A.F.R.

Reserved

Court No. - 4

Case :- CRIMINAL APPEAL No. - 4606 of 2008

Appellant :- Dilip And Others

Respondent :- State Of U.P.

Counsel for Appellant :- Ravi Sahu,Adil Jamal,Ahmad Saeed,Ali Hasan,Ghan Shyam Joshi,M. Islam,Mohd.Farooq,Rakesh Dubey,Ravi Sahai,Sanjay Srivastava,Shariqe Ahmad,Ved Kant Mishra

Counsel for Respondent :- Govt. Advocate,P.K. Singh

Hon'ble Bala Krishna Narayana,J.

Hon'ble Naheed Ara Moonis,J.

Per Hon'ble B. K. Narayana, J.

Heard Sri Dilip Kumar, Senior Advocate assisted by Sri Rakesh Dubey and Mohd. Farooq, learned counsel for the appellants, Sri P. K. Singh, learned counsel for the complainant and Smt. Manju Thakur, learned A.G.A.-I for the State.

This appeal has been preferred by the appellants Dilip (A1), Arjun Pal @ Palauli (A2) and Akhtar Karim @ Achchhe Kariya (A3) against the judgement and order dated 18.07.2008 passed by IVth Additional District & Sessions Judge, Kanpur Nagar in Sessions Trial No. 1349 of 2003 (State Vs. Dilip and others) arising out of Case Crime No. 183 of 2003 u/s 302 I.P.C. and 7 of Criminal Law Amendment Act connected with Sessions Trial No. 1350 of 2003 (State Vs. Arjun Pal and Dilip) arising out of Case Crime No. 205 and 206 of 2003 u/s 25/27 Arms Act and connected with Sessions Trial No. 1351 of 2003 (State Vs. Ankur and Akhtar Karim @ Achchhe Kariya) arising out of Case Crime No. 207 and

208 of 2003 u/s 25/27 of the Arms Act, P.S.- Bajariya, District- Kanpur Nagar, by which all the three appellants were convicted and sentenced to imprisonment for life and a fine of Rs. 10,000/- each and in case of default in payment of fine, six months additional imprisonment each u/s 302 I.P.C., six months rigorous imprisonment and a fine of Rs. 1,000/- each and in case of default in payment of fine, one month additional imprisonment each u/s 7 of Criminal Law Amendment Act and two years rigorous imprisonment and a fine of Rs. 2,000/- each and in case of default in payment of fine, two months additional imprisonment each u/s 25/27 of the Arms Act. All the sentences were directed to run concurrently.

Brief facts of this case are narrated hereinbelow :-

According to the written report (Ext.Ka.1) lodged by P.W.1 informant Ashok Kumar Gupta at P.S.- Bajariya, District- Kanpur Nagar on 13.07.2003 at 21.15 hours, in the afternoon of 13.07.2003 at 3 p.m., informant's brother Sushil Kumar was standing on the roof of his house while Dilip (A1), Rohit and Rajan were quarreling with each other. P.W.5 Jeetu son of Sukh Lal and Sushil Kumar son of Brij Bihari Lal had tried to settle the matter during which a dispute took place between them. On the same day at about 8 p.m. while Sushil son of Brij Bihari Lal, P.W.5 Jeetu son of Sukh Lal, Vijay Kumar Yadav son of Swaroop Yadav and Ram Lakhan Yadav son of Ram Sevak Yadav had gathered in House No. 104/72 situated in Sisamau for going to attend the house warming party in the neighbourhood, Arjun Pal @ Palauli (A2) son of Mishri Lal, Dilip (A1) son of Late Siddhnath, Ankur and Akhtar Karim @ Achchhe Kariya (A3) armed with country-made pistols arrived there and started abusing Sushil Kumar, accusing him of having become a very big leader, fired at him simultaneously. Sushil received several gunshot injuries on account of which he fell on the ground and started wriggling with pain. People who were sitting in the lane in front of their houses on cots, on hearing the sound of gunshots, started running helter-skelter which eventually led to a

stampede. Fear and terror gripped the atmosphere. People locked the doors of their houses from inside. After the firing was over, the accused left threatening everyone with dire consequences who dared to depose anything against them, brandishing their country-made pistols in the air. With the help of the family members and the residents of the locality, he took Sushil to the hospital. He however died on the way. All the miscreants were hardened criminals. According to the complainant, the aforesaid incident was witnessed by P.W.3 Ram Lakhan Yadav, P.W.5 Jeetu, Vijay Kumar and large number of neighbours.

On the basis of the aforesaid written report (Ext.Ka.1), Case Crime No. 183 of 2003 u/s 302 I.P.C. and 7 of Criminal Law Amendment Act was registered at P.S.- Bajariya, District- Kanpur Nagar against the accused. Check F.I.R. (Ext.Ka.2) and relevant G.D. Entry vide rapat no. 21.15 hours dated 13.07.2003 (Ext.Ka.3) were prepared by P.W.2 S.I. Laeek Ahmad.

The investigation of the case was taken over by P.W.10 Pramod Kumar Chawla, who reached the place of occurrence and after inspecting the same, prepared its site plan and recorded the statements of the witnesses. He also recovered plain and blood-stained earth and 3 empty cartridges of 12 bore from the place of occurrence and prepared the recovery memo of the aforesaid articles (Exts.Ka.5 and Ka.6). Thereafter, he held inquest on the body of the deceased and prepared the inquest report (Ext.Ka.7) and other related documents namely letter addressed to R.I., death intimation slip, letter addressed to C.M.O., photo lash, challan lash, specimen seal (Exts.Ka.7 to Ka.13). Thereafter, he got the body of the deceased sealed and dispatched to the District Hospital for postmortem examination.

Postmortem on the deceased's body was conducted by P.W.6 Dr. Ravindra P. Mishra on 14.07.2003 at about 11.15 p.m. who also prepared his postmortem report (Ext.Ka.4). He noted following ante-mortem injuries on the person of Sushil :-

(1) Firearm wound of entry 3 cm x 3 cm bone deep on lt. side of neck joint below chin. Blackening, tattooing and charring present around the wound. Margins inverted.

(2) Firearm wound of entry 3 cm x 3 cm abdomen cavity deep right side of back of chest. Blackening, tattooing and charring present around the wound. Margins inverted 9 cm below right scapula.

According to P.W.6 Dr. Ravindra P. Mishra, the cause of death of Sushil was shock and haemorrhage caused as a result of ante-mortem firearm injuries.

On 30.07.2003, P.W.10 Inspector Pramod Kumar Chawla, after obtaining police remand of Dilip (A1) and Arjun Pal @ Palauli (A2), on their pointing out, got recovered two country-made pistols of 12 bore and two live cartridges of 12 bore which were hidden under the heap of garbage. Both Dilip (A1) and Arjun Pal @ Palauli (A2) admitted that they had shot the deceased with the recovered country-made pistols. Two country-made pistols and two live cartridges allegedly recovered on the pointing out of Dilip (A1) and Arjun Pal @ Palauli (A2) were packed and sealed on the spot.

