

Court No.47

RESERVED

AFR

Case :- CRIMINAL APPEAL No. - 1599 of 1992

Appellant :- Dalveer And Others

Respondent :- State

Counsel for Appellant :- Mohan Chandra, Mohit Singh

Counsel for Respondent :- A.G.A.

Hon'ble Manoj Misra,J.

Hon'ble Mrs. Manju Rani Chauhan,J.

(Delivered by Hon'ble Manoj Misra, J)

1. This appeal assails the judgment and order dated 28.08.1992 passed by the IVth Additional Sessions Judge, Moradabad in Sessions Trial No. 587 of 1986 by which the appellants, namely, Dalveer, Ramesh and Naresh were convicted under sections 148 and 302/149 IPC and punished as follows: one year of rigorous imprisonment under section 148 I.P.C.; and imprisonment for life under section 302 read with section 149 I.P.C. Both sentences to run concurrently.

2. The aforesaid appellants were sent for trial along with co-accused Man Singh. Man Singh however died during the course of the trial. Hence, the case against him was abated. Amongst the appellants, Dalveer and Ramesh died during the pendency of the appeal hence their appeal was abated vide order dated 31.01.2019. Thus this appeal has been pressed only on behalf of surviving appellant no.3, namely, Naresh.

3. In brief the facts of the case are that on 14.06.1986, at 04:15 hours, a first information report (for short FIR) (Exhibit Ka-1) was lodged by Jagdish Prasad (not examined) at police station Kund Fatehgarh, District Moradabad, which was at a distance of about 10 km from the place of occurrence. In the FIR it was alleged that the informant along with his sister's husband (the deceased - Kishan Lal), nephew (another

deceased, namely, Mahender son of Kishan Lal) and another nephew (P.W.3), namely, Surender son of Kishan Lal, had gone to the house of Nathu Lal (not examined), at about 7 pm, on 13.06.1986, to attend a feast. On their way back home, near the house of Roshan (not examined), at about 8:30 p.m., they were surrounded by five persons, namely, Dalveer (appellant no.1), Ramesh (appellant no.2); Naresh (appellant no.3); Man Singh Jatav (who died during trial); and one unknown person. All of them had emerged from the *Gher* of Naresh. Naresh had a gun whereas the rest had *Tabal* (sharp-edged weapon). Ramesh challenged the deceased - Kishan Lal by saying that today he shall be taught a lesson for lodging a case against him and for implicating Dalveer's father in a dacoity case. On his saying so, Naresh opened fire from his gun at the deceased - Kishan Lal, as soon as he fell down, Dalveer attacked him with his *Tabal*. In the meantime, informant's nephew, namely, Mahender, was surrounded by accused Ramesh, Man Singh, Dalveer and the unknown person, who all attacked him with *Tabal* and killed him too. Seeing all that, the informant raised an alarm. Upon which, Ramesh fired two shots in the air, as a result, due to fear, no villager came forward. Thereafter, Dalveer, Ramesh and Naresh effected their escape by running away towards the west and while they were running informant's sister- Ramwati (PW2) and informant's niece Ramshree (not examined) spotted them from the roof of their house. The remaining accused, namely, Man Singh and the unknown person escaped by using a *Gali* (lane) towards the east. In the FIR it was alleged that bodies of the two deceased were lying on the spot. The FIR sought to explain the delay by stating that in the night, due to fear, it could not be lodged.

4. The informant was not examined as a witness, as he was

reported dead. However, the lodging of the FIR was proved by the Head Moharir (Shiv Kumar Singh – P.W.4), who had made GD entry of the FIR, and the writing of the informant was proved by his relative, namely, Yashoda Nandan (P.W.7).

5. Two inquest reports were prepared for the two deceased. They were proved by the Investigating Officer (I.O.) (P.W.5) and were marked Exhibit Ka-3 and Exhibit Ka-4. Ex. Ka-3 indicated that inquest started at about 8.05 am on 14.06.1986 and was completed at 10.15 am. The other inquest, as per Ex. Ka-4, started at 10.15 am and was completed at about 11.30 am. The autopsy of deceased - Mahendra Kumar was conducted on 15.06.1986 at about 2.45 pm. As per autopsy report (Ex. Ka-27), eight ante-mortem incised wounds were there. Semi digested food material was present in small intestine whereas large intestine was found full with faecal matters. The cause of death was due to shock and haemorrhage as a result of ante-mortem injuries. Time of death was estimated about two days before. Autopsy of Kishan Lal was conducted on 15.06.1986 at about 1.00 pm. The autopsy report (Ex. Ka.22) disclosed five ante-mortem injuries on his body. Apart from one gun shot wound of entry on the front of right side of chest 4 cm below the right nipple, with blackening and charring present all around the wound, there were three incised wounds and one abrasion found. Some semi-digested food material was also found in the small intestine and the large intestine was found loaded with faecal matter. The time of death was estimated two days before.

6. During the course of investigation, recovery of *Farsa (Tabal)* was made on the pointing out of co-accused Man Singh of which a fard / memorandum (Exhibit Ka-12) was prepared. However, no recovery of any incriminating material was made from the appellants. After investigation, charge-sheet (Ex. Ka

14) was laid against four accused, namely, Dalveer, Ramesh, Naresh, and Man Singh. The identity of the fifth accused however could not be ascertained. Upon cognizance and consequential committal to the court of sessions, charges were framed against all the four accused for offences punishable under section 148 I.P.C. and under section 302 read with section 149 I.P.C. The accused pleaded not guilty and claimed for trial.

7. Seven witnesses were examined by the prosecution. PW 2 and PW 3 were witnesses of fact whereas the rest were formal witnesses. Before we proceed to notice the testimony of the witnesses of fact, it would be useful to briefly notice the testimony of the other witness, which is as under:

8. **P.W.1- Natthu Singh**, constable who visited the spot along with the Investigation Officer (I.O.). He stated that on 14.06.1986, he visited the spot with the I.O; that the dead body of Mahender and Kishan Lal were sealed and handed over to him for being carried to the mortuary for autopsy; that by the time he could reach there, it had become late, therefore, autopsy could not be conducted on that day. Hence, it was conducted on 15.06.1986 post noon.

