3.1983 whereby the learned IV Additional District and Sessions Judge, Kanpur has convicted the appellant-accused in S.T. No.58 of 1982 *(State vs. Amar Singh and others)* for the offence under Section 302 IPC and sentenced to life imprisonment. The rest of three co-accused were however, acquitted.

3. The background aspect so far as relevant for the present appeal could be noticed in brief as follows :-

(i) PW-1 - Sunil Dutt, minor son of deceased submitted a written complaint to the effect that on 12.10.1981, he along with his sister namely Sunita Verma (PW-2), minor daughter of the deceased were going on two separate bicycles to their school at 'about 9 a.m. along with their father (since deceased) who was teacher by profession. When they reached near the patri of Nehar, appellant-accused along with other three co-accused, who were hiding in the bushes, suddenly came out and attacked his father. The appellant-accused and co-accused Kripal Singh were armed with pistol and other two co-accused namely Mardan Singh and Sultan Singh were armed with lathi. The father of appellant (since

deceased) got down from the bicycle. PW-1 and PW-2 ran towards one side and hid themselves. Both PW-1 and PW-2 witnessed the occurrence wherein, appellant-accused fired the deceased with fire arm on the right side of his chest. Co-accused Kripal Singh also fired from country made pistol on the left cheek of the deceased. Due to assault, father of PW-1 fell down and other co-accused Mardan Singh and Sultan Singh, who were armed with lathi assaulted the deceased. Seeing the occurrence, PW-1 and PW-2 started crying. At that time, their uncle – Lala Ram s/o Shiv Pal, Nathu Ram s/o Shiv Ram and Santosh Kumar (PW-3) s/o Govind Prasad of the village came to the spot. It was further mentioned in the written complaint that earlier there was some dispute between the deceased and appellant-accused regarding the cutting of drain and an FIR was lodged against the appellant-accused by the deceased and due to this enmity, accused persons killed the deceased.

(ii) The FIR was lodged at about 3:15 p.m. on 12.10.1981 i.e. on the day of occurrence. The distance between the place of occurrence and the police station was ten miles (about 16 km).

(iii) The prosecution in order to bring the guilt of accused persons home, examined the following witnesses :-

Sunil Dutt (PW-1), Sunita Verma (PW-2), Santosh Kumar (PW-3), Jagmohan Lal (PW-4), Ram Sewak Singh (PW-5), Babu Ram (PW-6), Mahendra Singh (PW-7), Suraj Prasad Agnohotri (PW-8), Mahadeo Singh (PW-9), Dr. P.C. Chaurasia (PW-10).

(iv) PW-1 is the minor son of deceased and was around 14 years old, when the incident took place, his evidence was recorded on 27.7.1982. In his testimony, he repeated the version as mentioned in the written complaint. PW-1 was subjected to detail cross-examination.

(v) PW-2, daughter of the deceased was around 15 years of age, also supported the testimony of PW-1. She was also cross-examined in detail. Both PW-1 and PW-2 were eye witnesses to the occurrence.

(vi) PW-3 - Santosh Kumar has stated in his testimony that on 12.1.1981 around 9 a.m., he heard the sound of firing and when he came near the place of occurrence, which was at a distance of 100 steps, he saw the accused Amar Singh and co-accused Kripal Singh having armed with country made pistol. The other co-accused namely Mardan Singh and Sultan Singh were assaulting the deceased with lathis at that time. On chasing, the accused ran away. He was also cross-examined in detail.

(vii) PW-5 - Ram Sewak Singh - Sub-Inspector, who was Investigating Officer of the case, stated in his testimony that he recorded the written complaint of PW.1 on 12.10.1981 and thereafter, he proceeded to the place of occurrence, however due to night, no further investigation could take place. On the next day i.e. 13.10.1981, panchayatnama was prepared. The body of the deceased was seized in presence of the witnesses. Site plan was prepared, sample of plain as well as blood stained earth was taken. This witness was also cross-examined in detail.

(viii) PW-8 - Suraj Prasad Agnihotri, who was appointed as Sub-Deputy Inspector of Schools, was examined for the purpose of temporary transfer of deceased.

(ix) PW-10 - Dr. P.C. Chaurasia, who conducted the post-mortem of the deceased, was also examined. The following injuries were found on the body of deceased :-

(i) Gun shot wound 1 c.m x 1 c.m. x chest cavity deep on right side of chest in its outer aspect 6 c.m. below the right axilla and 6 c.m. outer to the right nipple in inter-coastal space between

5th and 6th rib. Blacking and charing were not present. Margins were inverted.

(ii) Lacerated wound 2.5 c.m. x 1.5 c.m. x muscle deep or inner aspect of right upper arm 5.6 c.m. below the centre of axilla.

The Doctor had opined that the death of deceased took place about 2 or 2½ days before the post-mortem and death was caused due to shock and hemorrhage as a result of the fire arm injuries. This witness was also cross-examined.

4. After the prosecution evidence was over, statement of appellant-accused was recorded under Section 313 Cr.P.C wherein he denied the evidence put against him. No defence witness was examined.

5. The IVth Additional District and Sessions Judge, Kanpur after considering the evidence on record and arguments raised by prosecution as well as from the defence side, convicted the appellant-accused under Section 302 IPC, however, acquitted the other co-accused namely Kripal Singh, Sultan Singh and Mardan Singh, vide judgment and order dated 19.3.1983. On the same day, sentence was also pronounced and the accused-appellant was sentenced to undergo imprisonment for life. The judgment and order dated 19.3.1983 is impugned in the present criminal appeal.