On the basis of the written report (Ext.Ka.1), Case Crime No. 205 and 206 of 2003 u/s 25/27 of Arms Act was registered against Dilip (A1) and Arjun Pal @ Palauli (A2) at P.S.- Bajariya, District- Kanpur Nagar and investigation thereof was entrusted to P.W.7 S.I. Ehtaram Ali Khan.

On the same day, P.W.10 Inspector Pramod Kumar Chawla, after obtaining police remand of Akhtar Karim @ Achchhe Kariya (A3) and co-accused Ankur, also got recovered two country-made pistols on their pointing out at 21.15 hours. Both the country-made pistols were seized and their recovery memo (Ext.Ka.20) was prepared on the spot.

On the basis of the aforesaid recovery memo, Case Crime No. 207 and 208 of 2003 u/s 25/27 of Arms Act was registered at P.S.- Bajariya, District- Kanpur Nagar against Akhtar Karim @ Achchhe Kariya (A3) and co-accused Ankur.

After completing the investigation, the Investigating Officers of the aforesaid case crime numbers filed charge-sheet u/s 302 r/w 34 I.P.C., 7 of Criminal Law Amendment Act and 25/27 of Arms Act against Dilip (A1), Arjun Pal @ Palauli (A2), Akhtar Karim @ Achchhe Kariya (A3) and co-accused Ankur.

Since the offences mentioned in the charge-sheet were triable exclusively by the Court of Sessions, Chief Metropolitan Magistrate, Kanpur Nagar committed the accused for trial to the Court of Sessions Judge, Kanpur Nagar where Case Crime No. 183 of 2003 was registered as S.T. No. 1349 of 2003, State Vs. Dilip and others, Case Crime No. 205 and 206 of 2003 was registered as S.T. No. 1350 of 2003, State Vs. Arjun Pal and Dilip and Case Crime No. 207 and 208 of 2003 was registered as S.T. No. 1351 of 2003, State Vs. Ankur and Akhtar Karim @ Achchhe Kariya. All the three trials were made over for trial from there to the Court of IVth Additional District & Sessions Judge, Kanpur Nagar who on the basis of material collected during the investigation and after hearing the prosecution as well as the accused on the point of charge, framed charge u/s 302/34 I.P.C., 7 of Criminal Law Amendment Act and 25/27 of Arms Act against all the three accused-appellants and co-accused Ankur who abjured the charges framed against them and claimed trial.

The prosecution in order to prove the charges framed against the accused-appellants examined as many as twelve witnesses out of whom P.W.1 informant Ashok Kumar Gupta, P.W.3 Ram Lakhan Yadav and P.W.4 Sanjay and P.W.5 Jeetu were examined as witnesses of fact while P.W.2 Laeek Ahmad who had prepared and proved the check F.I.R. and G.D. Entry of Case Crime No. 183 of 2003 as (Exts.Ka.2 and Ka.3), P.W.6 Dr. Ravindra P. Mishra who had conducted postmortem on the dead body of Sushil and proved the postmortem report as (Ext.Ka.4), P.W.7 S.I. Ehtaram Ali Khan who had accompanied the Investigating Officer of the case to the place of occurrence and had collected plain and blood-stained earth and three empty cartridges of 12 bore from there and prepared the

recovery memo of the aforesaid articles on the instructions of P.W.10 Inspector Pramod Kumar Chawla and proved the same as (Exts.Ka.5 and Ka.6), P.W.8 S.I. Subhash C. Bunodha who had conducted inquest on the body of deceased in the mortuary of the Hallet Hospital, prepared the inquest report, letter addressed to C.M.O., death intimation slip, letter addressed to R.I., photo nash, challan lash, specimen seal and proved the same during the trial as (Exts.Ka.7, Ka.9, Ka.10, Ka.11, Ka.12 and Ka.13 respectively), P.W.10 Inspector Pramod Kumar Chawla, C.B.C.I.D. Agra Division, who had investigated the matter and in whose presence the four country-made pistols allegedly used by the accused in committing the murder of Sushil Kumar were said to have been recovered on their pointing out and who after completing the investigation, had filed charge-sheet against the accused, P.W.11 S.I. Subhash C. Bunodha, witness of recovery of two country-made pistols and two live cartridges on the alleged pointing out of Dilip (A1) and Arjun Pal @ Palauli (A2) which was exhibited and produced during the trial as material Exts. 2A, 3A, 4A, 6A, 7 and 8, P.W.12 S.I. Jagdeo Sonkar who had prepared the check F.I.R.s of the Case Crime Nos. 207 and 208 of 2003 u/s 25/27 of Arms Act and filed charge-sheet against co-accused Ankur and Akhtar Karim @ Achchhe Kariya (A3) and proved the same as (Exts.Ka.23 and Ka.24), were produced as formal witnesses.

After the closure of the prosecution evidence, the appellant and co-accused Ankur were examined u/s 313 Cr.P.C. Dilip (A1), Arjun Pal @ Palauli (A2) stated that all the witnesses had given false evidence against them and they both belonged to respectable families and were looking after their families and they had been falsely implicated due to partibandi. They had neither fired at anyone nor they had any criminal history. Akhtar Karim @ Achchhe Kariya (A3) in his statement stated that he was carrying on the business of selling cattle. Deceased and the informant were carrying on the business of lending money on interest. They were members of Congress party. The deceased had obtained a loan for

purchasing buffalo and a sum of Rs. 2,00,000/- was remaining to be paid by him to them since two of his buffaloes had died. There was default in the payment of loan installments as a result whereof an altercation had taken place between them and on account of the aforesaid reason, the informant had falsely implicated them.

Co-accused Ankur stated before the Court below during his examination u/s 313 Cr.P.C. that the witnesses had given false evidence against him due to animosity. He also stated the same facts which were stated by Akhtar Karim @ Achchhe Kariya (A3). In addition, co-accused Ankur stated that his brother was a member of BJP and he was falsely implicated due to political rivalry. The appellants examined Vivek Singh, Bhagwati Singh, Gulshan, Nageena and Nitendra Mohan as D.W.1 to D.W.5 respectively.

Learned IVth Additional District & Sessions Judge, Kanpur Nagar after considering the submissions advanced before him by the learned counsel for the parties and scrutinizing the evidence on record, both oral as well as documentary, by the impugned judgement and order, convicted all the three appellants and awarded aforesaid sentences to them while co-accused Ankur was acquitted of all the charges.

Hence, this appeal.

Sri Dilip Kumar, learned Senior Counsel appearing for the appellants has submitted that out of four witnesses of fact examined by the prosecution during the trial, P.W.3 Ram Lakhan Yadav, P.W.4 Sanjay, P.W.5 Jeetu having failed to support the prosecution case during the trial and declared hostile, the recorded conviction of the appellants on the basis of uncorroborated evidence of solitary witness P.W.1 informant Ashok Kumar Gupta who is not only the real brother of the deceased and hence, highly interested in securing the conviction of the appellants but even whose very presence at the place of incident and claim of his having witnessed the occurrence, is highly doubtful, is apparently vitiated.

