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Judgment reserved on 24.09.2019.

Judgment delivered on 29.11.2019.

Court No. 1

Criminal Appeal No. 5018 of 2009.

Mashook & Others vs. State of U.P.

Connected with

Criminal Appeal No. 4699 of 2009

Shafique and another vs. State of U.P.

Hon'ble Ramesh Sinha, J.

Hon'ble Ajit Kumar, J.

(Delivered by Ramesh Sinha, J.)

1. As both the appeals arise out of same judgment and order, hence the same are hereby decided by this common judgment and order.

2. The present appeals have been directed against the judgment and order dated 29.7.2019 passed by Additional Sessions Judge, Court No. 7 Saharanpur in S.T. No. 738 of 2007 State vs. Mashooq and others by which all the appellants have been convicted under section 147 I.P.C. and sentenced to undergo one year imprisonment with a fine of Rs. 1,000/- whereas all the appellants have been convicted under section 148 I.P.C. and sentenced to undergo two years R.I. with a fine of Rs. 1,000/- further all the appellants have convicted under section 302/149 IPC and have been sentenced to undergo life imprisonment with a fine of Rs. 15,000/- whereas appellant nos. 1 and 4 have been convicted under sections 25/4 Arms Act and have been sentenced to undergo one year imprisonment and a fine of Rs. 2,000/- and appellants nos. 2 and 3 have been convicted under section 25 Arms Act and have been sentenced to under one year imprisonment and a fine of Rs. 2,000/-

Appellants Shafique and Babar were also convicted under section 147 I.P.C. and sentenced for one year R.I. with a fine of Rs. 1000/- and also convicted under section 148 I.P.C. for 2 years R.I. with a fine of Rs. 1,000/-. All the sentences have been ordered to run concurrently.

3. As per the report of the C.J.M., Saharanpur dated 13.9.2019, the appellant Shafique died during the pendency of the appeal on 19.12.2009, hence the appeal on his behalf is abated and the Court proceed to hear the appeal on behalf of other appellants.

4. The prosecution case in nutshell is that a written report (Ext. Ka.1) was submitted by one Arshad son of Sadiq resident of Sarsava, District Saharanpur which was written by one Gulzari Lal stating that on 28.4.2007 at about 8 p.m. his brother Gayyur son of Sageer after offering Namaz in the Mosque was returning to the house and when he was about enter in the house at the door, the accused persons, namely, Mashooq, Mahfooz, Sonu sons of Mahbeeob @ Bobby, Shafiquee son of Hafeez, Babar son of Shafiquee and Iliyas son of Mumtaz all residents of Mohalla Mirdhan, Qasba & police station Sarsawa, District Saharanpur, who were armed with sword and saria, standing from before with a common object to kill assaulted Gayyur on his neck, face and abdomen, who was badly injured because of earlier enmity. On raising alarm by him Galib, Usman, Ashraf, Naeem and Nisha-sister of Gayyur and Razia wife of Gayyur arrived at the place of occurrence and the said incident was witnessed by them in the light of torch. Thereafter, Gayyur was taken to the District hospital Saharanpur in injured condition but on the way he succumbed to his injuries. The dead body of the deceased was kept in the hospital. The written report was

submitted by P.W. 1 Arshad at police station Sarsawa for taking appropriate action against the accused persons.

5. In pursuance of the written report submitted by P.W. 1 Arshad on 28.4.2007, an F.I.R. (Ext. Ka.2) was registered on the same day at 22:40 p.m. at police station Sarsawa against the accused persons which was registered as case crime no. 138 of 2007 for the offence under sections 147, 148, 149 and 302/34 I.P.C. The F.I.R. was also endorsed in the G.D. No. 43 (Ext. Ka. 3) at 22:40 p.m. The police reached the place of occurrence and inquest on the dead body of the deceased was conducted on 28.4.2007 Ext. Ka 20. The other police papers were prepared such as police form No. 13 Ext. Ka. 31, Challan Lash Ext. Ka. 21, Photo Lash Ext. Ka. 22, letter to R.I. Ext. 23, letter to C.M.O. Ext. Ka. 24. The investigating officer made a spot inspection of the place of occurrence and prepared the site plan Ext. Ka. 25 and also collected the simple soil and blood stained soil from the place of occurrence Exts. Ka 4 and 5. The post mortem of the deceased was conducted on 29.4.2007 Ext. Ka. 19. The investigating officer recorded the statement of the witnesses under section 161 Cr.P.C. and submitted charge-sheet against 10 accused persons, i.e, six accused persons named in the F.I.R., i.e., the appellants, along with four other accused persons, namely, Rashid, Sajid, Intezar and Sabez under section 147, 148, 149, 302/34 I.P.C Ext. Ka. 39.

6. On 7.5.2007, the appellant Iltaf @ Altaf was arrested by the police and from his possession weapon of assault, i.e., knife and Maruti Van bearing registration no. HR-01 H 8925 was recovered and fard recovery memo of the same was prepared and Ext. Ka. 27. On the basis of said fard recovery memo, an F.I.R. was registered against Iltaf @ Altaf on 7.5.2007 under

section 4/25 Arms Act Ext. Ka 12 and the same was also endorsed in the G.D. No. 15 which was proved as Ex. Ka 13. The investigating officer prepared the site plan of the recovery and Ext. Ka 37. Charge-sheet was submitted against accused Iltaf @ Altaf under section 25/4 Arms Act Ext. Ka. 18. On 8.5.2007, the appellants Mashooq, Mahfooz and Sonu were arrested by the police and from the possession of Mashooq a country made pistol of 315 bore along with two cartridges were recovered and from the possession of Mahfooz and Sonu a sword was recovered. Fard recovery memo of the weapons recovered from the said accused were prepared Ext. Ka. 20. The same was also endorsed in the G.D. dated 8.5.2007 at 16:30 p.m. Ext. Ka 14. On the basis of said recovery memo three separate F.I.Rs., i.e., case crime nos. 153 of 2007, 154 of 2007 and 155 of 2007 were registered against three appellants under section 25 Arms Act and 4/25 Arms Act respectively which were endorsed in G.D. No. 32 marked as Ex. Ka. 16. The site plan of the place of recovery was also prepared by the investigating officer Ext. Ka. 31.

7. After finding sufficient evidence against the said three accused, charge-sheet was submitted against accused Mashooq under section 25/4 Ext. Ka. 34, against accused Mahfooz under section 25 Arms Act Ext. Ka. 35 and against accused Sonu under section 25 Arms Act Ext. Ka. 36 and requisite sanctions for their prosecution under the Arms Act was also obtained from the District Magistrate Saharanpur Exts. Ka. 29 and 30 respectively. Thereafter the case was committed to the Court of Sessions. The trial court framed charges against the accused appellants on 11.12.2007 under section 147, 148, 149, 302 I.P.C. On 11.1.2008 against accused appellants charges were

framed for the offence under section 120B I.P.C. along with co-accused Rashid, Sajid, Intezar and Sabez. The accused denied the charges and claimed their trial.

8. The charges were also framed against accused Mashooq and Iltaf @ Altaf under section 25/4 Arms Act and against accused Mahfooz and Sonu under section 25 Arms Act on 14.11.2009 and the said case was also committed to the Court of Sessions. The accused pleaded not guilty and claimed their trial.

