

Reserved on 8th September, 2022

Delivered on 23rd September, 2022

A.F.R.

Court No. - 43

Case :- CRIMINAL APPEAL No. - 2534 of 2007

Appellant :- Balister And Another

Respondent :- State of U.P.

Counsel for Appellant :- Shyamji Gaur,A.K.Dubey,A.R.

Dubey,G.P.Dikshit,Noor Mohammad

Counsel for Respondent :- Govt. Advocate

Hon'ble Ashwani Kumar Mishra,J.

Hon'ble Shiv Shanker Prasad,J.

(Delivered by Hon. Shiv Shanker Prasad, J.)

1. This appeal has been preferred by accused-appellants, namely, Balister and Smt. Kamla against the judgment and order dated 21st March, 2007 passed by the Additional Sessions Judge, Court No.6, Muzaffarnagar in Sessions Trial No. 830 of 2006 (State of U.P. Vs. Balister and Another), under Sections 302/34 I.P.C. arising out of Crime No. 838 of 2005, Police Station-Budhana, District-Muzaffarnagar, whereby both the accused-appellants have been convicted and sentenced to undergo life imprisonment under Section 302/34 I.P.C. with fine of Rs. 7,000/- each, in default thereof, they have to further undergo one year additional imprisonment.

2. We have heard Mr. Sheshadri Trivedi, learned Amicus Curiae appearing for the accused-appellant no.1 and Kumari Meena, learned A.G.A. for the State. Appellant no.2 has died and her appeal has already abated by this Court vide order dated 8th September, 2022. We have also perused the entire materials available on record.

3. The prosecution story, as reflected from the records, is as follows:

On the basis of a written report submitted by the informant-P.W.1, namely Jagendra Singh dated 23rd November, 2005 (which was marked as Exhibit-Ka-1), a first information report (Exhibit-Ka-9) was lodged on 23rd November, 2005 at 06:30 p.m. (in evening), which was registered as Crime No. 231 of 2005 under Section 302 I.P.C., at Police Station-Badhana,

District-Muzaffarnagar against three persons, namely, Puran, Balister and Smt. Kamla. In the said report, it has been alleged that on 23rd November, 2005 at 06:30 p.m., the brother of the informant-P.W.-2, namely, Anil Kumar went to the grocery shop of Satendra for buying some goods, where Puran, his brother Balister and his mother Smt. Kamla, who are residents of same village, were already standing there. When Anil Kumar, brother of the informant-P.W.-1, after buying goods, returned to his house from the said grocery shop, then the above three persons in front of the street of their house, started abusing and threatening him that they will see him today. When Anil Kumar brother of the informant-P.W.2 objected not to do the same, then Balister and Kamla grabbed Anil Kumar from behind and Puran started hitting him by Tabal. When Anil Kumar fell on the ground then Balister also started hitting him with Balkati. At the same time, the informant-P.W.-1, Krishnapal Singh, Mahipal and Sanjeev Kumar were coming from their fields through the front road. Hearing the sound in the street, informant-P.W.-1, Krishnapal Singh, Mahipal and Sanjeev Kumar reached the spot and tried to save him as also they raised alarm. On seeing informant-P.W.-1, Krishnapal Singh, Mahipal and Sanjeev Kumar, all the accused persons, namely, Puran, Balister and Smt. Kamla, ran away after threatening them. They chased them but did not succeed in catching them. Thereafter, they picked up Anil Kumar from the spot and took him to the hospital by a Car, where he was declared dead. Thereafter they went to the Police Station along with the dead body of Anil Kumar. Resultantly, on the written report of the informant-P.W.-1, Crime No. 231 of 2005 was registered. On registration of the said case, the inquest of the body of the deceased, which was lying in a Marshal jeep outside the Police Station, was conducted by Sub-Inspector Vijay Pal Singh (P.W.4) on 23rd November, 2005 at 2200 hours. Since injuries were found on the body of the deceased, in the opinion of the inquest witnesses, the cause of death of the deceased was homicidal. The inquest report was marked as Exhibit-Ka-3. As such, after sealing the dead body of the deceased, the same was sent to Mortuary for post-mortem on 23rd November, 2022 through Constables Yadram and Maheshpal.

