

A.F.R.

Reserved

Case :- CRIMINAL APPEAL No. - 1419 of 2009

Appellant :- Kripa Shanker Dubey

Respondent :- State of U.P.

Counsel for Appellant :- S.K. Singh Yadav, Jitendra Singh, Manvendra Singh, S.P. Srivastava

Counsel for Respondent :- Govt. Advocate, S.K. Srivastava

with

Case :- CRIMINAL APPEAL No. - 1313 of 2009

Appellant :- Uma Shanker Dubey

Respondent :- State of U.P.

Counsel for Appellant :- S.K. Singh Yadav

Counsel for Respondent :- Govt Advocate, Sharad Kumar Srivastava

Hon'ble Mrs. Sunita Agarwal, J.

Hon'ble Subhash Chandra Sharma, J.

(Delivered by Subhash Chandra Sharma, J.)

1. Heard Sri Jitendra Singh, learned counsel for appellant Kripa Shankar Dubey, Sri Manvendra Singh, learned Advocate for the appellant Uma Shankar Dubey and Sri Rupak Chubey, learned A.G.A. for State and perused the record.

2. These appeals emanate from the judgment and order dated 18.02.2009 passed by Additional Session Judge/Special Judge E.C. Act, Fatehpur in S.T. No.169 of 2006 (State vs. Kripa Shanker Dubey and another) arising out of Case Crime No.213 of 2005, under Section 302 read with Section 34 I.P.C. sentencing the appellants with life imprisonment and fine of Rs.10,000/- and in default of payment of fine to undergo additional one year rigorous imprisonment by each and in S.T. No.170 of 2006 (State vs. Kripa Shanker Dubey) arising out of Crime No.218 of 2005, under Section 25 Arms Act, Police Station Lalauli, District Fatehpur

whereby the appellant Kripa Shanker Dubey has been sentenced with two years rigorous imprisonment with fine of Rs.1000/- and in default of payment of fine to undergo additional six months rigorous imprisonment.

3. The prosecution case in brief is that on 22.12.2005 at about 8:00 P.M. an F.I.R. was lodged at the Police Station Lalauli, District Fatehpur by the informant Suresh Kumar S/o Ramasrey resident of Kichaucha, Police Station Lalauli, District Fatehpur by filing a written report stating therein that on 22.12.2005 at about 6:00 P.M. his elder brother Umesh @ Pappu aged about 27 years went to the hand pump to fetch water and as he (deceased) reached near the hand pump Kripa Shanker Dubey S/o Ram Vishal and his brother Uma Shanker Dubey residents of the same village equipped with country-made pistol came with the intention of committing murder and shot fire at him (deceased) causing injuries in his stomach, as a result it he died and accused persons fled away towards the field. The incident was witnessed by his bua (aunt) Maun Shree and Surajpal.

4. The investigation of the case was handed over to S.H.O. Manoj Kumar Pandey who after receiving the information went to the place of occurrence alongwith other officials and conducted the inquest of the dead body of deceased Umesh @ Pappu and prepared the inquest report and other relevant papers required for the purposes of post-mortem. The dead body was sealed and handed over to constable Baburam and Devmani who took it to the Mortuary District Hospital, Fatehpur.

5. The post-mortem was conducted on 23.12.2005 at 3:30 P.M. by Dr. A.S. Khan who found the dead body in sealed cloth intact which tallied the sample seal. The external condition of the dead body as described therein is as under :-

Average built body. Rigor mortis present.

Antemortem Injuries

1. Fire arm wound of entry 2 cm x 2 cm x cavity deep in right side of the abdomen 15 cm outer to umbilicus at 9 O'clock position. Blackening present around the wound. Intestines were protruded out from wound.

2. Contusion of 6 cm x 3 cm in right side of the abdomen 20 cm below the right nipple.

3. A metallic bullet recovered from left side of pelvic muscles which was sealed in an envelop and sent to S.P., Fatehpur through C.M.S.