9. The prosecution in support of its case has examined P.W. 1 Arshad-the informant of the case, P.W. 2 Nisha wife of Ghalib, P.W. 3 Mohammad Usman, P.W. 4 Constable Pramod Kumar, P.W. 5 Constable Peepan Singh, P.W. 6 Dr. R.K. Goel, P.W. 7 S.I. Sripal Rana, P.W. 8 Irfan and P.W. 9 Rishiram Katheria.

10. The accused in their statement under section 313 Cr.P.C. have denied the prosecution case. They have stated that the witnesses have falsely deposed against them and due to enmity they have been falsely implicated.

11. P.W. 1 Arshad in his deposition before the trial court has stated that appellants Mashook, Mahfooz, Sonu, Shafiquee, Babar and Iltaf @ Altaf, who are accused in the present case are known to him as they are residents of Mohalla Mirdhan Sarsawa and all the accused are related to each other. The deceased Gayyur was an accused in the murder case of Mahmood @ Bhure and was facing trial in the court of Saharanpur for the last 16-17 months prior to the incident in which Gayyur was on bail. Mahmood was a historysheeter and was having enmity with deceased Gayyur. On 28.4.2017, i.e., on the day of incident, the witnesses was present at the house of

Gayyur. At 8 p.m. in the evening, Gayyur after offering Namaz in the Mosque was returning to his house and when he reached near his house the accused Mashooq, Mahfooz, Sonu, Babar and Iltaf @ Altaf came out of whom accused Sonu and Mahfooz were armed with country made pistol, accused Mashooq and Iltaf @ Altaf were armed with sword and Shafiquee and Babar were armed with sharp edged saria and with an intention to kill Gayyur assaulted him with their respective weapons on account of which Gayyur received serious injuries on his person. On the alarm raised, the witnesses, namely, Ghalib, Usman, Ashraf, Nisha sister of Gayyur, Razia wife of Gayyur and Margoob brother of Gayyur arrived, who saw the incident in the electric light. The accused thereafter fled away in a Maruti Van which was parked nearby. At the place of occurrence blood was lying. On account of receiving of injuries, the condition of Gayyur was deteriorated. He was taken to Saharanpur hospital but on the way he died. His body was kept in the hospital. He got the report of the incident written by a boy. He wrote the same whatever he told to him. Thereafter he put his signature on the same and gave it at police station Sarsawa. After seeing paper no. 5, he proved the said written report as Ext. 1. He deposed before the trial court that he told the scribe of the report about the fact that Gayyur was assaulted by firearm but on account of hurry he forgot to mention the same, hence he told the same to the S.I. at police station in his statement recorded under section 161 Cr.P.C.

12. In his cross examination, the witness has stated that he studied upto 3-4 classes. He had put his signature on the written report (Ext. Ka.1) without reading the same and the person,

who wrote the written report had not read out the same to him. He has submitted the written report at police station at 10:30-10:40 p.m. At that time the Station Officer was present at the police station. After he submitted the written report, the investigating officer recorded his statement. The witnesses has stated that he is resident of village Kunda from where Sarsawa is 3 kms. away. The agricultural work is done from Kunda and elderly people of his family used to reside at Kunda. He has no rented accommodation in Sarsawa. He is still unmarried. He denied the suggestion that the accused Shafiquee was not related to accused Mahfooz and others. He was not aware of the fact that whether the name accused Iltaf @ Altaf is in the voter list of Sarsawa or not neither he is having any knowledge about his having any ration card. Iltaf @ Altaf used to reside in Sarsawa on rent. Prior to the present incident, the deceased Gayyur was facing criminal trial under section 302 I.P.C. for the murder of Mahmood and there was also another case on Gayyur for the murder of Dr. Kamil and his wife in which a compromise was entered between the parties. He denied the suggestion that Gayyur was amongst top 10 criminals of police station Sarsawa. Gayyur had also faced trial for the murder of son of Dr. Kamil, namely, Pappu in which also compromise took place between the parties. The second son of Dr. Kamil was Arshad. Gayyur had 100 bighas of land on which witness was engaged in the agricultural work. Gayyur had two children aged about 2 and 5 years respectively. He stated that in the F.I.R. he had written that he was present in the house and if the same has not been mentioned in the F.I.R. he could not tell any reason for the same but he told about the same to the investigating officer in his statement under section 161 Cr.P.C.

He had further mentioned in the F.I.R. that accused Shafiquee and Babar were armed with sharp edged weapon if the same has not been mentioned in the F.I.R. he could not tell any reason about the same. The thickness of saria was about 3" but the same was not sharp edged. The sword was three feet long. Accused Iltaf @ Altaf was also having a small sword. Accused Iltaf @ Altaf and Mashooq both of them had assaulted the deceased with their respective weapons four times each. At the time of incident, he was at a distance of 10-12 paces from the place of occurrence. Mosque is about 150 paces from the place of occurrence towards West. All the witnesses reached the place of occurrence on hearing the alarm and he was the first person to reach the place of occurrence and thereafter the sister of Gayyur, namely, Nisha, Razia wife of Gayyur came together and after that Ashraf, Naim, Usman, Ghalib and other witnesses reached at the place of occurrence. Margoob also reached thereafter. The house of Usman is near the house of deceased Gayyur. The witness made an effort to save the deceased but the accused pointed country made pistol on him. The scribe of the report had met him all of sudden and he was not known to him. He was resident of Yamunanagar. He had written the same what was dictated to him. Before signing the report it was not read out to him as he was in hurry and disturbed.

13. P.W. 2 Nisha wife of Ghalib, who is sister of deceased Gayyur has supported the prosecution case as has been stated by P.W. 1 and she deposed before the trial court that on 28.4.2007 she had come to her brother's house as on the next day her brother Margoob's engagement ceremony was to be solemnized in district Meerut and other relatives had also assembled in the house for the said purpose. On the night of the

incident, she along with sister-in-law Razia and brother of his Bua, namely, Arshad were having conversation while sitting in courtyard (Sahan). While, his brother Gayyur after offering Namaz in the Mosque was coming to the house accused Mashooq, Mahfooz, Sonu, Babar and Iltaf @ Altaf came together and assaulted him with their respective weapons. Accused Sonu and Mahfooz were armed with country made pistol, accused Mashooq and Iltaf @ Altaf were armed with sword and Shafiquee and Babar were armed with saria on account of which he was badly injured. On the alarm raised, Ghalib, Usman, Margoob and Ashraf arrived and witnessed the said incident in the light of invertor. The accused fled away in a Maruti van and when she saw her brother in a pool of blood she was frightened and her condition became bad. At the place of occurrence blood was lying. In the injured condition, his brother was taken to Saharanpur hospital but on the way he succumbed to his injuries.

14. In her cross examination, the witness has stated that she had come to the house of the Gayyur three days prior to the incident. The investigating officer had taken her statement under section 161 Cr.P.C. at the house of Gayyur. After the incident the police had arrived. She had told the investigating officer that his brother Margoob's engagement was to be solemnized at Meerut with the daughter of Sadiq. The distance between the main door of the house and the place of occurrence is about 10 paces. On hearing the fire shots all of us reached at the place of occurrence.

15. P.W. 3 Mohammad Usman in his statement recorded before the trial court, has supported the prosecution case and deposed that on 28.4.2007 at about 8 p.m. he along with Ghalib

was returning from market and when they reached near the house of Gayyur then they saw that Mahfooz and Sonu were firing shot at Gayyur whereas accused Mashooq and Iltaf @ Altaf armed with Sword, Shafiquee and Babar armed with saria were assaulting Gayyur with their respective weapons mercilessly on account of which his condition became critical. Beside him, the said incident was witnessed by Ashraf, Arshad, Naim, Nisha sister of the deceased, Razia wife of the deceased in the electric light. The accused fled away along with their weapon in a Maruti van which was parked near the place of occurrence. Gayyur was rushed to Saharanpur hospital in a critical condition where he was declared dead.

