

A.F.R**Court No. - 42****Case :-** CRIMINAL APPEAL No. - 1162 of 1993**Appellant :-** Ganga Singh And Others**Respondent :-** State Of U.P.**Counsel for Appellant :-** J.S.Kashyap**Counsel for Respondent :-** A.G.A.**Hon'ble Manoj Misra,J.****Hon'ble Mrs. Manju Rani Chauhan,J.**

1. This criminal appeal has been preferred by accused appellants Ganga Singh, Nem Singh, Hira Lal, Lalta Prasad and Udaivir against the judgment of conviction dated 03.07.1993 and the order of sentence dated 03.07.1993 passed by the Vth Additional Sessions Judge, Etah in Sessions Trial No.249 of 1991 whereby all the appellants have been convicted under section 148 IPC and section 302 read with section 149 IPC and sentenced to suffer one year R.I. and life imprisonment, respectively, for the aforesaid offences, coupled with a direction that both sentences would run concurrently.
2. During the pendency of this appeal, appellant nos. 1, 3 & 5, namely, Ganga Singh, Hira Lal & Udaivir Singh died and their appeal was declared abated by vide order dated 15.07.2019.
3. The prosecution case as narrated in the first information report (for short FIR), which was lodged by Smt. Omwati (P.W.1) wife of the deceased - Indrajeet on 27.09.1990, at 11:30 A.M., at police station Kotwali Dehat, District Etah, after discovery of dead body of her husband, is that her husband – deceased, a resident of village Nagla Hasan, was doing business in Garlic. On 26.09.2006 while he was returning from Etah to his house along with Balistar – P.W.2 (brother-in-law of deceased) and Lekhraj - DW1 (distant nephew of the deceased), at about 06:45 P.M., when they were near the road going towards village Nandgaon, the accused appellants,

armed with country made pistol and knives, with whom the deceased had an altercation in connection with dispute relating to land, caught hold of the deceased and dragged him towards the fields. When Balistar (PW2) and Lekhraj (DW1) resisted they were threatened as a result they escaped. After the deceased was dragged into the crops standing in the field, soon thereafter, a gunshot was heard. P.W.2 and D.W.1 came and informed the informant about the incident, at night, in the village. Upon which, many persons went to search for informant's husband but could not find him. Next day morning, body of the deceased was found in Millets (Bajra) field. FIR was lodged naming the appellants.

4. After registration of the FIR, the Sub Inspector (S.I.) Ompal Singh (P.W.4) visited the spot, prepared the inquest report (Ex. Ka-3); collected blood stained and plain earth; prepared site plan (Ex. Ka 8); took into possession three bicycles found on the spot along with other belongings of the deceased and prepared a memo of recovery (Ex Ka 10); and, thereafter, after sealing the body of the deceased, the body was sent for post mortem. Dr. G. C. Agrawal (P.W.3) carried out autopsy at about 4 p.m. on 27.09.1990 and prepared autopsy report (Ex. Ka 2). The autopsy report disclosed: (i) Fire arm wound of entry 1.5. cm X 1 cm through and through on left temple, blackening scorching and tattooing absent, with direction left to right and slightly backward; (ii) Fire arm wound of exit 3 cm x 3 cm communicating with injury no.(i) on right side of head behind right ear; (iii) incised wound 2 cm x 1 cm x muscle deep on left thigh upper part of outer aspect; (iv) incised wound 5 cm x 1 cm x muscle deep on inner surface of right knee joint; and (v) abrasion 3 cm x 2 cm on back of right shoulder joint. The time of death was estimated 3/4th of a day before.

5. The investigation was thereafter taken over by Aley Hasan

Khan (P.W.5) who recorded the statement of P.W.2 – Balister on 30.09.1990, handed over custody of cycle of the deceased and Rs.595 of the deceased recovered from the spot to P.W.1 and prepared memo (Ex. Ka 12), recorded statement of Lekhraj (D.W.1) on 4.10.1990 and, on 08.10.1990, took possession of the torch, allegedly being with the witness at the time of the incident, and prepared memo (Ex. Ka. 13); and, thereafter, submitted charge sheet (Ex. Ka.14). The learned Magistrate took cognizance of the offence on the charge sheet and committed the case to the court of session.