9. **P.W-4 - Shiv Kumar Singh**, Head Moharir posted at the police station where the FIR was lodged. He stated that on 14.06.1986 Jagdish Prasad (informant) had brought a written report to the police station of which GD Entry was made by him.

10. **P.W.5-** Harish Chand Rana, the I.O. - Station House Officer of the police station concerned. He proved the various steps taken during the course of investigation including holding of inquest proceeding, preparation of memorandums of recovery of: (i) samples of blood-stained and plain earth, (ii)

empty catridge of 12 bore, (iii) slippers and shoes of the two deceased and (iv) *Farsa* (sharp-edged weapon) from co-accused Man Singh. Site plan (Ex. Ka 13) from where recovery of *Farsa* was shown was prepared by him. The site plan (Exhibit Ka - 6) of the scene of the incident was prepared by him. He stated that on 14.06.1986 he had recorded statement of informant - Jagdish Prasad. He stated that on the same day, he recorded statements of Smt. Ramwati; Laturi Singh, Bhuri, Ram Avtar, Km. Ramshree, Itwari Lal and others. He also stated that on 15.06.1986, he recorded the statement of Surendra (PW3) on the basis of gestures made by him to the questions put to him. He also stated that though PW3 was dumb but he had the capacity to hear. He proved the submission of charge-sheet (Ex. Ka-14). He also stated that he learnt about the death of informant - Jagdish Prasad through a *Pairokar*. In his cross-examination at the instance of accused Ramesh and Dalveer, he stated that though he had recorded statement of various persons of the area residing close to the place of occurrence but they all gave hearsay evidence except Chowkidar Latti (not examined). He also admitted that in the site plan (Exhibit Ka-6), he had not shown the house of deceased - Kishan Lal and had also not disclosed the place from where Ramwati (PW2) had seen the accused running away. He stated that towards north of the place of occurrence, at a distance of just about 15-20 paces, there are shops. He admitted that he had not recorded statement of those shopkeepers. He also stated that towards north of the place of occurrence there is a temple and towards north-east there is jungle whereas towards north-west there is abadi. He stated that he did not record statement of Nathu Lal or any such person who may have returned with the deceased after

attending the feast. During cross-examination, he could not tell the distance of deceased- Kishan Lal's house from the place of occurrence though he stated that it is quite near. He however denied the suggestion that he had filed a false charge-sheet. He also denied the suggestion that Jagdish had not given any statement. He however admitted that he had not mentioned the date on which report of the case was sent though he stated that it was sent by post. He stated that as per endorsement, the FIR was sent to the court of Chief Judicial Magistrate on 19.06.1986.

11. **P.W.6 - Dr. Y.C. Gupta** proved the post-mortem reports of the two deceased. He opined that the death could have had occurred in between 8 and 8:30 pm on 13.06.1986. Though, during cross-examination, he stated that it is possible that the deceased may have had died at about quarter to 11 pm on 13.06.1986 as there could always be a variation of 6 to 8 hours in the estimation of time of death. He also accepted the possibility that the deceased died 3 to 4 hours after having meal.

12. **P.W.-7 - Yasoda Nandan** proved the signature of Jagdish Prasad on the written report (FIR). He stated that he is the brother-in-law (*Jija*) of the deceased - Mahender and son-in-law of the deceased-Kishan Lal and that he knew Jagdish Prasad (informant), the brother-in-law of Kishan Lal, very well and was conversant with his writing. He stated that Jagdish Prasad had been visiting Raholi (the village where the incident occurred) quite often. In his cross-examination, he admitted that he has not brought with him any writing of Jagdish Prasad. He denied the suggestion that Jagdish Prasad had died in the year 1980-81. He feigned ignorance as regards execution of will by Jagdish Prasad in favour of deceased Mahendra as also whether Mahendra (the deceased), on strength of that will on

death of Jagdish Prasad, had applied for mutation. He denied the suggestion that on 13/14.06.1986 Jagdish Prasad was not alive.

13. The two witnesses of fact, namely, Ramwati (P.W.2), the widow of the deceased - Kishan Lal and the mother of the other deceased- Mahender, and Surendra Singh (PW3 – the other son of the deceased), deposed as follows:

14. **P.W.-2 Ramwati** stated that about a year and a half before the incident, her husband (Kishan Lal) had lodged a first information report against the accused Ramesh and Dalveer in connection with theft of tractor bearings. In that theft case, Dalveer and Ramesh were charge-sheeted, as a result, the accused were inimical towards her husband and son. She stated that Jagdish Prasad (the informant) was her brother. Two days prior to the date of incident, Jagdish Prasad had come to her house. On the date of the incident, her two sons, namely, Surendra (PW3) and Mahendra (the other deceased) along with Jagdish Prasad and her husband (deceased - Kishan Lal) had left the house at about 7.00 pm to attend a feast at Natthu's place. At about 8 pm, while she was there at her own house with her daughter (Ramshree), she heard a gun shot. On hearing the gun shot, she and her daughter went upstairs. While they were climbing the staircase, they heard two shots more. Soon thereafter, she saw, towards the west, in the *Gali*, Dalveer, Ramesh and Naresh running and uttering in an abusive tone, in vernacular, "*this is what happens to police informers*". Naresh had a gun in his hand whereas Dalveer and Ramesh had *Tabal*. They ran through the Gher of Khushiram towards the North. She saw them in moonlight. Shortly thereafter her brother (informant) and her son Surendra (PW3) arrived and informed her that Dalveer, Naresh, Ramesh and