Cause of death was mentioned as shock and hemorrhage as a result of antemortem fire arm injury

6. During investigation, the statement of informant Suresh Kumar was recorded and after making spot inspection at the instance of the informant, site plan was prepared by the I.O. On 25.12.2005, accused persons Kripa Shanker Dubey and Uma Shanker Dubey were arrested near the bus stand. A country-made pistol of 315 bore and one cartridge, from the pocket of the accused and another cartridge from the chamber of the country-made pistol were recovered from the possession of accused Kripa Shanker Dubey. Recovery memo was prepared and a separate case because of the recovery of the country-made pistol and cartridge was registered u/s 25 Arms Act as Crime No.218 of 2005 at the police station, investigation of which was handed over to S.I. Ram Chandra Mishra. Further the statement of other witnesses

were recorded by the I.O and on the basis of the material collected during the investigation, a prima facie case under Section 302/34 I.P.C. was found to be made out against the accused persons, as a result, the charge-sheet was submitted to the court concerned. Later on reports from the F.S.L. were received and submitted to the Court through supplementary case diary.

7. In crime no.218 of 2005 u/s 25 Arms Act, the investigating officer recorded the statement of informant Manoj Kumar Pandey and constable Sarfaraz Haider and after spot inspection at the instance of the informant prepared the site plan. After recording the statements of other witnesses and obtaining the prosecution sanction from the District Magistrate, he filed charge-sheet before the court concerned.

8. The learned court took cognizance of the offence and provided copies of the prosecution papers in compliance of Section 207 Cr.P.C. to the appellants and committed the case for trial.

9. The learned trial court after taking into consideration the material on record framed the charges against both the appellants u/s 302 read with Section 34 I.P.C. and u/s 25 Arms Act against the appellant Kripa Shanker Dubey. The charges were read over and explained to the appellants. They pleaded not guilty but denied the charges and claimed for trial. Consequently, the cases were fixed for prosecution evidence. Since both the cases were connected to each other, therefore, consolidated and tried together.

10. In support of its case, the prosecution examined PW-1 Suresh Kumar, the first informant and brother of the deceased; Pw-2 Sheetla Devi as eye-witness of the incident and mother of the deceased; PW-3 Dr. A. S. Khan who conducted post-mortem of dead body of the deceased; PW-4 Constable Kunwar Singh who

prepared chick F.I.R. and entered the detail in G.D.; PW-5 S.I. Manoj Kumar Pandey the investigating officer of crime no.213 of 2005 u/s 302 I.P.C. and PW-6 S.I. Ram Chandra Mishra who investigated the case registered u/s 25 Arms Act relating to crime no.218 of 2005.

11. On conclusion of prosecution evidence statement of accused persons were recorded u/s 313 Cr.P.C. wherein appellants Kripa Shanker Dubey and Uma Shanker Dubey asserted the incident and statements of witnesses relating thereto, false. In relation to recovery of arm and cartridge appellant Kripa Shanker Dubey termed it to be false and stated that he was arrested by the police from his house and false recovery of country-made pistol was shown against him. In defence, no evidence was adduced on the part of the appellants.

12. After hearing the arguments on behalf of the appellants as well as for the State, the trial court passed the judgment and order dated 18.02.2009 convicting the appellants as aforesaid against which these appeals are preferred.

13. Learned counsel for the appellants submits that the impugned judgment and order of conviction is bad in law being against the evidence on record. The trial court has erred in convicting the appellants without making proper appreciation of the evidence. The appellants had no motive to commit the murder of the deceased. The F.I.R. is ante-time. PW-1 & PW-2 are relatives of the deceased, therefore, they are interested witnesses, their testimony is full of contradictions. The statement of PW-2 u/s 161 Cr.P.C. was not recorded by the investigating officer during investigation but she was introduced by the prosecution for the first time before the trial court so her testimony cannot be relied upon. The presence of PW-1 is not mentioned in the F.I.R. so he cannot

be said to be an eye-witness. In this way, the testimony of PW-1 being not present on the spot at the time of alleged incident and PW-2 being not examined by the investigating officer and not named in the F.I.R. as eye-witness cannot be made the basis of conviction. The witnesses those were named in the F.I.R. have not been examined by the prosecution. As a result, the whole prosecution story becomes doubtful and the benefit of doubt is to be extended to the accused appellants. Thus, the prosecution could not prove its case beyond reasonable doubt and the appellants are entitled for acquittal.

