A.F.R.

Court No. - 44

Case :- CRIMINAL APPEAL No. - 6351 of 2007
Appellant :- Naresh Chandra
Respondent :- State of U.P.
Counsel for Appellant :- R.P.S. Chauhan,Narendra Kumar,Rabindra Bahadur Singh,Shahabuddin
Counsel for Respondent :- Govt. Advocate

Hon'ble Dr. Kaushal Jayendra Thaker,J.
Hon'ble Nalin Kumar Srivastava,J.

(By Nalin Kumar Srivastava, J.)

1. This criminal appeal has been preferred by the appellant against the judgement and order dated 13.09.2007 passed by the Additional District & Sessions Judge, Court No.9, Moradabad in Session Trial No.127 of 2004 (State vs. Naresh Chandra) (case crime no. 211 of 2003) convicting and sentencing the appellant for the offence punishable under Section 302 IPC to undergo life imprisonment and a fine of Rs. 10,000/- with stipulation of default clause.

2. Brief facts of the case, as unfolded by the informant Shyam Lal son of Daulat in the First Information Report (in short 'F.I.R.'), are that on 9.10.2003 at about 9.30 a.m. while the informant alongwith his son Natthu and daughter-in-law Shakuntala was standing at Sirswan crossing in village Manpur in front of Stall (khokha) of Pandit Ji, Naresh, son of his brother Masih Charan, suddenly came from behind the Stall and catching the hair bun of Shakuntala, stabbed with knife many times on her body due to which she fell down on another side of the road. The son of the informant made noise but no one

turned-up to save her. When the informant rushed towards the Chauki Manpur situated nearby, he saw one Inspector and two Sepoy coming there. Having seen the policemen, Naresh ran away at once towards the Vidhya Niketan School but the policemen caught him alongwith the knife. Recovery memo Ext. A-4 was prepared and, thereafter, informant took away injured Shakuntala to hospital where she was declared dead. The dead body of deceased was sent to Manpur Chauki and accused Naresh was also brought to the Police Station concerned.

3. On the basis of the written report (Ext. ka-1) scribed by one Rajveer Singh, chik First Information Report (Ext. Ka-5) was registered at Police Station concerned on 9.10.2003 at 12.10 p.m. mentioning all the details as described in Ext. Ka-.1. G.D. entry was also made at the same time, which is Ext. Ka-6.

4. Investigation was entrusted to sub-Inspector Sanjiv Kumar (PW-7). He inspected the spot and prepared site plan - Ext. ka-7. He also prepared the inquest report of the deceased (Ext. ka-8) and papers relating to post mortem Ext. A-9 to Ext. A-14. The Investigating Officer also took the sample of plain earth and bloodstained earth from the place of occurrence and prepared the memo Ext. ka-15.

5. Autopsy report (Ext. ka-19) was prepared by Dr. Allauddin Saifi after performing the post mortem of the deceased on 10.10.2003 at 2.00 p.m. On examination

of the dead body of the deceased, following ante-mortem injuries were found:

"i. A stabbed wound 3.0 x 2.0 cms. x cavity deep in left axilla.

ii. A stabbed wound 3.5 x 2.5 cms. x muscle deep on anterior surface of left arm 4.0 cms below top of shoulder (Not exposed).

iii. Multiple abrasion in an area 20 x 6.0 cms. on posterior lateral surface of left arm with elbow

iv. An abrasion 6.0 x 4.0 cms. on left side of back of chest 8.0 cms. below left shoulder."

6. In the opinion of the doctor, death was caused due to haemorrhage and shock as a result of ante-mortem injuries.

7. After completing the investigation, charge-sheet (Ext. ka-16) against the appellant was filed. Concerned Magistrate took the cognizance. The case being exclusively triable by sessions court, was committed to the Court of sessions.

8. Appellant appeared before the trial court and charge under Section 302 IPC was framed against him. He denied the charge and claimed his trial.

9. Trial proceeded and in order to prove its case prosecution has examined in all seven witnesses, namely, PW-1 Shyam Lal (informant), PW-2 Natthu (eye witness), PW-3 Dr. Alauddin, PW-4 Sub-Inspector Anil Kumar Yadav (eye witness), PW-5 Constable Shyam Singh (eye witness), PW-6 H.C.P. Khem Singh (scribe of F.I.R.) and PW-7 Sub-Inspector Sanjiv Kumar, the Investigating Officer.

The following documents were exhibited :

10. Written report Ext. A-1, Recovery and arresting memo Ext. A-2, Ext. A-3 and Ext. A-4, F.I.R. Ext. A-5, G.D. Ext. A-6, site plan - Ext. A-7, inquest report Ext. A-8, photo lash Ext. A-9, paper No.33 Ext. A-10, challan lash Ext. A-11, letter to R.I. Ext. A-12, letter to C.M.O. Ext. A-13, sample seal Ext. A-14, seizure memo of plain and bloodstained soil Ext. A-15, charge sheet Ext. A-16, Analysis report from Forensic Science Laboratory Ext. A-17 and Ext. A-18, Autopsy report Ext. A-19.

11. After closure of evidence, incriminating materials appearing in the prosecution evidence were put to the appellant in his statement under Section 313 CrPC. He denied all the incriminating evidence including the alleged recovery of knife by claiming it to be false and bogus and also claimed false implication due to enmity.

