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Reserved

Criminal Appeal No.1417 of 2006

Dharmendra.....Appellant
Versus
State of U.P.....Opposite Party

Hon'ble Vinod Prasad, J.
Hon'ble Rajesh Chandra, J.

(Delivered by Hon'ble Vinod Prasad, J.)

Appellant Dharmendra was tried, convicted and sentenced by Additional Sessions Judge, Fast Track Court No.1, Ghaziabad by it's impugned judgement and order dated 25.1.2006 passed in S.T. No.318 of 2004, connected with S.T.163 of 2004,both appellated as State Vs. Dharmendra, for offences under Sections 302 I.P.C. and 25 Arms Act relating to Crime Nos.221 of 2003, P.S. Simbhawali (subsequently,Crime No.318 of 2004, P.S. Babugarh) and Crime No.222 of 2003 respectively. For the charge of murder life imprisonment with fine of Rs. 20,000/- and in default thereof to under go six months further imprisonment is the implanted sentence whereas for offence under the Arm's Act, sentence is one year R.I. with fine of Rs.1000/-, the default sentence being fifteen days additional imprisonment. Called in questioned in this appeal is the legality and sustainability of aforesaid convictions and sentences by the sole appellant.

Genesis of the incident was embedded in a written report, Ext. Ka 22, alleged to have been scribed and lodged by the appellant on 18.11.2003 at 8.30 p.m., according to which, textually, appellant is a resident of Bagh Rana Loni, Moradabad and had an infatuated love affair with one Pooja Pandit, a student of class tenth, resident of behind Naurang Talkies, Ghaziabad. Geeta, appellant's wife and his one year old infant daughter Rakhi @ Kokal were an impediment in his cupid relationship and hankered nuptial knot with Pooja. To do away with the obstacles, the appellant, in orchestration of his chalked out murderous plan started from his house at 1.30 p.m. on 18.11.2003 in a Maruti Car DL 2 CJ 6302of his uncle for his in-laws house along with his wife and daughter and then at 6 p.m, after crossing *Kuchaser Chaupala,* near *Nagar Farm House* parked it at a lonely place and then fired at Geeta from his country made pistol but she, however, survived the pistol shot and consequently appellant throttled her and Rakhi @ Kokal to death. Pushing their corpses in the car appellant drove to village *Shikhera* where he parked it on the pavement. To save the skin from wrath of law appellant shot at his buttock to fabricate a mendacious defence theory, threw the country made pistol in nearby field and then shriekingly rushed to nearby Balaji hotel where he narrated his hokum to the disbelief of persons present there. Thereafter appellant developed remorseful penancial psyche and

divulged the real incident, whereupon he was advised to contact the police by the persons present at the spot. Outcome of such an advise was scribbling of text of Ext. ka 22 by the appellant himself, who then came to the police station Simbhawali, at a distance of 5 kms, and lodged it there because he had committed a sinful crime.

Clerk Constable Nityanand Sharma, PW8, registered alleged appellant's FIR at 8.30 p.m., as crime number 221 of 03, under section 302 IPC, prepared Chik FIR and GD entry, Ext. Ka-23 and Ext. ka 24, in the presence of S.O. Simbhawali L.R. Verma,PW 10, who immediately commenced the investigation, copied the FIR and G.D., recorded 161 Cr.P.C. statement of Constable Nityanand Sharma and then came to the murder spot , where parental relatives of the deceased Geeta and many villagers were already present. PW10 dispatched Rakhi @ Kokal for medical treatment to Madhu Nursing Home, Hapur through S.I. R.K. Motala, where she was declared dead. Arranging lights, I.O. got the inquest on the dead body of Geeta conducted through S.I. Ram Swaroop,PW6, who has proved the inquest Memo Ext. Ka 2 and other relevant papers prepared at that time Ext. ka 13 to Ext. ka 16.Inquest memo was also signed by her father Mangu Singh (PW1). Same witness PW6 had also conducted inquest on the corpse of Rakhi @ Kokal in Madhu Nursing Home and had proved her inquest memo Ext. ka 3 and other relevant papers

Ext. Ka 9 to Ext. Ka 12. I.O. had seized ornaments, which were kept in a bag and those which were worn by the deceased Geeta along with two male wrist watches found on the front seat of the car, and had prepared its seizure memos Ext. Ka-4 and Ext. ka 5 and had handed over them to PW 1 who was also made to sign on seizure memos. Thereafter I.O. PW10 copied Mangu Singh's FIR in the case diary, which, meanwhile was lodged at the same police station at 10.05 p.m. I.O. thereafter interrogated appellant who was already in custody, and entered his desire to facilitate recovery of crime weapon in GD Ext. Ka-26. On 19.11.03 at 8.30 a.m. PW10, brought the appellant to the spot near the field of Fakira Tyagi, near village Sikhara at Rajapur Road accompanied by police constables and two public witnesses Vikram Singh and Anant Ram, from where appellant is alleged to have fetched out crime weapon a country made pistol with one empty cartridge loaded in the barrel, from beneath pumpkin creeper from the field of Udai Pal. Recovery memo Ext. Ka-6 and site plan of place of recovery Ext. Ka-27 were prepared. Subsequently, PW10 brought the appellant to the scene of the murder and sketched map Ext. Ka-28 at his pointing out. Recovery of weapon resulted in registration of a case under 25 Arm's Act against the appellant at the behest of PW 10, he being the informant. Head Constable Lakhraj Singh had registered the FIR of the said crime and had prepared Chik FIR Ext. Ka-29 and

relevant corresponding G.D. Entry Ext.Ka 30.

On 19.11.2003 P.W.10 interrogated PW1 Mangu Singh and recovery witnesses Vikram Singh, Anant Ram and thereafter copied the medical examination report of the appellant. Same day I.O. forwarded a report for recording appellant's 164 Cr.P.C. statement. After all these investigatory steps that the I.O. PW10 sent a written intimation to higher police officers that the crime was committed within the territorial limits of P.S. Babugarh and therefore, further investigation be got conducted from the said police station. During trial P.W.10 has proved recovered country made pistol and empty cartridge, as material Ext. ka 1 and 2 and has also proved the seizure memo of Maruti Car and it's GD entry as Ext. Ka-31 and Ka-32.

Transferred investigation was registered as crime no.318 of 2004 at P.S. Babugarh and S.I. Rohtas Kumar Sharma P.W.5, who was station officer continued further investigation on 18.12.2003, when he recorded statements of inquest witnesses and those of Nepal Singh, S.I. Ram Swaroop, Constable Banwari Lal, Raja Ram, Ravindra Singh, Atar Singh and S.I. R.K. Motla. Completing investigation he charge sheeted appellant vide Ext. Ka-8 for the charge of murder.

According to the prosecution story after registration of Ext. Ka-22 (FIR by appellant), a message was dispatched to PW1 Mangu Singh father of deceased Geeta and father-in-law of appellant in his

village, who after receiving such information, joined Rajpal and Agresh, arranged two motor cycles, and then reached at the scene of the murder, where he found the dead body of Geeta and police of P.S. Simbhawali present. He participated in the inquest examination of both the deceased, Geeta and Rakhi @ Kokal, and signed their inquest reports. As mentioned above he was handed over the recovered ornaments and wrist watches. Subsequent to both the inquests that P.W.1 came to P.S. Simbhawali and out side it's precinct he dictated FIR Ext. Ka-1 to scribe Rajpal and then lodged it at the police station. His FIR too was registered by P.W.8 at 10.05 p.m. as Ext. Ka-25.

PW1 Informant's version contained in his FIR Ext. Ka 1 are that he was a resident of village Birsinghpur and had solemnised his daughter Geeta's marriage with the appellant two years and nine months ago. Rakhi @ Kokal was born from the wedlock. Appellant had illicit relation with a girl of Ghaziabad because of which he used to torture Geeta on various excuses. Because of infatuated relationship, appellant had raised a demand of Rs. Ten thousand from the informant PW1 a week prior to the murder but was denied to be obliged. On the fateful day of the incident appellant had phoned informant and had intimated him that the corpses of his daughter and grand daughter shall reach to him in the evening but PW1 did not pay

any heed to such a threat but informed about it to Rajpal and Angresh who were present with him at that moment. To remove the obstacles and to marry the beloved, that the appellant had murdered the mother and the daughter.

As noted above inquest on both the dead bodies were conducted by S.I. Ram Swaroop P.W.6 who has proved inquest Memos and other relevant papers. He is also the I.O. of crime under 25 Arms Act and has deposed regarding his investigation. He has admitted that he had started from the police station at about 9 p.m. and no recovery was made in his presence. He had prepared site plan of place of recovery which is Ext. ka 17. He has also disclosed that no paper from Madhu Nursing Home was given to him. He had proved sanction for the prosecution of the appellant under Arm's Act as Ext. Ka 18 and charge sheet submitted by him vide Ext. Ka-18.

Autopsy on both the corpses were performed on 19.11.2003 at 2.30 and 3.30 p.m. by Dr. Rajendra Prasad P.W.7 vide Ext. Ka-20 and Ka 21. Geeta was 22 years of age having an average built body and rigour mortis were present on her both extremities. A day had lapsed since her death. Her internal examination revealed that her face, nails, pleura, bronchi, membranes, lungs, gall bladder, pancreas, spleen, kidney were congested, hyoid bone and trachea fractured and 150 grams of semi solid food was present in her stomach. Semi

digested food was present in the small intestine and large intestine contained faecal matters and gases. Cause of her death was asphyxia as a result of ante-mortem throttling. P.W.7 has noted following ante-mortem injuries on her dead body:-

1- Contusion size 5.0 c.m. x 4.0 c.m. on the Lt. side chest, 4.0 c.m. x away from the Lt. nipple, 9 O'clock in position.

2- Contusion side 5.0 c.m. x 5.0 c.m. around whole of the Rt. eye.

3- Contusion side 6.0 c.m. x 4.0 c.m. on the Lt. side forehead.

4- Elliptical contusion side 2.0 c.m. x 1.5 c.m. on the Rt. side cheek.

5- Multiple abraded contusion in an area of 15.0 c.m x 4.0 c.m. front of neck under bone, bone fractured.

Rakhi@ Kokal's post mortem report reveal that she was 12 months old with rigour mortis present all over her body. Her membranes, brain were congested, hyoid bone and trachea fractured, her pleura, bronchi, both lungs, pancreas, kidney were congested. Following ante-mortem injuries were detected on her body:-

1- GSW of entry side 1.0 c.m. x 1.0 c.m. x through x through Rt. arm 5.0 c.m. below the axilla blackening and tattooing present.

2- GSW exit side 3.0 c.m. x 3.0 c.m. x through on the Rt.

outer aspect of the upper arm 6.0 c.m. above elbow. Entry no.1 communicate to the injury no.2.

3- Multiple abrasion in an area of 11.0 c.m. x 4 c.m. on the front of neck underline bone fractured.

