Reserved.

Chief Justice's Court

Case :- CRIMINAL APPEAL No. - 925 of 1983

Appellant :- Bansh Raj
Respondent :- State Of U.P.
Counsel for Appellant :- C.S. Saran,K.K. Sharma,Kamal Krishna
Counsel for Respondent :- D.G.A.,A.G.A.,N.D.Shukla

Hon'ble Govind Mathur,Chief Justice
Hon'ble Vivek Varma,J.

1. This appeal arises out of the judgment and order dated 26.03.1983 passed by the Additional Sessions Judge, Gyanpur, Varanasi in S.T. No. 46 of 1981 by which he convicted the appellant Bansh Raj @ Lalley under Section 302 IPC and sentenced him to undergo imprisonment for life.

2. In brief, facts of the case are that on 5.1.1981, a written report (Ex-ka-1) was submitted by Sri Bihari Lal Pandey (Informant/P.W.-1) at Police Station Aurai, District Varanasi alleging therein that his uncle Sharda Prasad Pandey was issue-less, he owned 1.5 Bigha of land. Bansh Raj @ Lalley (accused/appellant) wanted Sharda Prasad Pandey to transfer that land to him. However, he refused on the advice of Informant's brother Sridhar Pandey. It antagonized the accused appellant who entertained ill will against Sridhar Pandey. About 8 to 10 days, prior to the incident, Bansh Raj Pandey @ Lalley abused and threatened the informant. The villagers intervened and saved the situation. On account of this animosity, on 5.1.1981, at about 8 p.m. in the night when the informant, his brother Sridhar Pandey, Rajpati Pandey and nephew Dinesh Kumar Pandey were sitting around a fire ('Kaura'), in front of the house of Sridhar, and a lantern was lit up, Banshraj Pandey @ Lalley suddenly turned up armed with a gun. He fired at informant's brother Sridhar Pandey. The shot hit Sridhar

Pandey in the stomach and he fell down. Hearing the noise of gun fire and uproar, the villagers came and saw the incident.

3. On the basis of the written report (Ex-ka-1), the First Information Report was lodged on 05.01.81 at 9.05 p.m, under Section 307 IPC against the accused appellant at P.S. Aurai, District Varanasi by P.W.-3 Sri Nath Ojha, Head Moharrir. An entry was made in General Diary (Ex-Ka-4), the investigation was entrusted to Ram Singh (P.W.-5).

4. The injured Sridhar Pandey was taken by the informant to the police station Aurai. The Investigating Officer recorded the statement of injured and informant. Thereafter the Injured was taken by a constable to Aurai Hospital. The doctor at Aurai Hospital referred him to Shiv Sundar Prasad Gupta Hospital, Varanasi.

5. The injured, Sridhar Pandey succumbed to his injuries at Shiv Shankar Prasad Gupta Hospital, Varanasi on 5.1.1981 at 10.35 p.m. The case was thereafter converted from Section 307 IPC to Section 302 IPC. Extract of this G. D. entry is available on record as Ex-ka-5.

6. During the course of investigation, inquest was prepared. The corpus of the deceased was subjected to autopsy. As per Dr A. K. Garg, (P.W.-7), following ante-mortem injuries were found:-

> *1. Wound of entrance 5 cm X 5 cm with irregular margins, contused charring present throughout. This wound was towards the left at the outer side of abdomen. A loop of intestine was protruding.*
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> *2. Rupture of large intestine and small intestine.*
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> *3. Rupture of spleen*
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> *4. Rupture of left kidney*
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> *5. Blood present in the abdominal cavity about 1-1/4 litres.*
>
> *6. Two pellets were recovered from the posterior wall of the abdomen on right side. In the opinion of the doctor the*

injuries on the body of the deceased were sufficient to cause his death.