12. Appellant in his defence has examined DW-1 Shomit Kumar, DW-2 Dal Chandra, DW-3 Narendra Sharma and DW-4 Constable Brajmohan Rana. DW-4 has proved the copy of G.D. as Ext. kha-1.

Evidence led by the Prosecution :

13. PW-1 Shyam Lal is the informant and eye witness of the occurrence. In his examination in chief he has stated that he reached the spot after receiving the information of murder and he did not see as to who has murdered the deceased. No one even told him the name of the accused. In his deposition he has proved the written report as Ext. A-1 and has stated that he had dictated the report to Rajveer Singh and whatsoever he has stated the same was written in the

report. He has also stated that on his report F.I.R. was lodged. The witness was declared hostile by the prosecution and in his cross examination he denied so many contents of the written report Ext. ka-1. On the recovery memo of murder weapon 'knife' he has identified his thumb impression which has been exhibited as Ext. A-2 but he has deposed that his thumb impression was taken on a blank paper by the police. When the witness was cross-examined by the defence, he has stated that since he was not in a fit mental condition, he could not understand as to what was written in the Tehrir and the villagers had dictated the report to Rajveer Singh.

14. PW-2, minor son of the informant, is also said to be the eye witness of the occurrence. He is also a hostile witness and has categorically stated that at the time of occurrence he was not present over there and he does not know as to who murdered the deceased. He has also shown his ignorance about the presence of his father Shyam Lal on the spot. In his cross-examination the witness has identified his signature over the recovery memo and Ext. A-3 has been marked over it but he has denied his statement under Section 161 CrPC given to the Investigating Officer. This witness has also stated that his signature was obtained on a blank paper at the Police Chauki, Manpur. Accused Naresh was not arrested before him and no knife was recovered from the accused before him.

15. PW-3 Dr. Alauddin Saifi has performed the autopsy of deceased and has proved the autopsy report as Ext. A-19.

16. PW-4 S.I. Anil Kumar Yadav is said to be present over the place of occurrence at the time of crime. He has stated in his examination in-chief that on 9.10.2003 about 9.30 a.m. while coming to P.S. Bhagatpur from Chauki Manpur alongwith Constable Shyam Singh and Constable Brijesh Kumar Tyagi, he saw from a distance of 50 yards (gaj) that at Sirswan Mod one person was stabbing a lady with knife and other person and a boy were shouting to save her. The aggressor fled towards Tanda but the policemen chased and caught him in front of Vidhya Niketan College at about 9.45 a.m., with a knife in his right hand. He was arrested on the spot. Murder weapon 'knife' was also taken into possession by the police and seizure memo Ext. A-4 was prepared on the spot. This witness has also proved the murder weapon 'knife' as Material Ext.-1. In his cross-examination PW-4 has stated that he did not give any information to Tanda Police and he brought the deceased alongwith the accused to the Hospital. Deceased at that time was alive.

17. PW-5 Shyam Singh is also said to be the eye witness of the occurrence. In his deposition he has corroborated the evidence of PW-4 and has proved the factum of arrest of accused as well as recovery of murder weapon from his possession. He, claiming

himself to be the eye witness of the occurrence, has identified his signature over recovery memo Ext. A-1.

18. PW-6 Head Constable Khem Singh is the scribe of the F.I.R. and has proved the chik F.I.R. and G.D. Rapat No. 24 at 12.10 p.m. as Ext. A-5 and Ext. A-6 respectively. In his cross-examination he has deposed that the scribe of report Rajveer Singh did not come to the police station alongwith the complainant.

19. PW-7 Sub-Inspector Sanjiv Kumar, the Investigating Officer of the case, has proved the proceedings of investigation in his examination-in-chief and also proved the site plan – Ext. A-7. Inquest of the body of the deceased has been performed by this witness and papers relating to the post mortem have also been prepared by him. He has proved the inquest report, photo nash, Form No. 33, challan nash, letter to R.I., letter to C.M.O. and specimen seal as Ext. A-8 to A-14 respectively in his evidence. He has also collected the bloodstained and plain soil from the place of occurrence and its seizure memo Ext. A-15 has also been proved by him. In his cross-examination he has stated that as per the memo, the deceased was taken to the hospital by her father in-law Shyam Lal and his companions but the police had not accompanied the informant Shyam Lal, according to the memo. He has also narrated that in the memo the doctor has endorsed that the stabbing was caused by an unknown person.

Evidence led by the Defence :

20. DW-1 Shomit Kumar, DW-2 Dal Chandra and DW-3 Narendra Sharma, the witnesses produced by the accused, have stated in their deposition that at the time of occurrence they were present on the spot and had seen an unknown person stabbing a lady and accused Naresh Chandra was not present over there at that time. They have also stated that they know the accused very well and they were present at their respective shops at the time and place of occurrence.

21. DW-4 Constable Brajmohan Rana has deposed that on 9.10.2003 at 10.00 a.m. sweeper Awadhesh working at C.H.C. Tanda had given a memo to him at the police station bearing seal of C.H.C. Tanda and signature of doctor, which was entered by him in G.D. Rapat No.17 at 11.00 a.m.. The information was sent to police station Bhagat Pur, District Moradabad through wireless. DW-4 has proved the carbon copy of the G.D. as Ext. kha-1.