According to the cross examination of the doctor injuries No. 1 to 3 sustained by deceased Geeta were caused by hard and blunt object and they could not have been caused by throttling and these injuries were insufficient to cause her death. Injury No. 4 was caused by tooth bite and injury No. 5 was caused by throttling. Post Mortem examination report of this deceased Geeta further indicate that she had not sustained any bleeding injury. Injury of Rakhi @ Kokal indicate that she had sustained a fire arm injury from point blank range as it had blackening and tattooing present in entry wound.

As an investigatory step recovered empty cartridge and country made pistol were sent for forensic science examination to Ballistic Expert whose report,Ext. Ka-33 dated 27.7.2004 revealed that the recovered empty cartridge E.C-1 was fired from the recovered country made pistol 1/2004.

As noted above since appellant was charge sheeted in both the crimes he was summoned to stand trial. ACJM, Hapur committed his case under Section 302 IPC to the court of Sessions vide committal order dated 27.2.2004 whereas offence under Section 25 Arms Act was

committed to Session's Court by Judicial Magistrate Garhmukteshwar on 21.1.2004.

Additional Sessions Judge, Fast Track Court No.5, Ghaziabad in the concerned connected Session's Trials 318 of 2004, under Section 302 IPC and S.T.No. 163 of 2004, under 25 Arm's Act, charged the appellant for those offences on 3.9.2004. Since both the charges were abjured, to bring home appellant's guilt trial procedure was undertaken.

In it's endeavour to establish appellant's guilt prosecution examined in all ten witnesses during the trial, out of whom informant Mangu Singh P.W.1 and Vishambhar P.W.4 are the fact witnesses. Rest of formal witnesses included Anant Ram P.W.2, V.P. Singh P.W.3, Rohtas Kumar Sharma P.W.5, Ram Swaroop P.W.6, Rajendra Prasad P.W.7, Nityanand Sharma P.W.8, Raja Ram P.W.9 and L.R. Verma P.W.10.

Informant Mangu Singh P.W.1, besides supporting his FIR version had further deposed that deceased Geeta was married to the appellant on 4.2.2001 and Rakhi@ Kokal was born one and a half year later. On demand being made by the appellant, he was given Rs. Twenty thousand as a price of a motorcycle, after withdrawing Rs. Fourteen thousand from the Bank and this had satiated appellant's rapacious appetite,who,thereafter, was fostering Geeta well. Six

months later on deceased had informed her mother about appellant's lustrous relationship with Pooja and assault being made on her. In this connection, PW1 had registered a protest with appellant's father also but in vain albeit, subsequently, appellant had tendered an apology for his conduct. Three or four months prior to the incident appellant had brought back the deceased and in lieu thereof he had raised a demand for a buffalo which too was fulfilled. A year / ten days prior to the incident appellant had raised yet another demand of Rs. Ten thousand by phoning in the house of Amarpal and had threatened PW1 with dire consequences in the eventuality of non-fulfilment of his demand. On 18.11.2003 appellant on telephone had intimated PW 1 that his demand remains unfulfilled and therefore, by that evening he will dispatch corpses of Geeta and Rakhi @Kokal to his house. This was disclosed by the informant to Angresh and Rajpal, who were present with him at that moment. They had told him that they will go to the appellant in next two or three days and will get the issue sorted out. On 18.11.2003 at about seven or eight in the night, prior to his going to bed, PW1 had received the information regarding the double murder of his daughter and grand daughter from police of P.S. Simbhawali. He further deposed that Kutchaser Chaupala was 10 kilometres away from his house and the place of murder was one and a half kilometres from Kutchaser Chaupala. On receiving said

information he had firstly joined Rajpal with his motor cycle and then had gone to the house of Angresh and subsequently to the house of village Pradhan from where he had collected the second motorcycle and then accompanied by both of them he had come the place of the incident at 8.30 or quarter to 9 p.m which was a lonely place with darkness and jungle with no source of light. There they had found dead body of Geeta lying on the rear seat of the car,police of PS Simbhawali and a huge conglomeration of people present. Rakhi @ Kokal was already sent to Madhu Nursing Home,Hapur, by the police, for treatment, but there she was declared dead. PW1 acknowledged being an inquest witness on dead bodies of the two deceased and signing of their inquest memos. Geeta's inquest was conducted in the torch light brought by the villagers. He admitted that ornaments found in the bag and the ornaments collected from the body of Geeta with two male wrist watches found on the front seat of the car were handed over to him by the Investigating Officer after preparing Ext. Ka-4 and Ext. Ka-5 same time at 8-8.30 p.m. and no cash money at all was recovered. This witness had reached Madhu Nursing Home at 9 p.m. and after completion of inquest of Rakhi @ Kokal, in which also he is a panch witness, that he had started to lodge his report. He admitted that albeit, police station Babugarh had fallen in his way to P.S. Simbhawali, but he had not gone there to lodge his FIR, as the

said police station was not the police station of his residence. He had reached PS Simbhawali at 10 p.m. and his FIR was registered at ten or five or ten minutes past ten in the presence of the I.O. whose directions he had obeyed. His further testimonial deposition is that he had a conversation with S.O. Simbhawali in the presence of Nawab, Raja Ram, Agrasen etc. After registration of his FIR he had returned to his village, starting from P.S. at ten or quarter past ten p.m. and reaching home at about twelve midnight. Although he became aware of territorial jurisdiction of police station Babugarh three or four days subsequent to lodging of his FIR yet he did not endeavour to inform or contact Babugarh police. He admitted that his investigatory interrogation was done by the police of PS Babugarh a month after registration of his FIR. PW1 had affirmed the omissions regarding motive part of prosecution case i.e.: demand of Rs. Twenty thousand for the motor cycle and demand of buffalo in his FIR and interrogatory statement under section 161 Cr.P.C. and also testified that the name of the girl having illicit relationship was not disclosed to him nor he was in the knowledge of any further details on that aspect. Police had informed him appellant's hokum and manufactured injury. Albeit FIR was lodged by him after handing over of the ornaments to him but he omitted to mention that fact in his FIR Ext. Ka-1. He further deposed that he had no conversation with the doctor in Madhu

Nursing Home and the inquest on Kokal's dead body was performed around 9 p.m. and it took 20 to 25 minutes to be over. His further deposition is that he had not gone to any place to find out whereabouts of Pooja nor his family members came to know about the same. Demand of ten thousand rupees was made on phone of Amarpal as he had no telephone connection in his house. PW1 further admitted in paragraph 14 of his deposition that witness P.W. 4 Vishambher is his distant brother and a co villager like Ishwar , who is his nephew and they had disclosed to him the fact of double murder witnessed by them after a lapse of three or four days and, in turn, he had informed the police about the same after a month of such a knowledge. According to PW1 Bala Ji Hotel is at a distance of 100 paces from the place of the incident. This witness has denied defence suggestion that appellant is not the real culprit and had not committed the murders and an incident of way laying and loot was reported by the appellant which was got transformed in a case of murder in his connivance by the police who had got Ext. Ka 1 cooked up and manipulated and had registered it ante timed. He further denied that appellant had gone to P.S. Simbhawali to lodge his report of loot and waylaying but was detained there and to fabricate a false case he was assaulted and a false FIR, Ext. Ka 22, was got scribed by him under assault and pressure from the I.O. PW1 further denied defence case

that there was no illicit relationship of the appellant or that he never raised any demand of Rs. Ten thousand or that of a buffalo and a motorcycle. He had also denied the suggestion that the FIR is the out come of fabrication and was registered ante timed.

Vishambher, PW4, second fact witness has deposed that from his village Virsampur he had paddled to purchase vegetables at 3p.m. to Kutchaser Chaupala,at a distance of 7 Kms accompanied with Ishwar and reaching their at 4 p.m., and on their way back home, at 6 P.M., they had seen a parked car DL-2 CJ 6302, hundred paces away from Nagar Farm House, inside which deceased Geeta, resident of their village,was lying dead in a pool of blood and appellant holding a country made pistol was standing nearby, who had intimidated them to escape from the spot or meet the same fate and consequently P.W. 4 and Ishwar returned to their village not informing any body either in the way or in their village about the said incident. His further depositions are that he had heard shrieks of Geeta and a single gun fire shot from a distance of hundred paces and it took him twenty seconds to reach close by from where he had detected that the windows of the car were open and appellant was standing out side the car, who had not stopped them from peeping inside the car where Geeta was lying dead. Appellant had threatened them and resultantly they stayed at the scene of murder for about a minute. He had not

raised any hue and cry because of appellant's fear and the two deceased were lying dead on the rear seat. He further testified that Geeta was shot at in his presence, and though firstly, he stated that he could not tell where Geeta sustained injury by gun fire but immediately he corrected himself by deposing that bullet had pierced her abdomen and subsequently in his further deposition he stated that blood was oozing out from her body. PW 4 further admitted that there is a police out post at village Kutchaser Chaupala at a distance of half a km. from the place of the incident. He had not endeavoured to save Geeta nor he disclosed the incident to anybody nor attempted to seek police help. He even he did not divulge the murder to any body in the village not even to PW1 Mangu Singh and his family members. He had admitted to have known the appellant from before the murder and, albeit, he came to know that appellant had gone to jail two or three days after the incident yet he did not go to the police nor informed the informant about the incident. On being questioned regarding corpses position he gave irreconcilable contradictory answers. His evidences regarding attires worn by the two deceased is inconsistent with inquest reports and is also contradictory from the facts found by the I.O. during investigation. He did not remember whether Geeta was wearing a *salwar suit* or a *sari.* He had further deposed that Kokal @ Rakhi's cloths were also soaked with blood and

she was neither moving nor crying. Regarding ornaments worn by deceased Geeta, he had given evasive and contradictory answers. He has denied the suggestion that he had not witnessed the incident and nor was present at the spot and in connivance with the informant, he has deposed falsely being a co-villager. PW 4 , however admitted that he was interrogated only once by the police of police station Babugarh but he does not remember at what time and at what place.

Besides above fact witnesses residue of formal witnesses have proved the registration of FIR, preparations of various GD entries, recovery and seizure memos, inquest reports, post mortem reports etc. Two Investigating Officers have testified various investigatory steps. Since all these facts have already been registered herein above hence for brevities sake we eschew it's repetition.

In defence appellant abjured all the incriminating circumstances and put forward defence theory that it was a case of way laying in which the two deceased and he himself had sustained injuries and subsequently, in connivance with PW1 a false case roping him was cooked up by the I.O. who after physically assaulting him got scribed Ext. Ka 22 forcefully after dictating it himself and he also claimed alleged recovered articles in his statement under section 313 of the Code.

Additional Sessions Judge, F.T.C.-I, Ghaziabad believed prosecution

evidences and opining that guilt of the appellant has been established successfully convicted and sentenced him on both the charges of murder and Arm's Act, hence this appeal.

We have heard Sri Brijesh Sahai, Sri V.P. Srivastava, learned Senior Counsel,and Sri J.S. Sengar advocate for the appellant and Sri K.N. Bajpai, learned AGA for the state respondent at a great length and have perused trial court as well record of instant appeal.