14. Learned A.G.A. opposed the contentions raised by the learned counsel for the appellants and urged that in this case the informant as well as PW-2 both were present on the spot and they had narrated the whole prosecution story as well. They are eye-witnesses, therefore, motive loses its importance. The testimony of PW-2 cannot be discarded only on the basis that her statement u/s 161 Cr.P.C. was not recorded by the investigating officer. No prejudice is caused to the accused appellants. The presence of PW-1 on the spot is not disputed. From the reading of the F.I.R., it is clear that PW-1 was present on the spot at the time of the incident. The prosecution witnesses, though relatives but their testimony cannot be discarded on this account only if they are reliable and trustworthy otherwise. The contradictions in the testimony of the witnesses are minor in nature and are not likely to affect the veracity of the statements, hence immaterial. The death of deceased Umesh Kumar Singh is said to be caused with fire arm which gets support from the post-mortem. In this way, the prosecution had proved its case beyond reasonable doubt against the appellants. The trial court has passed the judgment and order on the basis of evidence on record after appreciating the evidence according to the settled principles of law. There is no error in the

judgment under challenge. These appeals being devoid of merit are liable to be dismissed.

15. From the submissions and perusal of the record, the questions which emerge for consideration of this Court are :- as to whether the F.I.R is ante-time; motive is absent; the witnesses being relatives; no independent witnesses having been examined would have adverse affect on the prosecution case; as to whether the alleged contradictions in the testimony of witnesses make it unreliable and non-recording the statement of PW-2 u/s 161 Cr.P.C. by the investigating officer would cause prejudice to the appellants.

16. Before we deal with the contentions raised by the learned counsel for the appellants, it would be convenient to take note of the evidence adduced by the prosecution.

17. PW-1 Suresh Kumar is the first informant and brother of the deceased who deposed that there was enmity on account of village pradhani elections between both the families of the accused and the deceased. On 22.12.2005 at about 6:00 P.M., his elder brother Umesh Kumar went to fetch water at the hand pump in front of his house. As his brother reached near the hand pump, appellant Kripa Shanker Dubey opened fire which hit in the stomach of his brother on the right side near the umbilicus and after 10-15 minutes, he died. P.W.1 took the injured inside the house and made him lie down on the cot where he died. This incident was witnessed by he himself, his bua (aunt) Maun-Shree, another aunt Rajrani and Surajpal. The accused persons fled away after shooting the deceased. At the time of the incident, he (the informant) was at his gate and his bua (aunt) and another aunt were at the hand pump and Surajpal was talking to his brother (deceased). He himself wrote the written report and gave it at the police station Lalauli,

which he proved in his hand writing as Ex Ka-1.

18. PW-2 Sheetla Devi mother of the deceased deposed that she knew the accused Kripa Shanker Dubey and Uma Shanker Dubey who were residents of her village. The murder of her son Umesh Kumar was committed at about 6:00 P.M. near the hand pump in front of her house where his son went there to fetch water. Kripa Shanker came there and made fire on the stomach of his son Umesh @ Pappu. No other person was with Kripa Shanker Dubey. PW-2 stated that she was at her gate at that time from there she was watching everything. The incident was witnessed by Surajpal, his wife and Maushree. Suresh also saw the incident. She further stated that Uma Shanker Dubey was on the back side and he did nothing. She stated that she narrated all these facts to the police.

Both the witnesses were cross-examined on behalf of the appellants at length.