22. On the basis of aforesaid evidence, learned trial court came to the conclusion that the prosecution has succeeded to establish the guilt against the accused person on the basis of cogent, consistent and reliable evidence and charge against accused was proved beyond reasonable doubt and accordingly conviction order was passed.

23. Learned counsel for the appellant has assailed the impugned judgment and order on various grounds. It has been argued that prosecution version rests upon the ocular testimony of PW-1, PW-2, PW-3 and PW-4.

PW-1 and PW-2 are hostile witnesses and do not support the prosecution version at all. PW-3 and PW-4 are the police officials, who are the chance witnesses and their presence over the place of occurrence is not proved by any cogent evidence. No independent witness has been examined by the prosecution in support of its case. It has also been submitted that the place of occurrence is doubtful and there is no clinching evidence as to fact that the alleged occurrence happened at the same place as the prosecution claims. It has further been argued that the accused had no motive to kill the deceased. It has further been submitted that medical evidence does not corroborate the ocular version. It has also been submitted that the learned trial court has illegally relied upon the statement of accused given to the Investigating Officer during the course of investigation and in arbitrary and illegal manner has passed the conviction order on the basis thereof.

24. Per contra, learned AGA appearing for the State respondent has vehemently argued that the prosecution case was proved on the basis of cogent and reliable evidence. There is no merit in the appeal and the appeal is liable to be dismissed.

25. We have carefully gone through the record and have given our thoughtful consideration to the rival contentions of the parties.

26. Place of occurrence has always been an essential part of the prosecution story, which is necessary to be

proved by prosecution by cogent evidence in order to succeed.

27. Reliance has been placed upon ***Syed Ibrahim vs. State of Andhra Pradesh, JT 2006 (6) SC 597*** where it has been expressly held that it would not be proper to accept the prosecution case when the place of occurrence itself has not been established. Also in ***Asraf Biswas vs. The State of West Bengal, 2016 SCC OnLine Cal. 4342*** which was relied upon by the learned counsel for the appellant, it was found from the evidence on record that the place of occurrence was not proved beyond all reasonable doubts. The Calcutta High Court held that "Once it is held that the place of occurrence has not been established beyond all reasonable doubts, then the other circumstances are hardly sufficient to establish the guilt of the accused".

28. In light of the aforesaid observations, the learned counsel for the appellant has pointed-out that in the present matter the place of occurrence is highly suspicious and from the evidence on record a genuine doubt arises in respect of the certainty of the place of occurrence. He has submitted that in the F.I.R. (Ext. A-5) place of occurrence is mentioned at Sirsawa Tiraha, Village Manpur, P.S. Bhagat Pur, District Moradabad. In the written report Ext. A-1 it has been mentioned that at the time of occurrence, informant alongwith his son and daughter-in-law, was standing in front of Khokha of Pandit Ji at Sirsawa Tiraha, Village Manpur and that was the place where the incident occurred. It has also been

mentioned in Ext. A-1 that when the accused tried to escape towards Vidhya Niketan School, two policemen caught him.

29. Learned counsel for the appellant, referring to the written report Ext. A-1 has submitted that after the occurrence informant immediately rushed towards Police Chauki, Manpur but in the site plan (Ext. A-7) this fact has not been shown. It has also been submitted that place of occurrence has not been proved by the so called eye witnesses of the incident, namely, PW-1 and PW-2.

30. We made a close scrutiny of the oral and documentary evidence on record in view of the aforesaid submissions made by the learned counsel for the appellant.

31. PW-1 and PW-2 have been declared hostile and have stated that they were not present on the spot at the time of occurrence. What is the value of their evidence as hostile witness will be evaluated later on in this judgment but so far as the place of occurrence is concerned PW-1 in the opening part of his deposition has clearly stated that occurrence happened at Manpur Tiraha.

32. PW-4 and PW-5 are the two policemen, who happened to be present on the spot when crime was being committed by the accused and they are the persons who caught the accused with the murder weapon. PW-4 has clearly stated that he had seen one person stabbing a woman by knife at Sirawa Turn (Mod)

and when he tried to escape and ran away towards Tanda, he and his associate policeman chased and caught him in front of Vidhya Niketan College alongwith knife. PW-5, who was accompanying PW-4 at the time of occurrence, has also narrated the same facts in his statement.

33. PW-7 the Investigating Officer has proved the site plan Ext. A-7 in his deposition. It is pertinent to mention that nothing adverse has been stated by this witness in his cross-examination on the point of place of occurrence.

34. A perusal of the site plan Ext. A-7 reveals that the Khokha (small shop), where the informant was said to be standing alongwith his son and deceased, is situated at Tiraha and at the same place the accused assaulted the deceased and she fell down. Accused ran away towards Vidhya Niketan College trying to escape but policemen, who were coming from Chauki Manpur, saw the incident and grabbed him in front of Vidhya Niketan College. All this topography has been shown in clear terms in Ext. A-7 with specific points and in this way the place of occurrence as mentioned in Ext. A-1 and Ext. A-5 finds support from the oral evidence as well as from the site plan Ext. A-7. Learned AGA has also pointed out that seizure memo of plain and bloodstained soil has been proved as Ext. A-15 by PW-7 the Investigating Officer, as PW-7 has deposed that from the place of occurrence he had collected it and

thus the place of occurrence is fixed with the aid of Ext. A-15 also.