6. Learned counsel for the appellant-accused has challenged the impugned judgment mainly on the following grounds :-

(i) <u>FIR is anti-timed</u> - Learned counsel has pointed out that the occurrence took place on 12.10.1981 at about 9 A.M., however, the FIR was lodged on the same day at about 3:50 P.M. The distance between place of occurrence and police station was ten miles. According to learned counsel, delay of about more than six hour was fatal for the entire prosecution story. He further submitted that the written complaint, submitted by the PW-1 was

tutored and was not written by PW-1. It was further submitted that the FIR was anti-timed and tainted. The genesis of the occurrence was withheld.

Learned counsel also submitted that there is no G.D. entry about the recording of the written Tehrir. Learned counsel relying upon evidence of P.W-5 submitted that Investigating Officer was not even sure about the time of leaving police station and the time of reaching the place of occurrence.

Learned counsel has relied upon the judgment of the Supreme Court in ***Mehraj Singh vs. State of U.P., 1994 (5) SCC 188***, wherein it has been held in para 12 that :-

> *"12. 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 external 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 Cr.P.C. 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."

(ii) <u>Testimony of the child witnesses cannot be relied :-</u>

It has been argued by learned counsel for the appellant-accused that PW-1 and PW-2, the alleged eye-witnesses were child witnesses, therefore, it was not safe to have relied upon their testimonies. From the evidence of PW-1 and PW-2, learned counsel for the appellant-accused submitted that the presence of these alleged eye-witnesses at the place of occurrence was doubtful. Further conduct of the PW-1 and PW-2 was not even natural as they had not rushed to save their father rather they ran away from the place of occurrence. To buttress his argument, learned counsel has relied upon the judgment passed by the Supreme Court in ***Digamber Vaishnav and another vs. State of Chattisgarh, 2019 4 SCC 522,*** wherein it has been held in para 22 and 23 that :-

22. *This Court has consistently held that evidence of a child witness must be evaluated carefully as the child may be swayed by what others tell him and he is an easy prey to tutoring. Therefore, the evidence of a child witness must find adequate corroboration before it can be relied upon. It is more a rule of practical wisdom than law. [See Panchhi and others v. State of U.P., (1998) 7 SCC 177, State of U.P. v. Ashok Dixit and another, (2000) 3 SCC 70, and State of Rajasthan v. Om prakash, (2002) 5 SCC 745].*

23. *In Alagupandi alias Alagupandian v. State of Tamil*

Nadu, (2012) 10 SCC 451, this Court has emphasized the need to accept the testimony of a child with caution after substantial corroboration before acting upon it. It was held that:

"36. It is a settled principle of law that a child witness can be a competent witness provided statement of such witness is reliable, truthful and is corroborated by other prosecution evidence. The court in such circumstances can safely rely upon the statement of a child witness and it can form the basis for conviction as well. Further, the evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and that there exists no likelihood of being tutored. There is no rule or practice that in every case the evidence of such a witness be corroborated by other evidence before a conviction can be allowed to stand but as a rule of prudence the court always finds it desirable to seek corroboration to such evidence from other reliable evidence placed on record. Further, it is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable."

(iii) <u>Accused-appellant is entitled of benefit of acquittal of other three co-accused -</u>

Learned counsel for the appellant-accused pointed out on the basis of the prosecution evidence, three co-accused were acquitted as the prosecution evidence was not found to be sufficient to prove the guilt of the said three co-accused. Since the prosecution evidence was found not sufficient to convict the other three co-accused, therefore, same set of evidence could not be sufficient to prove the guilt of appellant-accused also. In this regard, learned counsel has relied upon paragraph 43 of the impugned judgment, which is quoted hereinafter :-

43. *As already stated above, the presence of P.W.1 and P.W.2 at the time and place of occurrence is natural and cannot be doubted. No dobut there are exaggerations in their statements which appears to be solely because they*

> *were made in the F.I.R. Itself in consultation with the police so as to include accused Kripal Singh, Mardan Singh and Sultan Singh in the commission of the offence. In view of the fact that the statement of P.W.1 and P.W.2 to the effect that accused Kripal Singh had also fired at the deceased which struck him in the left cheek; and that accused Mardan Singh and Sultan Singh were pressing the neck of the deceased, are in contradiction with the medical evidence and, therefore, the participation of these three accused in the commission of the offence is not without reasonable doubt and suspicion."*

(iv) ***No motive and no recovery -*** Learned counsel for the appellant-accused also submitted that there was no motive of the appellant-accused to cause death of the deceased and prosecution was failed to recover even the weapon used in the crime. Absence of motive and absence of alleged recovery of weapon used in occurrence was fatal for entire prosecution case.

7. Per contra, learned counsel appearing on behalf of the State supported the impugned judgment.

8. Heard learned counsel for the parties and perused the materials available on record.

9. Our discussions on the submissions raised by learned counsel for the parties are as follows :-

(i) Whether or not the First Information Report was anti-timed ?

From the evidence on record, it is evident that the occurrence took place on 12.10.1981 around 9 a.m. and the FIR was lodged at police station Mangalpur, District Kanpur Nagar on the same day at about 3:15 in the evening. The distance between the place of occurrence and the police station was about ten miles i.e. about 16 kms. In the present case, deceased was the father of PW-1 and PW-2, who witnessed the assault on their father. Both

PW-1 and PW-2 were minor on the date of incidence. Delay of about six hours in lodging the FIR at the police station, which is about 16 kms. from the place of occurrence, by the minor child, whose father was shot and died on the spot, cannot be said to be unreasonable delay and the FIR cannot be held to be anti-timed. Considering mental position of PW-1 when his father was assaulted to dead before him, delay of six hours in lodging an FIR was very well explained.

