

Judgement Reserved

AFR

Court No. - 49

Case :- CRIMINAL APPEAL No. - 5508 of 2007

Appellant :- Sanjay @ Kalla

Respondent :- State of U.P.

Counsel for Appellant :- Raghuraj Kishore, Ajay Kumar Sharma, Ashutosh Tripathi, Atmaram Nadiwal, Dharmendra Singhal, Dharmendra Singhal., Hari Om Yadav, Maqsood Ahmad, Mohd. Farooq, Shiv Prakash, Yogesh Srivastav

Counsel for Respondent :- Govt. Advocate

Connect with

Case :- CRIMINAL APPEAL No. - 4794 of 2007

Appellant :- Vinod @ Bhura

Respondent :- State of U.P.

Counsel for Appellant :- Raghuraj Kishore, Naveen Kumar Yadav, Sudhir Kumar Agarwal

Counsel for Respondent :- Govt. Advocate

Hon'ble Manoj Kumar Gupta, J.

Hon'ble Om Prakash Tripathi, J.

(Delivered by Hon'ble Om Prakash Tripathi, J.)

Heard Sri Dharmendra Singhal, learned Senior Advocate assisted by Sri Atmaram Nadiwal, Sri Sudhir Kumar Agarwal and Sri Naveen Kumar Yadav, learned counsel for the appellants as well as Sri A. N. Mulla, learned AGA for the State and perused the material on record.

The appellants have preferred these criminal appeals aggrieved by the judgment and order dated 18.07.2007 passed by the Additional Sessions Judge, Fast Track Court-I, Baghpat in Sessions Trial No. 544 of 2006, arising out of Case Crime No. 406 of 2006, Police Station Barot, District Baghpat convicting and sentencing the appellants to undergo rigorous life imprisonment under Section 302/34 of IPC with a fine of Rs.25,000/- each, in default thereof, to undergo two years rigorous additional imprisonment, therefore, these appeals are heard and being decided together by this common judgment.

The prosecution case is as follows:

Rishi Pal, the complainant, S/o Bhullan, R/o Wazidpur, Police Station Baraut, District Baghpat lodged the first information report on 24.07.2006 at the Police Station Baraut, District Baghpat alleging therein that on 24.07.2006 at 04:30 pm, the son of the complainant namely, Mange was going to see buffalo at the house of Rajiv S/o Padam with Pappu, S/o Vijay Pal and Kaley, S/o Nahar. When all these three persons came in front of the shop of Tejpal Jhevar, Pappu, S/o Vijay Pal began to purchase *gutka*, where Mange Ram and Kaley, stood before the shop. Suddenly, Sanjay @ Kalla and Vinod @ Bhura came from the back side and Vinod @ Bhura caught hold Mange Ram and Sanjay @ Kalla with intention to kill, inflicted gun shot injury upon Mange (son of the complainant), which resulted in the death of the deceased on the spot.

On the basis of the written report (Exhibit Ka.-1), the police registered a case as Crime No. 406 of 2006, under Section 302 IPC and entry about registration of the case was made in the General Diary on 24.07.2006. Investigation of the case was taken over by the Sub-Inspector Suraj Pal Singh (P.W.-5). He rushed to the spot and recorded the statement of the complainant Rishi Pal and prepared the site plan.

The postmortem examination was conducted on the dead body of the deceased Mange Ram by P.W.-4, Dr. P. Kapoor, Medical Officer, Community Health Centre, Baghpat on 25.07.2006 at 10:45 am. As per the post mortem report, the deceased was about 26 years old at the time of the death and possibility of death of the deceased was about 3/4th day from the date of postmortem. On internal examination of the deceased, the doctor opined that the deceased died due to coma, shock and haemorrhage due to ante mortem injuries. Ante mortem injuries are as follows :

Gun shot wound of exit on right side of head of size 3.5 cm x 1.5 cm margin everted.

Gun shot wound of entry on left side of neck of size 7 cm x 5 cm located above left collar bone margin inverted on dissecting underlying tissues and vessels lacerated and torn. On dissecting and probing injury nos. 1 and 2 in direct communication.

