

**RESERVED**  
**AFR**

**Court No. - 42**

**Case :- CRIMINAL APPEAL No. - 288 of 1991**

**Appellant :- Mahesh**

**Respondent :- State**

**Counsel for Appellant :- D. Dahma, Divya Ojha, Prem  
Chandra, Sangam Lal Kesharwani**

**Counsel for Respondent :- D.G.A.**

**Hon'ble Manoj Misra, J.**

**Hon'ble Virendra Kumar Srivastava, J.**

**(Delivered by Hon'ble Manoj Misra, J)**

This appeal has been filed by Mahesh son of Dibbu Mehtar against the judgment and order dated 13.02.1991 passed by the 1st Additional Sessions Judge, Aligarh in Sessions Trial No. 662 of 1987 by which the appellant, along with Gajendra Singh @ Gajpal son of Girraj Singh Jat; and Jagdish son of Ram Swarupa Mehtar, has been convicted for offence punishable under Section 302 read with Section 34 I.P.C. and awarded life imprisonment as well as fine of Rs. 2,000/- and, in case of default in payment of fine, to undergo one year additional rigorous imprisonment. The other two convicted accused, namely, Jagdish and Gajendra Singh, had jointly filed a separate Criminal Appeal No. 232 of 1991 which stood abated as they expired during the pendency of appeal. Thus, this judgment deals with the appeal filed by Mahesh only.

Briefly put the prosecution case is as under. The deceased - Mahendra Singh was working as a Homeguard attached to Police Station (for short P.S.) Pisawa, Aligarh. Like every day, on 11.07.1987, at about 6.45 p.m., he, along with his father Todar Singh (informant-P.W.1) who had to sleep over night at the shop of his other son (Mehtab Singh) at Pisawa, was going on a bicycle to P.S. Pisawa to attend his duty. As

they reached near Kumargarha Nala, four persons, namely, Jagdish son of Swarupa Mehtrar; Mahesh son of Dibbu Mehtar (appellant); Gajendra Singh @ Gajpal son of Girraj Jat; and an unknown person (later disclosed as Biri Singh), who were all hiding behind Patel bushes, came out and surrounded them. Gajendra shouted at Mahendra (the deceased) as to why he did not allow the pigs of Jagdish and Mahesh to graze in his field. Upon which, the deceased - Mahendra responded by saying that they would have destroyed his maize crop. On hearing the reply, Gajendra exhorted the other accused persons to finish off Mahendra (deceased) whereafter all four accused took out their knives and after putting the deceased on ground started assaulting him with knives, as a result, the deceased received injury on his neck. Witnessing attack on his son, the informant (P.W.1) cried for help, upon which, villagers, namely, Gulzar (P.W.2); Girraj (not examined); Tara Singh (not examined); and Harveer Singh (not examined) arrived. On seeing them coming, and sensing that the deceased had died, the accused escaped. Thereafter, Mahendra was brought in an injured condition to P.S. Pisawa where the report (Ex. Ka 1) was scribed by Kishan Singh (not examined) on dictation of the informant (P.W.1). After signing the same, PW1 got the first information report (FIR) (Ex Ka 2) registered at P.S. Pisawa at 20:15 hours (8:15 p.m.) which was entered by Head Moharir Ramvir Singh (P.W.3) in the register on 11.7.1987 as case crime no.32 of 1987 for offences punishable under sections 307/324 IPC. Thereafter, P.W.5 – Rajendra Singh Tomar, Investigation Officer (I.O.), proceeded to record the statement (Ex Ka 10) of Mahendra Singh (the injured), under section 161 CrPC, at about 9.00 p.m. However, as the condition of the injured was very serious he was taken to Pisawa hospital.

There no doctor could be found. Hence, he was taken to J.N. Medical College Hospital, Aligarh and was admitted there at about 10.50 p.m. However, he succumbed to his injuries at the hospital at about 11.20 p.m. on 11.07.1987 itself. As the said hospital was under P.S. Civil Lines, Aligarh, information of Mahendra Singh's death was given by the hospital to P.S. Civil Lines, Aligarh, which prepared the inquest report (Ex Ka 12). Thereafter, upon receipt of death report, on 12.7.1987, the offences were altered and Sections 302 read with 34 IPC were added.

