

Court No. -48
[RESERVED]

[AFR]

Case :- CRIMINAL APPEAL No. - 5584 of 2004

Appellant :- Narendra Singh @ Nanga

Respondent :- State Of U.P.

**Counsel for Appellant :- Jagdish Singh Sengar,A.K.S.
Solanki,Ashutosh Dwivedi,Rahul Raghav,Yogesh Srivastava**

Counsel for Respondent :- Govt. Advocate

CONNECTED WITH

Case :- CRIMINAL APPEAL No. - 5412 of 2004

Appellant :- Sant Kumar @ Nannu And Another

Respondent :- State Of U.P.

Counsel for Appellant :- P. Dikshit

Counsel for Respondent :- Govt. Advocate

Hon'ble Vinod Prasad, J.

Hon'ble Anjani Kumar Mishra,J.

(Delivered by Hon. Anjani Kumar Mishra, J.)

1. These two connected criminal appeals are directed against the impugned judgment and order dated 15.10.2004 passed by the Additional Sessions Judge (F.T.C. Second), Hathras in S.T. No. 62 of 2003.
2. Narendra @ Nannu, appellant in Crl. Appeal No. 5584 of 2004, has been convicted under section 307 IPC and sentenced to 10 years' imprisonment, along with a fine of Rs. 5,000/-, and to serve a further 3 months' imprisonment in default of payment of fine. He has also been convicted under section 302 IPC and sentenced to life imprisonment, along with a fine of Rs. 10,000/- and to undergo 6 months' further imprisonment in case of default in payment of fine.
3. Sant Kumar @ Nannu and Achchi @ Gajendra, appellants in Crl. Appeal No. 5412 of 2004, have been convicted under sections 307/34 IPC and sentenced to 7 years' imprisonment, with a fine of Rs. 4,000/- and to serve a further 2 months'

imprisonment in case of default in payment of fine.

4. The FIR of the present incident was lodged on 7.5.2001, at about 7.45 A.M., at police outpost Bisawar, Police Station Sadabad, District Hathras under section 307 / 504 IPC regarding an incident said to have taken place at 7.15 A.M. in village Garh Tisanga, situated at a distance of about 3 km from the police outpost. Later, on the death of Komal Prasad, the case was converted into one under section 302 IPC.
5. The allegations as per the first information report (FIR) are that Jai Prakash, accompanied by Dhanna and Bunty, while returning from the house of Prem Singh Kachi, was stopped by the appellant Narendra in front of his house. Jai Prakash was questioned as to why he was not closing down his shop, which was causing pecuniary loss to Narendra. On Jai Prakash refusing to shut down his shop, appellants Sant Kumar and Achchi are alleged to have caught hold of Jai Prakash by his waist (*jeth bhar li'*) and appellant Narendra brought his licensed gun from his house and shot at Jai Prakash, who, thereafter, freed himself and ran back in the direction he had come from. On receiving this information, Komal Prasad, father of Jai Prakash, the first informant, Chandra Shekhar @ Guddu and one Mathura Prasad rushed towards the site of the shooting. When they reached near the house of one Vishnu Dutt Rai, Narendra (the appellant), who was standing on his roof-top, fired at Komal Prasad, who was hit and he fell down. On hue and cry being raised, the three accused ran away firing shots in the air. The first informant thereafter took his father and lodged the FIR at the aforementioned police outpost. It was also stated that Jai Prakash had been taken by other family members to Agra for treatment.
6. The prosecution examined as many as 11 witnesses, to prove the charges against the appellants. Of these, Jai Prakash @

Oopo, PW-2, is the injured, while PW-3 Brijesh Kumar @ Bunty, is the maternal cousin of Jaipraksh. These two are said to be the eye-witnesses to the incident. PW-1, Chandra Shekhar @ Guddu, the first informant, is an eye-witness of the second shooting only.

7. Apart from the above three witnesses of fact, the remaining witnesses namely PW-4 to PW-11 are formal witnesses. PW-4, Kehri Singh is the constable moharrir who had recorded and registered the FIR. PW-5, Dr. V. S. Agnihotri, had conducted postmortem examination on the cadaver of the deceased, Komal Prasad. PW-8, Harishchandra Singh is the first investigating officer, who had prepared the site-plan, recovered the gun said to have been used in the incident and who collected the blood-stained earth from the site of the incident. PW-9, Surjan Singh, is the second investigating officer, who took over the investigation on 20.5.2001 and who had recorded the statements of Dhanna, Shiv Charan Badhai and Brijesh Kumar @ Bunty on 21.5.2001 under section 161 Cr.P.C. and the statements of Sanjay Kumar and Mathura Prasad on 26.5.2001. On his transfer, the investigation was taken over by PW-6, Vidya Raman Sharma on 5.6.2001. PW-7, Dr. Arvind Kumar Singh is the Emergency Medical Officer, S.N. Medical College, Agra who had examined Jai Prakash on 7.5.2001. PW-10, Harpal Singh, a constable posted at Bisawar Outpost on the day of the incident, is alleged to have accompanied Komal Prasad to the police station Sadabad, then C.H.C., Sadabad, on to G.G. Nursing Home, Agra and then back to his residence in village Garh Tisanga. PW-11, Bankey Lal is the scribe of the FIR.
8. The statements of the three accused were recorded under section 313 Cr.P.C. Appellant Narendra, in his statement under section 313 Cr.P.C. had stated that the deceased and his family members used to deal in stolen property and on his complaining to the

police in this regard, they were taken into custody but later on were released by the police without registering any case, in connivance with the brothers of Komal Prasad, who were serving and retired Sub-Inspectors of Police. It was on account of this fact that the family members of the deceased nursed a grudge against the appellant and this is the primary reason for his false implication in the case.