16. In his cross examination, the witness has stated that he is the son of real Tau of Gayyur and at the time of incident he was returning from market along with Ghalib. The witness used to do Imamat in the Mosque. The Mosque was situated in the Bazar. His statement under section 161 Cr.P.C. was recorded by the Investigating officer after one month of the incident and thereafter the statement of Ghalib was recorded by the investigating officer. He had come to the market with Gayyur. No one tried to rescue the deceased as the accused had pointed country made pistol on them on account of which they were frightened and did not say anything. He has seen sharp edged saria which was 1 and 1/2 inches thick and three feet long in the hands of Shafiquee and Babar. He denied the suggestion that on account of the fact that he was the brother of the deceased he is falsely deposing against the accused.

17. P.W. 4 Constable Pramod Kumar, who is the formal witness has stated before the trial court that on 28.4.2007 on the written report submitted by Arshad, he prepared the chik F.I.R.

in his writing and proved the same as Ext. Ka-2 and further endorsed the same in the G.D. in his writing and original copy and carbon copy of the same has been proved by him as Ext. Ka 3. He has proved various police papers as Exts. 4 to 18 at regular intervals.

18. In his cross examination, the witness has admitted that the deceased was a history-sheeter registered at his police station. There is a history-sheet opened against him being History-sheet No. 31A. He further deposed that the station officer immediately after registration of the F.I.R. has left for the place of occurrence. The distance of police station from the place of occurrence is about 700-800 meters.

19. P.W. 5 Constable Peepan Singh in his deposition has stated that on 28.4.2007 and 29.4.2007 he was posted at police station Sarsawa as Constable and the inquest of the dead body of the deceased Gayyur was conducted by the S.I. Sripal Rana, who had appointed Punch witnesses in his presence and sent the dead body of the deceased Gayyur to mortuary at district hospital Saharanpur. The dead body was sealed there and sample seal was also prepared along with other police papers and the same was handed over to him along with constable Pramod Kumar for being handed over to the doctor for conducting postmortem so long as the dead body was in sealed condition.

20. P.W. 6 Dr. R.K. Gautam has stated before the trial court that on 29.4.2007 he was posted at District Hospital as Medical Officer (Chest Officer) and at 12:30 p.m. in the afternoon he conducted the post mortem of the deceased and found following injuries on his person:-

"1. *Incised wound 8 cm. x 1.5 cm. x bone deep on the left*

frontal region with fracture of underlying bone.

2. *Incised wound 15 cm. x 3 cm. bone deep in the left mandible region and left lateral surface of neck and fracture of mandible.*

3. *Incised wound 6 cm x 2 cm. on the lateral surface of left side neck.*

4. *Incised wound 3 cm. x 1 cm. on the lateral surface of pharyngeal region on the left. side.*

5. *Incised wound 10 cm. x 4 cm. on the post surface of right side neck.*

6. *Incised would 14 cm x 4 cm on the Rt mandible region with fracture of Rt. mandible.*

7. *Gunshot wound of entry 3 cm. diameter on the lateral surface of right upper arm in the deltoid region with fracture of Rt. humerus.*

8. *Gunshot wound of exit 2 cm. diameter on the medial surface of right upper arm, margin inverted.*

9. *Gunshot wound of entry 1.5 cm. diameter on the lateral surface of right side chest. margin inverted.*

10. *Incised wound 8 cm. x 1 cm. on the outer surface of abdominal wall 5 cm. above the umbilicus.*

11. *Incised wound 7 cm. x 1 cm. on the outer surface of abdominal wall 4 cm. below umbilicus, margin of wound clean.*

12. *Gunshot wound of entry 2.5 cm. diameter on the base of skull.*

13. *Incised wound 23 cm. x 3 cm. on the outer surface of upper part of outer surface of thigh.*

14. *Incised wound 8 cm. x 3 cm. on the outer surface of middle of 1/3 of left thigh.*

15. *Incised wound 8 cm. x 2 cm. on the outer surface of right leg 20 cm. below the right knee joint.*

16. *Incised wound 5 cm. x 1 cm. on the outer surface of right leg 30 cm. below the right knee joint.*

17. *Gunshot wound of entry 3 cm. diatere on the lat surface of upper part of right thigh."*

21. He has proved the post mortem report as Ext. Ka-19.

22. On internal examination he found various bones of the body including parietal bone etc. to be fractured. The lungs the chest were also lacerated. Metallic bullet was recovered from the left side of the lung. One metallic bullet was embedded in the brain tissue.

23. He has stated that the death of the deceased had taken place on 28.4.2007 at 8:00 p.m. Out of the injuries found on the

dead body of the deceased, injury nos. 1 to 6 and 10, 11, 14 and 16 were of sword, knife and sharp edged saria and injury nos. 7, 8, 12 and 17 could be caused by fire arm weapon.

24. In his cross examination, he has stated that there was no blackening or charring on the gun shot injury. He could not tell the distance by which the fire was shot at the deceased. The injuries on the body of the deceased could be also caused by sharp edged weapon.

25. P.W. 7 S.I. Sripal Rana on being examined by the trial court has deposed that on 28.4.2007 he was posted as Sub Inspector and on the instruction of Station Officer Sarsawa he prepared the inquest report of the dead body of the deceased in his writing and proved the same as Ext. Ka. 20. He has also prepared other police papers such as challan lash (Ext. Ka 21), photo lash (Ext. Ka 22), letter to R.I. (Ext. Ka 23), letter to C.M.O. (Ext. Ka 24). Took the soil sample on the spot and thereafter handed over the dead body of the deceased to Constable Peepan Singh and Pramod Kumar for being taken for post mortem.

26. In his cross examination, the witness has stated that in the inquest report in the column of injuries received by the deceased, he has not mentioned about the gun shot injury. He stated that if the same would have been there then he would have written the same. He stated that the witness of the inquest have not tell him anything about the incident.

27. The said witness was again recalled on 23.3.2009 and his statement was recorded in which he has stated that the sanction for prosecution of accused Mahfooz and Sonu under section 25 Arms Act was taken by the then District Magistrate and he has proved the prosecution sanction of accused Mahfooz as Ext. Ka

29 and the prosecution sanction of accused Sonu as Ext. Ka 30. He has also made a spot inspection and prepared the site plan. The original site plan is in the file of Mashook and carbon copy of same is in the file of Mahfooz. He proved the same as Ext. Ka 31 and 32. He proved the site plan of Sonu as Ext. Ka. 33. After investigation charge-sheet was submitted against the said three accused under the Arms Act which were marked as Exts. Ka. 34 to 36. He has also investigated the F.I.R. of case crime no. 151 of 2007 registered against Iltaf @ Altaf. During investigation, he prepared the copy of the F.I.R., G.D., recorded the statement of Rishiram Katheria, the informant of the case and other police personnel, site plan of the place of occurrence and marked as Ext. Ka. 37 and submitted charge-sheet under section 25/4 Arms in his writing which is Ext. Ka. 38.

28. The station officer Brijesh Kumar was posted along with him and he has seen him working and he was acquainted with his hand writing and signature thus he proved the charge-sheet (Ext. 39) which was submitted by him in case crime no. 738 of 2007 under section 147, 148, 149, 302/34 and 120B I.P.C.

