

AFR

Reserved on: 15.10.2019

Delivered on: 24.10.2019

CRIMINAL APPEAL No. 238 of 1988

1. Ram Naresh

2. Kunwar

-----Appellants

Vs

State of Uttar Pradesh

-----Respondent

WITH

CRIMINAL APPEAL No. 260 of 1988

1. Rajendra

2. Basant Lal } (dead)

3. Dangar } (dead)

4. Nirju

-----Appellants

Vs

State of Uttar Pradesh

-----Respondent

For Appellants : Sri Sangam Lal Kesharwani, Sri B.D. Nishad, Sri Rajesh Kishore Srivastava, Advocates.

For Respondent/State : Sri J.K. Upadhyay, AGA

Hon'ble Pritiñker Diwaker, J.

Hon'ble Raj Beer Singh, J.

Per: Raj Beer Singh, J.

1. These criminal appeals have been preferred against the common judgment and order dated 28.01.1988 passed by the Sessions Judge, Mirzapur in Sessions Trial No. 240 of 1986 (State vs. Kunwar & five Ors), under Sections 148 and 302/149 of Indian Penal Code and Sections 3/4/5 Explosive Substances Act, P.S. Kotwali Dehat, District Mirzapur, whereby accused-appellants namely, Kunwar, Ram Naresh, Nirju, Dangar,

Basant Lal and Rajendra have been convicted under Sections 148 and 302/149 of IPC and sentenced to imprisonment for life under Section 302/149 of IPC and two years rigorous imprisonment under Section 148 of IPC. Accused appellant Kunwar was further convicted under Section 3 of Explosive Substance Act and sentenced to three years rigorous implication along with fine of Rs. 500. All the sentences were directed to run concurrently.

2. Accused-appellants Basant Lal and Dangar have expired during pendency of appeal, thus, appeal in their respect stands abated.

3. According to prosecution case, on account of some previous litigation, accused Basant Lal and Nirju etc. were having enmity with family of complainant Mishrilal (PW-1). It is alleged that on 14.05.1986 deceased Munnar, who was brother of complainant, had gone to river to collect sand, while complainant (PW-1), his brother Lal Chand, one Shiv Dhari and Mason Shitla Prasad (PW-3) were present in southern side of complainant's house and were waiting for Munnar, as some construction was going on in the house of complainant. At around 8:30 a.m. when deceased Munnar was carrying sand on his bicycle, they heard noise and commotion and saw that accused-appellants Kunwar, Ram Naresh, Nirju, Dangar, Basant Lal and Rajendra were making exhortation to kill deceased. Deceased Munnar left his bicycle and ran towards western side but accused Kunwar thrown a bomb, which burst near him. Thereafter, all the six accused persons encircled Munnar near land of Basant Lal and started assaulting him with barcha (spears). Complainant and his above stated companion ran to save deceased but accused persons threatened to kill them too. Thereafter, all the accused persons ran away towards northern side. Complainant and his companion went near Munnar and found that he has died due to injuries.

4. Complainant Mishri Lal reported the matter to police by submitting written complaint Ex. Ka-1 and on that basis case was registered under Sections 147, 148, 149, 302 of IPC and Sections 3/4/5 of Explosive

Substances Act against all the six accused persons on 14.05.1986 at 10:30 hours vide first information report Ex. Ka-8.

5. Inquest proceedings regarding death of the deceased were conducted by Vinay Chandra Shukla (PW-5) and the dead body of deceased was sealed and sent for postmortem.

6. The postmortem on the dead body of deceased Munnar was conducted by PW-6 Dr. P.K. Verma vide postmortem report Ex. Ka-17 and following injuries were found on the person of the deceased:

- “(i) Incised wound 2 cm x 1 cm x scalp deep just above right ear.*
- (ii) Abrasion in an area of 2 cm x 2 cm just above left eye.*
- (iii) Stabbed wound 3 cm x 1 cm muscle deep on the right side of neck.*
- (iv) Stabbed wound 2 cm x 1 cm x bone deep on the left side of neck 3 cm below left ear.*
- (v) Punctured wound 3 cm x 2.5 cm x shoulder joint cavity deep on the top of right shoulder.*
- (vi) Incised wound 3 cm x 2 cm x muscle deep on the outer aspect of right upper arm 5 cm above elbow.*
- (vii) Incised wound 3 cm x 2 cm x muscle deep on the back of right shoulder joint.*
- (viii) Incised wound 2.5 cm x 1.5 cm x muscle deep on the inner aspect of right arm 10 cm above elbow.*
- (ix) Abrasion on the outer aspect of right elbow.*
- (x) Contusion in an area of 2 cm x 1 cm on the outer aspect of left arm.*
- (xi) Lacerated wound 3 cm x 2 cm x muscle deep on the dorsum of left hand.*
- (xii) Punctured wound 2 cm x 1 cm on the cavity deep just above sternum.*
- (xiii) Punctured wound 2 cm x 1 cm x cavity deep on the chest.*
- (xiv) Punctured wound 4 cm x 3 cm x chest cavity deep 7 cm below and to the right left nipple.*
- (xv) Punctured wound 3 cm x 2 cm x cavity deep on the right side of chest 8 cm below armpit (axilla).*

(xvi) *Punctured wound 2.5 cm x 1 cm x cavity deep 4 cm below to injury no.15.*

(xvii) *Punctured wound 1 cm x 1 cm x abdominal cavity deep just below cartilage on the right side.*

(xviii) *Punctured wound 1.5 cm x 1 cm x abdominal cavity deep 3 cm below and to the right of injury no.17.*

(xix) *Incised wound 2 cm x 1 cm x muscle deep 3 cm below to injury no.18.*

(xx) *Lacerated wound 1 cm x 1 cm x muscle deep on left side.*

(xxi) *Incised wound 1.5 cm x 1 cm x muscle deep in post of left thigh 10 cm below injury no.20.*

(xxii) *Punctured wound 3 cm x 2 cm x cavity deep on the back of the chest just below right scapula bone.*

(xxiii) *Punctured wound 3 cm x 2.5 cm x cavity deep 10 cm below injury no.22.*

(xxiv) *Punctured wound 3.5 cm x 2 cm x cavity deep just adjacent to injury no.23.*

(xxv) *Punctured wound 3 cm x 2 cm x cavity deep, 1 cm away from injury no.24.*

(xxvi) *Punctured wound on the right side of chest 3 cm x 2 cm cavity deep 5 cm below and to the right of injury no.25.*

As per Autopsy Surgeon, the cause of death of the deceased was shock and hemorrhage as a result of ante-mortem injuries.