4. The post-mortem of the dead body of the deceased Anil Kumar was conducted by Dr. U.S. Fauzdar (P.W.-3) on 24th November, 205 at 03:30 p.m. and in his opinion, the cause of death of deceased was due to shock and haemorrhage as a result of ante-mortem injuries. On post-mortem of the dead body of the deceased, following ante-mortem injuries were reported:

- “(1). Incised wound 7 cm. x 1/2 cm x scalp deep on the back of skull (occipital region), 8 cm. above to hair line of back,*
- (2). Incised wound 8 cm. x 1 cm. x muscle deep over left cheek;*
- (3) Incised wound 15 cm. x 3 cm. x bone deep on left side of neck, underneath tissues are sharply cut with severed of cortical vessels, veins, partial cut of on left side trachea, Fifth cervical body of vertebra is partially cut;*
- (4) Incised wound lower 1/2 of outer helix of left Pinna. Cut;*
- (5) Contused abrasion 3 cm. x ½ cm. on top of left shoulder;*
- (6) Contused abrasion 1 cm. x 1/2 cm. on deltoid prominence of left shoulder;*
- (7). Contused abrasion 10 cm. x 1/2 cm. on back of left upper arm;*
- (8) Contused abrasion 10 cm. x 1/2 cm. on back of left shoulder;*
- (9) Incised wound 13 cm. x 3 cm. x muscle deep on Inner back of left forearm lower 1/2;*
- (10) Incised wound 3 cm. x 1 cm. x muscle deep on dorsum of left wrist;*
- (11) Incised wound 6 cm. x 2 ½ cm. x bone deep on flexor aspect of left forearm lower third;*
- (12) Incised wound 10 cm. x 2 ½ cm. x bone deep dorsum of left hand with fractured of v, iv & iii metacarpal, fractured ends are are reddish in colour;*
- (13) Incised wound 1 cm. x 1/2 cm. muscle deep on flexor aspect of left middle finger; and*
- (14). Incised wound 1 cm. x 1/2 cm. muscle deep of flexor aspect of left middle finger.”*

5. It would be worth noticing that the accused-appellant, namely, Balister @ Kallu and Smt. Kamla were also got medically examined by Dr.

Vineet Kaushik, In-charge Medical Officer, Primary Health Centre, Budhana, District Muzaffarnagar 13th November, 2005, wherein no fresh visible injury were seen on the bodies of the accused-appellants.

6. After sending the body of the deceased for post-mortem, the Investigating Officer, namely, Jagdish Singh, the then Station House Officer, Badhaut, District Baghpat, P.W.-6, went to the place of occurrence and collected blood stained earth and plain earth, thereafter prepared memo of recovery (Exhibit-13). He also prepared Site Plan of the place of occurrence. He recorded statements of witnesses. On 12th December, 2005, the Investigating Officer arrested the named accused persons, namely, Ballister and Smt. Kamla and on their pointing out, he recovered Balkati and Tabal which were alleged to have been used in the crime of which the recovery memo was also prepared (Exhibit-Ka-14). After completion of statutory investigation in terms of Chapter XII Cr.P.C., the Investigating Officer submitted the charge-sheet against the accused persons. The learned Magistrate took cognizance of the offence on the charge-sheet and committed the case to the court of Sessions Judge.

7. It would also worth noticing that the recovered weapons i.e. Tabal and Balkati as also the clothes and article, which were collected from the body of the deceased, namely, pant along with belt, T-shirt, Baniyan, underwear and kardhan, were sent for forensic examination to the Forensic Science Laboratory, U.P. Agra. After examining the same, the Forensic Science Laboratory has submitted its report dated 16th June, 2006. Though in the said report, it has been reported that human blood stain was found on all the objects sent for forensic examination, but it was preposterous.

8. On 21st November, 2006, the learned Trial Court framed charges against the accused persons for offences punishable under Sections 302 I.P.C. read with Section 34 I.P.C.

9. In order to prove its case, the prosecution relied upon documentary evidence, which were duly proved and consequently marked as Exhibits. The same are catalogued herein below:-

- “i). First information report was marked as Exhibit Ka -9 ;
- ii). The written report of informant/P.W.-1 Jagendra Singh Jaat, was marked as Exhibit Ka-1;
- iii). Recovery memo of blood stained and plain earth collected from the place of occurrence was marked as Exhibit Ka-13;
- iv). Recovery memo of blood stained Tabal and Balkati was marked as Exhibit Ka-14;
- v). The post-mortem report of the deceased Anil Kumar was marked as Exhibit Ka-2;
- vi). Report of Forensic Science Laboratory, U.P. Agra was marked as Exhibit Ka-7; and
- vii). Site plan with index was marked as Exhibit Ka-15.”

10. The prosecution also examined total nine witnesses in the following manner:-

- “i). The Informant, namely, Jagendra Singh, brother of the deceased has been adduced as P.W.-1;
- ii). Sanjeev Kumar, who is alleged to be an independent witness, has been adduced as P.W.-2;
- iii) Dr. U.S. Fauzdar, District Hospital, Muzaffarnagar, who conducted the post-mortem of the body of the deceased Anil Kumar has been adduced as P.W.-3;
- iv) Sub-Inspector Vijaypal Singh, who prepared the inquest report of dead body of the deceased, has been adduced as P.W.-4;
- v). Constable-378 Shashi Kawar Rana, who prepared the Chik first information report (Exhibit-ka-9) on the basis of written report of the informant Jagendra Singh has been adduced as P.W.-5; and
- vi). Sub-Inspector Jagdish Singh, the then Station House Officer, Police Station-Budhana, who conducted the investigation of the alleged crime.