29. P.W. 8, who is the witness of fact had turned hostile and not supported the prosecution case.

30. He in his cross examination has stated that the investigating officer has not recorded his statement, if the same has been recorded, he could not tell any reason about the same.

31. P.W. 9 Rishiram Katheria was examined by the trial court and he has stated that he was posted as Station Officer at police station Sarswa on 28.4.2007 and in his presence the F.I.R. of the present case was registered on 28.4.2007. He has taken the C.D. and copy of the chik F.I.R. and G.D. He recorded the statement of Head Moharrir Pramod Kumar and the informant Arshad at

police station had proceeded to the place of occurrence along with Sub Inspector Sripal Rana and other police personnel. He had also instructed S.I. Sripal Rana to prepare the inquest report of the dead body of the deceased Gayyur. He found the light of invertor at the house of the deceased Gayyur where the tubelight and bulbs were on. He inspected the place of occurrence at the pointing out of the informant and prepared the site plan in his writing and signature and proved the same as Ext. Ka. 25. He collected the plain and blood stained soil from the place of occurrence and prepare the sample seal in his writing and signature and marked as Ext. Ka 26, recorded the statement of the brother of the deceased, namely, Margoob and Naim at 12 p.m. in the night. On 29.4.2007, he went to the hospital where S.I. Sripal Rana, who prepared the necessary papers and got the dead body of the deceased sealed. He also recorded the statement of Irfan, Sajid and Zulfiquar, who were in the hospital, who had stated about the conspiracy of the murder of the deceased. They told that there was dispute between Mahmood @ Bhure and Gayyur with regard to some election, hence Mahmmod @ Bhure had assaulted Gayyur but fortunately Gayyur survived and Mahmood was killed by Gayyur. On 25.4.2007, they have stated that Rashid called a meeting at his house and had given country made pistol and knife to Mashook, Mahfooz, Sonu and Iltaf @ Altaf which was brought by Sajid and Intezar and on 28.4.2007 the incident took place. Gayyur was in a critical condition as he had suffered injuries of country made pistol, knife and sword by which he was assaulted and was succumbed to his injuries while being taken to the hospital. He has recorded the statement of Arshad under section 161 Cr.P.C. and added the offence under section

120-B I.P.C. On 3.5.2007, he came to house of the informant and recorded the statements of Smt. Razia and Nisha. He further arrested accused Iltaf @ Altaf on 7.5.2007 at 8:15 a.m. and recovered a Maruti Van bearing registration no. HR 01 H 8925 from Chilkana road near Grahmin turning. From his possession a knife was also recovered description of which has already been given in the fard recovery memo and when he was questioned about the license for having possession of the same he could not give the same. He prepared the fard recovery memo in his writing and marked the same as Ext. Ka. 27. He had deposited the knife as well as lodged the accused in lockup and lodged an F.I.R. under section 25/4 Arms Act. On 8.5.2007 he arrested accused Mashooq, Mahfooz and Sonu and recovered a sword from Mashooq, a country made pistol of 315 bore along with one live cartridge and one empty cartridge each from accused Mahfooz and Sonu. The recoveries which were made from all the three accused were sealed on the spot and fard recovery was prepared at the spot and took the signatures of the accused on the same. He proved the same as Ext. 28. The accused were taken to the police station where against accused Mashooq a case under section 25/4 Arms Act was registered whereas against accused Mahfooz and Sonu case under section 25 Arms Act were registered. On. 19.5.2007, he arrested co-accused Sajid. On 27.5.2007 under the orders of the Court he interrogated accused Rashid, Intezar and Sabez and thereafter he was transferred. The vehicle which was standing outside the Court, i.e., HR 01 H 8925 recovered from accused Iltaf @ Altaf was marked as Ext. Ka 1. He has proved the other recoveries before the trial court which was opened before him as material exhibits Ka-2 to 24.

32. In his cross examination on behalf of the accused, the witness has stated that the statement of the informant Arshad was recorded by him at the police station at 11 p.m. in the night. The witness Arshad had not stated to him that he was in his house on the day of the incident but was present at the house of Gayyur. Nisha in her statement under section 161 Cr.P.C. had not told him that there was Margoob's engagement on the next day. He has recorded the statement of Usman on 30.5.2007 at the house of the deceased at 2-2:30 p.m. The witness has not told him that Shafiquee and Babar had assaulted Gayyur with saria. In the F.I.R. the use of country made pistol has not been mentioned. The informant had told him that the fact about the use of country made pistol was dictated by him in the report but the scribe of the report forgot to mention it. He admitted the fact that accused Shafiquee is a political person and the deceased Gayyur was a man of criminal antecedents and was sent to jail in a murder case. Whether he was a history-sheeter or not he had no knowledge. At the time of recovery of the Maruti van there was no public witness. The vehicle was being driven by Iltaf @ Altaf himself. On the sword/knife which was recovered from him no blood stain was found. The witness was further cross examined and he admitted that in the F.I.R. there has been no mention that the accused had come and gone on vehicle nor the use of country made pistol has been mentioned. He was present at the time of panchayatnama. He admitted that joint recovery memo was prepared with respect to accused Mashooq, Mahfooz and Sonu. He denied the suggestion that he had not arrested the accused persons nor had prepared the fard recovery memo.

33. The trial court after examining the prosecution evidence

and considering the defence version had convicted the appellants for the offence in question and being aggrieved by the same, the appellants preferred the present appeals.

34. Heard Sri Noor Mohammad, Sri Tripurari Pal and Sri Sudhir Agarwal, learned counsel for the appellants, Sri Sanjay Mishra, learned counsel for the complainant, Sri G.P. Pratap Singh, learned A.G.A. for the State and perused the impugned judgment and order and record.

35. Learned counsel appearing on behalf of appellant Iltaf @ Altaf has vehemently argued that he has been falsely implicated in the present case on account of the fact that he was related to co-accused Shafiquee. He submitted that the appellant Iltaf @ Altaf has no motive whatsoever to commit the murder of Gayyur as the same, if any, is with co-accused Mahfooz, Mashooq and Sonu, who are the real brothers and whose brother Mahmood was murdered by Gayyur because of enmity. He argued that Gayyur was a history-sheeter and his history-sheet has been opened at police station Sarsawa being history-sheet no. 31-A as is evident from the statement of P.W. 4 Constable Pramod Kumar and he was a man of criminal antecedents. He was done to death in some other manner and not as stated by the prosecution. He next submitted that the informant P.W. 1 Arshad happens to be cousin brother of the deceased. His presence at the place of occurrence appears to be doubtful as he had no occasion to be present at the place of occurrence as he was a resident of village Kunda and the incident had taken place at village Sarsawa which is about three kms. away. It was pointed out that the scribe of the F.I.R., namely, Gulzari Lal from whom he got the written report prepared was a resident of Yamuna Nagar a district of State of