In the facts and circumstances of the case, lodging of the FIR was prompt. It is also relevant to note here that the PW-1 in his cross-examination has specifically stated that the Tehrir (report) was scribed by him after taking out a leaf from his biology copy. At the time of scribing the report, he was also weeping and it took about 1½ hour in writing the report. Therefore, the submission made on behalf of the learned counsel for the appellant-accused regarding the FIR to be anti-timed is rejected.

It would be relevant to quote para 26, 27 and 28 of the recent judgment passed by the Apex Court in the matter of ***Satya Raj Singh vs. State of Madhya Pradesh reported in*** (***2019) 3 SCC 615*** that :-

> ***"24.*** *So far as the next argument of the learned counsel for the appellant, that since there was delay in filing of FIR, the prosecution case should not be believed, is concerned, it was also rightly repelled by the High Court..*
>
> ***27.*** *It is not in dispute that the incident in question occurred around 7.30 p.m. on 19.09.1999, whereas the FIR was lodged by PW1 on the next day, i.e., 20.09.1999 at around 9 a.m. It is also not in dispute that the Police Station was around 25 KM away from the place of occurrence.*
>
> ***28.*** *In our opinion, since Bhaiya died after few hours of the incident and by that time it was dark night, it was, therefore, not possible for the complainant to go to the Police Station which was around 25 KM away from the place of occurrence immediately in the night to lodge the report/FIR. In these circumstances, if PW1 left for lodging report/FIR on the next*

day morning and lodged the report/FIR around 9.30 a.m. it cannot be said that there was delay in lodging the report/FIR."

The Apex Court has also held in para 14 and 15 of the judgment passed in ***Ravinder Kumar and Another vs. State of Punjab reported in (2001) 7 SCC 690*** that :-

14. *When there is criticism on the ground that FIR in a case was delayed the court has to look at the reason why there was such a delay. There can be a variety of genuine causes for FIR lodgment to get delayed. Rural people might be ignorant of the need for informing the police of a crime without any lapse of time. This kind of unconversantness is not too uncommon among urban people also. They might not immediately think of going to the police station. Another possibility is due to lack of adequate transport facilities for the informers to reach the police station. The third, which is a quite common bearing, is that the kith and kin of the deceased might take some appreciable time to regain a certain level of tranquillity of mind or sedativeness of temper for moving to the police station for the purpose of furnishing the requisite information. Yet another cause is, the persons who are supposed to give such information themselves could be so physically impaired that the police had to reach them on getting some nebulous information about the incident.*

15. *We are not providing an exhausting catalogue of instances which could cause delay in lodging the FIR. Our effort is to try to point out that the stale demand made in the criminal courts to treat the FIR vitiated merely on the ground of delay in its lodgment cannot be approved as a legal corollary. In any case, where there is delay in making the FIR the court is to look at the causes for it and if such causes are not attributable to any effort to concoct a version no consequence shall be attached to the mere delay in lodging the FIR. [Vide Zahoor vs. State of UP (1991 Suppl.(1) SCC 372; Tara Singh vs. State of Punjab (1991 Suppl.(1) SCC 536); Jamna vs. State of UP (1994 (1) SCC 185). In Tara Singh (Supra) the Court made the following observations:*

"It is well settled that the delay in giving the FIR by itself cannot be a ground to doubt the prosecution case. Knowing the Indian conditions as they are we cannot expect these villagers to rush to the police station immediately after the occurrence. Human nature as it is,

> *the kith and kin who have witnessed the occurrence cannot be expected to act mechanically with all the promptitude in giving the report to the police. At times being grief-stricken because of the calamity it may not immediately occur to them that they should give a report. After all it is but natural in these circumstances for them to take some time to go to the police station for giving the report.*"
>
> ***(emphasis supplied)***

In order to prop up the above view, we feel called to rely upon the decision in ***Sheikh Hasib alias Tabarak Vs. State of Bihar reported in 1972 (4) SCC 773*** on the issue of relevancy of First Information Report. Part of Para 4 being relevant is abstracted below.

> *"The legal position as to the object, value and use of first information report is well settled. The principal object of the first information report from the point of view of the informant is to set the criminal law in motion and from the point of view of the investigating authorities is to obtain information about the alleged criminal activity so as to be able to take suitable steps for tracing and bringing to book the guilty party. The first information report, we may point out, does not constitute substantive evidence though its importance as conveying the earliest information regarding the occurrence cannot be doubted It can, however, only be used as a previous statement for the purpose of either corroborating its maker Under Section 157 of the Indian Evidence Act or for contradicting him Under Section 145 of that Act. It cannot be used for the purpose of corroborating or contradicting other witnesses."*
>
> ***(Emphasis supplied)***

