

AFR

Reserved on 23.10.2019

Delivered on 10.12.2019

**Criminal Appeal No. 918 of 1989**

1. Salauddin

2. Riazuddin

---- Accused-Appellants

**Vs**

State Of U.P.

----- Respondent

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For Appellant : Shri Imran Ullah, Amicus Curiae

For Respondent/State : Shri J.K. Upadhyay, A.G.A.

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**Hon'ble Pritinker Diwaker, J.****Hon'ble Raj Beer Singh, J.****Per: Raj Beer Singh, J**

1. This criminal appeal has been preferred against the judgment and order dated 13.03.1989 passed by VII Additional District & Sessions Judge, Meerut in S.T. No. 679 of 1987 (State vs. Salauddin & Two Others), under Sections 302/34, 323/34 of Indian Penal Code (*hereinafter referred to as 'I.P.C.'*), Police Station Sardhana, District Meerut, whereby accused-appellants, namely, Salauddin and Riazuddin have been convicted under Section 302/34 of IPC and sentenced to undergo imprisonment for life, whereas they have been acquitted of the charge under Section 323/34 of IPC. However, co-accused Umarddin has been acquitted of the charge under Sections 302/34 and 323/34 of IPC.

2. According to prosecution version, on 14.09.1986 PW-1 Hasin Khan and his brother Shakil were returning back to their village after seeing a wrestling competition (Dangal) and when they reached near house of accused-appellant Salauddin in their village, accused-appellants Salauddin and Riazuddin confronted Hasin by uttering as to why he has abused his brother yesterday. PW-1 Hasin Khan denied any abusing but it ensued into a scuffle wherein accused-appellant Riazuddin has slapped PW-1 Hasin Khan. After coming to their home, PW-1 Hasin Khan and his brother Shakil narrated the incident to their father Abdul Rehman

Khan (deceased). In order to subsidy the matter, at about 06.00 PM Abdul, Rehman Khan along with Shakil and PW-1 Hasin Khan went to the house of accused-appellant Salauddin. There accused-appellants Salauddin and Riazuddin, armed with country made pistols, were standing in front of their house. Co-accused Umarddin was also standing near them. As they saw Abdul Rehman Khan and his sons, accused-appellant Salauddin exhorted to kill them by firing and consequently, accused-appellants Salauddin and Riazuddin fired one shot each at Abdul Rehman Khan. Hearing noise of firing, Aizaz, Iqbal alias Ballo, Munna, Sarfaraz and many other persons of the village also reached there. Co-accused Umarddin pelted a brick, which caused injury to Aizaz Khan.

3. PW-3 Jamil Ahmad reported the matter to police by submitting written complaint Ex. Ka-1 and on that basis the FIR was registered on 14.09.1986 at 19:45, under Sections 307/336 of IPC against accused-appellants Salauddin, Riazuddin and acquitted co-accused Umarddin vide Ex. Ka-18.

4. Police reached at the spot and deceased Abdul Rehman Khan, who was found in an injured condition at that time, was sent to hospital and was later on shifted to Safdarjang Hospital, Delhi.

5. Deceased Abdul Rehman Khan, who was in an injured condition at that time, was medically examined by PW-8 Dr. V.K. Sharma on 14.09.1986 at 10:15 PM and following injuries were found on his person:-

(i) Firearm wound of entry .5 cm x .5 cm depth not probed in the interest of patient. Margins are inverted. No blackening or tattooing present, on the left side of face 3.5 cm in front of trague of left ear. Advised x-ray.

(ii) Abrasion 2 cm x .5 cm on left side of face on the medial side of injury no. 1.

(iii) Contused swelling of the left eye. Bluish in colour. Conjunctive is congested. Injury kept under observation. Eye Surgeon informed.

(iv) Lacerated wound 1 cm x .2 cm x skin deep on the left side of forehead 5 cm above from left eye brow. Bleeding present.