7. Investigation was taken up by Vinay Chandra Shukla (PW-5) and further investigation was conducted by (PW-4) Ziv Bodhan Rai. After completion of investigation, all the six accused persons were charge-sheeted.

8. Learned trial Court has framed charges under Sections 148, 302/149 of IPC against accused-appellants Ram Naresh, Nirju, Dangar, Basant Lal and Rajendra. Accused Kunwar was charged under Section 3/4/5 Explosive Substances Act and under Sections 148, 302/149 of IPC. They pleaded not guilty and claimed trial.

9. In order to bring home the guilt of accused-appellants, prosecution has examined seven witnesses. After prosecution evidence, accused persons were examined under Section 313 of Cr.P.C., wherein, they have

denied the prosecution evidence and claimed false implication. In defence accused persons have examined six defence witnesses.

10. After hearing and analyzing the evidence on record, learned trial court convicted accused-appellants Ram Naresh, Nirju, Rajendra and Kunwar under Sections 148, 302/149 of IPC and accused Kunwar was further convicted under Section 3 of Explosive Substances Act vide impugned judgment and order dated 28.01.1988 and sentenced as stated in paragraph no.1 of the judgment.

11. Being aggrieved by their conviction and sentence, accused appellants Ram Naresh, Kunwar have preferred Criminal Appeal No. 238 of 1988 and accused-appellants Nirju, Dangar, Basant Lal and Rajendra have preferred Criminal Appeal No. 260 of 1988. Dangar and Basant Lal have expired during pendency of appeal.

12. Heard Sri Sangam Lal Kesharwani, Sri B.D. Nishad, Sri Rajesh Kishore Srivastava, learned counsel for the appellants and Sri J.K. Upadhyay, learned A.G.A. for the State and perused the record.

13. Learned counsel for the appellants submitted:

- (i) that PW-1 Mishri Lal and PW-2 Kanhaiya Lal are interested witnesses and their presence at the spot is highly doubtful. Presence of PW-3 Shitla Prasad is also doubtful. It was submitted that as per prosecution version, PW-3 Shitla Prasad was working as mason at the house of complainant and the incident took place at 8:30 a.m. while generally mason do not turn up for work before 9:30 to 10:00 am.
- (ii) that first information report is ante-timed. It was pointed out that in inquest report, no section of Explosive Act was mentioned, which indicate that by that time first information report was not in existence.
- (iii) that ocular testimony is not consistent with medical evidence. It was submitted that deceased has sustained

incised wounds, stabbed wounds, punctured wounds, lacerated wounds and abrasions and all these injuries were not possible by only one type of weapon.

- (iv) that there are material contradictions and discrepancies in prosecution case. The conduct of PW-1, PW-2 and PW-3 is not natural as they did not try to saw the deceased. Further, as per prosecution, deceased has fallen in 'Kyari' of Basant Lal but there is no evidence that he sustained any mud. It has come in evidence that two constables were on patrolling duty and they have reached at spot but they were not examined.
- (v) that defence evidence led by accused persons shows that accused-appellant Ram Naresh was working as Clerk of one Gyanendra Prasad Chaubey, Advocate at Mirzapur and at the time of alleged incident, he was present at the seat of Advocate at Mirzapur. Similarly, accused Kunwar was also working as Clerk of one Prem Nath Gupta at Mirzapur while accused Rajendra was working as Typist in the Collectorate, Mirzapur and, at the time of incident, these three accused persons were present in Court campus at Mirzapur.

14. Per contra, it has been submitted by the learned State Counsel that all the three eye-witnesses have made clear and consistent statements regarding involvement of all the accused appellants. FIR has been lodged by PW-1 Mishri Lal, without any undue delay, naming all the accused-appellants. All these witnesses have subjected to cross-examination, but they remained stick to prosecution version and no such fact could emerge so as to doubt their presence at the spot or to affect their testimony. The trial court has appreciated whole evidence in accordance with law and the accused appellants have rightly been convicted.

15. We have considered the rival submissions and perused the record.

16. PW-1 Mishri Lal is complainant of the case. He has stated that all the accused persons were known to him. One year prior to the incident, brother of Ram Naresh, namely, Shyam Naresh was murdered, in which complainant's brother Munnar (deceased), Chote Lal, Tikori Lal, Markandey and Mool Chand were accused but in that case they were acquitted. Due to this, the accused-appellants and deceased-accused were nurturing enmity against family of complainant (PW-1) Mishri Lal and even the proceedings under Sections 107 and 116 Cr.P.C. were also initiated between the parties. On the day of incident, at about 8:30 a.m. his brother Munnar (deceased) has gone to river by bicycle to bring sand as some construction was going on at their house. While Munnar was bringing two bags of sand on bicycle and reached near grove and PW-1 Mishri Lal and others were sitting near their house, they saw that accused Ram Naresh, Nirju, Rajendra and deceased accused Basant Lal and Dangar made exhortation to kill Munnar. Accused-appellant Kunwar was having bomb in a bag while remaining five accused persons were having spears. Munnar left his bicycle there and ran towards western side but accused-appellant Kunwar has thrown a bomb, which has fallen near Munnar. Thereafter, all the accused persons encircled Munnar near field of Basant Lal and assaulted him with spears. Munnar fell down but even then accused persons continued to assault him. PW-1 and others ran to save Munnar but accused Kunwar took out a bomb and threatened that if they tried to save the deceased, he would kill them too. After that accused persons ran away towards northern side. When PW-1 Mishri Lal and his companion reached there, deceased has died due to injuries. Thereafter, PW-1 has reported the matter to the police by submitting written complaint Ex. Ka-1.