(ii) Testimony of the child witnesses (PW-1 and PW-2) are reliable or not ? :- We have carefully gone through the evidence of PW-1 - Sunil Dutt and PW-2 - Sunita Verma. Both the witnesses who were the eye-witnesses had fully supported the prosecution version in their examination-in-chief. Both the witnesses remained consistent and unshattered even during their detailed cross-examination. They also described the manner of assault. Both the witnesses, had seen the occurrence from a short distance of 10-12

steps. The witnesses were going along with their father to attend their school, and it has come very specifically in the evidence that they were following the normal route for their school. Both the witnesses have also mentioned about the prior enmity between the accused-appellant and the deceased and lodging of FIR by the deceased against the appellant-accused under Section 352, 504, 506 IPC. Even before recording of the testimony of the child witnesses, the learned trial court had ascertained the mental intelligence for the purpose of recording of evidence of the child witnesses. In the ***Digambar Vaishnav (Supra),*** the Apex Court has emphasized the need to accept the testimony of the child with caution. The Apex Court in the matter of ***Yogesh Singh vs. Mahabeer Singh and others reported in (2017) 11 SCC 195*** has considered the issue of testimony of the child witnesses in para 22 and 23 that :-

> *"**22.** It is well-settled that the evidence of a child witness must find adequate corroboration, before it is relied upon as the rule of corroboration is of practical wisdom than of law. (See Prakash Vs. State of M.P., (1992) 4 SCC 225; Baby Kandayanathi Vs. State of Kerala, 1993 Supp (3) SCC 667; Raja Ram Yadav Vs. State of Bihar, (1996) 9 SCC 287; Dattu Ramrao Sakhare Vs. State of Maharashtra, (1997) 5 SCC 341; State of U.P. Vs. Ashok Dixit & Anr., (2000) 3 SCC 70; Suryanarayana Vs. State Of Karnataka, (2001) 9 SCC 129).*
>
> ***23.** <u>However, it is not the law that if a witness is a child, his evidence shall be rejected, even if it is a found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring.</u> [Vide Panchhi Vs. State of U.P., (1998) 7 SCC 177]."*
>
> ***(emphasis supplied)***

For ready reference, relevant part of the testimony of PW-1 and PW-2 (cross-examination) are reproduced hereinafter :-

PW-1 (Sunil Dutt) :-

"11– मेरे गांव से 1 फरलांग नहर दक्षिण की ओर है। नहर पश्चिम से पूरब को बहती है। अपने गांव से नहर पिन्डार्थू पुल होकर आते है। इस पुल से थोड़ी दूर हटकर नहर की बम्बी निकली है जो दक्षिण को जाती है। 4–5 फरलांग बाद मुगल रोड़ से मिल जाती है। यही सड़क पश्चिम औरइय्या जाती है। बम्बी से औरइय्या 6–7 मील है मुगल रोड़ के रास्ता से। उस पुल के पश्चिम दूसरा पुल पिन्डार्थू का पुराना है। इन दोनों पुलों में 3–4 फरलांग का अन्तर है। इस पुराने पुल के पश्चिम तरफ कसोलर का खारजा है। इस खारजा पर कोई निर्माण नहीं चल रहा है। पुराने पुल से एक मील पर तुतुवा पुर का पुल है। मेरे पिता तुतुवापुर में पढ़ाते है। तुतुवा पुर पुल से व स्कूल दक्षिण मौजा तुतुआपुर में है। नहर के दक्षिण तुतुवा पुर की तरफ बम्बी चलती है। मौजा तुतुआपुर बम्वी के दक्षिण मिला हुआ है। नहर व बम्बी के बीच में 100–125 गज का फासला है। तुतुवापुर के पश्चिम गाजीपुर का पुल लगभग 1 मील के फासले पर है। गाजीपुर के पुल से पश्चिम भंडारीपुर का पुल करीब 1–1½ मील है। भडारीपुर के पुल के पश्चिम मिरजापुर का पुल 5–6 फरलांग दूर है। मिर्जापुर के पुल से राहतपुर का पुल एक या स्वा मील पश्चिम में है। इस पुल से मेरा स्कूल 2–3 फरलांग है। गांव से स्कूल पहुचने में करीब एक या पौन घन्टा लगता है। यह गलत है कि मैं या मेरी बहेन ममाने रूक जाते थे।

11– घटना के दिनों रबी की जुताई चल रही थी। सुबह 4–5 बजे से 11 बजे दिन तक खेतों की जुताई करते थे। उस दिन रास्ते में खेतों में जुताई नहीं हो रही थी घटना स्थल तक इधर–उधर को आदमी जुताई करते नहीं देखा। कसोला खारजा से एक फरलांग पश्चिम में पिता के गोली लगी।

14– रिपोर्ट मैंने अपने आप से लिखी थी किसी की मदद से नहीं। इसके पहले मैं ने रिपोर्ट नहीं लिखी। मौके पर किसी ने कहा था कि रिपोर्ट लिखकर ले जावो। रिपोर्ट लाश के 2–4 कदम दूर बैठकर लिखी थी। कागज कापी से फाड़ लिया था। <u>रिपोर्ट लिखते समय रोना पीटना मचा था। रिपोर्ट लिखते समय मेरे आंसू बहे रहा था। वालोजी के कापी से कागज फाडकर रिपोर्ट लिखी थी। वह कापी दोनो तरफ सादी थी। रिपोर्ट लिखने में एक 1–1–1/2 घंटा लगे थे। रिपोर्ट फाउन्टेन पेन से लिखी थी। फिर कहा डाटपेन से लिखी थी।</u> रिपोर्ट में यह सही लिखा था कि लाश के पास अपने घर वालों व गांव वालों को छोड़ कर आया हूँ।

टू बी कान्टीन्यूड पुट अप टूमारो

कोर्ट सर्टिफिकेट

ह0अ0

पंचम एडि0 डिस्ट्रिक्ट एण्ड

सेशन जज कानपुर

15– <u>28–7–82</u>

कान्टीन्यूड आन ओथ.