Assailing impugned judgement it was harangued that prosecution was unsuccessful in proving appellant's guilt. Evidences of neither of the two fact witnesses are creditworthy and reliable which suffers from un-naturalities and intrinsic inherent improbabilities which do not inspire any confidence. Their depositions are at variance with medical evidence and facts found on the spot by the two investigating officers. PW 1 informant is not an eye witness of the incident and had disclosed only motive and lodging of FIR by him. His evidence does not bring home the charge against the appellant as motive howsoever strong can not be a substitute for proof beyond all reasonable doubt. He collected ornaments belonging to the appellant and his wife and subsequent thereto, in connivance with I.O. fabricated a mendacious story implicating appellant in a false case of murder and got his FIR Ext. Ka 1 lodged ante timed. His conduct was that of an unreliable witness and his allegations was a coloured version result of concoction

and fabrication. Since on record it is established that Ext. Ka 1(FIR) was registered ante timed and therefore it looses all it's corroborative value consequently it can not be relied and acted upon. Defence version is quite probable and has been illegally disbelieved by the trial court without sound reasons and meticulous examination of defence case. To add authenticity to his case appellant even endeavoured to lodge a FIR and seek police help from PS. Simbhawali but was detained there and later on,in connivance with PW1 was implicated in a prevaricated version of murdering his wife and daughter whom he loved so much. Ext. Ka-22 is inadmissible and is outcome of assault and threat by the I.O. It can not be utilised against the appellant as being hit by section 25 of Evidence Act as the same is inculpatory confessional written statement of an accused before the police. Motives alleged are contradictory and irreconcilable. No worth can be attached to the evidences of P.W. 1 and P.W. 4 Vishambher and since prosecution miserably failed to bring home the charge against the appellant, defence of the appellant alone cannot be utilised to hold him guilty and convict him, especially when appellant's defence version is equally compatible and probable. Defence case has to be examined on preponderance of probability and not for proof to the hilt. Weaknesses of the defence case cannot be a substitute for credible prosecution evidence beyond all reasonable doubt and same

can not be utilised to bolster up it's case as the cardinal jurisprudential principle of criminal justice delivery system for decades is that prosecution has to stand on it's own legs. As a corollary to this contention it was submitted that Section 106 Evidence Act has no application on the facts of the appeal and it can not be resorted to by the prosecution to anoint appellant's guilt when it's eye witnesses account remained unsuccessful to bring home the charge. Prosecution has reposed confidence in the testimony of PW 4 as an eye witness of the murder hence 106 Evidence Act has no application. Buttressing the contention further it was argued that since factum of murder was not within the "special knowledge of the appellant only" therefore Section 106 Evidence Act is inapplicable. Ext. Ka-22 besides being inadmissible is in direct contradiction with medical evidence and negates prosecution case of it being a remorseful version written to confess guilt and undertake penance. It is not a defence FIR as it was dictated by the I. O.and was got scribed forcefully after assaulting the appellant. Another witness of fact PW4 is a chance, related, untruthful and got up witness whose testimonies are full of inherent improbabilities and un-naturalities and consequently is unworthy of credence on which no reliance can be placed. PW 4's conspicuous silence for a period of four days in divulging the incident to PW 1 and more than a month thereafter to the I.O. regarding his being an eye

witness of crime and murder being committed by the appellant makes him untruthful and unreliable witness specially when he was distantly related with the deceased and PW1 and was a co-villager too. Not only his depositions are in direct contradictions with the facts discovered by the two I. O.s at the spot but it is contradicted by medical evidence irreconcilably.

Criticising investigation conducted by the two I. O.s, it was submitted that the same is full of pitfalls and suffers from various intrinsic inherent infirmities and is not above board. Simbhawali police had conducted the same without having territorial jurisdiction over the area, in connivance with informant and scribe Raj Pal who garnered a great influence over it, and hence it's investigation is not a liceri and is un-sanctified in law. Admittedly incident had occurred within the territorial limits of P.S. Babugarh, which was kept out of the investigation for a considerable period intentionally and deliberately to fabricate false evidence against the appellant,retorted appellants counsel. Recovery of weapon and cartridge is planted and cooked up to implicate appellant for offence under Section 25 Arms Act and to coalescenced otherwise truncated prosecution story. Additionally, it was submitted that since recovery of weapon is an un-proved evidence, ballistic expert report in it's respect does not farther prosecution case. It was also submitted that defence version with it's

own narration of incident stated under Section 313 Cr.P.C. cannot be bifurcated to accept parts suitable to the prosecution case and ignore in-congruent rest. 313 Cr.P.C. statement has to be taken as a whole, without chiselling it to suit the prosecution version and ignoring rest of unfavourable part. Defence version has to be accepted as a whole or rejected as a whole pleaded Sri Sahai. It was suggested further that the version given by the accused, which is materially different from that of the prosecution, cannot be scattered to collect favourably suitable evidenciary pebbles to the prosecution case and eschew rest of it. Learned counsel castigating impugned judgement submitted that trial court committed glaring legal errors in not examining prosecution case for it's acceptability and reliability of it's witnesses, instead, it recorded conviction only on defence version and that too by relying upon half of it while ignoring material part of it which approach by the trial court is illegal. They submitted that trial Court eschewed cardinal principle of criminal jurisprudence that if prosecution is unsuccessful to establish the charge then accused deserves acquittal irrespective of fact that defence version admits some of the issues involved in the case. Learned counsels submitted that the view taken by the trial Court is wholly erroneous and contrary to settled principles of criminal jurisprudence and, therefore,indefensible. It was further submitted that the trial Court was in such a hurry and was so un-oblivious of law

that it even forgot to frame separate charges for the two murders and record convictions for both the murders and sentence the appellants for each of them and this indicates the hurried and unfair manner in which it conducted the trial. Concludingly,it was summarised by contending that instant appeal deserves to be allowed and conviction and sentence of the appellants be set aside and he be acquitted of both the charges.

Learned AGA conversely would submit that the accused has admitted most part of incident and, therefore section 106 Evidence Act can be pressed into consideration and it was for the appellant to disclose how and in what manner incident occurred cutting short two lives in this ephemeral world. Way laying defence pleaded by appellant is hollow, palpably false and hokum. His prevaricated defence is a strong circumstance against him to be reckon with by him alone. Prosecution has successfully anointed appellant's guilt and in net result instant appeal being bereft of merits, deserves to be dismissed. It was next suggested that accused statement can be utilised to prove admitted facts and lend credence to prosecution version and, therefore, appellant cannot escape liability of conviction by fabricating a false defence. Closing submissions by learned AGA was to uphold the conviction and dismiss the appeal.

We have considered rival contentions and have gone through the

entire record of the trial court and evidences of witnesses. Both the rival sides have cited and placed reliance on some of the decisions of the apex court favourable to their submissions which we have considered and which we will refer at appropriate stage.

A priory,before critically appreciating merits of the appeal and summation of evidences,a brief search light on some legal jurisprudential principles affecting final result of this appeal are sketched below.

For centuries one golden thread weaving all criminal trials is that the prosecution has to prove it's case beyond all reasonable doubt to the hilt standing on it's own legs to secure conviction of an accused. The initial onus of proof never shifts from it's shoulders. The guilt of the accused has to be established comprehensively clear of all reasonable doubts by leading cogent, reliable, creditworthy evidence, which inspire confidence in the prosecution version. It is only when prosecution has discharged it's initial burden of proof beyond all shadow of doubt, that the defence of the accused has to be peeped into for final acceptance of the prosecution story. Natural corollary of this jurisprudential principle is that if, in it's initial burden of poof, prosecution fails to prove it's case then inescapable conclusion is to acquit the accused as in that eventuality there is no need to look into the defence case. It is only when prosecution has discharged it's initial

burden of proof that the defence plea has to be considered to judge the veracity of the prosecution case for it's final acceptability. If the accused succeeds in creating a reasonable doubt in the prosecution version on preponderance of probability or successfully demolishes it's authenticity, then the benefit has to bestowed on him. In essence therefore it is trite law that defence of an accused can be looked into only to lend credence or negate prosecution story in it's initial burden of proof which never shifts from it's shoulders. This principles runs through out in the scheme of sections 101 to 106 of The Evidence Act as well and it has been so interpreted in various judicial pronouncements by the Apex court and various High Courts. This aspect has been lucidly stated in **Woolmington versus Director of Public Prosecution: 1935 AC 462,** wherein it has been held :-

"*Just as there is evidence on behalf the prosecution so there may be evidence on behalf of the prisoner which may cause a doubt as to his guilt. In either case, he is entitled to the benefit of the doubt. But while the prosecution must prove the guilt of the prisoner, there is no such burden laid on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt; he is not bound to satisfy the jury of his innocence. . . Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have*

already said as to the defence of insanity and Subject also to any stationary exception. If, at the end of and on the whole of the case, there reasonable doubt created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

(emphasis ours)

Above view has been approved by the apex court in a catena of it's decisions. In **Vijayee Singh versus State of U.P.: 1990 Cr.L.J. (SC) 1510,** apex court has observed thus:-

"15. The phrase "burden of proof" is not defined in the Act. In respect of criminal cases, it is an accepted principle of criminal jurisprudence that the burden is always on the prosecution and never shifts. This flows from the cardinal principle that the accused is presumed to be innocent unless proved guilty by the prosecution and the accused is entitled to the benefit of every reasonable doubt".

In **K.M. Nanavati v. State of Maharashtra: AIR 1962 SC 605** apex court has observed as follows:-

"In India, as it is in England, there is a presumption of innocence in

favour of the accused as a general rule, and it is the duty of the prosecution to prove the guilt of the accused."

In ***Gurchran Singh versus State of Punjab: AIR 1956 SC 460*** apex court has laid down that :-

6.*But even so, the burden of proving the case against the appellants was on the prosecution irrespective of whether or not the accused have made out a plausible defence."*

Some of the other decisions on this point are ***Sawal Das versus State of Bihar: AIR 1974 SC 778; BaidyaNath Prasad Srivastava versus State of Bihar: AIR 1968 SC 1393; R venkatkrishnana versus CBI: (2009) 11 SCC 737; Subramaniam versus State of T.N.: (2009)14 SCC415*** and many more.

The residue of the above decisions are that prosecution has to establish guilt of the accused filtered of all reasonable prognosis favourable to the accused to secure conviction and it is never relieved of this initial duty. It is only when it has discharged it's initial burden of proof that the defence of the accused has to be looked into.