The lodging of the FIR was proved by P.W. 1 and P.W.-3. Dr. Mohd. Arshad (P.W.4), who had examined the deceased - Mahendra at the hospital, proved the injury record (Ex Ka 5) and confidential memo (Ex Ka 6) to demonstrate that Mahendra (the deceased) was brought by his brother Mehtab (not examined) to the hospital at 10:50 p.m. on 11.07.1987 as a case of cut-throat (stab injury neck), where he expired at 11:20 p.m.

The post mortem report (exhibit Ka-13) was proved by Dr. R.P. Gupta (P.W.6) of Malkhan Singh Hospital, Aligarh. The post mortem examination disclosed a solitary ante mortem injury as follows:-

*“An incised wound measuring 4 cm x 2 cm (in middle) muscle deep on left side neck, 5 cm above the medial end of left clavicle, oblique in direction. Spindle shaped in figure. Margins are well defined. On exposure, the wound runs towards right side downwards, cutting through and through trachea and oesophagus, reached right side in muscles. Great vessels of right side are also cut.”*

The prosecution examined six witnesses. Only two were witnesses of fact, namely, P.W.1- informant -Todar Singh (father

of the deceased) and P.W.2 – Gulzar. P.W.-3- Ramveer Singh was head moharir at the police station who made GD entry of the first information report; P.W.5 - Rajendra Singh Tomar conducted the investigation; P.W.4-Dr. Mohd Arshad is the doctor who examined the deceased when he was brought to the hospital in the night of 11.07.1987; and P.W.6 - Dr. R.P. Gupta is the doctor who conducted the post-mortem examination.

P.W.4 in his testimony stated that the injured Mahendra Singh was brought to the hospital by his brother Mehtab Singh, where he died at 11:20 p.m. in the night of 11.07.1987 and information of his death was given to P.S. Civil Lines.

P.W.6-Dr. R.P. Gupta proved the post-mortem report which disclosed that post mortem examination was conducted on 12.7.1987 at about 3.30 p.m. and a solitary incised wound was found on the neck region. He stated that, according to his opinion, the deceased died due to excessive bleeding caused by the injury. He stated that it was possible that the deceased died on 11.07.1987 at 11:20 p.m.; that the injury was caused by a knife; and that the injury might have been inflicted at about 6:45 p.m. on 11.07.1987. On cross-examination, he stated that after receipt of such injury though it was possible that the injured might have been able to speak but the probability that he might not have been able to speak is higher. He also stated that if he could have managed to speak then such speech would not have lasted for more than 5-10 minutes after such injury. He stated that the possibility that the injury was caused between 8:30 and 9 p.m. of 11.07.1987 is there.

P.W.1-Todar Singh, who is the informant, reiterated the story narrated in the first information report except that in his testimony he also named the fourth accused, who was left

unnamed in the FIR, as Biri Singh. He stated that all four had assaulted the deceased with knives though the knife blow of Gajendra caused the injury. He stated that he had raised alarm, upon which, Gulzar, Tara, Harveer and Girraj arrived. Seeing them, the accused ran away. As his son was injured and bleeding, he tied a *Tahmat* (head-cloth) on the neck of his son. Thereafter they arranged for a cot and carried the injured Mahendra to P.S. Pisawa where the FIR was written by Kishan Singh on dictation of informant and thereafter informant got it lodged after putting his signature. He disclosed that the deceased had been working as a homeguard and, on the fateful day, he was going to attend his duty at P.S. Pisawa. As regards the motive for the crime, he disclosed that 5-7 days before the incident, pigs of Jagdish and Mahesh had entered the field of the deceased and the deceased had scolded them therefore they had a grudge against the deceased. The fourth accused, namely, Biri Singh, was disclosed as brother-in-law (Behnoi) of Mahesh. P.W.1 stated that he had taken his injured son Mahendra to M.S. Hospital and there he expired at about midnight. He stated that at the time of the incident, there was sunlight.

