

**Reserved on:- 13.04.2022**  
**Delivered on:- 30.05.2022**

**Court No. - 46**

**Case :- CRIMINAL APPEAL No. - 3952 of 2012**

**Appellant :-** Pawan Kumar Pandey @ Bablu And Others

**Respondent :-** State of U.P.

**Counsel for Appellant :-** Sheshadri Trivedi,Ajay Kumar Pandey,Anand Kumar Pandey (Amicus Curie),Pratik J.Nagar,Rajrshi Gupta,Satish Trivedi

**Counsel for Respondent :-** Govt. Advocate,Rahul Mishra,Satyendra Narain Singh

**Alongwith**

**Case :- CRIMINAL APPEAL No. - 3239 of 2012**

**Appellant :-** Shyam Narain Pandey

**Respondent :-** State of U.P.

**Counsel for Appellant :-** Rajeev Misra,Anand Kumar Pandey,Durgesh Kumar Singh,Prashant Kumar Tripathi

**Counsel for Respondent :-** Govt. Advocate,Rahul Mishra,Rajeev Upadhyay

**Alongwith**

**Case :- CRIMINAL APPEAL No. - 3404 of 2012**

**Appellant :-** Laxmi Narain Pandey And Others

**Respondent :-** State of U.P.

**Counsel for Appellant :-** Sheshadri Trivedi,Ajay Kumar Pandey,Anand Kumar Pandey (Amicus Curie),Rajrshi Gupta,Satish Trivedi

**Counsel for Respondent :-** Govt. Advocate,Rahul Mishra

**Hon'ble Mrs. Sunita Agarwal,J.**

**Hon'ble Vikas Kunvar Srivastav,J.**

**(Delivered by Justice Sunita Agarwal)**

1. Heard Sri Dileep Kumar, learned Senior Advocate assisted by Sri Rizwan Ahmad, learned counsel for the appellants, Sri Durgesh Kumar Singh, learned counsel appearing for appellant-Shyam Narain Pandey in the connected Criminal Appeal No.3239 of 2012 as also Sri Rahul Mishra and Sri Rajeev Upadhyay, learned counsels for the first informant, Sri Roopak Chaubey, learned AGA for the State.

**Introduction:-**

2. These appeals are directed against the judgement and order dated 07.08.2012 passed by the Additional Sessions Judge, Court No.2, Azamgarh in Sessions Trial No.435 of 2006 arising out of Case Crime No.65 of 2006 under Section 147, 148 149, 302, 120-B, 504, 506 IPC and Section 7 Criminal Law Amendment Act, Police Station Atraulia, District Azamgarh whereby the appellants (7 in number) have been convicted for the offence under Section 147, 148, 302 read with Section 149, 120-B IPC and 7 Criminal Law Amendment Act. They have been acquitted for the offence under Section 504 and 506 IPC. Two appellants namely Rajesh Kumar Pandey and Amit Kumar Pandey in the connected Sessions Trial No.436 of 2006 and Sessions Trial No.437 of 2006 have been acquitted for the offence under Section 3/25 Arms Act.

3. The sentence awarded to the appellants are under Section 147 for one month rigorous imprisonment and fine of Rs.1000/-, the default punishment is one month additional rigorous imprisonment; under Section 148 the sentence for two years rigorous imprisonment and Rs.3000/- as fine, the default punishment is six months additional rigorous punishment;

under Section 7 Criminal Law Amendment Act sentence for six months additional rigorous imprisonment. Under Section 302/149 read with Section 120-B, the appellants have been sentenced for imprisonment for life and Rs.25,000/- each towards fine, the default punishment is three years additional rigorous imprisonment. All the punishments are to run concurrently.

#### **PROSECUTION CASE:-**

4. The prosecution story unfolded with the first information report lodged on 28.02.2006 at about 19.45 hrs. by Sri Atul Tripathi son of deceased Rajendra Prasad Tripathi resident of P.S. Atraulia, District Azamgarh. The written report given by Sri Atul Tripathi narrates that he and his deceased father were resident of P.S. Atraulia District Azamgarh. On 28.02.2006, the first informant (Atul Tripathi), alongwith Arun Kumar Pandey, Krishna Kumar Tiwari, Rajkumar Tiwari and Ram Shiromani Shukla, was waiting at the 'Kesari Chauraha' for the arrival of his father from Azamgarh. While they were standing, his father alighted from a bus and moved to the pavement towards the East-South side of the crossing (Kesari Chauraha) to go to his house alongwith the first informant and other witnesses.

5. At that point of time, suddenly from a Bolero car, Sons of Laxmi Narain Pandey namely Rajesh Kumar Pandey, Pawan Kumar @ Babloo, Amit Kumar Pandey, Umesh and Ramesh alighted carrying weapons in their hands. They encircled his father and Rajesh Kumar Pandey, Pawan Kumar @ Babloo and Amit Kumar Pandey killed his father by firing from their weapons, Umesh and Ramesh also fired. Laxmi

Narain Pandey and Shyam Narain Pandey were sitting in the car and exhorting the assailants that the deceased should not be spared as he wanted to become the Principal. While firing, all the assailants ran away in the said car towards the west side. Crowd was collected on the spot.

6. While leaving the dead body of his father, the first informant went to the police station to lodge the report. The time of the incident as noted in the Check report is 28.02.2006 at about 06.00 PM and the report was lodged on 28.02.2006 at 19.45 hrs, the distance of the police station from the place of the incident which is 'Kesari Chauraha', Kasba Atraulia noted therein is half (½) kilometer. The original report and original G.D. were brought in the Court and G.D. entry of Rapat No.35 was proved to have been prepared on the same date, the carbon copy of which was filed on record. The G.D. entry and the check report were proved to be in the handwriting and signature of PW-6, which were marked as Exhibit Ka-16 & 17. It was stated by PW-6 in his examination-in-chief that the special report of the crime was sent through Constable 694 Ram Surat Yadav on 28.02.2006 itself and entry of the same was made at G.D. No.40 in his handwriting and signature, which was marked as Exhibit Ka-18. The paper No.129 of the special report being in his handwriting and signature was produced in the Court which was noted and proved as Exhibit Ka-18. In cross, PW-6 was contradicted about several inconsistencies pointed out in the entries made by him which would be discussed at the appropriate place of this judgement.

7. At this stage, while noting the police papers, it may be recorded that the Investigating Officer proved the memo of collection of blood stained and plain earth from the spot as

Exhibit Ka-10. On 28.02.2006, another memo was prepared of recovery of a bag besides the dead body as Exhibit Ka-2. It was noted in the recovery memo of bag that one bag Rexin, brown-black was found lying besides the dead body. It was seized and opened, a typed application signed by deceased Dr. Rajendra Prasad Tripathi dated 25.02.2006, a service book of the deceased and a letter dated 17.02.2006 addressed to the District Inspector of Schools, Azamgarh wherein prayer for determination of salary was made and the date certified as 17.02.2006 was mentioned, were found and seized. It is further recorded therein that the application dated 25.02.2006 was addressed to the Commissioner Azamgarh, Division, Azamgarh, District Magistrate, Additional District Magistrate (Revenue and Finances) and Superintendent of Police, Azamgarh, wherein it was mentioned that the accused persons namely Manager Laxmi Narain Pandey and his sons were giving him threat to kill him. The application was seized by the police for including it in the investigation, whereas bag and service book were handed over to the first informant with the direction that he should keep it preserved and would produce it whenever needed in the investigation.

8. The arrest of three accused persons namely Rajesh Kumar Pandey, Umesh Kumar Pandey and Ramesh Kumar Pandey who were travelling in the Bolero Car and the seizure of Bolero Car without registration number used in the occurrence, was made on 05.03.2006, memo of which was prepared and exhibited as Exhibit Ka-11. It was noted therein that a country made pistol 315 bore in working condition, with the description mentioned in the recovery memo was recovered from the possession of Rajesh Kumar Pandey. In the chamber of the

pistol one empty cartridge of 315 bore was found and two live cartridges 315 bore from the clothes of Rajesh Kumar Pandey were recovered. The recovered articles were sealed but no independent witness could be found as no-one was ready to be a witness.

9. The arrest of Laxmi Narain Pandey and Pawan Kumar Pandey @ Babloo and Amit Kumar Pandey was made on 06.03.2006 from a public place. Two country made pistols of 315 bore and 303 bore were recovered from the possession of Amit Kumar Pandey, wherein one-one live cartridge was found in the chambers of each weapon. The description of both the weapons has been given in the recovery memo proved and exhibited as Exhibit Ka-12. It was noted therein that both the weapons were in working condition.

10. The inquest of the body was conducted on the same day i.e. on 28.02.2006 commencing at 21.10 hrs and ended at 22.25 hrs. The postmortem of the body was conducted on 01.03.2006 at about 11.30 AM. The proximate time of death mentioned therein was about half ( $\frac{1}{2}$ ) day. On external examination, Doctor had recorded that:-

“An average built body, eyes, mouth closed, clotted blood present over face and head. Blood oozing out from the nose. Rigour mortis present in both extremities. The postmortem staining present in different parts.”

11. On internal examination, the doctor has reported that:-

“Temporal, parietal and frontal bone of right and left side of the head were fractured, brain lacerated, clotted blood present, right lung lacerated, about 500 ML blood present in the chest cavity.

Right chamber of heart was full, left chamber empty. Semi digested food about 100 ML was present in the stomach; small intestine filled by gases and pasty matter. Large intestine had faecal matter.”

12. One copper colour metallic bullet of 3 cm in length recovered from liver was handed over to the Constable in a sealed envelope with sample seal. The clothes of the deceased were sealed in another bundle and handed over to the police. The cause of death was hemorrhage and shock due to ante-mortem injuries. The postmortem report was proved as Exhibit Ka-4 by the doctor PW-3, being in his handwriting and signature. The charge sheet was submitted by the Investigating Officer on completion of the investigation and on committal, charges under the above noted sections were framed against the accused persons who had denied the same and demanded trial.

13. The weapons recovered from the possession of the accused persons were sent to the ballistic expert, the forensic laboratory report is on record. The finding therein indicate that presence of nickle was noted in two weapons of 315 bore marked as 1/06 and 2/06 whereas in the 303 bore pistol marked as 3/06, remnants of firing, led, copper and nickle was present. The used cartridges marked as EC-1 could not be tallied with two weapons of 315 bore marked as 1/06 and 2/06. The bullet recovered from the dead body marked EB-1 could not be tallied with the weapons 1/06 and 2/06, whereas in the country made pistol of 303 bore marked as 3/06, cartridges of 315 bore could not be loaded. The result is that the weapons recovered from the accused could not be connected to the crime. The accused persons, thus, had been acquitted under Section 3/25 of the Arms Act.

14. The prosecution had produced 10 witnesses to prove its case and the defence produced 16 witnesses in their support.

**Ocular version of Eye-witnesses :-**

15. Amongst the witnesses of fact, PW-1, the first informant, in the examination in chief, had described the topography of the place of the incident namely Kesari Chauraha and stated that his father (the deceased) was a teacher in Maruti Vidyalaya Inter College and was appointed as a Lecturer in Social Science in the said institution in the year 1979. He remained on the said post till July 1997 when he was appointed as the Principal being the senior most Lecturer on the retirement of the then Principal Sri Paras Nath Mishra. Accused-appellant Laxmi Narain Pandey was the Manager of the institutions in the year 2000-01 when Rs.10 lacs were received from the M.P. Funds in the account of the Principal Rajendra Prasad Tripathi for development and construction of building. Laxmi Narain Pandey, the Manager and his sons were trying to misappropriate the money and the deceased had confronted them. On the pressure created by the Manager the said money was returned by his father to the Chief Development Officer, Azamgarh through cheque. Later on, the said money was got transferred by the Manager of the institution in the account of the degree college which had resulted in a dispute between his father and the Manager and the Manager started conspiring to remove his father from the post of Principal. The appellant Shyam Narain Pandey was appointed as Principal in April 2003 on forged educational testimonials just in order to remove the deceased from the post of Principal. Despite the said fact, his father was working in the institution as a teacher and the Manager Laxmi Narain Pandey

and his sons, the accused herein, had threatened him and thrown him out of the institution.

16. A writ petition was filed by his father (the deceased) in the High Court wherein educational testimonials of Shyam Narain Pandey were found forged. After enquiry on the complaint of the deceased, Shyam Narain Pandey was removed from the post of Principal by the Commission. It is stated therein that in the year 2005, his father was again appointed as Principal and his signatures were attested, however, that order was withdrawn by the Manager by illegal means. The salary of the deceased was also stopped since 2003 and after much efforts, his father (the deceased) got the post of Principal.

17. PW-1 stated that the incident had occurred on 28.02.2006 at about 06.00 PM. His father went to the office of the District Inspector of School, Azamgarh to collect Board copies and the first informant also accompanied him but he came back early after his work was completed. While coming back, his father told to wait for him at the Kesari Chauraha where he would reached around 06.00 PM and that he would bring copies. The first informant alongwith the persons named in the first information report was waiting for his father at the crossing and they were at a "Takht" on the southern pavement, which was at the west of the crossing. As soon as his father got down from the bus and moved to the tea stall of Ram Singh towards east, the bus moved ahead, he and the witnesses moved towards his father, a Bolero car came from right behind the bus at the centre of the road on the northern side of his father, the accused Rajesh, Amit, Pawan @ Babloo, Ramesh and Umesh alighted from the car carrying weapons like country made pistol in their hands. Pawan @ Babloo, Rajesh and Amit encircled his

father and fired, while his father was felling down being hit by the fires, Ramesh and Umesh also fired at his father. Laxmi Narain Pandey and Shyam Narain Pandey were exhorting them to kill while sitting in the car saying that "kill that bastard, wanting to become Principal." His father fell down on sustaining injuries and died. The Bolero Car belonged to Laxmi Narain Pandey. The first informant got shocked on seeing the incident. The accused persons fled away in the car towards the West.

18. PW-1, in his examination-in-chief, further stated that on 01.03.2006, the District Inspector of School was about to handover the charge of the Principal of the institution to his father as Board examinations were to commence on 04.03.2006 and it was the reason for conspiring to commit the murder of his father.

19. PW-1 stated that the report of the incident was written by him and given in the police station, his signature and the contents of the report were proved by PW-1 in the Court, which was marked as Exhibit Ka-1. PW-1 stated that the Investigating Officer recorded his statement. The bag of his father found besides the dead body was seized by the police and was given in his custody. One application addressed to the Commissioner, District Magistrate and Superintendent of Police taken out from the bag was seized and a memo was prepared on which his signature and that of Ramakant Mishra were taken. Paper No.9 Ka/1, memo taking possession of the bag and Superdiginama was proved by him bearing his signature, marked as Exhibit Ka/2. The recovered letter, paper No.11 Ka/2, was shown to this witness wherein he had proved the signature and stamp of his father and stated that it was in the

handwriting and signature of his father which he could identify and that the same was seized by the police on the spot, it was marked as Exhibit Ka-3. The bag was marked as Material Exhibit-1.

20. The cross-examination of PW-1 was made about the narration by him of the dispute between his father and Laxmi Narain Pandey, the Manager of the institution; i.e. the motive assigned by him to commit the murder. PW-1 reiterated that the appointment of Shyam Narain Pandey though was made by the Commission but it was a result of fraud and his father got a stay order from the High Court about the appointment of Shyam Narain Pandey. Shyam Narain Pandey remained Principal from 2003 till 2005. Further, when Rs.10 lacs were received from M.P. fund, his father was the Principal and Laxmi Narain Pandey was the Manager. The said grant was for Intermediate institution. Laxmi Narain Pandey was also the Manager of a Degree College and both the institutions were located nearby. The money came in the account of his father but could not be utilized for the intermediate institution. He then stated that he cannot say much about the accounts of the institution. The suggestion that his father had misappropriated the money and on the said dispute it was returned to the Chief Development Officer, Azamgarh, had been categorically denied. It was admitted by PW-1 that his father was removed from the post of Principal in April 2003. Further suggestion that a charge of misappropriation of Rs.10 lacs was levelled against his father and that is why another Principal was appointed was denied.

21. As to the identity of the accused person, PW-1 stated that Rajesh, Pawan, Amit, Umesh and Ramesh are sons of Laxmi Narain Pandey and he had no knowledge about the

education and occupation of those persons. Shyam Narain Pandey is not related to Laxmi Narain Pandey and is resident of Ballia. On a question put to PW-1 about the identity of accused Pawan Kumar, he categorically stated that he knew Pawan Kumar by name and face and also that he was son of the Manager Laxmi Narain Pandey and that he knew Pawan Kumar since 2001. PW-1 also identified accused Pawan Kumar standing in the Court and stated that the said accused hit a bullet in the head of his father.

22. PW-1 stated that his house in Atraulia was at a distance of half a kilometer towards north-east side of the Kesari Chauraha. His father, mother and sister were occupants of the house. Giving details of the incident, PW-1 stated that the Bolero car stopped at the east of the crossing facing towards west. He was at a distance of ten paces from the car towards south-west. Laxmi Narain Pandey was sitting inside the car in the middle seat at the southern gate and the gate was open and he could clearly see Laxmi Narain Pandey from the place where he was standing. Laxmi Narain Pandey was taking his body out of the car while exhorting other accused persons to kill. He knew Laxmi Narain Pandey for the last about ten years.

23. He further stated that there was a day light at the time of the incident, electric light was not on by then and he made no mistake in identification of Laxmi Narain Pandey. A suggestion was given that Laxmi Narain Pandey and Pawan Kumar were lodged in the District Jail, Lucknow few days from prior to the incident till the date of the incident, had been categorically denied by PW-1.

24. In cross, PW-1 was confronted about the presence of

crowd at the Kesari Chauraha in the evening hours and that the police usually remain present for checking purpose. He though accepted that Kesari Chauraha used to become crowded by 3.00 PM and it was a crossing for the big and small vehicles running on Azamgarh-Faizabad road but stated that police was not present on the spot. He further stated that there was no jam like situation and that the Bolero Car stayed for 5-6 minutes at the site of the incident and that no members of public threw stones on Bolero car. He further stated, on confrontation, that when bus stopped, his father got down alone and bus moved ahead, his father was not caught and fired but the accused surrounded him and then opened fire. All five accused persons gheraoed his father. PW-1 also gave the direction in which the accused persons were standing while encircling his father and the distance of them from the deceased. He further stated that as per his knowledge, total five fires were made but it could be more than that. His father fell down after being hit by the bullet, facing downwards. The incident was witnessed by him from a distance of ten paces and while he was about to move forward towards his father, Ramesh and Umesh opened fire and that time deceased was falling. After the accused left in the car, he went near his father but crowd did not allow him to touch the deceased.

25. On a query made from PW-1 as to whether his clothes were soaked with the blood of his father, he stated that he could not hug his father though he wanted to, people were holding him while he was sitting besides the dead body of his father for about 10-15 minutes. After 15 minutes, when people left him, he kept on crying for 5-10 minutes but did not touch his father. In the meantime, his mother and sister also reached

the spot. His house was at a distance of half a kilometer on the southern side from the police station Atraulia. His mother and sister became unconscious and remained lying as such for about 10 minutes but the police of the Police Station Atraulia did not reach by then.

26. PW-1 stated that he then wrote the report while sitting at a Samadhi Sthal Balakdas which was about 10-12 feet on the northern side of the place of the incident. It took about 20 minutes to write the report and then he went to the police station, by that time even the police of the Police Station Atraulia did not reach there. It took him about 15 minutes to reach the police station as he went on foot and when he gave the report, the police came to know that a murder had been committed on the spot.

27. After lodging of the report, police personnel came on foot with him, they were 3-4 in number. The Investigating Officer reached after half an hour of reaching other police personnel on the spot and he came by an official Jeep. After 2-4 minutes of coming to the place of the incident, the Investigating Officer started inquest. The body was then moved from the place of the incident and it must be about 10.30 PM when the police took the body to Azamgarh. PW-1 stated that by the time body was sealed and sent away, the police of many police stations reached at the spot and some officers also came. They took the sealed body towards east and then put it in a vehicle which he could not see. PW-1 stated that he remained at the place of the incident even after the body was taken away and he was there till 12.00 hrs.