6. The charge of offences punishable under section 148 IPC and section 302 read with section 149 IPC were framed against the appellants. Upon denial of charges, trial commenced. The prosecution, in order to prove its case, produced and examined five prosecution witnesses: P.W.-1 - Smt. Omwati, the first informant, who is wife of the deceased; P.W.-2 Balistar Singh, the eye witness of the incident, who is brother of P.W.-1 - Smt. Omwati and thus is brother-in-law of the deceased; P.W.-3 Dr. G.C. Agarwal, who conducted the post-mortem; P.W.-4 Ompal Singh, Sub-Inspector, who is the first Investigation Officer; and P.W.-5 Ale Hasan, Sub-Inspector, the then Station Officer, the second Investigation Officer of the case.

7. After recording of prosecution evidence, the incriminating evidence were put to the accused for recording their statement under section 313 CrPC. In their statements recorded U/s 313 Cr.P.C. all the accused appellants denied their involvement in the crime. Accused appellants Ganga Singh, Lalta Prasad & Udaivir Singh specifically stated that they have been falsely implicated in this case as they appeared as prosecution witnesses against the deceased, who was accused in murder of one Har Prasad. The accused

appellant Hiralal stated that he is cousin of Har Prasad. The accused appellant Udaivir Singh denied that his cycle was recovered from the place of occurrence, when this circumstance was put to him under section 313 Cr.P.C.

8. The defense examined the alleged eye witness Lekhraj as DW1, who stated that he was not there with the deceased at the time of alleged incident. He further stated that he received the information of the incident on the next day when he was there in village Manota. Thereafter he visited the village Nagla Hasan and after about two-three hours, when he reached, P.W.-2 Balistar also reached there. Upon being confronted by his statement recorded under section 161 CrPC, he categorically denied giving of any such statement to the police.

9. The learned trial court relied upon the evidence adduced by the prosecution and convicted and sentenced the appellants for the charges framed against them. Hence, this appeal.

10. We have heard learned counsel for the surviving appellants 2 and 4; the learned Additional Government Advocate (AGA) for the State; and have perused the record.

11. It has been submitted by the learned counsel for the appellants that the evidence adduced by the prosecution is concocted and is wholly unreliable. The first information report has been lodged with inordinate delay, without there being any plausible reason for the same. The alleged eye witness is a procured witness and is highly interested, partisan and inimical witness. The appellants had no motive to commit the offence and the motive alleged by the prosecution is false and imaginary.

12. On the other hand learned AGA has stated that the eye witness P.W.-2 Balistar is wholly reliable and his testimony is corroborated by medical evidence and recovery of the bicycle of the deceased and one of the accused appellants, namely, Udaivir Singh (since deceased), from the spot and, therefore, the conclusion drawn by the learned trial court is justified and the appeal is liable to be dismissed.

13. In the light of the aforesaid submissions, this court proceeds to examine the evidence available on record.

14. The P.W.-1 Smt. Omwati is wife of the deceased. She has stated in her examination in chief that one Master Har Prasad, resident of her village was murdered and her husband was accused in that murder case. He was prosecuted but was acquitted. The accused Lalta Prasad, Udai Singh & Hira Lal are cousins of Har Prasad and due to this reason, they bore enmity with her husband. Regarding the incident in issue, she has stated that her husband Indrajeet Singh (deceased) along with Balistar and Lekhraj were returning from Etah to his village. All of them were on bicycle. Her husband was on one bicycle and the two witnesses were on another bicycle. When all the three reached near the road going towards village Nandgaon, accused appellants, present in the court, were found having country made pistols and knives in their hands. They caught hold of her husband and dragged him towards the field and when Balistar and Lekhraj tried to intervene, they were threatened. The accused persons killed the deceased by gunshot and knives and threw the dead body into the field of pearl millets (Bajra). She has further stated that after receiving the information of the incident she, along with some other persons of the village, reached the place of occurrence but on account of darkness could not trace the dead body. Thereafter, on the next day morning, she along with co-

villagers again tried to trace the dead body and the dead body was found in the field of pearl millets. She proved lodging of the FIR. She stated that one month prior to the incident, a quarrel had taken place between the accused persons and her husband.