In his cross-examination, he stated that before inflicting knife blows, the accused persons had exhorted each other and all four had caught hold the deceased and, after putting him down, had inflicted knife blows. He stated that while they were inflicting knife blows, Mahendra Singh was trying to get up and was twisting and moving sideways. He stated that he did not make any attempt to catch hold any of the accused persons while they were inflicting knife blows because he was standing 2-3 paces away and the entire incident just lasted two minutes. He stated that only a single blow was received by the deceased

although all four were trying to inflict blows. He stated that he is not in a position to disclose about the length of the knife. P.W.1 also stated that as soon as Mahendra received knife blow, he had raised alarm. Immediately, thereafter, he stated that he raised alarm the moment Mahendra was pinned down. He stated that Tara Singh and Harveer Singh had arrived before infliction of knife blow whereas rest arrived later. He stated that the field of Gulzar - P.W.2 is at a distance of 60-70 paces from the spot. He stated that the injured was taken on a cot. The cot was brought from Pisawa. He stated that Mahendra got unconscious on receiving knife blow but later regained consciousness and was conscious at the police station. He stated that in the FIR he had specifically disclosed about receipt of solitary knife blow by Mahendra but he does not know as to how it has been written that all four had inflicted knife injuries on the neck. He further stated that he had told the scribe to write that knife blow of Gajendra had caused the injury to his son but the scribe told him that it would result in death penalty. He also stated that the accused Gajendra is a *Jat* whereas the other accused are *Bhangi*.

In his cross-examination, at the instance of Mahesh and Biri Singh, he stated that he had seen Biri Singh earlier but he was not aware of his name and relationship with Mahesh, though, later, after two days, he became aware of his name and relationship on being told by the investigation Officer. In his cross-examination, he stated that the witnesses took 3-4 minutes to arrive after he had raised the alarm. Upon suggestion that Mahesh was falsely implicated because he had refused to lift night soil, he stated that Mahesh and his father never used to clean his toilets. He denied the suggestion that he had not seen the incident or that he had falsely implicated

the accused only because they had stopped cleaning his toilets. He stated that after the incident, about 10 minutes were taken to arrange a cot as from the spot Pisawa was about a kilometer away. He also stated that Harveer, Tara had accompanied him to the Hospital.

P.W.2 - Gulzar Singh stated that he arrived at the spot upon hearing shouts of Gajendra Singh. When he reached there, he found that Gajendra Singh; Jagdish; Mahesh; and Biri Singh were inflicting knife blows on Mahendra Singh (deceased). He stated that he was just 5-7 paces away from the spot but he could not notice as to whose blow caused the injury to the deceased. He stated that at that time Tara, Harveer and Girraj Singh all had arrived and Todar Singh (informant) was shouting. He stated that upon seeing them, the accused escaped. In his cross-examination, he stated that his field is 50-60 yards away; that before his arrival, Todar Singh had arrived; that he, Harveer and Tara arrived simultaneously from different directions; that Girraj arrived later from the village. Harveer and Tara arrived on a Buggy (cart). He stated that when he had arrived there all four accused had put the deceased on the ground and were inflicting knife blows. He stated that he had seen all the accused inflicting knife blows but he is not sure as to who caused the injury. He stated that Mahendra was brought on a cot to P.S. Pisawa. The cot was called from Pisawa. He stated that the distance between Pisawa and the place of occurrence is about four furlongs and that Pisawa is about six furlongs from his village. He stated that about 15-20 minutes were spent in arranging for the cot. He stated that he had been with the deceased till 10 p.m. He denied the suggestion that he has falsely implicated the accused on account of party bandi.

In his cross-examination, he stated that he knew Biri

Singh from before as Biri Singh happens to be the Behnoi (brother in law) of Mahesh. However, his name was not known, which came to be known on the next day. He also stated that Todar Singh had dictated the first information report in his presence and he had informed Todar Singh at that time that Mahesh's brother in law is also one of the persons involved. In his cross-examination, he admitted that Mahesh had been cleaning toilets though he claimed that he never used to clean his toilets. He denied the suggestion that Mahesh was implicated because he refused to lift his toilet's night soil.