9. Appellant Sant Kumar, in his statement under section 313 Cr.P.C. stated that on 7.5.2001, the investigating officer, along with two constables, came to the house of appellant Narendra and asked his mother for him and took away his licensed DBBL gun and the bandolier. He also took the appellant Sant Kumar to the police station at 11 A.M., where he was detained till 8.5.2001 then chalaned and sent to the Court. He further stated that the investigating officer had fired four shots from his gun.
10. Gajendra Prasad @ Achchi has stated that he was working as a clerk in SPL Industries Ltd., Faridabad, and was on duty on the date of the incident. He claimed to have been falsely implicated as he is the brother of accused Narendra.
11. Four witnesses have been examined in support of the defence version. DW-1, Saheb Singh, appeared under orders of the Court along with General Diary of police station Sadabad dated 8.5.2001. DW-2, Manish Kumar, the Deputy Jailer, District Jail, Aligarh, also entered in the witness-box on the orders of the Court, along with the relevant jail records to show that the first informant and his brothers were men of criminal antecedents and had been lodged in District Jail, Aligarh in connection with different criminal offenses. DW- 3, D.C. Kushwaha, is a Senior Assistant in the S.N. Medical College, Agra, while DW-4, Neeraj Agarwal, was the Medical Officer posted at Community Health Centre, Sadabad, District Hathras, on the date of the incident.

12. We have heard Sri Rajul Bhargava and Sri Yogesh Srivastava, learned counsel for the appellants in the two connected appeals and Sri R.S. Yadav, learned AGA, for the State.

13. Briefly stated prosecution charge is that Jai Prakash accompanied by two others while returning from the house of Prem Singh Kachi, was stopped by Narendra in front of his house, and questioned as to why he was not shutting down his shop which was effecting his (Narendras') business and on his refusal to do so, Sant Kumar and Acchi caught hold of him and Narendra brought out his gun from his house and shot at Jai Prakash who after being hit, freed himself and fled from the spot in the direction from which he had come. On getting information of the shooting, his father, Komal Prasad, first informant Guddu and one Mathura Prasad rushed towards the spot of shooting and as they approached, Narendra who was standing on his roof top, fired at Komal Prasad who was hit and fell down, where after the accused ran away firing in the air. Jai Prakash was taken to Agra for treatment while the first informant carried his critically injured father to the Police Out Post Bisawar for lodging the first information report.

14. Besides recapitulating prosecution case described in the FIR it has further come in the evidence that after lodging the report the injured Komal Prasad was taken to Police Station Sadabad and from there to the Community Health Center, Sadabad, which is said to very close by, where the doctor on duty declared him dead but the family members took him to Agra for a second confirmatory opinion. It is also said, that constable Harpal Singh also accompanied Komal Prasad right upto Agra. After receiving confirmation of death at G.G. Nursing Home Agra, the dead body was brought back in village Garh Tisanga where the panchnama was prepared and the body sent for post mortem, which was performed the next day.

15. Thus, from the above narration of facts, the entire incident can be split into two sequence of events. The first part involved the verbal altercation between Jai Prakash @ Oppo and his being shot at by Narendra and the second part involved only appellant Narendra, firing upon Komal Prasad, father of Jai Prakash, as he was approaching the site of the first shooting on getting information of the same.

16. The first informant, PW1, Chandra Shekhar @ Guddu is not an eyewitness of the first shooting. He is alleged to be the eyewitness of the second shooting which resulted in the death of Komal Prasad. However, it is the first part of the incident which, as per the prosecution case, is the genesis of the second part. Of the witnesses examined, Jai Prakash, PW-2 and Bunti @ Brijesh Kumar, PW-3, are the eye witnesses of both the parts. Jai Prakash is the injured witness and as such his testimony is most crucial for the purposes of the case.

17. Counsel for the appellants have submitted that the appellants have been falsely implicated on account of enmity; the incident took place elsewhere and at some other point of time over some dispute with criminal elements with whom the deceased and his family members had dealings in stolen properties; the manner of assault is false and concocted; the entire case and evidences against the accused are false and have been fabricated with the active participation and connivance with three brothers of the deceased, two of whom are retired Sub-Inspectors and the third is still in service as an Inspector in the Police Department. The prosecution case is full of improvements, embellishments with material contradictions. The conduct of the family members is contrary to normal human behavior and this unusual conduct has not been explained. Though the two shootings are said to have taken place five minutes apart, yet one person was taken to Agra by one jeep and the other who sustained extensive firearm

injuries and died as a result thereof, was taken to the police station and then to the Community Health Center at Sadabad about 10 kms away by another jeep. It is further submitted that the investigation itself is tainted and wholly unreliable.