During investigation, the Investigating Officer recorded the statements of the witnesses. After completing all formalities of investigation, he submitted the charge sheet (Exhibit Ka.-13) against the appellants in the Court of Chief Judicial Magistrate, Baghpat under Section 302 IPC and the cognizance of offence was taken by the Magistrate. The case was committed to the Court of Sessions Judge by the Chief Judicial Magistrate and thereafter, the case was transferred to the Court of Additional Sessions Judge, Fast Track Court-I, Baghpat. On 17.04.2017, charge was framed against the appellants under Section 302 IPC and the accused-appellants pleaded not guilty and claimed to be tried.

In order to prove the charges framed against the appellants, the prosecution has examined the complainant (P.W.-1) Rishi Pal, (P.W.-2) Pappu, (P.W.-3) Kaley, (P.W.-4) Dr. Pradeep Kapoor, (P.W.-5) Sub Inspector Surajpal Singh, (P.W.-6) Clerk Surendra Singh, (P.W.-7) Ashok Kumar, (P.W.-8) Head Constable Ram Kishan Rathi.

In examination-in-chief the complainant Rishi Pal (P.W.-1) who is a witness of fact, but not eye witness, stated that the incident took place on 24.07.2006. His son Mange was going to see buffalo at the house of Rajiv with Pappu and Kaley. At 4:30 p.m., they reached at the shop of Tej Pal Jhevar, then Sanjay @ Kalla and Vinod @ Bhura came from back side, Vinod @ Bhura caught hold his son and Sanjay @ Kalla, fired gun shot injury by country made pistol, which hit on the head of the deceased and resultantly he died on the

spot. Pappu (P.W.-2) and Kaley (P.W.-3) came at the house of the complainant and narrated the story to the him. The complainant has proved the written report as Exhibit Ka-1. There was hot-talk among Mange, accused Sanjay @ Kalla and Vinod @ Bhura prior to 12 days prior to the incident and both have threatened him. In his cross examination, P.W.1 stated that the incident took place at about 4:30 pm. The house of P.W.-2 is at about one and a half km far from his house. P.W.-2 went to see buffalo. He visited the spot 10-15 minutes after the incident. The information was given by P.W.-2 and P.W.-3, but they have not visited the spot again. The police came on the spot 15 minutes after the incident. Police has recovered one empty cartridges, blood stained soil and plain soil. Recovery memos were not prepared before me. There was injury on the left side of the ear of the deceased, except this, there was no other injury on the body of the deceased.

P.W. 2 Pappu, who is an eye witness of the incident had deposed that incident took place on 24.07.2006, they were going to see buffalo at the house of Rajeev with Mange and Kaley (P.W.-3). They reached at the shop of Tej Pal Jhevar at 04:25 pm. He went to take *dilbag* (gutka) from the shop. Mange and Kaley were standing on *Kharanja*, in the meanwhile, accused namely, Vinod @ Bhura and Sanjay @ Kalla came there, Vinod caught hold Mange from the back side and Sanjay shot fire from country made pistol, which hit on the head of deceased. Seeing the incident, Pappu (P.W.-2), Kaley (P.W.-3) and accused fled away from the place of occurrence. P.W.-2 and P.W.-3 went to the house of the complainant and narrated the story to him. The complainant (P.W.-1) rushed to the place of incident. They also accompanied him and saw that Mange was dead. He wrote the report of the incident. He has identified his handwriting and signature on the written report (Ex.Ka-1).

In cross-examination, P.W.-2 stated that the shop of Tej Pal is about four steps far from the place of occurrence. He stood at the gate of the shop and there was no other person. Tej Pal has not seen the occurrence, because he was inside of the shop. There was only one fire on the spot. When accused Vinod caught Mange (deceased), the deceased shouted, then P.W.-2 reached there. He told the complainant that Kalla fired gun shot upon Mange, but he did not tell about the death of the deceased on the spot. Written report was dictated by the complainant P.W.-1 and some lines were written by P.W.-2, both prepared the written report jointly. The complainant had not seen the occurrence. He told the complainant that Mange received gun shot injury and he rushed from the spot. All the facts are not required to be narrated in the FIR. After receiving fire arm injury, Mange fell down and all of them along with the accused fled away from there. This fact was not mentioned in the FIR. Mange died on the spot. After incident, we ran in the north side and accused ran in the south side. In the spot map, direction of fleeing away has not been shown by the Investigating Officer. The reason is not known to him. Sanjay put fire arm over Mange from 4-5 steps. When Sanjay shot fire on Mange, Vinod caught hold the leg of Mange. This fact was not written in the FIR. He has shown the place from where accused fired upon Mange, if this place was not shown in the spot map, then he could not give reasons therefor. He has heard that there was hot talk among deceased and accused about 15 days prior to the incident. This fact was told by him. Regarding this, no report has been lodged. The appellants-accused murdered the deceased due to enmity. In the report, it was not alleged that country made pistol was not used as weapon in the commission of offence, only '*weapon*' word has been used. Country made pistol and *Katta*, both are the same weapons. When Mange received fire arm

