

A.F.R.  
Judgment Reserved On: 07.09.2021  
Judgment Delivered On: 27.09.2021

**Court No. - 48**

**Case :-** CRIMINAL APPEAL No. - 6693 of 2010

**Appellant :-** Sayeed Alias Sahid And Another

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

**Counsel for Appellant :-** Smt. Nayan Shri, I.M. Khan, Sudhanshu Srivastava

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

**Hon'ble Anjani Kumar Mishra, J.**

**Hon'ble Syed Aftab Husain Rizvi, J.**

**Per: Hon'ble Syed Aftab Husain Rizvi, J.**

1. Heard Sri I.M. Khan, learned counsel for the appellants, learned A.G.A. for the State and perused the record.
2. This criminal appeal has been filed against the common judgment and order dated 26.08.2010 passed by the Additional Sessions Judge, court no.6 Saharanpur in S.T.s No. 742 of 2005 (*State vs. Sayeed alias Shahid*) in case crime no.448/05 under Section 302 and 307 IPC, S.T. No.744 of 2005 (*State vs. Sayeed alias Shahid*) in case crime no.453/05 under Sections 25/4 of Arms Act, and S.T. No.746 of 2005 (*State vs. Zahid*) Case Crime No.470/05, under Section 25/4 of Arms Act, P.S. Kotwali Dehat, District- Saharanpur, convicting the accused-appellants (Sayeed @ Shahid and Zahid) under Section 302/34 and sentencing each of them to undergo life imprisonment, and a fine of Rs.5000/- and in default of payment of fine, three months simple imprisonment, under Section 307/34 to undergo rigorous imprisonment for seven years and fine of Rs. 3,000/- and in default of payment of fine, three months simple imprisonment and further convicting the accused-appellant (Sayeed @ Shahid) under Section 25/4 of Arms Act and sentencing him to undergo rigorous imprisonment for one year and a fine of Rs.1000/- and in default of payment of fine, one month simple imprisonment and accused-appellant (Zahid) under Section 25/4 of Arms Act

and sentencing him to undergo rigorous imprisonment for one year and imposing a fine of Rs.1000/- and in default of payment of fine, one month simple imprisonment. All the sentences to run concurrently.

3. In brief the prosecution case is that complainant- Furkan gave a written information dated 09.09.2005 at Police Station- Kotwali Dehat, District- Saharanpur that today on 09.09.2005 at about 7:00 p.m. he along with his father Rashid Ahmad and brothers Nasir, Kabir and Abdul Qadir after offering Namaz were coming out from the Mosque situated at pooja road, village- Rasoolpur when accused-persons Islam, Shahid, Zahil (correct name-Zahid) and Israr who are the resident of the same village armed with knives/ chhura and saying that today no one should be let alive suddenly with the intention to kill, attacked them. His brothers Nasir and Kabir got seriously injured and Abdul Qadir also received serious injuries. Fear and panic prevailed. The devotees coming out from the Mosque ran helter-skelter bare footed to save their lives and the neighbours out of fear shut the doors and windows of their houses. All the four accused persons seriously injured the three brothers of the complainant. Complainant and his brothers ran towards their house to save their lives, the accused-persons chased them and entered into their house because of which the female members of the house ran outside towards the forest to save their lives. Injured Nasir, Kabir and Qadir were taken to the District Hospital by the complainant and his father with the aid of other villagers where the doctor declared Nasir and Kabir dead while Abdul Qadir is under treatment. The incident has been witnessed by the complainant and his father and other villagers in the electric light.

4. On the aforesaid written information, case crime no.448 of 2005 under Sections 307 and 302 IPC was registered against Islam, Sayeed, Zahil and Israr all sons of Phullu and the investigation commenced, the inquest report and related papers of the dead bodies of Nasir and Kabir were prepared, the dead bodies were sealed and sent for post-mortem. The Investigating Officer visited the place of occurrence and collected the blood stained and plain soil from the spot and sealed it in separate containers, prepared the site plan, recorded the statement of complainant and other witnesses.