28. In cross, PW-1 was confronted about the proof of his

father travelling by bus on the fateful day. He stated that his father alighted from a Roadways bus. The bag of his father was given in his custody by the police after preparation of the memo and no bus ticket was found inside it. About Rs.250/- were found in the pocket of pant of his father which was given to him without any paper work. Neither the bus ticket nor any pass of traveling by the bus was recovered from the clothes of his father (the deceased). On further confrontation, he stated that the fact that his father was about to receive the charge of Examination Controller on 01.03.2006 could be known to him from his father and his father told him that he was going to bring Board copies from the office of the District Inspector of School, Azamgarh. He says that he also accompanied his father but he came back early and could not know as to whether copies were received by his father. He had denied the suggestion that his father did not alight from the bus at the Kesari Chauraha on the date of the incident.

29. PW-1 was further confronted about the place of the residence of other witnesses and that is how about the presence of the witnesses on the spot. PW-1 stated that when the Investigating Officer recorded his statement, all four witnesses were not with him and they went with his mother and sister and, thereafter, he did not know where they had gone and that they did not meet the Investigating Officer in front of him. Affidavit of four witnesses given in the office of the District Magistrate were put to PW-1 to confront that those affidavits were filed to put undue pressure on the witnesses. Suggestion about the enmity of the deceased with other persons was also given to PW-1 in order to project that some unknown persons had committed the offence on account of land dispute and the

appellants had been falsely implicated due to enmity. It has also come in the evidence of PW-1 that on the date of the incident, the Ex-Principal of the institution namely Sri Paras Nath Mishra had died. The suggestion that he went to the house of Sri Paras Nath Mishra was denied by him.

30. On a suggestion that Rajkumar Tiwari, who is witness in the instant case, was peon in the institution and his salary was withheld by accused Shyam Narain Pandey when he was Principal as Rajkumar Tiwari used to remain absent and did not work properly, PW-1 showed his ignorance. He was again confronted on various missing details in the description given in the first information report and his previous statement under Section 161 Cr.P.C. which he replied and stated that the report was written by him on his own and no-one was helping him nor he asked anyone. A suggestion was also given to PW-1 that a bus stand was there on the eastern side at a distance of about half kilometer from the Kesari Chauraha and buses used to stop there.

31. About the posting of his father in the institution concerned, when confronted, PW-1 reiterated that his father was a Lecturer in the institution since the year 1979. When confronted about the nature of his appointment and the post that whether his father was about to become Principal or the Examination Controller, PW-1 stated that whatever had been stated by him was informed by his father and he did not know much about the post held by his father. The suggestion that his father was absent from the institution for a long time i.e. from 14.04.2003 was denied by PW-1. He further stated that he did not know as to whether another Senior Lecturer Sri Ram Naval Pandey was the Principal of the institution on the date of the

incident. About knowing the witnesses Krishna Kumar Tiwari and Arun Kumar, he stated that he knew them as they were appointed in place of their father on compassionate ground. All other witnesses Ram Shravan Pandey and Rajkumar Tiwari were Peons in the institution and were close to his father. He denied that the name of accused Shyam Narain Pandey was added at the instance of witnesses Rajkumar Tiwari and Ram Siromani Pandey.

32. On a query made by the Court that the post of Principal and Examination Controller were two different posts and in the examination-in-chief PW-1 stated that on 01.03.2006, the District Inspector of School was about to handover charge of the Principal to his father whereas in the cross he stated that it was the charge of the post of Examination Controller, PW-1 explained that it might have been stated because of the confusion but the correct fact was that his father was to be handed over the charge of the post of Examination Controller by the District Inspector of School. The suggestion that accused Shyam Narain Pandey had sworn an affidavit before the Oath Commissioner, High Court in a case at about 07.10 PM, on the date of the incident, was repelled by PW-1 saying that he had no knowledge of the same but he had categorically denied the suggestion that Shyam Narain Pandey was falsely implicated at the instance of Krishna Kumar Tiwari and Raj Kumar Tiwari. PW-1 categorically denied the suggestion that he was not present on the spot. PW-1 lastly denied that his father was coming back from the house of the Ex. Principal Sri Paras Nath Mishra and then the incident had occurred.

33. PW-2 Rajkumar Tiwari, a resident of P.S. Atraulia

District Azamgarh stated on oath that he was working as Peon in Matruti Inter College since 1970-71 and had superannuated on 30<sup>th</sup> April 2006. In the year 1996-97, Sri Paras Nath Mishra was the Principal of the institution. After retirement of Sri Paras Nath Mishra on 30.06.1997, Sri Rajendra Prasad Tripathi who was the Senior-most Lecturer became officiating Principal in July 1997 and he continued to work as such for about three years, his tenure was about 7 years and there was no dispute in the initial three years. PW-2 pointing to the accused Laxmi Narain Pandey present in the Court, stated that he was the Manager of the institution who had created an atmosphere of corruption and fear in the institution, he was a man of criminal nature and became Manager by illegal means.

34. PW-2 stated that accused Laxmi Narain Pandey was a convict in the murder case of 5-6 persons in Village Hatdiya in the year 1970-71 and was sentenced for life imprisonment by the Sessions Court. Apart from that, 7-8 cases in P.S. Atraulia were against the said accused. He stated that the accused Laxmi Narain Pandey was in the habit of realizing money by illegal means from the students of the college and doing bungling in the scholarship of Harijan students. He had also manhandled one peon of the institution about three months prior to the incident.

35. In the year 2001-02, Rs.10 lacs were received from M.P. fund for construction of building and other purposes. With a view to misappropriate that money, the Manager wanted to get signature of deceased Rajendra Prasad Tripathi in a blank cheque which he had denied and thereafter Manager and his sons used to exert a lot of pressure on the deceased. Because of the pressure, the deceased (Principal) had returned the money to

the Chief Development Officer, Azamgarh. Being annoyed by the said fact, the Manager was hatching conspiracy with his sons to kill the deceased. In order to remove the deceased from the post of Principal, co-accused Shyam Narain Pandey was appointed as Principal on the basis of forged papers through the Commission. The deceased, the then Principal namely Rajendra Prasad Tripathi gave an application against the appointment in the Commission and on enquiry, the testimonials of Shyam Narain Pandey were found forged and his appointment was cancelled. After removal of Shyam Narain Pandey, the deceased again became Principal and, thereafter, the Manager and Shyam Narain Pandey jointly hatched conspiracy to kill him and in furtherance of their intention, the accused persons namely the Manager Laxmi Narain Pandey, his sons and the co-accused Shyam Narain Pandey committed the murder.

36. Narrating the occurrence, PW-2 stated that the incident had occurred at about 06.00 PM on 28.02.2006 when sun was being set and sky was clear. He was present at the Atraulia Kesari Chauraha alongwith Krishna Kumar Tiwari, Arun Kumar and Atul Kumar Tripathi (PW-1) and they were waiting for the Principal Rajendra Prasad Tripathi while sitting on a Chawki. On a day before, the Principal had instructed them to wait for him at the Kesari Chauraha as he would go to the office of the District Inspector of School, Azamgarh on 28.02.2006 (the next date) to bring Board copies and other material. On the day of the incident, the Principal (the deceased) went to Azamgarh and all the witnesses were waiting for him at the Kesari Chauraha. At around 06.00 PM, a bus stopped at the crossing and the Principal (deceased) alighted. The bus moved ahead to the West, while the Principal Sahab

was going towards the east, he stopped at the tea Stall of Ramu Singh, they moved towards him. They were directed by sign, by the deceased to move towards north and at that time, a Bolero Car (without number) came and stopped on the opposite side. The accused persons namely Rajesh Pandey, Ramesh Pandey, Umesh Pandey, Amit Kumar Pandey and Pawan Kumar Pandey got down from the car, all carrying country made pistols. In the front seat of the car accused Shyam Narain Pandey and in the middle seat accused Laxmi Narain Pandey were sitting and both the persons while sitting inside the car were exhorting the accused persons to kill the deceased by saying that "बड़ा प्रिसिपली करने चला है बचने ना पाए". The accused Amit, Rakesh, Babloo, Umesh and Ramesh gheraoed the Rajendra Prasad Tripathi, Amit fired at the back of the right earlobe whereas Babloo fired at the back of left earlobe, Rakesh fired at the back and thereafter the deceased started falling down and then Umesh and Ramesh also fired. The deceased fell down and died instantly. Both Laxmi Narain Pandey and Shyam Narain Pandey were also challenging the witnesses that if they moved ahead, they would also met the same fate. All the accused then sat in the car and fled towards the west. Lot of commotion had occurred on the spot because of the incident. After sometime, wife and daughter of the deceased came on the spot, they became unconscious and then PW-2 alongwith Krishna Kumar and Arun Kumar took them to the village. PW-2 stated that he was interrogated by the Investigating Officer.

37. In cross, PW-2 narrated that prior to the incident he was going to the school daily and was putting his signatures on the attendance register. He admitted that his salary was stopped from 19.01.2005 but stated that the reason for stopping of the

salary was not his absence. He admitted that the withheld salary was not received by him till date though proposal in that regard had been sent. PW-2 further stated that he had retired on attaining the age of superannuation of 60 years and admitted that Shyam Narain Pandey and Laxmi Narain Pandey were behind all his problems, i.e. for stoppage of salary but he never went to the deceased to seek help.

38. On further confrontation, PW-2 denied that he was terminated on account of long absence and also submitted that he read in the newspaper that his services were terminated four days prior to his superannuation. A suggestion that he was very close to the deceased Rajendra Prasad Tripathi was denied by PW-2 who reiterated that even after the incident till 30.04.2006 i.e. till the date of his superannuation, he was continuously going to the school and since thereafter he remained at his house. PW-2 stated that the Investigating Officer reached his home after 20-25 days of the incident but he could not remember the date. He stated that he gave statement to the Investigating Officer for the first time on the day when he came his home. On confrontation about the affidavit given in the office of the District Magistrate, PW-2 stated that the said application was dictated by him in the Collectorate Kachehri and after attestation of the same by an Advocate it was given by him in the Court. He stated that he narrated the same fact in the affidavit given to the District Magistrate as stated in the Court and before giving the said affidavit, the Investigating Officer did not meet him.

39. On confrontation, PW-2 stated that he did not mention the said fact to the family members of the deceased as he did not find any purpose to do so and admitted that he was

told that his Advocate was brother of Bajrang Tripathi who was real brother of deceased Rajendra Prasad Tripathi. Various questions were put to PW-2 on the affidavit given by him in the office of the District Magistrate to which he gave categorical replies. The affidavit given by him was shown in the Court and he admitted the same.

40. On further confrontation about the post which the deceased was holding, PW-2 reiterated that the deceased became officiating Principal in the year 1997 after retirement of Paras Nath Mishra. He had reiterated the criminal antecedents of accused Laxmi Narain Pandey who was the Manager of the institution. It has come in the evidence of PW-2, in cross, that in the murder case of five persons, he alongwith Laxmi Narain Pandey and other persons was convicted by the Sessions Court and they all had been acquitted by the High Court. PW-2, however, explained that he was implicated being brother in law of Laxmi Narain Pandey. The suggestion that he was not related to Laxmi Narain Pandey was denied by him.

41. PW-2 further stated that two days after he gave affidavit to the District Magistrate, the Investigating Officer came to his house to record his statement. The Investigating Officer also interrogated him about the affidavit given by him. It has come in the evidence of PW-2, in cross, that the investigation of the case was transferred from the police station Atraulia to the police station Mubarakpur. He, however, stated that he did not know the reason as to why the investigation was transferred. PW-2 denied that his name was included amongst the witnesses for the reason that he was a victim at the hands of the accused and the prosecution was sure that he would give evidence against them. The suggestion that PW-2 had not

witnessed the incident had been categorically denied and that he gave the testimony after making a deal with the family members of the deceased.

42. PW-2 further stated that he was not sure as to whether the deceased was the Principal on the date of the incident and the date when he became the Principal. He, however, heard that when Shyam Narain Pandey was removed from the post of Principal because of forged testimonials, the deceased Rajendra Prasad Tripathi was appointed.

43. In a gruelling cross-examination running into several pages, continued for about two months on several dates, PW-2 narrated the manner in which the deceased was killed and categorically stated that he had identified both the accused namely Laxmi Narain Pandey and Pawan Kumar Pandey and there was no doubt about the same. As to whether the deceased got the Board copies and the reason why they were present on the spot of the incident, PW-2 reiterated, in cross, that the reason given by him to wait for the deceased at the crossing was correct. He stated that he alongwith other witnesses had witnessed the incident while standing at the same place and when accused ran away they went near the deceased. He denied the suggestion that he was not present at the place of the incident and was in Atraulia market and that no incident had occurred in his presence and he was making deposition due to enmity.

44. PW-2 admitted that Shyam Narain Pandey was the Principal during his service period and his appointment in the institution was made by the then Principal Paras Nath Mishra. He admitted that Paras Nath Mishra had died on the date of the

incident and the distance between the house of PW-2 and Paras Nath Mishra was 1 KM. PW-2, however, stated that he did not participate in the last rites of Paras Nath Mishra though he went to his house after hearing the news. PW-2 stated that he could not tell as to whether college was closed when condolence meeting was held and that he did not participate in the condolence meeting. PW-2 further stated that he went to the institution on the date of the incident and made his signature on the register at about 09.00 AM. The college was open till 04.00 PM and he also performed his duties on the said date. PW-2 reiterated that he was present in the institution till 03.00 PM and till the college was open no condolence meeting was held in his presence. He then stated that Sri Paras Nath Mishra died at the dawn and categorically denied that the college was closed due to condolence and every teacher and employee of the institution went to the house of Sri Paras Nath Mishra and that he also participated in the cremation ceremony.

45. On confrontation, PW-2 denied that he was suspended by Shyam Narain Pandey on account of long absence from duty though he admitted that his salary was stopped and that had caused annoyance and further when he applied for the loan from GPF account, Shyam Narain Pandey was the Principal and that he could not get the loan. PW-2 also admitted that he did not get pension till date though he had denied termination of his services.

46. Queries were made from PW-2 about his criminal antecedent and that he remained in jail in the murder case in which he was one of the accused alongwith Laxmi Narain Pandey. A suggestion was also given about enmity with Laxmi Narain Pandey because of the election of Gram Pradhan

contested by his wife against the wife of Laxmi Narain Pandey which he denied. Another suggestion of enmity of grabbing of land of his brother by Laxmi Narain Pandey which was also denied. PW-2 further admitted that his mother Sundari Devi contested election against the wife of Laxmi Narain Pandey for the post of Gram Pradhan and had lost but stated that the said election was held much prior to the incident.

47. Further suggestion was given to PW-2 that he remained absent for a long time and on account of the said fact, show cause notice was given by the District Inspector of School and he managed forged entries in the attendance register.

48. At this stage, one document namely the notice dated 09.02.2004 was shown to PW-2 upon which he had denied his signature and handwriting on the receiving. Certain portions of his examination-in-chief was put to PW-2 to confront that no such submission was made by him in his previous version under Section 161 Cr.P.C. PW-2 stated that all those facts were narrated by him to the Investigating Officer but why it was not written therein, was not known to him. He was also confronted about the time when sun was set on the date of the incident. PW-2 was also confronted that he did not show the Chowki (wooden bench) whereupon they were sitting at the crossing. He was also confronted that the reason to remain present on the spot was not narrated by him to the Investigating Officer in his statement under Section 161 Cr.P.C., i.e. that the deceased told him to wait at the crossing as he went to bring the Board copies. On further confrontation, PW-2, in cross, stated that when the Principal (deceased) alighted from the bus he was empty hand, no Board copies were with him. He was further confronted that he was giving oral testimony on the condition that his pension

would be released.

49. Lastly PW-2 had denied the suggestion that he was not present on the spot and was giving evidence against Shyam Narain Pandey due to enmity. Apart from these two witnesses of fact, all the other witnesses are formal witnesses.

#### **Formal Witnesses:-**

50. PW-3 is the doctor who had conducted the postmortem of the dead body. PW-3 proved the injuries, noted above, on the person of the deceased. PW-4 is the first Investigating Officer who proved the police papers prepared upto inquest.

51. PW-5 is the second Investigating Officer to whom the investigation was handed over on 02.03.2006. PW-6 is the Constable clerk who proved the preparation of check FIR and G.D. entry of the same. PW-7 is the police officer who proved the collection of recovered articles and sending them to the forensic laboratory. PW-10 is the officer posted in CBCID, to whom the investigation was handed over on 05.05.2006 on an order passed by the State Government. He conducted the investigation and filed the charge sheet. Amongst the formal witnesses, PW-3 had proved the injuries noted above found on the person of the deceased.

#### **DEFENCE SUBMISSION:-**

52. Placing the prosecution evidence, it is vehemently argued by Sri Dilip Kumar learned Senior Advocate that this is a case of false implication of accused persons because of admitted enmity of private witnesses PW-1 and PW-2, one of

whom is the son of the deceased and another an employee of the institution against whom disciplinary action was taken by the co-accused Shyam Narain Pandey as Principal of the institution. Further, there are material contradictions in the testimony of PW-1 who is stated to be an eye witness of the incident.

53. The question is as to whether the story of the first informant with regard to the place of the incident and the manner of occurrence could be proved, with the presence of other eye witness, in as much as, the prosecution could not even prove the fact that the deceased had travelled by a Roadways bus on that day. It is vehemently argued that the entire story narrated by PW-1 from the beginning was concocted, in as much as, the narration by PW-1 of the reason of enmity of the deceased with accused Laxmi Narain Pandey for Rs.10 lacs received from M.P. Fund, could not be proved by the prosecution. In cross, it has come that the said money was though transferred by the deceased to the Chief Development Officer, Azamgarh but it was again refunded to the accused Laxmi Narain Pandey for degree college. The enmity suggested by the prosecution because of the dispute relating to the money (Rs. 10 lacs), therefore, falls. The story of the pressure created by Laxmi Narain Pandey upon the deceased to handover money to him was creation of the witnesses PW-1 & PW-2.

54. It is argued that PW-1 was not sure as to whether the deceased (his father) was to be given charge of the post of Principal or the Examination Controller on the next date of the incident, i.e. 01.03.2006. In view of the apparent contradictions in his statement-in-chief and cross, his version that the deceased went to the office of the District Inspector of School to bring

the Board copies and that being the reason of the presence of the witnesses on the spot, therefore, is proved to be false. Besides the apparent contradictions in his testimony, no material such as answer books were found near the dead body nor noted in the inquest, the said fact was also admitted by PW-2 that the deceased did not bring answer books with him. No copy or no other material was found besides the dead body. No bus ticket or pass to travel by the roadways bus was found either in the pocket of clothes of the deceased or in the alleged bag found by the Investigating Officer besides the dead body. There is no memo of alleged money recovered from the pocket of the pants of the deceased. In the inquest report, the column for noting the things found besides the dead body is blank which further proves the stand of the defence that nothing was found besides the dead body. As per the evidence of PW-1, the deceased had alighted from the roadways bus. A presumption, thus, has to be drawn in the ordinary course of business that he was travelling with ticket or a pass but no such material was found near the dead body. The entire theory of prosecution of the deceased having alighted from the roadways bus, thus, falls short of evidence. There is, thus, no evidence on record to prove that the deceased went to the office of the District Inspector of School, Azamgarh and was coming back from the said office by a Roadways bus as narrated by the prosecution witnesses. The reason for their presence given by the prosecution witnesses (PW-1 & PW-2) to receive the deceased at the Kesari Chauraha as he was bringing the Board copies, therefore, proved to be wholly concocted story. The presence of prosecution witnesses (PW-1 & PW-2) on the spot, therefore, is belied.

55. It is then argued that once the reason for presence of PW-1 and his companion (PW-2) on the spot could not be proved by the prosecution, the presence of witnesses on the spot becomes highly doubtful. The direction wise details given by PW-1 as to which accused fired in which manner, further goes to show that the prosecution had concocted the entire version of PW-1 about his presence on the spot. There is apparent contradictions in the testimony of PW-1 about the number of fires from the medical evidence wherein only three firearm injuries of entry wounds were found on the person of the deceased. Two other firearm injuries as indicated in the postmortem report are exit wounds corresponding to two entry wounds. According to the learned Senior Counsel, PW-1 having counted the number of firearm injuries as indicated in the postmortem report without understanding its impact, stated that all the accused persons had fired at the deceased and that total 5 fires were made by assigning firearm in the hands of each accused.

56. It is clear in his version that PW-1 though stated that Umesh and Ramesh also fired but did not explain as to whether their fire hit the deceased.