Man Singh along with another person have killed her husband and her son Mahendra. In her cross-examination, she could not tell the distance of the place of occurrence from her house. She admitted having seen the accused running, near her house only. She also admitted that by that time the night had set in. She admitted that towards east of the place of occurrence, there is a *rasta* going towards the jungle. In response to the suggestion that her house is at a distance of 300-400 yards from the place of occurrence, she could not tell the distance. She stated that when her brother and son (PW3) informed her about the incident she had already come down from the staircase. She stated that she had visited the spot after receiving information but no one from the Mohalla was present there, though, later, they had come. Later, Natthu had also arrived. In her cross-examination, she denied the suggestion that her husband had got her son's name mutated over the land of Jagdish by showing him dead. She also denied the suggestion that on account of such act of her husband, Jagdish was angry with him. In her cross-examination she stated that her brother and son (PW3) at that time had not informed her whether the deceased had left Natthu's house after having food, though, later, she came to know that they had had food. In her cross-examination she admitted that her maternal home i.e. house of Jagdish, is at a distance of 15 *Kos* (45 km) from her village. She stated that there was no special reason for Jagdish to have come to her house though he used to visit her house on a regular basis. In her cross-examination, she admitted that boundary wall of her house is quite high towards the lane, which was used by the accused for effecting their escape, and that she could not have seen the accused had she not been on the roof. A specific question was put to her as to when she first

saw the accused to which she responded by saying that when they were about 8-10 yards away from her door towards the east. In response to a specific question as to what her brother had been doing the entire night, she stated that she could not tell because she had been crying and was in a state of shock. She also could not tell who had visited her in the night. She, however, stated that her brother had left at about 4 am, before sun rise, on a tractor, along with fellow villagers Parmanand and her son's brother-in-law, namely, Umesh, to lodge the FIR.

In her cross-examination, she admitted that her husband had been mingling with criminals and had been passing on information to the police, as a result, criminals were annoyed with him. She accepted the suggestion that her husband had got multiple accused arrested. She however could not tell whether he had been witness in various cases. She also stated that in her house, about 25 years back, there was a dacoity in which Dalveer's father, namely, Lokman alias Loki, was accused though he was acquitted. She stated that though, thereafter, there had been no quarrel with Loki but, about two years back, Dalveer and Ramesh had stolen her tractor's parts. However, she could not tell whether any case in that connection was going on. She denied the suggestion that on the night of the incident there was no moonlight as there were clouds. She further denied the suggestion that she did not see the accused but has implicated them on account of past enmity. In her cross-examination, at the instance of accused Naresh, she admitted that Naresh is *Nai* by caste whereas the remaining accused were *Dhobi* by caste. During her cross-examination at the instance of Naresh, she was also confronted by her statement recorded under Section 161 Cr.P.C. wherein she had not stated that she heard Naresh also exclaiming about the fate of police

informers when she spotted him running with other accused persons. On being confronted with that statement, she stated that she does not know as to how the I.O. did not mention that. She denied the suggestion that Jagdish, her brother, had died much before the incident. As regards the direction where the accused went, during cross-examination, she stated that the accused were seen running towards north through the *Gher* of Khushiram's house. Later, she stated that she had seen the accused entering that *Gher* but could not see where they went. She stated that, at that time, her daughter-in-law and her daughter were also there at the roof. She stated that she had informed the I.O. about the place from where she had witnessed the incident but she could not tell as to why the I.O. had not disclosed that place in the site plan. She further stated that her younger son Surender (PW3) though is dumb but is able to hear and understand. She denied the suggestion that she, at the time of incident, was at her Maika. She denied the suggestion that Jagdish was not present. She also denied the suggestion that Naresh was not involved in the incident and that she leveled false allegations.

15. **P.W.3 - Surendra Singh**, son of the deceased - Kishan Lal, who was aged about 14-15 years at the time of his examination, being dumb, therefore, through gestures got his statement recorded in the question and answer form. The said witness initially tried to support the prosecution case but in his cross-examination, the said witness made gestures to questions in such a manner which suggested that he did not have knowledge of the incident and was tutored. Interestingly, the said witness, in his cross-examination, by making gestures, admitted that he came to know about his father and brother's death when he woke up in the morning. The trial court

therefore discarded his testimony.

16. The entire incriminating circumstances evinced from the prosecution evidence were put to the accused while recording their statement under Section 313 Cr.P.C. The accused denied the allegations and claimed that they were falsely implicated on account of police pressure and enmity. In addition thereto, they claimed that Jagdish Prasad (the informant) had died much before the incident and in support thereof they passed on a Khatauni extract to demonstrate that mutation proceedings were drawn in respect of plots of agricultural land consequent to death of a tenure holder named Jagdish Lal. They however led no evidence in defense.

17. The trial court though discarded the testimony of P.W.3 by holding him to be a tutored witness but convicted the accused-appellant on the basis of other evidence. While recording conviction, the trial court relied on the hearsay testimony of Ramwati (PW2), by treating it to be admissible under section 6 of the Evidence Act, 1872 (for short the Evidence Act). The trial court took the view that the said hearsay testimony was corroborated by circumstantial evidence as well as medical evidence.

18. We have heard Sri V.P. Srivastava, learned senior counsel, assisted by Sri Mohit Singh, for the surviving appellant - Naresh; and Sri Deepak Mishra, the learned A.G.A. for the State.

19. The learned counsel for the appellant submitted that as the informant (Jagdish Prasad) was not examined, the first information report which, by itself, is not a substantive piece of evidence, could not have been taken into consideration to corroborate the testimony of other witnesses and could not

have been read to ascertain the manner in which the incident occurred. He submitted that since the testimony of P.W. 3 has been discarded by the trial court there remains the testimony of Ramwati (P.W.2) only. Admittedly, Ramwati is not an eye-witness of the incident. Her testimony is only to the effect that she saw three persons running with arms and proclaiming that *"this is what happens to police informers"*. This by itself is not a clinching circumstance inasmuch as the place of the incident and the place from where P.W.2 noticed the three, out of the five accused, running were not proved to be in such close proximity to each other that involvement of other persons in the crime could be ruled out.