During the course of the Investigation on 14.09.2005, the police party comprising Investigating Officer S.O. Vijay Kumar Yadav, HCP Madanlal Singh, Constable- Sudhir Kumar, Constable- Sunil Kumar and Constable (driver)- Surendra Singh at about 4:30 a.m. arrested the accused Sayeed and Islam and on interrogation they furnished the information that the knife and Chhuri used by them in the incident was concealed and on the aforesaid information, one knife was recovered at instance of accused Sayeed alias Shahid under the trees towards west of Kothi situated at Maqbool Nursery and another knife was recovered at the instance of Islam from other place in presence of public witnesses Furkan Ahmed and Mohd. Ishaq at about 6:30 a.m. The recovered knives were sealed on the spot and recovery memo was prepared and on the basis of recovery memo, a separate FIR case crime no.453 of 2005 under Section 4/25 of Arms Act against Sayeed alias Shahid and case crime no.454 of 2005 under Section 4/25 of Arms Act against Islam were registered on 14.09.2005 at 8:30 a.m. at police station-Kotwali Dehat, Saharanpur.

Further on 20.09.2005, the police party comprising Investigating Officer S.O. Vijay Kumar Yadav, HCP- Madanlal Singh, Constable- Rajveer Singh, Constable- Dalchandra, Constable (driver)- Surendra Singh arrested accused Zahid at 7:00 am and on his interrogation he also disclosed that he has concealed the knife used in the incident and on his instance the same was recovered at about 7:50 am from the western boundary of Moonji field of Maqbool. The recovery memo was prepared on the spot and the knife was sealed and a case crime no.470 of 2005 under Section 4/25 of Arms Act was registered against accused-Zahid.

The investigation of the aforesaid two cases was conducted by S.I.- Ashok Kumar and S.I.- Adesh Kumar respectively who visited the place of occurrence, prepared the site plan, recorded the statement of witnesses and submitted the charge-sheets.

The investigation of the main case under Section 302 and 307 was completed by Inspector Vijay Kumar Yadav- SHO, Kotwali Dehat, Saharanpur and he submitted the charge-sheet against all accused-persons

namely Israr, Islam, Sayeed *alias* Shahid and Zalim *alias* Zahid under Section 307 and 302 IPC.

5. Accused Israr and Islam being juvenile, their cases were separated and transmitted to Juvenile Justice Board for further proceedings. Accused Sayeed *alias* Shahid and Zalim *alias* Zahid were tried for offence under Sections 307 and 302 IPC and also under Section 4/25 of Arms Act in the three Sessions Trial which have been consolidated and decided by the impugned common judgment.

6. The trial court framed the charges under Section 302/34 and 307/34 IPC against accused Sayeed *alias* Shahid and Zalim *alias* Zahid and the separate charge under Section 4/25 of against each accused Sayeed *alias* Shahid and Zahid. Accused denied the charges and claimed for trial. The prosecution has examined 10 witnesses who have proved 33 prosecution papers marked as Ex.Ka-1 to Ex.Ka-33. Four material exhibits (Ex.1 to 4) were also produced before the trial court. The statement of accused were recorded under Section 313 Cr.P.C. in which they have denied the prosecution case. The accused have also stated that injury report and Bed Head Ticket (BHT) of injured Qadir have been fabricated on legal advice, the Investigation has been conducted showing ante-time proceedings. They have also stated that they have been arrested from their houses and falsely implicated and they are innocent. No evidence in defence was produced.

7. The injured Abdul Qadir was medically examined on 09.09.2005 at 10:00 p.m. by Dr. Mahesh Grover, Emergency Medical Officer of District Hospital, Saharanpur. Following injury was found on his body:

*Incised wound 3 cm X 1cm X muscle deep on left side head, behind left ear, fresh bleeding was present.*

In the opinion of the doctor, the injury was caused by some sharp object and duration was fresh, injured was admitted. Dr. Mahesh Grover (P.W.-3) has proved the injury report as Ex.Ka-2 and has further stated that the injury of the injured may have been received at 7:00 pm and may be

caused by knife/ choori. Dr. Mahesh Grover (P.W.-3) has also proved the BHT of injured Abdul Qadir marked as Ex. Ka-3 according to which the injured was admitted in SBD District Hospital, Saharanpur on 09.09.2005 at 10:00 p.m. and was discharged from hospital on 10.09.2005. The details of treatment given to the injured (patient) are also recorded in it.