6. On 17.09.1986, Abdul Rehman Khan succumbed to injuries sustained in the alleged incident. Inquest proceedings were conducted by PW-4 S.I. Ram Narain of police station Vijay Nagar, New Delhi on 17.09.1986 and dead body of the deceased was sent to police station Sardhana, district Meerut.

7. Post-mortem on dead body of deceased Abdul Rehman Khan was conducted by PW-5 Dr. P.N. Khanna at Meerut Medical College vide post-mortem report Ex.Ka-9 and following injuries were found on the person of deceased:-

(i) Gun shot wound of entry  $\frac{1}{2}$  x  $\frac{1}{2}$  cm x brain cavity deep on the left temporal region 4 cm front of the left ear. Scorching and tattooing present around the wound. Oval in shape direction from below upwards and front.

(ii) Abrasion 2 cm x 1 cm behind the left ear on its upper part.

As per Autopsy Surgeon, the cause of death of the deceased was due to coma as a result of noted gunshot injury of the head.

8. Investigation was taken up by PW-7 S.I. Satpal Singh of police station Sardhana, district Meerut and after completion of investigation, both the accused-appellants Salauddin and Riazuddin as well as co-accused Umarddin were charge sheeted for the offence under Sections 302, 307, 336 of IPC.

9. The trial court framed charge under Sections 302/34 and 323/34 of IPC against all the three accused persons. However, they pleaded not guilty and claimed trial.

10. In order to bring home the guilt of accused persons, prosecution has examined ten witnesses. Accused persons were examined under Section 313 Cr.P.C., wherein they denied prosecution evidence and claimed false implication. In defence, accused persons have examined one Anees Ahmad, Advocate, Notary Meerut as DW-1.

11. After hearing and analysing the evidence on record, accused-appellants Salauddin and Riazuddin have been convicted under Sections 302/34 of IPC vide impugned judgment and order dated 13.03.1989 and sentenced as stated in paragraph no. 1 of this judgment, whereas, they have been acquitted of the charge under Section 323/34 of IPC. However, co-accused Umarddin has been acquitted of all the charges.

12. Being aggrieved by their conviction and sentence, accused-appellants have preferred the present criminal appeal.

13. We have heard Sri Imran Ullah, learned Amicus Curiae for the accused-appellants and Sri J.K. Upadhyay, learned A.G.A. for the State-respondent.

14. Learned Amicus Curiae submits as under:-

(I) that presence of PW-1 Hasin Khan, PW-2 Sarfaraz and PW-3 Jamil Ahmad at the spot is highly doubtful. It was pointed out that as per prosecution evidence, after incident, deceased was not taken to hospital, rather he remained present at the spot till police reached there. The conduct of PW-1, PW-2 and PW-3 for not taking the deceased to hospital is unnatural and it falsifies their presence at the spot.

(II) that PW-1 Hasin Khan, PW-2 Sarfaraz and PW-3 Jamil Ahmad are interested witnesses. PW-1 and PW-3 are brothers and they are sons of the deceased and thus, they are interested witnesses. As per prosecution version, one Aizaz has sustained injury at the spot, but he was not examined. As per prosecution version, many persons have reached at the spot, but no independent witness was examined.

(III) that the oral evidence is not consistent with the medical evidence. As per prosecution version, both the accused-appellants Salauddin and Riazuddin have fired one bullet each at deceased, but injury Nos. 1, 2, 3 and 4 sustained by the deceased are not result of firearm injury and thus, injuries have not been explained.

(IV) that motive alleged by the prosecution is not sufficient so as to cause murder of deceased. As per prosecution version merely an altercation has taken place, wherein accused-appellant Riazuddin has slapped PW-1 Hasin Khan, but such minor incident cannot be a motive to commit murder of the deceased.

(V) that alleged dying declaration Ex. Ka-11 of deceased is not reliable. There is no evidence that deceased was in fit state of mind to make an statement. There are corrections and overwriting in Ex. Ka-11, which further falsify alleged dying declaration.