20. It has been submitted that the site plan prepared by the I.O. neither discloses the location of the house of P.W.2 with reference to the place of occurrence nor it discloses the spot from where she had allegedly witnessed the three accused running. Moreover, the suggestion put to PW2 that her house is at a distance of 300-400 yards from the place of occurrence has not been specifically denied though she claimed that she is not aware of the distance. Further, in her testimony, PW2 has neither disclosed the time nor the time-gap by which, or within which, she received information from her brother Jagdish regarding the murder of her husband and her son by the accused-appellants. Otherwise also, since it has not specifically come in the evidence as to how contemporaneous with the incident was the reporting of the incident by the informant to PW2, the hearsay evidence would not become admissible by applying the principle of *res gestae* enshrined under section 6 of the Evidence Act.

21. In addition to above, the learned counsel for the appellant submitted that it has come in the post-mortem of the deceased

that there was semi-digested food found present in the intestine though the large intestine was found full of faecal matter which is suggestive of the fact that the deceased had had their food 2-3 hours before their death. If that is so, then the prosecution story that the deceased had left at 7 pm to attend a feast at the house of Natthu and, after having the dinner there, on way back, at about 8 pm, the incident occurred gets falsified. It has been submitted that in all probability the incident had occurred much later and, only after learning about the incident, on the basis of guess work and past enmity, the prosecution story was developed, which theory gets probabalized by the delay in lodging the FIR.

22. It has also been submitted that evidence was brought on record to demonstrate that in the year 1981, by showing Jagdish Prasad (the informant) dead, mutation proceedings had been undertaken concerning land of Jagdish Prasad which resulted in entry of the name of one of the deceased, that is Kishan Lal's son, in the revenue records. This gives rise to three possibilities, first, that Jagdish, if not dead, would be inimical towards the deceased's family and, therefore, would not probably be in the company of the deceased; second, that, under the circumstances, he came only after hearing about the death of his brother in law to help out his bereaved sister and, therefore, was not witness to the incident; and, third, the first information report is completely bogus. It has been submitted that even assuming that Jagdish Prasad was alive, the second possibility gets credence from the circumstance that there was no justification to wait till 4:15 am of the next day to lodge the FIR, particularly, when they had a tractor for transportation and, if there had been fear of the night, even by that time, that is 4:15 am, the sun had not come out, which is the admitted case

of the prosecution. It thus appears that the incident occurred late in the night; that no one had witnessed the incident; that Jagdish Prasad who resided at a distance of about 45 kms was informed and called; that, upon his arrival, on the basis of suspicion and guess-work, the prosecution story was developed with the help of the police as the deceased Kishan Lal was admittedly a police informer.

23. In addition to above, it was submitted that if the statement of Ramwati (PW2) is taken in its entirety, Jagdish had not informed her as to who played what role in the killing of the two deceased, as also, as to how many shots were fired by whom and in what manner, because, she has merely stated that Jagdish informed her that the accused have killed her husband and son but who did what is not disclosed by her. The medical evidence discloses, inter alia, solitary gun shot wound, that too, on one of the two deceased persons. Whereas, according to PW2 she heard three gun shots. Who fired those three shots is not disclosed. The contents of the FIR though may offer explanation for all that but it is not admissible in evidence as the informant was not examined. Thus, as only three accused were seeing running and, out of them, only one had gun in his hand whereas the other two had Tabal, who fired the other shots becomes a mystery. More so, because the I.O. in his testimony disclosed that on the spot only one 12 bore empty cartridge was found.

24. It was also argued that no source of light except moonlight has been disclosed by P.W.2 in her testimony. The distance from where P.W. 2 saw the accused running appears to be about 8 to 10 yards. Whether a person could be recognized from that distance, in moonlight, is extremely doubtful. It has also been submitted that, apart from above,

P.W.2 in her statement recorded under section 161 Cr.P.C has not disclosed that Naresh was also exclaiming that “*this is what happens to police informers*”. This clearly shows that her stand is not consistent and her testimony in absence of other convincing evidence cannot form basis of conviction.

25. Learned counsel for the appellant also submitted that, admittedly, Naresh is a *Nai* by caste whereas the other accused were *Dhobi* by caste; and there is no motive attributed to Naresh for the crime though motive has been attributed to other accused Dalveer and Ramesh. Hence, there was no valid reason shown for Naresh to associate with the other accused persons.

26. It has next been submitted that nothing incriminating has been recovered on the pointing out of the accused Naresh or Dalveer or Ramesh who were allegedly seen running together. The recovery, as alleged, is at the instance of co-accused Man Singh who was not seen running with the accused appellants.

27. It was lastly contended that the appellants though have been convicted under section 148 IPC as also under section 302 with the aid of section 149 I.P.C. but the prosecution has miserably failed to disclose that there was a fifth accused also. Even the charge-sheet was submitted against four persons only. Further, the fourth person, namely, Man Singh, was not seen together with the accused-appellant. Under the circumstances, there was no evidence to suggest that there existed an unlawful assembly of five persons of which the appellants were members. Hence, the conviction under section 148 I.P.C. as also under section 302 I.P.C. with the aid of section 149 I.P.C. is not at all sustainable.

28. It has thus been prayed that the conviction of the accused

appellant by the trial court is completely unjustified and the impugned judgment and order be therefore set aside.