8. The postmortem of deceased-Nasir was conducted on 10.09.2005 at 4:30 a.m. by Dr. R.K. Gupta and according to post-mortem report Ex.Ka-4 the age of the deceased was about 16 years, average built body, Rigor Mortis was present all over the body and there was no decomposition, eyes were closed. Following ante-mortem injuries were found on the body.

*i. Incised wound 1cm X 0.5cm X muscle deep on right side nose, 2cm below right eye-brow.*

*ii. Abrasion 5cm X 3cm on right side neck, 4 cm below right ear.*

*iii. Abrasion 2cm X 2cm on left side chest, 7cm above left nipple at 1 O'clock position.*

*iv. Incised wound 4cm X 2cm X abdominal cavity deep on front of abdomen, in mid-line, 13cm above umbilicus.*

In the internal examination both lungs were pale, right chamber of heart contained blood, peritoneum was lacerated and one litre blood was in the cavity, stomach contains 100gm semi digested food, in small intestine and large intestine gases and fecal matters were present, gallbladder was full, spleen and kidneys were pale.

In the opinion of doctor, the death was due to shock and haemorrhage, as a result of injuries sustained and duration of death was about half day.

9. The postmortem of other deceased- Kabir was conducted on 10.09.2005 at 3:45 a.m. by Dr. R.K. Gupta and according to postmortem report (Ex.Ka-5) the age of the deceased was about 22 years, average built body, Rigor Mortis was present all over the body, no decomposition present, eyes were closed.

Following ante-mortem injuries were found on the body:

- i. Incised wound 4cm X 0.25cm, muscle deep on left side of forehead, 2cm above left eye brow.*
- ii. Incised wound 3cm X 0.25cm X muscle deep on left side forehead, 3cm above left eye brow and this injury was communicating to injury no.1.*
- iii. Incised wound 7cm X 0.5cm X bone deep on right side head, 7cm above right ear.*
- iv. Incised wound 5cm X 3cm X abdominal cavity deep, 6cm above umbilicus at 11.45 O'clock position. Loops and omentum of intestine coming out of wound.*
- v. Incised wound 5cm X 1cm X muscle deep on left side back of chest, 3cm below inferior angle of left scapula.*
- vi. Incised wound 5cm X 2cm X muscle deep on left side back of chest, 10cm below injury no.5.*
- vii. Incised wound 8cm X 3cm X muscle deep on back right side chest, 7cm below inferior angle of right scapula.*

In internal examination both lungs were pale, right chamber of heart contains blood, peritoneum was lacerated and one litre blood was present, stomach was empty, in small intestine and large intestine gases and fecal matters were present, gallbladder was full and liver was lacerated and pale, spleen and kidneys were pale.

In the opinion of doctor, death was due to shock and haemorrhage, as a result of injuries sustained and duration was about half day.

Both postmortems were done under artificial light by the order of ADM (F) and CMS, SBD Hospital, Saharanpur.

10. The prosecution case is based on direct evidence and two eye witnesses Furkan (P.W.-1) and Abdul Qadir (P.W.-2) have been produced by the prosecution. Furkan (P.W.1) is also the complainant while P.W.-2 is injured, they are also brothers of the deceased Nasir and Kabir and hence related witnesses. The examination in chief of Furkan (P.W.-1) has been

recorded twice, first on 07.01.2008 and thereafter on 16.04.2008 when the case of co-accused Islam was consolidated but later on it was separated and sent to Juvenile Justice Board. In examination in chief recorded on 16.04.2008 the witness has said that the incident is about two years and six months before. It was 7:00 pm when he was coming out of the Mosque after offering Namaz; Kabir, Qadir, Nasir and his father Rashid were also with him, when we came out the accused-persons namely Sayeed, Zahid, Islam and Israr armed with knives/Chhuri were standing there and said that none of them should go alive and all the accused persons attacked Kabir and Nasir with knives and Chhuri. When Qadir came to rescue them, they also stabbed him with knife on his upper part of the neck. Accused also chased him but he ran away. In this attack Kabir, Nasir and Qadir received injuries, and he, his father and other persons of the village carried the injured persons to the hospital where doctor declared Nasir and Kabir dead while Abdul Qadir was admitted in the hospital and medically examined. At the place of occurrence, there was electric light. The witness has further stated that he got the report of the said incident written by Killan Saheb (Advocate) in the hospital and lodged the report at police station. The witness has proved the *Tehrir* marked as Ex.Ka-1. Witness has further stated that panic prevailed in village due to this incident.