15. In her cross-examination, she stated that Balistar and Lekhraj had informed her about the incident in the village at about 08:00 P.M. They had come on bicycles. The two witnesses (Balistar and Lekhraj) and others had accompanied her to search out the body, however they did not visit the police station with her at the time of lodging of the report. Her husband's body was discovered at 10 A.M. When she had gone to the police station to lodge the report, Balister and Lekhraj were there near the body of the deceased. Sher Singh, Jalim Singh & Talevar were present with her at the police station. She stated that the police arrived at the place of occurrence at about 12:00 noon. The Investigation Officer recorded her statement at about 11:30 A.M., near the body, at the place of occurrence, during which witnesses Balistar and Lekhraj were present there. She admitted in her cross examination that at the time when Har Prasad was murdered, the accused persons were not living with Har Prasad. With regard to the quarrel relating to land, she admitted that no report was lodged. She has also stated that the house of accused Lalta Prasad, Udai Singh and Hira Lal is situated in the eastern side of the village and the house of accused Ganga Singh is situated in the western side of the village and her house is situated in the middle of the village and the land which was subject matter of quarrel is situated in front of her house. The tube well and open land of the accused persons, namely, Lalta Prasad, Udai Singh and Hira Lal, is situated in the eastern side of their houses. She has denied the suggestion that the deceased was murdered by unknown persons and that she had lodged a false first information report against the accused appellants on account of enmity.

16. P.W.-2 Balistar, who is brother-in-law of deceased-Indrajeet and is resident of village Amapur, has stated in the examination in chief that deceased Indrajeet was his sister's husband and was doing business of garlic at Etah and he was helping him in his business. The village Nagla Hasan is situated in between his village and Etah and he used to visit village Nagla Hasan and the house of his brother-in-law. He has further stated that the accused persons were having grudge and enmity with his brother-in-law Indrajeet Singh on account of murder case of Har Prasad, in which the deceased Indrajeet was prosecuted but was acquitted. He has further stated that the accused were also bearing enmity with the deceased due to earlier incident of quarrel regarding abadi land of the deceased. Regarding the present incident, this witness has stated that he was returning from Etah along with his brother-in-law, (deceased Indrajeet) and Lekhraj to village Nagla Hasan. His brother-in-law was on one bicycle and he and Lekhraj were on another bicycle. He was having torch with him. When they reached near the way going to village Nandgaon, they saw accused persons coming from front towards them. Accused Udai Singh and Lalta Prasad were having knives, while accused appellants Hira Lal, Ganga Singh and Nem Singh were having country made pistols. The accused person caught hold of the deceased and when the witnesses tried to save him, they were threatened by showing country made pistols. All the five accused appellants dragged the deceased towards field of pearl millets (Bajra) and thereafter he heard a gun shot. After hearing the sound of gunshot, he ran towards village Nagla Hasan and informed his sister Smt. Omwati and other persons of the village about the incident. Thereafter they along with Smt. Omwati and other villagers went to the place of occurrence but as it was dark, they could not search the deceased in the field and returned to the village. Next day, his sister and other

persons of the village went to the place of occurrence and found the dead body of deceased - Indrajeet Singh in the field of pearl millets (Bajra). His sister Smt. Omwati lodged the first information report regarding this incident by giving written information at the police station. He saw the incident in the light of the torch.