29. **Per Contra**, the learned A.G.A. submitted that the evidence brought on record indicated that the two deceased had died at the same time and on or about the same spot. One of them died due to gun shot injury as also incised wounds and the other died due to several incised wounds which disclosed that multiple assailants were there. Shortly, after hearing the gun shot, the appellant - Naresh was seen in the company of other two accused persons with such weapons of which injuries were found on the body of the two deceased and, soon thereafter, Jagdish, the informant, who had accompanied the two deceased, came rushing and informed P.W.2 that her husband and her son have been killed by five persons, out of those five, three were seen by her. All this constituted part of the same transaction and therefore the statement of Jagdish Prasad (the informant), narrated to his sister - Ramwati (P.W.2), becomes admissible in evidence by applying the doctrine of *res gestae* enshrined under section 6 of the Evidence Act and as such was admissible and sufficient to record conviction, particularly, when nothing material could come out of her cross-examination.

30. It was also submitted by him that, admittedly, Ramesh and Dalveer were inimical to the deceased as they had been implicated by the deceased in a theft case. Hence, they had motive for the crime and Naresh by joining them has incurred liability even though he may not have had personal motive for the crime.

31. The learned A.G.A. also pointed out that it was proved not only by the testimony of the Investigating Officer but also of P.W.7 that Jagdish had lodged the FIR. It has been submitted

that as two persons were brutally murdered in the night, awaiting the wee hours of the morning to lodge the FIR is a natural human conduct on the part of victim's family and therefore it cannot be said that the FIR is highly delayed and that the prosecution version suffers from embellishment.

32. It was next submitted that no explanation has been offered by the accused as to why they were running with weapons in the night shortly after the incident. Lack of explanation could therefore provide the missing link which completes the chain of circumstances pointing towards the guilt of the accused. He thus prayed that the appeal be dismissed and the judgment of the court below be maintained.

33. We have given our thoughtful consideration to the rival submissions and have perused the record carefully.

34. Before we proceed to deal with the weight of the rival submissions, it would be useful for us to first examine whether the contents of the FIR lodged by Jagdish Prasad, who has not been examined as a witness, could be read and considered for the purpose of corroborating and contradicting the testimony of the witnesses who were examined during the course of trial. In this regard in ***Sheikh Hasib alias Tabarak v. The State of Bihar : (1972) 4 SCC 773***, it has been held that a first information report does not constitute substantive evidence. It can, however, only be used as a previous statement for the purpose of either corroborating its maker under section 157 of the Evidence Act or for contradicting him under section 145 thereof. It cannot be used for the purpose of corroborating or contradicting other witnesses. Similarly, in ***Harkirat Singh v. State of Punjab : (1997) 11 SCC 215***, the apex court had observed that where the first informant could not be examined as a witness during the course of trial and the first information

report does not relate to the cause of his own death, or as to any of the circumstances of the transaction resulting in his death, the first information report cannot be used as substantive piece of evidence.

35. In the instant case, admittedly, the informant - Jagdish Prasad was not produced as a witness and the FIR did not relate to the cause of his own death, or as to any of the circumstances of the transaction which resulted in his death, therefore the said first information report is not admissible as a dying declaration under section 32(1) of the Evidence Act. Hence, in view of the decisions of the apex court noticed above it can not be used for the purpose of contradicting or corroborating the testimony of other witnesses. Under the circumstances, the prosecution case would therefore depend on the admissibility, reliability and weight of other evidences led during the case of the trial.

36. The issues that now arise for our consideration are whether the hearsay testimony of P.W.2 (Ramwati) that she was informed by her brother (Jagdish Prasad - informant) and her dumb son (Surendra - P.W.3) that her husband (Kishan Lal) and her elder son (Mahendra) were killed by the accused persons could be considered admissible under Section 6 of the Evidence Act. If no, then, whether there remains on record sufficient reliable evidence on the basis of which the accused-appellant could be convicted.

37. Before we proceed to examine the admissibility of the statement of Ramwati (P.W.2) that her husband and son were done to death by the accused, as told to her by her late brother and dumb son, we may note that the trial court has already discarded the testimony of her dumb son, namely, Surendra Singh, who was examined as PW3, by observing that the said

witness was not reliable as he appeared tutored and could not withstand the test of cross-examination and by his gestures gave an impression that he used to sleep by the sun set and that he got information about the death of his father and brother when he woke up next morning. Thus, the testimony of PW2 alone survives for our consideration.

38. At this stage, before proceeding to analyze the statement of P.W.2 on the principles laid out by 6 of the Evidence Act, it would be apposite for us to observe that the prosecution has not set up recovery of any incriminating article from the surviving appellant or the other accused-appellants with whom the surviving appellant (Naresh) was seen running soon after the gun shots were heard by PW2. The alleged recovery of *Farsa* (sharp-edged weapon), allegedly used in the crime, was made at the instance of co-accused Man Singh, who died during the pendency of the trial. Admittedly, Man Singh was not seen running with the accused-appellants. Hence, the recovery at the instance of Man Singh is inconsequential in so far as the surviving accused-appellant Naresh is concerned.

39. Now we shall proceed to analyze the testimony of Ramwati (P.W.2). Her testimony is in two parts. The first part relates to what she saw and the second part relates to what she heard from her brother Jagdish (Informant) and what she gathered from her dumb son Surendra Singh (P.W.3). As per what she saw, even if her testimony is accepted in its entirety, she just saw three persons, namely, Dalveer; Ramesh; and Naresh (the surviving appellant) running with weapons and proclaiming *"this is what happens to police informers"*. Though, in her statement before the court, she stated that she heard all three proclaiming in unison but in her statement recorded under section 161 Cr.P.C, with which she was confronted, she had not

disclosed that the surviving appellant- Naresh was also heard proclaiming. These three accused were seen running in a lane which was adjacent to her house. She saw them in moonlight after she had climbed the stairs of her house upon hearing gun shots. She admitted in her cross-examination that the boundary wall of her house is high and the lane would not have been visible had she not gone upstairs. She stated that as she had heard gun shots, to find out as to what had happened, she had climbed the staircase with her daughter and daughter in law. She stated that from the higher floor of her house she could see the lane and those three accused running. She had been cross-examined in respect of source of light. She stated that there was moonlight and in that moonlight she saw the accused running.