11. Abdul Qadir (P.W.-2) in his examination in chief has also supported the prosecution case and said that the incident took place about three years ago. It was 7:00 pm when he along with his brothers Kabir, Nasir, Furkan and father Rashid were coming out from the Mosque after offering Namaz. This Mosque is near his house. The accused-persons Zahid, Sayeed, Islam and Israr met outside the Mosque, they were armed with knives/ Chhuri and with the intention to kill, they attacked them with the aforesaid weapons because of which he, Kabir and Nasir received injuries. There was electric light at the place of occurrence. The incident was also seen by his brother Furkan and father. The other persons ran away barefooted and there was a state of panic in the village. After inflicting injuries the accused-persons ran away. After the incident we were brought to District Hospital, Saharanpur by our father and Samir, Naseem, Furkan where he was medically examined

and admitted in the hospital. Nasir and Kabir were declared dead. The report of this incident was lodged by his brother. He was admitted in the hospital for eight days, where he got treatment.

12. Learned counsel for the appellants contended that both the public witnesses Furkan (P.W.-1) and Abdul Qadir (P.W.-2) are real brothers and also the brothers of the deceased and, therefore, related and interested witness. There is no independent witness of the incident. Even in the FIR no independent public witness has been named while the place of occurrence is a public place and it has come in the evidence that people after offering prayers were coming out from the Mosque. The Imam of the Mosque was also present and seen the alleged incident. There is one tea-shop in the southern side of the Mosque where people remain till 8:30 - 9:00 pm and there is also a factory where people work till 8:00 - 8:30 pm. Learned counsel further contended that the presence of Furkan (P.W.-1), is highly doubtful as he has admitted in his cross-examination that he lives in another house which is in other village Ramzanpura situated at a distance of about 1-k.m. from the place of occurrence. It is also in the evidence that there is another Mosque in the village Ramzanpura which is near the house of witness Furkan (P.W.-1) so it is unnatural and improbable that he should have come to the Mosque of village Rasoolpur for offering Namaz. It is further contended that he has not received any injury and further in the medico-legal report of Abdul Qadir, the name of Sameer is mentioned as the person who brought the injured to the hospital, the name of Furkan (P.W.-1) is not there which also creates serious doubts about the presence of this witness at the time of incident. The learned counsel further contended that P.W.-2 Abdul Qadir has denied that evenings prayer (*Maghrib Namaz*) in all Mosques is offered simultaneously and has said that it is offered with time difference of 15 minutes which is totally incorrect and this false statement has been intentionally made just to show the presence of Furkan (P.W.-1) at the time of incident.

Learned A.G.A., on the other hand contended that the house of Furkan (P.W.-1) is only 100 meters away from the place of occurrence, just south to

the road. The Mosque situated at village Rasoolpur is nearer to his house while it has come in the evidence that the other Mosque situated at village Ramzanpura was under construction at the time of the incident. Both the witnesses Furkan and Kabir have fully supported the prosecution version and there is consistency in their statements. Except some minor discrepancies, there is no other major discrepancy or contradiction which creates doubts on their presence or makes them untrustworthy. Further Abdul Qadir is also an injured witness and his presence at the place of occurrence in no way can be doubted.