19. PW-3 Dr. A. S. Khan has proved the post-mortem report as Ex Ka- 2 in his hand writing and signature. He told that the injury was caused with fire arm like country-made pistol at about 6:00 P.M. as a result, the deceased died. He also opined that the cause of death was shock and hemorrhage due to antemortem fire arm injury. During post-mortem, a bullet was recovered from the abdomen of the deceased which was sealed and sent to S.P., Fatehpur through C.M.S.

20. PW-4 constable Kunwar Singh has proved the check F.I.R. which was prepared by him on the basis of written report in his hand writing and signature as Ex Ka-3 and G.D. as Ex Ka-4.

21. PW-5 S.I. Manoj Kumar Pandey who investigated the case has proved the investigation and the papers prepared by him relating to the inquest as Ex Ka-5 to 10, recovery memo as Ex Ka-

11, country-made pistol and cartridge as material Ex.- 1 to 3, charge-sheet as Ex Ka-12 and F.S.L. report as Ex Ka- 13 & 14.

22. PW-6 S.I. Ram Chandra Mishra has proved the investigation relating to the Crime No.218 of 2005 registered u/s 25 Arms Act, site plan as Ex Ka-15, charge-sheet as Ex Ka-16, prosecution sanction as Ex Ka-17 and check F.I.R. in the hand writing of constable Ramkripal Pandey as Ex Ka-18 and G.D. as Ex Ka-20.

23. Relating to the F.I.R, it is argued that it is antetime. In this regard, it is to note that the incident took place on 22.12.2005 at 6 p.m. and F.I.R. was lodged at 8.p.m on the same day at the police station concerned, 12 km away from the place of occurrence. P.W.4 constable Kunwar Singh deposed that he lodged the F.I.R. on 22.12.2005 at 8 O'clock on the basis of the written report given by informant Suresh Kumar and entered its detail in the G.D. report no. 26 in the presence of the Station House Officer of the police station and, thereafter, sent him to the place of occurrence. P.W. 5. Manoj Kumar Pandey, the station house officer deposed that he had gone to attend the OR of ASP at the Fatehpur Police Office, while returning he was informed on the RT set that Umesh Kumar had been murdered in the village Kichhauchha. He reached at the village directly and conducted the inquest and prepared relevant papers. It shows that PW-5 was not present at the Police Station at 8 p.m. as stated by P.W.4 but arrived at the police station after conducting the inquest and sending the dead body for post-mortem from the place of the incident.

24. P.W.1 informant has stated that he wrote the written report and gave it in the police station Lalauli, which he proved as Ex. Ka-1. During cross examination, P.W.1 stated that he called the police by phone call from the police station. The Station Officer was somewhere else from where he came on the spot. Then P.W.1 told

him (P.W.5) about the incident who got him write down the report. P.W.1 showed the place of occurrence to the Investigating Officer. P.W.1 did not take the dead body to the police station. The inquest was conducted at home, then he went with the Investigating Officer to lodge the FIR. The Investigating Officer dictated, he wrote and gave that written report to him. This statement of P.W.1 clearly shows that the station house officer was not present at the police station. The informant called the police by phone and did not go to the police station for lodging the FIR on his own but after the Station Officer visited the place of the occurrence and conducted inquest, P.W.1 went with him to the police station and lodged the FIR by giving the report, written by him on the dictation of the Station Officer. The inquest shows that the proceedings were started at 20.23 p.m. and completed on 23.35 pm. It infers that the station house officer reached at the police station after 23.35 p.m. with the informant and then FIR was lodged on the basis of the written report given by the informant, mentioning therein the time of receiving information at 8 pm, which proves that the FIR was lodged ante-time.

25. It is also argued that PW2 Sheetla Devi mother of the deceased and PW 1, had not witnessed the incident. P.W.2 was not present at the time of the incident. Her statement was neither recorded by the Investigating Officer nor her name was mentioned in the list of witnesses in the charge sheet, therefore, she cannot be relied on. In this regard, it is true that the informant did not mention her name in the F.I.R. with other witnesses who had witnessed the incident. Her statement was not recorded by the Investigating Officer under Section 161 Cr.P.C. and also her name was not included in the list of prosecution witnesses in the charge sheet but she was produced before the trial court as P.W.2 projecting her as eye witness of the incident. On 4.4.2007, after

one and half year, for the first time, she (P.W.2) deposed that the incident was seen by her.