11. After recording of the prosecution evidence, the incriminating evidence were put to the accused-appellants Balister and Smt. Kamla for recording their statements under section 313 Cr.PC. In their statements recorded U/s 313 Cr.P.C. on 19th January, 2007, the accused appellants

denied their involvement in the crime. Accused appellants Balister and Smt. Kamla specifically stated before the trial court that they have been falsely implicated in this case. The defence has also adduced Yogendra Singh resident of the same village, as D.W.-1.

12. It would also be worth noticing that the trial court under Section 311 Cr.P.C. has summoned Balesh Kumar, the then teacher of Dayanand Bal Vidyalaya, Junior High Court, Budhana, Police-Station Budhana, District-Muzzafarnagar and has also recorded his statement as Court Witness.

13. While passing the impugned judgment of conviction, the trial court after relying upon the documentary as well as oral evidence adduced by the prosecution, has recorded its finding that it has been proved that the prosecution has mentioned the immediate reason for the murder of Anil by the accused from the very beginning and has also proved by the evidence. The informant-P.W.-1 took the injured Anil, who was breathing a little, immediately to the Primary Health Center where he was declared dead and immediately thereafter he was taken from there to the Police Station, where on the written report of the informant, the first information report has been lodged. The first information is prompt in which date, time and place of incident; the immediate reason for commissioning of the offence; the details of the weapons used by the accused-appellants; the name of the witnesses; the brief details of the incident have been mentioned and there is no possibility of any false facts being mentioned in the first information report. The entire prosecution version has been proved by the eye-witnesses, namely, P.W.-1 and P.W.-2. Though both eye-witnesses are brothers of the deceased yet their presence on the spot is proven and despite the fact that they have faced a long cross-examination but they stand in the test of truth. There is no possibility of false implication of the accused in the alleged offence by the prosecution even if they do not have any prior enmity with the accused without any reason. Despite the fact that they are real brother of the deceased. It is also not likely that they will falsely implicate an innocent person except the real accused. The medical evidence has also supported the statements of the eye witnesses and the prosecution version. The investigation in the matter has been done

promptly following due procedure known to law. There is no defect in the investigation done in the matter so that the benefit of the same could accrue to the defense party. After recording such finding, the trial court has come to the conclusion under the impugned judgment of conviction that the prosecution has been able to fully prove that both the accused, in furtherance of their common intention, committed the murder of Anil Kumar in front of their street. As such, the trial court has found the offence under Section 302 read with 34 I.P.C. to have been committed by the accused persons Balistar and Smt. Kamla. Consequently, the trial court has awarded sentence of life imprisonment along with a fine of Rs. 7,000/- each.

14. Aggrieved by the aforesaid judgment and the order of conviction and sentence, the present jail appeal has been filed on the ground that conviction is against the weight of evidence on record and against the law and the sentence awarded to the accused-appellants is too severe.

15. Questioning the impugned judgment and order of conviction, learned Amicus Curiae appearing for the appellant no.1 Balister submits that:

(i) the alleged incident took place on 23.11.2005 when the brother of informant Anil Kumar S/o of Dhara Singh R/o Tanda P/s Bhudhana, Muzaffarnagar had gone to purchase few items from the shop of Satendra at about 6:30 p.m. When the deceased was returning to his house after purchasing the said items, he was surrounded by Puran, his brother Balister and mother of Balister, namely, Smt. Kamla, who threatened and abused informant's younger brother Anil. In the meantime, Balister and Kamla grabbed Anil and Puran attacked him with Tabal. Consequently, Anil fell down on the ground. Balister also attacked him with Balkati. This incident was seen by Kishan Pal Singh, Mahi Pal and Sanjeev Kumar, who were returning from their fields. When they heard screams of Anil Kumar, they tried to rescue him. Thereafter, Puran, Balister and his mother Kamla Devi ran away from the place of occurrence. The injured Anil was brought to the hospital where he was declared dead. After that, the informant (P.W.-1) along with other took him in a Jeep to the Police Station, where on the written report of the informant the first information report has been lodged.