injury on his head, he was five steps far from the spot. When accused Vinod caught hold Mange, accused Sanjay was about five steps far from Vinod. When Vinod caught Mange, the back of the Mange was in south and west side. Face of Vinod was very near to the back of Mange. Face of Mange was towards shop. When police took the dead body of the deceased, then there was protest by villagers to pressurise the police to arrest the accused. When Vinod caught hold Mange, he was in bent position. Vinod caught hold both the legs of Mange. Accused Sanjay had not stated to Vinod to catch hold Mange before him. Mange tried to save himself, meanwhile, he received fire arm injuries. At the time, when Vinod caught hold Mange, he had not taken *dilbag* (*gutka*), shopkeeper was taking the *dilbag* from the shop, he did not know that there were fifty cases against Mange and faced long litigation. It is wrong to say that due to terror of deceased someone has murdered him.

P.W.-3. Kaley, who is an eye witness, had supported the prosecution case and deposed that incident took place about 9-10 months ago. Kaley, Mange, father of Mange, Rishi Pal sat in the house. Pappu came in the house and said to give company in seeing the buffalo. They proceeded to see the buffalo. They reached at the shop of Tej Pal, Pappu said that it is not the time for milking, he wanted to purchase *gutka*. Pappu went to the shop of Tej Pal to purchase *gutka* at 4:00-4:15 pm. He was standing there, Mange was also standing behind Kaley. Bhura caught hold Mange from the back side and Kalla put fire arm injury on the head of Mange. Bhura and Kalla fled away from the spot Kaley and Pappu also fled towards the house and told the incident to the father of the deceased Mange that Mange received fire arm injury. On hearing, they proceeded towards spot and saw that Mange died on the spot. They again returned back to his house and report of the incident was written by

Pappu. Election took place 20 days prior to the incident. Accused threatened Mange that they would not leave him.

In cross-examination, he has stated that Mange is the son of his real uncle Rishi Pal. Pappu s/o Vijay Pal had good friendly relations with Mange. Mange was affected by *folize* (disease) from 14 years. He was under treatment. He was standing in the left side of the shop of Tej Pal at the time of incident. He has not visited the school; there was Kharanja on the spot. The house of accused Sanjay and Vinod are nearby and they can be approached there within 3-4 minutes. There were houses in all directions from the spot. It was well developed area. After the incident, he went from the place of occurrence. Sanjay and Vinod also fled away from the place of occurrence. Police came on the spot after half an hour of the incident and recovered one *empty cartridge* from the spot and taken soil from there and sent for FSL report. Police recorded the evidence of the complainant Rishi, Kaley and Pappu. Rishi Pal went to the police station for lodging FIR in the vehicle of Anuj. He has told that incident took place at 4:15 pm. Police station is about 3 kms far from his village. Police Chauki is about 1 km far from his village. Written report was prepared by P.W.-2 and then given to the complainant. As soon as they reached the shop, incident took place within a second. It took 15 minutes time in reaching the house of the complainant. He told the Investigating Officer that Bhura and Kalla fled away from the spot. If this statement was not written by Investigating Officer, he could not disclose the reason. He visited three times on the spot on the date of incident, where the dead body of Mange was lying; Rishi Pal wept bitterly. Mother of Mange also came there and she also wept. He and accused did not flee in the same direction. Accused had not abused Mange on the spot. Mange, the deceased