रिपोर्ट में मैंने लिख दिया था कि हम लोगों ने साइकिल गिरा दिया

पिताजी आगे बढ़ गये हम लोग पीछे रह गये। दरोगा जी को अपने बस्ते नहीं दिखाये थे। बस्ते मौके पर छोड़ गये थे। पिता जी की व अपनी साइकिल दरोगा जी को नहीं दिखाई दरोगा जी ने साइकिल व वस्ते की वावत पूंछा था मौके पर। चूँकि वस्ते व साइकिले मौके पर नहीं थी इसलिये नहीं दिखाई। बाद में साइकिल व बस्ते मुझे नहीं मिले पता नहीं कहां गये। 15–20 कदम दूर से मुलजिमान को पहली बार देखा। उस समय मुलजिमान बम्बे की पटरी के उत्तर 10–12 हाथ पर थे। वह जगह बम्बे की पटरी से 2–1/2 फुट नीचे थी। मेरी नजर अमरसिंह के चिल्लाने पर मुलजिमान पर पडी थी। अमरसिंह के ललकारने पर मुलजिमान के हथियार भी देखे थे। उन्हें देखकर हमले का भय भी लगा था। साइकिल छोडकर पिताजी पश्चिम की ओर बढे। 10–12 कदम बढे तभी हमला हुआ था। मुलजिमान ने आगे से पश्चिम की ओर से घेरा फिर कहा घेरा नहीं तुरन्त नहर पटरी से फायर दिया। मुलजिमान पटरी पर मेरे पिता के उत्तर थे 2 मुलजिम पश्चिम में आ गये 2 उत्तर की तरफ थे उत्तर में कृपाल सिंह व अमरसिंह थे। पश्चिम में मुलजिमान मेरे पिता से हाथ 2 हाथ दूर थे। उत्तर वाले भी इतनी दूर पर थे। मुलजिमान ने आते ही पिता जी पर फायर कर दिया। गोली चलाने के लिये मुलजिमान पीछे नहीं हटे थे। तमन्चों की नालें करीब 2–1/2 इंच मोटी थी। मालूम नहीं कृपाल सिंह की गोली पिताजी के लगी या नहीं। कृपाल सिंह ने उत्तर से फायर किया उस समय मेरे पिता का मुंह दक्षिण ओर था और अमरसिंह के फायर करते समय मेरे पिता का मुंह पश्चिम तरफ था। रिपोर्ट में यह लिखा था कि कृपाल सिंह ने फायर किया जो मेरे पिता के बांई गाल पर लगा जिससे वह गिर गये। दरोगा जी को बयान दिया था कि कृपाल सिंह ने तमन्चा से फायर किया जो पिता के बांई गाल पर लगा और वह गिर गये। रिपोर्ट में मैंने यह बात सही लिखी थी। पूरी घटना 1 या 2 मिनट में हो गई थी। लाठी से गला दबाने से गले में गड्ढा बन गया था। पंचायतनामा के समय मैं मौजूद था। यह गलत है कि मैंने कोई घ ाटना नहीं देखी और सिखाने से झूठ बोल रहा हूँ।

PW-2 (Sunita Verma)

"तुतवा पुर गांव से दो मील है। राहतपुर गांव से 6–7 मील है। नहर से तितवा करीब 2, 3 फरलांग है पुलिस से। तितवापुर से पिता जी साइकिल से चलाकर ले जाती थी। मैं साइकिल पर पीछे बैठी थी।

घर से चलने पर मौके तक कई लोग मिले थे। जान पहचान के। कोई नहीं था। आस पास के खेतों में जुताई नहीं हो रही थी। जुताई सूर्य निकलने से पहले ही बन्द हो जाती है।

मुल्जिमान को मैंने पहले पहेल 6–7 कदम की दूरी से देखा था। मुलजिमान उत्तर से आए थे। मुलजिमान ललकारते हुए नहर की पटरी पर चढ गए थे। मुलजिमान जिधर हम जा रहे थे उससे आगे थे। यह सही है कि साईकिलो से उतरते उतरते यह लोग पटरी पर आ गए थे। सही है कि मुलजिमान ने हमें पश्चिम से घेर लिया था। तब पिताजी कुछ पच्छिम को भागे और हम पूर्व को हट गए। पिताजी 10–12 कदम पश्चिम भागे थे ललकारने की जगह से गोली मारने से पहले नहीं घेराया। ऐसा नहीं था कि गोली मारने से पहले घेरकर खडे हो गए हो। हम मुलजिमान के ललकारने पर पूर्व को हो गए थे पिता जी के घेरने पर नहीं। मैंने दरोगा जी को यह बयान था कि ''नहर पर आकर चारो घेरकर खडे हो गए हम दोनों भाई बहन डर के मारे दूर जाकर खडे हो गई अमरसिंह ने मेरे पिता जी पर फायर किया। दरोगाजी ने मेरा वयान ऐसा कैसे लिख लिया नहीं कह सकती।

कृपाल सिंह का फायर पिता जी को कहां लगा था लगा कि नहीं

मैंने नहीं देखा। मैंने कृपालसिंह का फायर पिता की कनपटी पर लगते नहीं देखा। मैंने केवल एक गोली लगते देखा था। मैंने दो गोली लगते नहीं देखा था। मैंने दरोगाजी को यह नहीं कहा था कि कृपाल सिंह का फायर कनपटी पर लगा। दरोगाजी को मैंने दो गोली लगना नहीं बताया था। अगर मेरे वयान में कनपटी पर फायर लगना व दो गोली लगना कैसे लिख लिया नहीं कह सकती।