Henceforth, it is evident that the alleged incident took place on 23.11.2005 at 6:30 p.m. Whereas, the first information report has been lodged by the informant P.W. 1 on 23.11.2005 at 20:50 p.m. The distance between the place of occurrence and the P.S. concerned is about 7 kms;

(ii) in support of prosecution story, prosecution has adduced two eyewitnesses P.W.-1 Jogendra Singh and P.W.-2 Sanjeev Kumar. These two are the star witnesses of the prosecution. However, there are major contradictions in their statements and that is why, in the first information report, it is stated that Puran attacked Anil with Tabbal and Balister attacked him with Balkati. The same has been stated in chief-examination by Jogendra Singh P.W.-1, whereas P.W.-1 Jogendra Singh has stated in his statement under 161 Cr.P.C. that Puran as well as Balister had attacked the deceased Anil with Tabbal. Hence, there is contradiction with regard to the weapons, which are alleged to have been used by both the accused Puran and Balister for assaulting the deceased Anil;

(iii) it is stated in the first information report that the accused-appellants Balister and Kamla grabbed deceased Anil at the time of occurrence, whereas P.W.-1 Jogendra Singh in his cross-examination admitted that accused-appellant Kamla caught hold of the left-hand of deceased Anil and did not grab him along with accused Balister, whereas in the first information report it has been alleged that she had grabbed him along with accused Balister. P.W.-2 Sanjeev Kumar stated in his examination-in-chief that Balister caught hold of left-hand of Anil and accused Kamla caught hold right-hand of Anil. As such, there is inconsistency in the statements of the star witnesses P.W. 1 and P.W.- 2;

(iv) there was no source of light at the place of occurrence. Although P.W.- 2 Sanjeev Kumar has stated that there were two gas lanterns, which were lighting. It has also been stated that P.W.- 2 Sanjeev Kumar had seen the occurrence in the light of these two lanterns. Whereas, P.W.-1 Jogendra Singh has stated in his examination-in-chief that there was no electric light at the place of occurrence. He has further stated that there was no light of lanterns at the place of occurrence because there were no gas lanterns, which were lightning at the time of occurrence;

(v) in the month of November at about 6:30 p.m. in evening, according to Indian climate, it becomes dark. Prosecution witness P.W.-1 Jogendra Singh has stated in his cross-examination that at the time of occurrence there was dense darkness. Therefore, it is apparently clear that in the absence of source of light, it was impossible for witnesses to recognize the accused persons. Sanjeev Kumar P.W.-2 has stated in his cross-examination that the Investigating Officer had recorded his statement under Section 161 Cr.P.C. after a month from the date of incident. Thus, there is a possibility of development/improvement in the statements of the witnesses;

(vi) P.W.- 2 Sanjeev Kumar has stated that, "*I heard the incident at tiraha from the main road*". While in the order of framing of charge passed by the trial judge on 21.11.2006, it has been mentioned that the incident occurred at the shop of Satendra, which is situated at village-Tanda Vahad Police Station Bhudhana, District Muzaffarnagar. From the perusal of the site plan which is marked as Exhibit Ka-12, which have been prepared by the Investigating Officer, tiraha is shown as 'Point A+' and shop of Satendra is situated in the east side of this very tiraha which is 40 passes (Kadam) away from 'Tiraha Point A+', meaning thereby that the place of occurrence has shifted. As such, due to shifting of place of occurrence, the prosecution story is wholly unreliable;

(vii) it has been stated in the first information report as well as in the cross-examination of P.W.-1 Jogendra Singh that at the time of incident Mahipal, Sanjeev and Kishan Pal were present, but the prosecution has not examined Mahipal and Kishan Pal except Sanjeev Kumar as P.W.-2. P.W.- 1 Jogendra Singh has stated in cross-examination that when he arrived at the place of occurrence, his brother was lying injured. Blood of his brother was spilled on the ground. Whereas, in the first information report, it has been stated that the accused Puran and Balister attacked Anil with Tabbal and Balkati. The same has been stated by P.W.- 2 Sanjeev Kumar in his examination-in-chief. It is therefore, clear that there are major contradictions in the statements of P.W.-1 and P.W.-2 as well as in the first information report;

(viii) P.W.-3 Doctor U.S. Faujdar who conducted the post-mortem of the deceased Anil, has stated in his cross-examination that there was no injury on the waist of the body of deceased Anil. At the time of post-mortem, P.W.-3 had found as many as 14 ante-mortem injuries on the left part of the body of the deceased, but none of the injuries are shown on the waist of the dead body of the deceased. Therefore, the entire prosecution story is doubtful;

(ix) Jagendra P.W. 1 and Sanjeev P.W. 2 have not seen the incident because when they arrived at the spot, the incident had already occurred, meaning thereby that after the occurrence of the incident, witnesses reached the spot. On the basis of which it can be said that before arrival of the witnesses including P.W.-1 and P.W.2 at the spot, the accused persons ran away, meaning thereby that they have not seen the incident by their own eyes. Therefore, the prosecution story is wholly improbable as also the same has not been supported by the evidence and that is why, the accused appellants are not guilty of the offence under Section 302 read with 34 I.P.C.