17. In his cross examination, P.W.-2 Balistar Singh had stated that his village is situated at a distance of about 11-12 kms from Etah and it takes about one hour to reach his village from Etah. On the date of incident, he started from Etah at about 06:15 P.M. on separate cycle, while Indrajeet Singh was on separate cycle. He has further stated in cross examination that the accused persons were not covering their faces and two bicycles were parked there. The accused persons were hidden in bushes and crop of pearl millets (Bajra). He has also stated that near the place of incident, there is a tube well and flour mill situated on the approach road towards Nandgaon and a human habitation exists about 2-2.5 furlong away from the place of incident. He has further stated that he didn't shout at the time of incident, as no one was present there. He has further stated that the place of occurrence is situated at a distance of about four kms from Etah city and it is about 1.5 - 2 kms away from village Nagla Hasan. He has also stated that he could not go to Etah to lodge the first information report as it was quite dark at that moment. He has further stated in his cross examination that he went to village Nagla Hasan on his cycle. He came back to the place of occurrence to trace the deceased but could not find him on account of darkness and went back to village Nagla Hasan. In the morning at about 07:00-08:00 A.M., inhabitants of village Nagla Hasan again went to search the deceased and the dead body was found at about 10:00 A.M. He did not go to the police station to lodge the first information report. He admitted that the accused appellants Lalta Prasad, Udai Singh and Ganga Singh were

prosecution witnesses against his brother-in-law (deceased Indrajeet Singh) in the murder case of Har Prasad.

18. P.W.-3 Dr. G.C. Agarwal had conducted the post mortem examination on the body of deceased Indrajeet Singh on 27.09.1990 at about 04:00 P.M. He has estimated that the death occurred about 3/4th of a day (i.e. 18 hours) earlier. He stated that he found five injuries on the person of the deceased, which have already been detailed above. Though he accepted that the death could have occurred at about 06:45 P.M. on 26.09.1990 but also expressed that it is possible that death may have taken place at 10 pm or up to four hours before 10 pm, on 26.09.1990.

19. P.W.-4 Sub-Inspector Ompal Singh is the first Investigation Officer of the case. He has stated that on 27.09.1990 he was posted as Sub-Inspector at police station Kotwali Dehat and the case was registered in his presence. Upon lodging of the first information report he proceeded to the place of incident and prepared the inquest report and other police papers and sent the dead body for post mortem examination. Thereafter he made recovery of three cycles, one plastic bag, one torn tehmad and slipper and Rs.595/- from the site, from where the deceased was dragged and had prepared memos of the recovery. In his cross examination, he has stated that he did not record the statement of first informant under section 161 of Cr.P.C at police station and site plan was prepared on the pointing out of first informant. On that day, he did not interrogate the eye witnesses Balistar and Lekhraj. He has also stated that the witness Balistar did not show his torch to him, when he visited the place of occurrence.

20. P.W.-5 Sri Aale Hasan Khan is the Station Officer of police station Kotwali Dehat, District Etah and has stated that on the day

when the first information report was registered he was on V.V.I.P. duty and when he returned back after completing that duty, he took over the investigation of the case from Sub-Inspector Ompal Singh and went to the place of occurrence and saw various recoveries prepared by first Investigating Officer. He recorded the statement of eye witness Balistar under section 161 of Cr.P.C. on 30.09.1990 and on the same day, he recorded the statement of first informant again and the statement of witness Lekhraj was recorded by him on 04.10.1990 and the statement of witness Duryodhan (not examined) was recorded on 26.10.1990, who identified one of the cycle found on the spot as that of accused Udai Veer Singh. He has further stated that he prepared the memo of recovery pertaining to the torch of witness Balistar on 08.10.1990. He has admitted that he did not conduct any investigation or enquiry in the small hamlet (abadi) near the place of occurrence and at the flour mill which stood near the place of occurrence.

21. From the evidence adduced by the prosecution, it is clear that the prosecution case rests on the testimony of solitary eyewitness P.W.-2 – Balistar. This witness is brother of the first informant -Smt. Omwati and is brother-in-law of the deceased Indrajeet Singh. The defense has assailed his testimony on the ground that he is an interested and partisan witness, who has not lodged the FIR despite full opportunity to him and, in fact, is a witness who has been set up. Furthermore, it is not safe to rely upon the testimony of a solitary eye witness who has himself not suffered any injury, particularly when the other eye witness named in the first information report has not supported the prosecution case and has denied the presence of P.W.-2 Balistar in the village also. On the other hand, the learned AGA has contended that this witness P.W.-2 Balistar is wholly reliable and conviction can always rest on the testimony of a solitary witness.