(VI) that there are material contradictions and inconsistencies in prosecution case. It was submitted that it is not the case of prosecution that after alleged fist incident of slapping, PW-1 Hasin Khan and his brother Shakil have stated that they would return back and thus, the accused persons were not aware as to deceased and his sons would come at their house. The version of prosecution that when deceased and his sons reached at the house of accused persons, both the accused-appellants Salauddin and Riazuddin were standing, having country made pistols in their respective hands, is not probable. Further, PW-3 Jamil Ahmad has admitted that the FIR was got scribe by police officers, which further affects prosecution case adversely. It was also pointed out that PW-3 in his cross-examination has stated that after incident, till police reached there, no member of his family has gone to the spot to help deceased Abdul Rehman Khan, while, PW-1 in his cross-examination has stated that daughter of deceased, namely, Shama has reached at the spot. It was submitted that all these contradictions and inconsistencies render prosecution version unreliable.

15. Per contra, it was submitted by learned State counsel that conviction of accused-appellants is based on evidence of three eye witnesses and all these witnesses have been subjected to cross-examination but no such fact could emerge so as to doubt their presence at the spot or to doubt authenticity of their version. Merely, because soon after the incident, deceased was not taken away to hospital, it cannot be said that conduct of these witnesses is unnatural. FIR of alleged incident has been lodged by PW-3 Jamil Ahmad without any undue delay naming all the accused persons. There is no material contradiction between oral and medical evidence. In such incident, injury like injury nos. 2, 3 and 4 sustained by the deceased are quite probable in such incident. He further submitted that there was not even suggestion from the side of accused persons to the eye witnesses as to why they falsely implicate the accused-appellants. It was argued that there is overwhelming evidence against the accused-appellants and there is no infirmity in

conviction and sentence of accused-appellants.

16. We have heard the rival submissions of learned counsel for the parties and perused the record.

17. PW-1 Hasin Khan is son of deceased. In evidence, he stated that on the day of incident, after seeing a wrestling competition, when he along with his brother Shakil returned at his village and reached near house of accused-appellants, accused-appellants Salauddin, Riazuddin and co-accused Umarddin met them at around 5:45 PM. Accused-appellant Riazuddin asked him as to why he has abused his brother yesterday. PW-1 denied the same and thereafter, accused-appellant Riazuddin has slapped him. PW-1, further, stated that he and his brother Shakil went to their home and narrated the incident to their father Abdul Rehman Khan. After that, his father took him as well as Shakil with him and went to house of accused-appellant Riazuddin to lodge protest. There accused-appellants Salauddin and Riazuddin having country made pistols and co-accused Umarddin having brick, were standing and when his father asked them as to why they have beaten his son, on exhortation of accused-appellant Salauddin, accused-appellants Salauddin and Riazuddin fired shots at deceased. PW-1 stated that his father sustained firearm injury and fell down. Hearing noise, Imran, Sarfaraz, Shareef, Aizaz, Jameel and others persons reached there. Co-accused Umarddin has pelted a brick at Aizaz and resultantly Aizaz has also sustained injuries.

18. PW-2 Sarfaraz Khan stated that he is milkman by profession and on the day of incident, he saw that in front of house of accused-appellant Salauddin, deceased Abdul Rehman Khan has sustained bullet injuries and accused-appellants Salauddin and Riazuddin were having country made pistols in their hands, while co-accused Umarddin has pelted a brick. Later on, due to injuries, Abdul Rehman Khan has died.