At this juncture we advert to the most contentious contention mooted before us that section 106 Evidence Act can be applied to fasten guilt of the appellant even if prosecution has failed in it's initial burden. In this respect it is to be noted that in the present case

prosecution has heavily relied upon the testimony of P.W.4 Vishambhar as an eye witness to the murder to establish guilt of the appellant. Failing in that feat that now it desires to take a 'U' turn by shifting the burden of proof on the shoulders of the accused with the aid of section 106 Evidence Act. From what we have noted above it is sufficiently born out that even in cases which are covered under section 106 of Evidence Act the same principle applies which applies in cases of eye witness account for establishing guilt of the accused. Section 106 has to be read in conjunction with and not in derogation of section 101 Evidence Act. section 106 does not relieve prosecution of it's primary and foremost duty to establish accused guilt beyond all reasonable doubt independent of weaknesses of the defence. It is only when prosecution, for well perceptible and acceptable reasons, is unable to lead evidence because of circumstances beyond it's control including the reason that the fact required to be proved was "within the special knowledge of the accused alone" and prosecution could not have known it by due care and diligence, that section 106 can be resorted to by shifting burden on the accused to divulge that fact which is "in his special knowledge" and if accused fails to offer any reasonable explanation to satiate judicial inquisitive scrutiny he is liable to be punished. But even in such a situation prosecution has firstly to

establish entire chain of circumstances woven together in a conglomerated whole unerringly indicating that it was accused alone who is the perpetrator of the crime and the manner of happening of the incident is known to him alone and is within his special knowledge. It is then that the burden shift from the prosecution to the accused to explain how and in what manner offence was committed. Section 106 can not be utilised to make up for the prosecution's inability to establish it's case by leading cogent and reliable evidences, especially when prosecution could have known the crime by due diligence and care. Aid of section 106 Evidence Act can be had only in cases where prosecution could not produce evidence regarding commission of crime but brings all other incriminating circumstances and sufficient material on record to prima facie probablise it's case against the accused and no plausible explanation is forthcoming from the accused regarding fact within his special knowledge about the incident. That section lays down only this much that if a fact is in the "special knowledge of a person" and other side could not have due knowledge of it in spite of due diligence and care then burden of proving that fact lies on that person in whose special knowledge it is. Section 106 Evidence Act has no application if the fact is in the knowledge of the prosecution or it could have gained it's knowledge with due care and diligence. Here we refer some of the decisions countenancing our view. Apex court in

Shambhu Nath Mahra versus State of Ajmer: AIR 1956 SC 404

has held as follows:-

" 11. This lays down the general rule that in a criminal case the burden of proof is on the prosecution and S. 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult for the prosecution to establish facts which are "especially" within the knowledge of the accused and which he could prove without difficulty or inconvenience.

The word "especially" stresses that it means facts that are pre-eminently or exceptionally within his knowledge. If the section were to be interpreted otherwise, it would lead to the very startling conclusion that in a murder case the burden lies on the accused to prove that he did not commit the murder because who could know better than he whether he did or did not.

It is evident that that cannot be the intention and the Privy Council has twice refused to construe this section, as reproduced in certain other Acts outside India, to mean that the burden lies on an accused person to show that he did not commit the crime for which he is tried. These cases are Attygalle v. The King, 1936 PC 169 (AIR V 23) (A) and Seneviratne v. R. 1936-3 ER 36 AT P. 49 (B).

.....

13. We recognise that an illustration does not exhaust the full content of the section which it illustrate but equally it can neither curtail nor expand its ambit; and if knowledge of certain facts is as much available to the prosecution, should it choose exercise due diligence, as to the accused, the facts cannot be said to be especially" within the knowledge of the accused.

This is a section which must be considered in a common sense way; and the balance of convenience and the disproportion of labour that would be involved in finding out and proving certain facts balanced against the triviality of the issue at stake and the ease with which the accused could prove them, are all matters that must be taken into consideration. The section cannot be used to undermine the well established rule of law that save in a very exceptional class of case, the burden is on the prosecution and never shifts."

Another decision on this aspect is **Attygalle versus The King:AIR 1936 PC169.** In **P. Mani versus State of Tamil Nadu: AIR 2006 SC 1319** apex court has held as under :-

" *10. We do not agree with the High Court. In a criminal case it was for the prosecution to prove the involvement of an accused beyond all reasonable doubt. It was not a case where both, husband and wife, were last seen together inside a room. The incident might have taken place in a room but the prosecution itself has brought out*

evidences to the effect that the children who had been witnessing television were asked to go out by the deceased and then she bolted the room from inside. As they saw smoke coming out from the room, they rushed towards the same and broke open the door. Section 106 of the Evidence Act, to which reference was made by the High Court in the aforementioned situation, cannot be said to have any application whatsoever."

In yet another decision **Murlidhar and others versus State of Rajasthan: AIR 2005 SC 2345**, it has been observed by the apex court as follows:-

"*22.In our judgement, the High Court was not justified in relying on and applying the rule of burden of proof under Section 106 of the Evidence Act to the case. As pointed out in Mir Mohammand Omar (supra) and Shambu Nath Mehra (supra), the rule in Section 106 of the Evidence Act would apply when the facts are "especially within the knowledge of the accused" and it would be impossible, or at any rate disproportionately difficult for the prosecution to establish such facts, "especially within the knowledge of the accused." In the present case, the prosecution did not proceed on the footing that the facts were especially within the knowledge of the accused and, therefore, the principle in Section 106 could not apply. On the other hand, the prosecution proceeded on the footing that there were eye-witnesses to*

the fact of murder. The prosecution took upon itself the burden of examining Babulal (PW-5) as eye-witness. Testimony of Ram Ratan (PW-7) and Isro (PW-10) shows that their agricultural land was situated in a close distance from the house of Khema Ram. As rightly pointed out by the High Court, it is highly unlikely and improbable that their kith and kin Ramlal would have been given beating resulting in his death by the accused-appellants while keeping lights of their house on and door of the room opened. It is also unlikely that the accused-appellants would have taken the risk of dragging Ramlal to the house of Khema Ram, which was situated in the vicinity of agricultural land and well of Isro (PW-10), the father of Ramlal. The evidence of Govind (PW-13) also appears to be unnatural, as he had not disclosed the incident to anybody. The High Court has correctly analysed that all the witnesses, namely, Babulal (PW-5), Ram Ratan (PW-7), Isro (PW-10) and Govind (PW-13) are wholly unreliable as their evidence is replete with contradiction and inherent improbabilities.

23.In the result, we are of the view that the prosecution having put forward a case that, what transpired after Ramlal was dragged away by the assailants was within the knowledge of witnesses, utterly failed in proving the said facts. Once this is established, it was not open for the High Court to have fallen back on the rule of burden of proof under Section 106 of the Evidence Act. In fact, as we notice, it was

nowhere the case of the prosecution that Section 106 of the Evidence Act applied to the facts on record. The High Court seems to have brought it out on its own, but without any justification."

In **Ch. Razik Ram versus Ch. J.S.Chouhan: AIR 1975 SC 667** it has been held as follows:-

"116. In the first place, it may be remembered that the principle underlying Section 106, Evidence Act which is an exception to the general rule governing burden of proof - applies only to such matters of defence which are supposed to be especially within the knowledge of the defendant-respondent. It cannot apply when the fact is such as to be capable of being known also by persons other than the respondent."

In **State Of West Bengal versus Mir Mohammad Umar: 2000SCC(Cr) 1516** it has been held as follows:-

"36. In this context we may profitably utilise the legal principle embodied in Section 106 of the Evidence Act which reads as follows : "When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."

37. The section is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. But the Section would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn

regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the Court to draw a different inference.

38. Vivian Bose, J. had observed that Section 106 of the Evidence Act is designed to meet certain exceptional cases in which it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused. In Shambu Nath Mehra v. The State of Ajmer, 1956 SCR 199 : (AIR 1956 SC 404 : 1956 Cri LJ 794) the learned Judge has stated the legal principle thus (para 11 of AIR) :

"This lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would impossible, or at any rate disproportionately difficult for the prosecution to establish facts which are 'especially' within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word 'especially' stresses that. It means facts that are pre-eminently or exceptionally within his knowledge."

Thus what is gathered from the above decisions and discussion is that the prosecution has to establish the charge independently standing on it's legs and the defence of the accused cannot be

singularly utilized to hold him guilty and convict him when prosecution evidence is weak, incredible, insufficient and does not inspire any confidence.

After amplifying principle of burden of proof, we, at this juncture, now digress to another legal aspect involved in the appeal as to how much benefit prosecution can gather from accused statement under section 313 Cr.P.C. On this score we should not vex our mind as we find that law on this point is no longer res intergra. Defence of the accused can be considered to judge the veracity of the prosecution case but in absence of creditworthy satisfactory credible prosecution evidence accused statement alone can not form the basis of his conviction. In **Mohan Singh versus Prem Singh And Another: 2003 SCC (Cr) 1514** it has been laid down by the Supreme court as follows:-

" *28. The statement made in defence by accused under Section 313, Cr.P.C. can certainly be taken aid of to lend credence to the evidence led by the prosecution, but only a part of such statement under Section 313 of the Code of Criminal Procedure cannot be made the sole basis of his conviction. The law on the subject is almost settled that statement under Section 313 Cr.P.C. of the accused can either be relied in whole or in part. It may also be possible to rely on the inculpatory part of his statement if the exculpatory part is found to*

be false on the basis of the evidence led by the prosecution. See Nishi Kant Jha v. State of Bihar, (AIR 1969 SC 422) "

In the same decision it was further observed:-

" 30. The statement of accused No. 1-Prem Singh recorded in his examination under S. 313 of Cr. P.C. constitutes his defence plea. He stated that he was attacked by the deceased along with his associate whereupon the villagers rushed and caused injuries to the deceased. The evidence led by the prosecution having been rejected by this Court, the defence set up by accused-Prem Singh cannot be discarded as wholly improbable.

31.The statement of accused under S. 313 of Cr. P.C. is not a substantive piece of evidence. It can be used for appreciating evidence led by the prosecution to accept or reject it. It is, however, not a substitute for the evidence of the prosecution. As held in the case of Nishi Kant (supra) by this Court, if the exculpatory part of his statement is found to be false and the evidence led by the prosecution is reliable, the inculpatory part of his statement can be taken aid of to lend assurance to the evidence of the prosecution. If the prosecution evidence does not inspire confidence to sustain the conviction of the accused, the inculpatory part of his statement under S. 313 of Cr. P.C. cannot be made the sole basis of his conviction.

32. In the present case, the exculpatory part of statement of the

accused under S. 313 of Cr. P.C. in which he stated that he was attacked by the deceased and his associate, whereupon the villagers rushed for his help and inflicted injuries on the deceased, cannot be outright rejected as false. The inculpatory part of his statement under S. 313 of Cr.P.C., therefore, to the extent of admission of his presence in the compound of Atma Singh when the deceased was attacked, cannot form sole basis of his conviction."