P.W.3- Ramveer Singh, Head Moharir (clerk), who made the GD entry of the FIR at P.S. Pisawa, though proved the lodging of the FIR but, during cross-examination, upon suggestion that FIR was ante-timed and was lodged after death of Mahendra, after denying the said suggestion, admitted that on that day other than the concerned FIR only a non-cognizable report was registered at 6:40 am in the morning. He also stated that information / special report of the concerned FIR was sent on 13.7.1987 at about 8.00 am in the morning as in the night no vehicle was available.

P.W.5- Rajendra Singh Tomar, who conducted the investigation, stated that he first recorded the statement of the injured Mahendra Singh; thereafter of the informant Todar Singh and of the scribe Ramveer Singh and, thereafter, he proceeded to the spot, collected samples of blood stained and plain earth and prepared site plan. On his return, on receipt of information regarding death of the injured, the case was converted into one under section 302 / 34 IPC on 12.07.1987. He stated that inquest was carried out by P.S. Civil Lines. He stated that after completing the investigation the charge-sheet was filed under his signature.

In his cross examination, he stated that along with informant and the injured several others had come to the police station. He stated that although the condition of the deceased was serious when he was brought to the police station but he could speak therefore, after lodging of the first information report, his statement was recorded and thereafter he was sent to the hospital. He stated that Mahendra was sent to Pisawa hospital but there the doctor was not available and therefore he was taken to Malkhan Singh Hospital. He stated that the informant had stayed back at the police station whereas the rest had gone to the hospital with the injured. He stated that the injured had a cloth tied around his neck of which possession was not taken by him. He stated that the informant had gone with him to the spot and had remained with him till about 6.30 am (next day morning). He stated that he had reached the spot at about 10.30 p.m. on the night of the incident. The site plan was prepared next day morning, at about 5:45 am. He stated that blood stained earth was found at that spot where, as per the site plan, knife blow is stated to have been inflicted, and at no other place. He stated that the deceased Mahendra was Home Guard posted at P.S. Pisawa and his duty hours were from 6 pm to 4 am. He admitted that he had not noted the location of the fields of Gulzar and Girraj in the site plan.

Upon recall, he stated that the statement of Mahendra (deceased) had been recorded by him. The statement was thereafter exhibited as Ex Ka 10.

In his cross-examination, upon recall, he stated that he had recorded the statement of the injured at about 9 pm and that he took about 20 minutes to record the statement. He stated that he had not taken adequate precaution while

recording statement and that he did not take the signature of the injured on his statement. He stated that when he recorded his statement no other person was present. He stated that the injured was in a fit condition to give his statement. He denied the suggestion that the injured was not in a position to give his statement and that the recorded statement is bogus.

The accused were confronted with the prosecution evidence. They denied the prosecution case in their statement recorded under section 313 CrPC and claimed that they have been falsely implicated.

The trial court on the basis of the evidence produced by the prosecution convicted Jagdish; Mahesh (Appellant) and Gajendra Singh but acquitted Biri Singh by giving him benefit of doubt on the ground of non disclosure of his name or identity in the first information report even though his identity as Behnoi of Mahesh was known. The trial court also discarded the alleged dying declaration recorded by the Investigating Officer by observing that from the medical evidence it becomes clear that the deceased was not at all in a condition to get his statement recorded.

We have heard Sri Sangam Lal Kesarwani and Sri Prem Chandra Yadav for the appellant; the learned A.G.A. for the State; and have perused the record.

Sri Sangam Lal Kesarwani, learned counsel for the appellant, has submitted that according to the prosecution case all four accused were armed with knives and they had put down the deceased on the ground and had inflicted several knife blows and that the incident lasted for about two minutes but the post mortem report of the deceased reveals a solitary incised wound. This would suggest that the incident was not witnessed by the

witnesses and the story was subsequently developed.

He submitted that the presence of P.W.1 on the spot becomes doubtful for the following reasons: (a) his son was being assaulted in front of his eyes yet he makes no attempt to save him; (b) no bloodstained clothes of PW1 have been collected to demonstrate that he had been with the deceased at the time of the incident and had carried the deceased to the hospital; (c) that the medical papers suggests that the deceased was brought to the hospital by his brother - Mehtab Singh and not by PW1, whereas Mehtab Singh has not been examined as a witness. Moreover, it has not been disclosed as to how Mehtab Singh was with the deceased at the time of his medical examination.

