

**AFR**

**Reserved on : 21.10.2021**

**Delivered on : 22.11.2021**

**Court No. - 49**

**Case :- CRIMINAL APPEAL No. - 4399 of 2015**

**Appellant :-** Ramji Yadav

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

**Counsel for Appellant :-** Sanjay Kumar Singh, Ajay Kumar Pandey, Faizan Siddiqui, Fatma Khatoon, Rajesh Kumar, Rajrshi Gupta, Rajul Bhargava, Rama Shanker

**Counsel for Respondent :-** Govt. Advocate

**Hon'ble Manoj Kumar Gupta, J.**

**Hon'ble Samit Gopal, J.**

**(Per Samit Gopal, J.)**

1. This criminal appeal has been preferred by Ramji Yadav S/o Sri Chhannu Yadav, resident of Village Pahari, Police Station Maruadih, District Varanasi against the judgment and order dated 17.09.2015 passed by the Additional Sessions Judge, Court No. 13, Varanasi in Sessions Trial No. 390 of 2011 (State of U.P. Vs. Ramji Yadav) whereby the accused-appellant has been convicted and sentenced under Section 302 of the Indian Penal Code, 1860 (hereinafter referred to as the 'IPC') to life imprisonment, a fine of Rs. 40,000/- and in default of payment of fine to one year rigorous imprisonment. It is ordered that Rs. 20,000/- as realised from fine will be paid to Nihori Yadav the father of the deceased Sanjay Yadav as compensation under Section 357 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the 'Cr.P.C.'). The trial court has ordered that benefit of Section 428 Cr.P.C. be extended to the accused.

2. The entire trial court records of the present case went missing from the trial court itself. It had been reconstructed under the order dated 01.12.2014 of the District Judge, Varanasi.

3. The prosecution case as per the First Information Report lodged by Nihori Yadav PW-1 is that on 15.01.2011 at 06:15 pm Ramji Yadav was

coming from village Kadipur. Sanjay Yadav, his son was standing at the door. Ramji Yadav on seeing his son started hurling abuses. His son then asked him as to why he is abusing on which there were some hot talks between them. Mohan Yadav and Sohan Yadav @ Patali Yadav the brothers of Ramji Yadav then exhorted on which Ramji Yadav who was carrying a 12 bore gun fired from it on his son with an intention to kill him. Persons of village took his son to the hospital. The first informant, his brother and persons of the village have seen the occurrence. Ramji Yadav was apprehended there only. He was also taken to the hospital.

4. An application dated 15.01.2011 was given by Nihori Yadav for lodging of a First Information Report which is marked as Exb.: Ka-1 to the records. Roop Chandra is the scribe of the same.

5. A First Information Report was then registered on 15.01.2011 at 19:30 hrs (7:30 pm) as Case Crime No. 20 of 2011 under Section 307 IPC at Police Station Maruadih, District Varanasi of which Nihori Yadav is the informant. The same is Exb.: Ka-3 to the records. The distance between the place of occurrence and the Police Station is 4-1/2 kilometres.

6. Sanjay Yadav S/o Nihori Yadav aged about 35 years died on 15.01.2011 at 08:35 pm in Heritage Hospital, Lanka, Varanasi. His postmortem examination was conducted on 16.01.2011 at about 3:30 pm by Dr. Santosh Kumar Gupta PW-4 which is marked as Exb.: Ka-6 to the records. The doctor found the following injuries on his body:-

(i) Firearm entrance wound 2.5 cm diameter x cavity deep on left side chest, 3 cm below cavity border of left clavicle 6 cm outer to midline, 133 cm above left above diaphragm and 7 cm above left nipple.

(ii) Surgical drainage with stitches (2 cm size) 10 cm below left axilla.

Cause of death is opined as shock and haemorrhage as a result of firearm injury left chest which was cause of rupture of left lung.

7. After the death of Sanjay Yadav, the case was converted under Section 302 IPC. The investigation concluded and a charge sheet No. 55 of 2011 dated 30.03.2011 under Section 302 IPC was submitted against the accused-appellant, the same is marked as Exb.: Ka-16 to the records.

8. The trial court vide order dated 17.08.2011 framed charge against the accused-appellant under Section 302 IPC. The accused-appellant pleaded not guilty and claimed to be tried.