22. The law in this regard is well settled. Section 134 of Indian Evidence Act, 1872 provides that "*no particular number of witnesses shall, in any case, be required for the proof of any fact*". Law does not require plurality of witnesses and no particular number of witness is required to prove the fact. It is the quality of the evidence that counts and not the quantity. In the celebrated judgment of **Vadivelu Thevar vs. State of Madras – AIR 1957 SC 614**, the Hon'ble Apex Court has discussed this aspect of law in following words: -

"Hence, in our opinion, it is a sound and well-established rule of law that the court is concerned with the quality and not with the quantity of the evidence necessary for proving or disproving a fact. Generally speaking, oral testimony in this context may be classified into three categories, namely:

(1) Wholly reliable.

(2) Wholly unreliable.

(3) Neither wholly reliable nor wholly unreliable.

12. In the first category of proof, the court should have no difficulty in coming to its conclusion either way - it may convict or may acquit on the testimony of a single witness, if it is found to be above reproach or suspicion of interestedness, incompetence or subornation. In the second category, the court equally has no difficulty in coming to its conclusion. It is in the third category of cases, that the court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial. There is another danger in insisting on plurality of witnesses. Irrespective of the quality of the oral evidence of a single witness, if courts were to insist on plurality of witnesses in proof of any fact, they will be indirectly encouraging subornation of witnesses. Situations may arise and do arise where only a single person is available to give evidence in support of a disputed fact. The court naturally has to weigh carefully such a testimony and if it is satisfied that the evidence is reliable and free from all taints which tend to render oral testimony open to suspicion, it becomes its

duty to act upon such testimony. The law reports contain many precedents where the court had to depend and act upon the testimony of a single witness in support of the prosecution. There are exceptions to this rule, for example, in cases of sexual offences or of the testimony of an approver; both these are cases in which the oral testimony is, by its very nature, suspect, being that of a participator in crime. But, where there are no such exceptional reasons operating, it becomes the duty of the court to convict, if it is satisfied that the testimony of a single witness is entirely reliable. We have therefore, no reasons to refuse to act upon the testimony of the first witness, which is the only reliable evidence in support of the prosecution.”

23. It has also been held by Hon’ble Supreme Court in many cases that when the sole eye witness is partisan or related or inimical witness, the court must be cautious and evidence of such witness may require corroboration from independent reliable sources before making conviction. In the case of **Ramji Surjya Padvi vs. State of Maharashtra, AIR 1983 SC 810**, the relevant portion of the judgment reads thus:

“There is no doubt that even where there is only a sole eye-witness of a crime, a conviction may be recorded against the accused concerned provided the Court which hears such witness regards him as honest and truthful. But prudence requires that some corroboration should be sought from the other prosecution evidence in support of the testimony of a solitary witness particularly where such witness also happens to be closely related to the deceased and the accused are those against whom some motive or ill-will is suggested.”

24. Like-wise, in the case of **Govindaraju @ Govinda v. State By Sriramapuram P.S. & Anr. (2012) 4 SCC 722**, the Hon’ble Apex Court cautioned about relying on testimony of sole eye-witness in following terms: -

“Equally well settled is the proposition of law that where there is a sole witness to the incident, his evidence has to be accepted with caution and after testing it on the touchstone of evidence tendered by other witnesses or evidence otherwise recorded. The evidence of a sole witness should be cogent, reliable and must essentially fit into the chain of events that have been stated by the prosecution. When the prosecution relies upon the testimony of a sole eyewitness, then such evidence has to be wholly reliable and trustworthy. Presence of such witness at the occurrence should not be doubtful. If the evidence of the sole witness is in conflict with the other witnesses, it may not be safe to make such a statement as a foundation of the conviction of the accused. These are the few principles which the Court has stated consistently and with certainty.”