Advancing his arguments in this regard, Sri Dilip Kumar further invited our attention to the recitals contained in the written report of the incident (Ext.Ka.1) which P.W.1 informant Ashok Kumar Gupta claims was scribed by S.K. Gupta, an Advocate his brother-in-law, on his dictation and lodged by him at P.S.- Bajariya, District- Kanpur Nagar, submitted that there is nothing in the written report (Ext.Ka.1) which may even remotely indicate that P.W.1 informant Ashok Kumar Gupta was present at the place and time of the incident and had witnessed the same. Infact only P.W.3 Ram Lakhan Yadav and P.W.5 Jeetu had been nominated as eye-witnesses in the written report (Ext.Ka.1). Even P.W.3 Ram Lakhan Yadav and P.W.5 Jeetu have nowhere stated in their statements recorded before the trial court that at the time of the incident, P.W.1 informant Ashok Kumar Gupta was also present along with them at the place of incident. Neither his presence nor the point from which he had witnessed the occurrence is shown in the site plan of the place of incident (Ext.Ka.18). P.W.1 informant Ashok Kumar Gupta made material improvements in his statement recorded before the trial court to prove that he had witnessed the occurrence by deposing that when the incident had taken place, he was standing in front of the grocery shop of Daya Ram from where he had witnessed the occurrence along with other witnesses.

The english translation of the facts stated by P.W.1 informant Ashok Kumar Gupta in his examination-in-chief in this regard is being reproduced hereinbelow:-

> ....."That day in the evening at about 8 p.m., his brother Sushil was standing in front of the house of Saran. The place was illuminated by the streetlight in which I and my brother were able to see and recognize the passers by. Sushil, Ram Lakhan Yadav, Jeetu, Vijay Kumar Yadav alias Sanjay and Brij Bhushan Awasthi had assembled in the House No. 104/72 situate in village- Sisamau adjacent to the school for going to attend the house warming party. At that time, Dilip (A1), Arjun Pal @ Palauli (A2), co-accused Ankur and Akhtar Karim @ Achchhe Kariya (A3) present in the Court who were known to him previously, came and after telling his brother that he had become a big leader, all four of them started firing simultaneously from their country-made pistols which they were carrying in their hands. They were also abusing. All four of them had fired at Sushil at the same time. The bullets had hit Sushil Kumar who had fallen on the ground then and

there and started wriggling with pain. On hearing the sound of gunshots, those people who were sitting on their cots in front of their house ran inside their house and a stampede took place. Everybody closed the door of their house. The accused left the place threatening anyone with dire consequences who dared to give evidence against them, brandishing their country-made pistols in the air. I, Santosh Kumar and Ram Lakhan took Sushil to Hallet Hospital whether he was declared brought dead. In fact Sushil had died while he was being taken to the hospital. The incident was witnessed by Jeet, Ram Lakhan Yadav, Vijay Kumar alias Sanjay and himself. He had got the written report of the incident scribed by his brother-in-law S.K. Gupta, an Advocate. He had written whatever he had dictated to S.K. Gupta.

.....My brother had asked all his family members to house warming party. I knew the other members of the family who were ready to go to the house warming party. Jeetu, Ram Lakhan, Sanjay Yadav along with my brother was standing with the aforesaid persons for going to the house warming party.

.....At the time when my brother had come out of the house, I was standing adjacent to the masala shop. The masala shop is not my personal shop. It was taken on rent. The masala shop was about 25-30 paces from my house. At the time of the incident, I was standing in front of same masala shop. The distance between the place of incident and the masala shop is about 20 paces. I know all the persons who lived around the place of occurrence."

Sri Dilip Kumar further submitted that from the perusal of the death memo of the deceased, it is proved that it was deceased's brother Santosh Kumar, whom the prosecution failed to examine during the trial, who had brought Sushil Kumar to the hospital and got him admitted in Hallet Hospital, Kanpur Nagar at 8.20 p.m. The intimation of the death of Sushil was given to P.S.- Swaroop Nagar vide death memo which was recorded in the G.D. at serial no. 50 on 13.07.2003 at 22.30 hours. Hence, in view of the above, the claim of P.W.1 informant Ashok Kumar Gupta that he had not only witnessed the occurrence but had also brought the deceased and got him admitted to Hallet Hospital, stands totally belied. He also submitted that the prosecution has failed to connect the so-called crime weapons allegedly recovered on the pointing out of the accused-appellants pursuant to their disclosure statements made before the police after their arrest. He lastly contended that in view of the submissions made by him, neither the recorded conviction of the appellants nor the sentences awarded to them can be sustained and are liable to be set-aside.

Per contra Smt. Manju Thakur, learned A.G.A.-I appearing for the State submitted that the complicity of the appellants in causing death of Sushil Kumar stands fully proved from the evidence of P.W.1 informant Ashok Kumar Gupta who had not only witnessed the incident but had also lodged its written report promptly thereby leaving no room for any manipulation or concoctions. She further submitted that there is no law that the part of evidence of a witness which lends support to the prosecution story, stands wiped off once such a witness is declared hostile. On the other hand, it is settled law that part of evidence of hostile witness which supports the prosecution story or corroborates the evidence of another eye-witness can always be relied upon for the purpose of recording a conviction, albeit with caution. She further submitted that although P.W.3 Ram Lakhan Yadav had failed to support the prosecution case in his examination-in-chief but P.W.5 Jeetu had fully corroborated the evidence of P.W.1 informant Ashok Kumar Gupta on all material particulars pertaining to the time, place and manner of assault as well as the identity of the perpetrators of the crime in his examination-in-chief. He was declared hostile only after he failed to support the prosecution case in his cross-examination. As far as the submission made by learned counsel for the appellants that in order to give semblance to his status as eye-witness of the occurrence, P.W.1 informant, Ashok Kumar Gupta had made material improvements in his examination-in-chief by deposing facts which were conspicuous by his absence in his statement u/s 161 Cr.P.C. is concerned, the same will not adversely affect the prosecution story or belie the claim of P.W.1 informant Ashok Kumar Gupta of his being the eye-witness of the occurrence as the defence had failed to contradict him with his statement recorded u/s 161 Cr.P.C. in which according to the learned counsel for the appellants, P.W.1 informant Ashok Kumar Gupta had not stated that he had seen the incident himself along with P.W.3 Ram Lakhan Yadav, P.W.5 Jeetu and Vijay Kumar @ Sanjay and that at the time of the incident, he was standing in front of the

grocery shop of Daya Ram which was at a distance of about 20 paces from the place of incident. She also submitted that since the complicity of the appellants in committing the crime in question stands proved from the evidence of P.W.1 informant Ashok Kumar Gupta which finds corroboration from the facts stated by P.W.5 Jeetu, the failure of the prosecution to connect the weapons allegedly recovered on the pointing out of the appellants will not inure to the benefit of the appellants. She lastly submitted that this appeal lacks merit and is liable to be dismissed.

We have very carefully considered the submissions advanced before us by the learned counsel for the parties and scrutinized the entire lower court record.

The only question which arises for our consideration in this appeal is that whether the prosecution has been able to prove its case against the accused-appellants beyond all reasonable doubts or not ?