9. A SBBL 12 bore gun bearing Gun No. 17283 - 96 of the Bhargava Arms Company with an empty cartridge embedded in its chamber and 4 (four) cartridges in its cover were recovered on 16.01.2011. Sobhash Yadav and Rajendra Yadav PW-2 are the witnesses to the same. A recovery memo regarding the said recovery was prepared which is marked as Exb.: Ka-2 to the records.

10. Certain articles were sent to the ballistic expert for examination. A report dated 22.12.2011 has been sent, the same is on record. The gun which was recovered was sent, was marked as 1/2001. Two cartridges were fired as test cartridges in the laboratory which were marked as TC-1 and TC-2. The cartridge recovered from the barrel of the gun was marked as EC-1. As per the opinion of the ballistic expert, the marks of EC-1 were identical to that of TC-1 and TC-2 and they matched with them.

11. The prosecution in order to prove its case examined Nihori Yadav PW-1 who is the first informant and also father of the deceased. Rajendra Yadav PW-2 is the brother of the deceased and son of Nihori Yadav PW-1. These two witnesses are produced and examined as the eye witnesses of the incident.

12. As formal witnesses, Umesh Rai PW-3 was the Head Constable of Police Station Maruadih, Varanasi who transcribed the First Information Report and prepared its Chik. Dr. Santosh Kumar Gupta PW-4 conducted the postmortem examination of the deceased Sanjay Yadav. Arun Kumar

Yadav, Sub-Inspector PW-5 conducted the inquest on the body of the deceased which is Exb.: Ka-7 to the records. Sageer Ahmad PW-6 is the Investigating Officer of the matter who took up the investigation and concluded it by filing charge sheet against the accused-appellant Ramji Yadav.

**13.** The accused-appellant denied the occurrence and claimed false implication due to enmity with the first informant due to some land dispute and claimed to be tried. No defence was led by him.

**14.** The trial court after considering the entire evidence on record came to the conclusion that the evidence of witnesses and the entire records go to show that the accused Ramji Yadav has committed the said offence which has been proved against him beyond reasonable doubts and the prosecution has been successful in proving the case against him and thus convicted him under the aforesaid section.

**15.** We have heard Sri Rajrshi Gupta & Sri Rama Shankar Yadav, learned counsels for the accused-appellant and Sri Attreya Dutta Mishra, learned Additional Government Advocate for the State of U.P. and have perused the entire reconstructed records and the judgment and order of conviction.

**16.** Learned counsels for the accused-appellant have made the following submissions before us:-

(i) There has been a delay in sending of the First Information Report to the Magistrate. The Chik First Information Report states that the same is being sent by dak. There is no recital of the date and time of its dispatch. The same is in violation of Section 157 of the Cr.P.C. The First Information Report is thus an anti-time document.

(ii) In the First Information Report, there is a specific allegation of Mohan Yadav and Sohan Yadav @ Patali Yadav, the brothers of the accused-appellant Ramji Yadav to have exhorted him after which he fired

but the first informant and Rajendra Yadav later on exonerated them and as such in the investigation they were exonerated. After investigation no charge sheet was submitted against them. This would go to show that the prosecution case is not truthful. There has been an attempt to increase the number of accused persons and thus the implication of the accused-appellant also becomes doubtful. The genesis of the occurrence is also doubtful.

(iii) The accused-appellant had no motive at all to commit the said offence. The prosecution has not come out with any motive at all for the accused-appellant to indulge in the said incident.

(iv) The arrest of the accused-appellant is in dispute. In the First Information Report, it is stated that he was apprehended by the villagers and he was also taken to the hospital. There is no document whatsoever on record to show that the accused-appellant was taken to the hospital as narrated in the First Information Report and by the first informant. Sageer Ahmad PW-6 who is the Investigating Officer of the case states that he arrested the accused-appellant from the hospital and then he took him for the recovery of the weapon. The link of the accused-appellant being apprehended and being taken and admitted in the hospital and then being arrested from there is missing.