25. Another decision in the case of ***Bhimappa Chandappa Hosamani & Ors. Versus State of Karnataka, 2006 (11) SCC 323*** would be worth-while to notice, in which Hon'ble Apex Court dealt with the evidence of sole eye-witness and held as follows: -

“We have undertaken a very close and critical scrutiny of the evidence of P.W.--1 and the other evidence on record only with a view to assess whether the evidence of P.W.--1 is of such quality that a conviction for the offence of murder can be safely rested on her sole testimony. This Court has repeatedly observed that on the basis of the testimony of a single eye witness a conviction may be recorded, but it has also cautioned that while doing so the Court must be satisfied that the testimony of the solitary eye witness is of such sterling quality that the Court finds it safe to base a conviction solely on the testimony of that witness. In doing so the Court must test the credibility of the witness by reference to the quality of his evidence. The evidence must be free of any blemish or suspicion, must impress the Court as wholly truthful, must appear to be natural and so convincing that the Court has no hesitation in recording a conviction solely on the basis of the testimony of a single witness.”

26. The legal principle deducible from the decisions noticed above is that although ocular evidence of solitary eye-witness, who is close relative of deceased, can be made basis of conviction but only after it is found to be of sterling quality, free of any blemish or suspicion, and should impress the Court as wholly truthful, natural and convincing. As to whether the testimony is of such sterling quality would depend on the proven facts and circumstances of a case. The primary test ordinarily adopted by the court to test reliability of a witness is whether the presence of the witness on the spot has been proved beyond doubt and whether he had opportunity to witness the incident. When incident occurs inside a house, the presence of the inmates of that house would be natural. But where the incident takes place at a place where ordinarily a person may not be found present, the courts would have to closely scrutinize the evidence to find out whether the claim that the witness was present at the scene of occurrence is reliable or not. Some of the tests, inter alia, adopted by courts, to ascertain whether the witness was present at the scene of occurrence, are whether the witness has suffered any injury in the incident; and whether the conduct of the witness at the time of the incident or soon thereafter is such which is reflective of his having witnessed the incident. No doubt, there can be no golden rule that every person would react in a given manner in a given situation but broad probabilities have to be kept in mind to assess whether the conduct of the witness is in harmony with the hypothesis of his presence at the scene of occurrence. Sometimes inordinate delay in lodging the FIR, without proper explanation, is evidence of conduct which is suggestive of the fact that the witness might not have been present and, therefore, after deliberation and guesswork, on the basis of suspicion, FIR has been lodged by naming several accused persons. At times, reliability of a witness may be gauged from the conduct reflected by those who have been informed by the witness. In a nutshell each case turns on its own

facts and circumstances derived from the evidence led.

27. In the light of the aforesaid principles, when we examine the evidence of the prosecution witnesses P.W.-1 Smt. Omwati first informant (not an eye witness) and P.W.-2 Balistar (claimed to be the eye witness), it transpires that their conduct is not that of a normal prudent human being. Say, if PW2 had informed PW1 about the murder, she would not have waited till recovery of the body to lodge the FIR next day morning, particularly, when, according to her (PW1), she had collected villagers in the night and had visited the spot thereby ruling out any fear factor. Moreover, PW1 would not have waited till 8.00 AM of the next day morning to resume search for her husband, as has been stated by PW2, because, an apprehending wife would not wait till day break to find out whether her husband is dead or alive, after receipt of information that her husband has been dragged into the fields and a gun shot was heard soon thereafter. It is noteworthy that the incident is of the month of September and the morning sun is out by 6 A.M. therefore waiting till 8.00 AM to resume search does not appeal to the conscience of the court and is suggestive of the fact that there had been no information by that time with PW1. More so, when no independent witness has been produced by the prosecution to disclose that search operations were conducted in the night also. Then there is another aspect, which is, if the eye witnesses, namely, Balistar (PW2) and Lekhraj (DW1) were present at the scene of occurrence why it would take 2 hours to find out the body. It may be noticed that according to the prosecution evidence body was found at about 10 AM whereas the search began at 8 AM. More so, when from the site plan, the dead body was found just 7 paces away from the chak road, 16 paces from the drain (nali) inside the field, and in total just 77 paces from the road/ place from where the deceased was allegedly dragged by the accused. Further, the explanation given by