18. In the context of the aforesaid submissions, we have been taken through the entire evidence on record and the important aspects highlighted, shall be dealt with at the appropriate places.

19. Turning specifically to the evidences of all the fact witnesses, so far as P.W.-1 is concerned, he has disclosed the pedigree of the family, which revealed that Komal Prasad were four brothers including him. Rest of the three brothers were Ramesh Chandra, Mahendra Ji and Hari Om Prakash. Komal Prasad had two wives. From one wife, Gopal Prasad, Guddu @ Chandra Shekhar P.W. 1, Jai Prakash @ Opo injured-P.W.2 were issues. The houses of both the wives were at the distance of 100-150 meters from each other and the deceased Komal Prasad used to reside with both the wives. From another wife, Govind is the sole issue and hence he is the step brother of P.W.-1 and P.W.-2. It further becomes evident that brother of deceased Om Prakash, Ramesh Chandra and Mahendra Ji were in police services. While the former was still in service as police inspector, rest of the two had retired as Sub Inspector from the police force. Ramesh Chandra after retirement resided in the incident village whereas Mahendra Ji after retirement had settled down in Agra City. Scribe of the FIR, Bankey Lal is the cousin brother of the informant. Reporting police chauki Bisawar is four kilometers away from the informant's village and Sadabad Dispensary is fourteen kilometers away from the reporting police out post Bisawar. Agra is forty kilometers from Sadabad. It is further revealed that after the incident, first of all the FIR was got lodged at reporting police out post Bisawar and from there, the deceased was taken to Sadabad Dispensary in a jeep driven by

police constable Arjun Singh which took round about 10 minutes. Blood had trickled down at the spot as well as in the jeep from the injuries sustained by the deceased. Informant's clothes were also stained with blood. It becomes further evident that informant had not sent any of his brothers along with the injured to Agra. It is further evident that both the injured and the deceased were carried to Agra and to the police station in separate jeeps and the injured deceased Komal Prasad was also accompanied by Smt. Omwati, mother of informant and wife of deceased and his brother SI Ramesh Chandra since retired. Cadaver of the deceased was brought back from Agra at sunset when police was already present at the house of the deceased and the informant. Inquest was conducted in one and half hours and thereafter the body was brought to the police out post and from there was dispatched for autopsy report to Mathura. It is categorical statement of the informant that when injured was shot at he was not present at the spot and the incident occurred 10 or 15 minutes after injured had left the house for calling iron smith Prem Singh Kachhi. The interval between both the shooting incidents was 5 minutes and no other person other than injured or the deceased had sustained any injury in both the episodes. While injured was shot at when he was in between the two houses of Naresh, Komal Prasad was shot at when he was prior to the shop of Vishnu Dutt at the brick pavement. P.W.-1 has further evidenced that Durgesh Prasad, cousin brother of the injured had accompanied him to Agra. After deceased was declared dead and his cadaver was transported to Agra then his wife Omwati, mother of informant, had also accompanied the cadaver. It was in the jeep of Kunji Lal that the injured was transported to Agra. It has also been stated by the informant that the injured was admitted in S.R. Nurshing Home, Agra and, therefore, he has gone to see him there. P.W.-1 has rejected the defence suggestion that FIR Ext. Ka-1 was got lodged after due

consultation and deliberation between the police and his uncle retired SI Ramesh Chandra and he had not seen the incident and the deceased and the injured were shot at different time and different places by unknown persons and by falsely implicating the accused, the case has been cooked up. Many criminal history of his family members including the deceased was asked from this witness but he had denied the same. P.W.1 has further evidenced that when his father was shot at then the barrel of the gun was diagonal to his father and the shot was fired from a height of 10-12 feet from the roof of the appellant Narendra's house. For injured, this witness has said that sustaining gun fire injury he had fallen down in front of the house of Kaptan Singh. Regarding the deceased, P.W.-1 has also evidenced that after examining his pulse, doctor has said at CHC, Sadabad that he has died. He was also examined by the doctor with the help of a stethoscope. This witness expressed his complete ignorance regarding the hospital in which his deceased father was shown. Regarding inquest on the cadaver of the deceased, P.W.-1 was unable to spell out the time of conducting of the inquest.

20.First informant, Chandra Shekhar @ Guddu, PW-1, in his examination-in-chief has also stated that his brother Jai Prakash, who was sent to Agra for treatment by another jeep, was admitted in S.R. Nursing Home, Namner crossing, Namner Road, Agra, and that this information was given to him by his cousin, Durgesh Prasad over the phone. However, as per the bed head ticket produced, the injured was brought to the hospital by one Sushil son of Netrapal whose identity is not clear and who has not been produced by the prosecution. P.W.-1 has stated that he visited his brother at this nursing home next day after the incident and talked to him. He has also stated that Narendra had only recently opened his shop. He has further stated that, in fact, he took his father to Bisawar for lodging the FIR and after