19. PW-3 Jamil Ahmad has also made a similar statement like that of PW-1 Hasin Khan. PW-3 stated that in the evening of 14.09.1986, when his brothers Shakil and Hasin Khan came back at village after seeing a wrestling competition and reached in front of house of accused-appellants, accused-appellants were standing there. Accused-appellant Riazuddin confronted his brother Hasin by saying that why he has abused his brother yesterday. Hasin Khan denied the same, but accused-appellant Riazuddin has slapped him. Shakil and Hasin came to their

house and told this incident to their father. Abdul Rehman Khan took his sons Shakil and Hasin with him and went to the house of accused-appellants. PW-3 was also following them. PW-3, further, stated that when his father and brothers reached near the house of accused persons, accused-appellants Riazuddin and Salauddin were standing there and they were having country made pistols in their hands. Co-accused Umarddin was also standing near them. Accused-appellant Salauddin made exhortation to kill the deceased and consequently, both the accused-appellants fired at deceased, causing firearm injuries to deceased. Deceased Abdul Rehman Khan fell down on the ground. One Sarfaraz, Imran and some other persons have also reached at the spot. Co-accused Umarddin has caused injuries to his cousin Aizaz by pelting brick at him.

20. PW-4, Ram Narain has conducted inquest proceedings and PW-5 Dr. P.N. Khanna has conducted post-mortem on dead body of deceased. PW-6 constable Jagpal Singh, PW-9 Ram Saran Sharma and PW-10 H.C. Banwari Lal are formal witnesses, who have assisted during investigation.

21. PW-7 S.I. Satpal Singh has conducted investigation. He has also proved dying declaration of deceased and stated that he has recorded statement of deceased, which has been proved by him as Ex. Ka-11

22. PW-8 Dr. V.K. Sharma has medically examined the deceased, vide MLC Ex. Ka-16.

23. DW-1 Anees Ahmad, Advocate, Notary stated that on 25.06.1987, Sarfaraz Khan has brought his affidavit before him for attestation and he was identified by Sri Upendra Singh, Advocate. He has read over contents of affidavit to Sarfaraz and thereafter, he has put his thumb impression on the affidavit. The said affidavit was verified by DW-1. He has proved the said affidavit as Ex. Kha-2.

24. So far the contention, that presence of PW-1 Hasin Khan, PW-2 Sarfaraz and PW-3 Jamil Ahmad at spot is doubtful, is concerned, perusal of record shows that these witnesses have made clear and cogent statements about their presence at the spot and have narrated entire incident in detail. PW-1 Hasin Khan and PW-3 Jamil Ahmad have stated that they have gone with deceased whereas version of PW 2 Sarfaraz is that he is milkman by profession and at that time, he was collecting milk from a nearby home. First information report of the incident has been lodged by PW-3 naming all the accused stating all necessary details of

incident. The alleged incident took place at 06.00 PM in mid of village. Names of PW-1 Hasin Khan and PW-2 Sarfaraj were mentioned in the FIR, lodged by PW-3 Jamil Ahmad. These witnesses have been subjected to lengthy cross-examination but no such substantial fact could emerge, which may create any doubt about their presence at the spot. In view of these facts, there is no ground to doubt presence of these witnesses at the spot and thus, contention of learned counsel has no force.

It is correct that PW-1 and PW 3 are brothers and son of deceased but mere relationship cannot be a factor to doubt 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. On the issue of appreciation of evidence of interested witnesses, **Dalip Singh Vs. State of Punjab**, AIR 1953 SC 364 = 1954 SCR 145, is one of the earliest cases on the point. In that case, it was held:

"A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth."

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 this Court observed that:

".. 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."

In **Jayabalan V UT of Pondicherry** (2010) 1 SCC 199, the Supreme Court held as under:

"23. We are of the considered view that in cases where the court is called upon to deal with the evidence of the interested witnesses, the approach of the court, while appreciating the evidence of such witnesses must not be pedantic. The court must be cautious in appreciating and accepting the evidence given by the interested witnesses but the court must not be suspicious of such evidence. The primary endeavour of the court must be to look for consistency." (emphasis supplied)

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

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'. 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. 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 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).