40. The learned counsel for the appellant had strenuously urged that it was not possible for P.W.2 to recognize persons in moonlight, particularly, when they are running and it has not been satisfactorily established as to from how far she had spotted the accused more so when the I.O. in the site plan had not shown the place from where P.W.2 saw the accused running and the place where they were seen running. Further, the site plan that was prepared by the I.O. did not disclose the location of the house of P.W.2 from where she saw qua the place where the incident occurred and the bodies were found.

41. Upon careful perusal of the site plan (Ex. Ka-6) prepared by the I.O. (P.W.5), the distance between the two spots, where the two bodies were lying, was about 21 paces. Meaning thereby that the two bodies were separated by 21 paces. The first body which is shown at point A was lying on the side of the path whereas the second body was lying on the middle of the path 21 paces towards the north. At the place where the second

body was lying, going towards east from that place, there existed a *rasta* (path). The main *rasta* (path) where the bodies were found proceeded towards north and then curved towards the west. Before it curved towards the west, there was another *rasta* (path) going towards the north. The site plan though discloses that the accused-appellant took the path curving towards west, which was towards north from the place of occurrence, but the location of the house of P.W.2. from where she allegedly spotted the accused-appellants has not been disclosed. P.W.2 has not stated in her testimony that she could see the place of occurrence from the upper floor of her house or from any portion of her house. A suggestion was put to her that her house is 300-400 yards away from the place of occurrence in response to which she could not tell the distance of the place of occurrence from her house. She also did not disclose the exact time, shortly where after, she saw the accused running, after she had heard the gun shots. She only stated that she saw them running when she had climbed the upper floor of her house upon hearing the gun shots. The time duration between hearing the gun shots and seeing the accused running by P.W.2 has not come in the evidence. The distance between the house of P.W.2 and the place of occurrence has also not come in the evidence. Further, from the site plan it appears that for the assailants there were two other escape /exit points from where they could have exited the main path before reaching the house of PW2. The other two exit points were as follows: one towards east and the other towards north. From the evidence led, it appears, the house of PW2, from where she spotted the accused running, fell after those two exit points. Thus, the circumstance that the accused were seen running with weapons in front of the house of PW2,

in our view, is not clinching enough to put the burden on the accused to explain their conduct or presence inasmuch as the said circumstance does not rule out intervention of others in the crime as there existed other exit and access points for the assailants to arrive and to effect their escape from the place of occurrence, much before reaching the house of PW2.

42. Now, we shall examine whether PW2 was allegedly informed by her brother and son almost contemporaneous to the incident so as to form part of the same transaction. In her testimony PW2 has stated that after having witnessed the accused running away, when she had come downstairs, her brother (informant) and her son (PW 3) arrived and informed her that the accused persons including the appellants have killed her husband and her son. The time gap between the accused seen running away and her brother and son arriving at her house and reporting it to her is not disclosed. Interestingly, in her testimony, she has not disclosed that her brother - Jagdish and her son (PW3) had told her about the role played by each accused as was narrated in the FIR. Further, she has not disclosed in her testimony that her brother had informed her that the other two accused, out of a total of five accused, escaped by taking some other route.

43. From a close scrutiny of the evidence noticed above, it is clear that the information, if any, given to PW2 by her brother and son, does not appear to be contemporaneous with the time and place of the incident for the following reasons: (a) because the place of incident is not demonstrated to be in close proximity; and (b) because the time-gap between the incident and the information provided has not been demonstrated to be almost non-existent.

44. Now we shall examine whether the statement of PW2 in

respect of culpability of the accused appellant on the basis of statement of the informant could be considered admissible under section 6 of the Evidence Act, as found by the trial court. The rule of *res gestae* embodied in section 6 of the Evidence Act in essence is that the facts which, though not in issue, are so connected with the fact in issue as to form part of the same transaction, become relevant by itself, whether they occurred at the same time and place or at different times and places. The apex court had the occasion to examine the said principle in several decisions. In ***Gentela Vijayavadhan Rao and another v. State of A.P. : (1996) 6 SCC 241***, the apex court, in paragraph 15 of the judgment, as reported, held as follows:-

“The principle or law embodied in Section 6 of the Evidence Act is usually known as the rule of res gestae recognised in English Law. The essence of the doctrine is that fact which, though not in issue, is so connected with the fact in issue "as to form part of the same transaction-becomes relevant by itself. This rule is, roughly speaking, an exception to the general rule that hearsay evidence is not admissible. The rationale in making certain statement or fact admissible under Section 6 of the Evidence Act is on account of the spontaneity and immediacy of such statement or fact in relation to the fact in issue. But it is necessary that such fact or statement must be part of the same transaction. In other words, such statement must have been made contemporaneous with the acts which constitute the offence or atleast immediately thereafter. But if there was an interval, however slight it may be, which was sufficient enough for fabrication then the statement is not part of res gestae. In R. v. Lillyman, (1896) 2 O.B. 167 a statement made by a raped woman after the ravishment was held to be not part of the res gestae on account of some interval of time lapsing between making the statement and the act of rape. Privy Council while considering the extent up to which this rule of res gestae can be allowed as an exemption to the inhibition against hearsay evidence, has observed in Teper v. Reginam, (1952) 2 All E.R. 447, thus :

“The rule that in a criminal trial hearsay evidence is admissible if it forms part of the res gestae is based on the propositions that the human utterance is both a fact and a means of communication and that human action may be

so interwoven with words that the significance of the action cannot be understood without the correlative words and the dissociation of the words from the action would impede the discovery of the truth. It is essential that the words sought to be proved by hearsay should be, if not absolutely contemporaneous with the action or event, at least so clearly associated with it that they are part of the thing being done, and so an item or part of the real evidence and not merely a reported statement."

The correct legal position stated above needs no further elucidation."