लाठी से गला 1, 2 सेकेन्ड? के लिए दवाया होगा। तब तक मलखान सिंह व दूसरी तरफ सुलतानसिंह लाठी दवा रहे थे। मेरे पिताजी खून से लतपथ हो गए थे।

कुल घटना में 1, 2 मिनट लगे होंगे। हमारे चिल्लाने के तुरन्त बाद लालाराम आदि आ गए थे। मैंने इन्हें 35–40 कदम की दूरी से देखा था। यह लोग पश्चिम तरफ से आए थे। ऐसा नहीं कि (अप0) पूर्व तरफ से आए हों। जब गवाहान को मैंने देखा तब मुलजिमान लाठी से गला दवा रहे थे। तीनों गवाहान तब साइकिल पर थे। उन्होंने साइकिल वहीं छोड़ दी जहां मैंने उन्हें पहले पहल देखा। साइकिल छोड़कर पिताजी की तरफ ईटा लेकर दौड़े थे। 15–20 कदम पिताजी से दूर थे कि मुलजिमान ने गला दवाना छोड़ दिया और भागे। ईट पत्थर फेंका कि नहीं ध्यान नहीं ललकारा था। ईट पत्थर हाथ में लेकर।

गवाहान ने खुद मारते हुए देख लिया था हमने उन्हें किससा नहीं बताया। गवाहान ने मारने वालों की तलाश नहीं की। पीछा भी नहीं किया। मैंने व भाई ने पिता जी को नही छ ुवा गवाहान ने छूने नहीं दिया। मैंने ध्यान नहीं दिया कि पिताजी के साइकिल का हैण्डिल टेहड़ा हो गया था कि नहीं। पुलिस के आने तक मैं घटना स्थल पर ही रही थी। पुलिस रात 10–1/2, 11 बजे आई थी। उजाली रात थी कोई गैस लालटेन नहीं जलाई थी। पुलिस के आने पर भी कोई रोशनी नहीं की गई।

From the above, it is clear that the child eye-witnesses (PW1 and PW-2) were reliable and truthful as well as they were not tutored as they stood unshaken even during their long and gruelling cross-examination. The witnesses have described the entire incident in very specific terms. The appellant-accused belonged to the same village, therefore, there was no difficulty in recognizing him by PW-1 and PW-2.

In view of the above, the submission made by learned counsel for the appellant-accused that the evidence of the child witnesses are liable to be rejected, cannot be accepted. We have scanned carefully the testimony of the both the child witnesses and we are of the definite view that both the child witnesses had seen the incident and are reliable and truthful. Both the witnesses had in very specific words stated in their cross-examination that

accused-appellant fired on chest of their father. They saw the entire incident from a short distance. Their presence at the place of occurrence was natural as they were going to school as per their daily routine. Argument of the appellant-accused cannot be sustained.

(iii) <u>Whether or not non - recovery of weapon is fatal for prosecution ?-</u> Argument is raised on behalf of appellant-accused that in the present matter, neither weapon used in the occurrence nor bicycle on which deceased was travelling were recovered. Therefore, in the absence of such recovery, conviction of the appellant-accused was untenable. In this regard, judgment passed by the Hon'ble Supreme Court ***Mritunjoy Biswas Vs Pranab aslias Kuti Biswas and another reported in 2013 (12) SCC 796*** is relevant wherein it has been held that ***:-***.

> *"33. The learned counsel for the respondent has urged before us that there has been no recovery of weapon from the accused and hence, the prosecution case deserves to be thrown overboard and, therefore, the judgment of acquittal does not warrant interference.*
>
> *34. In Lakshmi and Others v. State of U.P. [(2002) 7 SCC 198 : (AIR 2002 SC 3119 : 2002 AIR SCW 3596)], this Court has ruled that*
>
> *"Undoubtedly, the identification of the body, cause of death and recovery of weapon with which the injury may have been inflicted on the deceased are some of the important factors to be established by the prosecution in an ordinary given case to bring home the charge of offence under Section 302 IPC. This, however, is not an inflexible rule. It cannot be held as a general and broad proposition of law that where these aspects are not established, it would be fatal to the case of the prosecution and in all cases and eventualities, it ought to result in the acquittal of those who may be charged with the offence of murder".*
>
> *35. In Lakhan Sao v. State of Bihar and Another [(2000) 9 SCC 82 : (AIR 2000 SC 2063 : 2000 AIR SCW 1955)], it has been opined that the non-recovery of the pistol or spent*

cartridge does not detract from the case of the prosecution where the direct evidence is acceptable.

33. In State of Rajasthan v. Arjun Singh and Others [(2011) 9 SCC 115 : (AIR 2011 SC 3380 : 2011 AIR SCW 5295)], this Court has expressed that:

"18..... mere non-recovery of pistol or cartridge does not detract the case of the prosecution where clinching and direct evidence is acceptable. Likewise, absence of evidence regarding recovery of used pellets, bloodstained clothes, etc. cannot be taken or construed as no such occurrence had taken place".

Thus, when there is ample unimpeachable ocular evidence and the same has been corroborated by the medical evidence, non-recovery of the weapon does not affect the prosecution case."