the witnesses that in the night the dead body was not traceable on account of darkness, does not appeal to reason, particularly, when the witnesses had torch as, later, a case has been set up that the accused was spotted in the light of a torch, which was handed out to the investigation officer on 08.10.1990. Another noticeable aspect which has surfaced in the prosecution case is with regard to the absence of the eye witness (PW2) at the time of registration of FIR. In natural course of events, the first information report ought to have been lodged by the eye witnesses of the incident, who were themselves close relatives of the deceased. Not only there is delay in lodging the FIR but the same has not even been lodged by the eye witness. According to the prosecution case, P.W.-2 Balistar, the brother-in-law of deceased, and Lekhraj, nephew of the deceased (not produced by the prosecution though produced by the defense as DW1), had themselves seen the incident and were throughout available either with the P.W.-1 or at the place of occurrence, having a cycle with them yet they did not go to lodge the first information report for which no satisfactory explanation is there. In fact, they did not even accompany the first informant Smt. Omwati to the police station at the time of lodging of the first information report though it has come in the evidence that they were there with the body. If that was so, then they could have been made witness of the inquest proceeding. But neither of the two witnesses was a witness to the inquest proceeding. The said circumstances, make the presence of the solitary eye witness P.W.-2 Balistar, examined by the prosecution, at the scene of occurrence highly doubtful.

28. Another aspect of the matter is the delayed interrogation of P.W.-2 Balistar by the Investigating Officer. As per the statement of P.W.-1 - Smt. Omwati, P.W.-2-Balistar was throughout present with her, except at the police station, that is at the time of registration of the FIR. She has admitted in her cross examination that when her

statement was recorded by the Investigating Officer, witnesses Balistar and Lekhraj were present there. P.W.-2 Balistar also stated in his cross examination that when the police arrived at the place of occurrence, he was present there with the dead body and had shown the torch to the Sub-Inspector and the Sub-Inspector had done a short interrogation with him. But P.W.-4 -Sub-Inspector Om Pal Singh, the Investigating Officer, has specifically stated that when he visited the place of occurrence on 27.09.1990, he prepared the site plan at the instance of first informant P.W.-1 Smt. Omwati and, on that date, he did not interrogate witnesses Balistar and Lekhraj and that the witness Balister did not show his torch to him. According to the statement of P.W.-5 Aale Hasan Khan, the second Investigating Officer, he recorded statement of eye witness Balistar on 30.09.1990 and took the torch of Balistar in his possession on 08.10.1990 and prepared the memo (Exhibit Ka-13). In the facts and circumstances of the present case, the delayed interrogation of P.W.-2 Balistar by the Investigating Officer is suggestive of the fact that, in all probability, P.W.-2 Balistar was not then available as a witness and when he was convinced to become a witness, his statement was recorded. This circumstance dents the credibility of the witness PW2 and renders him not of sterling quality.

29. The defense has also assailed the motive of the accused appellants alleged by the prosecution for committing the offence. In the first information report, the motive alleged by the first informant is with regard to an earlier incident of some quarrel in between the deceased and the accused persons over a piece of land. However in the statement of witnesses recorded during trial, an additional motive has been introduced which is that the deceased Indrajeet Singh was prosecuted in the murder of Har Prasad and accused appellants Udai Veer Singh, Lalta Prasad & Hira Lal are cousins of Har Prasad and due to that reason they were bearing enmity with

the deceased Indrajeet Singh. The cross examination of P.W.-1 Smt. Omwati reveals that the deceased did not make any complaint or report against the accused persons regarding the alleged quarrel and, further, it has also been admitted by P.W.-1 Smt. Omwati that the open land, stated to be root cause of quarrel, is situated in the midst of the village while the houses and open land of accused persons are situated in the eastern and western side of the village. In these circumstances, the motive, as claimed by prosecution, generated from quarrel in between deceased and accused persons relating to a piece of land which does not appear to be accessible to the accused persons, seems to be unfounded. Moreover, PW1 and P.W.-2 have stated that though accused appellants Udai Singh, Ganga Singh & Lalta Prasad were prosecution witnesses against deceased Indrajeet Singh in the murder case of Har Prasad but they resided separate from Har Prasad. Thus, there appears no strong motive for commission of the offence.