Harayana and he being stranger and had no connection with P.W. 1 it would not be possible that he would take his assistance for writing the said report on the basis of which the F.I.R. has been lodged against the accused persons. He further submitted that the testimony of P.W. 1 is not worthy of credence, hence the conviction of the appellants on the basis of his evidence by the trial court is not sustainable. Similarly he has also assailed the evidence of P.W. 2 Smt. Nisha, who is the real sister of deceased Gayyur and has supported the prosecution case her evidence also does not inspire confidence and cannot be relied upon and it appears to be at the instance of police to work out a case against the appellants and other co-accused persons. So far as evidence of Usman P.W. 3 is concerned, his evidence is not reliable one as he himself was an accused in a murder case along with the deceased Gayyur and had also gone to jail which is clearly evident from his evidence before the trial court. It was argued by him that all the three witnesses are highly interested and partisan witnesses and they are related to the deceased, hence the conviction and sentence of the appellant Iltaf @ Altaf by the trial court is bad and is liable to be set aside. So far as recovery of knife from the appellant Iltaf @ Altaf and blood stained earth from the place of occurrence is concerned, he argued that as per the report of Serologist the blood found on the knife was found to be disintegrated which goes to show that the recovery of knife which was shown from the possession of appellant Iltaf @ Altaf after nine days of the incident is absolutely false one and moreover no blood was found on the earth which was recovered from the place of occurrence which further goes to show that the place of occurrence is doubtful. Moreover, there is no independent witness of the said recovery,

hence the said recovery appears to be doubtful. In support of his submissions, he has placed reliance on the judgment of the Apex Court in the case of ***Balwan Singh vs. The State of Chhattisgarh and another reported in 2019 0 Supreme (SC) 826***. He has drawn the attention of the Court towards para-8 of the said judgment which is reproduced hereunder:-

"8. The prosecution also relies upon the evidence relating to recovery of sticks and tabbal which were bloodstained. Such evidence may not be helpful to the prosecution in this case inasmuch as there is no evidence to show that these articles were stained with human blood, and more particularly with blood of the same blood group as that of the deceased. As per the Forensic Science Laboratory Report, the blood stains were disintegrated, and their origin could not be determined.

In Sattatiya v. State of Maharashtra, (2008) 3 SCC 210, one of the crucial factors that had led this Court to reverse the conviction was that the bloodstains on the items seized in the recovery could not be linked with the blood of the deceased. This factor was treated as a serious lacuna in the case of the prosecution.

Similarly, in Shantabai and Ors. v. State of Maharashtra, (2008) 16 SCC 354, the bloodstains on some of the clothes seized from the accused in recovery belonged to a different blood group from that of the blood group of bloodstains found on the clothes of the deceased and on the sample of soil, axe, stones etc. which were taken from the spot by the investigating officer. As a result of this mismatch, it was held that this circumstance was not proved against the accused.

It is also important to note the following observations made by a Constitution Bench of this Court in Raghav Prapanna Tripathi & Ors. v. State of U.P., AIR (1963) SC 74:

"21. In this connection, reference may also be made to circumstances 9 and 10, relating to the recovery of the bloodstained earth from the house.

The bloodstained earth has not been proved to be stained with human blood. Again, we are of opinion that it would be far fetched to conclude from the mere presence of bloodstained earth that earth was stained with human blood and that the human blood was of Kamla and Madhusudhan. These circumstances have, therefore, no evidentiary value." (Emphasis supplied) Therefore, the five judge bench had ruled that in that case the prosecution needed to prove that the bloodstains found on the earth or the weapons were of a human origin and were of the same blood group as that of the deceased."

36. Sri Tripurari Pal, learned counsel appearing on behalf of rest of the three appellants has also assailed the presence of three eye witnesses at the place of occurrence and argued that in the F.I.R. the informant has only alleged a general allegation of the deceased being assaulted by the accused persons with sword and saria. He submitted that the country made pistol which is said to have been used by the accused appellants Mahfooz and Sonu are concerned the same does not find mention in the F.I.R. that the said weapons were used by the accused Mahfooz and Sonu respectively. He submitted that the specification of the weapons have been made by the witnesses before the trial court for the first time only and during the course of investigation the same does not find place. He reiterated the arguments advanced by Sri Noor Mohammad Advocate appearing on behalf of appellant Iltaf @ Altaf for the other accused persons also that the deceased was a man of criminal antecedents and he was done to death in some other manner and not as stated by the prosecution. So far as recoveries of country made pistol, cartridges and sword which are said to have made at the time of arrest of the appellants Mahfooz, Mashooq and Sonu by the police are concerned, he submits that there is no independent witness of the said recoveries, hence the same appears to be doubtful. He next argued that so far as the motive for committing the murder of the deceased Gayyur by the appellants Mashooq, Mahfooz and Sonu it has been suggested that their brother Mahmood @ Bhura was murdered by Gayyur for which he was facing trial and on account of which the said three brothers have committed his murder along with other accused persons, is absolutely false as the deceased himself was a history-sheeter and when he was done to death by some

unknown miscreants, the appellants have been falsely implicated by the informant Arshad, who happens to be the cousin brother of the deceased and two other eye witnesses, namely, Nisha, who is the real sister of the deceased and Usman cousin brother of the deceased stating that it was the appellants, who along with other accused persons have committed the murder of the deceased.

37. Sri Sudhir Agarwal, learned counsel appearing on behalf of appellant Babar in the connected appeal has also assailed the conviction and sentence of the said appellant and has adopted the arguments advanced by learned counsel appearing on behalf of other appellants and submitted that no recovery of any saria was made from possession of the appellant and his false implication in the present case cannot be ruled out. Thus, it has been argued by learned counsel for the appellants that the conviction of the appellants by the trial court is against the evidence on record and the same be set aside and the appellants be acquitted.

38. *Per contra*, Sri Gaurav Pratap Singh, learned A.G.A. for the State has vehemently opposed the arguments of learned counsel for the appellants and submitted that the F.I.R. of the incident was lodged by P.W. 1 Arshad, who is the cousin brother of the deceased promptly soon after the incident on the same day at 22:40 p.m. at the concerned police station which is 1/2 km. away from the place of occurrence. He submitted that the arguments regarding the presence of eye witnesses, namely, Arshad-P.W.1 the informant and cousin brother of the deceased, Nisha-P.W. 2 real sister of the deceased and Usman cousin brother of the deceased at the place of occurrence cannot be doubted as it has come in the evidence of P.W. 2 that the real

brother of the deceased, namely, Margoob's engagement ceremony was to be solemnized on the next day of the incident and all the members of the family and other relatives have assembled in the house of the deceased and the accused, who are three real brothers and other two accused, namely, Iltaf @ Altaf and Babar are also closely related to the three accused whose brother Mahmood @ Bhure was murdered by the deceased Gayyur they come to murder the deceased for taking vengeance on the day of incident as the accused were fully conscious that the deceased would be present in the house as there was engagement ceremony of his brother Margoob giving them advantage to kill him because of previous animosity between the parties. He submitted that some discrepancies which have been pointed out and argued by learned counsel for the appellants that there has been general allegation against the accused persons in the F.I.R. that they have assaulted the deceased with sword and sharp edged sarias and no use of fire arm weapon was mentioned in the F.I.R. and for the first time specific role and use of fire arm have been deposed by the witnesses before the trial court, is hardly of a significance which may belie the prosecution case. He has drawn the attention of the Court towards the statement of P.W. 1 in which he has clarified and deposed that after the deceased, who was his cousin brother, who was brutally done to death by the appellants with sword country made pistol and saria and the deceased after receiving as many as 17 injuries on his person, was rushed to the hospital in a vehicle by the informant and other persons and on the way he succumbed to his injuries. He deposed that the scribe of the F.I.R. Gulzari Lal from whom he took assistance in writing the written report and he dictated