Undisputedly, this case rests upon the evidence of eye witnesses. The prosecution in order to prove its case, apart from examining formal witnesses, had examined P.W.1 informant Ashok Kumar Gupta, P.W.3 Ram Lakhan Yadav, P.W.4 Sanjay and P.W.5 Jeetu as witnesses of fact. Before proceeding to scrutinize the oral evidence on record, we proceed to first have a glance at the evidence of formal witnesses.

P.W.2 Laeek Ahmad who at the relevant point of time was posted as Head Moharrir at P.S.- Bajariya and who had prepared the check F.I.R. and made relevant G.D. at serial no. 59 at 21.15 hours on 13.07.2003 proved the same as Exts.Ka.2 and Ka.3 respectively.

P.W.6 Dr. Ravindra P. Mishra who had conducted postmortem on the body of the deceased Sushil Kumar had deposed that Ravindra Singh had died as a result of haemorrhage and shock due to ante-mortem firearm injuries. He proved the postmortem report of the deceased as (Ext.Ka.4).

P.W.7 Ehtaram Ali Khan in his evidence tendered during the trial deposed that on 13.07.2003, he was posted as S.I. at P.S.- Bajariya. After

the registration of Case Crime No. 183 of 2003 u/s 302 I.P.C. and 7 of Criminal Law Amendment Act, he was instructed to reach the place of incident along with few constables by another S.I. of the same police station on the order of P.W.10 Inspector Sri Pramod Kumar Chawla. He had collected plain and blood-stained earth from the place of occurrence in the presence of the witnesses and after keeping the same in two different tin containers, had sealed the same. He had also recovered three empty cartridges of 12 bore from the crime scene and had sealed the same in a piece of cloth. He proved the recovery memos of the plain and blood-stained earth and the empty cartridges as (Exts.Ka.5 and Ka.6).

P.W.8 Subhash C. Bunodha stated before the trial court that he had conducted the inquest on the body of the deceased in the mortuary on the next day of the incident i.e. on 14.07.2003 between 10 a.m. and 9.30 p.m. and prepared the inquest report and other relevant documents namely letter addressed to C.M.O., death intimation slip, letter addressed to R.I., photo lash, challan lash and sample of seal and proved the same as (Exts.Ka.7 to Ka.13). He also deposed that after completing the inquest proceedings, he had got the body of the deceased sealed and its custody was handed over to Constables Sushil and Ram.

P.W.9 Jang Bahadur Singh deposed before the trial court that on 30.07.2003, he had registered Case Crime No. 205 and 206 of 2003 u/s 25/27 of Arms Acts against Dilip (A1) and Arjun Pal @ Palauli (A2) on the basis of the recovery memos filed by the P.W.10 Inspector Sri Pramod Kumar Chawla. Check F.I.R.s and the relevant G.D. Entries vide rapat no. 52 time 18.15 hours dated 30.07.2003, carbon copy whereof was brought on record. He proved the check F.I.R. of Case Crime No. 205 and 206 of 2003 and the relevant G.D. entry as (Exts.Ka.14 and Ka.15). He further deposed that he had registered Case Crime No. 207 and 208 of 2003 u/s 25/27 of Arms Act, P.S.- Bajariya and prepared the check FI.R. and the relevant G.D. Entry of the aforesaid case and proved the same as (Exts.Ka.16 & 17) vide rapat no. 64 time 23.45 hours dated 30.07.2003.

Inspector Sri Pramod Kumar Chawla, the Investigating Officer of the case who was examined as P.W.10 by the prosecution during the trial in his evidence before the trial court narrated the various steps taken during the investigation including the arrest of the accused-appellants and recovery of crime weapons of 12 bore allegedly used by them in committing the deceased's murder and live cartridges of the same bore on their pointing out and and proved the memos of recoveries of the aforesaid articles as (Exts.Ka.20 and Ka.21). He proved the charge-sheet filed by him against Dilip (A1), Arjun Pal @ Palauli (A2) and Akhtar Karim @ Achchhe Kariya (A3) and co-accused Ankur as (Ext.Ka.19).

P.W.11 S.I. Subhash C. Bunodha who stated before the trial court that the recovery of crime weapons and live cartridges used by the appellants Dilip (A1) and Arjun Pal @ Palauli (A2) was made on their pointing out in his presence. He also deposed that the Dilip (A1) and Arjun Pal @ Palauli (A2) had confessed before him that they had shot the deceased from the same country-made pistols. He proved the country-made pistols and the live cartridges allegedly recovered on the pointing out of Dilip (A1) and Arjun Pal @ Palauli (A2) as Material Exts.2A, 3A, 4A, 6A, 7 & 8 respectively. He also proved the recovery of one country-made pistols and one live cartridge each from co-accused Ankur and appellant Akhtar Karim @ Achchhe Kariya (A3) on their pointing out which was produced during the trial and marked as Material Exts.10, 11, 12, 13, 14 and 15 respectively.

P.W.12 S.I. Jagdeo Sonkar who had investigated Case Crime No. 207 and 208 of 2003 u/s 25/27 of Arms Act, proved the charge-sheets filed by him against co-accused Ankur and Akhtar Karim @ Achchhe Kariya (A3) on 01.08.2003 as (Exts.Ka.23 and Ka.24). He also proved the letter of approval obtained by him from the District Magistrate for prosecuting co-accused Ankur and Akhtar Karim @ Achchhe Kariya (A3) u/s 25/27 of Arms Act as (Exts.Ka.25 & 26). In his evidence tendered before the trial court, he further deposed that he had prepared the site

plans of the places from where the crime weapons allegedly used by the appellants and co-accused Ankur in committing the murder of deceased Sushil on their pointing out (Exts.Ka.21, Ka.22, Ka.27 & Ka.28). Letters of District Magistrate granting approval of prosecution of Dilip (A1) and Arjun Pal @ Palauli (A2) u/s 25/27 of Arms Act were proved by him as (Exts.Ka.31 and Ka.32). He also proved the charge-sheets filed by him against Dilip (A1) and Arjun Pal @ Palauli (A2) as (Exts.Ka.29 and Ka.30).

All the eight formal witnesses produced by the prosecution during the trial were cross-examined by defence counsel at great length but he failed to elicit anything material out of them which may adversely affect the prosecution case.

P.W.4 Sanjay proved the recovery of plain and blood-stained earth, three empty cartridges of 12 bore from the place of incident and admitted his signature on the recovery memo of the aforesaid articles prepared on the spot.

Thus, from the evidence of P.W.6 Dr. Ravindra P. Mishra who had conducted postmortem on the body of deceased, the deceased had died due to shock and haemorrhage as a result of ante-mortem firearm injuries found on his body.

We now proceed to evaluate and appraise the oral evidence on record with the object of ascertaining whether the appellants were the authors of firearm wounds found on the deceased's body ?