(Emphasis Supplied)

45. In **Vasa Chandrasekhar Rao vs Ponna Satyanarayana & Anr. : (2000) 6 SCC 286**, a question had arisen whether statement of prosecution witness that accused's father had told the prosecution witness over the telephone that his son (the accused) had killed the deceased, could be read in evidence under Section 6 of the Evidence Act, particularly, when the accused's father, in the witness box, had denied making any such statement. The apex court, in paragraph 7 of its judgment, though had found that the prosecution had been able to prove the case against the accused on the basis of circumstantial evidence but as regards admissibility of the said statement, under Section 6 of the Evidence Act, it proceeded to observe as follows:-

"The question arises whether the statement of PW21 that PW1 told him on telephone at 6 p.m. that his son has killed the deceased, could go in as evidence under Section 6 of the Evidence Act. PW1, not having supported the prosecution during trial, the aforesaid statement of PW 21 would be in the nature of an hearsay but Section 6 of the Evidence Act is an exception to the aforesaid hearsay rule and admits of certain carefully safeguarded and limited exceptions and makes the statement admissible when such statements are proved to form a part of the res gestae, to form a particular statement as a part of the same transaction or with the incident or soon thereafter,

*so as to make it reasonably certain that the speaker is still under stress of excitement in respect of the transaction in question. **In absence of a finding as to whether the information by PW1 to PW 21 that accused has killed the deceased was either of the time of commission of the crime or immediately thereafter, so as to form the same transaction, such utterances by PW1 cannot be considered as relevant under Section 6 of the Evidence Act.***"

(Emphasis Supplied)

46. In ***Dhal Singh Dewangan vs State Of Chhattisgarh : (2016) 16 SCC 701***, a three-judges bench of the Apex Court had the occasion to deal with the applicability of section 6 of the Evidence Act. In this case, a question had arisen whether the testimony of prosecution witnesses that after receipt of information about the crime they had reached the spot and had found Kejabhai (PW.6 of that case) shouting that the accused had killed his wife and children could be considered admissible under section 6 of the Evidence Act. After examining the provisions of section 6 of the Evidence Act and the law laid down in earlier decisions, the apex court, by its majority view, in paragraphs 24 and 25 of the judgment, held as follows:-

*"The general rule of evidence is that hearsay evidence is not admissible. However, Section 6 of the Evidence Act embodies a principle, usually known as the rule of res gestae in English Law, as an exception to hearsay rule. **The rationale behind this Section is the spontaneity and immediacy of the statement in question which rules out any time for concoction. For a statement to be admissible under Section 6, it must be contemporaneous with the acts which constitute the offence or at least immediately thereafter.** The key expressions in the Section are "...so connected... as to form part of the same transaction". The statements must be almost contemporaneous as ruled in the case of Krishan Kumar Malik (Supra) and there must be no interval between the criminal act and the recording or making of the statement in question as found in*

Gentela Vijayvardhan Rao's case (Supra). In the latter case, it was accepted that the words sought to be proved by hearsay, if not absolutely contemporary with the action or event, at least should be so clearly associated with it that they are part of such action or event. This requirement is apparent from the first illustration below Section 6 which states "whatever was said or done.... at the beating, or so shortly before or after it as to form part of the transaction, is a relevant fact."

*Considered in the aforesaid perspective, we do not find the statements attributed to PW-6 Kejabai by PWs 3 and 5 to be satisfying the essential requirements. **The house of the appellant, according to the record, was at a distance of 100 yards from Gandhi Chowk, where these witnesses are stated to have found PW-6 Kejabai crying aloud. Both in terms of distance and time, the elements of spontaneity and continuity were lost. PW-6 Kejabai has disowned and denied having made such disclosure. But even assuming that she did make such disclosure, the spontaneity and continuity was lost and the statements cannot be said to have been made so shortly after the incident as to form part of the transaction. In the circumstances, we reject the evidence sought to be placed in that behalf through PWs 3 and 5. Even if we were to accept the version of PWs 1 and 2, the same would also suffer on this count and will have to be rejected.***

(Emphasis Supplied)

47. From the decisions noticed above, the legal principle deducible is that section 6 of the Evidence Act is one of the exceptions to the rule against hearsay evidence therefore hearsay statement of a witness, by taking the aid of Section 6 of the Evidence Act, would be admissible in evidence only if that statement was made to the witness contemporaneous with the acts which constitute the offence or at least immediately thereafter so as to form part of the same transaction. As to whether it forms part of the same transaction is to be found out from the proven facts and circumstances of each case. One of the tests is whether such statement has been made so

contemporaneous with the transaction in question as to make it reasonably certain that the speaker is still under stress of excitement in respect of the transaction in question. Where it is not clear from the evidence led as to what was the time gap between the incident and the making of that statement and whether the maker of the statement was still under stress of excitement in respect of the transaction in question, it would be unsafe to rely upon such statement by invoking the provisions of section 6 of the Evidence Act inasmuch as the principle embodied under section 6 of the Evidence Act is an exception to the general rule against hearsay evidence. Where the time gap between the statement and the fact in issue is such that it does not make it contemporaneous with the fact in issue, or where there is no satisfactory evidence to show that the statement is contemporaneous with the fact in issue, or where the distance between the place of occurrence and the place where the statement is made is such, which could be considered sufficient to douse the stress or the emotions, thereby giving opportunity to the possibility of concoction, the statement would not fall within the exception to the rule against hearsay and, hence, would not be admissible.