about the incident as he was disturbed after the incident, the report was not read over to him and had put signature and submitted the same at the concerned police station for lodging the F.I.R. against the accused persons though he has further submitted in his deposition that he had dictated about the use of fire arm weapon by the accused but inadvertently the same was not mentioned by the scribe. He further submitted that Smt. Nisha, who is the real sister of the deceased was quite natural witness she was also present at the time of the incident and she has narrated the entire version which was witnessed and the same is corroborated by the medical report of the deceased. Similarly P.W. 3 Usman also supported the prosecution case and was natural witness, who was returning from the market and witnesses and ocular testimony of the said witness corroborates with the medical report. He submitted that the recoveries of sword from accused Mahfooz, country made pistol from accused Mashooq and Sonu sariya which was also used by Babar goes to show that the ocular testimony cannot be discarded as the same is fully corroborated by the medical evidence. The country made pistol of 315 bore was sent to Ballistic Expert and the use of the same was also found corroboration as the three metallic bullets were recovered from the body of the deceased also matched and the said weapons were used in the crime which shows the participation of the two appellants and further the other recoveries made from Mashooq and Sonu and Altaf also shows its use as it has come in the evidence of P.W. 1 that four times assault was made by Altaf and Mahfooz by their respective weapons as 12 incised wounds were found which was also caused by sharp edged sariya by co-accused Babar. He has further drawn the attention of he

Court that the recovery of the Maruti van which belong to appellant Mahfooz was recovered from Altaf @ Iltaf when he was arrested by the police on 8.5.2007 and simply because the said recoveries were not made before the independent witnesses be discarded would not be correct as it has come in the evidence of P.W. 8 that police had made effort to arrange independent witnesses but no one was agreed to be a public witness of the said recoveries. So far as argument of learned counsel for the appellant Iltaf @ Altaf is concerned that no blood was found on the earth collected from the place of occurrence and further recovered knife which was recovered from Iltaf @ Altaf no blood was found as it has been opined by the Serologist to be disintegrated he submitted that some it happens that the blood stains were disintegrate, and their origin could not be determined, hence the conviction and sentence of the appellants is fully justified on the basis of the evidence led by the prosecution which is corroborated by the medical report, hence the appeal be dismissed. In support of his submissions, he has placed reliance on the judgment of the Apex Court in the case of ***State of Rajasthan vs. Teja Ram reported in 1999 LawSuit (SC) 333***. He has drawn the attention of the Court towards para-25 of the said judgment which is quoted hereinbelow:-

"Failure of the Serologist to detect the origin of the blood, due to disintegration of the serum in the meanwhile, does not mean that the blood stuck on the axe would not have been human blood at all. Sometimes it happens, either because the stain is too insufficient or due to hematological changes and piasmatic coagulation that a Serologist might fail to detect the origin of the blood. Will it then mean that the blood would be of some other origin? Such a guess work that blood on the other axe would have been animal blood is unrealistic and far fetched in the broad spectrum of this ease. The effort of the criminal court should not be to prowl for imaginative doubts. Unless the doubt is of a reasonable dimension which a

*judicially conscientious mind entertains with some objectivity
no benefit can be claimed by the accused. "*

39. We have considered the rival contentions of learned counsel for the parties and perused the record.

40. It is apparent from the record that the present incident had taken place on 28.4.2007 at about 8:00 p.m. in which Gayyur s/o-Sagheer was done to death by the appellants, Mashooq, Mahfooz, Sonu sons of Mahboob, Shafique son of Hafiz, Babar son of Shafique and Iltaf @ Altaf son of Mumtaz, who were armed with sword, saria and country made pistol respectively. The F.I.R. of the incident was lodged by P.W. 1 Arshad, who happens to be the cousin of the deceased on the same day at 22:40 p.m. at the concerned police station which is at a distance of 1/2 kms. from the place of occurrence. The deceased received as many as 17 injuries on his person which include incised wounds and gun shot injuries. The incident was witnessed by the informant P.W. 1 Arshad along with Ghalib, P.W. 3 Usman, Ashraf, Naeem and P.W. 2 Nisha, who is real sister of the deceased and Razia wife of the deceased Gayyur. The deceased was immediately rushed to the district hospital Saharanpur by the informant but on the way he succumbed to his injuries.

41. The accused appellants were arrested by the police and charge-sheet was submitted against them for the offence in question and under the Arms Act against accused Mahfooz, Mashooq, Sonu and Iltaf @ Altaf. They were put to trial and were convicted and sentenced by the trial court by passing the impugned judgment and order.

42. The contention of learned counsel for the appellants that the deceased was a man of criminal antecedents and he was also

registered as a history-sheeter at police station Sarsawa as history-sheet no. 31A which is evident from the statement of P.W. 4 Constable Pramod Kumar and so might have been done to death in some other manner and not as stated by the prosecution and further the presence of three eye witnesses of the occurrence, namely, P.W. 1 Arshad, P.W. 2 Nisha and P.W. 3 Mohammad Usman at the place of occurrence is doubtful, is not at all acceptable, as from a perusal of the evidence of three eye witnesses, i.e., P.W. 1, 2 and 3 goes to show that their testimony with respect to the incident is a consistent one as they have stated before the trial court that they have seen the appellants Mashooq armed with sword, Mahfooz and Sonu armed with country made pistol of 315 bore, Shafique and Babar (now dead) armed with Saria and Iltaf @ Altaf armed with knife (talwarnuma chaku) and they had assaulted the deceased when he was entering at the door of his house after offering 'Namaz' in the mosque and on the alarm raised, all the witnesses including the witnesses named in the F.I.R. including the three eye witnesses, i.e., P.W. 1, 2 and 3 arrived at the place of occurrence and saw the incident and further seen the appellants fleeing away in a Maruti Van. The deceased was rushed to the hospital but he succumbed to his injuries. The eye witnesses, i.e., P.W. 1 Arshad, P.W. 2 Nisha and P.W. 3 Mohammad Usman are though closely related to the deceased but their presence at the place of occurrence is fully established and the trial court examining their evidence, has convicted and sentenced the appellants. P.W. 2 Smt. Nisha wife of Ghalib, who is the real sister of the deceased has categorically stated before the trial court in her evidence that she had come to the house of the deceased, where he was living along with his brothers, as one of

her brothers, namely, Margoob's engagement ceremony was to be performed on the next day of the incident in district Meerut and for the said ceremony she along with other relatives had gathered in the house. P.W. 1 has also categorically stated in his deposition before the trial court that he was present at the house of the deceased Gayyur on the date and time of the incident and has witnessed the same along with other eye witnesses of the occurrence. It is noteworthy to mention here that soon after the incident when the deceased succumbed to his injuries, he got the F.I.R. of the incident lodged at the police station after getting the same written by one Gulzari Lal, who met him at the police station, at 22:40 p.m. Similarly, P.W. 3 Mohammad Usman has also deposed in his evidence before the trial court that at the time of incident, he was returning along with Ghalib to the house and when they reached near the house of the deceased Gayyur, he witnessed the incident in the electric light. The deceased was the son of his Tau and he was returning from the market at that point of time along with Ghalib. Though learned counsel for the appellants tried to show some contradictions in the statements of three eye witnesses recorded by the trial court but the contradictions in their statements are not such which may throw out the entire prosecution case.