17. PW-2 Kanhaiya Lal, stated that there was enmity between Munnar and accused persons. Earlier, brother of accused Ram Naresh was murdered, in which Munnar, Mishri and others were accused. On the day

of incident at 8:30 a.m., he (PW-2) was going to western side from village to attend call of nature and while he was returning back, he heard commotion and voice of bomb. He (PW-2) ran towards the field of Basant Lal and saw that Munnar was lying in land of Basant Lal and accused-appellants Nirju, Ram Naresh, Rajendra and deceased accused Basant Lal and Dangar were assaulting him with spears (barchi). Shiv Dhari, Lal Chand, Mishri Lal and Shitla came to save Munnar but accused Kunwar took out a bomb from his bag and threatened that if they proceeded further, he would kill them. After murdering Munnar, accused persons ran towards northern side.

18. PW-3 Shitla Prasad stated that on the day of incident he was working as mason at the house of complainant since last 2-3 days. On the day of incident at 8:30 a.m. he was sitting with Lal Chand, Shiv Dhari and Mishri Lal in southern side of the house of the deceased and deceased Munnar has gone to bring sand. Suddenly, they heard noise and saw that accused-appellants Ram Naresh, Nirju and Rajendra along with deceased accused Dangar and Basant Lal having spears, while Kunwar having a bag ran to kill Munnar. Munnar left his bicycle and started running, but accused persons chased him and accused-appellant Kunwar has thrown a bomb towards Munnar which burst near him. They encircled Munnar in the land of Basant Lal and started assaulting him. PW-2 Kanhaiya Lal and his companion including PW-1 Mishri Lal, ran to save him but accused Kunwar took out a bomb from his bag and threatened that if they proceeded further, he would kill them. Munnar fell down but accused persons continued to assault him and after murdering him, they have made blood inoculated on their forehead.

19. PW-5 S.I. Vinay Chandra Shukla, conducted investigation of the case. He has also prepared site plan Ex. Ka.15. PW-4 Inspector Ziv Bodhan Rai has conducted further investigation and has filed charge-sheet.

20. PW-6 Dr. P.K. Verma has conducted postmortem on the dead body

of the deceased.

21. PW-7 Constable Subhash Kumar Tiwari took the dead body of the deceased for postmortem.

22. In defence, DW-1 Gyanendra Prasad Chaubey, Advocate has stated that accused Ram Naresh was working as his clerk since last 7-8 years and on 14.05.1986, he remained present in Court since 6:00 a.m. to 6:00 p.m. and did his routine work.

23. DW-2 Prem Nath Gupta, Advocate, has stated that accused Kunwar was working as his clerk since last five years and on 14.05.1986 he remained present in Court from 6:00 a.m. to 6:00 p.m.

24. DW-3 Baghwan Das Sonekar, Advocate has stated that accused Kunwar was working as clerk with Prem Nath Gupta, Advocate and on 14.5.1986 accused Kunwar has come to Court at 7:00 a.m. and did his work. Similarly, accused Ram Naresh was also working as clerk and remained present in Court compond.

25. DW-4 Kali Shankar Jaisawal stated that he is working as a typist in Collectorate, Mirzapur since 18-19 years. Accused Rajendra is also working as a typist and he used to sit near him. On 14.05.1986 accused Rajendra has come to Court at 6/7 a.m. and worked there till 10/10:30 a.m.

26. DW-5 Harishchandra Tripathi, Advocate Collectorate Mirzapur, has stated that he is working as Assistant of Sri Keshav Dutta Tripathi, Advocate. Accused Rajendra is a typist and he used to sit in adjoining seat of DW-5. On 14.05.1986 accused Rajendra reached at Collectorate at 6/6:30 a.m. and remained present there till 10/10:30 a.m.

27. DW-6 Chhangur Singh, Advocate, Collectorate Mirzapur, stated that accused Ram Naresh is working as clerk of Gyanendra Chaubey, Advocate, whereas accused Kunwar was working as clerk of Prem Nath Gupta, Advocate. On 14.05.1986 at 6:00 a.m. he has found accused Ram Naresh and Kunwar present at their respective seats and they did work

there till 10:00 a.m.

28. So far the contention, that PW-1 Mishri Lal and PW-2 Kanhaiya Lal are interested witnesses, is concerned, it is correct that PW-1 is brother of deceased Munnar but mere relationship cannot be a factor to doubt the testimony of a witness, which otherwise inspires confidence. It is well settled that a natural witness may not be labelled as interested witness. Interested witnesses are those who want to derive some benefit out of the litigation/case. In case the circumstances reveal that a witness was present on the scene of the occurrence and had witnessed the crime, his deposition cannot be discarded merely on the ground of being closely related to the victim. Generally close relations of the victim are unlikely to falsely implicate anyone. Relationship is not sufficient to discredit a witness unless there is motive to give false evidence to spear the real culprit and falsely implicate an innocent person is alleged and proved. A witness is interested only if he derives benefit from the result of the case or as hostility to the accused. In case of **State of Punjab Vs Hardam Singh, 2005, S.C.C. (Cr.) 834**, it has been held by the Hon'ble Apex Court that ordinarily the near relations of the deceased would not depose falsely against innocent persons so as to allow the real culprit to escape unpunished, rather the witness would always try to secure conviction of real culprit. In case of **Dilip Singh Vs State of Punjab, A.I.R. 1953, S.C. 364**, it was held by the Hon'ble Supreme Court that the ground that the witnesses being the close relatives and consequently being the partition witness would not be relied upon has no substance. The contention about branding the witnesses as interested witness and credibility of close relationship of witnesses has been examined by Hon'ble Apex court in a number of cases. A close relative, who is a very natural witness in the circumstances of a case, cannot be regarded as an 'interested witness', as held by the Hon'ble Supreme Court in **Dalbir Kaur V. State of Punjab, AIR 1977 SC 472**. The mere fact that the witnesses were relations or interested would not by itself be sufficient to discard their evidence

straightway unless it is proved that their evidence suffers from serious infirmities which raises considerable doubt in the mind of the court. Similar view was taken in case of **State of Gujrat v. Naginbhai Dhulabhai Patel, AIR 1983 SC 839.**

Similarly, in **Piara Singh and Ors. Vs. State of Punjab, AIR 1977 SC 2274 (1977) 4 SCC 452**, the Apex Court held:

"It is well settled that the evidence of interested or inimical witnesses is to be scrutinised with care but cannot be rejected merely on the ground of being a partisan evidence. If on a perusal of the evidence the Court is satisfied that the evidence is creditworthy there is no bar in the Court relying on the said evidence."