As already noted, the prosecution had examined P.W.1 informant Ashok Kumar Gupta, P.W.3 Ram Lakhan Yadav and P.W.5 Jeetu as eye-witnesses of the occurrence. As far as P.W.3 Ram Lakhan Yadav and P.W.5 Jeetu are concerned, P.W.3 Ram Lakhan Yadav had failed to support the prosecution case in his examination-in-chief whereas P.W.5 Jeetu after supporting the prosecution case in his examination-in-chief, has failed to support the prosecution story in his cross-examination on

account of which both P.W.3 Ram Lakhan Yadav and P.W.5 Jeetu were declared hostile but the facts deposed by P.W.5 Jeetu in his examination-in-chief fully corroborates the evidence of P.W.1 informant Ashok Kumar Gupta on all material points pertaining to the incident.

The evidence of P.W.1 informant Ashok Kumar Gupta has been castigated by the learned counsel for the appellants mainly on the ground that he is neither the eye-witness of the incident nor he had seen anything. In this regard, he has invited our attention to the recitals contained in the F.I.R. which admittedly was scribed by S.K. Gupta, Advocate and brother-in-law of the informant on the dictation of P.W.1. He has not stated anything in the written report either about the place where he was standing at the time of the occurrence or he had witnessed the same. He had merely nominated P.W.3 Ram Lakhan Yadav, P.W.5 Jeetu, Vijay Kumar and other neighbours as the eye witnesses. His presence, according to the learned counsel for the appellants, at the time and place of the incident, became further doubtful on account of failure of any of the prosecution witnesses to state in their evidence about the presence of P.W.1 informant Ashok Kumar Gupta at the time of the incident. P.W.1 informant Ashok Kumar Gupta in his examination-in-chief, apart from supporting the prosecution story as spelt out in the written report of the incident which was scribed on his dictation, has further deposed that accused had left the place of incident, brandishing their weapons. Thereafter, he, Santosh Kumar and Ram Lakhan had taken Sushil to Hallet Hospital where the doctors had declared him brought dead. Sushil had died while being taken to the hospital. The incident had been witnessed by P.W.3 Ram Lakhan Yadav, P.W.5 Jeetu, Vijay Kumar and large number of neighbours. He had got the written report of the incident scribed by his brother-in-law S.K. Gupta and he had written whatever was dictated to him. After the written report had been scribed, it was read over to him and he had then put his signature thereon only after being satisfied and lodged it at P.S.- Bajariya. He proved the written report of the

incident as (Ext.Ka.1). In his cross-examination on page 24 of the paper book, he has deposed that when his brother had left his house, he was standing adjacent to the Pan Masala shop which was not his personal shop and he had taken it on rent. The masala shop was at a distance of about 25-30 paces from his house while the distance between the place of occurrence and the masala shop was 20 paces. Although it has been argued by learned counsel for the appellants that P.W.1 informant Ashok Kumar Gupta had made material improvements in his statements recorded before the trial court by deposing the aforesaid facts for the first time which was neither mentioned in the written report of the incident (Ext.Ka.1) nor in his statement recorded u/s 161 Cr.P.C. with the object of establishing that he had witnessed the occurrence, we are constrained to observe after going through the entire cross-examination of P.W.1 informant Ashok Kumar Gupta which runs into about 21½ pages that there is nothing which may indicate that the defence counsel had contradicted P.W.1 with his statement recorded u/s 161 Cr.P.C. in which, as argued by learned counsel for the appellants, he had neither stated that he was present at the place of occurrence nor the place from where he had allegedly witnessed the incident.

The question which arises for our consideration is that whether any part of the statement of a witness recorded u/s 161 Cr.P.C. which has been reduced into writing and is called for prosecution during the enquiry or trial can be used by the accused without contradicting such witness in the manner provided u/s 145 of the Indian Evidence Act, 1872 ?

Before examining the aforesaid question, it would be useful to reproduce 161 and 162 Cr.P.C. and Section 145 of the Indian Evidence Act, 1872 :-

Section 161 in The Code Of Criminal Procedure, 1973

161. Examination of witnesses by police.

(1) Any police officer making an investigation under this Chapter, or any police officer not below such rank as the State Government may, by general or special order, prescribe in this behalf, acting on the requisition of such officer, may examine orally any person supposed to be acquainted with the facts and circumstances of the case.

(2) Such person shall be bound to answer truly all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.

(3) The police officer may reduce into writing any statement made to him in the course of an examination under this section; and if he does so, he shall make a separate and true record of the statement of each such person whose statement he records.

Section 162 in The Code Of Criminal Procedure, 1973

162. Statements to police not to be signed: Use of statements in evidence.

(1) No statement made by any person to a police officer in the course of an investigation under this Chapter, shall, if reduced to writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose, save as hereinafter.

> provided, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made: Provided that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the Court, by the prosecution, to contradict such witness in the manner provided by section 145 of the Indian Evidence Act, 1872 (1 of 1872); and when any part of such statement is so used, any part thereof may also be used in the re- examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination.

(2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of clause (1) of section 32 of the Indian Evidence Act, 1872 (1 of

1872), or to affect the provisions of section 27 of that Act. Explanation.- An omission to state a fact or circumstance in the statement referred to in sub- section (1) may amount to contradiction if the same appears to be significant and otherwise relevant having regard to the context in which such omission occurs and whether any omission amounts to a contradiction in the particular context shall be a question of fact.

Section 145 in The Indian Evidence Act, 1872

145. Cross-examination as to previous statements in writing.—A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.1145. Cross-examination as to previous statements in writing.—A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him."

A conjoint reading of the aforesaid provision indicates that any police officer making an investigation under chapter 12 of the Code of Criminal Procedure, 1973 or any police officer making any investigation under this chapter examines any person believed to be acquainted with the facts and circumstances of the case, the police officer may reduce into writing any statement made to him in the course of examination u/s 161 Cr.P.C. and if it is true, he shall make separate entry to record all the statements of such person whose statement he records.

Section 162 (1) of Cr.P.C. stipulates that no statement made by any person to a police officer in the course of an investigation under this Chapter, shall, if reduced to writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for

any purpose, save as hereinafter provided, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made. Proviso to Section 162 (1) of Cr.P.C. mandates that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the Court, by the prosecution, to contradict such witness in the manner provided by Section 145 of the Indian Evidence Act, 1872 (1 of 1872); and when any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination. Section 162 (2) of Cr.P.C. excludes any statement falling within the provisions of clause 2 of the Indian Evidence Act, 1872 and 27 of that Act from the application of the aforesaid proviso.

The object of Section 145 of the Evidence Act is to give a witness a chance of explaining the discrepancy and inconsistency and to clear up the point of ambiguity and dispute.

There is nothing in the cross-examination of P.W.1 informant Ashok Kumar Gupta that his attention was called to that part of his statement recorded u/s 161 Cr.P.C. in which he had omitted either to describe himself as an eye-witness of the incident or to name the place from where he had witnessed the same. We do not find any reason to dis-believe the evidence of P.W.1 informant Ashok Kumar Gupta. Mere inconsistency in evidence is not sufficient to impair the credit of the witness.