7. P.W.-9 Sub Inspector Rajendra Prasad Rai, after concluding the investigation submitted a charge sheet (Ex-Ka-7) against the appellant Bansh Raj @ Lalley under Section 302 IPC. The then Addl. Sessions Judge indicted the appellant under Section 302 IPC on 5.2.1982. Accused denied the charge and claimed to be tried.

8. During the course of trial, the prosecution adduced nine witnesses in support of its case, namely, P.W.-1 Bihari Lal (informant/witness of fact/eye witness), P.W.-2 Dinesh Kumar (witness of fact/eye witness), P.W.-3 Srinath Ojha (who transcribed the chick report), P.W.-4 Sharda Prasad (motive witness), P.W.-5 Sri Ram Singh (SI), P.W.-6 Sri Ram Sajiwan Mishra (SO/Subsequent Investigating Officer), P.W.-8 Sri Mahendra Nath Ram, constable and P.W.-9 Rajendra Prasad Rai (SI) and exhibited several documents (Ex-Ka-1 to Ka-12).

9. The statement of appellant was recorded under Section 313 Cr.P.C., he denied the allegations and claimed false implication due to previous enmity. He has taken plea of alibi that he was admitted in Government Hospital at Jangiganj from 4.1.1981 to 8.1.1981 and to prove his defence, he adduced three defence witness namely D.W.-1 Janardan Pandey, the then pharmacist, D.W.-2 Dr M. P. Srivastava, and D.W.-3 Vishambhar Nath Pandey, the relative of accused appellant as also Ex-Kha-1 (Bed Head Ticket) and Ex-Kha-2 (Discharge Ticket).

10. The trial Court held that the prosecution was able to prove guilt of the appellant beyond reasonable doubt and accordingly convicted him for his having committed offence under Section 302 IPC and sentenced him to life imprisonment.

11. Sri Kamal Krishna, learned senior counsel for the appellant submitted that prosecution has failed to prove the manner and place of occurrence. He contests the place of occurrence, since neither empty cartridge or pellets were found at the incident site, nor the blood stained soil was found by the Investigating Officer. He further submitted that the witnesses who have claimed to be eye witness of the occurrence are partisan and related witnesses and as such no reliance can be placed on their testimony. He further submitted that the medical evidence is at variance with ocular version of the witnesses, because, the fire was said to be made from a distance of 5-6 steps yet charring was found present around the wound of the deceased, which is not possible. All these factors, according to the learned counsel for the appellant, are clearly suggestive of the fact that the prosecution has failed to establish its case beyond all reasonable doubts and the appellant was falsely framed.

12. On the other hand learned A.G.A. opposing the said arguments submitted that the ocular testimony of the prosecution witnesses is not in any manner inconsistent with the medical evidence and reliability of the eye witnesses of the incident cannot be doubted as their presence at the place of occurrence, which is just in front of their house, is quite natural and there was no reason to spare the real culprit and falsely implicate the appellant, therefore, the trial court has rightly held that the prosecution has proved its case beyond all reasonable doubts against the appellant and has rightly convicted him.

13. Heard learned counsel for the parties and perused the material on record.

14. The prosecution case rests on the evidence of PW-1 and P.W.-2, who are the witnesses of fact and the eye witnesses.

P.W-1 -Bihari Lal is the author of first information report. He is brother of the deceased. This witness deposed that Sharda Prasad was his real uncle. On the advice of his brother Sridhar (deceased), Sharda Prasad refused to execute/transfer his land in favour of accused appellant. As a result, the latter harboured animosity against Sridhar Pandey. He asserted that on the fateful day at about 8.00 p.m. when the informant along with Sridhar, Rajpat and his nephew (P.W-2) were sitting around a fire, the accused-appellant came with a gun and fired at Sridhar. The shot hit him in the abdomen. This witness along with other persons wrapped the wound of the injured with a "Gamacha" (towel) and covered him with a "rajai " (blanket). Thereafter, the injured was taken to Police Station Aurai and First Information Report was lodged.