As held by Apex Court, non-recovery of weapon or other relevant material will not be fatal for the prosecution, as in the present case, testimony of the eye-witnesses was consistent and reliable. Thus, the argument raised on behalf of appellant-accused cannot be accepted.

(iv) Whether or not absence of motive is fatal for prosecution ? :- In the evidence of PW-1 and PW-2, it has come that there was prior enmity between the deceased and the accused-appellant. There was no cross-examination to discredit the version of the child witnesses on this issue. It is also well settled even in the absence of motive where there was sufficient evidence available on record against the accused, the same could be relied upon and order for conviction could be passed. Even absence of motive could end up in conviction. In the present case, it had came on record that deceased had lodged an FIR against the appellant-accused on 11.11.1980, therefore, prosecution had proved motive of the accused-appellant to commit the offence. The Hon'ble in ***State of U.P. Vs Babu Ram, 2000 (4) SCC 515*** has stated in para

12 that :-

> ***"12.*** *In this context we would reiterate what this court has said about the value of motive evidence and the consequences of prosecution failing to prove it, in Nathuni Yadav vs. State of Bihar {1998 (9) SCC 238} and State of Himachal Pradesh vs. Jeet Singh {1999 (4 SCC 370}. Following passage can be quoted from the latter decision:*
>
> *"No doubt it is a sound principle to remember that every criminal act was done with a motive but its corollary is not that no criminal offence would have been committed if the prosecution has failed to prove the precise motive of the accused to commit it. When the prosecution succeeded in showing the possibility of some ire for the accused towards the victim, the inability to further put on record the manner in which such ire would have swelled up in the mind of the offender to such a degree as to impel him to commit the offence cannot be construed as a fatal weakness of the prosecution. It is almost an impossibility for the prosecution to unravel the full dimension of the mental disposition of an offender towards the person whom he offended."*

(v) <u>Effect of acquittal of other three co-accused</u> :- Learned counsel for the appellant-accused has vehemently argued that since prosecution evidence was not found to be sufficient to convict the other three co-accused, therefore, on the basis of same set of evidence, conviction of the appellant-accused was unsustainable. This argument is also bereft of merit as from the careful perusal of the evidence on record, it is evident that the prosecution story was completely corroborated by the ocular as well as medical evidence towards the role of the appellant-accused. So far as, the acquittal of other three co-accused is concerned, the learned trial court has come to the conclusion that the evidence on record was not sufficient to convict the other three co-accused.

The main thrust of the argument submitted by learned

counsel for appellant-accused is that since on the same set of prosecution evidence, three co-accused were acquitted, therefore, only the appellant-accused could not be convicted on the basis of said evidence.

It is well settled that entire testimony from the witnesses cannot be discarded only because in certain aspects or part of the statement was not believed. The maxim '*falsus in uno falsus in omnibus*' has no application in India and the witnesses cannot be termed as liers. This issue has been dealt by the Hon'ble Supreme Court on many occasions. In ***Sheesh Ram vs. State of Rajasthan reported in (2014) 3 SCC 689,*** the Apex Court has held in para 11 that :-

> *"**11.** It is trite that the maxim 'falsus in uno falsus in omnibus' has no application in India. It is merely a rule of caution. It does not have the status of rule of law. In Balaka Singh v. State of Punjab[2], this Court has said that where it is not feasible to separate truth from falsehood, because the grain and the chaff are inextricably mixed up, and in the process of separation, an absolutely new case has to be reconstructed by divorcing essential details presented by the prosecution completely from the context and background against which they are made, the Court cannot make an attempt to separate truth from falsehood. But, as we have already noted, this is not a case where the grain and chaff are inextricably mixed up. The evidence of eye-witnesses is not discrepant on the material aspect of the prosecution case. Reliance can, therefore, be placed on them. In this connection, reliance placed by the counsel for the State on Rizan is apt. The same principle is reiterated by this Court in Rizan. We may quote the relevant paragraph from Riza :-*
>
> *"12. Even if a major portion of evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, notwithstanding acquittal of a number of other co-accused persons his conviction can be maintained. It is the duty of the court to separate the grain from the chaff. Where the chaff can be separated from the grain, it would be open to the court to convict an accused notwithstanding the fact that evidence has been found to be deficient to prove guilt of other accused persons. Falsity of a particular material witness or material particular would not ruin it from the beginning to end. The maxim falsus in uno falsus in omnibus has no application in India and the witnesses cannot be*

> *branded as liars. The maxim falsus in uno falsus in omnibus has not received general acceptance nor has this maxim come to occupy the status of a rule of law. It is merely a rule of caution. All that it amounts to, is that in such cases testimony may be disregarded, and not that it must be disregarded. The doctrine merely involves the question of weight of evidence which a court may apply in a given set of circumstances, but it is not what may be called "a mandatory rule of evidence". (See Nisar Ali v. State of U.P AIR 1957 SC 366.)*"

(emphasis supplied)

The Apex Court in a recent judgment of ***Mahendran vs. State of Tamil Nadu reported in (2019) 5 SCC 67*** has observed in para 39, 40, 41 and 42 that :-