The Apex Court in the case of **Karan Singh & Ors. Vs State of Madhya Pradesh, J.T. 2003, Suppl. Vol. 2 SC 261,** has held that when a previous statement is to be proved as an admission, the statement as such should be put to the witness and if the witness denies having given such a statement, it does not amount to any admission and if it is to be proved that he had given such a statement, the attention of the witness must be drawn to that statement. The object behind this provision

is to give a witness a chance of explaining the discrepancy or inconsistency and to clear up the particular point of ambiguity or dispute.

The question of contradicting the evidence and the requirements of compliance in Section 145 of the Evidence Act has been considered by the Apex Court in the case of **Tahsildar Singh and Another Vs The State of Uttar Pradesh, AIR 1012, 1959 SCR Supl. (2) 875.** The Apex Court in the aforesaid case was examining the question as to when an omission in the former statement can be held to be a contradiction and it was also indicated as to how a witness can be contradicted in respect of his former statement by drawing his attention to that portion of the former statement. Following paragraphs of the aforesaid judgement of **Tahsildar Singh** (supra) which are relevant for our purpose are being reproduced hereinbelow :-

> *9. Diverse and conflicting views were expressed by Courts on the interpretation of Section 162 of the Code of Criminal Procedure. A historic retrospect of the section will be useful to appreciate its content. The earliest Code is that of 1872 and the latest amendment is that of 1955. Formerly Criminal Procedure Code Courts in the Presidency, towns and those in the mofussil were not the same. Criminal Procedure Code, 1882 (10 of 1882), consolidated the earlier Acts and prescribed a uniform law to all Courts in India. It was superseded by Act 5 of 1898 and substantial changes were made by Act 18 of 1923. Since then the Code stands amended from time to time by many other Acts. The latest amendments were made by Act 26 of 1955 which received the assent of the President on August 10, 1955, and by notification issued by the Central Government its provisions came into force on and from January 1, 1956. We are not concerned in this case with the Amending Act of 1955, but only with the Act as it stood before the amendment of 1955.*
>
> *10. In Act 10 of 1872 the section corresponding to the present Section 162 was Section 119, which read:*
>
> *"An officer in charge of a police-station, or other Police officer making an investigation, may examine orally any person supposed to be acquainted with the facts and circumstances of the case, and may reduce into writing any statement made by the person so examined.*
>
> *Such person shall be bound to answer all questions relating to such case, put him by such officer, other than questions criminating himself.*
>
> *No statement so reduced into writing shall be signed by the person making it, nor shall it be. treated as part of the record or used as evidence."*
>
> *This section enables a police officer to elicit information from persons supposed to be acquainted with facts, and permits him to reduce into writing the answers given by such persons, but excludes the said statement from being treated as part of the record or used as evidence. Act 10 of 1882 divided the aforesaid Section 119 into two sections and*

numbered them as Sections 161 and 162, which read:

161: " Any Police-officer making an investigation under this chapter may examine orally any person supposed to be acquainted with the facts and circumstances of the case, and may reduce into writing any statement made by the person so examined.

Such person shall be bound to answer truly all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture."

162: " No statement, other than a dying declaration, made by any person to a Police-officer in the course of an investigation under this chapter shall, if reduced to writing, be signed by the person making it, or be used as evidence against the accused.

Nothing in this section shall be deemed to affect the provisions of Section 27 of the Indian Evidence Act, 1872."

The first two paragraphs of Section 119 of Act 10 of 1872 with slight modifications not relevant for the present purpose constituted the corresponding paragraphs of Section 161 of Act 10 of 1882; and the third paragraph of Section 119 of the former Act, with some changes, was made Section 162 of the latter Act. There was not much difference between the third paragraph of Section 119 of the Act of 1872 and Section 162 of the Act of 1882, except that in the latter Act, it was made clear that the prohibition did not apply to a dying declaration or affect the provisions of Section 27 of the Indian Evidence Act, 1872. The Code of 1898 did not make any change in Section 161, nor did it introduce any substantial change in the body of Section 162 except taking away the exception in regard to the dying declaration from it and putting it in the second clause of that section. But Section 162 was amended by Act 5 of 1898 and the amended section read :

"(1) No statement made by any person to a police-officer in the course of an investigation under this Chapter shall, if taken down in writing, be signed by the person making it, nor shall such writing be used as evidence:

Provided that, when any witness is called for the prosecution whose statement has been taken down in writing as aforesaid, the Court shall, on the request of the accused, refer to such writing, and may then, if the Court thinks it expedient in the interests of justice, direct that the accused be furnished with a copy thereof ; and such statement may be used to impeach the credit of such witness in manner provided by the Indian Evidence Act, 1872.

(2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of Section 32, clause (1), of the Indian Evidence Act, 1872."

For the first time the proviso to Section 162 introduced new elements, namely: (i) The right of the accused to request the Court to refer to the statement of a witness reduced to writing; (ii) a duty cast on the Court to refer to such writing; (iii) discretion conferred on the Court in the interests of justice to direct that the accused be furnished with a copy of the statement; and (iv) demarcating the field within which such statements can be used, namely, to impeach the credit of the witness in the manner provided by the Indian Evidence Act, 1872. From the standpoint of the accused, this was an improvement on the corresponding sections of the earlier Codes, for whereas the earlier Codes enacted a complete bar against the use of such statements in evidence, this Code enabled the accused, subject to the limitations mentioned therein, to make use of then to impeach the credit of a

witness in the manner provided by the Indian Evidence Act. On the basis of the terms of Section 162 of Act 5 of 1896, two rival contentions were raised before the Courts. It was argued for the prosecution that on the strength of Section 157 of the Evidence Act, the right of the prosecution to prove any oral statement to contradict the testimony of any witness under that section was not taken away by Section 162 of the Code of Criminal Procedure which only provided that the writing shall not be used as evidence. On the other hand, it was contended on behalf of the accused that when the statement of a witness was admittedly reduced into writing, it would be unreasonable to allow any oral evidence of the statement to be given when the writing containing the statement could not be proved. The judgment of Hosain, J., in the case of Rustam v. King-Emperor (1) and the decisions in Fanindra Nath Banerjee v. Emperor (2), King-Emperor v. Nilakanta (3) and Muthukumaraswami Pillai v. King-Emperor (4) represent one side of the question, and the judgment of Knox, J., in Rustam v. King-Emperor (1) and the observations of Beaman, J., in Emperor v. Narayan (5) represent the other side. A division Bench of the Bombay High Court in Emperor v. Hanmaraddi Bin Ramaraddi (6), after noticing the aforesaid decisions on the question, ruled that the police officer could be allowed to depose to what the witness had stated to him in the investigation for the purpose of corroborating what the witness had said at the trial. In that context, Shah, J., observed at p. 66:

"The point is not free from difficulty which is sufficiently reflected in the diversity of judicial opinions, bearing on the question."