48. When we test the testimony of P.W.2 in the light of the legal principle noticed above, we find that the prosecution has failed to disclose the distance between the place of occurrence and the house where P.W.2 resided, that is the place where she was allegedly informed by the informant and her son PW3. The prosecution evidence also fails in specifically disclosing the time-gap between the incident and making of the statement by the informant and P.W.3, which has been narrated by P.W.2. The evidence that has come only indicates that P.W.2 was informed by the informant and P.W.3 shortly after the accused

ran away. The evidence does not indicate that P.W.2's brother (informant) or her son (P.W.3), who had reported the incident to her, were being chased by the accused, or they came chasing the accused, when they entered the house and informed P.W. 2 that her husband and elder son have been done to death by as many five persons. Rather, the testimony is to the effect that P.W.2, upon hearing gun shots, went upstairs. From there she could see three persons running and proclaiming that *"this is what happens to police informers"*. Thereafter, she came down and, soon thereafter, her brother (informant) and younger son (P.W.3) arrived and informed her that the accused persons have killed her husband and her elder son. The testimony noticed above suggests that there was a time-gap between the incident and the reporting of the incident to P.W.2. The possibility of the time-gap being substantial cannot be ruled out because in the site plan, the house of P.W. 2 is not disclosed. In fact, a suggestion has come that her house is at a distance of about 300 to 400 yards from the place of occurrence, which has not been specifically refuted by her. Further, as the informant and PW3 had not arrived at the residence either being chased by, or while giving chase to, the accused, in absence of cogent evidence in respect of the time-gap between the incident and reporting of the incident, it cannot be safely concluded that the informant and PW3 were still reeling under the stress of excitement in respect of the transaction in question. Under the circumstances, keeping in mind that there is no clear and cogent evidence led by the prosecution to disclose the distance between the two places and the time gap between the incident and reporting of the incident to P.W.2, it would be unsafe on our part to accept the statement of the informant and PW3, narrated in the testimony of P.W.2, as

admissible by applying the doctrine of *res gestae*.

49. Once, we discard this hearsay statement of PW2, we are left with very little evidence which is of P.W.2 seeing the three accused running, two with sharp-edged weapon and one with a gun. Admittedly, from the place where PW2 saw the accused running, the place of occurrence was not visible. Further, we have already found that the path which connects the place of occurrence and the house of PW2, from where she spotted the accused running on the path, before reaching the house of PW2 provided at least two other exit points for the perpetrator of the crime to escape as is clear from the site plan (Ex. Ka-6). Thus, the circumstance that these three accused persons were seen running is not such which could rule out all other hypothesis than the guilt of the accused. In addition to above, the proclamation by these three persons that this is what happens to police informers is not an admission of guilt but is simply an expression of opinion as to what is the fate of police informers. This evidence, as we have found, being not clinching enough, would not throw the burden on the accused to explain the circumstance in which they were seen running. Moreover, there is no recovery, either of the gun or of any other incriminating material, from the possession or on the pointing out of the surviving appellant or the other two accused who were seen running with him. We are thus of the considered view that there is virtually no worthwhile evidence to uphold the conviction of the appellant (Naresh).

50. There is another aspect of the matter, which is whether PW2 was really informed by her brother and son about the incident or she came to know from other sources. In this regard, what assumes importance is that PW3, who happens to be the dumb son of PW2, has been discarded as completely

unreliable. Once that is the case, we would have to test whether this information could have come to her from the informant. In this regard there are certain circumstances which may be noticed. According to the prosecution case the two deceased had gone to attend a feast at about 7 pm. P.W.2 had admitted in her testimony that she was informed that they had had food there before leaving. However, semi-digested food was found in the small intestine. The incident is said to have occurred at 8.00 pm. Normally, digestion would take some time. This lends credence to the argument that the incident took place much later, and may not have been witnessed. This theory gets corroborated from the circumstance that the FIR was lodged at 4:15 am next day. If fear of night was the factor for the delay in lodging the FIR what was the hurry in lodging the FIR at 4.15 am when, admittedly, it was still dark. This also lends credence to the possibility, which has been suggested by the defense, that Jagdish Prasad (the informant), who resided in a different village 45 km away, was summoned, and, thereafter, FIR was lodged by doing guess-work and by creating witness of circumstance, namely, P.W.2

51. There is yet another aspect which goes in favour of the appellant. This is that the charge against the appellant is not under section 302 IPC simpliciter but under section 302 read with section 149 I.P.C. Interestingly, except the statement of the informant made to P.W.2, which we have already held not admissible, there is no evidence to show that there were five or more persons involved in the crime. Admittedly P.W.2 saw only three accused running. The remaining two were not seen by her. In fact, charge-sheet was laid against four persons only. The identity of the fifth could not be established. When participation by five persons is not proved by any admissible

evidence led by the prosecution, there can be no conviction with the aid of section 149 I.P.C. Otherwise, there is no evidence as to who played what role and whether they shared common intention hence conviction with the aid of section 34 IPC would also not be justified more so because the only evidence that survives is with regard to three persons running not from the spot of occurrence but at some distance therefrom. On this ground also, the conviction of the appellants can not be sustained.

52. In addition to above, there is another unexplained circumstance in the prosecution case which is as to why would Naresh (surviving appellant), who had no motive, would join other accused in finishing off the two deceased. No doubt, prosecution has led evidence that there had been a motive for Dalveer; Man Singh; and Ramesh to finish off the deceased - Kishan Lal as he had implicated them in the past but there is no motive attributed to the surviving-appellant Naresh to join the other accused. Further, we find that other two accused were by caste *Dhobi* whereas Naresh is *Nai* by caste.

53. When we take a conspectus of the entire evidence led by the prosecution, we find that there are too many gaps in the prosecution evidence and, therefore, even if we go by the circumstantial evidence, the chain of circumstances is not complete to rule out all other hypothesis than the guilt of the accused. Hence, the benefit of doubt would have to go to the accused.

54. Consequently, for all the reasons recorded above, we have no option but to allow the appeal. The judgment and order dated 28.08.1992 passed by IVth Additional Sessions Judge, Moradabad in Sessions Trial No. 587 of 1986 is hereby set aside as against the appellant Naresh. The appellant Naresh is

acquitted of all the charges leveled against him. If the appellant is on bail, he need not surrender.

55. Let a copy of this order be sent to the trial court for compliance.

Order Date :- 21.11.2019

Sunil Kr Tiwari