15. P.W-2 Dinesh Kumar, is son of the deceased. His statement was recorded on 1.12.1982. His age as recorded on the date of his deposition is 14 years. On the date of occurrence this witness was aged about 12 or 13 years. The trial Judge, however, before recording his evidence, tested his ability to depose and after being satisfied that he was in a position to depose, he recorded his evidence. His evidence, therefore, cannot be doubted on the ground that he was a minor at the time of occurrence. He had given a very consistent statement about the occurrence. He stated that he along with his uncle Bihari lal (informant), Rajpati and his father Sridhar Pandey (deceased) were sitting around a fire when the accused-appellant came with a gun in his hand and fired at his father. His father fell down and the accused appellant, fled from the spot towards west.

16. We have examined the testimony of P.W-2 Dinesh Kumar very closely, we do not find any inconsistency in his deposition.

17. P.W.-4 Sharda Prasad has been examined as motive witness. He deposed that he earned his livelihood as a cloth vendor in Calcutta. He owned 1.5 bigha of land. The accused appellant wanted Sharda Prasad to transfer that land to him. However, he refused on the advice of Sridhar Pandey. It antagonized the accused appellant who threatened Sridhar Pandey of dire consequences. During cross examination, this witness remained firm and there was no inconsistency.

18. The prosecution case from the very inception, i.e. from the registration of the First Information report, states that at the time when the appellant had fired a shot, the deceased was sitting in front of his house along with his brother Bihari and his son Dinesh and one Rajpati and all of them were warming themselves sitting around a fire. Their testimony remained unshaken at the trial. The two eye witnesses Bihari (PW-1) and Dinesh (PW-2) have also supported their depositions before the trial court. The fact that the deceased and witnesses were sitting around a fire has a ring of truth. It is a very common sight in the villages that during winters, villagers, in the evening and early morning sit around fire out-side their houses in the sahan (court yard) to warm themselves. Thus the presence of the two eye witnesses, PW-1 and PW-2 at the place and time is natural and cannot be doubted. The presence of these two witnesses at the scene of occurrence is established. Their testimony cannot be discarded on the ground of their being partisan as they are related to the deceased. Both these witness were extensively cross examined regarding the manner of assault, on the point of sufficiency of light at the time and place of incident. Nothing adverse could be elicited from them during such cross examination. The trial court has rightly relied on the testimony of these two eye witnesses and we have no reason

to hold other-wise

19. There is no rule of law, which requires rejection of testimony of related witnesses. Once it is found by the court, subsequent to analysis of such evidence that there is no reason to disbelieve such witnesses then the mere fact that the witnesses are interested, is not enough to reject the prosecution case on this ground alone.

20. The Hon'ble Apex court in the case of **State of Punjab v. Karnail Singh reported in 2004 SCC (Cri) 135** has held as under.

> *" 8. We may also observe that the ground that the witnesses being close relatives and consequently, being partisan witnesses, should not be relied upon, has no substance. This theory was repelled by this Court as early as in Dalip Singh v. State of Punjab [AIR 1953 SC 364 : 1953 Cri LJ 1465] in which surprise was expressed over the impression which prevailed in the minds of the Members of the Bar that relatives were not independent witnesses. Speaking through Vivian Bose, J., it was observed: (AIR p. 366, para 25)*
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> *"25. We are unable to agree with the learned Judges of the High Court that the testimony of the two eyewitnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rule. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this Court endeavoured to dispel in — 'Rameshwar v. State of Rajasthan [AIR 1952 SC 54 : 1952 Cri LJ 547] ' (AIR at p. 59). We find, however, that it unfortunately still persists, if not in the judgments of the courts, at any rate in the arguments of counsel."*
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> *9. Again in Masalti v. State of U.P. [AIR 1965 SC 202 : (1965) 1 Cri LJ 226] this Court observed: (AIR pp. 209-10, para 14)*
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> *"But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses. … The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard and fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct."*