Presumably, in view of the aforesaid conflict, to make the legislative intention clear the section was amended by Act 18 of 1923. Section 162 as amended by the aforesaid Act reads:

"(1) No statement made by any person to a police-officer in the course of an investigation under this Chapter shall, if reduced into writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police-diary or otherwise, or any part of such statement or record, be used for any purpose (save as hereinafter provided) at any inquiry or trial in respect of any offence under investigation at the time when such statement was made:

Provided that, when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, the Court shall, on the request of the accused, refer to such writing and direct that the accused be furnished with a copy thereof, in order that any part of such statement if duly proved, may be used to contradict such witness in the manner provided by Section 145 of the Indian Evidence Act, 1872. When any part of such statement is so used, any part thereof may also be used in the reexamination of such witness, but for the purpose only of explaining any matter referred to in his cross- examination:

Provided, further that, if the Court is of --opinion that any part of any such statement is not relevant to the subject-matter of the inquiry or trial or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interests, it shall record such opinion (but not the reasons therefore) and shall exclude such part from the copy of the statement furnished to the accused."

Sub-section (1) of the substituted section attempted to steer clear of the aforesaid conflicts and avoid other difficulties by the following ways: (a) Prohibited the use of the statement, both oral and that reduced into writing, from being used for any purpose at any inquiry or trial in respect of any offence under investigation; (b) while the earlier section enabled the accused to make use of it to impeach the credit of a witness in the

manner provided by the Indian Evidence Act, 1872, the new section enabled him only to use it to contradict the witness in the manner provided by Section 145 of the said Act; (c) the said statement could also be used for the purpose of only explaining any matter referred to in his cross-examination; and (d) while under the old section a discretion was vested in the Court in the matter of furnishing the accused with a copy of an earlier statement of a prosecution witness, under the amended section, subject to the second proviso, a duty was cast upon the Court, if a request was made to it by the accused, to direct that the accused be furnished with a copy thereof. The effect of the amendment was that the loopholes which enabled the use of the statement made before the police in a trial were plugged and the only exception made was to enable the accused to use the statement of a witness reduced into writing for a limited purpose, namely, in the manner provided by Section 145 of the Indian Evidence Act, 1872, and the prosecution only for explaining the matter referred to in his cross examination. The scope of the limited use also was clarified. Under the old section the statement was permitted to be used to impeach the credit of a witness in the manner provided by the Indian Evidence Act; under the said Act, the credit of a witness could be impeached either under Section 145 or under Section 155 (3). While the former section enables a witness to be cross-examined as to a previous statement made by him in writing without such writing being shown to him, the latter section permits the discrediting of the witness by proof of his previous statement by independent evidence. If a statement in writing could be used to discredit a witness in the manner provided by those two sections, the purpose of the Legislature would be defeated. Presumably in realisation of this unexpected consequence, the Legislature in the amendment made it clear that the said statement can only be used to contradict a witness in the manner provided by Section 145 of the Evidence Act. By Act 2 of 1945, the following sub-section (3) was added to Section 161 :

"The police-officer may reduce into writing any statement made to him in the course of an examination under this section, and if he does so, he shall make a separate record of the statement of each such person whose statement he records."

This subsection restored the practice obtaining before the year 1923 with a view to discourage the practice adopted by some of the police officers of taking a condensed version of the statements of all the witnesses or a precise of what each witness said. It is not necessary to notice in detail the changes made in Section 162 by Act 26 of 1955, except to point out that under the amendment the prosecution is also allowed to use the statement to contradict a witness with the permission of the Court and that in view of the shortened committal procedure prescribed, copies of the statements of the prosecution witnesses made before the police during investigation are made available by the police to the accused before the commencement of the inquiry or trial. The consideration of the provisions of the latest amending Act need not detain us, for the present case falls to be decided tinder the Act as it stood before that amendment.

11. It is, therefore, seen that the object of the legislature throughout has been to exclude the statement of a witness made before the police during the investigation from being made use of at the trial for any purpose, and the amendments made from time to time were only intended to make clear the said object and to dispel the cloud cast on such intention. The Act of 1898 for the first time introduced an exception enabling the said statement reduced to writing to be used for impeaching the credit of the witness in the manner provided by the Evidence Act. As the phraseology of the exception lent scope to defeat

the purpose of the legislature, by the Amendment Act of 1923, the section was redrafted defining the limits of the exception with precision so as to confine it only 112 to contradict the witness in the manner provided under Section 145 of the Evidence Act. If one could guess the intention of the legislature in framing the section in the manner it did in 1923, it would be apparent that it was to protect the accused against the user of the statements of witnesses made before the police during investigation at the trial presumably on the assumption that the said statements were not made under circumstances inspiring confidence. Both the section and the proviso intended to serve primarily the same purpose, i.e., the interest of the accused.

12. Braund, J., in Emperor v. Aftab Mohd. Khan (1) gave the purpose of Section 162 thus at p. 299:

"As it seems to us it is to protect accused persons from being prejudiced by statements made to police officers who by reason of the fact that an investigation is known to be on foot at the time the statement is made, may be in a position to influence the maker of it and, on the other hand, to protect accused persons from the prejudice at the hands of persons who in the knowledge that an investigation has already started, are prepared to tell untruths."

A Division Bench of the Nagpur High Court in Baliram Tikaram Marathe v. Emperor (2) expressed a similar idea in regard to the object underlying the section, at p. 5, thus: "The object of the section is to protect the accused both against over-zealous police officers and untruthful witnesses."

The Judicial Committee in Pakala Narayana Swami v. The King-Emperor (3) found another object underlying -the section when they said at p. 78:

"If one had to guess at the intention of the Legislature in framing a section in the words used, one would suppose that they had in mind to encourage the free disclosure of information or to protect the person making the statement from a supposed unreliability of police testimony as to alleged statements or both.

Section 162 with its proviso, if construed in the manner which we will indicate at the later stage of the judgment, clearly achieves the said objects.

13. The learned Counsel's first argument is based upon the words "in the manner provided by Section 145 of the Indian Evidence Act, 1872 "found in Section 162 of the Code of Criminal Procedure. Section 145 of the Evidence Act, it is said, empowers the accused to put all relevant questions to a witness before his attention is called to those parts of the writing with a view to contradict him. In support of this contention reliance is placed upon the judgment of this Court in Bhagwan Singh v. The State of Punjab (1). Bose, J., describes the procedure to be followed to contradict a witness under Section 145 of the Evidence Act thus at p. 819:

"Resort to Section 145 would only be necessary if the witness denies that he made the former statement. In that event, it would be necessary to prove that he did, and if the former statement was reduced to writing, then Section 145 requires that his attention must be drawn to those parts which are to be used for contradiction. But that position does not arise when the witness admits the former statement. In such a case all that is necessary is to look to the former statement of which no further proof is necessary because of the admission that it was made."