57. PW-2 Rajkumar Tiwari conspicuously absented from the spot soon after the occurrence and did not meet the police officer as is evident from his testimony and that of PW-4. His statement was recorded after about 20-25 days of the occurrence and the admitted fact that he gave an affidavit to the District Magistrate to record his testimony show that the prosecution had pressurized the witnesses to give a false testimony. The statement under Section 161 Cr.P.C. of PW-2 was recorded only after he gave affidavit to the District

Magistrate on 20.03.2006. It is admitted to this witness (PW-2) that he did not meet the Investigating Officer before giving affidavit to the District Magistrate. It is further argued that, in cross of PW-2, it has come that Ex. Principal Paras Nath Mishra died on the same day and it was suggested that PW-1 was coming from his house, which was near the place of the incident, when this murder was committed. This suggestion given to the witnesses could not be successfully refuted by PW-1 or PW-2 which fact coupled with the above noted facts makes it evident that the prosecution had suppressed the truth, i.e. the reason for the presence of the witnesses on the spot.

58. It is then argued that the suggestion of enmity of the deceased with other persons on account of lodging of the first information report by him was admitted. Further there was a considerable delay in sending the dead body to the police lines. As per the statement of PW-1, the body was sent for postmortem from the place of the incident at about 10.30 PM but as per the entries in Form 13, which records movement of the dead body, the body was dispatched from the place of the incident at 10.25 PM but received in the police lines in the morning at about 11.15 AM. The postmortem commenced at about 11.30 AM and the doctor (PW-3) admitted that he had received the body in the mortuary at 11.15 AM. Similar entries could be seen from two documents maintained at the police lines which are the postmortem register and GD proved by the defence as Exhibit Kha-1 and Kha-2. The entries in the said documents do tally with the postmortem report (Exhibit Ka-4) and the time of arrival and dispatch of the dead body to the mortuary recorded therein is 10.45 PM. The first Investigating Officer namely PW-4 was cross-examined on the issue of

arrival of the body in the mortuary and he also admitted that as per his information, the body had reached the mortuary at about 6.00-7.00 AM though it was asserted by PW-4 that the body was straightway sent to the mortuary from the place of the incident for postmortem.

59 The defence witness DW-1, clerk of the police Headquarter, Azamgarh brought the original postmortem register and G.D. and as per the entries therein, it was proved by DW-1 that the dead body of Rajendra Prasad Tripathi (deceased) had reached at the police lines on 01.03.2006 at about 10.45 AM.

60. With the statement of DW-1, learned Senior Counsel for the appellant vehemently argued that the entries in both the documents namely Kha-1 and Kha-2 were of 10.45 AM. There is no corresponding entry in Form 13 wherein a column exist for noting the time of arrival of the dead body in the police lines and also of sending it to the mortuary. The contention is that since only one time namely 22.25 hrs dated 28.02.2006 has been mentioned in the relevant column in Form 13 with regard to which the relevant entry in the postmortem register at serial No.82 Rapat number 50 time 10.45 AM dated 01.03.2006 exist, it can be inferred that the dead body reached the police station only in the morning at about 10.15 AM. It is argued that the distance of the police lines from the place of the incident was about 33 KM. In any case, dead body could not have been received in the police lines at about 10.25 PM as noted in the relevant column of form 13 as it was proved to be the time of dispatch of the dead body. Looking to the distance of the police Headquarter from the place of the incident, only entry of the postmortem register and Rapat No.15 in G.D.

(Kha-1 and Kha-2) have to be considered to ascertain the time when the body was received in the police lines, Headquarter Azamgarh. The doctor had proved that the body was received by him for the postmortem at about 11.15 AM on 01.03.2006 alongwith police papers and he conducted postmortem at 11.30 AM.

61. In light of the above evidence on record, no explanation could be offered by the prosecution witnesses specially the Investigating Officer to explain the gap of 12 hrs in transportation of the dead body to the police lines. The Constables carrying the dead body were not examined on the vital delay of arrival of the dead body in the police station and then to the mortuary. As per the opinion of the Doctor, the proximate time of death estimated by him was  $\frac{1}{2}$  day that means 12 hrs. From the above opinion of the expert also the death could not have been caused at around 06.00 PM, as projected by the prosecution witnesses of fact (PW-1 & PW-2). It seems more probable that the death was caused sometimes around midnight and for that reason, the body was received in the police lines/mortuary in the morning. The statement of the Investigating Officer (PW-4) also becomes significant when he says that he had received information that the body was received in the mortuary at about 06.00-07.00 AM.

62. In view of the above circumstances, two probabilities arise, firstly, that the incident had occurred in the dead of night and no-one had seen the murder and secondly that some unknown person who were carrying ill will against the deceased on account of lodging of the first information report against them under Section 307 IPC had killed him and for that reason, the body was received in the police lines and the mortuary

during morning hours on the next day i.e. 01.03.2006. As a consequence to that, the first information report becomes Ante-time. By preponing the time of lodging of the first information report, the prosecution tried to build a case of the presence of alleged eye witnesses (PW-1 & PW-2) at the site of the incident. The special report of the incident was also sent with considerable delay and as per the endorsement on the same, it was received by the Judicial Magistrate on 04.03.2006.

63. All the above facts taken together prove the improbability of the deceased having alighted from the bus at the Kesari Chauraha at the time which was fixed by the prosecution witnesses. According to the defence, in fact, PW-1 was present in his house which was at a short distance from the place of the incident and the deceased had gone to the house of Paras Nath Mishra, the Ex-Principal who had died on the same day. While coming from the house of Paras Nath Mishra, the deceased was killed by unknown assailants and PW-1, who came from his house projected himself as an eye witness in a motivated manner to falsely implicate the accused persons because of enmity. The reason for presence of the witnesses namely PW-1 on the spot was not narrated in his previous statement under Section 161 Cr.P.C. which fact further proves that PW-1 is lying.

64. It is further argued that when it was put to PW-1 that a bus stand was nearby, only 250 paces towards the west from the place of the incident, he admitted the same and this admission would be further proof of the fact that there was no reason for the roadways bus to stop at the Kesari Chauraha which was a busy place. In fact the place of the incident as narrated by PW-1 and the reason for his presence at the said

place all are concocted story which could not be proved by the prosecution. The falsity in the testimony of PW-1 is further proved from the fact that he gave a false affidavit in the bail matter against accused Shyam Narain Pandey.

65. On motive, it was vehemently argued by the learned Senior counsel for the appellants that there is no evidence of the suggested motive and PW-1 could not even prove the motive in his oral testimony. It is lastly argued that both the witnesses are interested and partisan witnesses, PW-1 being son of the deceased and PW-2 having grudges against the co-accused Shayam Narain Pandey. No independent witnesses was produced though the incident allegedly had occurred at a crowded place at a time (in the evening) when lot of crowd was collected on the spot. Strict scrutiny of the prosecution evidences, therefore, would be required and it becomes important to ascertain as to whether the deceased had actually travelled by bus.

66. To prove the said doubt in the prosecution story bus ticket was a significant evidence which could not be found by the prosecuting officer. The bag which was allegedly found near the dead body was a planted one. The prosecution witnesses were put to cross on the evidence of proof of traveling of the deceased by bus but none of them could give any satisfactory answer. This fact itself completely ruled out the story of traveling of the deceased by the roadways bus.

67. It is argued by the learned Senior Counsel for the appellant that in the statement of the second Investigating Officer (PW-5) though it has come that he had interrogated the District Inspector of School and recorded his statement but the

said statement was neither produced in the evidence nor exhibited. Without proving the evidence of the District Inspector of School, the substance of the statement of the second Investigating Officer in that regard would be liable to be thrown away.

68. The Material Exhibit-12, the bullet recovered from the dead body, could not be matched with the weapons allegedly recovered from the accused persons. This again show the falsity in the case of the prosecution about the weapons in the hands of the accused persons and the offence committed by them. The appellants had been acquitted for the offence under the Arms Act as the recovery of weapon was planted.

69. It is urged that PW-2 admittedly had motive to falsely implicate the co-accused Shyam Narain Pandey. Further investigation of the case was done by the CBCID under the order passed by the State Government. The PW-10, the third Investigating Officer of CBCID, though collected evidence for the offence under Section 120-B but did not produce any witness in the Court and, thus, allegation of conspiracy could not be proved. There is no transparency in the investigation. The material improvement in the testimony of PW-2 were put to the Investigating Officer namely PW-5 who could not explain the same. The offence under Section 7 Criminal Law Amendment Act, which was indicated in the first information report had not been mentioned in any of the police papers prepared by the Investigating Officer.

70. The Investigating Officer did not ascertain the post which the deceased was holding on the date of the incident. There are several flaws in the investigation which were pointed

out to the Investigating Officer to dispute the presence of eye witnesses and no satisfactory reply could be obtained. From the entry in the case diary dated 28.02.2006, it was pointed out by the learned Senior Counsel that there was interpolation in the case diary about the bag seized as the case property. This interpolation was put to the Investigating Officer namely PW-4 who could not give any satisfactory answer. It was also observed by the trial Court that there was an interpolation in the case diary and the word “bag” was later introduced.

71. Sri Dilip Kumar learned Senior Counsel for the appellants places reliance on various judgements of this Court and the Apex Court, **Nem Singh Vs. Emperor<sup>1</sup>**, **Guchun Misir & others Vs State<sup>2</sup>**, **State of U.P. Vs. Moti Ram & another<sup>3</sup>**, **Sahib Singh Vs. State of Haryana<sup>4</sup>**, **Malempati Pattabi Narendra etc. Vs. Ghattamaneni Maruthi Prasad & others<sup>5</sup>**, **State of Uttar Pradesh Vs. Babu Singh,<sup>6</sup> Jumni & others Vs. State of Haryana<sup>7</sup>**, **Ayodhaya Prasad Namdeo Receiver Vs. Babu Ram Prasad<sup>8</sup>**, **Chhang & others Vs. State of U.P.<sup>9</sup>** to buttress his arguments.

72. It is argued by Sri Durgesh Kumar Singh learned counsel for appellant Shyam Narain Pandey that the accused persons Laxmi Narain Pandey and Shyam Narain Pandey were wrongly convicted in the offence of murder with the aid of Section 149 when admittedly they did not step out of the car.

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1.1934 AIR (ALL) 908

2.1956 Law Suit (All) 245

3.1990 (4) SCC 389

4.1997 (7) SCC 231

5.2000 (5) SCC 226

6.1998 (2) ACR 1654

7.2014 (85) ACC 650

8.AIR 1954 V.P

9.Criminal Appeal No.2927 of 1982

Only role of exhortation had been assigned to these appellants as per own case of the prosecution itself. The accused Laxmi Narain Pandey and Shyam Narain Pandey cannot be said to have committed any offence in prosecution of the common object of the assembly which was projected as unlawful assembly. Reference has been made to the decision of the Apex Court in **Roy Fernandes Vs. State of Goa**<sup>10</sup> to assert that the conviction of two appellants namely Laxmi Narain Pandey and Shyam Narain Pandey for the offence under Section 302 IPC with the aid of Section 149 IPC is a result of misapplication of law. Further, PW-1 did not even assign the role of exhortation to Shyam Narain Pandey in his statement under Section 161 Cr.P.C., his version before the Court, therefore, is a material improvement. As established from the record, PW-2 had motive to falsely implicate Shyam Narain Pandey. He, therefore, is liable to be acquitted.

73. It is lastly argued by Sri Durgesh Kumar Singh learned Advocate that appellant Shyam Narain Pandey could not have been present on the spot, in as much as, he was in Allahabad and sworn an affidavit before the Oath Commissioner in the High Court. Two witnesses, DW-7 a litigant and DW-12, a lawyer were produced in the Court to prove the plea of alibi. Even PW-1 in his testimony admitted that he had never seen Shyam Narain Pandey prior to the incident and could not explain as to how he knew him.

74. This fact shows that PW-1 could not identify Shyam Narain Pandey at the time of the incident. His implication was later made on deliberations at the instance of PW-2 who was having enmity with Shyam Narain Pandey. This fact further

proves the falsity in the statement of the prosecution witnesses and the case of prosecution falls on account of all the material contradictions found in the testimony of the prosecution witnesses.

#### **DEFENCE EVIDENCE:-**

75. To press the plea of alibi of accused Laxmi Narain Pandey, Pawan Kumar Pandey and Shyam Narain Pandey following evidence has been placed before the Court by the defence.

76. For Laxmi Narain Pandey and Pawan Kumar Pandey, their statement under Section 313 Cr.P.C. were placed wherein Laxmi Narain Pandey stated that he was lodged in the District Jail, Lucknow on the date and time of the incident. Similar plea was taken by appellant Pawan Kumar Pandey that he was lodged in the District Jail, Lucknow alongwith his father on the date and time of the incident. In support of this plea of alibi, the witnesses from the District Jail, Lucknow and the office of the Railway Police Force had been brought in the Court.

77. DW-2 came from the District Jail, Lucknow and deposed that he brought the gate book register and register No.1 (Kaidi register) register No.7 Doctor Mulaiza register in the Court. This witness had simply brought the document noted above and did not say anything beyond that, he was not cross-examined by the prosecution.

78. DW-3, the Head Constable posted in RPF Post, Charbagh (NR) Lucknow brought the original G.D. from the date 14.02.2006 till 27.02.2006 under the orders of the Court and proved the G.D. entries dated 24.02.2006, 16.26 hrs and

25.02.2006 as Exhibit Kha-3 and Kha-4. It was stated by DW-3 that as per the entries in the General Diary, two persons namely Laxmi Narain Pandey and Pawan Kumar Pandey were caught by the T.C. (Ticket Collector) and were handed over to RPF post (NR), Charbagh Lucknow alongwith two chargesheets. The entry in that regard exists at serial No.60 of G.D. When the case was registered against these persons, Constable Gauri Shankar Singh was on duty and according to DW-3 these entries might be in the writing of Gauri Shankar Singh. It was further stated that as per the entries in G.D. 25.02.2006 at 00.10 hrs, Laxmi Narain Pandey and Pawan Kumar Pandey were in the RPF lock-up under the supervision of Constable Gauri Shankar Singh and they were handed over to Constable Shiv Raj Prasad who made entries at G.D. No.4, 00.10 hrs of handing over the accused persons to him. Constable Shiv Raj Prasad was on duty till 08.15 AM on 25.02.2006 and these two accused alongwith 15 other persons were handed over to another Constable at about 08.15 AM on 25.02.2006, entry of which could be seen at serial No.25 of the G.D. This witness stated that all the above entries and signatures might be of Constable Shiv Raj Prasad. As per the G.D. entries dated 25.02.2006 rapat No.47, two accused persons alongwith 15 others were taken to the Court of ACJM North Railway Charbagh Lucknow by the RPF Constables and they were brought back on the same day at about 18.00 hours, entries of which was made in the G.D. at rapat No.57. In the entries of return of the accused persons in the Lock-up, out of 17 persons, 4 persons were released as they had deposited the requisite fine.

79. These two accused persons namely Laxmi Narain Pandey and Pawan Kumar Pandey did not pay the fine of

Rs.880/- per person imposed upon them and, therefore, they were inflicted punishment of 15 days imprisonment. The result was that 13 remaining accused including two persons namely Pawan Kumar Pandey and Laxmi Narain Pandey were lodged in the District Jail, Lucknow.

80. DW-3 in his testimony stated that all the above noted G.D. entries could be found in the original copy of the same.

81. In cross, he further stated that the names of the appellant Laxmi Narain Pandey and Pawan Kumar Pandey could be found in the list of those persons who did not deposit the requisite fine. On recall, DW-3 filed original Khuraki register, RPF Charbagh, Lucknow for the period from 03.11.2005 to 17.11.2006 and refuted the suggestion of the prosecution that all the documents were forged and prepared in order to provide undue benefit to the accused appellants. One register known as Jama Talashi register dated 24.02.2006 was also brought in the Court by DW-3 and it was stated that during frisking of the accused persons, one mobile charger was found which was not returned to him and as such there was no signature of the accused appellant Laxmi Narain Pandey therein, the copy of the Jama Talashi register was proved as Exhibit Kha-6. The original Khurakhi register was proved as Exhibit Kha-7, wherein it was indicated that meals of two times were given to the accused appellants namely Laxmi Narain Pandey and Pawan Kumar Pandey in the RPF locker. One sealed envelope addressed to the Additional District and Sessions Judge, Court No.3 Azamgarh sent by the Additional Chief Judicial Magistrate (N.R.) Lucknow was produced by DW-3 in the Court, seal of which was opened therein. Five papers found in the envelope were marked as Exhibit Kha-9,

Kha-10, kha-11 and kha-12 and kha-13. Kha-12 pertains to case No.1440 of 2006 arising out of case No.787 of 2006 under Section 137 Railway Act, Laxmi Narain Pandey son of Shiv Kumar Pandey, resident of Adilpur, P.S. Atraulia, District Azamgarh.

82. In cross DW-3 admitted that none of the entries in the register filed by him were made in his presence.

83. DW-4 is the Deputy Jailer, District Jail, Lucknow who brought, on the direction of the Court, the record of proforma for health screening and reasons of admission of the accused in jail, which is the record of the jail hospital. He stated that the entire record of the District Jail, Hospital Lucknow was destroyed in a fire outbreak on 15.03.2006 and the copy of the available record was being filed in the Court as certified by the present Jailer, District Jail, Lucknow as Exhibit Kha-5. He categorically stated that the record which was summoned by the court had been destroyed in the fire incident and was not available in the hospital of the District Jail. Original register No.7, Hospital Mulaiza Register for the period from 21.02.2006 till 04.03.2006, gate register from 24.02.2006 till 18.03.2006 and Kaidi register No.1 dated 28.02.2006 till 07.03.2006 were shown to him and he stated that he was not authorized to send these documents to the Court which were brought by the Constable Ram Nayan Tiwari examined as DW-2.

84. DW-4 categorically stated that for sending those document only the Jailer, District Jail was authorized.

85. DW-5 is the Jailer, District Jail, Lucknow who stated on oath that the above noted documents were sent by him through the Constable Ram Nayan Tiwari (DW-2) as they were

summoned by the Court. He further stated that those registers were not sent sealed as there was no such order of the Court. DW-5 narrated that the register noted above bears signatures of two accused appellants namely Pawan Kumar Pandey and Laxmi Narain Pandey in the relevant columns.

86. He was crossed by the prosecution on various discrepancies such as overlapping in the thumb impression and incomplete description of the accused appellants against their names.

87. DW-6 is the Jailer, posted in the District Jail, Lucknow between 07.02.2006 till 20.12.2006. He had identified the entries in the register gate book of the District Jail, Lucknow for the period from 24.02.2006 till 18.03.2006, original of which was brought in the Court and stated that as per the entries therein of dated 22.02.2006 at 17.31 hrs, two accused appellants Pawan Kumar Pandey and Laxmi Narain Pandey were lodged in the District Jail, Lucknow at serial No.2 & 3 alongwith other 11 persons. He stated that the said entries were made by the then Bandi Rakshak on duty. The certified photostat copy of the gate book/gate register was filed by DW-6 under his signature as Exhibit Kha-14.

88. He stated that on 02.03.2006 at 11.36 hrs, 11 prisoners were released from the jail and amongst whom the name of accused appellant Pawan Kumar Pandey was entered at serial No.1 and Laxmi Narain Pandey at serial No.4. The attested photo copy of the said entries was filed by DW-6 under his signature as Exhibit Ka-15. He explained that in Kaidi register No.1, original of which was before him in the Court, the entries of lodging and release of the convicted accused

persons were made and, according to the said Register, at serial No.964 of 25.02.2006, the factum of lodging of Laxmi Narain Pandey son of Shiv Kumar Pandey resident of Village Adilpur, District Azamgarh was noted whose release was made on 02.03.2006 on deposit of fine of Rs.880/- through receipt No.406814. The copy of the said receipt was pasted in the register and the identification marks of Laxmi Narain Pandey had also been noted therein.

89. Similarly, the name of the accused appellant Pawan Kumar Pandey was entered at serial No.965 in register No.1 and the name of his father was mentioned as Laxmi Narain Pandey. His date of lodging in the jail was mentioned as 25.02.2006 with the description of his age, weight, height and identification marks. The names of his relatives had also been indicated therein and he was released on 02.03.2006 on deposit of Rs.880/- by the Railway Court, receipt of which was pasted as receipt No.406815. It was stated that both the receipts were received from the office of the Additional Chief Judicial Magistrate, (NR) Lucknow. However, he could not identify the signature of the Deputy Jailer on the said entries. The photostat certified copy of the register No.7 (release register) dated 02.03.2006 filed by DW-6 under his signature was exhibited as Exhibit Kha-6 wherein the accused appellant Pawan Kumar Pandey and Laxmi Narian Pandey were shown as having been released at serial No.12 & 13; respectively.