It is a settled principle of law that the oral testimony of a witness cannot be discarded or ignored merely on the ground that he is an interested witness or a related witness. What is required is cautious approach in scrutiny and appreciation of his oral statement. Both the witnesses have supported the prosecution case and corroborated the allegation of FIR regarding genesis of occurrence, manner of assault, date, time and place of occurrence and nature of injuries. Their oral testimony got fully corroborated by medical evidence and there is no contradiction between the two. According to medical evidence both the deceased have suffered *incised wounds*, and injured Kabir has also suffered one *incised wound* on the back of his neck. The date and time of the incident is also corroborated from the medical evidence as the doctor has opined that said injuries can be caused on 09.09.2005 at 7:00 pm with knife/ chhuri and the injuries of the deceased Nasir and Kabir were sufficient in the ordinary course of nature to cause death. The two witnesses Furkan (P.W.-1) and Abdul Qadir (P.W.-2) have been put at lengthy cross-examination by the defence to test their trustworthiness but there is no major discrepancy or contradiction in their statements which creates any kind of doubt or suspicion about their presence and seeing of occurrence. From the evidence on record it is established that incident has occurred in a very daring and gruesome manner. The complainant and his brother when they came out from the Mosque were suddenly attacked by the accused-persons holdings knives/ Chhuries chased in the public way and were inflicted knives blow on vital parts of their body. So it was natural and probable that the persons present there, out of fear have

escaped to save their lives and in this situation, it is not expected that anyone would have dared to come forward. Further the injured/ deceased and accused are resident of the same village and are also neighbours. Considering all these facts and situation, production of independent public witnesses cannot be insisted and only on this ground the cogent and consistent oral testimony of eye witness and injured witness cannot be discarded. It has come in evidence that Qadir, Nasir and Kabir all these injured were carried to hospital by complainant, his father, Sameer and other villagers. It is also clear from evidence on record that Nasir and Kabir were seriously injured and ultimately succumbed to their injuries. It is probable that complainant may be with his seriously injured brothers and Qadir whose injury was not so serious was accompanying Sameer at the time of his medical examination so his name was recorded as the person who brought the injured. The presence of complainant Furkan at the place of occurrence cannot be doubted on this ground.

13. Learned counsel for the appellants further contended that prosecution is not clear about the place of occurrence and according to prosecution initially the incident has occurred at one place then prosecution developed its case and said that it occurred at two places and lastly it was said that incident has also occurred inside the house. Learned counsel submitted that the witnesses in their oral testimony has not supported the allegations of FIR in this respect. No witness has supported this allegations of the FIR that accused entered into their house and female members ran outside towards the forest to save their lives, so there is utter confusion and major discrepancy in prosecution case regarding place of occurrence. Learned counsel further contended that Investigating Officer has also collected blood from only one place while it has come in the evidence that one of the deceased fell near the entrance of the Mosque and the other fell outside the door of his house, so the place of occurrence is not established.

According to site plan Ex.Ka-18, the house of the injured/ deceased is in north-west of the Mosque with Southern entrance, 44 paces away from the eastern entrance of the Mosque and there is a *Rasta* in between. From the

evidence on record, it is clear that the incident started at the southern entrance of the Mosque. Accused-attacked the complainant and his brothers with knives/ chhuries when they came out from the Mosque chased them and inflicted knives blow. One of the injured fell down near the southern entrance of the Mosque while the other fell down near the main door of his house. The third one received injury on his neck while trying to rescue his brothers and complainant saved himself by running away. The two places where deceased fell down have been shown by the letters- 'A' & 'B' in the site plan and the Investigating Officer collected the blood stained and plain soil from both these two places which is mentioned in the site plan itself. So the place of occurrence is clear from the evidence on record and there is no doubt about it. It also established that one deceased fell just outside main entrance of his house, so it is natural and probable that family members may have come outside. The allegation that accused entered into the house and female members ran towards the forest may be exaggeration but this does not create any kind of doubt about the place of occurrence or the manner in which incident has occurred. It is clearly established from the evidence on record that the incident has started at the eastern entrance of the mosque and culminated at the door of the house of injured/ deceased in an area of about 44 paces.

Learned counsel for the appellants also disputed the place of occurrence submitting that HCP- Sunil Kumar (P.W.-6) who is Head Moharir and writer of Chick and GD of crime no.448/05 under Section 307 and 302 IPC, in his cross-examination has said that:-

"ये बात सही है कि इस घटना के सिलसिले में थाना जनकपुरी से भी सूचना आई थी जिसका उल्लेख GD की रपट नं० 51 पर किया गया है।"

On the aforesaid, the learned counsel tried to build up the argument that there was no occasion of receiving any information from another police station about this incident and it clearly indicates that the incident has occurred at some other place.