It is unnecessary to refer to other cases wherein a similar procedure is

suggested for putting questions under Section 145 of the Indian Evidence Act, for the said decision of this Court and similar decisions were not considering the procedure in a case where the statement in writing was intended to be used for contradiction under Section 162 of the Code of Criminal Procedure. Section 145 of the Evidence Act is in two parts: the first part enables the accused to cross-examine a witness as to previous statement made by him in writing or reduced to writing to without such writing being shown to him; the second part deals with a situation where the cross- examination assumes the shape of contradiction : in other words, both parts deal with cross-examination; the first part with cross-examination other than by way of contradiction, and the second with cross-examination by way of contradiction only. The procedure prescribed is that, if it is intended to contradict a witness by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him. The proviso to Section 162 of the Code of Criminal Procedure only enables the accused to make use of such statement to contradict a witness in the manner provided by Section 145 of the Evidence Act. It would be doing violence to the language of the proviso if the said statement be allowed to be used for the purpose of cross-examining a witness within the meaning of the first part of Section 145 of the Evidence Act. Nor are we impressed by the argument that it would not be possible to invoke the second part of Section 145 of the Evidence Act without putting relevant questions under the first part thereof. The difficulty is more imaginary than real. The second part of Section 145 of the Evidence Act clearly indicates the simple procedure to be followed. To illustrate: A says in the witness-box that B stabbed C; before the police he bad stated that D stabbed C. His attention can be drawn to that part of the statement made before the police which contradicts his statement in the witness-box. If he admits his previous statement, no further proof is necessary; if he does not admit, the practice generally followed is to admit it subject to proof by the police officer. On the other hand, the procedure suggested by the learned Counsel may be illustrated thus: If the witness is asked " did you say before the police-officer that you saw a gas light ? " and he answers " yes ", then the statement which does not contain such recital is put to him as contradiction. This procedure involves two fallacies: one is it enables the accused to elicit by a process of cross-examination what the witness stated before the police-officer. If a police-officer did not make a record of a witness's statement, his entire statement could not be used for any purpose, whereas if a police-officer recorded a few sentences, by this process of cross- examination, the witness's oral statement could be brought on record. This procedure, therefore, contravenes the express provision of Section 162 of the Code. The second fallacy is that by the illustration given by the learned Counsel for the appellants there is no self-contradiction of the primary statement made in the witness-box, for the witness has yet not made on the stand any assertion at all which can serve as the basis. The contradiction, under the section, should be between what a witness asserted in the witness-box and what he stated before the police-officer, and not between what he said he had stated before the police-officer and what he actually made before him. In such a case the question could not be put at all: only questions to contradict can be put and the question here posed does not contradict it leads to an answer which is contradicted by the police statement. This argument of the learned Counsel based upon Section 145 of the Evidence Act is, therefore, not of any relevance in considering the express provisions of Section 162 of the Code of Criminal Procedure.

This question was again considered in the case of **Binay Kumar Singh Vs The State of Bihar, 1997 Vol. 1 SCC 283.** The Apex Court taking note of the earlier decision in **Bhagwan Singh Vs The State of Punjab, 1952 AIR 214, 1952 SCR 812,** explained away the same with the observation that on the facts of that case, there could not be a dispute with the proposition laid down therein. But while elaborating the second limb of Section 145 of the Evidence Act, it was held that if it is intended to contradict a witness, his attention must be called to those part of his writings of his earlier statements which are intended to be used for the purpose of contradicting him. It was further held that if the witness denies having made any statement which is inconsistent with his present stand, his testimony in Court on that score would not be vitiated until cross-examiner proceeds to comply with the procedure prescribed in the second limb of Section 145 of the Evidence Act.

Hence, the procedure prescribed u/s 145 of the Evidence Act having not been complied, we do not find any reason to discredit the evidence of P.W.1 informant Ashok Kumar Gupta or to hold either that he is not a fully reliable witness or he had not seen the occurrence. The statement of P.W.1 informant Ashok Kumar Gupta stands fully corroborated from the facts deposed by P.W.5 Jeetu in his examination-in-chief.

The next issue which arises for our consideration is that whether the facts stated by P.W.5 Jeetu in his examination-in-chief in which he had fully supported the prosecution case and corroborated the evidence of P.W.1 informant Ashok Kumar Gupta on all material particulars but was declared hostile during his cross-examination can be relied upon by the Court for the purpose of seeking corroboration of evidence of P.W.1 ?

The aforesaid question is no longer *res integra* and stands settled by a catena of decisions of the Apex Court.

The Apex Court in **Mrinal Das and others v. State of**

Tripura, (2011) 9 SCC 479, which was the case in which the main prosecution witnesses, viz., P.Ws. 2, 9, 10 and 12 were declared hostile witnesses while reiterating that corroborated part of evidence of hostile witness regarding commission of offence is admissible, held :-

> *"67. It is settled law that corroborated part of evidence of hostile witness regarding commission of offence is admissible. The fact that the witness was declared hostile at the instance of the Public Prosecutor and he was allowed to cross-examine the witness furnishes no justification for rejecting en bloc the evidence of the witness. However, the Court has to be very careful, as prima facie, a witness who makes different statements at different times, has not regard for the truth. His evidence has to be read and considered as a whole with a view to find out whether any weight should be attached to it. The Court should be slow to act on the testimony of such a witness, normally, it should look for corroboration with other witnesses. Merely because a witness deviates from his statement made in the F.I.R., his evidence cannot be held to be totally unreliable. To make it clear that evidence of hostile witness can be relied upon at least up to the extent, he supported the case of the prosecution. The evidence of a person does not become effaced from the record merely because he has turned hostile and his deposition must be examined more cautiously to find out as to what extent he has supported the case of the prosecution."*

The Apex Court in **Sathya Narayanan v. State rep. by Inspector of Police, 2013 (80) ACC 138,** observed as hereunder :-

> *"In other words, the evidence of hostile witness can be relied upon at least to the extent, it supported the case of the prosecution. In view of the same, reliance placed on certain statements made by hostile witnesses by the Trial Court and the High Court are acceptable."*

Thus in view of the legal principles propounded hereinabove by the Apex Court, we are not inclined to reject the evidence of P.W.5 Jeetu in toto merely because he was declared hostile during his cross-examination.

There is no law which lays down that a conviction cannot be recorded on the basis of the solitary witness. A conviction can be based upon the testimony of a sole witness provided he is found to be wholly reliable. In case the solitary witness appears to the Court to be partially reliable, in that case the Court shall seek corroboration from the other

evidence. In the present case, we have not only found P.W.1 informant Ashok Kumar Gupta to be wholly reliable witness but also his evidence finds full corroboration from the deposition made by P.W.5 Jeetu in his examination-in-chief.

In our opinion, the prosecution's inability to connect the weapons allegedly used by the appellants in committing the deceased's murder and which the prosecution claims were recovered on their pointing out, with the crime in question by leading any cogent and reliable evidence, would not adversely affect the credibility of the prosecution case or the evidence of the eye-witnesses.

The F.I.R. in this case was promptly lodged within 75 minutes of the occurrence, leaving no room for holding any discussion or deliberation, with the object of concocting a false prosecution story and implicating innocent persons falsely.

Upon a holistic view of the facts and circumstances of the case and the evidence on record, both oral as well as documentary, we have no hesitation in holding that the prosecution has fully succeeded in proving that the deceased was shot dead by the appellants on 13.07.2003. Neither the recorded conviction of the appellants nor the sentences awarded to them warrant any interference by this Court.

This appeal lacks merit and is accordingly **dismissed.**

Order Date :- 22.11.2019
KS