90. Two photostat copies of register No.1 (kaidi register) were filed by DW-6 under his signature as Exhibit Kha-17 and Kha-18.

91. In cross, DW-6 had admitted that none of the entries

were made in his presence as they did not pertain to the period of his posting in the District Jail, Lucknow. On a suggestion, it was admitted by DW-6 that whenever some prisoner is lodged in the jail, information is being given to his family members.

92. DW-8 is an officer of RPF, Lucknow who stated that two accused namely Laxmi Narian Pandey and Pawan Kumar Pandey were arrested and handed over to him. He lodged them in jail on the basis of the charge sheets which were submitted as Case No.7787 of 2006 and 708 of 2006 under Section 137 and 138 of the Railways Act. At that point of time, Constable Gauri Shankar Singh was on lock-up duty and all the entries in the G.D. dated 24.02.2006 and 25.02.2006 shown to him were made by Constable Gauri Shankar Singh. DW-8 had identified the signature and handwriting of Constable Gauri Shankar Singh and stated that two accused appellants, named above, were lodged in the RPF lock up. He stated that 13 accused including two accused appellants herein were lodged in the District Jail, Lucknow on 25.02.2006 and their return was also entered in the G.D. He has further stated, in the cross, that the information of lodging of the accused appellants Laxmi Narain Pandey and Pawan Kumar Pandey was sent to their home on the said date itself, i.e. 25.02.2006.

93. DW-9 is Constable Gauri Shankar Singh who was posted in R.P.F. Post (NR) on 24.02.2006 and 25.02.2006. He proved the GD no.60 dated 24.02.2006 and GD No.4 dated 25.02.2006 being in his handwriting and signatures and stated that when accused persons were lodged in the RPF lock-up, he was on duty of writing the G.D. He had entered two accused and one mobile charger found in their frisking in the G.D. No.60 of 24/25.02.2006. He handover the charge of the accused

person to Constable Shiv Prasad, entry of which was at G.D. No.4 dated 25.02.2006. All other G.D. entries were not made by him nor he could identify the signature of those persons who maintained the same. DW-9, however, identified his signatures on the entries made in G.D. 57 dated 25.02.2006.

94. In cross, DW-9 stated that when an accused is brought in RPF custody, his family members are being intimated and from the entries in the G.D. dated 24.02.2006 he stated that information was given to the family members of the accused persons on the number given by them which was entered in the G.D.

95. DW-10 is Constable Ram Surek posted in the police station RPF (NR) Charbagh, Lucknow and stated that he alongwith five other Constables took 17 accused persons to the Court of Additional Chief Judicial Magistrate (NR) Charbagh, Lucknow for their appearance in the said Court, out of which four were released whereas 13 accused persons including Laxmi Narain Pandey and Pawan Kumar Pandey were lodged in the District Jail, Lucknow. The entry of the jail gate book at serial No.63 was shown to this witness who had identified his signature therein as Exhibit Kha-19. He than stated that his return alongwith other Constable in the Police Station RPF, Charbah was entered in G.D. 57 at 18.00 hrs, which also bears his signature.

96. In cross, DW-10 admitted that he could not identify the accused persons and he had stated their names on the basis of the entries in the documents proved by him.

97. DW-11 is the T.C. Sarvendra Singh who stated that he was posted at the Railway Station Charbagh. Two persons

namely Laxmi Narain Pandey and Pawan Kumar Pandey residents of village Adilpur, Police Station Atraulia, District Azamgarh were caught at the first entry gate of Charbagh Railway Station being without ticket and when brought before the concerned officer they were asked to deposit Rs. 130/- as tariff and Rs.250/- (Total rs.380/-) as penalty per person. When they did not deposit the said money, the concerned officer had filled their charge sheet and handed over to them to the Police Station RPF, Charbagh, Lucknow.

98. The attested photostat copy of the said charge sheets had been filed in the Court by DW-11 under his signature as Exhibit Kha-20 and Kha-21. In cross, DW-11 stated that his duty was at the first class entry gate of train No.3075 Jammu Tavi Howrah which reached at Charbagh railway station at about 15.15 hrs at platform No.1. He, however, did not remember as to on which platform, the said train had stopped on 24.02.2006. However, he stated that his duty was at the first class entry gate when he caught the accused-appellant Laxmi Narain Pandey and Pawan Kumar Pandey. He could not remember as to whether they were empty hands and also as to why they were caught. However, he stated that since they were charge sheeted that would mean that they were traveling without ticket. He did not remember anything told to him by the accused on that day. He further stated that the accused persons were charge sheeted for the general Bogey. He then stated that on 24.02.2006 apart from these two accused persons at gate No.1 of the platform, no other passenger was caught without ticket.

99. In cross, DW-11, however stated that he could not identify the accused persons if they were brought before him.

100. DW-13 is Deputy Jailer posted in the District Jail, Lucknow on the date of the incident and was shown various registers maintained in the jail as noted above. He stated that there were overlapping in the thumb impression of accused persons in the relevant register No.1 wherein their release was entered and stated that in case of any doubt about the thumb impression, the prisoner would not be released. He admitted that in the relevant column of register No.1, 4 thumb impressions of Laxmi Narain Pandey and Pawan Kumar Pandey were there, where there was a lot of overlapping and in a entry like this, release could not be ordered. He then stated that when he directed for release of the accused persons, the entries in the register were not like as they are. He then stated that the registers which were produced in the Court were very important documents and that they are being kept in the custody of jail officer and no-one can touch, see or write anything on the said registers. The suggestion that all the entries in the register of the thumb impressions were made in a forged manner was denied by DW-13.

101. DW-14 Bandi Rakshak, District Jail, Lucknow had proved the entries in the hospital Mulaiza register and the identification marks of physical appearance of the accused persons noted in the gate book. He stated that according to the original hospital Mulaiza register, on physical examination of these accused persons on 26.02.2006, age, sex, weight and height and other specific identification marks were noted in the register. The attested photostat copies of the register was filed by DW-14 under his signature as Exhibit Kha-22. We may record that the identification marks noted in the relevant column of the register were tallied from the identification marks

found on the persons of two accused namely Laxmi Narain Pandey and Pawan Kumar Pandey in the Court and it was noted therein that all identification marks mentioned in the register tallied with the marks on the body. On a suggestion, DW-14 admitted that he could not explain the overlapping in the thumb impression of the accused persons at the time of release and in case such a situation existed, their release from the jail was not possible. He had denied the suggestion that all these entries were made in connivance of the jail official in a forged manner and admitted that he could not identify the accused appellants namely Laxmi Narain Pandey and Pawan Kumar Pandey, apart from the record.

102. DW-15 is the Doctor posted in the Jail who had tallied the identification marks of the accused person in the hospital Mulaiza register and stated that his signature were therein. This witness (DW-15) was recalled and he had tallied the identification marks noted in the register from the 4 identification marks found on the person of the accused appellants in the Court.

103. DW-16 is the handwriting and fingerprint expert who had taken specimen signatures and thumb impressions of the accused person namely Laxmi Narain Pandey and Pawan Kumar Pandey as Exhibit Kha-25, Kha-26, Kha-27 and Kha-28 and tallied them with their thumb impression and signature on the relevant documents. The report submitted by him was proved as Exhibit Kha-33. The affidavit filed by DW-16 wherein his report, photos and negative of the thumb impression and signatures were filed and proved was exhibited as Exhibit Kha-34. In a gruelling cross-examination by the prosecution, DW-16 was questioned on various aspects of the

report given by him to demonstrate that the thumb impression and signature of the accused persons did not tally with their thumb impression and signatures on various documents filed in defence as noted above.

104. To prove the plea of alibi of accused Shyam Narain Pandey, two witnesses DW-7 namely Sadanand Pandey and DW-12 namely Sudhakar Pandey were produced by the defence. Sadanand Pandey, a resident of District Ballia, in the witness box, stated that he came to the High Court, Allahabad in relation to his case and was staying in the City between 26.02.2006 till 28.02.2006 and on 28.02.2006 at about 7.15 PM he had signed the affidavit before the Oath Commissioner and before his affidavit was prepared, the accused appellant Shyam Narain Pandey also got his affidavit prepared in another case.

105. In cross, DW-7 stated that he knew accused appellant Shyam Narain Pandey very well as they used to meet in the High Court Allahabad when they came for Pairvi of their cases and that he met accused Shyam Narain Pandey in the chamber of an Advocate about five years prior to the date of his deposition.

106. DW-12 is Sudhakar Pandey, an Advocate of the High Court at Allahabad, who stated that accused-appellant Shyam Narain Pandey was staying in his house while doing Pairvi of his case from 26.02.2006 till 01.03.2006 and, on each day, he used to come to his house in the night at about 08.00-09.00 PM. A suggestion was given to this witness that he was resident of Ballia which was the place of residence of accused appellant Shyam Narain Pandey and since he knew him well he was making a false statement.

107. Placing the above evidence filed by the defence, it is vehemently argued by Sri Dilip Kumar, learned Senior Counsel appearing on behalf of the appellant Laxmi Narain Pandey and Pawan Kumar Pandey that the onus to prove the plea of alibi had been discharged by the appellants by bringing cogent documentary and oral evidence. It is proved that the said appellants when were traveling on 24.02.2006 from Train No.3074 Jammu Tavi and reached at the first entry gate of the platform No.1 of the Railway Station, Lucknow, were caught by the T.C. (Ticket Collector) Savendra Singh and brought to the office of Incharge who charged them for the ticket of the general bogey with penalty, for traveling without ticket. As the appellants could not deposit the fine, they were charged by the officer concerned. The charge sheet No.35257 and 35258 for two appellants namely Laxmi Narain Pandey and Pawan Kumar Pandey; respectively had been submitted and proved as Exhibit Kha-20 and Kha-21. The said charge sheets contain the description of the appellants such as their parentage, residence, post, police station and the district concerned. The time of arrest has been indicated as 15.15 hrs dated 24.02.2006. They were handed over to the RPF office, Charbagh, Lucknow on 24.02.2006 at about 16.40 hrs and the entry in that regard exists in the general dairy, Jama Talashi and Khana Khuraki register of the Railway Police Force. It was proved by DW-3 that the appellants were sent to the lock-up and from there they were also produced in the Court of Railway Magistrate under custody. On 25.02.2006, sentence of 15 days imprisonment was inflicted upon them. The entries in the Jama Talashi register (Exhibit Kha-4) proved that a mobile charger was found from Pawan Kumar Pandey in his personal search. Link evidence of DW-3 based on the G.D. entry produced by the

defence is the proof of the fact that the appellants were in the custody of RPF and lodged in the lock-up from 24.02.2006 till 25.02.2006. The Constable Gauri Shankar Singh who was In-charge of lock-up proved that the appellants were in his custody till the midnight of 24-25.02.2006 and further in the custody of Constable Shiv Raj Prasad from midnight till 08.15 AM on 25.02.2006.

108. The crime numbers allotted to the cases lodged against the appellants were also proved. The entries by RPF (NR) Charbagh further prove that 15 other accused persons alongwith two appellants were produced in the Court of Railway Magistrate in the custody of Constable Kesar Bux Singh on 25.02.2006. The G.D. entry in that regard had been proved as Exhibit Kha-4. The entries in Khana Khuraki register which is maintained about the food of the people in the lock-up prove that all the appellants were given two time meal while lodged in the lock-up. All the documents noted above were summoned by the trial court and produced by the persons in whose custody they were kept. Signatures and thumb impression of the appellants were found at the relevant places in the documents and they were tallied from the specimen signatures taken in the Court by DW-16, handwriting expert who proved that signatures and thumb impressions of both the appellants on the documents filed in defence matched with the specimen signatures and thumb impressions. The report of the Additional Chief Judicial Magistrate (NR) Charbagh, Lucknow was accompanied with register No.9 (Kha-12) and fine register (kha-13) which further prove that case No.1440 of 2006 (Case Crime No.780 of 2006) and Case No.1444 of 2006 (Case Crime No.788 of 2006) under Section 137 of the Railways Act were

registered against the appellants Laxmi Narain Pandey and Pawan Kumar Pandey; respectively.

109. Register No.9 Exhibit Kha-12 contain the description such as name, parentage and residents of the accused-appellants and it is noted therein that the total penalty of Rs.880/- each was not deposited by the appellants and, therefore, they were awarded 15 days simple imprisonment. It is proved from the above document that the RPF police handed over the appellants to the District Jail, Lucknow where they were lodged till 02.03.2006. The gate book entry (Exhibit Kha-14) till 25.02.2006 at 17.31 hrs is proof of the said fact.

110. To verify the factum of admission of the appellants in the District Jail, Lucknow, the jail records were summoned which included register No.1, admission register of the convict, the register of screening of the health of the prisoners, the register No.7 release register and the gate books dated 25.02.2006 and 02.03.2006. The jail records produced before the trial court were proved by the officers who were responsible to maintain the said records. The entries in the register maintained in the jail contain the admission time and tallied the description for securing identity of the accused appellants. The identification marks noted in the jail record were tallied physically from the accused-appellants present in the trial Court.

111. DW-15, the Jail Doctor proved the record for keeping track of health of prisoners. DW-14, Bandi Rakshak proved continuous physical presence of both the appellants in the District Jail, Lucknow from 25.02.2006 till 02.03.2006. The description of relations of accused-appellants mentioned in

register No.1 can be tallied from the Pariwar register which was filed in evidence by the defence as Exhibit Kha-33. Exhibit Kha-15, Kha-17 and Kha-18 on record are receipt of payment of penalty and fine which were pasted in register No.1. The date of deposit of fine as indicated therein is 02.03.2006 for both the appellants Laxmi Narain Pandey and Pawan Kumar Pandey who were physically released only on 02.03.2006. Exhibit Kha-14 contains the names of the appellants Pawan Kumar Pandey and Laxmi Narain Pandey at serial No.1 and 4; respectively and the time of release mentioned therein is 11.36 hrs dated 02.03.2006.

112. The submission, thus, is that the defence has proved the plea of alibi with cogent evidence. All the documents produced in defence are public documents and no doubt can be raised about the genuineness of the same. In the light of steel clay plea of alibi put forth by the defence, it is proved that PW-1 and PW-2 who are related and interested witnesses are perjured witnesses as they had specifically stated the presence of two appellants namely Laxmi Narain Pandey and Pawan Kumar Pandey at the place of the incident and specific role had been attributed to them in the entire occurrence. No independent witness was produced nor any residuary evidence was filed by the prosecution. Once the plea of alibi is accepted, the entire prosecution evidence has to be thrown away as unbelievable and manufactured.

113. Pressing the plea of alibi of two appellants namely Laxmi Narain Pandey and Pawan Kumar Pandey, it is vehemently argued by the learned Senior Counsel that ample material on record had been brought by the defence and the plea of alibi had been proved. The fact that two accused appellants

proved to be not present on the spot itself demolishes the entire prosecution case on the ground that the prosecution had not presented its case in a truthful manner. In a criminal trial, it is the duty of the prosecution to bring all circumstances of the case in a fair and transparent manner as any falsity in the prosecution case which goes to the root of the matter would demolish its case as a whole.

114. It is argued by Sri Dilip Kumar learned Senior Counsel for the appellants that the principle of falsus in uno falsus in omnibus though has no application in India but it can be taken into consideration as a rule of caution. The Court, therefore, is required to examine the evidence of the prosecution witnesses with extra caution as the presence of two appellants namely Laxmi Narain Pandey and Pawan Kumar Pandey at the place of the incident had been successfully disputed by the defence. A categorical plea of alibi had been taken on behalf of these appellants and the same was also proved by production of cogent documentary and oral evidence.

115. Adopting the argument of the learned Senior Counsel, Sri Durgesh Kumar Singh learned counsel for the appellant Shyam Narain Pandey also urged that the plea of alibi of Shyam Narain Pandey is proved from the testimony of DW-7 and DW-12 which evidence cannot be discarded by the Court.

116. Sri Rahul Mishra learned counsel for the complainant/first informant, in rebuttal, argued that the presence of first informant namely Atul Tripathi and another eye witnesses PW-2 namely Rajkumar Tiwari on the spot of the incident cannot be discarded for the minor contradictions/inconsistencies pointed out in their testimonies. It was proved by the eye witness PW-1 that three accused

persons namely Rajesh Kumar Pandey, Pawan Kumar Pandey and Amit Kumar Pandey shot the deceased to kill him whereas other two accused persons namely Umesh and Ramesh also opened fires from their weapons while two other accused namely Laxmi Narain Pandey and Shyam Narain Pandey were exhorting them to kill sitting in the Bolero Car. From the oral testimony of PW-1 or his statement in the first information report, it cannot be said that all five fires opened by the accused persons hit the deceased. The statement of PW-1 that two other accused namely Umesh and Ramesh also fired at the deceased while he was falling down should be read in this context only.

117. It is urged that the contention of the learned counsels for the appellants that there were material improvements in the testimony of PW-1 with regard to the reason of his presence on the spot is without any substance, in as much as, the first informant (PW-1) was confronted with his statement in the first information report and Section 161 version only to the extent that he did not narrate that his father (the deceased) told him to wait at the Kesari Chauraha. The contention is that the first information report is only an information of the incident and cannot be treated as complete narration of the occurrence. The discrepancy noted above is not so material so as to discard the testimony of PW-1 recorded in the Court. The names of all the accused persons were categorically indicated in the first information report and any suggestion otherwise is liable to be rejected.

118. The entire testimony of PW-1 is unshaken version of the incident. He has categorically assigned the role of each accused persons explaining the motive for commission of the crime. It was proved by PW-1 that he went with his father to

Azamgarh but returned back early. The said statement of PW-1 is proof of the deceased having gone to the office of the District Inspector of School (DIOS). Mere fact that Board copies were not found on the spot cannot be a reason to discard the testimony of PW-1 about the reason of presence of the deceased and the witnesses on the spot. PW-2, the Peon of the institution also gave the same reason of his presence on the spot and proved it as well.

119. It is further argued that the fact that there are some inconsistencies about the post being held by the deceased at the time of his death is not relevant. It is, however, proved from the record that on a challenge made by the deceased, the appointment of accused Shyam Narain Pandey on the post of Principal was cancelled as his experience certificate was found invalid and the Board had removed him from the post of Principal. The motive assigned to accused Shyam Narain Pandey is evident from the aforesaid proven fact. The first information report and the oral evidence is proof of the existence of old dispute between the parties. The recovery memo exhibited Ka-2 of recovery of bag and Supurdiginama contains signature of the first informant (PW-1) Atul Kumar Tripathi. The letter found in the bag produced in the Court marked as Exhibit Ka-3 also contain the narration of motive assigned to the accused persons.

120. The defence has not been able to dispute the said letter as the writing or signature of the deceased over the same were proved by the prosecution. It is further submitted by the learned counsel for the first informant that in a writ petition filed by accused Shyam Narain Pandey, the deceased was a party and the said writ petition was dismissed on 25.07.2005. It

is further proved that after cancellation of the appointment of Shyam Narain Pandey, the deceased became officiating Principal and his signature were attested by the District Inspector of School. The said fact is corroborated from the testimony of PW-1 and PW-2 and the defence has failed to discredit the said witnesses in cross.

121. The presence of PW-1, the first informant on the spot is further proved by injuries in the postmortem report and the contention of the defence that five shots assigned by PW-1 to five accused persons only in view of five firearm injuries (which included three entry and two exit wound) mentioned in the postmortem report, is unacceptable. It is argued that since all the accused persons were surrounding the deceased from four sides it was possible that PW-1, the first informant, could not count the exact fires and noted the details as to whose fire hit the deceased. However, the version of PW-1 as to how the deceased was killed cannot be discarded.

122. It is proved from the testimony of police witnesses that the Investigating Officer namely the Station House Officer of the police station concerned was not present in the police station when the report was lodged as he was in the field doing investigation and reached after about  $\frac{1}{2}$  an hour of the lodging of the report. The police station though was only 1 KM away but the version of PW-1 that the police could not reach the spot also stood explained by the police witness. The time taken in lodging the first information report is because of the fact that the first informant, son of the deceased took time to recover from the shock and, moreover, the first information report lodged at about 07.45 PM is a prompt report. No delay can be attributed to PW-1 in lodging of the said report and there was

absolutely no scope of deliberations.