35. We, therefore, do not find any force in the contentions of the learned counsel for the appellant regarding the fixation of place of occurrence.

36. The prosecution has a definite case that the deceased was assaulted with knife by the accused and, therefore, it is very significant to search out from the evidence on record whether the death of the deceased was caused by use of knife or not. Learned counsel for the appellant has vehemently argued that the medical evidence on this point does not support the prosecution version and at this juncture the whole prosecution story fails.

37. The post mortem report is on record, which has been proved by the Dr. Alauddin Saifi – PW-3. PW-3 while proving the autopsy report Ext. A-2 has clearly and in specific terms stated that death of the deceased was caused due to haemorrhage and shock and injury no. 1 and 2 may have been inflicted by knife. He has also pointed out that death may have occurred on 9.10.2003 at 12.00 noon. It is to be reminded here that injury no. 1 and 2 are stab wounds. PW-3 in his cross examination has clarified that injury no. 1 and 2 were sufficient to cause death.

38. It is noteworthy that in the inquest report Ext. A-8 the panchas have also opined that death of deceased seems to be caused by stabbing.

39. Learned trial court has discussed the prosecution evidence with a view to find out whether it is in conformity with the medical evidence or not and has correctly opined that the prosecution version finds corroboration with the medical evidence. Hence, we are of the considered view that the prosecution story is fully supported with the medical evidence and on this point the objections raised by the learned counsel for the appellant are proved to be futile.

40. The point, which has been most vehemently argued by the learned counsel for the appellant is that there is no independent witness of the occurrence except PW-1 and PW-2, who are the father-in-law and brother-in-law of the deceased respectively. Two other persons allegedly the eye witness of the occurrence are the police personnels and are only the chance witnesses and their presence on the spot is highly improbable. No other independent witness has been examined and more over PW-1 and PW-2 have been declared hostile by the prosecution and they do not support the prosecution version at all.

41. PW-1, the informant / father in-law of the deceased, has stated in his examination in-chief that he reached the spot after being informed regarding the murder of his daughter-in-law. He did not see as to who was the author of the crime. He has been declared hostile by the prosecution. In his cross examination he, though identifying his thumb impression on seizure memo of knife Ext. A-2, has stated that it was a plain

paper when his thumb impression was taken over it. He also resiled from his statement made to the Investigating Officer under Section 161 CrPC and has also stated in the cross-examination that the written report was written by Rajveer Singh on the dictation of villagers and he never narrated this fact to Rajveer Singh, the scribe, that this was the accused Naresh who had assaulted his daughter in-law with knife and was caught on the spot.

42. PW-2 was also declared hostile by the prosecution when he stated in his examination in- chief that at the time of occurrence he was not present over there and he even does not know who has murdered the deceased. He has also resiled from his statement under Section 161 CrPC and has identified his signature as Ext. A-3 over the seizure memo – Ext. A-2. It has also been stated by him that his signature was obtained by police on plain paper. He has also deposed that accused was never arrested before him nor any recovery of knife was made from him.

43. In an honour killing case reported as ***Bhagwan Dass vs. State (NCT) of Delhi, AIR 2011 SC 1863 (C)***, the Hon'ble Supreme Court found that the mother of the accused stated before the police that her son (the accused) had told her that he had killed the deceased but when she was confronted with this statement in Court she resiled from her earlier statement and was declared hostile. The Hon'ble Apex Court held that her subsequent denial in the Court is not believable

because she obviously had afterthoughts and wanted to save her son (the accused) from punishment. The Hon'ble Supreme Court further held that "we are of the opinion that the statement of Smt. Dhillo Devi to the police can be taken into consideration in view of the proviso to Section 162(1) CrPC and her subsequent denial in Court is not believable because she obviously had afterthoughts and wanted to save her son (the accused) from punishment."

44. The principle laid down in the aforesaid judgment is clearly applicable in this case where PW-1 and PW-2, father and brother of the accused, respectively are trying to save the accused and with this motive they have resiled from their statement given to the Investigating Officer under Section 161 CrPC.

45. The law, so far as the evidentiary value of a hostile witness is concerned, is settled. In a catena of decisions the Hon'ble Supreme Court and this High Court have held that the evidence of a hostile witness would not be rejected if spoken in favour of prosecution but it can be subjected to close scrutiny and that portion of the evidence, which is consistent with the case of prosecution, may be accepted. In ***C. Muniappan v. State of T.N., (2010) 9 SCC 567***, the Hon'ble Apex Court settled the legal position as "the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witnesses cannot be treated as effaced or washed off

the record altogether but the same can be accepted to the extent their version is found to be dependable on a careful scrutiny thereof."