In **Hari Obula Reddy and Ors. Vs. The State of Andhra Pradesh, (1981) 3 SCC 675**, a three-judge Bench of the Court observed: "

"it is well settled that interested evidence is not necessarily unreliable evidence. Even partisanship by itself is not a valid ground for discrediting or rejecting sworn testimony. Nor can it be laid down as an invariable rule that interested evidence can never form the basis of conviction unless corroborated to a material extent in material particulars by independent evidence. All that is necessary is that the evidence of interested witnesses should be subjected to careful scrutiny and accepted with caution. If on such scrutiny, the interested testimony is found to be intrinsically reliable or inherently probable, it may, by itself, be sufficient, in the circumstances of the particular case, to base a conviction thereon."

Again, in **Ramashish Rai Vs. Jagdish Singh, (2005) 10 SCC 498**, the following observations were made by the Court:

"The requirement of law is that the testimony of inimical witnesses has to be considered with caution. If otherwise the witnesses are true and reliable their testimony cannot be thrown out on the threshold by branding them as inimical witnesses. By now, it is well-settled principle of law that enmity is a double- edged sword. It can be a ground for false implication. It also can be a ground for assault. Therefore, a duty is cast upon the court to examine the testimony of inimical witnesses with due

caution and diligence."

A survey of the judicial pronouncements of the Hon'ble Apex Court on this point leads to the inescapable conclusion that the evidence of a closely related witnesses cannot be doubted on the ground that he is related to deceased or complainant, however, evidence of such witness is required to be carefully scrutinised and appreciated before any conclusion is made to rest upon it, regarding the convict/accused in a given case. Thus, the evidence cannot be disbelieved merely on the ground that the witnesses are related to each other or to the deceased. In case the evidence has a ring of truth to it, is cogent, credible and trustworthy, it can, and certainly should, be relied upon. (See **Anil Rai Vs. State of Bihar, (2001) 7 SCC 318; State of U.P. Vs. Jagdeo Singh, (2003) 1 SCC 456; Bhagalool Lodh & Anr. Vs. State of U.P., (2011) 13 SCC 206; Dahari & Ors. Vs. State of U. P., (2012) 10 SCC 256; Raju @ Balachandran & Ors. Vs. State of Tamil Nadu, (2012) 12 SCC 701; Gangabhavani Vs. Rayapati Venkat Reddy & Ors., (2013) 15 SCC 298; Jodhan Vs. State of M.P., (2015) 11 SCC 52).**

29. In the instant case, it is apparent that alleged incident took place at 08.30 AM near house of PW-1 Mishri Lal and thus, at that time his presence at his house or near his house is quite natural. Further, it is consistent case of prosecution that at that time, some construction work was going on in the house of PW-1 and deceased has gone to collect sand, therefore, presence of PW-1 along with mason PW-3 Shitla Prasad is quite probable. PW 1 has made clear and cogent statement and his version is consistent with first information report, which was lodged without any undue delay. The incident took place in broad day light and all the accused persons were known to him since before the incident. There are no grounds to believe that PW 1 would depose falsely against accused-appellants, sparing the actual assailants of his brother. In view these facts, testimony of PW 1 cannot be doubted on the ground that he is brother of deceased.

So far as PW-2 Kanhaiya Lal is concerned, there is nothing on record to indicate that he is an interested witness or related to the complainant or deceased. Though he admitted that witness Shiv Dhari is his uncle, but this fact would not render him as an interested witness. A suggestion was made to PW-2 Kanhaiya Lal that deceased Munnar was his maternal brother but he has denied the same and stated that only by distant relationship, deceased falls in the category of maternal brother. No such fact could be pointed out in the cross examination of PW-2 Kanhaiya Lal so as to indicate that he is an interested or related witness. He has consistently deposed that at the time of incident, he was coming back after attending call of nature and after hearing commotion he reached near spot and witnessed the incident. This witness has been subjected to cross-examination, but no such fact could emerge so as to doubt his presence at the spot.

Testimony of PW-3 Shitla Prasad has been mainly assailed on the ground that his presence at the spot is doubtful as he is a resident of another village and that generally mason do not turn up before 09.30-10 AM for work. In this connection it may be seen that it is consistent case of prosecution as well as of PW-3 Shitla Prasad that he (PW-3) was working as mason at the house of deceased since last 2-3 days. This fact also finds support from the fact that at the time of incident deceased Munnar has gone to river to bring sand, which was required for construction work. The argument that generally mason do not turn up for work before 9:30 a.m, cannot be accepted. It was the month of May and in summer season, it is quite common in villages that mason or farmers start their work early morning. PW-3 Shitla Prasad has been subjected to lengthy cross-examination, but he remained stick to prosecution version and no such fact could come out in his cross-examination so as to doubt his presence at the spot.

30. Scrutiny of evidence shows that all the three eye-witnesses have made clear and cogent statements. The version of PW-1 Mishri Lal has

been amply corroborated by PW-2 Kanhaiya Lal and PW-3 Shitla Prasad. A perusal of site plan Ex. Ka-15 shows that spot of incident shown as point 'B' is clearly visible from the southern side of house of complainant and deceased, from where these eye witnesses claim to have seen the incident. It is consistent case of all the three eye-witnesses that they were sitting in southern side of the house of deceased and have witnessed the alleged incident which took place in field of Basant Lal. This version finds corroboration from site plan of spot. As stated earlier, first information report was lodged without any undue delay. Merely because of some minor contradiction like, that PW-3 Shitla Prasad has stated that after murdering the deceased, accused persons have made blood inoculated on their forehead, while PW-1 Mishri Lal and PW-2 Kanhaiya Lal have not made any such statements, would not render their testimony doubtful. Such minor inconsistencies are bound to crept in every criminal case. Similarly, the presence of these witnesses cannot be doubted on the ground that they did not try to save the deceased. These witnesses have seen the incident from some distance and when they tried to save him, accused-appellant Kunwar has threatened to kill them by bomb. The five accused persons were armed with spear (barchi) while another accused was having bomb, whereas these witnesses were unarmed and three in number. Considering all these attending facts and circumstances, the presence or credibility of eye-witnesses, PW-1 Mishri Lal, PW-2 Kanhaiya Lal and PW-3 Shitla Prasad cannot be doubted on the ground that they did not try to save the deceased.