was unmarried. Vinod lives in the village. It is wrong to say that Vinod was doing job in Delhi and Muzaffar Nagar in security service. I saw the incident, there was only one fire arm shot. Accused Sanjay came with country made pistol from his back side; when Sanjay shot fire upon Mange, he was about four steps far from him. Deceased and accused Sanjay were on the same height. Kaley was on the platform (*chabutara*). He saw the incident standing on platform, Pappu was standing at the gate of the shop, blood was lying on the bricks of *kharanja*. After the incident, Kaley fled away from the place of occurrence. There was fire arm injury on the head of Mange; due to the said fire arm injury, Mange died on spot. Pappu was with Kaley. The entire incident which was seen by Kaley, was narrated to complainant.

P.W.-4 Dr. Pradeep Kapoor, evidence of the doctor has already been stated earlier.

P.W.-5 S.I. Suraj Pal Singh had proved recovery memo of blood stained and plain earth (Ex.Ka.-3) and recovery memo of empty cartridge (Ex.Ka.-4). This witness has also proved that site plan (*naksha nazri*) (Ex.Ka.-5) and inquest report (Ex.Ka.-6), which was prepared by S.I. Sompal Singh. Letter R.I. (Ex.Ka.-7), letter, Chief Medical Officer (Ex.Ka.-8), photo of dead body (Ex.Ka.-9), Challan (Ex.Ka.-10), report of FSL (Vidhi Vigyan Prayogshala) (Ex.Ka.-14), pant material (Ex.-5), shirt material (Ex.-6), Kalava (band) material (Ex.-7), shoes material (Ex.-8) and cloth material (Ex.-9) have been produced by the prosecution as documentary evidence.

P.W.-6 Constable Clerk, Surendra Singh had proved FIR as (Ex.Ka.-14) and carbon copy of GD (Ka.-15).

P.W.-7 Constable Ashok Kumar had proved recovery memo of country made pistol (Ex.Ka.-11).

P.W.-8 ASI Ram Kishan Rathi, who was Investigating Officer of Crime No. 432 of 2006 under Section 25/27 Arms Act, had proved smart map (Ka.-16), prosecution signature (Ka.-17), chik FIR (Ka.-19) and carbon copy of GD (Ka.-20).

Accused had examined D.W.-1 (Dhare) and D.W.-2 (Constable Sudesh Kumar) in his defence and had proved the history-sheet of Mange (Ex.Kha.-1), accused Vinod @ Bhura had filed photostat copy of Security Services from the list. No other evidence has been adduced by the defence.

After evaluating the evidence available on record, the Trial Court reached to the conclusion that the prosecution has successfully proved its case against the appellants beyond reasonable doubts and accordingly convicted and sentenced the appellants as referred above.

Learned counsel for the appellants has submitted that they have been falsely implicated in this case. He further submitted that the case of the prosecution falls within the ambit of Section 304 Part-1 IPC. Accused was history-sheeter, notorious person, he has enmity with so many persons, but there was no motive to cause the incident. There is contradiction in the statements of the witnesses. They are related to the deceased. Their testimonies are not reliable and trustworthy.

Learned counsel for the appellant Vinod @ Bhura has submitted that role of accused Vinod is quite different, he was not present on the spot. Role of catching hold the deceased has been assigned to the accused as alleged by prosecution, is false.

Statement of the accused under Section 313 Cr.P.C. had been recorded, in which, he has stated that witnesses had given their evidence due to enmity and village party bandi and accused had been falsely implicated in the present case. Accused -Sanjay @ Kalla has stated that deceased was defamed in the area. He had enmity with others and he has ill will against the females of the village. In this regard, many times panchayat was organized. His father and family members insulted the father of Mange and Pappu, so he was falsely implicated. Vinod @ Bhura had stated in his statement that he is living in Delhi and Muzaffar Nagar with his children prior to 7-8 years of the incident; he was working as Security Guard and on the day of the incident he was not present in the village.