On the cumulative strength of the aforesaid, learned Amicus Curiae appearing for the appellant no.1 submits that the impugned judgment and order of conviction cannot be legally sustained and is liable to be quashed.

16. On the other-hand, Kumari Meena, learned A.G.A. for the State, supports the prosecution version by submitting that the statements of P.W.-1 Jagendra and P.W. 2-Sanjeev are credible in the facts and circumstances of the case and since they are eyewitnesses and have clearly disclosed about the commissioning of the offence of murder, therefore, the trial court has not committed any error in holding conviction of the accused appellants under Section 302 read with 34 I.P.C. On the cumulative strength of the aforesaid submissions, learned A.G.A. submits that as this is a case of direct evidence, the impugned judgment and order of conviction does not suffer from any illegality and infirmity so as to warrant any interference by this Court. As such the present appeal filed by the accused-appellant who committed heinous crime by murdering deceased Anil Kumar, is liable to be dismissed.

17. We have considered the submissions made by the learned counsels for the parties and have gone through the records of the present appeal especially, the judgment and the order of conviction and evidence adduced before the trial court.

18. The only question which is required to be addressed and determined in this appeal is whether the conclusion of guilt arrived at by the trial court and the sentence awarded is legal and sustainable under law and suffers from no infirmity and perversity.

19. The facts, as have been noticed above, would clearly go to show that the incident of this case has occurred on 23.11.2005 at 6:30 p.m. in the evening. The first information report qua the incident has been lodged on 23.11.2005 at 20:50 p.m. According to prosecution, the first information report is well within time and prompt. As per the first information report, the incident took place on the relevant date as on 23.11.2005 at 6:30 p.m. when Anil Kumar had gone to purchase a few items from the shop of Satendra. When the deceased Anil was returning to his house after purchasing the said items, he was surrounded by Puran, his brother Balister and his mother Kamla, who threatened and abused the informant's younger brother Anil. In the meantime, Balister and Kamla grabbed Anil and Puran attacked Anil with Tabal. Resultantly, Anil fell down on the ground. Balister also attacked Anil with Balkati. In the first information report, it has been stated that the incident occurred in the street which is situated in front of the house of the accused persons. The house of accused persons shown by the Investigating Officer is situated in the east side from the shop of Satendra, whereas, as per the site plan, the place of occurrence has been shown by the Investigating Officer on tiraha at 'Point A+'. This place of occurrence is situated west side from the shop of Satendra which is 40 passes (Kadam) away from the shop of Satendra. On 21st November, 2006, the trial court has framed charge against the accused person namely, Balister and Kamla, the said order has been numbered as 10/A and a copy of which is brought on record at page-12 of the paper book.

20. For examining veracity or genuineness or otherwise of the fact as to what is the actual place of occurrence, it would be worthwhile to reproduce, the order of trial court framing charge against the accused-appellants, which is quoted hereinafter:

“मैं, अशोक कुमार पाठक, अपर सत्र न्यायाधीश, कोर्ट नम्बर 6, मुजफ्फरनगर आप 1. बालिस्टर एवं 2. श्रीमती कमला को निम्न आरोप से आरोपित करता हूँ: यह कि दिनांक 23.11.2005 को समय करीब 6.30 बजे शाम स्थान सतेन्द्र की दुकान गांव टाण्डा बहद थाना बुढाना जिला मुजफ्फरनगर में आपने सामान्य आशय से इस आशय, ज्ञान व परिचिति में वादी जगेन्द्र सिंह के भाई अनिल की कोहली भर ली तथा आपके एक अन्य सह अभियुक्त पूरन ने तबल व पलकटी से तथा आपने भी पलकटी से अनिल को उपहतियाँ कारित कर उसकी हत्या कारित की। इस प्रकार आपने धारा 302 सपष्टित धारा 34 भ0द0सं0 के अन्तर्गत दण्डनीय अपराध कारित किया जो इस न्यायालय के प्रसंज्ञान में है। मैं एतद द्वारा निर्देश देता हूँ कि उक्त आरोप हेतु आपका विचारण इस न्यायालय द्वारा किया जाये।”

21. From perusal of the aforesaid framing charge order, it is apparent that the place of occurrence is the shop of Satendra, which is situated in village Tanda Vahad, Police Station-Bhudana District Muzaffarnagar. All the evidence has however been led by the prosecution over the place of occurrence i.e. Point-A+ which is Tiraha at a distance of 40 passes from the shop of Satendra alleged to be place of occurrence in Charge Paper No.10/A. In the circumstances as elaborated herein-above, the place of occurrence is shifting. The same has been alleged by P.W.-1 Jogendra Singh in his examination-in-chief that when Anil Kumar deceased had gone to purchase some items from the shop of Satendra, Puran, Balister and Kamla were already there and after surrounding Anil, all the accused persons threatened and attacked him. From the perusal of this version of P.W. 1, the incident occurred in the street, which is situated between the shop of Satendra and house of the accused persons. As per Jogendra Singh P.W.-1, the incident did not occur at 'Place A+' as shown by Investigating Officer, in site plan as 'Exhibit-Ka/12'. Moreover, P.W.-1 Jagendra Singh has admitted in his cross-examination that, "*tiraha is situated 10-15 passes (Kadam) away from the place of occurrence.*" On the contrary, in site plan, the Investigating Officer has indicated the place of occurrence at 'Point A+'. P.W.-2 Sanjeev Kumar has stated in his cross-examination that shouting was heard by him at *tiraha* which is on the street. It means that the incident had not occurred at 'Point A+' as shown in