formalities were over, they proceeded to P.S. Sadabad and, from there, to the CHC, Sadabad, where the doctor pronounced Komal Prasad dead. He thereafter returned to his village, while his uncle and mother proceeded to Agra to get confirmation about the diagnosis made at the CHC, Sadabad. It emerges from the sequence of the events, as made out by the prosecution, that Komal Prasad was taken to the CHC, Sadabad, at about 9 A.M. As per the statement of this witness, he was present at the CHC, Sadabad, at the said time while, on the other hand, it emerges from the record that the investigating officer has prepared the site-plan at the pointing out of this witness PW1 at about 8:45 A.M. in village Tisanga. It is admitted that the CHC, Sadabad, is situate at a distance of 12 km from the village Tisanga. If, as alleged by this witness, he had taken his father to police station Sadabad and thereafter to the CHC, Sadabad, after lodging the FIR, at 7.45 A.M., it is impossible for him to BE present in his village at 8:45 A.M. when the investigating officer is alleged to have prepared the site-plan at his pointing out. For the same reason, it is not possible that his statement under section 161 Cr.P.C. could have been recorded by the I.O. at 8.30 AM.

21. The above anomaly further highlights another rather unnatural conduct of P.W.-1 who on the one hand states that he loved his father very much and was his favourite and after his father being shot, carried him in his lap in the jeep to the Bisawar chowki and thereafter to Police Station Sadabad and from there to the Community Health Center where he was pronounced dead but he did not accompany his father while he was taken to Agra to obtain confirmation of his death and in fact very quickly he returned to his village by bus. This unnatural conduct not only casts a doubt upon the statement of this witness, but it also renders the investigation and the timings as recorded in the case diary etc highly doubtful.

22. PW-2, Jai Prakash @ Oopo, is the central figure in the entire prosecution case, and is also the injured. P.W.-2, has reiterated the same facts as P.W.1. When cross examined, he expressed ignorance regarding treatment of his father and has stated that he himself was medically treated in S.N. Hospital, Agra where he was admitted for 20/22 days. He further stated that two persons who were accompanying him namely, Dhanna and Bunti had met him in the way and from his house, he had started all alone to call Prem Singh Kachi, whose house was 2-3 furlongs away from his house. He further evidenced that he was interrogated by the I.O. on 30.6.2001. It has been evidenced by P.W.2 that the appellant Narendra were four brothers and his brother Lomus is a constable in P.A.C. P.W.-2 further evidenced that appellant Narendra had threatened 15 days prior to the incident and no assault took place concerning shop dispute prior to this incident. He further evidenced that only once there was heated exchange of words for closing of the shop between him and Narendra and no complaint was made prior to the present incident regarding the said threatening. He denied that appellant Narendra has not done anything as alleged against him concerning the shop and for falsely implicating the appellants the case was fabricated and no such incident as alleged by him ever occurred. P.W. 2. Further evidenced that Bunti too is related with him, being his maternal cousin brother and he resided in Alvar, Rajasthan, Dhanna is his classmate and neighbour and was known to him since last 12 or 14 years. This witness further stated that heated exchange took place with appellant Narendra for 2 or 3 minutes and then Narendra had entered into his house uttering to wait and he will return with gun. P.W.2 further disclosed that after being injured by first shot he ran away whereupon the second shot was fired at him from behind from a distance of six yards. He further evidenced that in between both the shots only one minute had lapsed. P.W.-2

further disclosed that the place at which he was shot at was 100-150 yards from his house and he had not fainted after sustaining both the gun shot injuries. From the first gun shot injury, blood had oozed out and had stained his clothes. He further said that he could not tell as to whether the blood had trickled down on the earth or not? He further disclosed that he had regained consciousness in Agra after three or four days which statement contradicts the claim of PW 1 of having conversed with him on the following day. He further evidenced that after squatting on the ground, he has no re-collection and had fainted. Many omissions has been asked from this witness to which he had denied. On being questioned by the Court, he informed that after regaining consciousness after four days, he had inquired about his father and he was informed that he had died and, therefore, he came to know that after sustaining gun shot injury his father had died instantaneously. He was unable to disclose in which ward and on which bed he was admitted in the hospital nor he could correctly disclose the name of the doctor, who had treated him, although he stated that he was admitted in the hospital for 22-23 days during which period, no police personnel visited him. He further stated that he had not left the hospital for all this period, which statement is totally incorrect as he had eloped from the hospital. He was also unable to disclose at what point of time last rites of his father (*tervi*) was performed. He denied the defence suggestion that he and his father were shot at different time at different place and the entire prosecution story has been cooked up. He further denied the defense case that he and his father and other family members indulged in business of stolen ornaments and because of that reason, they were fired upon and because the appellants had made a complaint against them in the police and therefore the appellants have been falsely implicated. Regarding his hospitalisation also the contradiction was put to this witness that

he was treated in S.R. Nurshing Home, Nammer Road and not in S.N. Medical College to which he has denied. He was suggested that he could not have seen the injury being inflicted on the deceased as the place from where he was hiding himself, the said spot where his father was shot at is not visible. This witness has clearly stated that he was not taken to C.H.C., Sadabad because it has not such good medical facility as that of Agra. He also denied the defence suggestion that he had not gone to the house of Prem Singh Kachi nor the incident had occurred on the brick pavement.