(v) The two eye witnesses being Nihori Yadav PW-1 and Rajendra Yadav PW-2 are the father and brother respectively of the deceased Sanjay Yadav. They are family members of the deceased and as such are interested witnesses. There is no independent witness to support the prosecution case. It would be very unsafe to rely upon the testimony of the alleged eye witnesses as they are the family members of the deceased and are interested witnesses.

(vi) It is lastly argued that even if presuming all the evidences to be true and correct, the matter would not travel beyond Section 304 Part-I of the IPC. The case is a case of a single shot without any repetition of firing as is

evident from the prosecution evidence and the postmortem report. There was no motive for the accused-appellant to commit the said offence. The incident started with an altercation in which a single shot was fired. The accused-appellant has been in jail since 16.01.2011 and as such has suffered imprisonment for about 10 years and 10 months which would be an appropriate sentence for him under Section 304 Part-I IPC.

**17.** Learned Additional Government Advocate for the State on the other hand opposed the submissions of learned counsels for the accused-appellant by arguing that the present case is a case of direct evidence. The incident took place on 15.01.2011 at 06:15 pm and the First Information Report was lodged on 15.01.2011 itself at 19:30 hrs which was after about one hour and fifteen minutes of the incident. The distance between the place of occurrence and Police Station is four and a half kilometres. The First Information Report has been lodged promptly. Sanjay Yadav, the deceased in an injured condition was taken to the hospital and as such the First Information Report was lodged under Section 307 IPC but after getting information about his death, the case was converted under Section 302 IPC. PW-1 Nihori Yadav and PW-2 Rajendra Yadav are the eye witnesses of the incident and were natural witnesses present.

**18.** It is further argued that the SBBL gun used in the incident was recovered on the pointing out of the accused-appellant which had an empty cartridge in its chamber. The same was sent to ballistic expert for examination. The report of the ballistic expert clinches the case as he opined that the said empty was fired from the said weapon after testing it and comparing it from the test cartridges. Thus the use of the said weapon gets corroborated from the ballistic report.

**19.** It is argued that in so far as the argument of the First Information Report being anti-time is concerned, there is no foundation laid by the accused in the cross-examination of the witnesses for the same. Only drawing a presumption about it by the fact that the date and time of

sending the First Information Report is not mentioned therein would not in any manner be conclusive of the fact that there was a delay in sending of the same to the Magistrate. It is argued that the testimony of the two eye witnesses are correct and intact and they are natural and truthful witnesses. There is ample evidence on record to prove that the accused-appellant is the person who shot the deceased. The appeal lacks merit which is liable to be dismissed.

**20.** PW-1 Nihori Yadav is the first informant of the case and the brother of the deceased. He states that the incident is of 15.01.2011 at about 06:15 pm. He was present in his house. Accused Ramji Yadav started abusing Amit and Sanjay. His son was shot by him. He was carrying a gun, the shot hit his left chest. Ramji Yadav shot him while he was standing at the door of his house. His son was taken to the hospital by his family members. He later on came to know that his son died while going to the hospital. Ramji Yadav tried to run away after firing. He was apprehended by the villagers. Police came and took him away. He lodged the First Information Report. He also went with Ramji to the Police Station. He proves the application given by him for lodging of the First Information Report.

**21.** In his cross examination, he states that he had given an affidavit dated 14.02.2011 to the D.I.G., Varanasi. He states that in the said affidavit in para 3, he has stated that Mohan Yadav and Sohan Yadav have been falsely implicated in the present case. To a suggestion that he has enmity with many people he refuses. He further refuses the suggestion that unknown person shot his son and he did not witness the incident. He refuses that he has falsely implicated the accused.

**22.** PW-2 Rajendra Yadav is the other son of the first informant Nihori Yadav and is the brother of the deceased Sanjay Yadav. He states that the accused-appellant shot his brother with his licensed gun which hit his left chest. His brother then walked 2-3 steps and then fell down after which he with the help of villagers took him to Heritage Hospital wherein the

doctors declared him dead at about 08:30 pm. He is also a witness of the recovery of the gun and cartridges which was on the pointing out of the accused-appellant on 16.01.2011. He states about the said recovery being effected before him and the recovery memo being prepared before him. He is also the witness of the recovery of blood stained mud and plain mud, the recovery memo of which is Exb.: Ka-13 to the records which was also done on 16.01.2011. He is a witness of the inquest. He states that he had also given an affidavit in the matter through his lawyer which was prepared on his instructions. He had stated in the same that Mohan and Sohan were not present at the place of incident at the date and time of the occurrence. Their names have been wrongly mentioned in the First Information Report. To a suggestion to him that unknown persons have murdered his brother in the night he denies. He further denies that he is not an eye witness to the incident. It is further denied by him that he has falsely implicated the accused-appellant and he was not present at the place of occurrence. He denies the suggestion that no such incident took place as stated by him in his examination-in-chief and also denies the suggestion that he is giving a false statement in court.