site plan as 'Exhibit-Ka/12'. Thus, in these circumstances, the place of occurrence is shifting. This anomaly creates a doubt upon the prosecution version.

22. In *Matlab Ali v. State of U.P. (Criminal Appeal No. 175 of 1971, decided on 9th August, 1971)*, this Court has observed that, "*shifting of place of occurrence is a serious matter and must necessarily cast a grave doubt as to the correctness of prosecution version. If place of occurrence is different, there could be no question of alleged eyewitnesses seeing anything.*"

23. It is pertinent to note that in *Syed Ibrahim v. State of A.P.*, reported in (2006) 10 SCC 601, the Hon'ble apex court has observed that, "*when the place of occurrence itself has not been established it would not be proper to accept the prosecution version*".

24. In *State of U.P. v. Mangal Singh and Ors.*, reported in (2009) 12 SCC 306, the Hon'ble apex court has observed that, "*whereon a reading of evidence it is clear that occurrence as claimed is changed, it was noticed that the witnesses were shifting their versions almost at every stage. This itself was sufficient to doubt the veracity of the prosecution version*".

25. Again, in *Asraf Biswas v. State of W.B.*, reported in 2016 SCC OnLine Cal 4342, the Hon'ble Apex Court made reference to the case of *Syed Ibrahim v. State of A.P.*, reported in (2006) 10 SCC 601, wherein it has been stated that, "*it would not be proper to accept the prosecution case when the place of occurrence itself has not established. The place of occurrence was not proved beyond all reasonable doubts in the instant case and as a result, we have no hesitation to arrive at a conclusion that there was infirmity in decision making process of the learned Trial Judge. Once it is held that the place of occurrence has not been established beyond all reasonable doubts, then the other circumstances are hardly sufficient to establish the guilt of the accused*".

26. In *Jumma Vs. State of U.P.* reported in MANU/UP/1104/1992, Pr.-19; a Division Bench of this Court has observed that, "*shifting of place of occurrence is a serious matter and must necessarily cast a grave doubt as to the correctness of prosecution version. If place of occurrence is*

different, there could be no question of alleged eyewitnesses seeing anything."

27. As per the first information report, at the time of occurrence, accused Balister and Kamla had grabbed Anil, whereas the accused Puran attacked Anil with Tabbal and thereafter the accused Balister attacked him with Balkati. On the other hand, P.W.-2 Sanjeev Kumar has stated in his examination-in-chief that Balister caught hold of left hand of Anil and Kamla caught hold of right hand of Anil. Puran was attacking Anil with Tabbal and when Anil fell down on ground, Balister attacked him with Balkati. On the contrary, P.W.-1 Jogendra Singh in his statement recorded under Section 161 Cr.P.C. has stated that the accused Puran as well as accused Balister both attacked Anil with Tabbal. Therefore, there is inconsistency with respect to weapon used by the accused persons.

28. In the first information report as well as in the examination-in-chief of P.W.-1 Jogendra Singh it has been alleged that accused Balister and Kamla had grabbed deceased Anil at the time of occurrence, but P.W.-1 Jogendra Singh has stated in his cross-examination that Kamla caught hold of the hand of Anil from left side. Whereas, P.W.-2 Sanjeev Kumar has stated in his examination-in-chief that Balister had caught hold of the left hand of Anil and Kamla had caught hold of right hand of Anil. At this point of juncture, there is major discrepancy and inconsistency in the statements of the witnesses which also creates doubt in prosecution version.

29. It is also noteworthy that when Balister caught hold of left hand of deceased Anil and Kamla caught hold of right hand of Anil at the time of incident as is stated by P.W.-2 Sanjeev Kumar in his examination-in-chief or Kamla had caught hold of left hand of deceased Anil at the time of occurrence, as stated by P.W. 1 Jogendra in his cross-examination, it is not possible that the accused persons, who had caught deceased Anil, did not receive any injury. From the perusal of Photo-Lash (Exhibit-Ka/4) and the Post-mortem report (Exhibit-Ka/2), it is apparent that there were 14 ante-mortem injuries, which are on the left-side of the deceased. If Kamla or Balister had caught hold of the left/right hand of deceased Anil then, it is not possible for them not to receive any injury on the point of catching hold of the hands of deceased. Therefore, there are major contradictions,

inconsistency and discrepancy which again creates doubt in the prosecution version.