23. According to the testimony of PW-2, Jai Prakash, he was accosted by Narendra for not shutting down his business, which was resulting in financial losses to Narendra; and, on his refusal, the brothers of Narendra had caught hold of him while Narendra brought out his gun and fired at him. It emerges from his cross-examination that his statement under section 161 Cr.P.C. was recorded by the investigating officer on 30.6.2001. In this statement he has not mentioned that at the time of shooting he was accompanied by Dhanna and Bunty, whose names find mention in the FIR. It also emerges that the shop of this injured witness was 10-15 years old while the appellant Narendra, had opened his shop only about 6 months back. He has also stated that prior to the incident Narendra had only once asked him to shut down his shop. On this occasion only a verbal altercation had taken place. Thereafter the dispute had been settled in a *panchayat*. It also emerges from the perusal of his cross-examination that this witness had not stated anything in his statement under section 161 Cr.P.C. about the second shot alleged to have been fired at his father, which is therefore an improvement. As regards the injuries he himself had sustained, he has stated that the first shot fired at him was a chest shot, which went through and through but at a later stage he has

stated that the second shot was fired at him while he was running away hitting him on the back, and the same exited from his chest. This material contradiction has also been noticed by the court below. Lastly, he has stated that Narendra fled from the spot firing from his gun and that he was informed by his mother that his father had died at the spot. Initially, in his cross-examination he had stated that he was treated entirely at the S.N. Medical College and that he was never treated at S.R. Nursing Home, Namneer Road, Agra, but after a pause he states that he was treated at both the places. In this connection it is relevant to refer to his cross-examination, at page 25 of his statement, wherein this witness has stated that he never left his bed in S.N. Medical College, during the 22 days he was under treatment there. But, later on, on pages 29-30 of his statement, he has stated that he was often taken to S.R. Nursing Home for specialised treatment. The interesting fact which emerges from the perusal of the record is that there exists no documentary proof of any treatment having been given to this witness at S.N. Medical College, Agra. The only evidence in this regard has been furnished by PW-7, Dr. Arvind Kumar Singh, who is the Emergency Medical Officer, SN Medical College, Agra. He is stated to have examined Jai Prakash on 7.5.2001 at about 10:30 A.M. The injuries of Jai Prakash are reproduced below :

1. Lacerated wound size 3cm x 2.5cm x not probed due to surgical reasons over left lateral side & left chest wall, margin irregular & inverted, profuse bleeding present. KUO. Ad. X-ray chest- P.A. view, left chest, left/ oblique & left lateral view wound is entry.

2. Lacerated wound size 2.5cm x 2cm x not probed due to surgical region over left middle 1/3 back latterly margin irregular because of profuse bleeding margins inverted or everted can not be --- out that is why surgeon opinion require. KUO.

pt.- conscious, in shock, GC- poor. Pt.- admitted, police inform, KUO

Opinion- Injury No. 1 caused by firearm, Injury No. 2 caused by KUO, both injuries KUO.

Duration fresh.

24. According to P.W.-7, Jai Prakash was brought by Sushil, son of Netrapal. As noted above on examination, it was revealed that there was a wound on the left side of the chest, about 3 cm x 2.5 cm in size and the same was bleeding profusely. This injury was not probed to ascertain its depth for surgical reasons and was kept under observation and an X-ray was advised. He has categorically stated that the injured was conscious, though in shock. He further opined that injury no. 1 was a firearm injury. Doctor, PW 7, has also categorically stated that he does not have any Nursing Home at Namneer Road, nor he has any private clinic nor he referred the injured to any private hospital for treatment as all the facilities and experts are available in his hospital [S.N. Medical College, Agra]. He has further opined that the injuries on the person of Jai Prakash were bleeding profusely and there was little likelihood of his surviving, if he had covered a distance 45 km from his village Garh Tisanga to Agra. In this connection, it would be relevant to refer to the testimony of D.W.-3, D.C. Kushwaha, who has appeared before the Court along with the original bed head ticket of the injured Jai Prakash. In this document, it is recorded that the injured was admitted at 10:30 A.M. on 7.5.2001 and was medically examined by Dr. A.K. Singh. The bed head ticket no. is 10532. There is an entry on the bed head ticket made at 11 A.M. on 7.5.2001, that the patient was found to have absconded. PW-7 has further stated that it is not clear from this bed head ticket as to whether any X-ray was done before the injured eloped.

25. From the narration of the facts above, it is clear that the injuries alleged to have been inflicted upon Jai Prakash are not proved in the absence of any documentary evidence as regards the treatment given to him. There is apparent contradiction as to the place/places of treatment. There is no further record of any treatment given to the injured witness at any place even though

he states that he was admitted in S.N. Hospital for 22 days continuously. Even though an x-ray was advised, there is nothing on record to show that any x-ray was actually done.

26. In so far as the alleged eye-witness-account of this injured, Jai Prakash, as regards the shooting of Komal Prasad is concerned, the witness has stated that after the first shot hit Komal Prasad, he sat down and the second shot hit him thereafter. This version does not appear to be correct, because, according to the postmortem report of the deceased, Komal Prasad, there is a contusion 2 cm x 2 cm in size on the front of the chin. This injury, to our mind, could have been caused by the deceased falling face-wards after being shot at. There is greater likelihood of this injury being caused if a man standing erect, falls face forward than one who is sitting down.