Another exemplar decision on this aspect is found in **Tanviben Pankaj Kumar Divetia versus State of Gujrat : AIR 1997 SC 2193** wherein apex court has held as follows:-

"*44. The Court has drawn adverse inference against the accused for making false statement as recorded under Section 313 of the Code of Criminal Procedure. In view of our findings, it cannot be held that the accused made false statements. Even if it is assumed that the accused had made false statements when examined under Section 313 of the Code of Criminal Procedure, the law is well settled that the falsity of the defence cannot take the place of proof of facts which the prosecution has to establish in order to succeed. A false plea may be considered as an additional circumstance if other circumstances proved and established point out the guilt of the accused."*

In **Shankarala Gyarasilal Dixit v. State of Maharashtra:AIR**

1981 SC 765 it has again been held by the Supreme Court as follows:-

"30. The last circumstance relied on by the prosecution is that the total ignorance of the incident pleaded by the appellant is false, and would itself furnish a link in the chain of causation. We have come to the conclusion that the appellant was not present in the house at the time when Sunita's dead body was discovered. That makes it impossible to hold that the appellant's plea is false. Besides, falsity of defence cannot take the place of proof of facts which the prosecution has to establish in order to succeed. A false plea can at best be considered as an additional circumstance, if other circumstances point unfailingly to the guilt of the accused."

The above discussion, thus, reveals that the statement of the accused can only be utilized to lend credence or negate the prosecution version. If the prosecution fails to prove its case, then statement under Section 313 Cr.P.C. cannot be resorted to nor section 106 Evidence Act can be had to convict an accused. Section 313 of the Code can be utilized by the prosecution only for a limited purpose to lend credence to it's evidence. In this respect, some of the other exemplar judgements are **State Vs. Usman 1965 (2) Cr.L.J. 569, Purusottam Lal Vs. State 1975 Cr.L.J. 309, Roshan Lal**

Vs. State 1975 Cr.L.J. 426, Nana Ganga Ram Vs. State 1970 Cr.L.J. 621, Rahman Shaikh Vs. State, 1967 Cr.L.J. 1292. In **Vishnu Pratap Sinha Vs. State of Assam AIR 2007 SC 848.** In fact courts have gone to the extent of laying down the law that even if the accused pleads guilty to the charge, his trial should be held to establish his guilt in a serious case of murder. This has been so held by this Court in the case of ***Ram Kumar Vs. State: 1998 Cr.L.J. 1267*** wherein it has been held as follows:-

"9. The principle that in a serious case a finding of conviction should not be recorded on the plea of guilty, was stated a century ago by this Court in Queen Empress v. Bhadu (1896) ILR 1 9 All 120 in the following words :

"In this country it is dangerous to assume that a prisoner of this class understands what are the ingredients of the offence under Section 302 of the Indian Penal Code, and what are the matters which might reduce the act committed, to an offence under Section 304. Even in England it used to be the practice of some Judges, and probably is still, although they were not bound to do so, to advice persons pleading guilty to a capital offence to plead not guilty and stand their trial.

The accused is charged with a capital offence, and it need hardly be pointed out that the usual practice in such cases is not to accept the

plea of guilty, but to proceed to record evidence and base the order of conviction or acquittal according to the reliability or unreliability of that evidence."

Again in ***Dalli v. Emperor, AIR 1 922 All 233 (1)*** *it was held as follows :*

"In a case of murder it has long been the practice not to accept the plea of guilty. After all murder is a mixed question of fact and law and unless the court is perfectly satisfied that the accused knew exactly what was necessarily implied by his plea of guilty, the case should be tried."

In ***Mst. Sukhia v. Emperor, AIR 1992 All 266*** *it was held as follows :*

"The Rule is that when an accused is on his trial on a capital charge, it is not expedient that the court should convict him even upon a plea of guilty entered before the trial Court itself. As a matter of practice the Court should in its discretion, put such a plea on one side and proceed to record and consider the evidence, in order to satisfy itself, not merely of the guilt of the accused, but of the precise nature of the offence committed and the appropriate punishment for the same."

Similar view was taken by Calcutta High Court as early as in the year 1885 in **Netai Lusker v. Queen Empress, ILR 11 Cal 410** and by Bombay High Court in **Emperor v. Chinia Bhika Koli, (1906) 3 Cri**

LJ 337, wherein it has been observed as follows:-

"10.Almost all the High Courts of the country have taken the view that the court should not act upon the plea of guilty in serious offences but should proceed to take the evidence as if the plea had been one of not guilty and should decide the case upon the whole evidence including the accused plea. We do not consider it necessary to refer to those decisions in detail. As mentioned earlier the appellant had pleaded not guilty and as such there was no occasion for the court to record a finding of conviction as contemplated by Section 229, Cr.P.C. The prosecution having led no evidence to prove its case, the conviction of the appellant has to be set aside."

(under line emphasis supplied)

In the backdrop of above legal principles now we proceed to examine and test the veracity of prosecution witnesses in the light of their tendered evidences and arguments advanced before us.

Revisiting facts of case critically it is born out that some of the issues involved in the appeal are undisputed to rival sides. Relationship between deceased and appellant of being a family, date,time and place of the incident,appellant going to police station, are common to both the versions. The bone of contention between them is whether appellant murdered the deceased because of infatuated relationship or it is case of way laying and murder?

Starting from motive an analysis of evidences of prosecution witness indicate that the pair of motives alleged by the prosecution is oxymoron, incompatible and wavering. They are irreconcilably contradictory. Demand of motor cycle, buffalo, money and torturing of the deceased because of non fulfilment of it does not go down well with another motive of murdering the deceased because of extra marital relationship. If the appellant hankered death of the two deceased because of his lustrous overtures, there was no reason for him to raise those demands .What is alarmingly significant is absence of these demand allegations in the FIR and interrogatory statement of PW1 recorded under 161 Cr.P.C., especially when FIR was scribed at leisure after conclusion of two inquest reports and completion of a seizable part of investigation of seizure of ornaments etc. and handing over of it to PW1. No other witness entered into witness box to support PW 1 not even his wife to lend credence to such allegations .No other reliable supportive evidence was led in the trial as well. It was maiden disclosure by PW 1 for the first time during trial after an unexplained delay of two and half years, which period was enough for him to fabricate those motive allegations. During entire investigation the motive singularly alleged was infatuated relationship. It was for this reason that vide Ext. Ka 8 appellant was neither charge sheeted nor was prosecuted for offences

of demand of dowry and torture. Trial Judge also did not prima facie found offence of dowry demand worth trying and therefore did not charge and prosecute the appellant for the same. It transpires from perusal of para 21 to 25 of deposition of PW1 that these allegations of various demands being raised by the appellant and torturing the deceased wife because of those greedy intentions as a motive to commit double murder is an embellishment and an after thought without any truth attached to it and therefore unworthy of acceptance.

Another motive of love relationship alleged by the prosecution is still more dicey. According to the deposition of PW 1 vide para 3 of his depositions, appellant's cupid relationship was disclosed by the deceased wife to her mother who never entered into the witness box to testify and corroborate PW1. Evidentially testimony of PW 1 on this score is hearsay as he had no personal knowledge about it nor the deceased informed him about the same, and therefore inadmissible in evidence. Moreover the deposition of PW1 on said issue is incredible. Transliteration of his evidence sketched below of his cross examination will support our conclusion. In para 34 of his deposition PW1 has testified thus:-

" *(34) I.O. has interrogated me regarding the girl Pooja. I didn't tell him any thing because I did not know any thing about Pooja.*

My wife also did not know about the address of that girl. I and my wife have not seen that girl. If any of the villager has seen her that I don't know because no body informed me .I had not gone to inquire about that girl. I.O. also did not took me with him. From any other person of the village or from my wife I.O. had no conversation regarding the girl nor any of my family members came to know about it. Police of PS Simbhawali or Babugarh did not inform me any thing about the girl".

Besides above transliterated deposition there is absolutely nothing on the record to establish identity of that girl Pooja Pandit, so much so that none of the two I. O.s also made any effort to unearth said relationship and identity of the girl. PW 1 himself had no conversation with the appellant about that girl. Albeit he claims that he had complained to the appellant's father and appellant had apologised for his conduct but those are his mere pies digit without any ring of truth and it seems that PW 1 was rebuffed by appellant's father, as has been admitted by him, ostensibly for the reason that his complaint, if at all he had lodged one to the father, was a fabrication. Judicial scrutiny compels us not to accept existence of such a girl as we are in grave doubts about the same. Her whereabouts is unbeknown to everyone. Investigation regarding her identity is woefully zero. It is not improbable that to grab ornaments and other valuables a charge of infatuated relationship was brought forward.

Our above discussion leads us to conclude that prosecution has failed to establish motive nurtured by the appellant to commit the crime of his two most beloved once. This erodes the credibility of prosecution version to a large extent as having above opinion we can not conclude that the fact witnesses are wholly reliable and implicit reliance can be placed on their testimonies.

Turning now towards FIR lodged by PW 1 vide Ext. Ka 1, there is prima facie indefensible sufficient documentary evidence on record to indicate that the same is a sham document cooked up,manufactured and registered ante timed. Attended reasons for our such an opinion are that PW 1 informant got the information of the crime from police of PS Simbhawali at seven or eight p.m. by an unknown caller. He reached at the crime spot at about half past eight or quarter to nine vide para 12 of his testimony, where police of PS Simbhawali was already present and crowd had also gathered meanwhile. He did not inform the police about the complicity of the appellant at that time and maintained chillingly unappealing silence. According to him Rakhi @ Kokal was already dispatched to Madhu Nursing Home, Hapur, by the police for management of her injuries. PW 1 participated as witness No.3 in the inquest proceedings of his daughter Geeta which started at 9.30 p.m. and was over at 10.30 p.m. He then proceeded to Madhu Nursing Home, where he participated as witness no.3 in the inquest

proceeding of Rakhi @ Kokal, which had started at 11 p.m. finished at 11.55 p.m. It was after 11.55 p.m that PW 1 started for the police Station Simbhawali from Madhu Nursing Home to lodge his report. Outside the precinct of the PS Simbhawali that he got his FIR scribed and then he handed it over at PS to be registered. How then his FIR, Ext. Ka 1, was got registered at 10.05 p.m. two hours earlier? At the time mentioned in the chik FIR for registration of Ext Ka 1 PW1 was at the murder spot participating in the inquest proceedings on the cadaver of his daughter Geeta at a distance of 5 kms from the police station. How can he be omnipresent? If we believe testimony of PW 1 Mangu Singh vide paragraphs 8, 16, 31 and 33 of his depositions, then there remains no difficulty in concluding that Ext. Ka 1 is the outcome of manipulation, deliberation, concoction and is a sham ante timed document. There is much substance in the harangued contentions by appellant's counsel that it is the brain child of an unholy nexus between PW1, PW 8 and PW 10 . Informant is conspicuously clear in his testimonial statement that after staying in nursing home for about half an hour that he had started for the police station Simbhawali vide para 13 of his testimony. Para 33 struck last nail in the genuineness of FIR Ext. Ka 1 as therein it has been candidly admitted by PW 1 that it was only after the inquest of Rakhi @ Kokal was over that he had proceeded for the police station to lodge his FIR from the nursing

home. Thus there is no doubt left to conclude that Ext. K 1 has been made ante timed and is a fabricated and cooked up piece of evidence. Appendaged with said reason other reasons for us for not upholding FIR to be a genuine one are that it is based on suppression of some very significant uneschewable aspects of the events, intentionally and deliberately, to which informant himself was a party, which on the one hand diminishes value of PW1's testimony and on the other hand indicates that FIR was lodged with ulterior motives. Mangu Singh consciously omitted to mention regarding information of murder being furnished to him by the police, his participation in the inquest of the two deceased, receiving of ornaments and male wrist watches, accompanying of Rajpal and Angresh with him at the scene of murder, cause of death of the two deceased, his making a complaint to appellant's father and apology tendered by the appellant, his going to Nursing Home etc. Without exemplifying further we conclude that the contents of the earliest prosecution story as is contained in Ext. Ka 1 is a coloured version monitored and incredible on which no reliance can be placed and consequently Ext. Ka 1 looses all it's corroborative value. It is bereft of truth. Attempt by the prosecution to make PW 1 omnipresent and a reliable witness conversely spatted on it's face. This fact alone erodes entire prosecution edifice right from it's genesis which itself is un-creditworthy. FIR is an important piece of document

in a criminal trial. It not only unfolds prosecution story but also recites committed offences and identity of perpetrators crime, weapon of crime, method and manner of it's execution, witnesses thereof so on and so forth. Entire investigation is engineered and guided by it which revolves around it. Charge sheet is the ultimate progeny of it. If such pivotally vital important piece of document is proved to be embellished , concocted and unauthentic, then all other evidences supporting such hokum attracts nothing but condemnation. We are therefore of the view that the very first prosecution version of the incident is untrue and is the out come of deliberation and consultation and hence no reliance can be placed on such a piece of evidence to corroborate a false prosecution story.