43. The motive to commit the murder of the deceased Gayyur by the appellants is strong one as the three appellants, namely, Mashooq, Mahfooz and Sonu are the real brothers and one Mahboob @ Bhure, who was also their real brother was murdered by the deceased Gayyur, who was facing trial in the Court of Saharanpur for the last 16-17 months prior to the incident in which he was on bail. The other appellants, namely, Shafique, Babar and Iltaf @ Altaf also happen to be related to

the three appellants as it has come in the evidence of P.W. 1, 2 and 3, who participated in the murder of the deceased with a common object to eliminate him on day of incident. Even if, the deceased was a history-sheeter and a man of criminal antecedents then too the involvement of the appellants for his murder, cannot be ruled out in the light of the evidence of three eye witnesses of the occurrence, who have deposed before the trial court. Their ocular testimony fully corroborates the prosecution case and there remains no iota of evidence to show that the deceased being a man of criminal antecedents was done to death by some unknown miscreants or the incident had taken place in some other manner and not as stated by the prosecution as has been argued by learned counsel for the appellants. The another circumstance which goes to show that it was the appellants, who were responsible for the murder of the deceased is the recovery of weapons which have been made from their possession when they were arrested by the police on 7.5.2007 and 8.5.2007 respectively. Learned counsel appearing on behalf of appellant Iltaf @ Altaf has vehemently argued that the said appellant was implicated in the present case only on account of the fact that he happens to be related to appellants Shafique and further the recovery of knife which was made from his possession at the time of his arrest shows as per the Serologist report that on the same disintegrated blood was found which shows false recovery from his possession. The said argument of learned counsel for the appellants is also not of much relevance as from the report of Serologist dated 17/18.8.2007 it is apparent that the articles which were sent by the Investigating Officer which include sword, knife the weapon of assault, clothes and the plain earth and blood stained

earth in all said articles blood stains were found and on the sword and clothes of the deceased human blood was found and so far as the knife and blood stained earth are concerned disintegrated blood was found on the same in this regard the submission of the learned A.G.A. has substance.

44. Learned A.G.A. in reply to the arguments of learned counsel for the appellants with respect to disintegrated blood found on the knife and blood stained earth, has placed reliance on the judgment of the Apex Court and has argued that some times it happens, either because the stain is too insufficient or due to haematological changes and plasmatic coagulation that a Serologist might fail to detect the origin of the blood as has also been observed by the Apex Court in para-25 of the judgment in the case of ***State of Rajasthan vs. Teja Ram (Supra)***, therefore, this cannot be a ground for setting aside the conviction and sentence of the applicant Iltaf @ Altaf particularly when there is eye witness account of the occurrence which is in the form of P.W. 1, 2 and 3, who have witnessed the incident and the trial court has rightly believed their testimony and convicted and sentence the appellants.

45. Moreover, the case law which has been cited by Sri Noor Mohammad of the Apex Court in the case of ***Balwan Singh vs. State of Chhattisgarh (Supra)***, the Apex Court has considered its earlier decision on the point reference of which is necessary to be taken note of such as in the case of ***Jagroop Singh vs. State of Punjab reported in (2012) 11 SCC 768***, the Court had ruled that as the recovery was made pursuant to a disclosure statement made by the accused, and the serological report had found that the blood was of human origin, the non determination of the blood group had lost its significance.

46. In another case of ***State of Rajasthan vs. Teja Ram and others reported in (1999) 3 SCC 507***, the Court had observed that the failure of the serologist to detect the origin of the blood, due to disintegration of the serum, did not mean that the blood stuck on the weapon could not have been human blood at all.

46. Further in the case of ***Balwan Singh (Supra)***, the Apex Court in para-9 and 13 has held the proposition of law which are reproduced hereunder:-

"9. We are also conscious of the fact that, at times, it may be very difficult for the serologist to detect the origin of the blood due to the disintegration of the serum, or insufficiency of blood stains, or haematological changes etc. In such situations, the Court, using its judicious mind, may deny the benefit of doubt to the accused, depending on the facts and circumstances of each case, if other evidence of the prosecution is credible and if reasonable doubt does not arise in the mind of the Court about the investigation.

Thus, in the case of R. Shaji v. State of Kerala, (2013) 14 SCC 266, this Court had observed:

"31. A failure by the serologist to detect the origin of the blood due to disintegration of the serum does not mean that the blood stuck on the axe could not have been human blood at all.

Sometimes it is possible, either because the stain is insufficient in itself, or due to haematological changes and plasmatic coagulation, that a serologist may fail to detect the origin of the blood in question. However, in such a case, unless the doubt is of a reasonable dimension which a judicially conscientious mind may entertain with some objectivity, no benefit can be claimed by the accused in this regard. Once the recovery is made in pursuance of a disclosure statement made by the accused, the matching or non matching of blood group(s) loses significance." Similar observations were made by this Court in the case of Gura Singh v. State of Rajasthan, (2001) 2 SCC 205, wherein it was observed that it was not possible to accept the submission made on behalf of the accused that in the absence of the report regarding the origin of the blood, the accused could not have been convicted, inasmuch as it was only because of the lapse of time that blood could not be classified successfully.

In the case of State of Rajasthan v. Teja Ram and Others, (1999) 3 SCC 507, the Court had observed that the failure of the serologist to detect the origin of the blood, due to disintegration of the serum, did not mean that the blood stuck on the weapon could not have been human blood at all. In this context, it was noted that it could not be said that in all cases where there was a failure in detecting the origin of blood, the circumstance arising from recovery of the weapon would stand relegated to disutility. It was thus observed that unless the doubt was of a reasonable dimension which a judicially conscientious mind entertained with some objectivity, no benefit could be claimed by the accused.

13. From the aforementioned discussion, we can summarise that if the recovery of bloodstained articles is proved beyond reasonable doubt by the prosecution, and if the investigation was not found to be tainted, then it may be sufficient if the prosecution shows that the blood found on the articles is of human origin though, even though the blood group is not proved because of disintegration of blood. The Court will have to come to the conclusion based on the facts and circumstances of each case, and there cannot be any fixed formula that the prosecution has to prove, or need not prove, that the blood groups match. "

48. In the case of **Balwan Singh (Supra)**, the Apex Court granted benefit to the accused as it was argued in the said case that the investigation of the case was a tainted one and further the prosecution had failed to prove that the blood recovered on the weapon of assault was of human origin and further of the same blood group as that of the accused, hence it doubted the recovery made from the accused but in the instant case as the serologist report, the articles item nos. 1 to 5 which included knife and blood stained earth blood stains were found but serologist further opined that in item no. 2 to 5 which are knife and blood stained earth, blood stains were found to be disintegrated, hence failed to detect the origin of the blood in question, whereas on item nos. 1, 3 and 4 human blood was found, therefore, the said case is distinguishable on the facts and circumstances and cannot be made applicable in the instant case and further there has been no argument made by learned

counsel for the appellants that the investigation of the case was tainted one and no malafides have been alleged against the investigating officer of the case for the false recovery made from the said appellant Iltaf @ Altaf.