31. It was next argued that first information report is ante-timed. It was pointed out that as per prosecution version first information report was registered under Sections 147, 148, 149, 302 of IPC and 3/4/5 of Explosive Substances Act, but in the inquest report, no section of Explosive Act was mentioned, which indicate that by that time first information report was not in existence. Learned counsel has cited case of **Mehraj Singh V State of U.P. 1994 SCC (Cri) 1370 and Sudarshan and**

Anr V State of Maharashtra (2014) 5 Supreme court cases (cri) 94. In case of Sudarshan (supra) quoting the observations of case of **Mehraj Singh (supra)**, it was observed as under:

“12. FIR in a criminal case and particularly in a murder case is a vital and valuable piece of evidence for the purpose of appreciating the evidence led at the trial. The object of insisting upon prompt lodging of the FIR is to obtain the earliest information regarding the circumstance in which the crime was committed, including the names of the actual culprits and the parts played by them, the weapons, if any, used, as also the names of the eyewitnesses, if any. Delay in lodging the FIR often results in embellishment, which is a creature of an afterthought. On account of delay, the FIR not only gets bereft of the advantage of spontaneity, danger also creeps in of the introduction of a coloured version or exaggerated story. With a view to determine whether the FIR was lodged at the time it is alleged to have been recorded, the courts generally look for certain external checks. One of the checks is the receipt of the copy of the FIR, called a special report in a murder case, by the local Magistrate. If this report is received by the Magistrate late it can give rise to an inference that the FIR was not lodged at the time it is alleged to have been recorded, unless, of course the prosecution can offer a satisfactory explanation for the delay in despatching or receipt of the copy of the FIR by the local Magistrate. Prosecution has led no evidence at all in this behalf. The second external check equally important is the sending of the copy of the FIR along with the dead body and its reference in the inquest report. Even though the inquest report, prepared under Section 174 Cr.PC, is aimed at serving a statutory function, to lend credence to the prosecution case, the details of the FIR and the gist of statements recorded during

inquest proceedings get reflected in the report. The absence of those details is indicative of the fact that the prosecution story was still in an embryo state and had not been given any shape and that the FIR came to be recorded later on after due deliberations and consultations and was then ante-timed to give it the colour of a promptly lodged FIR. In our opinion, on account of the infirmities as noticed above, the FIR has lost its value and authenticity and it appears to us that the same has been ante-timed and had not been recorded till the inquest proceedings were over at the spot by PW 8." Neither the trial court nor the High Court has appreciated the aforesaid circumstances which go to the root of the matter and raise sufficient doubt about the involvements of the appellants in the present case".

In the instant case, alleged incident took place 08.30 AM and first information report was lodged at 10.30 AM and distance of police station from spot was shown 7 miles and thus, it could not be said that first information report was lodged with delay. It is correct that first information report was registered under Sections 147, 148, 149, 302 of IPC and 3/4/5 of Explosive Substances Act where as in the inquest report no section of Explosive Act was mentioned, but merely on the basis of this inconsistency it cannot be said that by the time of inquest proceedings, first information report was not in existence, particularly when, crime number of first information report was mentioned in the inquest report. Further, it is also mentioned in inquest report that besides other related documents, copy of first information report was being sent to autopsy surgeon. In view of these facts and circumstances, it is clear that facts of the instant case are on different footing and the observations made in above stated cases are of no help to the appellants.

32. It was next argued that medical evidence is not consistent with oral evidence. It was pointed out that deceased has sustained some incised

wound, some stabbed wound, some punctured wound, some lacerated wound and abrasions and all these injuries were not possible by same type of weapon, while case of prosecution is that all the accused persons were having *barchi*, which is also call ballam (spear). It was submitted that contradiction between oral and medical evidence not only makes testimony of PW-1 Mishri Lal, PW-2 Kanhaiya Lal and PW-3 Shitla Prasad, doubtful but also affects at the core of prosecution case.

It is trite that oral evidence has to get primacy as medical evidence is basically opinionative. It is only when the medical evidence especially rules out the injury as claimed to have been inflicted as per the oral testimony, then only in a given case, the Court has to draw the adverse inference. It is well settled by a series of decisions of the Apex Court that while appreciating variance between medical evidence and ocular evidence, oral evidence of eyewitnesses has to get primacy as medical evidence is basically opinionative. But when the court finds inconsistency in the evidence given by the eyewitnesses which is totally inconsistent to that given by the medical experts, then evidence is appreciated in a different perspective by the courts. The Apex Court has consistently taken the view that except where it is totally irreconcilable with the medical evidence, oral evidence has primacy. In the case of **Abdul Sayeed v. The State of Madhya Pradesh [(2010) 10 SCC 259]**, the Supreme Court held as under:

“ In State of U.P. v. Hari Chand, (2009) 13 SCC 542, this Court reiterated the aforementioned position of law and stated that: “In any event unless the oral evidence is totally irreconcilable with the medical evidence, it has primacy.”

Thus, the position of law in cases where there is a contradiction between medical evidence and ocular evidence can be crystallised to the effect that though the ocular testimony of a witness has greater evidentiary value vis-à-vis medical evidence, when medical evidence makes the ocular testimony improbable, that becomes a relevant factor in the process of the evaluation of evidence. However, where the medical evidence goes so far that it completely

rules out all possibility of the ocular evidence being true, the ocular evidence may be disbelieved.

In the instant case as referred to hereinabove, a very large number of assailants attacked one person, thus the witnesses cannot be able to state as how many injuries and in what manner the same had been caused by the accused. In such a fact- situation, discrepancy in medical evidence and ocular evidence is bound to occur. However, it cannot tilt the balance in favour of the appellants.”