Now we proceed to examine the testimonies of two fact witnesses PW 1 and PW 4 to test the veracity of their depositions. Where as PW1 is not an eye witness and his evidence is only on the question of motive and lodging of FIR, PW 4 claims himself to be an eye witness of the incident of murder. Both theses witnesses are wholly unreliable and their depositions are unworthy of any credence and are pitiably untrue and embellished. It has an air of unreality attached to it. Conduct of these witnesses is very unnatural and makes them unreliable and got up witnesses. First of all, when PW 1 reached at the spot he did not express his anger nor raised any hue

and cry against the appellant, although police was already present there. He was joined as witness of inquest but even in inquest he did not complained against the appellant as the main perpetrator of the crime because of his infatuated relationship and greed for money. His silence at that point of time is too unnatural and against natural human conduct. He has blindly signed inquest memo containing false recitals that deceased Geeta sustaining gun shot injury as well, when in fact Geeta did not sustain any gun shot injury and died of throttling. He accepted two wrist watches belonging to the appellant and intentionally eschewed it from being mentioned in his FIR. He accepted entire ornaments and did not produce them in court,which fact creates a doubt on seizure of all those ornaments and also indicates ulterior motives which he and I.O. imbibed. Curiously no attempt was made by the prosecution to produce those ornaments during trial to negate appellant's defence of way laying. Preparing Exhibit for seizure of ornaments by the I.O., who got manipulated the FIR is too dicey a piece of evidence to rely on it. Primary evidence was the act of seizure by the I.O. and production of those ornaments in the court which prosecution conveniently omitted. Informant also did not dictate the motive and rapacious demand by the appellant in his FIR nor narrated the same to the investigating officer, which make him an untruthful and unreliable witness who was always ready to change

his story as suited to his interest. As concluded above his alleged motives for committing the crime are false, which fact too makes him an un-creditworthy witness. If PW1 can cook up an FIR to implicate the appellant in connivance with the police he can not be dubbed as a truthful witness at all. Un-naturality of his conduct of not knowing the whereabouts of the beloved of his son in law, who was alleged to have ruined marital life of his daughter, his silence in divulging the name of the appellant at the time of the inquest , his not going to the police of PS Babugarh to seek justice for his daughter, his going to his house after lodging of the FIR and not caring for the cadaver of his daughter,his dancing on the tune of the I.O. and the most surreal conduct of not divulging the disclosures made to him by the eye witnesses PW4 and Ishwar to the investigating officer for an long gap of more that a month regarding their being eye witness to the murder of his daughter all theses circumstances jointly and cumulatively makes him wholly unnatural and untrustworthy witness. His no caring attitude towards Rakhi @ Kokal and abjuring conversation with the doctor regrading her condition is all the more bizarre. He did not go to the police station Babugarh to seek justice for his brieved daughter albeit he came to know of it's territorial jurisdiction three or four days after the murder. His FIR is over simplified narration of facts which does not sooth judicial scrutiny. He is also a party to the fabrication by

the I.O. His story that the appellant phoned at the house of Amarpal demanded money and intimidated him that he will dispatch bodies of his daughter and grand daughter that very day is extremely weird conduct and can not be swallowed in absence of any corroborative evidence to support it as neither Amarpal nor Angresh nor Rajpal came forward to cement his claim. Adding blow to it is the fact that this witness was not sure when the said demand was made. Thus after examining his entire evidence on the touch stone of truthfulness and probability we are of the opinion that no implicit reliance can be placed on his evidence on the question of motive and lodging of FIR and therefore hold him to be an unworthy, unreliable and untrustworthy witness. We also cannot treat his FIR Ext. Ka 1 containing true, correct and unembellished version which is the out come of consultation , deliberation and concoction and therefore opine that it looses all it's corroborative value.

Turning towards evidence of PW 4 we find him even a worst witness. He is a co villager, a relative and an eye witness of the murder incident. His wrapping up of the whole incident close to his chest, keeping silence and not divulging it to any body for four days not even to PW1 bracket him as untruthful witness. He came to know about incarceration of the appellant three or four days subsequent to murder but even then he did not inform the police about his being an

eye witness of murder and appellant being the sole malefactor. Appellant was not a criminal nor he had such proclivities and therefore explanation offered by PW 4 of keeping silence for four days even when appellant had gone to jail dub him as untrustworthy witness. He is the cousin brother of P.W. 1 as has been admitted by P.W. 1 in his deposition in para 44. Both of them are co-villagers. If in fact PW4 and Ishwar had witnessed the incident informant would have produced them before the I.O. without any unreasonable delay, which endeavour PW1 informant did not make at all. It seems that in his attempt to bloster up his case that P.W. 1 has introduced PW4 and Ishwar as eyewitnesses of incident. Cause of his presence at the spot is very unsatisfactory. He is the sole eye witness examined by the prosecution about the murder. No other person came forward not even Ishwar and people from the hotel to support his claim and lend credence to his evidence. There is no corroboration of his evidence from any independent source. His description that deceased Geeta was shot dead is a false claim inconsistent with her autopsy report. His description about the conduct of the appellant who allowed him to peep inside the car and see the cadaver of the two deceased is not only very surreal but is also against human psychology. His evidence that he heard a single gun fire shot is belied by prosecution evidence itself according to which two shots were fired in the incident, one on

the deceased and other on the appellant. On the facts before us it will be childishly unrealistic to accept prosecution submission that in a given situations and circumstances people act differently. There are some human weaknesses which are common to all and we should and must not accept converse contentions against all canons of common human psychology and conduct. According to PW4 there was a police outpost in the vicinity in Kutchaser Chaupla but no endeavour was made by him to rush to the police and seek it's help. This witness even did not rush to Balaji Hotel in the vicinity and seek help from there as well. His description about the cloths of the victim and position of two deceased inside the car are belied by the facts found on the spot by the I.O. His complete evidence projects a picture of his being a got up witness who was not present at the spot at all nor had witnessed the incident and he only sprang up to support informant's case because of being a relative and for ulterior motives known to him only. It is all the more damaging that after his disclosure to the informant four days later he was interrogated by the I.O. more that a month later. His claim that on the date of the incident he had gone to purchase grocery and vegetable at the distance of 7 km. from his village is an after thought. He claims to have seen Geeta in a pool of blood on the rear seat of the car, as she was shot at by the appellant in his witnessing is a false story. In his deposition, he has not said anything about Rakhi

alias Kokal and regarding her murder. Had he been an eye witness, his snapping of noticing Rakhi alias Kokal would not have been there. Although he remained at the spot for a minute or so yet he remembered the number of the car when it was dark without any source of light in such tense atmosphere. It is recollected here that the incident is alleged to have taken place in the month of November and by the time of the incident at 6 p.m., it would have been sufficiently dark. According to this witness vide para 4 of his deposition he had reached the spot when the windows of the car were opened and both the deceased were lying on the rear seat. His such a deposition is contradicted by the I.O., who found body of deceased Geeta, lying on the front seat. Vide Para 9 of his deposition, he had heard even the shrieks of Geeta but did not endeavour to save her. He does not know the colour of her draper and testified that blood was oozing out from her breast and stomach and her attires were soaked with it which obviously is a untrue fact as Geeta had no bleeding injury. She had sustained all contusions caused by blunt object and tooth bite and such a claim by PW4 is inconsistent with autopsy report. From the spot from where he had heard gun fire, he had reached near the car within 20 seconds. From his entire depositions we hold him a totally unreliable and untruthful witness. Time and again this court and the apex court have held that non disclosure of the name of the

accused without any valid reason at an earliest opportunity makes a witness unreliable and untrustworthy on whom no reliance can be placed. Some of those exemplar decisions are as follows:-

In **State of Rajasthan v. Bhanwar Singh :AIR 2004 SUPREME COURT 4660** it has been held as under :-

"6. We find that the High Court has carefully analysed the factual position. Though, individually some of the circumstances may not have affected veracity of the prosecution version, the combined effect of the infirmities noticed by the High Court are sufficient to show that the prosecution case has not been established. The presence of PWs. 3, 4 and 8 at the alleged spot of incident has been rightly considered doubtful in view of the categorical statement of PW-5, the widow that she sent for these persons to go and find out the body of her husband. It is quite unnatural that PWs. 3, 4 and 8 remained silent after witnessing the assaults. They have not given any explanation as to what they did after witnessing the assault on the deceased. Additionally, the unexplained delay of more than one day in lodging the FIR casts serious doubt on the truthfulness of prosecution version. The mere delay in lodging the FIR may not prove fatal in all cases. But on the circumstances of the present case, certainly, it is one of the factors which corrodes credibility of the prosecution version."

In **State of Maharashtra v. Raju Bhaskar Potphode :AIR 2007**

SC (Supp) 708 it has been held as under :-

"*6. Several factors have been highlighted by the High Court to cast doubt on the veracity of PW-2's evidence. Firstly, it noted that his name was not indicated in the FIR. Furthermore, his conduct at the time of incident about what he did at that time cor rodes the credibility of his version. He admitted that he did not inform the deceased that the accused was coming with a knife loudly proclaiming that he wanted to harm the deceased. Additionally, his conduct was quite unnatural because he did not take the deceased either to the hospital or police station and stated to have been gone his home directly. Neither did he take him to the hospital which was nearby nor inform the police at the police station which was also situated close-by. The statement was also discrepant as to whether he returned from home after he had left the deceased in an injured condition. At one stage he stated to have come after about 10 minutes, but in his cross-examination he admitted that he did not return.*

7. Learned counsel for the appellant submitted that he may have gone to inform the relatives. Interestingly, none of the relatives came near the spot. The injured was taken to the hospital by other. High Court found it unnatural that the PW-2 did not bother to provide medical assistance. He also did not inform the police. He claimed to have left for his home. Whether he came back or not is another doubtful

question because as noted above he himself admitted in cross-examination that he stayed at home. As rightly observed by the High Court it is quite unnatural conduct on the part of a close relative that he would leave the relative in a pool of blood not bothering to take him to the hospital and not to return after having left the spot. Further his conduct in not in forming the police is another relevant factor."