30. P.W.-1 Jogendra Singh has stated in examination-in-chief that Sanjeev Kumar, Kishan Pal and Mahi Pal arrived at the time of occurrence but except Sanjeev Kumar as P.W.-2, neither Kishan Pal nor Mahi Pal have been examined in support of prosecution story. Even Satendra and Devendra have also not been examined in support of prosecution story. P.W.-1 in his statement has disclosed that the fact about the three accused persons including the appellant no.1 of abusing the deceased was informed by Devendra. Devendra however is not produced. As per the statements of P.W.-1 and P.W.2, it was Devendra, who told Jogendra (informant-P.W.1), Sanjeev Kumar (P.W.-2), Kishan Pal and Mahipal that in front of his shop, there was altercation between the deceased Anil Kumar and accused persons, namely, Puran, Balister and Kamla and at that time, the accused persons were having Tabal and Balkati. Inspite of the fact that Devendra is the witness and his information is the basis of disclosure about the manner in which the fight erupted on the spot leading to the murder of deceased yet Devendra is not adduced in evidence.

31. It would also be worth noticing that as per the version of the first information report as well as the statement of P.W.-1 in his examination-in-chief that on the date of incident, the deceased went to the shop of Devendra for buying some goods and when he was returning to his house after buying the same, on the way in front of their street, the accused persons, namely, Puran, Balister and Kamla assaulted the deceased, whereas in the cross examination, P.W.-1 has stated as follows:

“देवेन्द्र ने यह बात भी मुझे बतायी थी कि उसकी दुकान पर मुलजिमान की मेरे भाई अनिल के साथ कहन सुनन हुयी थी। क्या कहन सुनन हुयी थी यह उसने नहीं बताया था। देवेन्द्र ने मुझे यह भी बताया था कि उसकी दुकान पर जब मुलजिमान से मेरे भाई की कहन सुनन हुयी थी तब मुलजिमान बलकठी व तवल लिए हुए थे मेरे ध्यान नहीं है कि मैंने दरोगा जी को देवेन्द्र द्वारा बतायी जाने वाली बात बतायी थी या नहीं। यह बात देवेन्द्र ने बतायी थी तहरीर में मैंने नहीं लिखी।”

Similarly, in his cross examination, P.W.-2 has stated as follows:

“मैंने पूर्ण व अनिल को देखा था। वे लोग कहा से आये थे मैंने नहीं देखा था। मैंने दरोगा जो को यह बात बतायी थी कि घटना से पहले अनील मुतक व मुलजिमान देवेन्द्र की दुकान से आये थे। दरोगा जी ने मुझसे सारी बाते पूछी थी। मोटी-2 बाते घटना के बारे में पूछी थी।”

Perusal of the aforesaid statements would go to show that there is material contradiction as to at whose shop, either Devendra or Satendra, the deceased went to buy the goods.

32. As per prosecution story, the incident occurred on 23.11.2005 at 6:30 p.m. in the evening. According to Indian climate, in the month of November, at about 6:30 p.m. it gets dark, meaning thereby that at the time of occurrence, there was darkness. This fact is admitted by P.W.-1 Jogendra Singh in his cross-examination that at the time of occurrence, it was deep dark. P.W.-1 Jogendra has also admitted that at the time of occurrence, there was no supply of electricity. P.W.-2 Sanjeev Kumar in his cross examination has also admitted that at the time of occurrence, it was dark night. P.W.-1 Jogendra has however stated in his cross-examination that at the time of occurrence, gas lantern was lightning at the gate of the house of Narendra. However, no gas lantern was recovered by the Investigating Officer during the course of investigation. Hence, it is clear that the source of light at the time of occurrence is not explained. In the absence of any source of light, it would be difficult for witnesses to recognise the accused persons at the time of occurrence.

33. P.W.-1 Jogendra in his cross-examination has also stated that which of two accused had assaulted the deceased, how many injuries were inflicted upon the body of the deceased and in which part, he sustained injuries, are not known to him. He has further stated that accused Puran has assaulted Anil on his waist but from the perusal of the post-mortem report, no injury was found on the waist of deceased Anil. From the aforesaid it is apparent that there is inconsistency in the statements of this star witness i.e. P.W.-1 which also makes the prosecution story doubtful.