Police had filed another charge sheet against accused Sanjay @ Kalla under Section 25/27 Arms Act. Prosecution case, in brief, in this regard is that recovery memo had been prepared on 11.08.2006 (Ex.Ka.-11), in which, it has been stated that while in police remand the accused Sanjay @ Kalla had taken the police personnel to the place where weapon of the murder had been hidden by the accused and on the pointing out of accused Sanjay @ Kalla, *Alha katal* was recovered; accused had concealed country made pistol of 315 bore in the field of sugar cane. Accused has also stated that on 24.07.2006, he had committed the murder of Mange by that country made pistol.

Prosecution had examined PW-7 (Constable Ashok Kumar) to prove the recovery memo and P.W.-8 (ACP Ram Kisan Rathi), who conducted the investigation of this case and filed charge sheet under Section 25/27 Arms Act against the accused Sanjay @ Kalla (Ex.Ka.-18). He also proved GD of this Crime No. (Ex.Ka.-19). After examination of the entire evidence, learned trial

court had acquitted the accused Sanjay @ Kalla for the charges under Section 25/27 Arms Act against which no appeal has been preferred.

Learned AGA vehemently opposed the submissions made by learned counsel for the appellants and submitted that it is a daylight murder; eye witnesses had been examined, whose testimony is fully reliable and credible. There is no cause to falsely implicate the accused. Accused had committed very serious offence, which has been proved by the prosecution through cogent, reliable and trustworthy evidence beyond reasonable doubt. In this way, learned trial Judge has passed the judgment and order dated 18.07.2007 and sentenced the appellants properly as per law. The evidence on record is sufficient on the basis of which learned trial Judge has concluded the conviction of appellants which is right in the eyes of law. There is no illegality or impropriety in the order dated 18.07.2007. The appeals are of no force and are liable to be dismissed.

We have heard Sri Dharmendra Singhal, learned Senior Advocate assisted by Sri Atmaram Nadiwal, Sri Sudhir Kumar Agarwal and Sri Naveen Kumar Yadav, learned counsel for the appellants as well as learned AGA for the State and perused the material available on record.

Learned counsel for the appellants has submitted that present FIR is ante-time and has pointed out the statement of complainant (PW-1), which is on page 38 of paper book, that he has not stated in the report that there was hot talk among his son and accused 10 days prior to the incident. He has not stated the fact in the report that he was unaware about that fact. He came to know about that fact after lodging report on the basis of rumour in the village.

The incident took place on 24.07.2006 at 4:30 pm and FIR was lodged at 6:15 pm, place of occurrence is about 4 kms far from the police station. PW-1 (complainant) has proved (Ex.Ka.-1), written report through his statement. Scribe of the said written report i.e. Pappu (PW-2), also proved the writing and contents of the written report. On the basis of this report, FIR was lodged. PW-6 (Constable Clerk Surendra Singh) has proved chik FIR as (Ex.Ka-14A) and GD as (Ex.Ka.-15).

PW.-1 has stated in his statement that he had prepared written report with the help of Pappu s/o Vijay Pal. Pappu is the writer of the report. Contents of the report has been told to Pappu by him and few facts were also written by Pappu himself, as he was eye witness. Police came on the spot after lodging the report, there was protest against the police for 24 hours for the reason that actual name of assailants were not told to him clearly. On this point PW-2 has stated that protest was made against the police to pressurize the police for arresting the accused. Thus, it is evident that FIR has been lodged against the accused within two hours from the time of incident. Police station is 4 kms far from the place of occurrence. Deceased was 26 years old and after the murder of such young son, father has consoled himself and lodged FIR within 2 hours. It shows that FIR was lodged promptly without consultation or legal advice. Natural facts were stated in the FIR. It is also alleged that in panchayatnama, names of the assailants have not been mentioned, which shows that panchayatnama has been prepared prior to lodging the FIR. Crime number and Section details of GD has been mentioned in the panchayatnama. Mentioning the name of the accused is not required in inquest report as held in the case of **Seikh Ayuub Vs. State of Maharashtra 1999 SCC Criminal page 1055**. Thus, from the evidence on record, it is clear that FIR was lodged prior

to panchayatnama. FIR is not anti-time but lodged promptly within two hours from the time of the occurrence without due consultation.