In **State of U. P. v. Mushtaq Alam :AIR 2007 SUPREME COURT 2672** it has laid down as under :-

" *The High Court found it improbable that when the Police Constable had arrived at the spot why the name of the assailant could not have been told. Further, PW-1 had accepted that he had not accompanied the deceased to the hospital and waited at the spot for about 40 minutes before he left for the police station to lodge the first information report. This, according to the High Court, was also un-natural conduct. In a normal course, he could have either accompanied the deceased or could have immediately gone to the police station which was not very far away from the place of occurrence to lodge the FIR.*

13. So far as the gun shot injury is concerned, the prosecution version was contrary to what PW-1 deposed. Though oral testimony has to get preference over the medical opinion, yet when the latter totally improbabilis a witness's oral testimony, same is a relevant factor.

14. The presence of PWs. 1 and 4 at the spot has also been found to be not established. PW-4 is the owner of a tea stall. The High Court found that he had no reason to go out in the night to take tea at another tea stall which was at a distance from his own house. The evidence of PW-1 so far as manner of assault and about his presence has been stated to be not consistent. In the examination-in-chief he stated that both he and the deceased were coming together when the accused put the pistol on the side of the deceased and shot. On being shot at, both PW-1 and the deceased cried loudly but in the cross examination he categorically admitted that he was at a distance and was coming behind the deceased as he had stopped mid way for urinate. That is why he was not by the side of the deceased. The High Court referred to this aspect to conclude that possibility of his having seen the assailant was remote. The reasoning indicated by the High Court to discard the prosecution version, as analysed above, does not suffer from any infirmity to warrant interference. "

Now turning towards the two FIRs, one alleged to have been lodged by the appellant(Ext. Ka 22/23) and other by the informant(Ext. Ka 1) we find that Ext. Ka 22/23 lodged by the appellant is hit by section 25 Evidence Act(herein after referred to as the Act) being in the nature of his inculpatory confessional statement before a police Officer. It was an FIR which , according to prosecution

case, was scribed to divulge the crime by the appellant and confess guilt of murder and was therefore inculpatory statement by the appellant. In such a view the contents of FIR Ext. Ka 22/23 can not be read against the appellant. We are fortified in our view by the following decisions of the apex court:-

In **Bandlamuddi Atchuta Ramaiah v. State of A.P.: AIR 1997 SUPREME COURT 496** it has been held by the apex court as follows:-

"*16. The legal position, therefore, is this: A statement contained in the FIR furnished by one of the accused in the case cannot, in any manner, be used against another accused. Even as against the accused who made it, statement cannot be used if it is inculpatory in nature nor can it be used for the purpose of corroboration or contradiction unless its maker offers himself as a witness in the trial. The very limited use of it is an admission under section 21 of the Evidence Act against its maker alone unless the admission does not amount to confession.*"

IN **Nisar Ali v. State of U.P.:AIR 1957 SUPREME COURT 366** it has bee laid down by the apex court as below:-

" *A first information report is not a substantive piece of evidence and can only be used to corroborate the statement of the maker under S. 157, Evidence Act, or to contradict it under S. 145 of*

the Act. It cannot be used as evidence against the maker at the trial if he himself becomes an accused, nor to corroborate or contradict other witnesses. In this case, therefore, it is not evidence."

IN **Aghnoo Nagesia v. State of Bihar: AIR 1966 SUPREME COURT 119**, Supreme Court has held thus :-

"10. Section 154 of the Code of Criminal Procedure provides for the recording of the first information. The information report as such is not substantive evidence. It may be used to corroborate the informant under S. 157 of the Evidence Act or to contradict him under S. 145 of the Act, if the informant is called as a witness. If the first information is given by the accused himself, the fact of his giving the information is admissible against him as evidence of his conduct under S. 8 of the Evidence Act. If the information is a non-confessional statement, it is admissible against the accused as an admission under S. 21 of the Evidence Act and is relevant, see Faddi v. State of Madhya Pradesh, Cri. Appeal No. 210 of 1963, dated 24-1-1964: (AIR 1964 SC 1850), explaining Nisar Ali v. State of U. P., (S) AIR 1957 SC 366 and Dal Singh v. King Emperor, 44 Ind App 137: (AIR 1917 PC 25). But a confessional first information report to a police Officer cannot be used against the accused in view of S. 25 of the Evidence Act."

In **Faddi versus State of M.P.: AIR 1964 SC 1850** has approved it's view in Nisar (Supra) as follows:-

".....Of course a confessional first information report cannot be used against the maker when he be an accused and necessarily cannot be used against a co-accused....."

Thus so far Ext. Ka 22/23 are concerned it is no evidence against the appellant and can not be utilised by the prosecution to bolster it's case. It is noticeable that appellant had denied having scribed the same on his own free will. According to his defence he was forced to scribe it at the dictation of the I.O. after being assaulted at the police station and the same was registered ante timed. Further it is the prosecution case that prior to the information furnished by the appellant P.S. Simbhawali had no clue about the crime. Appellant intimated the said incident to the police by lodging Ext. Ka 22/23. After registration of the crime, that information was sent to P.W. 1 Mangu Singh. According to prosecution allegations Ext. Ka 22/23 was registered at 8.30 p.m. at P.S. Simbhawali but it is proved on the record that P.W. 1 Mangu Singh got the intimation of the said crime much prior to the said registration. According to the deposition of PW1 he received the said information at 7 or 8 p.m. prior to his going on bed, vide para 6 of his examination in chief. If PW1 was intimated at 7 or 8 p.m., the registration of Ext. Ka 22(alleged FIR by the appellant) at 8. 30p.m. makes the registration of the document ante timed. Consequently contents of Ext. Ka 22 remains a disproved fact.

Coming to the FIR by the informant Ext. Ka 1 we have already castigated it as a sham document being outcome of consultation deliberation and concoction. Attour it was registered subsequent to commencement of investigation into the crime and hence was hit by section 162 Cr.P.C. and therefore it could not be utilized for any purpose other than to contradict the maker of it. It is no FIR at all and is in the nature of previous statement of informant. It could not have been utilized for the purposes of corroboration at all. On this aspect it has been held by the apex court in **Ganesh Gogoi Versus State of Assam: AIR 2009 SC 2955** as follows:-

"22. It is clear from the aforesaid statement, investigation in the case had already commenced and once investigation commences the FIR is hit by Section 162 Cr.P.C. and no value can be attached to the same."

Further, significant omissions in Ext. Ka 1 makes it incredible piece of evidence, unauthentic for any purposes. This aspect we have already mentioned above and therefore do not repeat the same. Delay in lodging it after the two inquest were over further erodes it's genuineness. It contains false recitals and therefore we can not place any reliance on it and reject it as a waste piece of paper.

Turning towards investigation a glimpse of the same into the crime reveals that it has many infirmities which goes to the root of the

controversy and damage prosecution version and hence does not inspire any confidence. At the out set the document which commenced it was itself a sham document being outcome of manipulation of P.W. 10 in connivance with P.W. 1 and P.W. 8 and was registered ante timed. Thus the two F.I.Rs. one by the appellant and other by P.W. 1, both are registered ante timed. P.W. 10, the first I.O., could not explain such a manipulation while in the witness box. Further P.W. 10 after registration of crime came to the spot where the family members of deceased Geeta and many villagers were already present. This fact is at variance with what had been stated by PW 1, according to whom when he had reached the spot police was already present. Sending of Rakhi@ Kokal to Madhu Nursing Home, Hapur, through S.I. R.K. Motala for treatment by the I.O. was a step in his manipulation to suit informant's case. According to her post-mortem examination report she was strangulated to death and consequently did not require any medical attention. S.I.R.K. Motala was not examined by the prosecution to support PW10.This add one more rung to mendacious prosecution version and reveals that entire investigation was doctored. What is most significantly irregular is that though crime was committed within the territorial limits of PS Babugarh yet P.W.10kept it uninformed for a long period and it was only when he had

manipulated entire case that he recommended for transfer of investigation to PS Babugarh. This conduct of P.W.10 indicates that he was a interested party and was a privy to cooking up a case against the appellant. It is recollected here that subsequent to alleged seizure of ornaments and wrist watches, recovery of weapon,that P.W.10 had recommended for transfer of investigation vide paragraph 4 of his examination-in-chief. He never investigated motive part of allegation because he knew the truth of it's falsity. He never went in search of girl Pooja nor investigated her whereabouts. Vide paragraph 7 of his deposition he had pleaded ignorance regarding dispatching of the F.I.R. to the Magistrate in accordance with section 157 of the Code. He has given a false statement that deceased Geeta had sustained injury on a left side of her breast. He also made a deliberate false statement that Rakhi @ Kokal was sent to nursing home as she seems to be alive. He has no recollection about the conveyance with which he had dispatched the dead body for the purposes of post-mortem. He never went to nursing home for conducting inquest on the body of Rakhi @ Kokal. Vide paragraph 39 of his deposition he admitted that the ornaments were handed over to PW 1 because he had demanded the same. This I.O.

never collected any blood from inside the car nor searched for signs of shooting inside it. He intentionally eschewed sketching spot inspection map nor endeavoured to recover weapon of assault on the first day, which facts raises a doubt regarding recovery being genuine attended with other circumstances.

So far as second I.O. P.W.5 R.K. Sharma is concerned he had commenced the investigation on 18.12.2003. It was he who has interrogated the informant and other witnesses and had submitted the charge sheet vide Ext. Ka-8. He did not go to the spot nor interrogated the appellant. His entire deposition is very unsatisfactory and total eyewash. We have no hesitation in concluding that the entire investigation is wholly unsatisfactory, not above board nor it inspires any confidence. We only put on record the criticism by the appellant counsel in this respect when he uttered that the two investigators seems to have acted as a conduit to PW1 to nail in the appellant.

Turning towards defence of the appellant U/S 313 Cr.P.C. it is to noted that appellant also sustained gun shot injury in the same incident. Perusal of his injury report vide Ext Ka 7 indicate that gun shot injury sustained by him had a

dimension of 13.5.cmx 7 cm , 0.2 cm wide and 17 pellets were recovered underneath it. Said injury therefore could not have been self inflicted in absence of blackening and tattooing as no body can cause injury to himself with out a close proximity having such a dimension. Appellant was just 22 years of age and his medical examination was conducted on 19.11.2003 at 5.15a.m.at PHC Simbhawali by Dr. V.P.Singh. Another injury sustained by the appellant was traumatic swelling 3.5cmx 2cm around right eye with bluish contusion. Appellant also complained of pain in Lt. hand. No money was recovered from the deceased and recovery of ornaments etc. by the I.O is disproved fact. These ornaments were never produced in the court. His defence therefore is quite probable as it can not be said with any amount of certainty that it can not be a case of attempt to loot. As held earlier prosecution story is fabricated and unauthentic and therefore weakness of the defence can not prove it. It is trite law that suspicion howsoever grave cannot be a substitute for creditworthy, confidence inspiring unblemished prosecution evidence to record a conviction.