21. On the reliability of testimony of a child witness, the Hon'ble Apex Court in **Nivrutti Pandurang Kokate v. State of Maharashtra, (2008) 12 SCC 565** has held as under:

> *10. "6. … The Evidence Act, 1872 (in short 'the Evidence Act') does not prescribe any particular age as a determinative factor to treat a witness to be a competent one. On the contrary, Section 118 of the Evidence Act envisages that all persons shall be competent to testify, unless the court considers that they are prevented from understanding the questions put to them or from giving rational answers to these questions, because of tender years, extreme old age, disease—whether of mind, or any other cause of the same kind. A child of tender age can be allowed to testify if he has intellectual capacity to understand questions and give rational answers thereto. This position was concisely stated by Brewer, J. in Wheeler v. United States [40 L Ed 244 : 159 US 523 (1895)] . The evidence of a child witness is not required to be rejected per se, but the court as a rule of prudence considers such evidence with close scrutiny and only on being convinced about the quality thereof and reliability can record conviction, based thereon. (See Suryanarayana v. State of Karnataka [(2001) 9 SCC 129 : 2002 SCC (Cri) 413] .)*
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> *7. In Dattu Ramrao Sakhare v. State of Maharashtra [(1997) 5 SCC 341 : 1997 SCC (Cri) 685] it was held as follows: (SCC p. 343, para 5)*
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> *'5. … A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. 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 there is no likelihood of being tutored.'*
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> *The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an established principle that child*

> *witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaped and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness."*
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> *The above position was highlighted in Ratansinh Dalsukhbhai Nayak v. State of Gujarat 4 , SCC pp. 67-68, paras 6-7. Looked at from any angle the judgments of the trial court and the High Court do not suffer from any infirmity to warrant interference.*

22. It is worthwhile to mention here, that during the trial the defence made an effort to challenge the place of occurrence itself. Firstly, on the ground that the Investigating Officer did not find blood stains at the place of occurrence, and secondly, that empty cartridge and pellets were also not found at the place of occurrence.

23. The first submission that blood was not found at the scene of occurrence and the incident had not taken place, at the place where prosecution has alleged, cannot be accepted. In this regard it would be relevant to refer to the testimony of PW-1 and PW-2. They both deposed that as soon as the deceased received gun shot wound, he pressed the wound by his hand and just thereafter 'Gamachha' (cloth towel) was tied around the wound in order to stop the blood from oozing and spilling. Further, the injured was, thereafter, also wrapped in a blanket (razai). Thus, the possibility of blood falling on the ground becomes remote. It is also evident from the statement of the Doctor (PW-7) that he found huge collection of blood, i.e., 1-1/4 ltrs. of blood in the abdominal cavity of the deceased. Thus, it appears that the blood spill on the ground was prevented by promptly binding the wound with the "Gamachha". Consequently the blood got accumulated inside the deceased's body. There is nothing to doubt the correctness of the testimony of these witnesses.

24. The Supreme Court Court in **Nirmal Singh and another Vs. State of Bihar reported in (2005) 9 SCC 725** dealing with such a situation has held as-

> *"…….. in view of the explanation offered by the prosecution witnesses it appears probable that no blood had fallen on the ground at the place of occurrence and in any event, if some blood had fallen at the place of occurrence which the Investigating Officer failed to notice that by itself would not be fatal to the prosecution case."*

25. The aforesaid decision of the Supreme Court helps the prosecution and as such the absence of blood at the place of occurrence would be of no help to the defence and the submission of the learned counsel for the appellant that the place of incident is not proved, cannot be accepted.

26. However, even if it be assumed for the sake of argument that some blood had fallen at the place occurrence the possibility of blood stains on the ground being withered away by the foot steps of the persons assembled there at, cannot be ruled out, particularly when the evidence on record shows that just after the incident large number of persons had assembled at the place of occurrence. This could also be the reason that the Investigating officer did not find blood stains at the place of occurrence.