26. P.W. 2 stated that she was present at the gate of her house at the time of the incident. She further stated that she came from the tubewell and reached at her house and in the meantime, occurrence took place. She went back on the gate of the house and stood there. Suresh (P.W.1) was also there at the gate.

27. P.W.1 Suresh had not disclosed the presence of this witness i.e., P.W.2 at the place of occurrence in the F.I.R. and Section 161 Cr.P.C. statement, though during his examination in the court, P.W.1 stated about the presence of his *bu*a Maunshree, *bhabhi* Rajrani and Surajpal, who were not examined during the trial. In his cross-examination, P.W. 1 also stated that his mother was in the house. At the time of occurrence, he was out of the gate and Surajpal Rakesh, Rajshree and Maunshree were collecting water. He heard the sound of firing. All people present there disbursed and accused persons fled away. He remained there alone and brought his brother, the deceased inside the house. When he brought the deceased to some distance, his mother came, then both of them took the deceased and lay his body on the cot. In this way, the version of P.W. 2 that she was present at the gate with P.W. 1 Suresh and witnessed the incident, does not get support from the statement of Suresh but it seems that she (PW-2) was in the house and came outside after the incident had occurred and while P.W. 1 Suresh was carrying the deceased from the place of occurrence to his house. Thus, the presence of P.W. 2, on the spot, at the time of the incident, is not established. Her testimony that she witnessed the accused persons making fire at the deceased does not inspire confidence of the court.

28. The names of other witnesses namely, Maunshree and

Surajpal were mentioned in the F.I.R. who witnessed the incident and were present there at the time of the occurrence. But both these witnesses have not been examined by the prosecution, for the reasons best known to them. The testimony of P.W.2 about his presence is unreliable and is nothing but an improvement on the material aspect of the case.

29. It is to be noted that a witness, whose name was not mentioned in the F.I.R. as an eye witness, and whose statement was not recorded by the Investigating Officer under Section 161 Cr.P.C. and is not shown in the list of witnesses in the charge sheet but examined before the trial court to the first time years after the occurrence, his testimony cannot be considered safe to rely on, for it may cause prejudice to the accused.

30. It has been held by The Hon'ble Supreme Court in the case of **Ram Lakhon Singh And Ors. vs. The State Of U.P. AIR1977 SCC 1996** that *"It is true that no enmity or grudge is suggested against this witness, but we find that this witness was not even examined by the police nor was he cited in the chargesheet. In a grave charge like the present, it will not be proper to place reliance on a witness who never figured during the investigation and was not named in the chargesheet. The accused who are entitled to know his earlier version to the police are naturally deprived of an opportunity of effective cross-examination and it will be difficult to give any credence to a statement which was given for the first time in court after about a year of the occurrence. We cannot, therefore, agree that the High Court was right in accenting the evidence of this witness as lending assurance to the testimony of other witnesses on the basis of which alone perhaps, the High Court felt unsafe to convict the accused."*

31. Now there remains the testimony of P.W.1 Suresh, who is the brother of the deceased and the informant.

32. It is argued by the learned counsel for the appellants that the testimony of this witness cannot be relied upon he being an interested witness. In this regard, it is true that P.W. 1 Suresh is the real brother of the deceased and comes in the category of related witness. It has also been stated by P.W. 1 that the appellants committed murder of his brother owing to the enmity relating to the village pradhan election but only on account of enmity and being related witness his evidence cannot be disbelieved, rather his testimony is to be scrutinized with care and circumspection because of the alleged enmity.