123. As regards the time of receiving of the dead body at the police lines, Headquarter, Azamgarh, heavily agitated by the learned Senior Counsel for the appellants, it is argued by Sri Rahul Mishra learned counsel for the first informant that the police papers proved that the body was taken from the site of the incident at about 10.30 PM. PW-4, the Investigating Officer was consistent on this issue and had denied the suggestion that the body had reached the police lines at 10.25 AM in the next morning, and further stated that as per the information received by him, the dead body reached the mortuary at about 06.00-07.00 AM. It is further argued by the learned counsel for the first informant, that from amongst the two constable namely Janardan Singh and Komal Yadav who took the dead body to the Police Lines, Headquarter, Azamgarh from the spot of the incident, one namely Komal Yadav was summoned by the Court on the application moved by the appellants as a defence witness. However, for the reasons best known to the appellants, they got him discharged and his evidence was not recorded. The contention of the learned Senior Counsel for the appellants that the prosecution did not produce the Constables who carried the dead body to the Police Lines Azamgarh to explain the delay in receipt of the dead body at the police lines, thus, is liable to be rejected.

124. So far as the entry in Form-13 of date and time namely 28.02.2006 at 22.25 hrs (10.25 PM), it is urged that it has to be read as the time of dispatch of the dead body from the place of the incident and it is clear that the time of reaching of the body at the Headquarter had not been mentioned therein, as admittedly the distance of Headquarter from the place of the

incident was about 33 KM. The suggestion of the learned counsel for the appellants that the time mentioned in the entry in the postmortem register and G.D. of 10.45 AM dated 01.03.2006 is the time of reaching of the dead body at the police Headquarter, is without any substance, in as much as, there is no basis of the said suggestion.

125. The contention of the first information report being ante-time is without any basis, in as much as, all police papers prepared on the same date contain the proof of the first information report being lodged and the details of the case registered against the appellants can be found therein. Section 161 Cr.P.C. Statement of PW-1 (the first informant) was also recorded on the same date and the inquest report indicate that the inquest was completed by 10.25 PM. The special report under Section 157 Cr.P.C. was sent on the date of the incident i.e. on 28.02.2006 as was proved by PW-6, the Constable Moharir with the G.D. entry No.40 exhibited as Exhibit Ka-18. It was also proved that the Constable 694 Ram Surat Yadav who went to serve the special report came back on the next date and the return of the said Constable was noted in G.D. 21/ 01.03.2006 at about 15.45 hrs, which was proved by PW-6.

126. The endorsement of receiving of the special report by the Chief Judicial Magistrate dated 04.03.2006 would, therefore, be of no relevance. It is stated that the copy to the Chief Judicial Magistrate was sent through the Circle Officer and no suggestion otherwise had been given to PW-6 to confront him on the said fact. The contention of the learned Senior Counsel for the appellants about the first information report being ante-time on the basis of alleged delay in sending the special report under Section 157 Cr.P.C is, thus, liable to be

rejected.

127. On the issue of delay in sending the special report, reference has been made to the judgement of the Apex Court in **Ombir Singh Vs. State of U.P.**<sup>11</sup> to argue that even the alleged delay in receiving the report by the judicial Magistrate is not fatal to the prosecution case.

128. It is, thus, argued that the prosecution has proved the place, date and time of the incident as also the manner in which the murder was caused by production of two eye witnesses who remained intact throughout their deposition in the Court. The involvement of the appellants in the crime in question is, thus, proved by the prosecution beyond all reasonable doubt.

129. On the plea of alibi, it is urged by Sri Rahul Mishra, the learned counsel for the first informant that the timing of the appellants traveling ticket-less and then going to the prison for non-deposit of the meager amount of Rs.380/- each, as fine to the Ticket Collector, is noteworthy. The route of travel taken by the appellants is not proved. No luggage was found from the possession of the appellants in frisking except one mobile charger. No evidence could be produced by the defence to explain the said fact. There is no evidence that the appellants were bereft of money or their pockets were snatched. The appellant Laxmi Narain Pandey who claimed the plea of alibi is a very well-off person who owned one intermediate college and one degree college it is difficult to believe rather it is simply unbelievable that he would prefer not to deposit the meagre money of Rs.380/- to invite imprisonment for 15 days. For a respectable person of his stature, this story cannot be believed.

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It is also not explained as to why family members of appellants Laxmi Narain Pandey and Pawan Kumar Pandey did not come forward to deposit the fine, in case, it is accepted without admission that they were bereft of money, and when it has come in the evidence of defence witness that the information of the arrest was given to the family members of the appellants.

130. He contends that it is further noticeable that the fine which the appellants did not deposit earlier either before the Ticket Collector or before the Railway Magistrate and prefer to go to the prison, was deposited on the very next day of the incident i.e. 02.03.2006. Further the first information report, in the instant case, was lodged on 28.02.2006 naming both the appellants. Had they been in prison they could have brought the said fact before the Investigating Officer. No application had been given before the Investigating Officer. No plea of alibi was taken by the said appellants during the course of investigation nor any application for discharge was moved before the Court concerned at any point before the commencement of trial.

131. There is nothing on record that the plea of alibi was taken by appellants Laxmi Narain Pandey and Pawan Kumar Pandey in any proceeding prior to the submission of the charge sheet in the Court and their committal to the Sessions Court, though they had ample opportunity to do so. For the first time, plea of alibi was taken in their statement under Section 313 Cr.P.C. recorded on 01.05.2008. It is, thus, argued that the plea of alibi taken after two years of the lodging of the first information report in itself is proof of the fact it was an afterthought.

132. Further, no application was moved before the Railway Magistrate to secure the file of the case or the order of release of the appellants passed by him and the said records could not be secured by the trial Court on account of belated plea. None of the defence witnesses had identified the accused-appellants and the identification by them on the basis of papers, which were manufactured for the case, will not take the case in favour of the defence. The interpolation and overlapping in the documents proved in defence had been suggested to the defence witnesses and they could not come out with any plausible explanation. The matching of signatures and handwriting of the accused appellants Laxmi Narain Pandey and Pawan Kumar Pandey by DW-16 is of no relevance, in as much as, the matching of signatures and thumb impressions of the accused persons were not made from the admitted thumb impression or signature. The comparison made from sample signature and thumb impression taken in the Court after their accusation for involvement in the commission of murder was a baseless exercise. Even otherwise, the credibility of DW-16, the handwriting expert, had been impeached in the cross. His testimony is liable to be rejected as such.

133. Learned AGA adding to the arguments of Sri Rahul Mishra learned counsel for the first informant submits that the recovery memo of bag and Supurdiginama Exhibit Ka-2 proved by the prosecution witnesses cannot be discarded for any doubt about the entry in the case diary. The letter which was found in the bag was part of the case diary. There is no suggestion of plea of alibi to PW-1, the eye witness and the plea was taken for the first time during the course of the examination of the accused appellants under Section 313 Cr.P.C.

134. It is urged that from the version of DW-16, it is evident that he took sample signature in the Court and not much can be said about the report of matching of the said signature and thumb impression from the document presented in the defence. In any case, the plea of alibi of the defence is not proved by cogent positive evidence and the documentary evidences produced cannot be attached credence as it is admitted to the defence witnesses that none of the documentary evidences brought in the Court from the District Jail, Lucknow were sent in sealed cover. The possibility of interpolation, forgery in the defence documents, therefore, cannot be ruled out. Learned AGA has relied upon the judgement of the Apex Court in **Rajesh Singh & others Vs. State of U.P**<sup>12</sup>.

135. In sum and substance, it was argued by both the counsels for the first informant and the learned AGA that the judgement of the trial court being exhaustive appreciation of the evidence on record cannot be interfered and the appeal deserves dismissal.

136. In rejoinder, Sri Dilip Kumar learned Senior counsel for the appellants has reiterated his previous contentions about the testimonies of prosecution witnesses and the documentary evidences prepared by the formal witnesses during the course of investigation. He again presses the plea that the first information report and all other related papers including inquest were prepared ante-time for two reasons, firstly, that the prosecution had utterly failed to explain the delay in reaching of the dead body at the Police Headquarter; i.e. at about 10.45 AM, inference of which can be drawn from the material on record. And secondly, the corroborative argument for the first

information report being ante-time is the delay in sending the special report which was received by the Magistrate on 04.03.2006. It was urged that no definite reason of presence of the witnesses on spot of the incident could be given by the prosecution. The fact that the deceased alighted from the bus at the site of the incident is also not proved by any material such as bus ticket or the answer books which were supposed to be brought by the deceased. The bag allegedly found besides the dead body was introduced in the case diary and not noted in the inquest in the relevant column. The recovery memo of the bag was subsequently prepared document and had been introduced at the instance of the first informant (PW-1) only to show that the deceased was traveling. The Investigating Officer (PW-4) was confronted about the interpolation in case diary of the word "Bag" which he could not explain.

137. It is contended that the defence plea of alibi is proved by the official document summoned by the Court. The report received from the Court of Railway Magistrate, Exhibit Kha-10 & Kha-11 contain entries of the criminal case registered against the appellants and their lodging in the District Jail, Lucknow. The fine register Exhibit Kha-13 is an attested copy which again proves the criminal case registered against the appellants and the proceedings undertaken against them. The identification marks on the person of the accused-appellants had been tallied in the Court. The handwriting expert report is in favour of the appellants. No fault could be attributed to his report on account of tallying of sample signature which was taken in the Court.

138. It is vehemently argued by Sri Dilip Kumar learned Senior counsel for the appellants that watertight proof of steelclay plea of alibi negates the whole prosecution case.

139. Lastly, it was added by Sri Rahul Mishra learned counsel for the first informant that none of the registers produced by the defence witnesses, were sealed when they were brought in the Court. There were overlapping in the thumb impressions of the accused-appellants in all the defence documents especially the release register. Had this been the situation, their release from the jail was not possible which fact was admitted by the defence witnesses on confrontation.

140. Tallying of the specimen signatures of the accused persons by DW-16 will not be read in their favour as the said report cannot be a proof of the fact of genuineness of the entries in defence documents. In any case, the defence while taking the plea of alibi has to stand on its own leg and prove by cogent evidence that the accused-appellants could not be present at the place of the incident in all probabilities. There is no record of the registration of the alleged criminal case under Section 137 of the Railways Act of the Court of Railway Magistrate and the alleged release order on deposit of fine is also not on record. The manufactured documents produced by the defence are liable to be thrown as such.

#### **Analysis:-**

141. Having heard learned counsel for the parties and perused the record, in light of the arguments of the learned counsel for the parties and the material on record, following issues arise for consideration and pointwise analysis of the evidence on the same is as under:-

**A. The first information report being ante-time:-**

142. First ground of challenge to the conviction of the appellants is that the case of the prosecution is full of falsity since the very inception. The first information report which set the criminal action into motion itself was ante-time. To buttress this submission, the defence documents namely Exhibit Kha-1 and Kha-2, the postmortem register and the G.D. of the police lines (Headquarter) filed by D.W-1, the clerk posted in the police lines are pressed into service to assert that the body of the deceased Rajendra Prasad Tripathi was received in the police Headquarter on 01.03.2006 at about 10.45 AM. The corresponding entry has to be seen in the police paper form-13, (चालान लाश) (Exhibit Ka-5) wherein the relevant column is to record the time of reaching of the dead body at the police Headquarter and of sending the same to the dispensary/mortuary for the postmortem. As per the statement of PW-1, after half an hour of lodging of the first information report, the Investigating Officer reached the spot and started inquest within 2 to 4 minutes of arrival. The body was removed from the place of the incident at about 10.30 PM. The first Investigating Officer Kamlesh Narayan Pandey (PW-4) who prepared the inquest stated that he could not tell as to when the dead body was sent to the mortuary from the spot of the incident and stated that he gave the responsibility of sending the dead body to the mortuary, to his subordinate S.I. Lalta Yadav and left the place to arrest the accused. PW-4 further stated that he did not know as to whether the body was sent or it remained at the place of the incident throughout the whole night. In the morning, however, he got the information that the body was in the mortuary and the said information was received by him through a staff of the police station at about 06.00-07.00 AM.

143. The postmortem doctor PW-3 stated that the papers relating to the postmortem were received by him on 01.03.2006 at about 11.15 AM and the postmortem was conducted by him at about 11.30 AM. The estimated time of death as recorded by the doctor was about  $\frac{1}{2}$ , that means 12 hours. In the postmortem report, it was indicated that rigour mortis was present in the body. Two Constables namely Janardan Singh and Komal Yadav who took the body for postmortem were the best persons to prove as to when they had deposited the body in the police lines and how much time they had taken to cover the distance of 33 KM from the place of the incident to the police Headquarter. None of them was produced in the witness box and in view of the statement of the doctor coupled with the entry in Exhibit Kha-1 and Kha-2, it is clear that the body was sent to the mortuary at about 10.45 AM . As per the statement of PW-1, the body was dispatched from the place of the incident at about 10.30 PM, it cannot be accepted that the Constables carrying the dead body took 12 hours to travel the distance of only 33 KM. Further from the condition of the body and the opinion of the doctor, the gap in the postmortem and the time of death was about 12 hours which means that the death could be caused either around 11.30 PM or thereafter.

144. The above facts put together with the entry in form-13 Exhibit Ka-5 clearly prove that the incident had occurred around midnight or after 11.30 PM. The first information report lodged at 19.45 PM (07.45 PM), thus, becomes ante-time. All related police papers to the case prepared by the Investigating Officer, also, became ante-time at one go. As the prosecution had changed the time of the incident, its entire story becomes false. Further the check report was received by the concerned

Magistrate on 04.03.2006. The delay in sending the special report in contravention of Section 157 Cr.P.C. further strengthen the case of the defence about the first information report being ante-time. The prosecution has utterly failed to establish the time of reaching of the dead body in the police Headquarter. Only inference, thus, can be drawn is that the dead body reached at the police Headquarter at 10.45 AM, in the morning of 01.03.2006 and it was straightway sent to the mortuary where it was received at 11.15 AM by the doctor who conducted the postmortem. This discrepancy in the prosecution case creates a deep dent in the prosecution story, which is liable to be thrashed away.

145. Considering the said submissions and the rebuttal by Sri Rahul Mishra learned counsel for the first informant, we may first record that in the relevant column of form-13 (Exhibit Ka-5), the time of arrival of the dead body at the police Headquarter and the time of sending it to the mortuary was required to be recorded. These entries are in the nature of check and balance to ensure transparency in the process of investigation. As per the procedure in the Criminal Procedure Code during preparation of the inquest, in accordance with Section 174 Cr.P.C., the Investigating Officer has to draw the report of the apparent cause of death describing such wounds and marks of the injuries as may be found on the body and stating in what manner or by what weapons or instrument (if any) such marks appeared to have been inflicted. After drawing up the said report (inquest report) he has to forward the body, with a view to it being examined, to the nearest civil surgeon or other qualified medical man appointed in this behalf by the State Government. While sending the body, the state of weather

and distance and other factors have to be kept in mind so as to avoid the risk of putrefaction of the body on the road which would render such examination useless. In order to check any mishandling of the dead body during its transportation from the place of the incident to the mortuary, the procedure of sending the dead body to the police Headquarter and making entry of the same in form-13 (police papers) has been prescribed, so that in case of any mishandling of the dead body during the course of transportation, responsibility can be fixed on the erring officials and any factor which may arise on account of such eventuality may be explained.

146. Section 157 Cr.P.C. mandates that the report of the commission of an offence, which an officer In-charge of the police station is empowered under Section 156 to investigate, shall be sent forthwith to a Magistrate empowered to take cognizance of such offence. The purpose for forthwith sending the report to the concerned Magistrate is to keep the concerned Magistrate informed of the investigation of the cognizable offence so that he may be able to control the investigation and if required, to issue appropriate directions. The Criminal Procedure Code, thus, provides for internal and external checks; one of them being the sending of the copy of the first information report to the concerned Magistrate at the earliest. Failure to send the copy of the first information report to the Magistrate may cast a shadow on the case of the prosecution, may raise a suspicion that the first information report was a result of consultation and deliberations and it was not recorded on the date and time mentioned in it, and may result in holding that the investigation is not fair and forthright.

147. However, the settled law in a matter of delay in

sending the copy of the first information report to the Magistrate, i.e. violation of Section 157 Cr.P.C. is, that the said circumstance alone would not demolish the other credible evidence on record. It would only show the laxity or carelessness on the part of the Investigating Agency and that it was not prompt as it ought to be. However, it would depend upon the facts of the particular case that an unexplained delay may affect the prosecution case adversely. Such an adverse inference may be drawn on the basis of the attending circumstances involved in a case.

148. Reverting to the facts of the instant case, we may note that the entries in form-13 Exhibit Ka-5 police paper was prepared and proved by the Investigating Officer Kamlesh Narayan Pandey who entered in the witness box as PW-4. A suggestion was given to PW-4 that at the time of preparation of the inquest, the first information report was not in existence which was categorically denied by him. Further, as noted above from the statement of PW-6, Constable Awdhesh Kumar, posted as Constable Moharir in the police station concerned, the first information report, i.e. the check report Exhibit Ka-16 was prepared on a written report given by PW-1 Atul Tripathi at about 19.45 hours (07.45 PM). The G.D. entry of the check report at Rapat No.35 was proved by bringing the original G.D. and tallying it with the carbon copy prepared in the same process, by PW-6 marked as Exhibit Ka-17. The Investigating Officer namely PW-4 who conducted the proceedings on 28.02.2006, i.e. the date of the incident, proved that the entries in form No.13 Exhibit Ka-5 were made by S.I. Lalta Yadav on his dictation at the place of the incident and the body was sent for the postmortem alongwith this paper and other related

documents.

149. A perusal of form-13 indicates that in the relevant column, name of the officer who sent the dead body is mentioned as K. N. Pandey. The date and time of sending of the dead body, noted in the relevant column is 28.02.2006 at 22.25 hours (10.25 PM). The names of two Constables, the Constable No.28 Janardan Singh and Constable 484 Komal Yadav, Police Station Atraulia, District Azamgarh are also indicated in the relevant column of form-13. In the same writing, in the column for arrival of the dead body in the police Headquarter, the date 28.02.2006, time 22.25 hours is mentioned, whereas the distance of the police Headquarter from the place of the incident is indicated as 37 KM in the relevant column therein. It was noted therein that the dead body was sealed in a cloth and sent for postmortem with the police personnel alongwith relevant papers and the result be intimated.

150. This paper (form-13) is countersigned by the Inspector Police lines, Azamgarh on 01.03.2006 and besides his signature the entries of the postmortem register and G.D. report No.15 dated 01.03.2006 at 10.45 AM have been noted in the relevant column of noting the time of receipt of the dead body at the Police lines and sending it to the Mortuary. The column of receipt of the body in the police Headquarter and dispatch of the same to the dispensary was obviously required to be noted by the concerned police officer posted at the Headquarter. It seems that the concerned officer instead of making the correct entry casually extracted the entries in the postmortem register and G.D. Rapat putting his signature on the form-13, while sending the dead body for the postmortem. The time gap in receipt of the body at the police lines and sending of

the same to the mortuary, thus, cannot be explained from the entries in form-13 Exhibit Ka-5.

151. However, the said lacuna found in preparation of this document Exhibit Ka-5 form 13 चालान लाश does not become a proof of the fact that the body was received in the police Headquarter at 10.45 AM or it was not dispatched from the place of the incident after inquest at about 10.25 PM as recorded in the relevant entry in form-13 signed by the Investigating Officer, (PW-4), proved to have been prepared in the handwriting of S.I. Lalta Prasad, This fact is further corroborated from the statement of PW-1, the first informant, who stated that the body was dispatched from the place of the incident at about 10.30 PM after it was sealed. The entries in the postmortem register and G.D. of the police Headquarter Exhibit Kha-1 and Kha-2 cannot be read as a proof of the time of receiving of the dead body at the police Headquarter. Those entries only show that the body was sent for postmortem from the police Headquarter at about 10.45 PM and was received by the doctor alongwith the papers at about 11.15 AM as has been proved by the Doctor PW-3 in his deposition in the Court.