27. According to the prosecution case, the motive for commission of the crime was refusal on the part of Jai Prakash to shut down his business. To our mind, this motive does not sound logical in view of the fact that the shop of Jai Prakash was over a decade old while the accused Narendra had only recently started a similar business. On the contrary, this fact could be a potent reason for false implication of the appellant so as to eliminate a business rival.

28. Another glaring contradiction, which emerges from the testimony of this witness, Jai Prakash, is that he has categorically stated that his statement under section 161 Cr.P.C. was recorded on 30.6.2001 at his house. On the other hand, the investigating officer, PW-6, Vidya Raman Sharma, at page 7 of his cross-examination (page 65 of the paper-book) states that Jai Prakash had come to the police station on 30.6.2001 on being summoned by him, when his statement was recorded.

29. On page 19 (page 32 of the paperbook) of his statement, witness Jai Prakash has stated that Narendra had loaded both barrels at

the same time and he did not reload after firing the first shot. This must necessarily mean that the second shot was fired from the second barrel of the DBBL gun. This statement is not borne out from the ballistic report, which states that the empties sent for ballistic examination along with the gun were fired only from the right barrel of the gun. This defies logic because it is the categorical case of the prosecution that at the time of recovery of the weapon, empty cartridges were found in both the barrels of the gun. This could be possible only if the shooter fired a shot from one barrel and then reloaded after taking out the spent cartridge and placing it in the second barrel. This however is not the case of the prosecution. The recovery memo prepared by the investigating officer states that he recovered the gun containing two spent cartridges from the house of the appellant and further two spent cartridges were recovered from the cupboard nearby. This prosecution version of the recovery does not sound plausible and is not consistent with the categorical and consistent prosecution version that the appellant fled from the spot while firing in the air i.e. he fled with the gun used in the incident. How, in the given scenario, was the gun recovered from the house of the appellant, only an hour and a half after the incident? In this connection it would be relevant to refer to the statement of the first informant on page 13 of his statement (page 26 of the paper book) which indicates that the I.O. lifted the empty cartridges from the kharanja, at the site of the shooting, and the gun was brought from the roof top from where the appellant is alleged to have fired upon Komal Prasad. On an appraisal of the entire evidence on this issue, the statement of appellant Sant Kumar under section 313 Cr.P.C that the I.O. collected the gun from the mother of the Narendra and thereafter fired four shots with it becomes very significant and in view of the contradictions and probabilities it cannot be said with any degree of certainty that the prosecution case that

the accused fired two shots each upon the injured and the deceased is established beyond reasonable doubt or that the weapon was in fact used, as alleged. There is another fact which belies the prosecution case that Komal Prasad was fired at by the appellant Narendra from his roof top, about 12 feet above the ground level. For the said purpose the injuries mentioned in the post-mortem report are reproduced below:

1. Multiple firearm wounds of entry on front of chest and abdomen both shoulders, Rt. upper limb, neck and face. Uncountable ----- Rt. side than left side. No blackening & tattooing. Size 0.3cm x 0.3cm x muscle to cavity deep. Contusion 2cm x 2cm on front of chin.

The size of the wounds of entry as recorded above show that they were round in shape which was possible only in the case of a parallel shot. If, as alleged by the prosecution, the shot was fired from a height, the wounds of entry would have been oval in shape. Thus the prosecution case and the ocular testimony of the shot or shots fired at Komal Prasad, having been fired from a height is not supported by the medical evidence.

30. This witness has also stated that after seeing his father being shot, he got up and ran to some distance and thereafter fell down, fainted and regained consciousness after about four days. This statement is again contrary to what is recorded in the bed-head ticket and the statement of PW-7 according to whom he was conscious and talking. Even PW-1 has stated that he visited this witness at S.R. Nursing Home, Namneer Road, Agra on the day after the incident and had talked to him. This variance in the statements of the witness and the documentary evidence indicates that Jai Prakash, PW-1 is not telling the truth and is in fact hiding something. This coupled with the total lack of any documentary evidence regarding the treatment provided to him and the varying statements regarding the place of treatment, raises serious doubts about the credibility of this injured witness and he cannot therefore be relied upon to confirm the conviction

of the appellants.

31. The other glaring inconsistency in the statement of this witness, Jai Prakash, emerges from his statement at page 28 where he has stated that Buntty @ Brijesh Kumar, was not present on the spot when the first shot was fired by appellant Narendra and that he came to the spot later on. This statement is contrary to the allegations in the first information report and is also contrary to the statement of Buntty himself. Not only does this statement create a serious doubt as regards the first version of the prosecution case itself, it also casts serious doubt upon the oral testimony of PW-3, Buntty @ Brijesh Kumar himself, who, according to the prosecution, is made out to be an eye-witness of both parts of the incident.