In the instant case, it is correct that PW-1 Hasin Khan and PW-3 Jamil Ahmad are brothers and they are sons of deceased Abdul Rehman Khan, but as stated above, merely relationship cannot be a ground to doubt their testimony, particularly, when these witnesses have stood the test of cross-examination and no such material fact could be shown so as to doubt their presence at the spot. So far as PW-2 Sarfaraz Khan is concerned, he is not related to complainant or deceased and thus, he cannot be termed as an interested witnesses. Similarly, there is nothing to indicate that he was having any enmity with the accused persons. In fact, PW-2 appears a thoroughly independent witness. Alleged incident took place at around 6:00 PM and as per PW-2, he is a milkman by profession and collecting milk from various households. Thus, his presence at the spot appears quite natural. Further, he has been subjected to cross-examination, but no such fact could emerge in his cross-examination, so as to create any doubt about his presence at the spot. In view of all these facts, we do not find any force in the contention raised by learned Amicus Curiae.

25. It is correct that as per prosecution version, after incident of firing, co-accused Umarddin has caused injury to Aizaz, who has reached at the spot after hearing noise, but said Aizaz has not been examined by prosecution, however, it also cannot be a ground to doubt the testimony of the eye witnesses examined by the prosecution. No doubt, being an injured of same incident, he was an important witness, but his medical examination report was neither filed nor proved. In view of all these facts and also considering that prosecution has examined three eye witnesses, prosecution case is not affected on the ground that alleged Aizaz was not examined or that other persons reached at the spot were not examined. It is well settled that prosecution is not required to examine all the witnesses of incident. It is quality and not quantity of evidence, which matters. In **Raghubir Singh Vs. State of U.P., (1972) 3 SCC 79**, it was held that the prosecution is not bound to produce all the witnesses said to have seen the occurrence. Material witnesses considered necessary by the prosecution for unfolding the prosecution story alone need be produced without unnecessary and redundant multiplication of witnesses. In view of the above, contention of learned Amicus Curiae has no force.

26. The testimony of PW-2 Sarfaraz Khan was assailed on the ground that in his cross-examination, he has stated that when he reached at the spot, many persons have already assembled there and he has also admitted that when he reached at the spot, deceased has already sustained firearm injury and he was bleeding. On these basis, it was argued that he was not the eye witness of the incident. Considering entire statement of PW-2 Sarfaraz Khan, it appears that he has not seen the actual incident of firing at deceased and that when he reached at the spot, deceased has already sustained firearm injuries, however, his statement is still relevant on the description of incident after the alleged incident of firing. PW-2 has clearly stated that when he has reached at the spot, deceased has already sustained firearm injury and his injury was bleeding and that both the accused-appellants Salauddin and Riazuddin were standing there having country made pistols. Further, he has also deposed clearly that this incident took place just outside the house of accused-appellants. It is correct that PW-1 Hasin Khan has stated in his cross-examination that when his father sustained bullet injury, except deceased, PW-1 and his brother Shakil, none was there and that other persons have reached at the spot after hearing sound of firing, but this fact also establishes that PW-2 Sarfaraz Khan has reached at the spot after hearing sound of firing as he was

collecting milk in a nearby house.

27. So far the contention regarding variance between medical evidence and ocular testimony is concerned, 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 an 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. It is well settled that the oral evidence has to get primacy since medical evidence is basically opinionative. In **Ramanand Yadav v. Prabhu Nath Jha and others** (2003) 12 SCC 606, the Supreme Court held as under:-

“17. So far as the alleged variance between medical evidence and ocular evidence is concerned, it is trite law that oral evidence has to get primacy and medical evidence is basically opinionative. It is only when the medical evidence specifically rules out the injury as is claimed to have been inflicted as per the oral testimony, then only in a given case the court has to draw adverse inference.”

The same principle was reiterated in **State of U.P. v. Krishna Gopal and another** (1988) 4 SCC 302, where the Supreme Court held

“that eye witnesses’ account would require a careful independent assessment and evaluation for their credibility which should not be adversely prejudged making any other evidence, including medical evidence, as the sole touchstone for the test of such credibility.”