Learned counsel for the appellants has submitted that there was no motive to cause that incident. Motive has not been stated in the FIR. In the evidence, it has come that 10 days prior to the incident, there was hot talk among the deceased and accused. From the evidence on record, it is evident that deceased was a man of criminal mentality and he was within top 10 criminals of the police station. From the evidence on record, it is also proved that the incident took place at 4:30 pm, there was ample light on the spot to recognize the accused by the witnesses. It is a case of direct evidence. In the case of direct evidence, motive becomes insignificant.

In support of above contentions, learned A.G.A. placed reliance on following decisions :

In Pratap Singh and others vs. State of UP 2021, SCC Online All 686, the Court held that :

“motive is not very relevant in a case of direct evidence, where it dependable ocular version is available. Once, there is evidence forthcoming on the basis of an eye witness account that is consistently narrated by multiple witnesses motive is hardly relevant. “

In Abu Thaker Vs. State of Tamil Nadu, (2010) 5 SCC 91, the Court held that :

“It is settled legal proposition that even if the absence of motive and if allowed is accepted that is of no consequence and pales into insignificance when direct evidence establishes the crime, therefore, in case, there is direct, trustworthy evidence of witnesses as to commission of an offence, the motive part loses its significance. Therefore, if the genesis of motive of occurrence is not proved, the ocular testimony of the witnesses as to the occurrence could not be discarded only by reason of absence of motive, if otherwise the evidence is worthy of reliance.”

In Bipin Kumar Mondal Vs. State of West Bengal, (2010) 12 SCC 91, the Court held that :

“motive is of no consequence and pales into insignificance when direct evidence establishes the crime. Motive is a thing which is primarily known to the accused himself and it may not be possible for the prosecution

to explain it. Ocular testimony of the witnesses if reliable cannot be discarded only by the reason of the absence of motive."

Trial court was also of the view that P.W.-2 and P.W.-3 has deposed that both were present at the time of occurrence. Murder of Mange has been committed before them. They have witnessed the occurrence. Thus, in the presence of direct and reliable evidence, motive loses its importance. It is not required to mention each and everything in the FIR. If motive has not been mentioned in the FIR, this will not damage the prosecution case.

The postmortem examination was conducted on the dead body of the deceased Mange Ram by Dr. P. Kapoor, Medical Officer, Community Health Centre, Baghpat on 25.07.2006 at 10:45 am. Deceased was about 26 years old and possibility of death of the deceased was about 3/4th day from the date of the postmortem.

On internal examination, doctor found that the deceased died due to coma, shock & haemorrhage due to ante mortem injuries. Ante mortem injuries have already been discussed above. In the opinion of the doctor, cause of death was due to coma, shock & haemorrhage and due to ante-mortem injuries.

The main question before us is that, whether accused Sanjay @ Kalla and Vinod @ Bhura caused the murder of Mange in furtherance of common intention? P.W.-1 the complainant (father of the deceased) has deposed in his evidence that incident took place on 24.07.2006, his son Mange along with Pappu and Kaley went at the house of Rajeev to see a buffalo. They reached at the shop of Tej Pal Jhevar at 4:30 pm, Pappu went to purchase *dilbag* (gutka) from the shop. Mange and Kaley were standing outside the shop, then Sanjay @ Kalla and Vinod @ Bhura came from the back side, Vinod caught

hold his son Mange and Sanjay fired from country made pistol which hit in the head of Mange and he died on the spot. Pappu and Kaley came at the house and told the story to the complainant.

P.W.-2 is the eye witness who has deposed that incident took place on 24.04.2006, when they were going to see buffalo at the house of Rajeev with Mange and Kaley. They reached at the shop of Tej Pal Jhevar at 04:25 pm. He went to take *dilbag* (gutka) from the shop. Mange and Kaley were standing on *Kharanja*, in the meanwhile, accused namely, Vinod @ Bhura and Sanjay @ Kalla came, Vinod caught hold Mange from the back side and Sanjay shot fire from country made pistol on the head of Mange. Seeing the incident, Pappu, Kaley and accused fled away from the place of occurrence. Pappu and Kaley went at the house of the complainant Rishi and told about the incident.