> *"**39.** Therefore, the entire testimony of the witnesses cannot be discarded only because, in certain aspects, part of the statement has not been believed.*
>
> ***40.** The judgment referred to by learned counsel for the appellants in Ram Laxman's case is not applicable to the facts of the present case, as in that case, the Court found the testimony of the witnesses as undependable and unreliable so as to grant benefit to some accused while maintaining the conviction of the others. The Court noticed that the maxim "falsus in uno, falsus in omnibus" is not applicable. Therefore, if the witness is reliable and dependable then the entire statement cannot be discarded.*
>
> ***41.** Similarly, in the case of Noushad the Court found that the statement of PW11 that he has witnessed the incident with much of exactitude as to which accused assaulted his brother with what weapon cannot be said to have been really witnessed by him. Again, in Suraj Mal's case, the Court was examining the legality of conviction under the provisions of Prevention of Corruption Act, 1947. It was found that the evidence of witnesses against the two accused was inseparable and indivisible, when on such evidence one of the accused was acquitted and not the other accused.*
>
> ***42.** All these judgments are in respect of appreciation of evidence of witnesses in the facts being examined by the Court. The general principle of appreciation of evidence is that even if some part of the evidence of witness is found to be false, the entire testimony of the witness cannot be discarded."*

(emphasis supplied)

Accordingly, argument of learned counsel for appellant-

accused that entire evidence of PW-1 and PW-2 should be discarded, cannot be accepted. It is reiterated here that the evidence of eye-witnesses PW-1 and PW-2 was consistent and had fully supported the prosecution case in regard to appellant-accused. Further the testimony remained consistent even during their long cross investigation.

(vi) Other arguments :-

Argument is also raised to term the entire investigation to be tainted and for that, learned counsel for the appellant-accused has relied upon the findings of the learned trial court that the FIR was tainted as the same was written at the police station only. In this regard, it is apposite to refer the judgment passed by the Apex Court in ***Karan Singh vs. State of Haryana, 2013 12 SCC 529*** specifically paragraph 18, 19 and 20 which are reproduced hereinafter :-

> ***18.*** *Furthermore, in Ram Bali v. State of Uttar Pradesh, AIR 2004 SC 2329, it was held by this Court that the court must ensure that the defective investigation purposely carried out by the Investigating Officer, does not affect the credibility of the version of events given by the prosecution.*
>
> ***19.*** *Omissions made on the part of the Investigating Officer, where the prosecution succeeds in proving its case beyond any reasonable doubt by way of adducing evidence, particularly that of eye-witnesses and other witnesses, would not be fatal to the case of the prosecution, for the reason that every discrepancy present in the investigation does not weigh upon the court to the extent that it necessarily results in the acquittal of accused, unless it is proved that the investigation was held in such manner that it is dubbed as "a dishonest or guided investigation", which will exonerate the accused. (See: Sonali Mukherjee v. Union of India, (2010) 15 SCC 25; Mohd. Imran Khan v. State Government (NCT of Delhi), (2011) 10 SCC 192; Sheo Shankar Singh v. State of Jharkhand & Anr., AIR 2011 SC 1403, Gajoo v. State of Uttarakhand, (2012) 9 SCC 532; Shyamal Ghosh v. State of West Bengal, AIR 2012 SC 3539; and Hiralal Pandey & Ors. v. State of U.P., AIR 2012 SC 2541).*
>
> ***20.*** *Thus, unless lapses made on the part of Investigating*

authorities are such, so as to cast a reasonable doubt on the case of the prosecution, or seriously prejudice the defence of the accused, the court would not set aside the conviction of the accused merely on the ground of tainted investigation."

10. In the instant case, the trial court has examined the grievance raised by the accused-appellant regarding the tainted investigation and and not found any circumstance which could cast reasonable doubt on the case of prosecution. The ocular and medical evidence are credible towards the role assigned to the accused-appellant and the learned counsel for the appellant-accused has failed to show that how the appellant-accused was prejudiced due to any lapse on the part of Investigating Officer.

11. It is trite to know that on the basis of minor discrepancies in the testimony not touching the case of core of the case, would not result in rejection of the evidence as a whole. In view of the above discussion, this ground is also liable to be rejected, accordingly, rejected.

12. ***Conclusion*** **:-**

(i) Death of Awadh Narian was a culpable homicide amounting to murder who died due to shock and hemorrhage, as a result of fire arm injury .

(ii) It was natural for PW-1 and PW-2 to accompanied his deceased father at 9 a.m. on the day of occurrence going towards their School on bicycle.

(iii) PW-1 and PW-2 had witnessed the entire occurrence from a short distance and recognized the appellant-accused. PW-1 and PW-2 though were child witnesses, however, their testimony was reliable and truthful. The ocular evidence and medical evidence corroborates the role of the appellant-accused. Testimony regarding motive was corroborated by the documentary evidence

of lodging an FIR against the appellant-accused by deceased.

(iv) The maxim '*falsus in uno falsus in omnibus*' is not applicable in India in the strict sense and is applicable only as principle of caution, as such, conviction of the appellant-accused could be based on reliable and truthful testimony of PW-1 and PW-2 qua to accused-appellant, though same set of evidence was disbelieved for other three accused who were acquitted by trial court.

(v) Learned counsel for the appellant-accused has failed to point out any error on facts as well as on law in the impugned judgment.

(vi) The tainted investigation, if any, would not be fatal in the present case as there was sufficient ocular as well as medical evidence to prove the guilt of the appellant-accused. Mere non-recovery of weapon used in the occurrence would not be fatal for prosecution case.

13. In view of the above and the reasons stated hereinabove, we are of the considered opinion that there is no force in the present appeal. We, therefore, see no reason to interfere in the matter. The appeal, is accordingly, ***dismissed***.

Order Date :- 26.8.2019
Rishabh

(Saurabh Shyam Shamshery,J.) (Govind Mathur,C.J.)