33. In ***Piara Singh and Ors. Vs. State of Punjab, AIR 1977 SC 2274 (1977) 4 SCC 452***, Hon'ble The Supreme Court held: *"It is well settled that the evidence of interested or inimical witnesses is to be scrutinised with care but cannot be rejected merely on the ground of being a partisan evidence. If on a perusal of the evidence the Court is satisfied that the evidence is creditworthy there is no bar in the Court relying on the said evidence."* In such cases, their evidence is to be scrutinized with great circumspection.

34. Further it is contended by the learned counsel for the appellants that no independent witness has been examined by the prosecution, therefore, the testimony of P.W. 1 cannot be relied upon in absence of corroboration with some independent source. It is to note that in the F.I.R., P.W. 1 named his *bu*a (aunt) Maunshree and Surajpal as eye witnesses of the incident but both of them had not been examined before the trial court and there was no other witness said to be present at the time of occurrence. On the basis of non-examination of these two eye witnesses, the testimony of P.W. 1 cannot be discarded at all because ordinarily in village, no person wants to become a witness by putting his life in risk of inviting enmity with other villagers named as accused, therefore, non examination of independent eye witness cannot affect the

reliability of related witness.

35. In the case of ***Darya Singh Vs. State of Punjab AIR 1965 SC 328***, Hon'ble The Supreme Court observed that *“It is well-known that in villages where murders are committed as a result of factions existing in the village or in consequence of family feuds, independent villagers are generally reluctant to give evidence because they are afraid that giving evidence might invite the wrath of the assailants and might expose them to very serious risks. It is quite true that it is the duty of a citizen to assist the prosecution by giving evidence and helping the administration of criminal law to bring the offender to book, but it would be wholly unrealistic to suggest that if the prosecution is not able to bring independent witnesses to the Court because they are afraid to give evidence, that itself should be treated as an infirmity in the prosecution case so as to justify the defence contention that the evidence actually adduced should be disbelieved on that ground alone without examining its merits.”*

36. It is also argued that there are omissions, discrepancies and contradictions in the testimony of P.W. 1 which do not inspire confidence. It is well settled law that minor discrepancies are not to be given undue emphasis and the evidence is to be considered from the point of view of trustworthiness. The test is whether the same inspires confidence in the mind of the Court. If the evidence is incredible and cannot be accepted by the test of prudence, then it may create a dent in the prosecution version. If an omission or discrepancy goes to the root of the matter and ushers in incongruities, the defence can take advantage of such inconsistencies. It needs no special emphasis to state that every omission cannot take place of a material omission and, therefore, minor contradictions, inconsistencies or insignificant embellishments do not affect the core of the prosecution case and should not be taken to be a ground to reject the prosecution

evidence. The omission should create a serious doubt about the truthfulness or creditworthiness of a witness. It is only serious contradictions and omissions which materially affect the case of the prosecution but not every contradiction or omission. **(See Rammi @ Rameshwar Vs. State of M.P., (1999) 8 SCC 649; Leela Ram (dead) through Duli Chand Vs. State of Haryana and Another, (1999) 9 SCC 525; Bihari Nath Goswami Vs. Shiv Kumar Singh & Ors., (2004) 9 SCC 186; Vijay @ Chinee Vs. State of Madhya Pradesh, (2010) 8 SCC 191; Sampath Kumar Vs. Inspector of Police, Krishnagiri, (2012) 4 SCC 124; Shyamal Ghosh Vs. State of West Bengal, (2012) 7 SCC 646 and Mritunjoy Biswas Vs. Pranab @ Kuti Biswas and Anr., (2013) 12 SCC 796).**

37. It is also contended that there was no motive to commit the murder of the deceased by the appellants, even though the trial court has convicted the appellants. As per the F.I.R., there was enmity between both the parties relating to the election of the village Pradhan and that was the reason of the appellants to commit murder of the deceased, as stated by P.W. 1 during his examination before the court. Further it is settled legal proposition that even if there is absence of motive, as argued, that itself is of no consequence and it pales into insignificance when direct evidence establishes the crime. In case there is direct, trustworthy evidence of the witnesses as to commission of an offence, motive loses its significance and if genesis of the incident or motive of the occurrence is not proved, the ocular testimony of the witnesses as to the occurrence can not be discarded only on the ground of absence of motive if otherwise the evidence is worthy of reliance.