Now turning our attention towards charge under section 25 Arm's Act, we find that conviction and sentence on the

said charge is also assailable. According to prosecution case, appellant was arrested at P.S. Sibhawali in the evening of 18.11.2003.I.O. Albeit proceeded for the spot but did not took appellant with him to fathom out the murder weapon. This raises a suspicion regarding recovery. Appellant was interrogated on 19th morning at 6.00 a.m. after his medical examination at 5.55 a.m. According to the deposition of P.W.10, he accompanied the appellant to the place from where appellant took out the country made pistol with an empty cartridge fixed in it. Before said recovery there is no evidence on record to prove what disclosure statement was made by the accused to the I.O. which led to this recovery. From perusal of recovery memo, vide Ext. Ka-6 it is born out that the same was inked subsequent to recovery. Under section 27 of the Evidence Act, what is admissible is so much of the disclosure statement by an accused while in police custody which leads to recovery not the actual recovery as such. In his deposition P.W.10 S.I. Lala Ram Verma has not stated regarding any disclosure statement made by the appellant. No other witness was examined by the prosecution to prove that disclosure. Under section 27 of the Evidence Act what can be proved is the disclosure statement made by the

accused. Legally speaking it should be proved in the actual words of the accused. Ext. Ka-6 also does not contain such a statement. Once that evidence which is admissible under 27 of Evidence Act is not brought on record actual recovery is of no use nor it is admissible. In our this conclusions we draw support from following decisions of the apex court. In **Geejaganda Somaiah Vs. State of Karnataka AIR 2007 SC 1355** it has been held by the apex court in paragraph 21 and 22 thereof as follows:-

" *However, to the aforesaid rule of Sections 25 to 26 of the Evidence Act, there is an exception carved out by Section 27 the Evidence Act providing that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved. Section 27 is a proviso to Sections 25 and 26. Such statements are generally termed as disclosure statements leading to the discovery of facts which are presumably in the exclusive knowledge of the maker. Section 27 appears to be based on the view that if a fact is actually discovered in consequence of information*

given, some guarantee is afforded thereby that the information was true and accordingly it can be safely allowed to be given in evidence.

22. As the section is alleged to be frequently misused by the police, the courts are required to be vigilant about its application. The court must ensure the credibility of evidence by police because this provision is vulnerable to abuse. It does not, however, mean that any statement made in terms of the aforesaid section should be seen with suspicion and it cannot be discarded only on the ground that it was made to a police officer during investigation. The court has to be cautious that no effort is made by the prosecution to make out a statement of accused with a simple case of recovery as a case of discovery of fact in order to attract the provisions of Section 27 the Evidence Act."

In **Pulukuri Kottaya and others vs. Emperor:AIR 1947 PC 67** *it was held :*

"Section 27, which is not artistically worded, provides an exception to the prohibition imposed by the preceding section, and enables certain statements made by a person in police custody to be proved. The condition necessary to bring the section into operation is that discovery of a fact in

consequence of information received from a person accused of any offence in the custody of a Police Officer must be deposed to, and thereupon so much of the information as relates distinctly to the fact thereby discovered may be proved."

In **State of Uttar Pradesh vs. Deoman Upadhyaya: AIR 1960 SC 1125** was held that :-

"*Section 27 renders information admissible on the ground that the discovery of a fact pursuant to a statement made by a person in custody is a guarantee of truth of the statement made by him and the legislature has chosen to make on that ground an exception to the rule prohibiting proof of such statement. The principle of admitting evidence of statements made by a person giving information leading to the discovery of facts which may be used in evidence against him is manifestly reasonable"*

In**Earabhadrappa alias Krishnappa vs. State of Karnataka: 1983 (2) SCR 552** it was held that two conditions are sine qua non for applicability of Section 27 Evidence Act and those are (i) information must be such as has caused discovery of the fact, and (ii) the information must 'relate distinctly' to the fact discovered. Under Section 27 only

so much of the information as distinctly relates to the fact really thereby discovered, is admissible.

Thus what is admissible under section 27 of the Act is disclosure statement. Hence such statements should be taken down by the police in the actual words of the accused and those actual words transcript has to be proved to gain the benefit of section 27 of Evidence Act. Moreover Ananat Ram has been produced as P.W.2 by the prosecution who is a resident of village of informant. He therefore is an interested witness. Further place of recovery was open to all and sundry which was accessible to all and hence exclusive knowledge of the appellant can not be presumed. Since we have held that prosecution has cooked up a case against the appellant, we find recovery of weapon from the appellant also to be extremely doubtful.

Atour, the report by Forensic Science Laboratory will also not benefit the prosecution because of our finding that the recovery of country-made pistol the weapon of assault itself is an unreliable fact. We, therefore, do not propose to dwell further over Forensic Science Laboratory report.

Another important aspect of the matter to which we at this juncture would like to refer is that during trial

Investigating Officer has to utter those very actual words, which were disclosure statement of the accused to gain benefit of Section 27 of Evidence Act. Unless those words are deposed, Section 27 will have no application. It is noted here that in absence of those words it will be difficult for the Court to record a concrete finding in respect of actual disclosure made by the accused, which had led to the recovery. It is also observed that the extract of disclosure statement by an accused had to be filed separately by the Investigating Officer under his signature and it has got to be exhibited, which practice now we find is eroding fast and are being seldom practised. We hope and trust that henceforth trial courts will keep this important aspect which is of enormous evidenciary value into consideration so that no loophole is left in conducting a fair and impartial trial.

Adverting now to the impugned judgement and procedure adopted by the trial court, there are some disquieting feature of the trial procedure, which in our opinion are wholly illegal. It was a case of double murder of Geeta and Rakhi @ Kokal. It is to our dismay that the trial Judge did not charge the accused for those two murders and contended with framing a single charge. Both the murders

were separate act of human killing. Accused was required to be charged for both the offences which has not been done at all. Additionally for two murders accused has been convicted only for one and not for another. We are unable to fathom out any reason for the trial judge to commit such a blunderous mistakes. This is a projection of utter careless attitude on the part of the trial judge in conducting the trial. We deprecate such illegal slips. Framing charge against an accused is an onerous act of the trial courts. It is cardinal duty of the trial court to charge the accused with the offences which he has committed as accused can not be charged for those offences also which he had never committed. Charging an accused is a step in a fair trial procedure. The manner in which charge was framed by the trial Judge has bewildered us. It is expected of trial courts that it shall conduct trials in a just and fair manner in accordance with procedure established by law and not to transgress it nor abjure their responsibility in observing correct procedure. We hope and trust that henceforth trial courts will be oblivious of the facts and laws to be applied while framing charge which is not an empty formality. Merely because defect in charge or non mentioning of charge is not singularly sufficient to set aside a judgement

is no reason not to charge the accused correctly. Sections 215 read with section 464 of the code is not meant to ignore the responsibility of the trial court in charging an accused. Since we have opined that prosecution has failed to establish guilt of the appellant, we do not propose to remand the case back because of such illegality as it will be only a wastage of time of the court. We do not drag the issue further and only hope that in future such mistakes will not recur.

Turning now to the impugned judgement it is surfaced that trial Judge has ignored significant testimonies of PW1 and 4.It's conclusion that it is a case of circumstantial evidence is contrary to evidence led in the trial. As discussed above P.W.4 Vishambher,and his companion Ishwar was made eye witnesses of the incident. While scrutinising evidence of PW 4 Vishambhar we have noted that he had gone to the extent of deposing that he had heard gunfire and Geeta was shot dead in his witnessing and he had seen her lying in a pool of blood on the rear set of the car. Thus it was not a case of circumstantial evidence. Trial court's conclusion on this aspect is against the merits of the matter. It has totally misplaced itself by applying section 106 of the Evidence Act which, as has been pointed out above, had no

application at all as factum of murders was not within the special knowledge of the appellant alone. The reasoning adopted by the trial Judge, therefore, is totally fallacious and cannot be concurred. Since trial court completely ignored those evidences favourable to the appellant it's conclusions are erroneous. It had opined that nothing has surfaced to make P.W. 1 unreliable witness is incorrect. We have pointed out above that the very fact that informant cooked up a FIR which was registered ante-timed by itself speaks volumes against the conduct of the informant. None mention of motive of demand of dowry, money, motorcycle etc. either in the FIR or 161 Cr.P.C. statement further erodes his credibility besides his conduct being very unnatural and shaky. We have already pointed out glaring defects in his testimony. Conduct of P.W. 1 in not informing the I.O. for more than a month regarding P.W. 4 being an eye witness of the incident further discredits his testimony. Trial Judge committed serious mistake in relying upon testimony of P.W. 4 Vishambher who is an unreliable witness. It was cardinal duty of the trial Judge to separate the grain from the chaff so that no innocent man is punished and no guilty escapes punishment and in that exercise, it was very injudicious for it to lean in favour of prosecution. An impartial analysis of the evidence is of paramount importance in judging a criminal case where minimum punishment is life imprisonment. Since the trial Judge has completely

ignored the defects which we have pointed out herein above we are compelled to take a contrary view. Dispensation of justice require unbiased analysis of evidences to exhume the hidden truth out. It should be transparent dispensation with fair and reasonable approach. An injudicious approach will do more harm than to repose public confidence. Since none of the opinion taken by the trial Judge is commendable to us we therefore are unable to uphold the impugned judgement and take a contrary view by referring words of the apex court in **Mohd. Zahid versus State of Tamil Nadu: 1999 SCC (Cr) 1066**, which are as follows:-

" *Aware as we are of the fact, a budding life came to an unfortunate premature end, our jurisprudence will not permit us to base a conviction on the basis of the evidence placed by the prosecution in this case and the benefit of a reasonable doubt must be given to the appellant."*

Ending this judgement we allow this appeal, set aside impugned judgement of appellant's conviction dated 25.1.2006 recorded by Additional Sessions Judge, Fast Track Court No.1, Ghaziabad in S.T. No.318 of 2004 connected with S.T. No.163 of 2004 for offences U/S 302 IPC and 25 Arms Act and acquit him of those charges. Appellant is imprisoned

in jail. He is directed to be freed from it immediately unless he is incarcerated in some other offence.

We put on record our appreciation for Sri Brijesh Sahai, appellant's counsel and Sri KN Bajpai,learned AGA for rendering valuable assistance to us.

Let a copy of this judgement be transmitted to the trial court for its intimation.

Dt.6.8.2010
Rk/AKG/Criminal Appeal No.1417 of 2006