32. Turning to another witness, P.W.-3, Brijesh Kumar, he had to support the prosecution version in his examination-in-chief. This witness however was interrogated by the I.O. on 21.5.2001 after an ordinate delay of two weeks' for which prosecution has not offered any explanation. He had expressed his ignorance regarding the fact where injured was taken away after the incident and stated that the deceased had died instantaneously sustaining gun shot injury in front of the shop of Vishnu Dutt at brick pavement. He has also stated that the police never came to question him, and yet it is alleged by the prosecution that his statement under section 161 Cr.P.C. was recorded by the investigating officer on 21.05.2012. This witness is a chance witness as he is a resident of Alwar, Rajasthan, and has not been able to explain or assign any reason for his visit to the residence of his *phupha* (Komal Prasad, the deceased) in Tasinga. His alleged statement under section 161 Cr.P.C. does not talk of any second shot having been fired either at the deceased Komal Prasad or the injured Jai Prakash. Although he is alleged to be an eye-witness of both the shootings and he states that he was

on the spot till the time his *phupha*, Komal Prasad, was taken away by jeep and then he came back to the house of the deceased to inform his *bua*, whereafter he alleges that he had fainted. This testimony of Bunty is in direct contradiction with the statement of PW-11, Bankey Lal, who has stated that when he reached the spot where Komal Prasad had fallen down, both his wives were present. Under the circumstances, the statement of Bunty that he went back to his *bua's* house to inform her, cannot be believed. His statement is further under a cloud because it is the categorical case of the prosecution that after Komal Prasad was shot, both his wives arrived at the spot and one of them, Omwati, accompanied him for lodging of the FIR, and, thereafter, to CHC, Sadabad, and then to Agra and back. Thus, in view of the statement of Jai Prakash himself, that Bunty was not present when the first shot was fired, coupled with the other discrepancies pointed out above, it cannot be stated with any degree of certainty that Bunty was, in fact, present at the scene of the occurrence. Moreover, his statement cannot be believed also because he states that he remained in village Garh Tisanga in the house of the deceased till the "terahi" and did not go anywhere while the I.O. has recorded in the case diary that on 8.5.2001 he went to village Garh Tisanga to record the statement of Bunty but was informed that Bunty was not available as he had gone to Agra and was with Jai Prakash who was undergoing treatment at Agra. This witness in his statement under section 161 has not stated anything about any second shot having being fired at the deceased nor has he stated that Komal Prasad fell down after the first shot. In fact, his statement before the Court is that Komal Prasad was still standing when the second shot hit him. In his 161 Cr.P.C. statement, he has not informed the I.O. that he had informed the deceased and other family members regarding sustaining of gun shot injury by the injured P.W.2. This fact, makes this witness a

wholly unreliable and got up witness. He seems to have stated a parrot like statement. Significant contradiction was asked from him regarding sustaining of injury by the deceased to which this witness had denied and was unable to inform how that significant aspect is missing from his interrogatory statement recorded by the I.O. after a fortnight.

33. Coming to the argument that the investigation itself is tainted, it has been pointed out that even though the investigation has been carried out by three investigating officers, none of them made any attempt to contact Jai Prakash or record his statement at Agra even though he was the most crucial witness in the case. There exists no entry in the G.D. of 21.05.2001 whereby the S.I. Harishchandra Singh was directed by the Inspector Sadabad to obtain the clothes worn by the injured at the time of the incident. There is no documentary evidence to show that the deceased Komal Prasad was in fact taken to the C.H.C., Sadabad and the '*chitthi majroobi*' issued from the Police Station Sadabad with which Komal Prasad was sent to the C.H.C, Sadabad has not been tendered in evidence. The doctor on duty at the C.H.C. on the date of the incident, Neeraj Agrawal, Medical Officer, DW-4 has stated on the basis of the Registers brought by him, that there is no record of any injured having been examined at the Community Health Center on 7.05.2001 as per the M.L.B.C. Register. This C.H.C. is the only government Hospital in Sadabad. He has elaborated that in case Komal Prasad had been brought with the letter, it would contain some endorsement either that he was brought dead or that in view of his serious condition the patient was being referred for treatment elsewhere. On the strength of the above, it has been submitted that Komal Prasad, in fact, died at the spot and the entire story of his being taken to the Bisawar outpost and to Sadabad Police Station and C.H.C and then to Agra has been

fabricated to show him to be alive till long after his death, possibly with the motive of subsequently fabricating a dying declaration. The submission that Komal Prasad died at the spot is not easy to ignore. The post mortem report shows that the heart was lacerated as were the lungs. Two pellets each were recovered from each lung while two pellets were recovered from the heart. It appears highly unlikely that a person with a punctured heart and punctured lungs would have remained alive for any length of time after sustaining such injuries. If the deceased died at the spot, as is our inference, only then it could explain the conduct of the family members of the deceased of the injured being sent to Agra as there was no logic in carting a dead body to Agra. However, the fact that a lot of fabrication and concoction has been resorted to, to show the deceased to be alive till at least 11 A.M., lends credence to the defense plea that the injured and deceased sustained injuries elsewhere at some other point of time and appellants were falsely implicated on account of enmity and / or business rivalry.