Similar view was taken by the Court in the case of **Baso Prasad & Ors. v. State of Bihar [2006 (13) SCC 65]** wherein it was held as under :

“27. In some cases, medical evidence may corroborate the prosecution witnesses; in some it may not. The court, however, cannot apply any universal rule whether ocular evidence would be relied upon or the medical evidence, as the same will depend upon the facts and circumstances of each case.’

28..No hard and fast rule can be laid down therefore. It is axiomatic, however, that when some discrepancies are found in the ocular evidence vis-a-vis medical evidence, the defence should seek for an explanation from the doctor. He should be confronted with the charge that he has committed a mistake. Instances are not unknown where the doctor has rectified the mistake committed by him while writing the post-mortem report.”

In the case of **Krishnan v. State [(2003) 7 SCC 56]**, the Court held as under:

“Coming to the plea that the medical evidence is at variance with ocular evidence, it has to be noted that it would be erroneous to accord undue primacy to the hypothetical answers of medical witnesses to exclude the eyewitness account which had to be tested independently and not treated as the “variable”, keeping the medical evidence as constant.

It is trite that where the eyewitnesses’ account is found credible and trustworthy, medical opinion pointing to alternative possibilities is not accepted as conclusive.

Witnesses, as Bentham said, are the eyes and years of justice. Hence, the importance and primacy of the quality of trial process. Eyewitnesses’ account would require a careful independent assessment and evaluation for its credibility which should not be adversely prejudged making any other evidence, including medical evidence, as the sole touchstone

for the test of such credibility. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses held to be credit worthy;

consistency with undisputed facts, the “credit” of the witnesses; their performance in the witness box; their power of observation etc. Then, the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation.”

In **Solanki Chimanbhai Ukabhai v. State of Gujarat, AIR 1983 SC 484**, the Hon'ble Supreme Court observed as under:

“Ordinarily, the value of medical evidence is only corroborative. It proves that the injuries could have been caused in the manner alleged and nothing more. The use which the defence can make of the medical evidence is to prove that the injuries could not possibly have been caused in the manner alleged and thereby discredit the eye-witnesses. Unless, however the medical evidence in its turn goes so far that it completely rules out all possibilities whatsoever of injuries taking place in the manner alleged by eyewitnesses, the testimony of the eye-witnesses cannot be thrown out on the ground of alleged inconsistency between it and the medical evidence.”

From the above stated authorities, it is clear that though the ocular testimony of a witness has greater evidentiary value vis-a-vis medical evidence, but when medical evidence makes the ocular testimony improbable, that becomes a relevant factor in the process of the evaluation of evidence. In the instant case, deceased has sustained as many as 26 injuries on his body. It is correct that all the eye-witnesses have stated that deceased was attacked with barchis, which has also been referred as spears and no other weapon was used but much depends on the manner and force with which, barchi or spear has been used. PW 6 Dr P.K. Verma, who conducted postmortem, stated that injury number 1,3,4,5,6,7,8,12,13,14,15,16,17,18,19,21,22,23,24,25 and 26 were

possible by 'barcha, where as injury number 2,9,10,11 and 20 are possible, if victim falls on ground after sustaining injuries and such injuries were also possible if spear is used like a 'lathi. Thus, it is apparent that there is no material contradiction between ocular version and medical evidence. The opinion of doctor cannot be termed without logic. If pointed spear is pierced straight into some part of the body, such victim may suffer punctured wounds. Similarly incised wounds and stabbed wounds are also not improbable by use of barchi. PW-1 Mishri Lal has clarified in his cross-examination that wood stick side of barchi was also used by the accused-appellants while attacking the deceased. If barchhi or spear is used from wood stick side, lacerated wounds and abrasions are also probable. Considering the nature of injuries sustained by deceased Munnar, it is apparent that these injuries were possible by the alleged weapons attributed to the accused-appellants. In view of these facts, it cannot be said that oral evidence is not consistent with medical evidence. At any rate, it cannot be said that the oral evidence is totally irreconcilable with the medical evidence. Further, oral evidence has primacy over the medical evidence. The medical evidence does not make the ocular testimony improbable, nor the alleged inconsistency is of such nature that it completely rules out all possibility of the ocular evidence being true. There is no material discrepancy in the medical and ocular evidence and there is no reason to interfere with the judgment of the Court below on this ground. In any event, it has been consistently held by the Apex Court that the evidentiary value of medical evidence is only corroborative and not conclusive and, hence, in case of a conflict between oral evidence and medical evidence, the former is to be preferred unless the medical evidence completely rules out the oral evidence. [See Solanki Chimanbhai Ukabhai Vs. State of Gujarat, (1983) 2 SCC 174; Mani Ram Vs. State of Rajasthan, 1993 Supp (3) SCC 18; State of U.P. Vs. Krishna Gopal & Anr., State of Haryana Vs. Bhagirath, (1999) 5 SCC 96; Dhirajbhai Gorakhbhai Nayak Vs. State of Gujarat, (2003) 5 SCC 223; Thaman

Kumar Vs. State of U.T. of Chandigarh, (2003) 6 SCC 380; Krishnan Vs. State, (2003) 7 SCC 56; Khambam Raja Reddy & Anr. Vs. Public Prosecutor, High Court of A.P., (2006) 11 SCC 239; State of U.P. Vs. Dinesh, (2009) 11 SCC 566; State of U.P. Vs. Hari Chand, (2009) 13 SCC 542; Abdul Sayeed Vs. State of M.P., (2010) 10 SCC 259 and Bhajan Singh @ Harbhajan Singh & Ors. Vs. State, 2011) 7 SCC 421].