27. The next submission that empty cartridge and pellets were not found at the place occurrence and thus again the place of occurrence appears doubtful, also cannot be accepted, inasmuch as, in the present case only one shot was fired and it is not the case of the prosecution that the appellant after firing from his gun again loaded another cartridge. The evidence on record suggests that after making a single shot at the deceased, the appellant fled from the place of occurrence. So far as the absence of pellets at the place of occurrence is

concerned in that regard we may say observe that the shot was fired was from a close range, as charring is present around the wound and the pellets had entered the body of the deceased. Moreover, there is no exit wound on the body of the deceased. The possibility of the pellets being found at the place of occurrence is also ruled out by melee and the rush of people at the site of the incident after the crime. Even other-wise, nothing could be elicited from the cross-examination of the eye witnesses, PW-1 and PW-2 which may create doubt about the place and manner of occurrence.

28. In the case of **Lakhan Sao Vs. State of Bihar & anor 2002 Crl. L.J. 2959 (SC)**, it has been propounded that non-recovery of fire arm or cartridge does not detract from the case of the prosecution, where the direct evidence is acceptable

29. An effort has also been made by the counsel for the appellant to suggest that since medical evidence is at variance with ocular version, the medical evidence be believed and ocular evidence be disbelieved and it be inferred that the prosecution witnesses had not seen the incident. In this regard according to the ocular testimony the shot was fired at the deceased from a distance of 5-6 steps and if this ocular testimony is to be believed then charring around the wound of the deceased would not occur, as for charring to occur the fire would have been made from a distance of 3-4 feet. In our considered opinion, the variance in distance in the present case is so minor that it would hardly affect ocular testimony. Even otherwise if we take into consideration the length of the gun, which is generally about 3 feet long, there would be no variance in the distance, as then the distance would be 3-4 feet.

30. Now, coming to the plea of alibi as set up by the accused-appellant, his version in this regard is that he was not present in

the village on the date and time of the occurrence, as he remained admitted in Government Hospital at Jangiganj from 4.1.1981 to 8.1.1981. To prove his defence version the appellant had produced three defence witness, namely, Janardan Pandey (DW-1), the then pharmacist of the hospital, Dr M. P. Srivastava (DW-2) who gave treatment to the appellant and Vishambhar Nath Pandey (DW-3), a relative of accused appellant, who is alleged to have got the appellant admitted in the hospital. The appellant in his statement under section 313 Cr.P.C had stated that on 3.1.1981 he had gone to village Sunaicha where his sister was married. There he fell ill in the night of 3.1.1981 and in the morning of 4.1.1981 his relative Vishambhar Nath Pandey (DW-3) took him to hospital at Jangiganj where he remained admitted until he was discharged there from on 8.11.1981. The trial Court has discarded that plea stating that accused can very easily go the place of occurrence on the date of incident and after committing the crime can return to the hospital within an hour. We have also examined the statement of DW-3. He deposed that village Sahsepur where the incident had taken place is 14-15 kms. away from the hospital where appellant was admitted and the two places are connected by a pitch road (pukka road). He has also asserted that the said distance of 14-15 kms. would be shortened by 2-3 kms if one takes the journey via Jagarnathpur. On the basis of such an evidence on record the trial court rightly held that the appellant can very easily go to the place of occurrence on the date of incident and after committing the crime can return to the hospital within an hour. Besides the above the register on which the plea of alibi is based, on the face of it, does not inspire confidence. Though at Government Hospital, Katra, Varanasi the accused appellant claims to have been admitted on 4.1.81,

neither prior to that date nor subsequent to that date there is any entry of any other patient being admitted in the month of January. The defence also did not produce any other evidence to establish the existence of any earlier register/record of patient admission. Also the appellant did not adduce any evidence of any medicine having been actually issued to him by the hospital, though D.W.-2 Dr. M.P. Srivastava had stated so. On the plea of alibi the settled legal position is that such a plea can succeed only if it is shown that the accused was so far away at the relevant time that he could not be present at the place where the crime was committed.