152. As regards the submissions of the learned Senior Counsel for the appellants that the prosecution had failed to explain the time taken in transportation of the dead body from the place of the incident to the police Headquarter by producing the best evidence in the shape of two Constables who carried the dead body, relevant is to note that the trial court had considered this aspect and noted in its order that the accused-appellants moved an application for summoning of Constable Komal Yadav, one of the two Constables who carried the dead

body. On the said application, the trial court had summoned the said witness to depose on behalf of the accused-appellants. However, the said witness who could throw any light on this issue as he was got discharged from the Court on another application of the defence. The contention of the learned counsel for the appellants that the prosecution had suppressed the best evidence in the shape of the statement of the Constable who carried the dead body, therefore, is liable to be thrown as it is.

153. Further contention of the learned counsel for the appellant is that though the said witness namely Constable Komal Yadav was present in the Court who could throw light on the above noted fact of the case but he was not cross-examined by the Court even after he was discharged as a defence witness and it was always open for the Court to examine him as a Court witness when the witness was available.

154. We do not find any substance in this submission, in as much as, according to us, on perusal of the entries in form-13 and the other corroborative evidence on record, though the correct time of arrival of the dead body in the police Headquarter cannot be ascertained but the said fact in itself would not create any dent in the prosecution story. The lapse on the part of the officer posted in the Police Headquarter in not making correct entries in the relevant column of form-13 Exhibit Ka-5, in itself, would not make the first information report ante-time or demolish the prosecution case.

155. For the proven facts of lodging of the first informant report at 19.45 hours (07.45 PM) on the basis of the written

report given by PW-1, no contrary suggestion could be given to PW-6, Constable Moharir who prepared the check report and made G.D. entries of lodging of the first information report at the police station at 19.45 hours.

156. Further, PW-6, in the examination-in-chief proved that the special report of the case was sent to the Senior Officer on 28.02.2006 through Constable 694 Ram Surat Yadav and entry of the same was made in G.D. No.40 which was proved being in his handwriting and signature as Exhibit Ka-18. The paper No.129 of the special report prepared by him being in his handwriting and signature was also proved as Exhibit Ka-18. PW-6 was confronted on the entries of G.D. by making suggestions of overwriting on the same which was explained by PW-6 by saying that the overwriting was made to make necessary correction and it was done by him. He proved that the G.D. dated 28.02.2006 from 19.45 hours on 28.02.2006 till the morning was prepared by him. The certified photo copy of the G.D. of the registration of the case was filed by PW-6 and marked as Exhibit Ka-19. It was categorically stated by PW-6, in cross, that the special report was sent to the District Magistrate, Azamgarh, Superintendent of Police, Azamgarh, Additional Superintendent of Police, Azamgarh, Sub Divisional Magistrate, Budhanpur and Circle Officer, Budhanpur, Azamgarh.

157. He further proved, in cross, that Constable Ram Surat Yadav with whom the special report was sent, returned to the police station on 01.03.2006 at 15.45 hours and entry in that regard had been made at G.D. No.21. The original G.D. dated 01.03.2006 was forwarded to the Circle Officer on 02.03.2006 by the Station House Officer. On the statement made by PW-6

the Constable Moharir who himself sent the special report to the Senior Officials, that the Constable returned to the police station on 01.03.2006 and the entries in G.D. No.21 proved by him, no contrary suggestion had been given by the defence. In fact this witness was not confronted on this issue.

158. From the statement of PW-6, noted above, it is, thus, proved that the special report of the incident was sent to the Senior Officials on the date of the incident itself i.e. 28.02.2006 and the entry in that regard had been made in G.D. No.40 which also could not be confronted by the defence.

159. It was brought before us by the prosecution that as per practice the special report to the concerned Magistrate is being sent through the Circle Officer. Once the special report was sent on the same day by the police official of the police station concerned (PW-6) to his Senior Officials, any delay on the part of the Circle Officer to forward the report to the concerned Magistrate or delay on the part of the Magistrate in making endorsement on perusal of the special report, would not amount to non-compliance of the provisions of Section 157 Cr.P.C. which cast a mandate on the officer In-Charge of the police station to forthwith send the report of the commission of an offence to the concerned Magistrate. In the fact of this case, it is proved by the prosecution that in compliance of Section 157 Cr.P.lC., the special report was immediately forwarded to the Senior Officials including the Circle Officer on the same day, i.e. on 28.02.2006 through the Constable of the police station concerned. Any further delay which had resulted in the endorsement of the date 04.03.2006 by the Magistrate cannot be attributed to the officer In-charge of the police station concerned.

160. Both the above arguments made by the learned counsels for the appellants to challenge the date and time of lodging of the first informant report or terming the first information report as ante-time, are liable to be rejected. From the evidence of PW-6 and PW-4 as also the relevant papers produced and proved in the Court, it is established that the first information report of the incident was registered at the police station, Atraulia, District Azamgarh on 28.02.2006 at about 19.45 hours, which was at a distance of 1/2 KM from the place of the incident. On receipt of the said report, police reached at the place of the incident and the Investigating Officer who was in the field also reached at the spot and conducted inquest of the dead body. The inquest and all other relevant papers were got prepared by the Investigating Officer (PW-4) through his assistant S.I. Lalta Yadav, under his supervision.

161. The dead body was then sealed and sent for the postmortem through Constable 484 Komal Yadav and Constable 28 Janardan Singh to the police Headquarter at about 10.25 PM. The dead body in sealed state alongwith police papers was received by the doctor namely PW-3 who conducted autopsy at about 11.15 AM on the next date i.e. 01.03.2006. The postmortem was conducted on 01.03.2006 itself at about 11.30 AM. The opinion of the doctor in the postmortem report about the estimated time of death being half day does not fix the time of death to 11.30 PM or thereafter rather the doctor who conducted the postmortem namely PW-3 stated that the proximate time stated by him was only estimated time and the death could have been caused on 28.02.2006 at about 06.00 PM.

162. On this submission of the doctor in his examination-

in-chief, he was confronted in cross, wherein he had categorically denied that his statement that the death could have been caused at about 06.00 PM on 28.02.2006 was wrong and was made only to give shape to the instant case.

163. The contention of the learned counsel for the appellants that even as per the postmortem report, the death could not have been caused at about 06.00 PM as per the noting in the check FIR, therefore, is liable to be rejected.

164. In the entirety of the evidence on record, all arguments pertaining to the FIR being ante-time are liable to be turned down.

**B. Presence of the witnesses on the spot:-**

165. There are two eye witnesses of the incident. PW-1 Atul Tripathi is the son of deceased Rajendra Prasad Tripathi whereas PW-2 Rajkumar Tiwari was a peon in Maruti Inter College, the institution wherein deceased Rajendra Prasad Tripathi was a lecturer. Both the witnesses stated that they were present on the spot and described the occurrence having seen from their own eyes.

166. To demolish the presence of eye witnesses on the spot, it is argued by the learned Senior counsel for the appellants that the reason for the presence of the witnesses (PW-1 & PW-2) near the Kesari Chauraha, the place of the incident, was not proved by the prosecution. As per the statement of these witnesses, the deceased went to the office of the District Inspector of School, Azamgarh on the fateful day and while returning from the said office by a roadways Bus he alighted at the Kesari Chauraha. The witnesses namely PW-1

and PW-2 were present on the spot on the instructions of the deceased as they were to help him alighting the bus with answer books of the Board examination. From the record as also the statements of these witnesses, it is evident that no answer book was found besides the dead body. In the inquest report, there is no mention of any article found besides or from the dead body. As per the prosecution, the deceased was traveling by a roadways bus, the bus ticket or pass to prove the factum of traveling was also not brought in evidence by the prosecution. PW-1, in cross, admitted that no bus ticket was found from the bag allegedly recovered besides the dead body by the police and no travel pass was found from the clothes of the deceased, PW-1 stated only Rs.250/- were taken out by the police from the pocket of pant of his father but no memo was prepared of the said recovery. Further, PW-1 was not even sure as to the post which his father was holding on the fateful day or the charge of which was about to be given to him on 01.03.2006. In one breath, PW-1 stated that his father was supposed to be given the charge of the Examination Controller and, in the second, that he was given the charge of the Principal of the institution. It is admitted by PW-1 that he had not seen any certificate or any document pertaining to handing over charge of the office to his father. He admitted that he could not come to know as to whether the Board copies or any other material was received by his father from the office of the District Inspector of Schools.

167. Allegedly, a memo of recovery of bag found besides the dead body had been prepared by the Investigating Officer and proved as Exhibit Ka-2. The recovery memo records that one typed application signed by deceased Rajendra Prasad

Tripathi dated 25.02.2006 and one service book as also a letter dated 17.02.2006 addressed to the District Inspector of School, Azamgarh were found inside the bag. All these documents including the bag were handed over to the son of the deceased namely PW-1. It has come in the evidence of PW-4 that the relevant column No.6 in the inquest of description of articles found besides the dead body was blank, only explanation given by him was that it was left by mistake. PW-4 was also confronted that there was an interpolation in the case diary dated 28.02.2006 about the recovery of bag and the application found in it as they were not mentioned in the case diary initially and an interpolation about these articles, no plausible explanation could be furnished by PW-4, Investigating Officer. It is urged that the Court had also observed that the word "bag" was interpolated in between two words namely "मिट्टी कब्जे" in the case diary which made no sense and this fact further proves that the memo of recovery of bag Exhibit Ka-2 was prepared later as an afterthought and entered in the case diary by interpolation so as to give color to the case of the prosecution by adding the proof of the deceased alighting from the bus at the Kesari Chauraha.

168. The contention is that the blank space in the inquest which was to be mandatory filled up by the Investigating Officer to corroborate the recovery of the bag from besides the dead body creates a serious doubt about the presence of the eye witnesses. Once the prosecution has failed to prove the reason of presence of the eye witnesses on the spot, the entire story of the deceased alighting the bus and the prosecution witnesses present on the spot to receive him falls short of relevant details. In any case, the prosecution had not brought any evidence on

record to prove that the deceased went to the office of the District Inspector of Schools and returned by a roadways Bus at the time when the incident had occurred. The statement of PW-1 that he accompanied to his father to Azamgarh and returned back early had also been made just to fill the blanks noted above.

169. It is submitted that PW-1 was further confronted as to the residence of other two witnesses namely Krishna Kumar Tiwari and Arun Kumar Pandey who allegedly accompanied the eye witnesses PW-1 & PW-2. It has come in the evidence of PW-1, in cross, that the witnesses were residents of different villages and no plausible reasons of their presence on the spot could be given by the prosecution. Even otherwise, those two persons who allegedly accompanied the eye witnesses (PW-1 & PW-2) did not enter in the witness box.

170. Much emphasis has been laid to the fact that there was a bus stop about 250 paces towards the west from the Kesari Chauraha and there was no reason for the bus to stop at the busy crossing. It was also argued that on the date of the incident someone else was holding the charge of the Principal and hence the suggestion of enmity of the accused persons including Shyam Narain Pandey with the deceased was without basis.

171. For another motive brought by PW-1 i.e. for enmity of the deceased with accused Laxmi Narain Pandey about money received from M.P. fund, it was argued that the allegation about the said dispute was a concocted story. It is known to all that any amount received in the college account from the government or from a public fund would be deposited

in the joint account of the Manager and the Principal which is to be operated with their joint signatures. It was, thus, not possible for the deceased Rajendra Prasad Tripathi to transfer the said money on his own to the Chief Development Officer. This story was created by PW-1 only to implicate the Manager Laxmi Narain Pandey.

172. The defence had also given a suggestion in the cross-examination of PW-1 that the deceased went to the house of Paras Nath Mishra, Ex-Principal, who died on the same date and while he was returning back, some unknown persons out of enmity had caused his murder. It was placed by the learned Senior Counsel for the appellants that the house of Paras Nath Mishra was nearby the place of the incident.

173. With regard to PW-2, another eye witness, it was argued that his credentials are doubtful in as much as, he admitted that he was a life convict in a case alongwith the accused Laxmi Narain Pandey. It is urged by Sri Durgesh Singh learned Advocate that PW-2 had been brought in picture by the prosecution in order to falsely implicate Shyam Narain Pandey who was previously Principal of the institution and with whom PW-2 had grudges. On confrontation, in cross, PW-2 admitted that his salary was stopped by the accused appellant Shyam Narain Pandey and he was suspended and finally four days before his superannuation, he was terminated on account of long unauthorized absence. It is submitted that the reasons for false implication of appellant Shyam Narain Pandey at the instance of PW-2 are reflected in the cross-examination of PW-2. Further, PW-1 admitted that PW-2 was very close to the deceased. Being an interested and inimical witness, the testimony of PW-2 is liable to be discredited.

174. The record also indicates that PW-2 was pressurized by the family members of the deceased to depose against the appellants and he had entered in the witness box after receipt of money. Several contradictions in the testimony of PW-2 were brought before the Court to vehemently argue that the presence of PW-2 was highly improbable at the spot of the incident and no plausible reason could be given by PW-2 for his presence on the spot. There is also a suggestion of political rivalry of PW-2 with appellant Laxmi Narain Pandey on account of election for the post of Gram Pradhan held in the year 1999-2000. PW-2 was also contradicted with his statement under Section 161 Cr.P.C to demonstrate that he did not state therein the motive of causing murder or enmity of Laxmi Narain Pandey with the deceased. The contention is that the statement of PW-2 that Laxmi Narain Pandey used to pressurize the Principal of the institution namely the deceased herein, in money matters is nothing but an improvement on material facts. Further, the place where the witnesses were allegedly waiting for the deceased though had been shown in the site plan but the Chowki or wooden bench on which they were sitting according to PW-2, was not shown by the Investigating Officer therein. PW-2 admitted that he did not meet the Investigating Officer at the spot soon after the incident and his statement was recorded after 20-25 days of the occurrence.

175. With the above, it was vehemently argued by the learned Senior Counsel for the appellants that the statements of eye witnesses PW-1 and PW-2 were lacking in material details as to the reason of their presence on the spot. It is further contended that PW-1 had given a detailed description of the manner in which his father was killed but did not give the

registration number of the vehicle which was allegedly used in the killing. The place of the incident which was Kesari Chauraha was main Chauraha of Atraulia town and the police station was nearby, about 1 KM from the place of the incident, when the accused persons were carrying grudges and planned to kill the deceased, they could have chosen some other place rather than a busy crowded place to commit the crime in such a daring manner, exposing themselves. The entire family, father and five sons, had been implicated in order to eliminate the whole family because of the alleged enmity of the deceased with two co-accused, appellants Laxmi Narain Pandey and Shyam Narain Pandey.

176. The oral testimonies of the eye witnesses, therefore, are full of embellishments, exaggerations and improbabilities, their presence on the spot is liable be discarded as such.

177. To deal with the submissions on the issue of presence of eye witnesses at the spot, we may record, at the outset, that from the own version of the defence, there is no dispute about the place of the occurrence where the dead body of Rajendra Prasad Tripathi was found, which was Kesari Chauraha, Atraulia located at a distance of about  $\frac{1}{2}$  KM from the police station Atraulia wherein the first information report was lodged. The place of the incident is also proved from the suggestion given by the defence that the deceased was killed while he was coming from the house of Paras Nath Mishra, the Ex-Principal of the institution who died on the same date, and that his house was nearby the place of the incident.

178. As concluded in the preceding paragraphs, the first information report of the incident was a prompt report lodged

by the son of the deceased namely Atul Tripathi who had entered in the witness box as PW-1. The written report given in the handwriting of PW-1 was proved as Exhibit Ka-1. The first information report was lodged within 1 hour and 45 minutes of the occurrence and the period taken in lodging the report had been explained by PW-1, in cross, when he stated that he went near his father after the accused persons fled away in the Bolero car and the people present on the spot kept hold of him for about 10-15 minutes while he was crying. His mother and sister then came on the spot and they also kept crying. He then went to the place known as Samadhi Sthal Balakdas which was about 10-12 feet on the north side of the road from the place of the incident. It took about twenty minutes to scribe the report and then he left for the police station on foot where he reached within 15 minutes. The police personnel came to know about the murder only when he gave the report and after lodging the same they came alongwith him to the place of the incident. Nothing contrary could be brought in the testimony of PW-1 about writing the report and going to the police station to lodge the same. For the son who had witnessed the murder of his father, this explanation, in cross, about the time taken in going to the police station seems convincing. In a categorical statement, PW-1 stated as to how the murder had been caused. He had given categorical details as to how the accused persons came in a Bolero Car and five of them got down, gheroed the deceased and killed him while two of the appellants were exhorting others to kill.

179 It has come in the evidence of PW-2 that the Bolero car was without a number plate and the said fact is further corroborated from the statement of the Investigating Officer

recorded in the recovery memo where he stated that the confiscated Bolero car, which was the case property exhibited as material Exhibit Ka-8, did not carry any number plate, i.e. it had no registration number.

180. Appreciating the testimony of PW-1, it may be noted that he had given orientation of the place of the incident, the motive for causing the murder, reason of his presence and that of other witnesses on the spot and the manner in which the murder was committed by the appellants. The manner of occurrence narrated by PW-1, son of the deceased is corroborated from the testimony of PW-2 to whom the suggestion of enmity is with one of the appellants namely Shyam Narain Pandey. The motive stated by PW-1 for commission of the crime had been reiterated by PW-2 in his own way. The fact that the salary of PW-2 was withheld or he was suspended or he was terminated prior to his superannuation had nothing to do with six other appellants namely Laxmi Narain Pandey and his five sons. There was no suggestion of enmity of PW-2 with any of these appellants except appellant Shyam Narain Pandey. Even it has come in the cross-examination of PW-2 that he was someway related to accused Laxmi Narain Pandey and had been his accomplice in a crime wherein he was convicted alongwith appellant Laxmi Narain Pandey and later acquitted in an appeal by the High Court. There is no reason for PW-2 to falsely implicate the accused persons namely Laxmi Narain Pandey and his sons. The suggestion of political rivalry of Laxmi Narain Pandey with PW-2 Rajkumar Tiwari is too remote.

181. The contradictions in the testimonies of PW-1 and PW-2, pointed out by the learned counsel for the appellant, are minor which do not go to the root of the matter and cannot be

given undue credence. Both the witnesses namely PW-1, son of the deceased and PW-2, the Peon of the institution concerned stated that they were present on the spot of the incident on the instructions of the deceased and were waiting for him when he alighted from the roadways bus and was killed by the accused persons near the Kesari Chauraha. Mere fact that no bus ticket or pass to prove the factum of traveling of the deceased by roadways bus or no recovery memo of money was prepared by the Investigating Officer would not be a reason to disbelieve the factum of the deceased alighting from the roadways bus on the spot. It is possible that in the entire commotion, the Investigating Officer did not notice to confiscate the bus ticket as admittedly, he did not notice the articles found besides the dead body in the relevant column of the inquest.

182. This crucial evidence might have been left from being noticed by the Investigating Officer because of lack of promptness or agility on his part but for this reason it cannot be said nor it can be accepted that the deceased did not travel from the roadway bus or did not go to Azamgarh. The fact that the prosecution could not establish the reason for the deceased going to Azamgarh on the fateful day as no answer book was found besides his dead body is not so material so as to thrash-away the entire prosecution case. The suggestion that the recovery memo of bag was prepared as a afterthought is not acceptable as it was proved by PW-4, the Investigating Officer that the recovery memo Exhibit Ka-2 that one rexin bag was found besides the dead body, was prepared in the presence of witnesses including PW-1. It was proved that when the bag was opened a service book, a typed letter dated 17.02.2006 and also an application dated 25.02.2006 were inside. After preparation

of the memo of recovery, the bag and the service book were given in the custody of the first informant (PW-1). The bag was produced in the Court and was shown to PW-4 who identified the same which was found besides the dead body, it was marked as Material Exhibit Ka-1. PW-2 also proved that the application found inside the bag as Material Exhibit Ka-3.

183. On confrontation, PW-4, the Investigating Officer stated that he did not think it wise to deposit the bag as case property in the Maalkhana and that is why a *सुपुर्दगीनामा* was prepared and it was handed over to the first informant with the instruction to produce it in the Court whenever summoned.