**23.** PW-3 Umesh Rai is the Head Constable who transcribed the First Information Report and prepared the Chik. He proves the same.

**24.** PW-4 Dr. Santosh Kumar Gupta conducted the postmortem examination of the deceased Sanjay Yadav. He states that he conducted the postmortem on 16.01.2011 at about 03:30 pm. The deceased had died on 15.01.2011 at about 08:35 pm in Heritage Hospital. He proves the postmortem report and states that the cause of death was shock and haemorrhage as a result of firearm injury on the left chest with rupture of left lung.

**25.** PW-6 Sageer Ahmad is the Investigating Officer of the case. He states about his taking over the investigation on 16.01.2011 and conducting the Panchayatnama on the body of the deceased in the mortuary of

Heritage Hospital, Varanasi which is marked as Exb.: Ka-7 to the records. He then prepared other documents relating to the same and sent the body for postmortem. He states that on 16.01.2011 he prepared the site plan which was marked as Exb.: Ka-12 to the records. He prepared the recovery memo of the blood stained mud and plain mud in the presence of witnesses which was dictated by him to Sub-Inspector Arun Kumar Yadav. The same was marked as Exb.: Ka-13 to the records.

**26.** Accused Ramji Yadav gave his statement to him which was marked as Exb.: Ka-14 to the records. Subsequently, as he was admitted in Kabir Chaura, Hospital he reached the hospital and recorded his statement and took him for the recovery of the 12 bore gun. The same was then got recovered on the pointing out of the accused. The recovered gun was bearing Gun No. 17283 - 96 of The Bhargava Arms Company and had an empty cartridge in its barrel and four cartridges in its cover. The gun and the cartridges were sealed and a recovery memo of the same was prepared which was marked as Exb.: Ka-2 to the records. He then proceeded with the investigation and subsequently on 24.01.2011 Section 34 IPC was added in the investigation. The statements of witnesses were recorded. Smt. Girja Devi and Smt. Dulari Devi were also interrogated by him on 09.03.2011 as eye witnesses of the incident. The statement of formal witnesses were recorded by him. After investigation he submitted a charge sheet under Section 302 IPC against the accused-appellant. The said charge sheet is marked as Exb.: Ka-16 to the records. Articles were sent to the Director Forensic Lab, Lucknow through Constable-188 Rajesh Pandey in a sealed condition for analysis. A report was received from the ballistic expert in the matter after examination of the articles received in the lab.

**27.** He states that in the First Information Report, it is mentioned that Mohan Yadav and Sohan Yadav exhorted Ramji who then fired and in the statement of the first informant, he had stated about the same but later on

he gave an affidavit and an affidavit was also received from Rajendra Yadav stating therein that the said persons have been falsely implicated. To a suggestion that he did not get the recovery of the weapon done, he denies the same. He further denies the suggestion that in conspiracy he brought the licensed weapon of the accused from his house and fired from it at the Police Station and made a false case. In the end, he denies the suggestion that he has not investigated the matter properly and in conspiracy with the villagers, has filed charge sheet against the accused-appellant without any evidence. He further denies the fact that the deceased had enmity with many people of the village and was murdered in the night by someone and due to the enmity with the accused he has been falsely implicated.

**28.** The accused-appellant in his statement under Section 313 Cr.P.C. states that the case has been instituted against him due to enmity. He further states that Nihori Yadav and Rajendra Yadav have enmity with many people of the village. There is a dispute with regards to land between the accused-appellant and his brother with Nihori Yadav and as such he has enmity with him. The deceased has been murdered by some unknown persons in the dark.