He submitted that FIR appears to be ante-timed for the following reasons: (a) no *chitthi majroobi* (letter for medical examination of injured) was prepared and produced by the police and the medical papers also do not disclose that the injured was taken to the hospital with a letter from the police station concerned, which suggests that at the time when the deceased was taken to hospital, no report was in existence and registered at the police station and that after receipt of information about the death, first information report was lodged and the story was developed; (b) the inquest was conducted by a different police station; (c) the inquest papers do not disclose about prior registration of case, rather, it discloses that information was received from the hospital; and (d) that report under section 157 CrPC was given not on 12.07.1987 but on 13.07.1987, that is, after the post mortem examination of the deceased.

He also submitted that from the statement of P.W.1 it appears that Tara and Harveer, who were not examined as

witness, had arrived earlier whereas the remaining witnesses arrived later, which suggests that Gulzar had not witnessed the incident and had arrived later upon getting information about the incident.

It has been submitted that the nature of the incident suggests that some unknown assailant had inflicted injury upon the deceased and had escaped and the story was set up on the basis of suspicion and guess work.

It has been submitted that neither the weapon of assault nor bloodstained clothes, if any, of the accused have been recovered. The prosecution has therefore not been able to establish its case beyond the pale of doubt. He further submitted that the very fact that the police had shown that a dying declaration was recorded when, in fact, the deceased was not at all in a condition to even speak, would go to show that there was an effort to falsely implicate persons to solve out the case as a Home Guard had been the victim.

It was also argued that if the deceased, who was Home Guard deputed at P.S. Pisawa, been brought injured at the police station, it is but natural that a police constable would have accompanied him for medical examination/treatment. But, from medical papers, it appears, he was brought to the hospital by his brother who has not been produced as a witness. He thus submitted that the prosecution has left many questions unanswered, which leaves a lot of doubt about the truthfulness of the prosecution case, hence, the appellant is entitled to the benefit of doubt.

**Per contra**, learned A.G.A. has supported the judgment of the court below by submitting that the first information report was lodged promptly; the doctor in his cross-examination has

admitted that the incident could have occurred on or about the time at which it is purported to have occurred; that the presence of eye-witnesses cannot be doubted as they have appeared from adjoining fields; and that there is no cogent reason brought on record as to why the witnesses would be lying. It has also been submitted that there is no such serious conflict between ocular and medical evidence as very often blows may miss the body of the victim and, therefore, under the circumstances, merely because a solitary injury has been found, the involvement of four persons in the incident cannot be ruled out. Moreover, they have been convicted with the aid of section 34 IPC.

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

Upon consideration of the rival submissions, one of the issues that falls for our consideration is whether the FIR was ante-timed. To find out whether the FIR has been ante-timed certain external checks are there. Some of these checks have been noticed by the apex court in ***Meharaj Singh (L/Nk.) v. State of U.P., (1994) 5 SCC 188***, where, in paragraphs 12 and 13 of the judgment, as reported, it was observed:

*12. FIR in a criminal case and particularly in a murder case is a vital and valuable piece of evidence for the purpose of appreciating the evidence led at the trial. The object of insisting upon prompt lodging of the FIR is to obtain the earliest information regarding the circumstance in which the crime was committed, including the names of the actual culprits and the parts played by them, the weapons, if any, used, as also the names of the eyewitnesses, if any. Delay in lodging the FIR often results in embellishment, which is a creature of an afterthought. On account of delay, the FIR not only gets bereft of the advantage of spontaneity, danger also creeps in of the introduction of a coloured version or exaggerated story. With a view to determine whether the FIR was lodged at the time it is alleged to have been recorded, the courts generally look for certain external checks. One of the checks is the receipt of the copy of the FIR, called a special report in a murder case, by the local Magistrate. If*