184. As regards the interpolation in the case diary about the recovered articles being bag, PW-4 stated that the suggestion that bag was added later by interpolation was wrong. Further from the articles found inside the bag, it seems that a letter was written by the deceased to the District Inspector of School for release of his salary which was withheld for sometime as also stated by PW-1. It was also proved by PW-1 that a dispute about Principalship was going on between the accused Shyam Narain Pandey and the deceased. The appointment of accused Shyam Narain Pandey on the post of Principal was cancelled on account of the complaint made by the deceased, whereafter, Shyam Narain Pandey was removed by the Commission. No inconsistency in the statement of PW-1 & PW-4 could be found with regard to the recovery of bag besides the dead body and preparation of its recovery memo and handing over the same to the eye witness PW-1.

185. For the arguments of the learned Senior Counsel for the appellants, the genuineness of recovery memo Exhibit Ka-2,

for the mere reason that no entry of the bag was made in the inquest or the bag was given in the Supurdigi of PW-1, cannot be doubted.

186. Be that as it may, mere fact that the reason as to why the deceased traveled to Azamgarh or whether he had gone to the office of the District Inspector of School, Azamgarh on the fateful day could not be established by the prosecution by the evidences such as bus ticket or any material brought from the office of the District Inspector of School, would not be fatal to the prosecution story. It is proved that there was a dispute related to holding of the post of the Principal in the institution concerned and the deceased was trying hard to get appointment on the post of Principal being the Senior-most Lecturer in the institution concerned. The description in the testimony of PW-1 & PW-2, the eye witnesses of the occurrence, corroborated by the surrounding circumstances of the case such as lodging of the prompt report by PW-1 and the description given by him about the occurrence supported by the testimony of PW-2 is categorical proof of the presence of these two witnesses on the spot.

187. The suggestion of false implication of the appellants at the hands of PW-1 for the enmity projected by the prosecution, cannot be read in favour of the defene, in as much as, two eye witnesses, in the instant case, fall in the category of wholly reliable witnesses and further the suggestion of false implication of the appellants for the proved enmity is unacceptable, in as much as, it is not acceptable that the son of the deceased who had seen the occurrence would let go the real assailants scot free so as to falsely implicate the appellants with whom there is direct enmity of the eye witnesses namely PW-1.

The proof of enmity is only with the deceased who was working on the post of Lecturer in the institution of which one of the appellant namely Laxmi Narain Pandey was the Manager and wherein another appellant Shyam Narain Pandey held the post of Principal for sometime. All other appellants are sons of Manager Laxmi Narain Pandey who were carrying grudges with the deceased on account of his actions to hold the post of the Principal of the institution concerned.

188. In the instant case, the trial court had given an exhaustive finding on the credibility of evidence of the eye witnesses. Learned counsel for the appellant pointing out the discrepancies in the ocular account of two witnesses is invoking jurisdiction of the High Court being the first appellate court to reappraise the evidence.

189. In this regard, we would like to refer to the decision of the Apex Court laying down the legal principle in the matter of appreciation of evidence of witnesses by the first appellate court so as to impeach the credit of the witness. The principles narrated in the celebrated decision of the Apex Court in the **State of UP vs. M.K. Anthony<sup>13</sup>** are that while appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinize the evidence more particularly keeping in view the deficiencies, draw-backs and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of

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13. 1985 1 SCC 505

belief. Minor discrepancies on trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole. If the court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details. Even honest and truthful witnesses may differ in some details unrelated to the main incident because power of observation, retention and reproduction differs with individuals.

190. In the above context, it was held in **Leela Ram (D) Through Duli Chand vs State Of Haryana And another**<sup>14</sup> that the High Court is within its jurisdiction being the first appellate court to re-appraise the evidence, but the discrepancies found in the ocular account of two witnesses unless they are so vital, cannot affect the credibility of the evidence of the witnesses. There is bound to be some discrepancies between the narrations of different witnesses when they speak on details, and unless the contradictions are of a material dimension, the same should not be used to jettison the evidence in its entirety. Incidentally, corroboration of evidence with mathematical niceties cannot be expected in criminal cases. Minor embellishment, there may be, but variations by reason therefor should not render the evidence

<sup>14</sup>1999 (9) SCC 525

of eye witnesses unbelievable. Trivial discrepancies ought not to obliterate an otherwise acceptable evidence.

191. The previous decision in **Rammi @ Rameshwar Vs. State of M.P**<sup>15</sup> was taken into account in **Leela Ram (D) Through Duli Chand**<sup>14</sup> to note the observations therein as:-

*"In a very recent decision in Criminal Appeal No. 61 of 1999 (Rammi alias Rameshwar v. State of Madhya Pradesh) with Criminal Appeal No. 33 of 1999 (Bhura Alias Sajjan Kumar v. State of Madhya Pradesh) this Court observed :*

24. "When eye-witness is examined at length it is quite possible for him to make some discrepancies. No true witness can possibly escape from making some discrepant details. Perhaps an untrue witness who is well tutored can successfully make his testimony totally non-discrepant. But courts should bear in mind that it is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the Court is justified in jettisoning his evidence. But too serious a view to be adopted on mere variations falling in the narration of an incident (either as between the evidence of two witnesses or as between two statements of the same witness) is an unrealistic approach for judicial scrutiny".

*This Court further observed :*

25 "It is a common practice in trial courts to make out contradictions from previous

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15.1999 (8) SCC 649  
14.1999 (9) SCC 525

statement of a witness for confronting him during cross-examination. Merely because there is inconsistency in evidence it is not sufficient to impair the credit of the witness. No doubt **Section 155** of the Evidence Act provides scope for impeaching the credit of a witness by proof of inconsistent former statement. But a reading of the Section would indicate that all inconsistent statements are not sufficient to impeach the credit of the witness. The material portion of the Section is extracted below :

" 155. *Impeaching credit of witness.* The credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the Court, by the party who calls him.....

(1)-(2)

(3) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted."

26. A former statement though seemingly inconsistent with the evidence need not necessarily be sufficient to amount to contradiction. Only such of the inconsistent statement which is liable to be "contradicted" would affect the credit of the witness. **Section 145** of the Evidence Act also enables the cross-examiner to use any former statement of the witness, but it cautions that if it intended to "contradict" the witness the cross-examiner is enjoined to comply with the formality prescribed therein. **Section 162** of Code also permits the cross-examiner to use the previous statement of the witness (recorded under **Section 161** of the

*Code) for the only limited purpose, i.e. to "contradict" the witness.*

27. *To contradict a witness, therefore, must be to discredit the particular version of the witness. Unless the former statement has the potency to discredit the present statement, even if the latter is at variance with the former to some extent it would not be helpful to contradict that witness, (vide *Tahsildar Singh and Anr. v. State of U.P.*, AIR (1959) SC 1012)".*

192. In paragraph Nos.11 & 12 of **Leela Ram (supra)**, it was further observed:-

*"11. The court shall have to bear in mind that different witnesses react differently under different situations : whereas some become speechless, some start wailing some others run away from the scene and yet there are some who may come forward with courage, conviction and belief that the wrong should be remedied. As a matter of fact it depends upon individuals and individuals. There cannot be any set pattern or uniform rule of human reaction and to discard a piece of evidence on the ground of his reaction not falling within a set pattern is unproductive and a pedantic exercise.*

*12. It is indeed necessary to note that hardly one comes across a witness whose evidence does not contain some exaggeration or embellishments - sometimes there could even be a deliberate attempt to offer embellishment and sometimes in their over*

*anxiety they may give slightly exaggerated account. The Court can sift the chaff from the corn and find out the truth from the testimony of the witnesses. Total repulsion of the evidence is unnecessary. The evidence is to be considered from the point of view of trustworthiness - If this element is satisfied, they ought to inspire confidence in the mind of the Court to accept the stated evidence though not however in the absence of the same".*

193. Reverting to the instant case, on evaluation of the evidence of both the eye witnesses, in entirety, the discrepancies pointed out by the learned Senior Counsel for the appellants in their testimonies are found to be minor variations or infirmities in the matter of trivial details which do not touch the core of the case so as to reject the evidence as a whole. Attaching too much importance to the technical errors committed by the Investigating Officer in not noticing the bus ticket as a proof of travel of the deceased from Azamgarh or in not mentioning the bag as an article found besides the dead body in the relevant column of the inquest, in the attending circumstances of the present case, is impermissible, in as much as, absence of these details would not go against the general tenor of the evidence given by the witnesses which is found consistent and credible.

194. No inconsistencies from the previous statements of the eye witnesses (recorded under Section 161 Cr.P.C.) could be pointed out during their cross-examination by the defence. The statement of PW-1, the son of the deceased was recorded by the Investigating Officer soon after completion of the inquest at the spot of the incident. The narration of PW-1 of the

manner of causing the murder of his father by the appellants in the written report scribed by him, in his first statement recorded under Section 161 Cr.P.C. and his deposition (both in examination-in-chief and cross-examination) in the Court is consistent and is not at variance on any material particular or details. It cannot be said that the discrepancies pointed out by the learned counsels for the appellants would make the eye witnesses especially PW-1, the son of the deceased as an untrue witness.

195. The testimony of PW-2 is corroborative to the version of PW-1 both of whom were present on the spot together to receive the deceased who was coming by a roadways bus from the District Headquarter Azamgarh. On consideration of their evidence from the point of view of trustworthiness of the eye witnesses, it inspires confidence in the mind of the Court and removes all doubts sought to be created by the learned counsels for the appellants so as to disbelieve the evidence of such witnesses who are otherwise trustworthy. No such discrepancy could be pointed out by the defence which would shake the basic version of the prosecution case so as to discard the version of the eye witnesses about their presence on the spot.

196. The arguments of the learned Counsels for the appellants noted above to discredit the presence of eye witnesses (PW-1 and PW-2) at the spot of the incident are, thus, liable to be rejected.

### **C. Ocular Vs. Medical Evidence:-**

197. It is argued by the learned Senior Counsel for the appellants that the statement of PW-1 as to the manner of

causing firearm injuries to the deceased is in complete contradictions with the medical evidence, which goes to the root of the matter so as to discard the presence of PW-1 on the spot. It is submitted that in the examination-in-chief, PW-1 stated that five accused persons namely Rajesh Kumar Pandey, Amit Kumar Pandey, Pawan Kumar Pandey @ Babloo, Ramesh Kumar Pandey and Rajesh Kumar Pandey had encircled the deceased and all of them were all carrying firearms. Three out of five namely Pawan Kumar Pandey @ Babloo, Rajesh Kumar Pandey and Amit Kumar Pandey had opened fires at the deceased. While the deceased was falling down getting hit by the fires, two accused namely Ramesh Kumar Pandey and Umesh Kumar Pandey also fired whereas only three firearm wounds of entry were found on the person of the deceased as indicated in the postmortem report, proved by the doctor PW-3.

198. In cross on confrontation, PW-1 stated that total five fires were opened by the accused persons and accused Ramesh Kumar Pandey and Umesh Kumar Pandey also opened fires when the deceased was falling down.

199. As per the submissions of the learned Senior Counsel for the appellants, the number 5 had been fixed by the informant PW-1 so as to implicate five accused based on the number of injuries noted in the postmortem report. Out of 5 injuries in the postmortem report, 3 are entry wounds whereas 2 exit wounds correspond to 2 entry wounds of the firearm. There is no explanation as to whether fires allegedly opened by the appellants Ramesh Kumar Pandey and Umesh Kumar Pandey also hit the deceased. There is no recovery of weapons from the possession or on the pointing out of the appellants Ramesh Kumar Pandey and Umesh Kumar Pandey and there is no

recovery of empty cartridges from the place of the incident. The falsity in the statement of PW-1 evident from the records proves that he was not present on the spot.

200. Placing the statement of PW-1 recorded on 18.09.2006, it is argued that when this witness gave such a graphic details about the directions in which each assailants was standing while encircling the deceased, he could not have missed the number of fires opened by the appellants and that whose fires hit the deceased.

201. To deal with the above submissions, suffice it to note that in the statement of PW-1, it has come that all five accused persons who encircled the deceased after getting down from the Bolero car, opened fires at the deceased and the first three fires were made by appellants Pawan Kumar Pandey @ Babloo, Rajesh Kumar Pandey and Amit Kumar Pandey. Three firearm entry wounds with blackening and tattooing have been found near the right and left ear and right shoulder of the deceased. The position of all three wounds as indicated in the postmortem report show that three fires were made at the deceased from both sides and they were close range and his right and left parietal & temporal bone of the head were found broken and brain was ruptured.

202. The categorical statement of PW-1 is that while his father was falling down after being hit by three fires opened by appellants Pawan Kumar Pandey @ Babloo, Rajesh Kumar Pandey and Amit Kumar Pandey, two other appellants Ramesh and Umesh also opened fires. The fact that their fires did not hit the deceased or no empty cartridges could be recovered from the spot of the incident would not be a reason to discard the

presence of PW-1 who gave a clear and categorical detail as to whose fires hit the deceased. A careful reading of the statement of PW-1 makes his version clear that three fires opened by appellants Pawan @ Babloo and Rajesh and Amit hit the deceased.

203. Even otherwise, it is settled law that in case of any inconsistencies or contradiction between medical and ocular evidence, the ocular testimony of a witness will have greater evidentiary value vis-a-vis medical evidence and unless the oral evidence is totally irreconcilable with the medical evidence, the oral evidence would have primacy. It is only when the contradiction between the two is so extreme that the medical evidence completely rules out all possibilities of the ocular evidence being true at all that the oral evidence is liable to be discarded. Reference **State of U.P. vs. Hari Chand**<sup>16</sup> and **Darbara Singh versus State of Punjab**.<sup>17</sup>

204. In view of the above discussion, we find that the inconsistencies pointed out by the learned Senior Counsel for the appellants in the medical evidence vis-a-vis ocular evidence of PW-1 is not a relevant factor so as to discard or disbelieve the ocular evidence. The arguments of the learned Senior Counsel for the appellants in this regard are, thus, liable to be rejected.

#### **D. Ballistic Report:-**

205. Placing the ballistic report, it is submitted by the learned Senior Counsel that the recoveries made from the accused appellants Amit Kumar Pandey and Rajesh Kumar

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16.2009 (13) SCC 542

17.2012 (10) SCC 476

Pandey of the weapons namely 315 bore and 303 bore country made pistols, live cartridges and empty cartridge found in the chamber of the weapon could not be proved by the prosecution. The bullet found from inside the dead body could not be matched from any of the recovered weapon, even the recovered cartridges also did not match with the weapons recovered from the possession of appellants Amit Kumar Pandey and Rajesh Kumar Pandey. It is, thus, argued that it proves that the recovery of the firearms was planted by the Investigating Officer. The ballistic report rather supports the defence theory that the deceased was hit by some unknown persons in the dead of night and the implication of the appellants in the crime is false.

206. To deal with this submission, suffice it to note that mere fact that the ballistic report did not support the recovery made by the prosecution would not be a reason to discard the ocular evidence which is supported by the medical evidence, in as much as, two firearms wounds brain cavity deep were through and through as the entry wound 3 cm above left ear correspond with the exit wound at the right eyebrow which both were brain cavity deep. Whereas entry wound at 2 cm above right ear correspond with the exit wound which was 1 cm above the injury No.1. The bullet which was found from the liver of the deceased correspond to the entry wound found at 06. cm below right shoulder margin of which were inverted. It has come in the evidence that three accused persons had fired at the deceased and the fact that recovery of the weapons used in causing murder could not be made or the prosecution could not connect recovered firearms with the occurrence, cannot be given undue importance so as to discard the uncontroverted oral

testimony of the eye witnesses namely PW-1 and PW-2.

**E. Motive:-**

207. On the question of motive, it is proved by the prosecution witness that the deceased was Senior most Lecturer in the institution concerned and he was trying hard to hold the post of Principal of the institution concerned. The accused-appellant Laxmi Narain Pandey was against the deceased and was supporter of co-accused Shyam Narain Pandey. The appointment of Shyam Narain Pandey though was made by the Commission but it was cancelled on the complaint made by the deceased about the genuineness of his testimonials. It has come in evidence that the testimonials of appellant Shyam Narain Pandey, which were the basis of his appointment to the post of Principal were found forged and hence his appointment was cancelled in the year 2005 by the Commission. Both the witnesses of fact proved that there was a dispute between the Manager Laxmi Narain Pandey and the then Principal Rajendra Prasad Tripathi, i.e. the deceased herein in relation to some money received from the M.P. Fund, utilization of which could not be made as per the wishes of the Manager Laxmi Narain Pandey.

208. The recovery of bag material Exhibit 1 was proved by the Investigating Officer PW-4 wherefrom an application material Exhibit Ka-3 was recovered. The contents of the said application had been extracted by the trial court in paragraph No.55 of its judgement. A perusal of which further indicates that the deceased Rajendra Prasad Tripathi wrote the said application against the Manager stating that the Manager of the institution was making all efforts to harass him and prayed that

he may be restrained from interfering in the affairs of the institution concerned. The memo of recovery of bag and Supurdignama dated 28.02.2006 Exhibit Ka-2 bears signature of PW-1 namely Atul Kumar Tripathi who in the cross-examination had proved his signatures on the said document. The signature and writing of the deceased on Material Exhibit Ka-3 the application, was also proved by PW-1 by stating that he was well acquainted with the writing and signatures of his father and the signatures on document Exhibit Ka-3 were of his father which was seized by the police on the spot.

209. Nothing contrary could be culled out from the testimony of PW-1, the son of the deceased and PW-4 as also the Investigating Officer who proved recovery of bag and the application as Material Exhibit Ka-1 and Material Exhibit ka-3 found besides the dead body. The correctness of the allegations made in the application form namely Material Exhibit Ka-3 are not relevant for our consideration in the present case. The said document, coupled with other circumstances of the case noted above, proves the motive for commission of the crime. It is settled that motive though is not of much importance in a case of positive ocular evidence, i.e. of eye witnesses account, but the motive if proved or established is a very relevant and important aspect to highlight the intention of the accused and is relevant to show that the person who had the motive to commit the crime actually committed it. However, it is equally settled that such evidence (of motive) alone would not ordinarily be sufficient to record conviction.

#### **E. Flaws in the investigation:-**

210. Several flaws in the investigation were pointed out by

the learned Senior Counsel for the appellants such as delay in sending the dead body to the police lines and flaw in preparation of recovery memo of bag allegedly found besides the dead body have been dealt with in the foregoing paragraph of this judgement. Several inconsistencies in the statement of the IIIrd Investigating Officer namely PW-10 were pointed out by the learned Senior Counsel to assert that the prosecution had falsely implicated the accused appellants in a zeal to solve the crime merely on account of the alleged enmity of the deceased with the accused persons.

211. Dealing with the same, suffice it to note that it is now a well settled principle that any irregularities or even an illegality during investigation ought not to be treated as a ground to reject the prosecution case and we need not dilate on this issue. Reference may, however, be made to the decision of the Apex Court in **State of State of Rajasthan vs. Kishore**<sup>18</sup> which laid down the above proposition.

#### **F. Trial Court Finding:-**

212. For the above discussion, we do not find any error in the finding returned by the trial court on the above noted issues, in holding that the prosecution had proved lodging of the first information report in a prompt manner, the presence of the witnesses on the spot and the motive assigned to the accused appellants to cause the murder. No infirmity could be found in the finding returned by the trial court on the above issues.

#### **G. Plea of Alibi of the accused-appellants:-**

213. We are now left with the plea of alibi taken by three

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18.1996 (8) SCC 217

appellants.

214. The appellants who have pleaded alibi, are Laxmi Narain Pandey, Pawan Kumar Pandey and Shyam Narain Pandey. In his statement under Section 313 Cr.P.C. noted above Laxmi Narain Pandey stated that he was lodged in the District Jail, Lucknow on the date and time of the incident whereas Pawan Kumar Pandey another appellant taking the plea of alibi stated that he was lodged in the District Jail, Lucknow alongwith his father on the date and time of the incident. The appellant Shyam Narain Pandey in his statement under Section 313 Cr.P.C. stated that he left for his village on 03.07.2005 after leaving the college and used to reside therein. Between 26.02.2006 and 01.03.2006 he used to go to Allahabad High Court and stayed in Allahabad city for the preparation and pairvi of a rejoinder affidavit.

215. The appellants had produced 15 defence witnesses (DW-2 to DW-16) and number of documentary evidences in support of their plea of alibi.