**29.** The prosecution case is specific in so far as it relates to the firing upon the deceased Sanjay Yadav is concerned. The role of firing has been assigned to the accused-appellant Ramji Yadav with his licensed gun. The time of occurrence and the place of occurrence is also specified. There is no challenge by the accused with regards to the date and place of occurrence. Two eye witnesses examined in the trial being Nihori Yadav PW-1 and Rajendra Yadav PW-2 although are the father and brother of the deceased but are natural witnesses of the incident. Since the place of occurrence is the house of the first informant, the presence of the said two witnesses cannot be doubted.

**30.** The occurrence in the present case is of 15.01.2011 at 6:15 pm and the First Information Report has been lodged on the same day at 19:30 hrs

(07:30 pm) which is after about one hour and fifteen minutes of the incident. The same was lodged after Sanjay Yadav while being in an injured condition was taken away to the hospital by Rajendra Yadav PW-2 and other villagers. The distance between the place of occurrence and the Police Station is four and a half kilometres. The First Information Report is a prompt report lodged by Nihori Yadav PW-1. There is a recovery of SBBL gun on the pointing out of the accused-appellant which was having an empty cartridge embedded in it which is said to have been used in the present incident. The gun was sent to the ballistic expert for examination and empty cartridge found in it, was found to have been fired from the same. Since the matter is having eye witnesses being present, the motive does not play an important role and the non-mentioning of any motive in the First Information Report would not make the entire prosecution case doubtful.

It is trite law that a related witness may not be labelled as interested witness. Interested witnesses are those who want to derive some benefit from the result of litigation or implicating the accused. Once it is established that witnesses were present at the scene, to witness the occurrence, they cannot be discarded merely on the ground of being closely related to the victim. The Apex Court in **State of Uttar Pradesh Vs. Kishanpal and others : (2008) 16 SCC 73** held as under:

“18. The plea of defence that it would not be safe to accept the evidence of the eye witnesses who are the close relatives of the deceased, has not been accepted by this Court. There is no such universal rule as to warrant rejection of the evidence of a witness merely because he/she was related to or interested in the parties to either side. In such cases, if the presence of such a witness at the time of occurrence is proved or considered to be natural and the evidence tendered by such witness is found in the light of the surrounding circumstances and probabilities of the case to be true, it can provide a good and sound basis for conviction of the accused. Where it is shown that there is enmity and the witnesses are near relatives too, the Court has a duty to scrutinize their evidence with great care, caution and circumspection and be very careful too

in weighing such evidence. The testimony of related witnesses, if after deep scrutiny, found to be credible cannot be discarded.

19. It is now well settled that the evidence of witness cannot be discarded merely on the ground that he is a related witness, if otherwise the same is found credible. The witness could be a relative but that does not mean his statement should be rejected. In such a case, it is the duty of the Court to be more careful in the matter of scrutiny of evidence of the interested witness, and if, on such scrutiny it is found that the evidence on record of such interested witness is worth credence, the same would not be discarded merely on the ground that the witness is an interested witness. Caution is to be applied by the court while scrutinizing the evidence of the interested witness.

20. It is well settled that it is the quality of the evidence and not the quantity of the evidence which is required to be judged by the court to place credence on the statement. The ground that the witness being a close relative and consequently being a partisan witness, should not be relied upon, has no substance. Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the Court has to adopt a careful approach and analyse the evidence to find out whether it is cogent and credible.”

**31.** Relationship is not sufficient to discredit a witness unless there is motive to give false evidence to spare the real culprit and falsely implicate an innocent person.

**32.** The exoneration of two accused persons who were assigned the role of exhortation only cannot be a ground for discarding the entire prosecution evidence. In so far as, the delay in sending of the First Information Report to the Magistrate is concerned, there is no date and time mentioned in the Chik of sending it to the Magistrate. Even there is no cross examination done on behalf of the accused with regards to the same. In the event of no cross examination being done with regards to the

same, the accused cannot take benefit of it by just placing arguments for which the relevant witnesses have not been cross examined. As such, it cannot be said that there was no compliance of Section 157 Cr.P.C. and the First Information Report was an anti-timed document. The presence of the eye witnesses and their unblemished testimony is sufficient enough to prove the case. The prosecution cannot fail even for the reason that it has not proved the motive for the commission of the incident. Even during lengthy cross examination of PW-1 Nihori Yadav and PW-2 Rajendra Yadav no material could be elucidated by the accused in his benefit and favour from them which could be safely taken to discard their testimony in full. The prosecution has succeeded its case beyond reasonable doubts against the accused-appellant.