34. P.W. 2 Sanjeev Kumar has also stated in his cross-examination that he is unable to say as to which of two accused has assaulted Anil and on which part of his body, he sustained injuries. His statement under Section 161 Cr.P.C. has been recorded by the Investigating Officer after one month from the date of alleged incident. He further stated in his cross-examination that the deceased Anil and accused persons had come at the place of occurrence from the shop of Devendra before the incident occurred. Whereas, the prosecution version as unfolded in the first

information report as well as in the statement of P.W.-1 Jogendra Singh, the deceased Anil had gone to purchase something from the shop of Satendra. There is again major discrepancy and inconsistency in the statement of this second star witness which creates major doubt in the prosecution version. Apart from the above, P.W.-2 has admitted in his cross-examination that he is cousin brother i.e. son of real uncle of the deceased Anil, that is why it can be said that he is an interested witness, as argued on behalf of accused-appellant.

35. P.W. 3 Doctor U.S. Faujdar who did autopsy of the dead body of deceased Anil and found 14 injuries on his dead body but stated in his cross-examination that there was no injury on the waist of the dead body of the deceased.

36. P.W. 5 Constable 378 Shashi Kawar Rana has admitted in his cross-examination that it is true that the then Chief Judicial Magistrate C.J.M. has perused the first information report on 29.11.2005. He has admitted that he is unable to tell as to why the the first information report reached to the court so late. The argument of learned Amicus Curaie is that the first information report is ante-timed as the delay in its dispatch to Magistrate is not disclosed.

39. P.W. 6 the Station House Officer, Jagdish Singh has admitted in his cross-examination that it is true that there is no signature of Sub-Inspector Chandrashekhar on Alaqaatal recovery memo. Henceforth, recovery memo of alaqaatal as well as alaqaatal has not been proved by this witness P.W. 6. This witness has also admitted that on the date of occurrence, it was dark night. He further stated that informant Jogendra in his statement had stated to him that, at the time of occurrence, Balister and Puran had Tabbal. He has also admitted that no gas lantern was taken in the possession of Police. He further stated that on the inspection of place of occurrence, no slippers of deceased Anil were recovered. He is also unable to tell as to why first information report dated 23.11.2005 reached the court of Chief Judicial Magistrate on 29.11.2005.

38. Accused Balister has stated under Section 313 Cr.P.C. that he has been falsely implicated owing to village animosity. During the pendency of the present appeal, accused Kamla has died. With regards to said accused

Kamla, vide order of this Court dated 8th September, 2022, the present appeal at her behest has been abated.

39. We have examined the judgment and order of conviction passed by the trial court, which merely noticed the prosecution version and thereafter has referred to various judgments to hold that the prosecution has established guilt of the accused-appellants based on prosecution evidence. The trial court has not carefully examined the statements of the prosecution witnesses so as to evaluate the correctness or otherwise of the same. We have noticed hereinabove that there are material contradictions, inconsistencies and discrepancies in the statements of the prosecution witnesses specially its star prosecution witnesses i.e. P.W.-1 and P.W.-2, who are alleged to be eye-witnesses of the incident in question. Apart from the above P.W.-1 and P.W.-2 are interested witnesses as P.W.-1 and P.W.-2 are brother and cousin brother of the deceased respectively and as such their statements were liable to have been minutely examined when there is no independent witness. The trial court has also not carefully examined the site plan prepared by the Investigating Officer qua the shifting of place of occurrence.

40. In view of the above discussions, we find that the trial court was not justified in returning the finding of guilt against the accused-appellants on the basis of evidence led by the prosecution. Finding of the court below that the guilt of the accused appellant has been proved beyond reasonable doubt, is thus rendered unsustainable. We hold that the prosecution has failed to prove the guilt of accused-appellants beyond reasonable doubt.

41. Consequently, in view of the deliberation held above, this appeal succeeds and is allowed. The judgment and order of conviction of accused-appellants dated 21.03.2007 passed in Session Trial No. 830/06, by the Additional Session Judge Court No. 6 Muzaffarnagar cannot be legally sustained and is, hereby, set aside. The accused-appellant no.1 Balister is clearly entitled to benefit of doubt. As he has already suffered incarceration of almost 15 years since the date of his conviction, he is entitled to be released forthwith.

42. Accordingly, the present appeal stands allowed.

43. The accused-appellant no.1 Balister shall be released on compliance of Section 437-A Cr.P.C., unless he is wanted in any other case forthwith.

46. We record our appreciation for the able assistance rendered in the case by Mr. Sheshadri Trivedi, learned Amicus Curiae, who would be entitled to his fee from the High Court Legal Service Authority, quantified as Rs. 15,000/-

47. Let a copy of this judgment be sent to the Chief Judicial Magistrate, Muzaffarnagar henceforth, who shall transmit the same to the concerned Jail Superintendent for release of the accused-appellant no.1 Balister in terms of this judgment.

(Shiv Shanker Prasad, J.)

(Ashwani Kumar Mishra, J.)

Order Date :- 23.9.2022

Sushil/-