In **Solanki Chimanbhai Ukabhai v. State of Gujarat**, AIR 1983 SC 484, the 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.”*

In **State of U.P. v. Hari Chand, (2009) 13 SCC 542**, the Apex 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.

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 fact, 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.

28. In the present case, as per prosecution version, both the accused-appellants Salauddin and Riazuddin have fired one shot each at deceased with country made pistols. The post-mortem report of deceased shows that deceased has sustained one gunshot wound of entry on left temporal region, thus it is apparent that deceased has sustained firearm injury. As per Autopsy Surgeon, cause of death was gunshot injury on head and, thus it is also clear that deceased died due to alleged firearm injury. It is correct that as per PW-8 Dr. V.K. Sharma, who has medically examined deceased Abdul Rehman Khan in an injured condition, has stated that besides the firearm injury at left side of face, deceased has sustained one abrasion of 2 cm x .5 cm on left side of face, one contused swelling on left eye and one lacerated wound of 1 cm x .2 cm x skin deep on left side of forehead, but PW-8 has clearly stated that injury nos. 2, 3 and 4 are possible by falling on brick road. Similarly, PW-5 Dr. P.N. Khanna has also stated that injury no. 2 is possible by friction with some blunt object. He has clarified that it was a small and superficial abrasion and it was not possible by club. Considering nature of injury nos. 2, 3 and 4 and also taking into account statements of PW-5 Dr. P. N. Khanna and PW-8 Dr. V.K. Sharma, it is quite probable that these injuries are possible by falling on brick road. Non-explanation of these superficial injuries cannot be termed fatal, particularly, when version of prosecution is that both the accused-appellants Salauddin and Riazuddin have fired at the deceased and as per medical evidence, deceased has died of firearm injury. Alleged inconsistency regarding injury nos. 2, 3 and 4 is not so material as to make ocular testimony improbable. At any rate it can not be said that medical evidence makes the ocular testimony improbable or that the medical

evidence goes so far that it completely rules out all possibility of the ocular evidence being true. Considering all aspects of the matter, we do not find any force in the contention of learned Amicus Curiae.

29. So far as the question of motive is concerned, it is well settled that if a case is based on direct evidence, 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. Evidence of motive may be relevant to lend assurance to the other evidence, but 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**.

Dealing with similar issue the Apex Court in **State of U.P. Vs. Kishanpal & Ors., (2008) 16 SCC 73** held as under:

*"The motive may be considered as a circumstance which is relevant for assessing the evidence but if the evidence is clear and unambiguous and the circumstances prove the guilt of the accused, the same is not weakened even if the motive is not a very strong one. It is also settled law that the motive loses all its importance in a case where direct evidence of eyewitnesses is available, because even if there may be a very strong motive for the accused persons to commit a particular crime, they cannot be convicted if the evidence of eyewitnesses is not convincing. In the same way, even if there may not be an apparent motive but if the evidence of the eyewitnesses is clear and reliable, the absence or inadequacy of motive cannot stand in the way of conviction."*

As regards to the importance of existence of motive in a criminal case, it is worthwhile to look at the ratio laid down by this Court in **Shivaji Genu Mohite v. State of Maharashtra, AIR 1973 SC 55**:

*"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”.*

Reverting to the facts of present case, it would be pertinent to mention that it is the consistent case of the prosecution that on 14.09.1986 at around 5:45 PM, when PW-1 Hasin Khan and his brother Shakil were coming after seeing a wrestling competition and reached near house of accused persons, accused-appellant Riazuddin asked Hasin Khan as to why he abused his brother and slapped Hasin Khan. PW-1 and Shakil went to their house and narrated this incident to their father Abdul Rehman Khan and thereafter, when father of PW-1 and Shakil went to house of accused persons to lodge protest, both accused-appellants Salauddin and Riazuddin have fired shots at him. On this point, statements of PW-1 Hasin Khan and PW-3 Jamil Ahmad are clear and cogent. Accused persons have not come with any such case that before the incident of murder of deceased, alleged incident of alteration and slapping of PW-1 Hasin Khan has not taken place. Though, as stated above, the case is based on testimony of three eye witnesses, however, in view of above facts, it cannot be stated that there was no motive on the part of the accused-appellants to commit murder of the deceased. Though, there is nothing to indicate that accused-appellants were having enmity with the deceased, but as the alleged earlier incident has taken place with the sons of deceased and thereafter, deceased went to house of accused persons to lodge his protest, in such facts and circumstances, it cannot be said that there was no motive on the part of the accused-appellants to commit the incident in question.

30. So far as the inconsistencies and contradictions as pointed out by learned Amicus Curiae are concerned, it is correct that in his cross-examination PW-3 Jamil Ahmad has stated that he got written report of incident by Police Officers, but considering his entire statement, no such inference can be drawn that Tehrir Ex. Ka-1 was scribe by any police official or was dictated by any police official. In his examination-in-chief, PW-3 Jamil Ahmad has clearly stated that he got scribed the written complaint Ex. Ka-1 from one Abrar and has put his thumb impression after it was read over to him and thereafter, it was submitted at police station Sardhana, district Meerut. This version of PW-3 also finds corroboration from

written complaint Ex. Ka-1 as the scribe of this complaint has been shown Abrar Khan. Even in his cross-examination, PW-3 stated that he has got written complaint Ex. Ka-1 from Abrar in the village and thereafter, he has gone to police station. PW-3 has reiterated in his cross-examination that the said complaint was read over to him. Merely because at one place in his cross-examination, it has crept in that he got written the report from police officers, no such inference can be drawn that the written complaint Ex. Ka-1 was written at the dictation of police officials. Here it may be pertinent to mention that PW-3 Jamil Ahmad appears an illiterate witness as he has put his thumb impression on the written complaint. As in cross-examination of a witness, questions put to this witness are not recorded, thus, it is not clear that what exact question was asked from this witness and in what sense and context he has replied the same. Such type of paraphrasing regarding statement of a witness is quite probable and natural. The statement of a witness has to be considered as a whole and not a single sentence can not be appreciated out of context. Considering entire statement of PW 3 Jamil Ahmed in the attending facts and circumstances of case, no adverse inference can be drawn on ground that in his cross-examination, at one place PW 3 Jamil Ahmed stated that he got written report from police.

Similarly, so far as other contradictions like that in his cross-examination, PW-1 Hasin Khan has stated that after the incident, till police reached at the spot, he, Shakil, Jameel, his sister or mother have not gone to spot to check as to whether his father is died or alive, whereas While at another place, he stated that after incident of firing, his younger sister Shama has brought a trouser, which was put at head of deceased and that PW-3 has stated in his cross-examination that after incident, no member of his family went at the spot till police reached there, these are minor contradictions and inconsistencies. Such contradictions and inconsistencies do not affect the pith and substance of the 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 in the mind 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. 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).

31. Next piece of evidence against accused-appellants is alleged dying declaration of deceased, recorded by PW 7 SI Satpal Singh. PW-7 has, inter alia, stated that after reaching at the spot, he has recorded statement of deceased Abdul Rehman Khan, who was in an injured condition at that time. PW-7 stated that he has recorded whatever was stated by deceased. PW-7 has proved alleged statement of deceased as Ex. Ka-11. It was argued by learned Amicus Curiae that there is no evidence that deceased was in a fit state of mind to make a statement and further, the original statement of deceased has not been proved and that there are also corrections in the said statement. In this connection, it may be seen that as per statement of PW-7, he has recorded statement of deceased, who was injured in an injured condition at that time, in the case diary. Apparently at that time, statement of deceased was recorded under Section 161 Cr.P.C. Thus, after death of deceased, said statement is admissible in evidence under Section 32(1) of Indian Evidence Act as this statement relates to cause of death of deceased. Therefore, alleged statement Ex. Ka-11 of deceased has to be treated as dying declaration. Though, there is no medical evidence that deceased was in a fit state of mind to make statement but PW-7 clearly stated that deceased has made such statement. No such fact or circumstance could be shown so as to indicate that deceased was not in a fit state of mind. Here, it may be stated that it is nobody's case that after sustaining alleged firearm injuries, deceased became unconscious or that he was unable to speak. Further, deceased has died after two days of the alleged incident. Considering all these facts and circumstances, no such inference can be drawn that