this report is received by the Magistrate late it can give rise to an inference that the FIR was not lodged at the time it is alleged to have been recorded, unless, of course the prosecution can offer a satisfactory explanation for the delay in despatching or receipt of the copy of the FIR by the local Magistrate. Prosecution has led no evidence at all in this behalf. The second external check equally important is the sending of the copy of the FIR along with the dead body and its reference in the inquest report. Even though the inquest report, prepared under Section 174 CrPC, is aimed at serving a statutory function, to lend credence to the prosecution case, the details of the FIR and the gist of statements recorded during inquest proceedings get reflected in the report. The absence of those details is indicative of the fact that the prosecution story was still in an embryo state and had not been given any shape and that the FIR came to be recorded later on after due deliberations and consultations and was then ante-timed to give it the colour of a promptly lodged FIR. In our opinion, on account of the infirmities as noticed above, the FIR has lost its value and authenticity and it appears to us that the same has been ante-timed and had not been recorded till the inquest proceedings were over at the spot by PW 8.

13. *It appears that it was a blind murder and none of the eyewitnesses were actually present at the scene. The ante-timing of the FIR was obviously made to introduce eyewitnesses to support the prosecution case.....”*  
(Emphasis Supplied)

Though in several subsequent decisions the apex court has held that no time-limit for a report under section 157 CrPC could be specified as a rule and that mere absence of mention of crime number in inquest report or medical papers by itself is not significant to discard the FIR as ante-timed or to disbelieve the prosecution case, if otherwise the substantive evidence brings home the charge without reasonable doubt (vide **Mahmood v. State of U.P., (2007) 14 SCC 16; Jaishree Yadav v. State of UP, (2005) 9 SCC 788**), but, it is equally well settled that each case would have to be tested on its own facts and circumstances derived from the evidence led. In cases where the substantive evidence led throws questions that are left unanswered or leaves out gaps in the prosecution story, such latches, as noticed in **Meharaj Singh's case**

**(supra)**, may assume importance as to whether benefit of doubt is to be provided to the accused.

In the instant case, we find that the injuries sustained by the deceased were very serious inasmuch as his Trachea as well as Oesophagus, including the main vessels, were cut which, in ordinary course, would result in heavy bleeding and severe pain as well as shock. The doctor (P.W.6) who carried out the post mortem examination was of the view that with such an injury ordinarily the victim would not be in a position to speak and, if he could, that capacity would not last beyond 5 to 10 minutes from the time of infliction of the injury. The doctor (P.W.6) accepted the possibility that the injury sustained by the deceased might have been caused between 8.30 p.m. and 9.00 p.m. of 11.7.1987, though he did not rule out the possibility of the injury being caused at the time stated by the prosecution. What assumes importance is that the nature of the injury suffered by the deceased was such that the normal course of human conduct, particularly, of father or close relative of the injured, would be to rush the injured to the hospital straight away for immediate medical attention rather than to take him to the police station and wait there for over an hour. The medical papers disclose that the injured was brought to the hospital by Mehtab Singh and not by the police, without any *chitthi majroobi*, which is suggestive of the possibility that the injured was rushed to the hospital straight away. This possibility gets credence from other circumstances noticed herein after. The deceased was a home guard posted at P.S. Pisawa. If he had been brought in an injured condition at that police station, the least that was expected is that a constable would have been deputed to accompany him to the hospital. As per medical papers/ evidence, deceased's brother, Mehtab Singh, brought

him to the hospital. Though the I.O. (P.W.5) stated that a constable had gone to the Pisawa hospital and he returned because doctor could not be found there, but neither the name of that constable is disclosed nor Mehtab, whose name finds mention in medical papers, has been examined. Interestingly, the inquest proceeding was conducted at the hospital by the police of P.S. Civil Lines on information given by the hospital. Had there been information to the hospital that FIR has already been lodged at P.S. Pisawa there was a possibility of information being provided to that police station. Neither any one from police station Civil Lines nor any of the witnesses of inquest proceeding has been examined. Importantly, PW1 and PW2 are not Panch witnesses.