31. In the case of **State of Haryana Vs. Sher Singh 1981 Cr.L.J. 230 (SC)** has observed that if an accused takes the plea of alibi, he must establish it.

32. In the case of **Dudh NathPandey Vs. State of Uttar Pradesh AIR 1981 SC-911**, it was held that plea of alibi can succeed only if it is shown that the accused was so far away at the relevant time that he could not be present at the place where the crime was committed.

33. The said proposition of law has been reiterated in the case of **Binay Kumar Singh Vs. State of Bihar (1997) 1 SCC-283**. The apex court observed that the burden of proving an alibi is entirely on the accused and strict proof is required for establishing an alibi. In this context, we may reproduce a few paragraphs of the said judgment.

> *"22. We must bear in mind that an alibi is not an exception (special or general) envisaged in the Penal Code, 1860 or any other law. It is only a rule of evidence recognised in Section 11 of the Evidence Act that facts which are inconsistent with the fact in issue are relevant. Illustration (a) given under the provision is worth reproducing in this context:*
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> *'(a) The question is whether A committed a crime at Calcutta on a certain day. The fact that, on that date, A was at Lahore*

is relevant.'

23. The Latin word alibi means 'elsewhere' and that word is used for convenience when an accused takes recourse to a defence line that when the occurrence took place he was so far away from the place of occurrence that it is extremely improbable that he would have participated in the crime. It is a basic law that in a criminal case, in which the accused is alleged to have inflicted physical injury to another person, the burden is on the prosecution to prove that the accused was present at the scene and has participated in the crime. The burden would not be lessened by the mere fact that the accused has adopted the defence of alibi. The plea of the accused in such cases need be considered only when the burden has been discharged by the prosecution satisfactorily. But once the prosecution succeeds in discharging the burden it is incumbent on the accused, who adopts the plea of alibi, to prove it with absolute certainty so as to exclude the possibility of his presence at the place of occurrence. When the presence of the accused at the scene of occurrence has been established satisfactorily by the prosecution through reliable evidence, normally the court would be slow to believe any counter-evidence to the effect that he was elsewhere when the occurrence happened. But if the evidence adduced by the accused is of such a quality and of such a standard that the court may entertain some reasonable doubt regarding his presence at the scene when the occurrence took place, the accused would, no doubt, be entitled to the benefit of that reasonable doubt. For that purpose, it would be a sound proposition to be laid down that, in such circumstances, the burden on the accused is rather heavy. It follows, therefore, that strict proof is required for establishing the plea of alibi."

(emphasis supplied)

34. We thus endorse the said finding of the trial Court and it has committed no error in rejecting the plea of alibi of the appellant. Even otherwise, the ailment of the appellant for which he was admitted in the said hospital is fever and pain in chest and stomach. DW-3 has stated that no one of the family of the appellant had visited hospital to attend him, which shows that the ailment of the appellant was not serious enough. In fact the story of alibi as set up by the appellant does not inspire confidence and we disbelieve the same. Here we may also say that once the prosecution, through reliable evidence, has satisfactorily established presence of accused at the scene of

occurrence we would not believe any counter evidence that the accused-appellant was elsewhere when the occurrence happened.

35. In view of our above discussion we hold that the guilt of the appellant stood fully proved and his appeal lacks merit and deserves to be dismissed. It is accordingly dismissed and impugned judgment and order dated 26.03.1983 of the trial court is hereby affirmed. Appellant, who is on bail, is directed to surrender immediately. His bail is cancelled and sureties are discharged. Trial court is also directed to get the appellant arrested and send him to jail to serve out the sentence awarded by it as affirmed by this judgment.

36. Office will certify this order to the court concerned within 15 days. Trial court shall thereafter communicate compliance of this judgment within a month thereafter.

Order Date :- 17.10.2019
RavindraKSingh

(Vivek Varma,J.) (Govind Mathur, C.J.)