P.W.-3 who has given eye witness account, has also stated that incident took place about 9-10 months ago. Kaley, Mange, father of Mange, Rishi Pal; sat in the house. Pappu came in the gher and said to give company in seeing the buffalo. They proceeded to see the buffalo. They reached at the shop of Tej Pal; Pappu said that it is not the time for milking; he wanted to purchase *gutka*. Pappu went at the shop of Tej Pal to purchase *gutka* at 4:00-4:15 pm. He was standing there, Mange was also standing behind Kaley. Bhura caught hold Mange from the back side and Kalla fired on the head of Mange. Bhura and Kalla fled away from the spot. Kaley and Pappu also fled away towards the house and told the father of Mange, Rishi Pal that Mange received fire arm injury. On hearing that, they proceeded towards spot and saw that Mange died on the spot.

In cross-examination, he stated that there is no evidence on record which shows that accused had not committed the heinous crime. The presence

of accused, deceased and witnesses were proved on the spot. It is evident from the postmortem report that deceased sustained gun shot injury-exit on right side of head of size 3.5 cm x 1.5cm margin everted, gun shot wound of entry on left side of neck of size 7 cm x 5 cm located 3cm above left collar bone margin inverted on dissecting underlying tissues and vessels lacerated and torn and dissecting & probing injury nos. 1 & 2 in direct communication.

It is also submitted that such injury is not possible five steps far from where the accused shot fire over the deceased. The nature of injury shows that injury has been caused on vital part of the neck of the deceased but there was no blackening and tattooing on the entry wound, which shows that firing was made from some distance from the deceased. Thus, from the evidence, it is proved beyond reasonable doubt that weapon used by Sanjay @ Kalla matches with the injury sustained by the deceased and accused Sanjay @ Kalla is only the person who caused gun shot injury to the deceased by which, the deceased Mange succumbed to death.

So far as the role of Vinod @ Bhura is concerned, the role of catching hold the deceased from the back side has been assigned to accused Bhura. Witnesses P.W.-2 and P.W.-3 had stated that Vinod had caught hold the leg of the deceased in bent position so there was no danger to receive any injury to Vinod. Before the Court, the witness has also shown after catching the advocate below his hip. In such position, co-accused Vinod caught hold the deceased keeping in mind his safety, Sanjay @ Kalla had also fired gun shot injury in the neck and head of the deceased. There is no reason to falsely implicate the accused by the prosecution.

So far as section 34 IPC is concerned, the act of accused was done in furtherance of common intention to kill the deceased Mange. It is very difficult

to know the mental status of a person. Common intention should be gathered by the act and conduct of the accused. Both the accused came jointly from the same direction, Sanjay was carrying loaded country made pistol, Vinod caught hold Mange and Sanjay fired upon him. After committing the crime, they fled in the same direction from the place of occurrence. Deceased become helpless to save himself due to catching hold by the accused Vinod. Thus with the help of the said act and conduct, the accused persons succeeded in their common intention to kill the deceased Mange. Accused Sanjay @ Kalla caused fire arm injury on the neck which is on the vital part of the deceased and the exit wound is on right side of the head of the deceased.

So far as the role of Vinod @ Bhura is concerned, Vinod has taken the plea of alibi that he was not present on the spot and was doing service in Delhi or Muzaffar Nagar. In this support, Vinod had filed few papers from the said firm vide 73(b), but the papers had not been proved by any witness and no witness has been produced by Vinod @ Bhura in his support that at the time of occurrence he was not present on the spot.

Contrary to this, it is averred by P.W.-3 on page-4 that Mange was suffering from disease folize from 10 years, his leg was comparatively thin. Knowing this fact, accused Vinod caught hold Mange, by which, he became unable to defend himself and the act of Vinod had facilitated accused Sanjay @ Kalla in commission of crime. Accused Vinod @ Bhura had caught Mange at koli, leg, hip is immaterial. The role of Vinod shows that his act was effective in facilitating the commission of crime and his participation in commission of the crime was active one.