33. Learned counsel for the appellants has further submitted that there are material inconsistencies and discrepancies in prosecution case. It was stated that witnesses have stated that alleged incident took place in 'kyari' of Basant Lal, but there is nothing to indicate that the deceased has sustained any mud, that it has come in evidence that two police constables were patrolling in the area since before the incident and after incident, they have reached at spot but they were not examined and that investigating officer has not verified whether any construction work was being done at the house of the complainant. In this connection, it may be mentioned that there is absolutely no evidence that there was water at the alleged spot or that it was wet place and thus, it cannot be considered as discrepancy or infirmity. Other alleged discrepancies cited by learned counsel are not of such nature so as to affect the pith and substance of testimony of eye witnesses. It is well settled in law that the minor discrepancies are not to be given undue emphasis and the evidence is to be considered from the point of view of trustworthiness. The test is whether the same inspires confidence of the Court. If the evidence is incredible and cannot be accepted by the test of prudence, then it may create a dent in the prosecution version. If an omission or discrepancy goes to the root of the matter and ushers in incongruities, the defence can take advantage of such inconsistencies. It needs no special emphasis to state that every omission cannot take place of a material omission and, therefore, minor contradictions, inconsistencies or insignificant embellishments do not affect the core of the prosecution case and should not be taken to be a ground to reject the prosecution evidence. The

omission should create a serious doubt about the truthfulness or creditworthiness of a witness. It is only the serious contradictions and omissions which materially affect the case of the prosecution, but not every contradiction or omission. (See *Rammi @ Rameshwar Vs. State of M.P.*, (1999) 8 SCC 649; *Leela Ram (dead) through Duli Chand Vs. State of Haryana and Another*, (1999) 9 SCC 525; *Bihari Nath Goswami Vs. Shiv Kumar Singh & Ors.*, (2004) 9 SCC 186; *Vijay @ Chinee Vs. State of Madhya Pradesh*, (2010) 8 SCC 191; *Sampath Kumar Vs. Inspector of Police, Krishnagiri*, (2012) 4 SCC 124; *Shyamal Ghosh Vs. State of West Bengal*, (2012) 7 SCC 646 and *Mritunjoy Biswas Vs. Pranab @ Kuti Biswas and Anr.*, (2013) 12 SCC 796).

34. Much thrust was given to the argument that learned trial Court has ignored defence evidence and that in view of evidence of DW-1 Gyanendra Prasad Chaubey, DW-2 Prem Nath Gupta, DW-3 Bhagwan Das Sonker, DW-4 Kali Shanker Jaiswal, DW-5 Harish Chandra Tripathi and DW-6 Chhangur Singh, it is established that accused-appellant Ram Naresh, Kunwar and Rajendra were working with advocates as clerk and typist and that on the day and time of incident they were present in Collectorate, Mirzapur doing their work.

Plea of alibi has been put forward on behalf of accused-appellant Ram Naresh, Kunwar and Rajendra. It is well settled that the onus of proving a plea of alibi is on the accused (vide 1978 Cr. L. J. 141 [*State of Uttar Pradesh, vs. Sughar. Singh & Ors.*]). Therefore, the appellants must prove the plea of alibi to the satisfaction of the Court by producing cogent and consistent evidence so that the court comes affirmatively to the conclusion that the appellants could not have participated in the commission of horrendous crime at alleged spot. However, the plea of alibi can also be spelt out from the prosecution evidence, if it is available therefrom. True it is that when a plea of alibi is taken, it is open to him to establish such plea by preponderance of probabilities and to make it 'probably reasonable'. But the fact remains that such plea of alibi must be

proved with absolute certainty so as to completely exclude the possibilities of the appellants at the scene of the crime. Reliance can also be placed in this regard upon two rulings of the Apex Court reported in **1984 Cr. L. J.187 [Purna & Anr. vs State of U.P.,] and 1997 Cr. L.J. 2242 [Rajesh Kumar Vs. Dharam Vir.]**.

The Supreme Court in the case of **Vijay Pal v. State (Govt. of NCT of Delhi), reported in (2015) 4 SCC 749** has held as under : ..

"25. At this juncture, we think it apt to deal with the plea of alibi that has been put forth by the appellant. As is demonstrable, the trial court has discarded the plea of alibi. When a plea of alibi is taken by an accused, burden is upon him to establish the same by positive evidence after onus as regards presence on the spot is established by the prosecution. The said principle has been reiterated in **Gurpreet Singh v. State of Haryana, Sk. Sattar v. State of Maharashtra and Jitender Kumar v. State of Haryana.**"

The Supreme Court in the case of **Sk. Sattar v. State of Maharashtra**, reported in (2010) 8 SCC 430 has held as under :

"35. Undoubtedly, the burden of establishing the plea of alibi lay upon the appellant. The appellant herein has miserably failed to bring on record any facts or circumstances which would make the plea of his absence even probable, let alone, being proved beyond reasonable doubt. The plea of alibi had to be proved with absolute certainty so as to completely exclude the possibility of the presence of the appellant in the rented premises at the relevant time. When a plea of alibi is raised by an accused it is for the accused to establish the said plea by positive evidence which has not been led in the present case.

Thus, the burden to prove the plea of alibi is heavy on the accused and the plea of alibi cannot be proved by

preponderance of probabilities. Viewed in the light of sound proposition of law discussed in above referred foregoing paragraphs, it can be said that the burden on the accused is heavy as required under section 103 of the Indian Evidence Act which provides that the burden of proof as to any particular fact is on that person who wishes the court to believe in its existence. Therefore, the strict proof is required for establishing the plea of alibi. The burden to prove the plea of alibi is heavy on the accused and the plea of alibi cannot be proved by preponderance of probabilities. It is well-settled that it is for the accused to prove the case of alibi to the hilt.”

In the instant case, no doubt DW-1 Gyanendra Prasad Chaubey and DW-6 Chhangur Singh, Advocates have spoken about the presence of Ram Naresh at the Collectorate, DW-2 Prem Nath Gupta, Advocate and DW-3 Bhagwan Das Sonker Advocates have stated about the presence of accused-appellant Kunwar at Collectorate, whereas DW-4 Kali Shanker Jaiswal and DW-5 Harish Chandra Tripathi, Advocates have spoken about the presence of accused-appellant Rajendra at Collectorate, but there is nothing on record to indicate that why these witnesses did not take any such plea during investigation before concerned police authorities. There is nothing to show that these witnesses have raised any such plea that these accused-appellants were not present at the spot before the concerned police authorities. It may also be observed that though, a suggestion was made to PW-1 Mishri Lal that accused Ram Naresh, Kunwar and Rajendra used to work at the time of alleged incident, but he has denied the same. Further, no such suggestion regarding alleged plea of alibi was made to PW-2 Kanhaiya Lal. Suggestion made to PW-3 Shitla Prasad, is also quite vague and merely it was suggested to these witnesses that accused Kunwar, Ram Naresh and Rajendra were not present at the spot and that they were present at Mirzapur Kutchhery. But again no specific suggestion was made that with whom they used to work. Here it would be

relevant to mention that spot of incident was stated merely 7 miles away from Mirzapur. A close look to DW's testimony reveals that the same lacks relevant particulars, minute details and credibility which are essentially required for strengthening the appellants' claim of alibi. On the contrary, there are corroborative evidence and circumstances on record to conclusively prove their presence at the scene of occurrence at the material point of time. There is clear and cogent testimony of PW-1 Mishri Lal, PW-2 Kanhaiya Lal and PW-3 Shitla Prasad, which establishes presence of these witnesses at the spot. Examining entire evidence, it cannot be said that plea of alibi put forward on behalf of the accused-appellants Ram Naresh, Kunwar and Rajendra has been established.