46. In ***State of Gujarat vs. Anirudhsing and another, (1997)6 SCC 514***, it has been held that :

> *"**29**. In view of the above settled legal position, merely because some of the witnesses have turned hostile, their ocular evidence recorded by the court cannot be held to have been washed off or unavailable to the prosecution. It is the duty of the court to carefully analyse the evidence and reach a conclusion whether that part of the evidence consistent with the prosecution case, is acceptable or not. It is the salutary duty of every witness who has the knowledge of the commission of crime, to assist the State in giving evidence; unfortunately for various reasons, in particular deterioration in law and order situation and the principle of self-preservation, many a witness turn hostile and in some instances even direct witnesses are being liquidated before they are examined by the Court……..."*

47. Virtually it is a legal duty of the Trial Judge or the Appellate Judge to scan the evidence, test the anvil of human conduct and reach a conclusion whether the evidence brought on record even if the witnesses turning hostile would be sufficient to bring home the commission of crime. In continuity of this discussion this fact is also to be examined whether ocular evidence of PW-4 and PW-5 are credible of evidence or not on the two fold tests : (i) they are police personnel, and (ii) they are the chance witnesses.

48. In the impugned judgment the trial court has discussed the evidence of PW-1 and PW-2 at length and has found that according to the written report Ext. A-1 accused is the son of Masih Charan, who is the brother of informant and PW-2 is the son of PW-1, hence, accused is the nephew of PW-1 and cousin of PW-2. The trial court has also found that deceased Shakuntala is the wife of accused. On the basis of the scrutiny of evidence of PW-1 and PW-2, the learned trial court has come to the conclusion that PW-1 probably does not want his nephew to be convicted for murder of the deceased and that is why he turned hostile. It is also noteworthy that PW-1 in his examination in-chief has clearly stated that it was he who dictated the written report Ext. A-1 to scribe Rajveer Singh and whatsoever he had spoken was written over it but in his cross examination he resiled from his earlier statement and stated that the written report was dictated by the villagers. Learned counsel for the appellant failed to explain as to why the earlier statement made by PW-1 in his examination-in-chief should not be relied upon. This makes it clear that PW-1 has deliberately trying to hide the truth and at this juncture we find ourselves in full agreement with the conclusion arrived at by the learned trial court so far as the evidence of PW-1 is concerned. Same is the position of PW-2, whose signature finds place over the arresting and recovery memo Ext. A-2. In his cross examination he has stated that his signature was obtained by the police at Chauki Manpur but according to his statement if he was not

present on the spot, how and why he reached police chauki, Manpur and when his signature was obtained on Ext. A-2 has not been clarified by this witness. Hence, this witness is also trying to hide the correct facts of the case. In ***Rajesh Yadav and another vs. State of U.P., 2022 SCC OnLine SC 150*** the Hon'ble Supreme Court held as under:

> "21.....**...**Once evidence is completed, the said testimony as a whole is meant for the court to assess and appreciate *qua* a fact. Therefore, not only the specific part in which a witness has turned hostile but the circumstances under which it happened can also be considered, particularly in a situation where the chief examination was completed and there are circumstances indicating the reasons behind the subsequent statement, which could be deciphered by the court. It is well within the powers of the court to make an assessment, being a matter before it and come to the correct conclusion."

49. According to the prosecution story at the time of occurrence PW-4 and PW-5, the police personnels, were coming from Police Chauki, Manpur when they saw the occurrence and caught the accused with the murder weapon. In this way they may be termed as 'chance witness'. Whether a chance witness is devoid of trust and only by levelling him as chance witness whether his evidence can be shattered as without any foundation, has been discussed in the judgment of ***State of A.P. vs.***

K. Srinivasulu Reddy and another, (2003) 12 SCC 660 wherein the Apex Court has held that :

> "(13).....In a murder trial by describing the independent witnesses as "chance witnesses" it cannot be implied thereby that their evidence is suspicious and their presence at the scene doubtful. Murders are not committed with previous notice to witnesses; soliciting their presence. If murder is committed in a dwelling house, the inmates of the house are natural witnesses. If murder is committed in a street, only passers-by will be witnesses. Their evidence cannot be brushed aside or viewed with suspicion on the ground that they are mere "chance witnesses".

50. When we translate the aforesaid principle with their application to the facts of this case, we gather an impression that the learned trial court has rightly relied upon the evidence of PW-4 and PW-5. It is to be noted that for the purpose of the present case PW-4 and PW-5 shall be taken as independent witnesses. There was not even single suggestion to these witnesses that they had any animosity to the accused. There was no reason why these witnesses could falsely implicate the accused in a murder case. Learned counsel for the appellant has vehemently argued that no Rawangi G.D. has been produced before the Court to show that PW-4 and PW-5 were coming indeed from Police Chauki, Manpur. We do not find any force in this contention. Mere absence of

Rawangi G.D. on record so as to show the presence of PW-4 and PW-5 on the spot at the time of occurrence does not affect the prosecution case adversely. The whole evidence of PW-4 and PW-5 is reliable and trustworthy. They were not present on the spot as police personnels but they are simply eye witnesses of the occurrence. They may be dealt with for violation of any rule to leave the Police Chauki without rawangi G.D. but this does not make their presence on the spot improbable, if a murder suddenly took place before them. They have not only grabbed the accused red handed in front of Vidhya Niketan College but also recovered the murder weapon 'knife' from his possession and arrest and seizure memo Ext. A-2 was also prepared by PW-4. The T.I. and signatures of PW-1 and PW-2 and of the police personnels present over there were also obtained. No material contradiction or unnatural statement may be found in the version of PW-4 and PW-5. They are wholly reliable witnesses of fact and their ocular version finds support from other evidence available on record.