From the testimony of the doctor (P.W.6) the possibility of recording the statement of the injured by P.W.5 is ruled out, if the incident had occurred at 6.45 p.m. because the deceased could not have had sustained his speaking capacity beyond 5 to 10 minutes post the incident so as to enable the I.O. (P.W.5) to record his statement at about 9.00 pm. and, that too, for about 20 minutes, as is the claim of P.W.5. This circumstance is suggestive of two possibilities. One that the incident did not occur at 6.45 p.m., as alleged, and the other is that the dying declaration is bogus. What was the reason to show that the statement of the injured was recorded. Perhaps, the answer of that can be found in the alleged statement of the injured (Ex. Ka 10), which has been discarded by the court below.

On perusal of Ex Ka 10, the alleged statement of the injured made before his death, we find that it makes an effort to explain the absence of more than one injury on the injured as also to bring out the name of the fourth unnamed person, namely, Biri Singh. This clearly signifies that the I.O. had tried

to fill in the gaps in the prosecution case, after getting information, by setting up the statement of the deceased.

Further, we may observe that if the I.O. had recorded the statement of the deceased and had come to know about the identity of the fourth person there was no reason for him not to disclose this fact to the informant then and there at the police station itself on 11.07.1987. The informant (P.W.1), on the other hand, in his cross-examination, at the instance of Mahesh, stated that he came to know about the involvement of Biri Singh through the I.O. about 2 days later. This discrepancy not only throws doubt about recording of the dying declaration but is also suggestive of the probability that the I.O. filled up the police papers some time later to suit the prosecution case.

Another feature which is worthy of notice is that the I.O. (PW5) stated that the informant stayed with him till next day morning and in the night of 11.7.1987 itself he went to the spot and took blood stained earth and plain earth samples. The fard (Ex-Ka-7) of that recovery discloses Chhido Nath and Vijendra Singh as witnesses of recovery. Both of them have not been examined. Interestingly, PW1 states that from P.S. Pisawa he had brought the injured Mahendra to M.S. Hospital. If that was so, then how could he have stayed back at the police station as claimed by the I.O. so as to enable him to visit the spot and collect blood stained earth, etc in the night of 11.07.1987.

When we see the prosecution evidence in its entirety and the aspects discussed above, ante-timing of the FIR or the incident cannot be ruled out. The statement of P.W.3 that prior to the registration of the concerned FIR only one non cognizable report had been entered in the morning of that day (11.07.1987) at the police station concerned shows that there was sufficient scope in the General Diary to make entries

without the necessity of overwriting or interpolation.

Now, we shall proceed to examine the reliability of the ocular evidence. P.W.1 is the father of the deceased. He claims himself to be an eye witness. He, in his FIR as well as statement in court, states that four accused surrounded the deceased, pinned him down, took out knives and inflicted him blows. As against multiple knife injuries a solitary incised wound has been found. Even assuming that few blows may have missed but when some one is pinned down and his entire body is available for attack it is quite unbelievable that all the blows would miss. This discrepancy, PW1 sought to explain by stating that he tried to tell the scribe of the FIR that only the blow of Gajendra had caused the injury but the scribe retorted that it would result in death penalty. If P.W.1 had seen the incident and was convinced about what he saw why would he agree to dilute the case against Gajendra. Further, P.W.1 stated that after infliction of injury the deceased stood up, ran few paces and then fell down unconscious and, thereafter, regained consciousness and was also able to speak. Interestingly, I.O. (PW 5) stated that he could find blood at only one spot. When we appreciate the statement of P.W.1 in the light of the statement of the doctor that the deceased could not have sustained his speech faculty for more than 5 to 10 minutes after the injury, the statement of P.W.1 does not at all inspire confidence. Doubts as regards the presence of P.W.1 at the place of occurrence also surface from the medical papers which indicate that Mehtab Singh, son of P.W.1, who has not been examined, brought the deceased to the hospital. P.W.1 did not make any effort to save his son and has suffered no injury. Link evidence such as blood stained clothes of the informant to show that he has been with the deceased have not been

collected and produced. No doubt, every person may react differently to a given situation and therefore absence of effort on the part of informant to save his son may not be a clinching circumstance to discredit him but when all the circumstances are put together, including attribution of role of inflicting knife blows on the deceased to four persons as against solitary injury found on his body, they throw a serious doubt about the presence of P.W.1 on the spot at the time of occurrence. Further, it may be noticed that though P.W.1 states that he had been to the hospital with his son (injured) but the Investigating Officer states that P.W.1 had stayed at the police station. Under the circumstances, the statement of P.W.1 does not inspire confidence to enable us to uphold conviction of the accused persons.