216. Before advertig to the evidence produced by the defence/appellants, it would be worthwhile to note that in a criminal case wherein an accused makes an effort to take shelter under the plea of alibi, it has to be raised at the first instance and also be subjected to strict proof of evidence by the Court trying the offence. Such a plea cannot be allowed lightly inspite of lack of evidence merely with the aid of salutary principle that an innocent man may not have to suffer injustice by recording an order of conviction inspite of his plea of alibi.

217. While discussing the law relating to plea of alibi, the first and foremost principle is that the burden of substantiating

such a plea and making it reasonably probable is upon the accused. The plea of alibi is not one of the general exception contained in Chapter IV IPC. It is a rule of evidence recognized under Section 11 of the Evidence Act. Section 11 of the Evidence Act<sup>1</sup> 1872 provides that when facts not otherwise relevant are relevant if they are inconsistent with any fact and issue or relevant fact if by themselves or in connection with other facts they make the existence or non-existence of any fact or issue or relevant fact highly probable or improbable.

218. It is settled that the burden of proving commission of offence by the accused so as to fasten the liability of guilt on him remains on the prosecution and would not be lessened by the mere fact that the accused had adopted the defence of alibi. The plea of alibi taken by the accused needs to be considered only when the burden which lies on the prosecution has been discharged satisfactorily. If the prosecution has failed in the discharging its burden of proving the commission of crime by the accused beyond any reasonable doubt, it may not be necessary to go into the question whether the accused has succeeded in proving his defence of alibi. But once the prosecution succeeds in discharging its burden then it is incumbent on the accused taking the plea of alibi to prove it with certainty so as to exclude the possibility of his presence at the place and time of occurrence.

219. Further, when the presence of the accused at the scene of occurrence has been established satisfactorily by the prosecution through reliable evidence, normally the court would be slow to believe any counter evidence to the effect that he was elsewhere when the occurrence happened. But if the evidence adduced by the accused is of such a quality and of

such a standard that the court may entertain some reasonable doubt regarding his presence at the scene when the occurrence took place, the accused would, no doubt, be entitled to the benefit of that reasonable doubt. An obligation is cast on the Court to weigh in scales the evidence adduced by the prosecution in proving of the guilt of the accused and the evidence adduced by the accused in proving his defence of alibi. The burden of the accused is undoubtedly heavy. It follows, therefore, that strict proof is required for establishing the plea of alibi. This flows from [Section 103](#) of the Evidence Act which provides that the burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence. However, while weighing the prosecution case and the defence case, pitted against each other, if the balance tilts in favour of the accused, the prosecution would fail and the accused would be entitled to benefit of that reasonable doubt which would emerge in the mind of the Court.

220. Reference be made to the decisions of the Apex court in **State of Uttar Pradesh Vs. Sughar Singh & others**<sup>19</sup>, **Binay Kumar Singh Vs. State of Bihar**<sup>20</sup>, **Jayantibhai Bhenkarbhai Vs. State of Gujarat**<sup>21</sup>, **Jitendra Kumar Vs. State of Haryana**<sup>22</sup>, **Darshan Singh Vs. State of Punjab**<sup>23</sup> wherein above stated legal position has been discussed.

**G(i). Plea of alibi of Shyam Narayan Pandey:-**

221. In the instant case, plea of alibi of appellant Shyam

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19.1978 (1) SCC 178

20.1997 (1) SCC 283

21.2002 (8) SCC 165

22.2012 (6) SCC 204

23.2016 (3) SCC 37

Narain Pandey is supported by the evidence of two witnesses namely DW-7 Sadanand Pandey and DW-12 Sudhakar Pandey. Sadanand Pandey admittedly, was a resident of District Ballia which was the native village of the appellant Shyam Narain Pandey. As per the statement of DW-7, he met appellant Shyam Narain Pandey between 26.02.2006 till 28.02.2006 when the latter was staying at Allahabad for doing pairvi in his case filed in this Court (Allahabad High Court). The statement of DW-7 was recorded on 02.04.2009. His version in his deposition in the Court is only based on his memory and is not supported by any material on record. In cross, DW-7 admitted that he never went with appellant Shyam Narain Pandey for doing pairvi of his case and he met him in Allahabad only on few days. He also admitted that he came to know about the present criminal case about a year prior to his deposition. It is also admitted by PW-7 that he was not related to the appellant Shyam Narain Pandey. He also did not state that he knew Shyam Narain Pandey from before he met him at Allahabad in the year 2006 or ever met him thereafter. In this scenario, it is difficult to believe that DW-7 who was a litigant in another case could remember after a period of three years as to whom he met in the chamber of an Advocate at Allahabad.

222. DW-12 is an Advocate practicing in the Allahabad High Court. Admittedly he did not file Vakalatnama or appeared on behalf of appellant Shyam Narain Pandey in any matter in Allahabad High Court. It is admitted by DW-12 that some other Advocate was engaged by Shyam Narain Pandey. The statement of DW-12 that the appellant Shyam Narain Pandey used to stay in his house from 26.02.2006 till 01.03.2006 cannot be corroborated from any other circumstance

or material brought on record. In cross of DW-12, it has come that his native village was Ballia and appellant Shyam Narain Pandey was also a resident of District Ballia, DW-12 being acquaintance of appellant Shyam Narain Pandey as admitted in his testimony cannot be believed to support the plea of alibi of Shyam Narain Pandey in absence of any other supporting evidence or surrounding circumstance to prove that there was no possibility of presence of appellant Shyam Narain Pandey at the place of the incident on the date and time stated by the prosecution witnesses.

223. As noted above, no documentary proof of presence of appellant Shyam Narain Pandey on the date and time of the incident in Allahabad had been produced and the statement of defence witnesses (DW-7 and DW-12) are bereft of any supporting evidence. It may be noted that neither the Oath Commissioner who verified the affidavit allegedly sworn by appellant Shyam Narain Pandey or the Advocate who was appearing on his behalf in the High Court had been produced in evidence.

224. For the aforesaid, the plea of alibi of appellant Shyam Narain Pandey is liable to be rejected. No infirmity in this regard can be found in the findings of the trial court.

**G.(ii). Plea of alibi of Laxmi Narain Pandey and Pawan Kumar Pandey:-**

225. The appellants Laxmi Narain Pandey and Pawan Kumar Pandey pressed the plea of alibi, i.e. the proof of their absence on the spot of the incident at the date and time indicated by the prosecution or in another words to prove their presence at another place by leading a positive evidence which

is required to be scrutinized by this Court.

226. The contention is that both the abovenamed appellants were lodged in the District Jail, Lucknow on 25.02.2006 and were released only on 02.03.2006 and on 24.02.2006 they were lodged in RPF lock-up at the RPF post Charbagh (NR) Lucknow. This plea is supported by a number of documentary evidences brought by the defence witnesses who are police officers of RPF and Jailer of the District Jail, Lucknow. Some of the documentary evidences brought on record were summoned by the trial court.

227. DW-11 is the Ticket Collector who stated that while he was posted at the Railway Station, Charbagh, he caught both the appellants at the first class entry gate of Train No.3040 Jammu Tavi Howrah which reached at the Charbagh Railway Station 15.15 hours at platform No.1. From the testimony of this witness, it is evident that he did not identify both the appellants personally rather his version is supported by two documents namely Exhibit Kha-20 and Kha-21. Both these documents are certified copies of the alleged charge sheets prepared on 24.02.2006 in the handwriting and signature of one Atul Kumar who was posted as In-charge CTC in the office of VICTC. These documents are stated to be photostat copies of the original charge sheet and had been attested and filed by DW-11.

228. It is not known as to in what capacity these documents were brought by DW-11 for being filed in the Court in support of the plea of the defence that two appellants namely Laxmi Narain Pandey and Pawan Kumar Pandey were arrested by DW-11 at the Charbagh Railway Station and charge sheeted as

they were traveling without ticket and that they did not deposit the charge of general bogey with penalty i.e. Rs.380/- per person which was demanded by DW-11 for the offence of traveling without ticket. The Exhibit Kha-20 & Kha-21 for the above reasons cannot be relied to hold that the appellants were arrested by DW-11 on 24.02.2006 at the gate No.1 of the platform No.1 of the Charbagh railway Station, Lucknow.

229. Further documents relied by the appellants in support of the above plea are G.D. entries dated 24.02.2006 and 25.02.2006 which had been filed as Exhibit Kha-3 and Kha-4 and proved in the Court by DW-3, the Head Constable posted in RPF. It was stated by DW-3 that those documents were brought by him pursuant to the order of the Court. DW-8 is a police personnel of RPF who stated that these two appellants were arrested and handed over to him and he lodged them in the District Jail, Lucknow on the basis of the charge sheet prepared against them under Section 137 and 138 Railways Act.

230. DW-9 is a Constable posted in RPF who proved the entry in the G.D. Exhibit Kha-3 and Kha-4 being in his handwriting and signature and stated that when the accused persons were lodged in the RPF lockup, he was on duty to write the G.D. and on frisking of the two appellants, one mobile charger was found from the possession of the appellant Pawan Kumar Pandey.

231. DW-3 also brought the original Khuraki register from 03.11.2005 to 17.11.2006 and filed it in the Court which was proved as Exhibit Kha-7. A copy of Jamatalashi register (the proof of frisking of the accused) before lodging them in the lockup had also been brought on record as Exhibit Kha-7. It

may be noted that it has come on record that none of the documents produced in defence by the officers posted in the RPF post (brought under the order of the Court) were brought in sealed cover. G.D. entries dated 24.02.2006 at G.D. No.60 Exhibit Kha-3 records that both the accused who were caught at the first class entry gate by Ticket Collector Sarvendra (DW-1), on interrogation could not produce any proof of traveling and stated that they were traveling from Train No.3074 down, from Moradabad and as they did not have money and when asked to deposit the passengers tariff, they denied. From this story narrated in the G.D. Exhibit Kha-3, pertinent is to note that this entry cannot be accepted as true as there was no proof of traveling of the appellants by Train No.3074 down from Moradabad. The appellants were admittedly residents of District Azamgarh. They both were well-off persons belonging to a reputed family as on the date of the incident, appellant Laxmi Narain Pandey was the Manager of two institutions, one Intermediate and another Degree College. There is no explanation as to why these appellants would travel from Moradabad that too without ticket and how were they bereft of money.

232. The record brought by the defence show that the appellants were without luggage as nothing but a mobile charger could be found in their frisking as is recorded in Exhibit Kha-6, the alleged register of frisking of appellant Pawan Kumar Pandey. From a bare perusal of the document filed as Exhibit Kha-6 it is clear that the entry of the name of Pawan Kumar Pandey son of Laxmi Narain Pandey is not in chronological order. This documents filed to prove the arrest and lodging of the appellants in the RPF lockup at Charbagh, Railway Station,

Lucknow, therefore, cannot be believed.

233. DW-10 is the Constable posted in RPF, Charbagh who stated that he took two appellants alongwith 13 persons to the Court of Additional Chief Judicial Magistrate (NR), Charbagh, Lucknow for their appearance in the Court and DW-10 stated that out of 17, 4 accused persons were released as they deposited the fine and two appellants herein including others (total 13 in number) were lodged in the District Jail, Lucknow. His signature on the entry of the Jail gate book had been identified by DW-10 as Exhibit Kha-19.

234. In cross, it is admitted by DW-10 that he could not identify the accused persons from their appearance and he could only depose on the basis of the relevant registers brought in defence. We may note at this juncture that the entire record of the Court of Additional Chief Judicial Magistrate (NR) Charbagh had been weeded out as is evident from the record and no proof of appearance of the appellants in the Court of Additional Chief Judicial Magistrate (NR) Charbagh on 25.02.2006 could be brought or found. The evidence of DW-10, therefore, cannot be believed.

235. Now the remaining documentary evidence and the defence witnesses had been produced to prove the lodging of the appellants in the District Jail, Lucknow.

236. Before appreciating the documents relied by the learned Senior Counsel in that regard, we may note that Exhibit Kha-5 is the certificate of the Medical Officer, District Jail, Lucknow which is countersigned by the Superintendent, District Jail, Lucknow and the said document is dated 31.08.2006. This document was produced by the Deputy Jailer,

District Jail, Lucknow who entered in the witness box as DW-4. The certificate dated 31.08.2006 records that in a fire accident on 15.03.2006 the entire record of the Jail Hospital such as admission register and all other documents were destroyed. This certificate was given on 31.08.2006 (as noted above) in relation to some queries made with regard to another prisoner who was admitted in the District Jail, in the month of January, 2006.

237. We may further record that DW-2 is Bandi Rakshak, District Jail, Lucknow who brought the register No.1 (kaidi register) and register No.7 (Doctari Mulaiza register) in the Court. It may further be noted that these documents were not brought in a sealed cover as was admitted by DW-5, the Jailer, District Jail, Lucknow.

238. DW-6 is the Jailer who was posted in the District Jail, Lucknow at the relevant point of time. He was produced to prove the entries in the gate book/ gate register and register No.1 Kaidi register as also the register No.7 (release register). It is admitted by DW-6 that none of the entries were made in his presence as they do not pertain to the period of his posting in the District Jail, Lucknow.

239. DW-13 is the Deputy Jailer posted in the District Jail, Luckow on the date of the incident and he was shown various registers allegedly maintained in the jail and admitted that there were overlappings in the alleged thumb impressions of the accused persons in the relevant register No.1, both against the names of Laxmi Narain Pandey and Pawan Kumar Pandey. On confrontation about the overlapping of thumb impression found in the relevant column of register No.1, DW-13 stated that

when he directed for release of the accused appellants from jail, the entries in the register were not like this.

240. Hospital Mulaiza register which had been produced by DW-14, Bandi Rakshak, District Jail, Lucknow was placed before us to state that all identification marks mentioned in the said register tallied with the identification marks found on the body of the accused persons, on comparison in the trial court. DW-15 is the doctor who stated that he had tallied the identification marks of the accused persons noted in the Hospital Mulaiza register. It is not clear as to how this document which is known as Hospital Mulaiza register, wherein the health record of the prisoner and their identification marks were noted could be believed when it was not produced in the sealed cover. It may be noted that different officers of the District Jail, Lucknow posted at different point of time were produced in the Court by the defence to prove the entries in the documents/registers brought by DW-2 pursuant to the order of the trial Court.

241. It was admitted by DW-4 that only the Jailer, District Jail, Lucknow was authorized to produce the document in the Court and the Jailer, District Jail, Lucknow when entered in the witness box as DW-5 stated on oath that none of the documents sent by him through DW-2, as summoned by the Court, were in sealed cover. The excuse was that there was no such order of the Court.

242. For the above, none of the documents produced in defence to prove the plea of lodging of the appellants Laxmi Narain Pandey and Pawan Kumar Pandey in the District Jail, Lucknow are believable. Moreover, once we have discarded the

evidence of proof of arrest, the documents of arrest of the appellants at the railway Station, Charbagh, Lucknow and the factum of their lodging in the lockup of the RPF post (NR) Charbagh, Lucknow on 24.02.2006, all other documents of proof of their lodging in the District Jail, Lucknow are liable to discarded.

243. We may further record that none of the defence witnesses had identified the accused appellants personally and the entire plea of alibi is based on the documentary evidences, genuineness of which is highly doubtful and could not be proved by the defence witnesses. None of the documents are to be believed as genuine documents so as to accept them as a strict proof of plea of alibi of the appellants. As regards Exhibit Kha-12 and Kha-13, the extract of register No.9 and fine register; respectively, which were sent by the Court clerk of the office of the Additional Chief Judicial Magistrate, (NR) Charbagh, Lucknow by the letter dated 16.03.2009 (Exhibit Kha-11), which were found in the envelope Exhibit Kha-9, reference of which finds place in the statement of DW-13, suffice it to note that as per the report of the Court clerk, the record of cases lodged under Section 137 Railways Act bearing No.1435 of 2006 to 1448 of 2006 had been weeded out under the order of the Presiding Officer dated 05.06.2006. As a result of which, the entries in Exhibit Kha-12 and Kha-13 placed before us could not be verified from the own showing of the defence that the record of the office of the Additional Chief Judicial Magistrate, (NR) Charbagh, Lucknow was not available when they were summoned by the trial court.

244. For the aforesaid, we are afraid to accept the plea of alibi raised by the appellants Laxmi Narain Pandey and Pawan

Kumar Pandey on the basis of documentary evidences filed by the defence witnesses (DW-2 to DW-15). As regards the evidence of DW-16, same is liable to be rejected as the genuineness of the documents brought in the Court in defence about the arrest and detention of the appellants Laxmi Narain Pandey and Pawan Kumar Pandey firstly in RPF lockup and then in the District Jail, Lucknow is found unbelievable.

245. There is one more aspect of the matter. As per the plea taken by the two appellants named above, they deposited the fine on 01.03.2006 in the Court of the Railway Magistrate and were released from the District Jail, Lucknow on 02.03.2006. The incident occurred on 28.02.2006 and named FIR was lodged on the said date itself. All other co-accused except Shyam Narain Pandey are immediate family members of accused Laxmi Narain Pandey and Pawan Kumar Pandey being sons of Laxmi Narain Pandey. It is noticeable that the plea of alibi had not been taken at any point of time prior to the statement of the said accused appellants recorded under Section 313 Cr.P.C. before the trial Court. Neither the plea of alibi was taken during the course of investigation nor at the stage of committal. No application for discharge of these appellants had been filed on the plea of alibi. No application had been moved before the competent court to plead that the implication of the appellants in the criminal case was false as they could not remain present on the spot of the crime having been lodged in the District Jail, Lucknow. Had it been done, appropriate enquiry at the inception of this criminal case could have been conducted and appropriate order could have been passed to summon or seal the record of the Court of Railway Magistrate wherein the proceedings under Section 137 Railways Act were

allegedly conducted.

246. These facts raise a serious doubt about the genuineness of the plea of alibi.

247. Further, looking to the circumstance and the financial capacity of the appellants, it is difficult to believe that they would not deposit the fine of Rs.880/- per person for traveling without ticket and choose to go to the jail for 15 days. Further it has come in the evidence of the defence witness DW-3 that the information was given to the family members of the arrested accused appellants when they were lodged in jail. It is, thus, difficult to accept that none of the family members of the appellants came forward to deposit the fine or they did not take care to know the whereabouts of the appellants who allegedly remained in jail for 15 days.

248. The exhaustive findings recorded by the trial court on each and every issue relating to the plea of alibi are found justified in the facts and circumstances of the present case in view of the discussion made above.

249. For the above discussion, the plea of alibi taken by the appellants Laxmi Narain Pandey and Pawan Kumar Pandey in their statements under Section 313 Cr.P.C. and the proof brought in the shape of defence witnesses and the documentary evidences filed by them is a concocted story, put forth by the said appellants by carefully constructing the record with the help of the staff of the Railway Police Force and the District Jail, Lucknow.

250. The presence of appellants Laxmi Narain Pandey and Pawan Kumar Pandey at the place of the occurrence on the date

and time stated by the prosecution witnesses is found proved in view of the consistent, reliable and trustworthy testimony of eye witnesses namely PW-1 and PW-2. Rejecting the plea of alibi of appellants Laxmi Narain Pandey, Pawan Kumar Pandey and Shyam Narain Pandey, we find that the prosecution had proved the involvement of all the appellants in the occurrence beyond all reasonable doubt.

251. No other point has been pressed.

252. The judgement and order dated 07.08.2012 passed by the Additional Sessions Judge, Court No.2 Azamgarh in Session Trial No.435 of 2006 arising out of Case Crime No.65 of 2006 under Section 147, 148 149, 302, 120-B, 504, 506 IPC and Section 7 Criminal Law Amendment Act, Police Station Atraulia, District Azamgarh is hereby affirmed.

253. The accused appellants Pawan Kumar Pandey @ Bablu, Amit Kumar Pandey and Rajesh Kumar Pandey are in jail.

254. The appellant Ramesh Kumar Pandey had died in April, 2021 and the appeal on his behalf has been abated vide order dated 02.02.2022.

255. The accused persons Shyam Narain Pandey, Laxmi Narain Pandey, Umesh Kumar Pandey are on bail. Their bail bonds are cancelled and sureties are discharged. They shall surrender forthwith before the concerned court and be taken into custody and sent to jail to serve their sentence.

256. The appeals are, accordingly, **dismissed**.

257. Certify this judgement to the court below

immediately for compliance.

258. The compliance report be submitted through the Registrar General, High Court, Allahabad.

(Vikas Kunvar Srivastav, J.) (Sunita Agarwal, J.)

**Order date:-** 30.05.2022

Himanshu