51. It has been held by Hon'ble Supreme Court in ***State of Gujarat vs. Anirudhsing case*** (supra) that merely because the witnesses are police officers, their evidence cannot and must not be rejected outright as unreliable or unworthy of acceptance. It requires to be subjected to careful evaluation like any other witness of occurrence.

52. Learned counsel for the appellant has taken us through the evidence on record and has submitted that no motive has been assigned to the accused to commit the alleged crime. He has pointed out that no witness even PW-1 and PW-2, who are said to be family members of the deceased, no where mentioned in their entire deposition that the accused had any enmity with the deceased or he had any motive to kill her.

53. Although learned trial court has relied upon the statement of accused given to the Investigating Officer during course of investigation to determine the motive behind the crime, yet it has been submitted by the learned AGA that the present case rests upon the direct evidence wherein motive has no significance. Emphasis has been laid down upon the decisions of the Apex Court in ***Bikau Pandey Vs. State of Bihar (2003) 12 SCC 616, Anil Rai Vs. State of Bihar (2001) 7 SCC 318*** and ***Deepak Verma Vs. State of Himachal Pradesh (2011) 10 SCC 129.***

54. If we go through the evidence of PW-4 and PW-5, we have no hesitation to say that both the witnesses have given ocular evidence regarding the occurrence. They have seen the accused stabbing the deceased and have also caught him on the spot with murder weapon. They are reliable and trustworthy witnesses having no grudge or enmity with the accused. In these circumstances, we feel that the prosecution was never under any obligation to prove the motive in the present case and accordingly no force is found in the plea of the

learned counsel for the appellant so far as the motive is concerned.

55. The genuineness of the written report Ext. A-1 and the F.I.R. Ext. A-5 has also been put under challenge by the learned counsel for the appellant, who has referred the statement of PW-1 and submitted that this witness has given contradictory statements in his examination in-chief and cross- examination as to whether written report was dictated to the scribe Rajveer Singh by him or it was dictated by the villagers. It has been pointed out earlier that if any witness turns hostile, as PW-1 was declared, the portion of his evidence which supports the prosecution version may be acted upon. In his examination in-chief PW-1 has clearly stated that he himself had dictated the written report to the scribe Rajveer Singh. Learned counsel for the appellant was unable to explain as to why this portion of his examination in-chief could be rejected or overlooked. The occurrence is said to be happened on 9.10.2003 at 9.30 a.m. and F.I.R. Ext. A-5 has been lodged on the same day at 12.10 p.m.. It is mentioned in Ext. A-5 that the police station is at a distance of 10 kilometers from the place of occurrence and in the evidence it has been shown that the deceased was immediately taken to the hospital after the occurrence to save her life but she could not be survived and, hence, the F.I.R. is prompt and not a result of deliberations or after thought. PW-6, the scribe of the F.I.R., has proved chik F.I.R. and registration G.D. as Ext. A-5 and Ext. A-6 and there is no adversity in his testimony.

56. Learned AGA has drawn our attention towards the F.S.L. report Ext. A-18, which reveals that blood clots were found over all the materials sent to the forensic laboratory i.e. plain and bloodstained soil, knife, clothings of the deceased and belongings found over her body. No doubt the F.S.L. report has also supported the prosecution version.

57. Learned counsel for the appellant vehemently argued that from the defence side four witnesses in all have been examined and documentary evidence has also been adduced but the learned trial court has completely ignored the same and he has misinterpreted the defence evidence. It has also been argued that the evidence adduced by the defence also gets the same weight as the prosecution evidence. Reliance has been placed on a decision of the Apex Court in ***Munshi Prasad vs. State of Bihar, (2002) 1 SCC 351***.

58. Learned counsel for the appellant has referred the evidence of DW-1, DW-2, DW-3 and DW-4.

59. DW-1 Shomit Kumar has stated that he is the Barber and at the time of occurrence he was at his shop when an unknown person stabbed a woman with knife and on noise his neighbours Dal Chandra and some other persons reached there and he escaped from there. He is acquainted with the accused Naresh Chandra and he was not present at the place of occurrence. He has also stated that the police has enquired with him. In his cross-examination he has stated that accused Naresh comes to his shop for hair

cutting and he does not know his wife. On the fateful day he had opened his shop at about 9.00 a.m. he had heard that some person had stabbed a woman by knife and he does not know whether the accused was caught with knife or not.

60. DW-2 Dal Chandra has stated that he knows the accused Naresh present in the Court. He was not present at the time of occurrence. He has stated that he has a shop at Sirswa Chauraha and the occurrence took place about 3- 3 ¼ years before at about 9.30 a.m.. One stranger had stabbed a woman on the road by knife and when she cried, Shomit, Narendra Sharma and he himself and several other persons scolded him and he ran away with knife in his hand. The police had enquired with him. In his cross-examination he has stated that he resides outside the house of accused Naresh but he had never seen the wife of Naresh and he does not know the woman who got injured.

61. DW-3 Narendra Sharma has a beetle shop at Sirsawa Chauraha. He has stated that on 9.10.2003 about 9.30 a.m. when he was present at his shop, he saw that a male stranger stabbed a lady by knife, who had come from the direction of village Niwad and ran away. The occurrence was seen by Dal Chandra, Shomit etc. and by him also. They went to the police chauki and on their information police came over there and brought the injured lady to the hospital. He knows the accused Naresh, who is present in the Court but he was not present on the date, time and place of the

occurrence. He has also stated that he had narrated the entire story to the Investigating Officer. In his cross examination he has stated that at that time there was a huge crowd over the Chauraha.