So far as the defence taken by the accused under Section 313 Cr.P.C. is concerned, accused Vinod had not stated that someone had thrown the dead

body of the deceased after killing him. In the statement under Section 313 Cr.P.C., Sanjay had also not stated that someone has thrown the body of the deceased before the shop of Tej Pal. Defence has examined Dhare as D.W.-1, who has deposed that about 3:00 pm, three assailants came after covering their face by *chaddar* and throw the body of Mange before the shop of Tej Pal. In fact this was not the case of defence. No suggestion has been placed in the cross-examination of witnesses of fact that unknown assailant threw the dead body of the deceased Mange on spot. Trial court has not relied on the evidence of D.W.-1 Dhare. Evidence of D.W.-1 is totally improbable and unreliable. But the evidence of the witness shows that dead body of Mange was lying before the shop of Tej Pal. No argument has been placed on the point of spot map, spot map was not challenged by the defence. Spot map is prepared according to place of occurrence. From the evidence, it is proved that deceased with witnesses were going to see the buffalo, he was not returning from there. From evidence of D.W.-2, it is proved that deceased Mange was history-sheeter and was within the top ten criminals of the police station but there is no evidence that some other person had committed this crime except the accused. The defence taken by the accused is not probable.

Contradictions are minor in nature, evidence of eye witnesses i.e. ocular evidence has been supported by medical evidence.

It is also submitted that witness P.W.-2 Pappu is friend of the deceased and Kaley P.W.-3 is nephew of the deceased. Thus, they are related witnesses and the testimony of these witnesses is not reliable. No independent witness has been produced by the defence.

In support of the above contentions, the learned A.G.A. placed reliance on the decisions in following cases :

In Mohd. Rojali Ali and others vs. State of Assam (2019) 19 SCC 567, the Court held that :

“A related witness cannot be said to be an interested witness merely by virtue of being a relative of the victim, a witness may be called interested only when he or she drags some benefit from result of litigation which is in the context of a criminal case would mean that witness has a direct or indirect interest in seeing accused punished due to prior enmity or other reasons and thus has a motive to falsely implicate the accused.”

In Laltu Ghosh Vs. State of West Bengal (2019) 15 Supreme Court Cases 344, the Court held that :

“Related witness cannot be said to be an interested witness merely by virtue of being the relative of the victim. The scrutiny of evidence of related witness should be more caution.”

In the present case, Pappu P.W.-2 and Kaley P.W.-3 are the natural witnesses. There is long cross-examination but nothing adverse came out against prosecution. Both witnesses were present on the spot, witnessed the occurrence and informed the father of the deceased P.W.-1. There is no ground to discard the evidence of P.W.-2 and P.W.-3 eye witnesses; their evidences are supported by medical evidence; the evidence of P.W.-2 and P.W.-3 is fully reliable and credible. Witnesses have no enmity with the accused and there is no ground to falsely implicate them. The submission of defence that witnesses are related one, is not tenable. This does not affect prosecution case. Injury inflicted by the accused on the vital part of the deceased in furtherance of common intention of both the accused is proved beyond reasonable doubt. The submission of the learned counsel for the appellants that the case of the prosecution comes within the ambit of Section 304 Part-I of IPC, is not applicable in present facts, circumstances and evidence of the case.

In our opinion, the guilt of appellants has been established by the prosecution beyond reasonable doubt. Death of the deceased Mange is homicidal one caused by gun shot injury inflicted by accused Sanjay with

active support of accused Vinod. There is no manifest error or illegality in the finding of the trial court.

On the basis of above discussion, we are of the view that judgment and order of the trial court dated 18.07.2007 passed by Additional Sessions Judge, Fast Track Court-I, Baghpat in Sessions Trial No. 544 of 2006, arising out of Case Crime No. 406 of 2006, Police Station Barot, District Baghpat convicting and sentencing the appellants to undergo rigorous life imprisonment under Section 302/34 of IPC with a fine of Rs.25,000/- each, in default thereof, to undergo two years rigorous additional imprisonment, is hereby confirmed.

During trial, accused Sanjay @ Kalla remained in judicial custody and accused Vinod @ Bhura is on bail. The appellant Vinod @ Bhura shall surrender before C.J.M. Baghpat forthwith to serve the remaining period of sentence. Bail bond filed by accused Vinod @ Bhura is forfeited and sureties are discharged.

The appeals are devoid of merits and liable to be dismissed. The appeals are, accordingly, **dismissed**.

Order Date : 18.11.2021.

Monika

(Hon. Om Prakash Tripathi, J.) (Hon. Manoj Kumar Gupta, J.)