38. Last argument on the part of the learned counsel for the appellants is that the presence of P.W.1 at the place of occurrence is also disputed because he did not fix his presence in the F.I.R.

and his statement before the trial court is nothing but an improvement of the other witnesses who as per the statement in the F.I.R. had seen the occurrence were not examined.

39. In this regard, it is noteworthy that in the written report given by P.W.1 himself, he did not mention of having witnessed accused persons firing at the deceased but wrote clearly that the incident was witnessed by his *bu*a (aunt) Maunshree and Surajpal "इस घटना को मेरी बुआ मौनश्री व सूरजपाल ने देखा है ।" which infers that this witness himself had not seen the occurrence.

40. During his examination before the trial court, PW-1 projected himself as a witness of the incident. In the cross-examination, he stated that his brother was taking water when the accused persons came from the North side of the way. There was sound of fire which he heard. About the presence of PW-2, he stated that his mother Sheetla Devi (PW-2) was inside the house alongwith other family members such as his sister-in-law and wife with children. He then stated that when the appellants shot the deceased, all persons present there were disbursed and he alone was left there. He carried the deceased to his house who was alive at that time. When he carried his brother to some distance, his mother came and then both of them put the deceased on a cot. Thereafter, he went to Jindpur to the doctor who did not meet and then PW-2 stated that he went for arranging the vehicle to bring the doctor and when could not get the vehicle he came back from Jindpur which was around 1 KM from his village. When he came back, his brother had already died. He then stated that he put his brother in a tractor to take to the doctor and then saw he did not have pulse, so came back. His three uncles and brother were with him. Then police was called through telephone from the police station. The Station House Officer came on his own from somewhere. The incident was

narrated to him and he noted it down. He went to lodge the first information report alongwith the Investigating Officer after the inquest was concluded and the body was sent for the postmortem. PW-1 stated that whatever was dictated by the Investigating Officer, he wrote the same. In this testimony, PW-1, stated that he was outside the gate of his house at the time of the incident and other witnesses were near the handpump. The mother of the deceased Sheetla Devi (PW-2) stated that at the time of the incident she came back from the tube well and reached inside the house. The incident had occurred at that point of time and she immediately returned back. In the same breath, PW-2 stated that she was standing at the gate and was waiting for the deceased to come back so that she could talk to him. PW-1 was also with her at the gate and then stated that at that time itself, the deceased was hit and she was standing facing towards the west.

41. The postmortem report indicates only one firearm injuries on the person of the deceased which means that only one fire was shot. In light of this medical evidence, when the testimony of PW-2 is examined, her version is that she having returned from the tube well, reached inside the house and then the incident had occurred and she immediately came back. According to PW-1, the accused persons immediately ran away having shot his brother. When PW-2, mother of the deceased was inside the house she could have come out hearing the sound of fire which was one only. In all probabilities, testing the version of PW-2, she did not witness the appellants accused opening fire at the deceased. Beyond that nothing has been stated by PW-2 on confrontation, in cross, about the presence of the accused appellants. Her statement in the examination-in-chief that the appellant Kripa Shanker Dubey came and fired at her son while she was standing at her gate could not be substantiated from her version in the cross-examination. Her

statement in cross-examination is found to be inconsistent with the version of PW-2 in her examination-in-chief. It, thus, appears that PW-2 had reached at the place of the incident soon after the incident had occurred but she did not witness the incident i.e. the accused opening fire at the deceased or them being the assailants.

42. As a general rule, the Court can and may act on the testimony of a single eye witness provided he is wholly reliable. There is no legal impediment in convicting a person on the testimony of a solitary witness. That is the logic of Section 134 of the Evidence Act, 1872. As regards the PW-1, from his version that he wrote the written report at the dictation of the Investigating Officer and then went to the police station, non-mentioning of his name as a witness of the incident in the F.I.R. becomes relevant. PW-1, the informant, thus, remains a solitary witness of the incident.