34. The incident is said to have taken place in a heavily populated area with houses on both sides and yet no independent witness has been produced to support the prosecution case. All the three witnesses of fact are close relatives of the deceased and we are not convinced by their testimony for the reasons already recorded above. Even the independent witness mentioned in the first information report, namely Dhanna who is stated to be a friend and class-mate of Jai Prakash has not been produced by the prosecution. The wife of the deceased who is said to have accompanied him upto Agra has also not been produced. It is not disputed that two of the brothers of the deceased are retired Sub-Inspectors of Police and the third was still in service as an Inspector on the date of the incident. One of the retired brothers was residing in the village and is said to have been present at

the time of lodging of the FIR and accompanied the deceased upto G.G.Nursing Home Agra and then back to his house in Tisanga. In these circumstances the contradictions, omissions and most importantly the improvements in the version as contained in the first information report fail to establish the prosecution case beyond reasonable doubt and on the contrary lead to the inevitable conclusion of false implication of the appellants.

35. The time of death of Komal Prasad in the inquest report is 11 AM. This appears to be without any basis. According to P.W.-3, Komal Prasad died instantaneously. P.W.-2, the injured witness has stated that he was informed by his mother that Komal Prasad had died at the spot. There is no logical reason why the wife of the deceased would state that her husband died instantaneously, if this was not true. A wife would be the last person to want her husband dead. All three brothers of the deceased were police personnel and the police was at all stages helping the family of the deceased. A police constable accompanied the cadaver of Komal Prasad upto Agra and then back to his residence in village Tisanga. In fact he was with the first informant and the other family members accompanying Komal Prasad right from the time the first information report was lodged at Bisawar outpost. The jeep in which the entire distance from the village to Agra and back has been travelled was driven by a police constable. Even the injured is stated to have been taken to Agra for treatment in a jeep belonging to a police constable.

36. It, therefore, emerges from the facts stated above that persons from the police department have been in attendance at all times and have been more than willing to render assistance at every juncture. A retired Sub-Inspector, the brother of the deceased accompanied him from the village up to Agra where another

brother, also a retired Sub-Inspector, was settled. These circumstances, coupled with the statement of two fact witnesses (P.W.-2 and P.W.-3) that the deceased died at the spot leads to an inevitable conclusion that the time of death has been manipulated so as to buy time and to use the time so bought to fabricate a case against the appellants after consultations and deliberations. Another fact leading to the same conclusion is that the case was initially registered under section 307. It should have been under section 302, because as stated by the fact witnesses, Komal Prasad died instantaneously. This also casts a serious doubt upon the case set up by the prosecution at its very inception. Moreover, Bisawar being a reporting outpost, it possessed all powers of a regular Police Station. The *Majroobi chitthi* could and should have been issued immediately after the case was registered from this Police out post itself, but the case of the prosecution is that the first informant and other persons carried Komal Prasad to Sadabad Police Station where the *majroobi chitthi* is said to have been issued but even more interestingly, this *majroobi chitthi* has not been tendered in evidence. This story of the *majroobi chitthi* being issued from the Sadabad Police Station also appears to be a ploy to buy time. The fact that the said *majroobi chitthi* was not issued at the Bisawar Out Post would also indicate that it was not issued because there was no need to issue the same as Komal Prasad was already dead.

37. As regards the appellants Sant Lal and Acchi, appellants in Criminal Appeal no:5412 of 2004, the only allegation against them is that they caught hold of the injured, Jai Prakash @ Oppo while Narendra went inside his house to fetch the gun with which he is alleged to have fired the shots. There is contradiction as regards the manner in which Jai Prakash was restrained by these two appellants. The F.I.R. records that he was caught hold by the waist ('jeth bhar li') while the injured

himself has deposed that the appellants Sant Kumar and Acchi caught his arms and pulled in opposite directions to restrain him. These two different descriptions also cannot be reconciled.

38. Learned AGA has, while supporting the judgment of conviction, urged that it is a daylight incident. The FIR has been lodged without any delay and there is an injured witness who has supported the prosecution version to the hilt. The discrepancies, if any, in the testimonies of the witnesses could be attributed to the fact that their statements were recorded three years after the incident.

39. Upon due consideration of the submissions of the parties and after examining the evidence on record, we are not convinced by the testimonies of the fact witnesses for the reasons already given above. The prosecution has not been able to establish the guilt of the accused beyond doubt.

40. The impugned judgment of the trial Court has failed to notice and take into account the probabilities, material contradictions and the embellishments that have been highlighted above and therefore, in our opinion, the impugned order of conviction and sentence cannot be sustained and is liable to be reversed.

41. Under the the circumstances and for the reasons given above, both the above appeals are allowed. The impugned judgment of conviction is set aside and the appellants are acquitted of all the charges leveled against them. Narendra @ Nanga, the sole appellant in Criminal Appeal no:5584 of 2001 is in jail. He is directed to be released forthwith unless required in some other case. Sant Kumar and Acchi, appellant nos:1 and 2 in Criminal Appeal no:5412 of 2001 are on bail. Their bail bonds are canceled and their sureties are discharged. They need not surrender.

42. Let a copy of this judgement be certified to the trial court for its

intimation.

Order Date :- 13th September, 2013.
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