62. Learned counsel for the appellant argued that the real picture, which comes out from the evidence of DW-1, DW-2 and DW-3 is that the accused was not present at the place and time of occurrence and he is not the guilty of the alleged offence. DW-1, DW-2 and DW-3 are the independent witnesses and there is no reason to disbelieve their version.

63. Learned AGA has countered by arguing that DW-1, DW-2 and DW-3 are not the reliable witnesses and they are telling a lie before the Court. They have stated that the Investigating Officer had enquired from them regarding the incident but the Investigating Officer PW-7 no where states that he ever recorded the statement of any of the three defences witnesses or made any query form them. No suggestion is given to PW-7 by the defence side that he had recorded the statement of DW-1, DW-2 and DW-3 or enquired the matter from them. Since the arrest of the accused by the police personnels with the murder weapon 'knife' is proved by the cogent and reliable evidence, this fact must have been known to the defence witnesses as well but they do not speak even a single word that the person who had stabbed the deceased was also caught then and there by the policemen with knife and this makes their whole evidence unreliable and false.

64. DW-4 Constable Brijmohan Rana has stated that on 9.10.2003 he was working as Constable Clerk at Thana Tanda, Rampur and a memo was received by him by the sweeper Awadhesh bearing seal of C.H.C., Tanda and signature of doctor regarding death of a deceased lady, who was admitted by her father-in-law Shyamlal. Copy of this memo was entered by him in the general diary Rapat No. 17 at 11.00 am.. Carbon copy of G.D. has been proved as Ext. kha-1 by DW-4. He has also stated that through wireless he had sent the information to the police station Bhagatpur, District Moradabad but he was informed that they have already got the information about the occurrence.

65. Learned AGA submitted that this memo Ext. kha-1 actually supports the prosecution version and shows that immediately after reaching the hospital the doctor sent the memo for information to the concerned police station and hence this document also is of no help to the appellant. We are in full agreement with the learned AGA.

66. Learned trial court has also analysed the defence evidence, oral and documentary, in the impugned judgment and has correctly found it as not reliable.

67. Therefore, from the defence evidence also the accused appellant gets no help at all.

68. Learned counsel for the appellant has also argued that the Investigating Officer has been negligent in performing the investigation and the investigation is faulty. However, he could not point out any material

defect or irregularity in the investigation of the case. We also feel that the investigation conducted by the Investigating Officer in this case suffers with no material omission or irregularity. If there are some minor irregularities they are ignorable in the light of all other reliable and cogent evidence produced by the prosecution.

69. In a catena of decisions, it has been settled that for certain defects in the investigation the accused cannot be acquitted if the prosecution case is proved by other cogent evidence. In ***C. Muniappan vs. State of T.N. case*** (supra), it has been held that :

> *"55. There may be highly defective investigation in a case. However, it is to be examined as to whether there is any lapse by the IO and whether due to such lapse any benefit should be given to the accused. The law on this issue is well settled that the defect in the investigation by itself cannot be a ground for acquittal. If primacy is given to such designed or negligent investigations or to the omissions or lapses by perfunctory investigation, the faith and confidence of the people in the criminal justice administration would be eroded. Where there has been negligence on the part of the investigating agency or omissions, etc. which resulted in defective investigation, there is a legal obligation on the part of the court to examine the prosecution evidence dehors such lapses, carefully, to find out whether the said evidence is reliable or not and to what extent it is reliable and as to whether such lapses affected the object of finding out the truth. Therefore, the investigation is not the solitary area for judicial scrutiny in a criminal trial. The conclusion of the trial in the case cannot be allowed to depend solely on the probity of investigation."*

70. Considering the evidence of the witnesses and also considering the medical evidence including the post mortem report there is no doubt left in our mind about the guilt of the convict – appellant Naresh Chandra.

71. However, the question which falls for our consideration is whether, on reappraisal of the peculiar facts and circumstances of the case, the conviction of the appellant under Section 302 of the Indian Penal Code should be upheld or the conviction deserves to be converted under Section 304 Part-I or Part-II of the Indian Penal Code. It would be relevant to refer Section 299 of the Indian Penal Code, which reads as under:

> "299. Culpable homicide: Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide."

72. The academic distinction between ''murder' and ''culpable homicide not amounting to murder' has always vexed the Courts. The confusion is caused, if Courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Section 299 and 300 of I.P.Code. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

Section 299	Section 300

A person commits culpable homicide if the act by which the death is caused is done-	Subject to certain exceptions culpable homicide is murder is the act by which the death is caused is done.

INTENTION

(a) with the intention of causing death; or	(1) with the intention of causing death; or
(b) with the intention of causing such bodily injury as is likely to cause death; or	(2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
KNOWLEDGE	KNOWLEDGE
(c) with the knowledge that the act is likely to cause death.	(4) with the knowledge that the act is so immediately dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above.