43. The law of evidence does not require any particular principle of witness to be examined in proof of a given fact. However, faced with the testimony of a single witness, the Court may classify the oral testimony into three categories namely :- (i) wholly reliable; (ii) wholly unreliable; (iii) neither wholly reliable nor wholly unreliable.

44. In ***Vadivelu Dhevar vs. State of Madras AIR 1957 SC 614***, while laying the principle of appreciation of testimony of solitary witness, as noted above, it was observed that in first two category there may be no difficulty in accepting or discarding the testimony of a single witness. The difficulty arises in the third category of cases. The Court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial, before acting upon the testimony of a single witness.

45. In light of the above principle, when we examine the statement of PW-1 there are material improvement on the aspect of him being eye witness, coupled with the fact that first information report was found to be ante time and the presence of PW-1 on the spot was sought to be fixed by him for the first time during his deposition in the Court, when the report itself was scribed by him, the testimony of this witness would fall in the third category as this witness is neither wholly reliable nor wholly unreliable. We can neither place reliance nor totally discard the testimony of this witness. We find his testimony to have been substantially improved at the trial than what it was to began with when the first information report of the incident was lodged.

46. In the said scenario, we cannot, therefore, agree with the Sessions Court in accepting the evidence of P.W.2 as lending assurance to the testimony of P.W. 1 on the basis of which alone perhaps, the trial Court itself felt unsafe to convict the accused.

47. So far as the recovery of the country-made pistol is concerned, it was made by the Investigating Officer during the investigation at the time of arrest of accused persons from the Bus Stand near the tea stall on the basis of an information given by informer at about 21.25 o'clock. It has been proved by the P.W. 5, S.I. Manoj Kumar Pandey who made arrest and recovery, the place where-from appellants were arrested was a public place, a tea stall near the bus stand. Ext. Ka-6 site plan of the recovery shows that there were so many shops of tea, eggs and P.C.O. near the place of the arrest, where presence of people cannot be disputed at early hours in the night but no public witness was found by the arresting officer. It makes the recovery doubtful. Further it is noteworthy that the arrest of the accused person was made on 25.12.2005 after three days of the alleged incident of murder while they were

allegedly carrying the same country-made pistol with used cartridge in its chamber and another cartridge in his pocket. It seems improbable that the culprit who is a named accused in the F.I.R. would carry the country-made pistol with used cartridge in its chamber after three days of committing murder with the same weapon. Even the police personnel accompanying him at the time of the arrest had not been examined. During the cross-examination, PW-5 expressed his inability to explain the orientation of the place of arrest and recovery. The recovery of country-made pistol and cartridge, as such, cannot be believed being beyond the shadow of reasonable doubt.

48. After having examined the entire evidence and considering the circumstances of the case at hand in totality, we are afraid to affirm the conviction on the oral testimony of the prosecution witnesses (PW-1 & PW-2) and to hold that the prosecution has established the charges against the accused persons beyond reasonable doubt. The benefit of reasonable doubt, therefore, has to go to the accused persons and they are liable to be acquitted of all the charges. The judgment and order of the Sessions Court convicting and sentencing the appellants is hereby set aside.

49. The appellant Kripa Shanker Dubey is in jail who shall be released from the detention forthwith, if not wanted in any other case.

50. Appellant Uma Shanker Dubey is on bail. He need not to surrender, his bail bonds are cancelled and sureties are discharged.

51. These appeals are, accordingly, **allowed**.

52. Copy of this judgment alongwith the original record be transmitted to the Court concerned for necessary compliance. A

compliance report be sent to this Court within one month. The office is directed to keep the compliance report on record.

Order Date :- 30th September, 2022
Ashok Gupta/A. Singh

(Subhash Chandra Sharma, J.) (Sunita Agarwal J.)