deceased was not in a fit state of mind to make a statement. It is correct that statement was recorded in case diary, but perusal of the record shows that it was exhibited as Ex. Ka-11 by PW-7. Merely because some correction was made in the copy of Ex. Ka-11, it would not make any difference. Though, generally dying declaration recorded by a Magistrate is considered on different footing but dying declaration recorded by a police officer is also relevant and can be proved against accused persons. The reliability of dying declaration depends on peculiar facts and circumstances of each case. In the instant case, there is nothing even to remotely indicate that why PW-7, who was performing his duty as Investigating Officer of the case, would depose falsely regarding alleged dying declaration Ex. Ka-11 of deceased. The version of PW-7 S.I. Stapal Singh is corroborated by PW-3, who has stated in his cross-examination that statement of his father was recorded by the Investigating Officer. Considering entire facts and evidence, there are no sufficient and plausible reasons to discard the alleged dying declaration. Though besides, the dying declaration of Ex.Ka-11 of the deceased, there is also overwhelming evidence in the form of three eye witnesses to establish the involvement of both the accused-appellants in the incident, however, alleged dying declaration Ex. Ka-11 could not to be ignored. Version of PW-1, PW-2 and PW-3 is further supported by dying declaration Ex. Ka-11.

32. Close scrutiny of entire evidence makes it clear that testimony of PW-1 Hasin Khan and PW-3 Jamil Ahmad is clear and cogent. Version of PW-1 finds ample corroboration from PW-3, who has lodged FIR without any undue delay. Both these witnesses have been subjected to cross-examination, but they remained firm to prosecution version and no such fact or material contradiction could emerge so as to doubt their presence at the spot or to doubt their authenticity. The version of PW-1 and PW-3 also finds support from the statement of PW-2 Sarfaraz Khan, who has reached at the spot soon after the incident. In all material particulars, the ocular testimony has been corroborated by medical evidence. One important aspect of the matter is that there is absolutely nothing as to why these witnesses would depose falsely against the accused-appellants, sparing the actual assailant of their father. The defence has not put up any such cogent version that the witnesses have deposed falsely on account of some previous enmity. No specific suggestion has been made to PW-1 Hasin Khan and PW-3 Jamil Ahmad as they were deposing falsely due to any specific reason. Considering all aspects of

the case, testimony of PW-1 Hasin Khan, PW-2 Sarfaraz and PW-3 Jamil Ahmad appears reliable. The version of prosecution further finds support from dying declaration exhibit ka-11. Entire evidence on record proves involvement of both the accused-appellants beyond doubt.

33 view of aforesaid, we are of the considered view that the trial court was justified in convicting the accused-appellants under Section 302/34 of IPC and, accordingly, conviction and sentence of accused-appellants, namely, Salauddin and Riazuddin is affirmed. Both the accused-appellants are stated to be on bail. Their bail bonds are cancelled and they shall be taken into custody forthwith to serve the remaining sentence.

34. The appeal is, accordingly, **dismissed**.

35. Sri Imran Ullah, learned Amicus Curiae, who has argued on behalf of the accused-appellants, shall be paid Rs. 10,000/- as his remuneration.

36. Copy of this judgment be sent to Court concerned for necessary compliance.

**Dated:** 10.12.2019

Anand

(Raj Beer Singh, J)      (Pritinker Diwaker, J)