**33.** The alternative arguments of learned counsels for the accused-appellant that the matter would not be one under Section 302 IPC but would fall under Section 304 Part-I IPC is being taken up for consideration now.

**34.** The incident started with some quarrel between the parties. The accused-appellant fired a shot from his gun. The incident was not premeditated. The accused-appellant is not said to have acted on his own. The act of firing by him is said to have been done on impulse and that too upon being instigated by his brothers Mohan Yadav and Sohan Yadav @ Patali Yadav. From the evidence of PW-1 and PW-2 it is evident that there had been hot exchange of words. The injury as received by the deceased Sanjay Yadav is a single injury on his body which was the cause of his death. The other injury was a surgical drainage with stitches which has been stated by the doctor to be present on his body which was a procedure done during the course of his treatment.

**35.** The accused-appellant has caused a single gun-shot injury to the deceased that too on being instigated by his two brothers who have been exonerated during investigation and therefore under these circumstances, it

cannot be said that the accused-appellant has committed an offence under section 302 IPC. But according to the learned counsels for the accused-appellant, the offence would fall under section 304 Part-I IPC. Learned counsel submitted that the accused-appellant has already suffered imprisonment of more than ten (10) years and ten (10) months and he is first offender and he should be released on the sentence already undergone by him.

We have meticulously considered the evidence in this case in the light of the above submission of the learned counsels for the accused-appellant. The alleged eyewitnesses Nihori Yadav PW-1 and Rajendra Yadav PW-2 have deposed that the accused-appellant was abusing the deceased who objected to it and some hot talks between them took place after which his brothers Mohan Yadav and Sohan Yadav @ Patali Yadav, the exonerated co-accused instigated the accused-appellant Ramji Yadav and on this, he fired a shot on the deceased. None of these witnesses have disclosed as to what was the cause or reason by the accused-appellant to abuse the deceased. The accused-appellant had caused a single gun-shot injury, on being instigated by his brothers Mohan Yadav and Sohan Yadav @ Patali Yadav. Thus, if there was no dispute or quarrel or enmity before the incident and it has not been made clear by the witnesses as to what was the cause or reason for hurling abuses then certainly it can be inferred that the genesis of the occurrence has not been established in this case, though, it is proved beyond doubt that the accused-appellant fired a gun-shot on the deceased resulting in his death. Therefore, the offence committed by the accused-appellant would not fall under section 302 IPC, but in our considered view, the offence would fall under section 304 Part-I IPC.

**36.** So far as sentence is concerned, from the records it is clear that the accused-appellant was arrested on 16.01.2011 and during trial he remained in custody and even after the impugned judgment he has remained in jail till date. Thus, he has suffered imprisonment of about ten years and ten

months and if remission part is considered then this sentence would be more. The incident is of the year 2011 and the accused-appellant has suffered mental agony of this case for more than ten years. The accused-appellant is not reported to have any previous criminal history. Looking to the overall facts and circumstances of the case, nature of evidence available on record, this Court is of the conclusion that the present case would fall under Section 304 Part-I IPC and not under Section 302 IPC and a conviction of twelve (12) years alongwith fine already imposed by the trial court with compensation to the father of the deceased as ordered by the trial court would meet the ends of justice.

**37.** In the result, the appeal is **partly allowed**.

**38.** The accused-appellant is convicted under Section 304 Part-I IPC to a sentence of twelve (12) years rigorous imprisonment. The amount of fine as imposed upon him by the trial court and the compensation as directed to be paid from it under Section 357 Cr.P.C. is maintained. The default sentence as ordered by the trial court is also maintained.

**39.** The lower court record along with a copy of this judgment be sent back forthwith to the trial court concerned for compliance and necessary action.

**Order Date :-** 22.11.2021

M. ARIF

(Samit Gopal, J.) (Manoj Kumar Gupta, J.)