30. Lastly, DW1, another relative of the deceased, allegedly an eye witness as per the prosecution, has taken the courage to appear as a defense witness and declare that he has not been with the deceased and has not witnessed any such incident, as claimed by the prosecution. Though suggestion has been put to him that on account of pressure from his matrimonial home he has turned up as defence witness but there is no motive suggested as to why he would go against his relatives belonging to the family of the deceased. If prosecution had not examined him, as being won over, or if he had turned hostile, though examined by the prosecution, things would have been different. But here he appeared as defense witness and gave statement that his presence on the spot has been falsely shown by the prosecution. Under the circumstances, his testimony is of some significance so as to dent the credibility of the prosecution evidence.

31. At this stage, we may also observe that no recovery of the weapon of assault was made from any of the accused and that the alleged bicycles found on the spot were not connected, by any admissible evidence, with that of any of the accused persons or with any of the witnesses so as to demonstrate their presence at the scene of occurrence. It may be noticed that PW5 had stated that one of the bicycles was identified to be of accused Udai Veer Singh but that person who allegedly identified the cycle to be that of Udai Veer Singh was not examined whereas Udai Veer Singh, on the other hand, in his statement recorded under section 313 CrPC denied that the cycle recovered was his.

32. When we take a conspectus of the facts and circumstances emanating from the evidence led during the course of trial, it appears to us that the murder might have taken place in the dark hours of the night, which was not witnessed by any one and, therefore, after discovery of the body and deliberations, on the basis of suspicion and guess work, prosecution story was developed. This possibility gets credence from another circumstance which is that prosecution names five accused armed with two types of weapons of which injuries were found but except for showing as to which accused carried what weapon it is not disclosed as to who caused which injury. The reason for that appears to be that the injuries were much less than the number of assailants. Although specific role need not be attributed to all the accused as they could be fastened with liability by taking recourse to the provisions of section 149 IPC but what assumes importance is that this could be a ploy to add accused, on the basis of suspicion, as to form an unlawful assembly when, otherwise, the injuries suggested that there was a solitary gun shot wound of entry and exit which proved fatal and the rest were two incised wounds on non-vital part. Another aspect needs to be noticed which is that there is no blackening, tattooing or scorching

found present in or around the gunshot wound of entry which suggests that the shot was not from close proximity when the accused, as per prosecution case, after overpowering the deceased had all the opportunity to shoot from a close range. There is yet another aspect which is as to why would the assailants leave PW2 and DW1 escape alive on bicycles and fetch support from the nearby village or let them become a witness against them when, in the darkness of night, they had full opportunity to eliminate them as well.

33. The trial court did not test the prosecution evidence on all the aspects noticed by us and took the prosecution evidence as gospel truth. When we take a conspectus of the entire prosecution evidence, in the light of the discussion made above, we are of the considered view that, firstly, the presence of PW2 at the place and time of occurrence is highly doubtful, and, secondly, his testimony is not of such sterling quality that proves the prosecution case against the accused appellants beyond reasonable doubt. Under the circumstances, the benefit of doubt must go to the appellants. Consequently, the judgment of conviction dated 03.07.1993 and the order of sentence dated 05.07.1993 is liable to be set-aside and is hereby set aside. The appellants are acquitted from the charges. They are on bail and they need not to surrender.

34. Thus, the appeal succeeds and is allowed.

35. Let a copy of this judgment and order be sent to the court below for compliance.

(Manju Rani Chauhan, J.) (Manoj Misra, J.)

Order Date :- 18.9.2019

Sushil/-