So far as the motive aspect is concerned, it is well-settled that if a case is based on direct evidence, the motive has no much significance. Clear proof of motive lends additional assurance to other evidence but the absence of motive does not lead to contrary conclusion, however, in that case, other evidence has to be closely scrutinized. If positive evidence is clear and cogent the question of motive is not important. However, this is relevant to lend assurance the other evidence. Motive is not a sine qua non for the commission of a crime. Moreover, failure to prove motive or absence of evidence on the point of motive would not be fatal to the prosecution case when the other reliable evidence available on record unerringly establishes the guilt of the accused. Reference may be made to the case law pronounced in case of *State of U.P. V Nawab Singh, 2005 SCC (Criminal) 33*. In fact, motive is a thing which is primarily known to the accused himself and it may not be possible for the prosecution to explain what actually prompted or excited him to commit a particular crime. In *Shivji Genu Mohite V. State of Maharashtra, AIR 1973 SC 55*, the Hon'ble Supreme Court has held that in case the prosecution is not able to discover an impelling motive, that could not reflect upon the credibility of a witness proved to be a reliable eye-witness. Evidence as to

motive would, no doubt, go a long way in cases wholly dependent on circumstantial evidence. Such evidence would form one of the links in the chain of circumstantial evidence in such a case. But that would not be so in cases where there are eye-witnesses of credibility, though even in such cases if a motive is properly proved, such proof would strengthen the prosecution case and fortify the court in its ultimate conclusion. But that does not mean that if motive is not established, the evidence of an eye-witness is rendered untrustworthy. Therefore, in case there is direct trustworthy evidence of witnesses as to commission of an offence, the motive part loses its significance as held in *Bikau Pandey & Ors. V. State of Bihar, (2003) 12 SCC 616; and Abu Thakir & Ors. V. State of Tamil Nadu, (2010) 5 SCC 91*.

In the instant case, there is evidence that one year prior to the incident, brother of accused-appellant Ram Naresh, namely, Shyam Naresh was murdered, in which complainant's brother Munnar (deceased), Chote Lal, Tikori Lal, Markandey and Mool Chand were accused, however in that case they were acquitted. Thereafter, even the proceedings under Sections 107 and 116 Cr.P.C. were also initiated between the parties. As per prosecution version accused-appellants and deceased accused were nurturing enmity against family of complainant and deceased. No doubt, enmity is a double edged weapon as it cuts both way. On the one hand, it may provide motive for commission of offence, while on other hand, it may be a reason for false implication, however, in the instant case ocular testimony is quite cogent and credible and it finds support from other factors like prompt first information report and corroboration from medical evidence. In view of entire evidence, it can not be said that there was no motive on the part of the accused-appellants to commit murder of the deceased. We may add here that the benefit of doubt can not be extended by resorting to surmises, conjectures or fanciful considerations, as has been held by the Apex Court in the case of **State of Punjab Vs. Jagir Singh, (1974) 3 SCC 277** It was observed by the

Hon'ble Apex Court that a criminal trial is not like a fairy tale wherein one is free to give flight to one's imagination and fantasy. It concerns itself with the question as to whether the accused arraigned at the trial is guilty of the offence with which he is charged. Crime is an event in real life and is the product of interplay of different human emotions. In arriving at the conclusion about the guilt of the accused charged with the commission of a crime, the court has to judge. The evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses. Every case in the final analysis would have to depend upon its own facts. Although the benefit of every reasonable doubt should be given to the accused, the courts should not, at the same time, reject evidence which is *ex facie* trustworthy, on grounds which are fanciful or in the nature of conjectures.

35. Close scrutiny of the evidence shows that statement of PW-1 Mishri Lal is cogent and credible. He has lodged the FIR within two hours of alleged incident, while police station is situated at a distance of seven miles from spot and thus, he has lodged a prompt FIR, which further supports his version. All the accused persons were named in the FIR. Version of PW-1 Mishra Lal has been amply corroborated in all material particulars by PW-2 Kanhaiya Lal and PW-3 Shitla Prasad. Version of these witnesses is further supported by the fact that after incident the bicycle of deceased along with bags of sand was seized from near the spot. The remains of bomb burst were also seized from spot. All these witnesses have been subjected to cross-examination but no major contradiction or any other infirmity could be shown. Substantially, the ocular testimony of these eye-witnesses is supported by medical evidence.

36. Considering all these aspects of case, testimony of PW-1 Mishri Lal, PW-2 Kanhaiya Lal and PW-3 Shitla Prasad has been found credible. It is also apparent that murder of the deceased was committed in furtherance of common object of unlawful assembly which was comprising of accused-appellants and deceased accused. Considering the entire evidence on record, we are satisfied that conviction of accused

appellants, namely, Kunwar, Ram Naresh, Nirju, and Rajendra under section 148 and 302/149 of IPC is based on evidence and the trial court was fully justified in convicting them.

37. In view of aforesaid, conviction and sentence of accused appellants under Section 148, 302/149 is affirmed. All these appellants are on bail, they be taken into custody forthwith to serve out the remaining sentence.

38. Appeal is accordingly dismissed.

39. Let a copy of this judgment be sent to the concerned court below for necessary compliance.

Date : 24.10. 2019/A. Tripathi

(Raj Beer Singh, J)

(Pritinker Diwaker, J)