73. From the upshot of the aforesaid discussions, it appears that the death caused by the accused was not premeditated, injury caused was not on the vital part of the body, accused though had knowledge and intention to cause bodily harm to the deceased but did not want to do away with the deceased. Hence the instant case falls under the Exceptions 1 and 4 to Section 300 of

IPC. While considering Section 299 IPC as reproduced herein above offence committed will fall under Section 304 Part-I IPC as per the observations of the Apex Court in ***Veeran and others Vs. State of M.P.***, ***(2011) 11 Supreme Court Cases 367*** which have to be also kept in mind.

74. This takes us to the alternative submission of learned counsel for the appellant that the quantum of sentence is too harsh and requires to be modified. In this regard, we have to analyse the theory of punishment prevailing in India.

75. In ***Mohd. Giasuddin Vs. State of AP, [AIR 1977 SC 1926]***, explaining rehabilitary & reformative aspects in sentencing it has been observed by the Supreme Court:

> *"Crime is a pathological aberration. The criminal can ordinarily be redeemed and the state has to rehabilitate rather than avenge. The sub-culture that leads to ante-social behaviour has to be countered not by undue cruelty but by reculturization. Therefore, the focus of interest in penology in the individual and the goal is salvaging him for the society. The infliction of harsh and savage punishment is thus a relic of past and regressive times. The human today vies sentencing as a process of reshaping a person who has deteriorated into criminality and the modern community has a primary stake in the rehabilitation of the offender as a means of a social defence. Hence a therapeutic, rather than an 'in terrorem' outlook should prevail in our criminal courts, since brutal incarceration of the person merely produces laceration of his mind. If you are to punish a man retributively, you*

> *must injure him. If you are to reform him, you must improve him and, men are not improved by injuries."*

76. 'Proper Sentence' was explained in ***Deo Narain Mandal Vs. State of UP [(2004) 7 SCC 257]*** by observing that Sentence should not be either excessively harsh or ridiculously low. While determining the quantum of sentence, the court should bear in mind the 'principle of proportionality'. Sentence should be based on facts of a given case. Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically.

77. In ***Ravada Sasikala vs. State of A.P. AIR 2017 SC 1166***, the Supreme Court referred the judgments in ***Jameel vs State of UP [(2010) 12 SCC 532], Guru Basavraj vs State of Karnatak, [(2012) 8 SCC 734], Sumer Singh vs Surajbhan Singh, [(2014) 7 SCC 323], State of Punjab vs Bawa Singh, [(2015) 3 SCC 441],*** and ***Raj Bala vs State of Haryana, [(2016) 1 SCC 463]*** and has reiterated that, in operating the sentencing system, law should adopt corrective machinery or deterrence based on factual matrix. Facts and given circumstances in each case, nature of crime, manner in which it was planned and committed, motive for commission of crime, conduct of accused, nature of weapons used and all other attending circumstances are relevant facts which would enter into area of

consideration. Further, undue sympathy in sentencing would do more harm to justice dispensations and would undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to nature of offence and manner of its commission. The supreme court further said that courts must not only keep in view the right of victim of crime but also society at large. While considering imposition of appropriate punishment, the impact of crime on the society as a whole and rule of law needs to be balanced. The judicial trend in the country has been towards striking a balance between reform and punishment. The protection of society and stamping out criminal proclivity must be the object of law which can be achieved by imposing appropriate sentence on criminals and wrongdoers. Law, as a tool to maintain order and peace, should effectively meet challenges confronting the society, as society could not long endure and develop under serious threats of crime and disharmony. It is therefore, necessary to avoid undue leniency in imposition of sentence. Thus, the criminal justice jurisprudence adopted in the country is not retributive but reformative and corrective. At the same time, undue harshness should also be avoided keeping in view the reformative approach underlying in our criminal justice system.

78. Keeping in view the facts and circumstances of the case and also keeping in view criminal jurisprudence in our country which is reformative and corrective and not

retributive, this Court considers that no accused person is incapable of being reformed and therefore, all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream.

79. As discussed above, 'reformative theory of punishment' is to be adopted and for that reason, it is necessary to impose punishment keeping in view the 'doctrine of proportionality'. It appears from perusal of impugned judgment that sentence awarded by learned trial court for life term is very harsh keeping in view the entirety of facts and circumstances of the case and gravity of offence. Hon'ble Apex Court, as discussed above, has held that undue harshness should be avoided taking into account the reformative approach underlying in criminal justice system.

80. Recently in ***Khokan Alias Khokhan Vishwas vs. State of Chhattisgarh, (2021) 2 Supreme Court Cases 365***, the Hon'ble Supreme Court in almost similar circumstances modified the sentence under Section 302 IPC for life imprisonment for the offence under Section 304 Part-I IPC sentencing the convict to the period already undergone by him that was 14.5 years in that case.

81. For the reasons recorded herein above and following the dictum given by the Hon'ble Apex Court in ***Khokan Alias Khokhan Vishwas case*** (supra), we hold

the accused-appellant, Naresh Chandra, guilty of commission of offence under Section 304 Part I IPC and sentence him to 10 years rigorous imprisonment. The fine and default sentence is maintained. If the accused-appellant, Naresh Chandra, is not wanted in any other offence, he shall be set free.

82. Appeal is partly allowed, as modified above.

83. Record and proceedings be sent back to the Court below forthwith.

Order Date :-30.09.2022
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(Nalin Kumar Srivastava, J.) (Dr. Kaushal Jayendra Thaker, J.)