The statement of P.W. 2 falls in the same category. More over, he appears to be a chance witness who came to the spot on hearing cries. He has neither accompanied the deceased to the hospital nor has been an inquest witness. He also states that all four accused pinned down the deceased and inflicted knife blows, which is in conflict with medical evidence as noticed above. That apart, from his testimony, it appears that he had informed the informant before lodging of the FIR that fourth accused was Behnoi of Mahesh but, interestingly, there is no such mention in the FIR, which is suggestive of the fact that he may not have been there with the informant till the time of lodging of the first information report. Thus, his testimony also does not inspire confidence to enable us to sustain the conviction.

Apart from above, there is another unexplained gap in the prosecution story which is as to why Gajendra would espouse the cause of the other three co-accused more so when

Gajendra was Jat by caste and the others were members of lower caste (Bhangi).

When we test the prosecution case on all the aspects discussed above and keep in mind that four persons have been nominated with identical role of pinning down the deceased and inflicting blows on him with knives as against solitary injury found on the deceased, we get the feeling that the prosecution case is not only embellished but also highly exaggerated. In this context, it would be useful to refer to the observations made by the apex court in ***Dinesh and Another V. State of Haryana (Criminal Appeal No. 1076 of 2000, decided on October 10, 2001) reported in (2015) 17 SCC 804***. In paragraph 17 of the judgment, as reported, it was observed: *“If the prosecution has tried to implicate three persons-- the father and the two sons, while only one or two of them might have assaulted the injured Santra Devi and positive role is assigned to the three accused persons, which is not corroborated by medical evidence, the court is left guessing about the exact number of assailants and the manner in which they may have assaulted the injured. The present one is the case where a little grain has been mixed up with so much of chaff that it is almost not possible to separate the grain. Though a court of facts is obliged to make an effort at finding out the truth by separating it from the falsehood, but, on finding it not possible to do so, it is not permissible for the court to spin out altogether a new case, different from the one alleged by the prosecution, and to convict the accused.”* In the light of the decision noticed above, when we take a conspectus of the prosecution evidence it appears to us that so much of chaff has been mixed with the grain that it becomes almost impossible to sift the grain from the chaff. The benefit of which would have to

be extended to the accused. We are therefore of the considered view that the prosecution has failed to establish the guilt of the accused beyond the pale of doubt. The appellant's conviction is therefore unsustainable.

The contention of the learned AGA that the defense was not successful in establishing motive for false implication therefore the prosecution case was worthy of acceptance is unacceptable simply for the reason that the ultimate burden to prove the guilt beyond the pale of doubt is on the prosecution. The prosecution evidence is not to be accepted as gospel truth merely because no sufficient motive is shown for false implication. It may be observed that the apex court in ***Shankarlal Gyarasilal Dixit v. State of Maharashtra, (1981) 2 SCC 35 (paragraph 35)*** had observed that *“different motives operate on the minds of different persons in the making of unfounded accusations. Besides, human nature is too willing, when faced with brutal crimes, to spin stories out of strong suspicions.”* Under the circumstances, the prosecution evidence has to be tested before its acceptance and conviction is to be recorded only when it is found reliable. Where doubts arise about the truthfulness of the prosecution evidence, the benefit of doubt would always go to the accused.

Thus, for all the reasons recorded above, the appellant is entitled to the benefit of doubt. The appeal is **allowed**. The judgment and order dated 13.02.1991 passed by the 1st Additional Sessions Judge, Aligarh in Session Trial No. 662 of 1987 convicting and sentencing the appellant is hereby set aside. The appellant is acquitted of the charge. If the appellant is on bail, he need not surrender.

Let a copy of the order as well lower court record be sent

to the court concerned for compliance.

**Order Date :-18.09.2019**

Sunil Kr Tiwari