49. It is further relevant to mention here that when the appellant Iltaf @ Altaf was arrested by the police on 7.5.2007 then the Maruti van of appellant Mahfooz was also recovered from his possession for which no explanation could be given by the said appellant which is another circumstance to show his involvement in the present case. So far as the argument of learned counsel for the appellants that there was no independent witness of the recovery, hence the recovery is doubtful, is also not acceptable as it has come in the evidence of Investigating Officer and the police personnel that efforts were made to obtain independent witness but no one was ready to be the witness of the recovery. Moreover, the recovery memo was signed by the appellants which they have not disputed. So far as recovery with respect to appellant Mashooq is concerned, sword was recovered on 8.5.2007 from his possession and blood stains were found on the same as per the report of Serologist, hence his involvement in the murder of the deceased stands proved taking into account the evidence of three eye witnesses. Similarly country made pistol of 315 bore was also recovered from the possession appellants Mahfooz and Sonu when they were arrested by the police and the same was sent to the Ballistic Expert along with cartridges recovered from the dead body of the deceased which in the opinion of the Ballistic Expert were fired from the country made pistol recovered from the possession of the appellants, Mahfooz and Sonu which further goes to establish the participation of the said appellants

in the present incident. It was vehemently argued by learned counsel for the appellants that Gulzari, who was the Scribe of the F.I.R. happens to be resident of district Yamuna Nagar of State of Haryana and he was not examined before the trial court. In the F.I.R., he has only given general role of assaulting the deceased by the appellant with sword and saria and there was no mention of the use of firm arm weapon on the deceased which create doubt about the genuineness of the F.I.R. The said contention of learned counsel for the appellants does not hold good as from the evidence of P.W. 1 Arshad, who happens to be the cousin of the deceased and had lodged the F.I.R. it is apparent that he has categorically stated in his evidence before the trial court that soon after the incident he reached the police station to lodge the F.I.R. of the same where he met with one boy by the name of Gulzari and requested him to write the report. He dictated him the entire incident mentioning the name of the appellants and the weapon of assault and the name of eye witnesses but it appears that looking to the circumstances incident was narrated in a hurried manner and so due to mistake the Scribe of the F.I.R. forgot to mention the use of fire arm weapon in the F.I.R. The F.I.R. which was dictated by him to Gulzari was not read over to him by Gulzari and was signed by him as he was mentally disturb after the incident. It is true that there appears to be no mention of the use of fire arm in the F.I.R. but the said circumstance cannot be of such nature which may discard the prosecution case as the F.I.R. which was lodged by P.W. 1 had given broad narration of the incident and there cannot be any doubt to disbelieve the same. It was further argued by learned counsel for the appellants that the statements of eye witnesses of the occurrence were recorded under section

161 Cr.P.C. by the Investigating Officer at a belated stage though they were present at the place of occurrence which goes to show that the said witnesses have been planted to falsely implicate the appellants on account of inimical relationship but the said argument also does not has substance as if there was any latches on the part of the Investigating Officer in recording the statements promptly, the same cannot belie the prosecution case particularly in view of the evidence of three eye witnesses before the trial court, who have categorically stated about the involvement of the appellants with their respective weapons. From a close scrutiny of the evidence on record including the evidence of eye witnesses of the occurrence and also of the doctor, who conducted the post mortem of the deceased their remains no doubt that the appellants' participation in the murder of the deceased is fully proved by the ocular testimony and the medical evidence.

50. The Apex Curt in the case of ***Mallikarjun vs. State of Karnataka*** reported in ***(2019) 8 SCC 359*** has reiterated with appreciation of evidence of witnesses in a criminal case in paras-13 and 14 of the said judgement which are quoted hereasunder:-

"13. While appreciating the evidence of a witness, the approach must be to assess whether the evidence of a witness read as a whole appears to be truthful. Once the impression is formed, it is necessary for the court to evaluate the evidence and the alleged discrepancies and then, to find out whether it is against the general tenor of the prosecution case. If the evidence of eye witness is found to be credible and trustworthy, minor discrepancies which do not affect the core of the prosecution case, cannot be made a ground to doubt the trustworthiness of the witness.

*14. Observing that minor discrepancies and inconsistent version do not necessarily demolish the prosecution case if it is otherwise found to be creditworthy, in *Bakhshish Singh v. State of Punjab and another* (2013) 12 SCC 187, it was held as under:-*

32. In *Sunil Kumar Sambhudayal Gupta v. State of Maharashtra* (2010) 13 SCC 657 this Court observed as

follows: (SCC p. 671, para 30) “30. While appreciating the evidence, the court has to take into consideration whether the contradictions/omissions had been of such magnitude that they may materially affect the trial. Minor contradictions, inconsistencies, embellishments or improvements on trivial matters without effecting the core of the prosecution case should not be made a ground to reject the evidence in its entirety. The trial court, after going through the entire evidence, must form an opinion about the credibility of the witnesses and the appellate court in normal course would not be justified in reviewing the same again without justifiable reasons. (Vide *State v. Saravanan* (2008) 17 SCC 587.)”

33. this Court in *Raj Kumar Singh v. State of Rajasthan* (2013) 5 SCC 722 has observed as under: (SCC p. 740, para

43) “43. ... It is a settled legal proposition that, while appreciating the evidence of a witness, minor discrepancies on trivial matters, which do not affect the core of the case of the prosecution, must not prompt the court to reject the evidence thus provided, in its entirety. The irrelevant details which do not in any way corrode the credibility of a witness, cannot be labelled as omissions or contradictions. Therefore, the courts must be cautious and very particular in their exercise of appreciating evidence. The approach to be adopted is, if the evidence of a witness is read in its entirety, and the same appears to have in it, a ring of truth, then it may become necessary for the court to scrutinize the evidence more particularly, keeping in mind the deficiencies, drawbacks and infirmities pointed out in the said evidence as a whole, and evaluate them separately, to determine whether the same are completely against the nature of the evidence provided by the witnesses, and whether the validity of such evidence is shaken by virtue of such evaluation, rendering it unworthy of belief.” "

51. The Apex Court has further observed in the said judgment *Mallikaraju vs. State of Karnataka (Supra)* that it is fairly well settled that the evidence of the Investigating Officer can be relied upon to prove the recovery even when the Panch witnesses turned hostile. In the case of *Rameshbhai Mohanbhai Koli vs. State of Gujrat reported in (2011) 11 SCC 111* it was held as under:-

"33. In Modan Singh vs. State of Rajasthan it was observed (at SCC p. 438, para-9) that where the evidence of the investigating officer who recovered the material objects is convincing, the evidence as to recovery need not be rejected on the ground that seizure witnesses did not support the prosecution version. Similar view was expressed in Mohd. Aslam. v. State of Maharashtra."

52. In view of the settled proposition of law as has been referred above, the evidence of P.W. 1, 2 and 3, who are eye witnesses of the occurrence cannot be disbelieved as their evidence against the appellants have been found to be credible and trust worthy by the trial court and minor discrepancies do not affect the prosecution case and cannot be a ground to doubt trustworthiness of the witnesses. It is also well settled law that the evidence of family members of the deceased or his relative cannot be discarded simply because they are related to the deceased and are partisan witnesses though of course their evidence has to be considered by the Court with great caution, if they otherwise are found to be trust worthy and a credible one. In the instant case these are the three eye witnesses of fact out of which two are cousin of the deceased whereas one is real sister of the deceased and their evidence against the appellants does not cast any doubt, who have killed the deceased in their presence and they had witnessed the incident. Thus, the findings recorded by the trial court in convicting and sentencing the appellants is fully justified as the prosecution has proved its case beyond reasonable doubt against the appellants.

53. In view of the forgoing discussions, the conviction and sentence of the appellants by the trial court is hereby upheld.

54. The appeals lack merit and are accordingly, dismissed.

55. The appellants are stated to be in jail. They shall remain in jail and serve out the sentence as awarded by the trial court.

56. Let a certified copy of this order along with the record be

sent to the trial court concerned for its compliance.

(Ajit Kumar, J.) (Ramesh Sinha, J.)

Dated:-29.11.2019
Shiraz.