P.W.-6 has stated that some information was also received from police station- Janakpuri regarding this incident which was mentioned in the GD

No.51 but it is not clear from his statement what that information was. The copy of the said GD is also not on record to make it clear. It also appears that at the time of cross-examination, the original GD was brought by the witness and after its perusal, he has made this statement. If this information was of such a nature which was creating any doubt about place of occurrence, it was on the part of the defence to bring it on record. It appears that the defence counsel has very intelligently cross-examined the witness and knowingly and willingly left it unexplained just to create a doubt. On the aforesaid statement which is not clear about the kind of information, no inference can be drawn that the place of occurrence is somewhere else. It creates no suspicion about the place of occurrence. It also appears from the material on record that after the incident, the situation became tense in the village, so there is probability that some instructions may be given by the higher authorities regarding law and order and the information referred to in the statement of the witness may be related to it.

14. Learned counsel for the appellants further contended that the injury of P.W.-2 Abdul Qadir is simple in nature and fabricated, just to make him an injured witness. This injury may be self inflicted, so no reliance can be placed on the oral testimony of P.W.-2 Abdul Qadir only for the reason that he is an injured witness. Learned counsel further submitted that P.W.-2 Abdul Qadir in his cross examination has also stated that Israr was arrested on spot by the police. He was taken away by the police with knife while according to the statement of Investigating Officer- Vijay Kumar Yadav (P.W.-5) Israr was arrested on 11.09.2005. Learned counsel submitted that it is a major contradiction affecting the reliability of the witness.

According to medical evidence Abdul Qadir (P.W.-2) has received one *incised wound 3 cm x 1 cm x muscle deep on left side of head behind left ear*. He was medically examined just after the incident at 10:00 pm at District Hospital. In medical examination fresh blood was present. In the opinion of the doctor the injury was caused by sharp object and duration was fresh. The injury although simple but it is on the vital part of the body, so it cannot be self inflicted or fabricated. It is true that there is discrepancy in the statement of the witness about the arrest of accused- Israr on the spot. This

part of the statement may be untrue and exaggeration but his remaining oral testimony is consistent and there is no other major discrepancy. It is settled principle of law that a witness cannot be totally disbelieved merely because there is some false statement in his testimony. The entire oral testimony is to be appreciated as a whole and only then any conclusion about his trustworthiness can be drawn. So merely on the basis of one incorrect statement, the entire oral testimony of P.W.-2 cannot be brushed aside. P.W.-2 Abdul Qadir is an injured witness so due credence needs to be accorded to his testimony. In the case of ***Abdul Sayeed vs. State of M.P., (2010) 10 SCC 259*** Hon'ble Apex Court has held as under:

*“28. The question of the weight to be attached to the evidence of a witness that was himself injured in the course of the occurrence has been extensively discussed by this Court. Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone. “Convincing evidence is required to discredit an injured witness.”*

And a similar view in the case of ***Jarnail Singh vs. State of Punjab, (2009) 9 SCC 719***, has been taken in the Hon'ble Apex Court with following observations:

*“28. Darshan Singh (PW 4) was an injured witness. He had been examined by the doctor. His testimony could not be brushed aside lightly. He had given full details of the incident as he was present at the time when the assailants reached the tubewell. In Shivalingappa Kallayanappa v. State of Karnataka [1994 Supp (3) SCC 235 : 1994 SCC (Cri) 1694] this Court has held that the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies, for the reason that his presence on the scene stands established in case it is proved that he suffered the injury during the said incident.*

*29. In State of U.P. v. Kishan Chand [(2004) 7 SCC 629 : 2004 SCC (Cri) 2021] a similar view has been reiterated observing that the testimony of a stamped witness has its own relevance and efficacy. The fact that the witness sustained injuries at the time and place of occurrence, lends support to his testimony that he was present during the occurrence. In case the injured witness is subjected to lengthy cross-examination and nothing can be elicited to discard his testimony, it should be relied upon (vide Krishan v. State of Haryana [(2006) 12 SCC 459 : (2007) 2 SCC (Cri) 214] ). Thus, we are of the considered opinion that evidence of Darshan Singh (PW 4) has rightly been relied upon by the courts below.”*

In the case of *Baleshwar Mahto vs. State of Bihar, (2017) 2 SCC (crl.26)*, the Hon'ble Apex Court relying on the above case laws held as under:

*30. The law on the point can be summarised to the effect that the testimony of the injured witness is accorded a special status in law. This is as a consequence of the fact that the injury to the witness is an inbuilt guarantee of his presence at the scene of the crime and because the witness will not want to let his actual assailant go unpunished merely to falsely implicate a third party for the commission of the offence. Thus, the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies therein."*

15. Learned counsel for the appellants also contended that the incident is of night and the Investigating Officer (P.W.-5) Vijay Kumar Yadav in his cross examination has admitted that he has not shown any bulb outside the Mosque in the site plan. So the source of light is not established. It is true that in the site plan the Investigating Officer has not shown the place where electric bulb was on but all the witnesses in their oral evidence has said that there was electric light in which they have seen the occurrence. Further the place of occurrence is in abadi, the accused-persons and the witnesses are also neighbours so the identity of the accused cannot be doubted and the omission on part of the Investigating Officer to show the place of electric bulb in the site plan will not create any suspicion about the identity of the accused. The identity of the accused is fully established.

16. Learned counsel for the appellants further contended that the FIR is written by an Advocate in presence and with connivance of local Pradhan who is against the accused-persons. The FIR is prepared after due deliberation and consultation, there is chance of false implication and hence no reliance can be placed on it.

FIR is prompt. Informant Furkan (P.W.-1) while proving it has confirmed that it was written at his instance by the scribe. The presence of Pradhan at hospital is natural and probable being head of the village. There is no material on record to suggest that Pradhan is inimical to the accused. There is also no evidence of any previous enmity between the parties, so

merely because the scribe is an Advocate, it cannot be presumed that report has been manipulated to frame innocent persons. False implication of accused-persons sparing the real assailants of such an incident of double murder is highly improbable in the circumstances. The accused have also failed to give any reason of their false implication.

17. Learned counsel for the appellants further contended that the FIR and other papers are ante-time. The Investigating Officer- Vijay Kumar Yadav (P.W.-5) has admitted that in Ex.Ka-10 and Ex.Ka-11 unknown is written in column of time of the incident and time of death, in the inquest report only crime number and sections are written and other particulars are not mentioned. Dr. R.K. Gupta (P.W.-4) who has conducted the postmortem examination of the deceased has admitted that at the time of post-mortem FIR was not before him. Constable- Harendra Singh (P.W.-10) who has brought the dead bodies for post-mortem examination has said that he handed over the dead bodies to the doctor on next day at 11:00 am. The inquest report has been prepared by S.I. Adarsh Tyagi but his signatures are not there on the papers. All these clearly establishes that at the time of inquest proceedings and even at the time of post-mortem, FIR was not registered. It has been registered later, ante timing it and other papers prepared are also ante timed.

Learned AGA submitted that crime number, sections and other particulars relating to time etc, duly proper filled in every column of the inquest report. So FIR was very much in existence at the time of inquest proceedings and it is not ante-timed. Learned AGA further submitted that merely signature of CO does not bear any date or FIR has been sent to the concerned magistrate with some delay, it cannot be said that FIR is ante-timed. He placed reliance on ***Rajesh Singh vs. State of U.P., (2011) 11 SCC (page-144)***. The Hon'ble Apex Court in the aforesaid case in para no.12, 13 & 14 has made following observations:

*“12. The first such finding by the trial Court was that the FIR was ante- timed on the ground that as per the evidence of Chandra Shekhar Yadav (PW-4), the investigating officer, the dead body of deceased Deepak was dispatched from the spot after being sealed at 9 p.m. for the police lines. However, in the*

*record of the police lines, it was shown to have received at 10 a.m. on 12.4.1993. The FIR was also criticized by the trial Court and the defence counsel here on the ground that there was no evidence offered by the prosecution to suggest that the special report of the crime was sent to the higher authorities.*

**13.** *The High Court has found that this criticism was not justified. The High Court has given the reasoning that the FIR was lodged by the witness Virendra Kumar (PW-1) on 11.4.93 itself at 6.40 p.m. Thus, if the incident happened at about 5 O'Clock in the evening, the recording of the FIR at 6.40 p.m. in a police station which was 8 Kms. away from the spot of occurrence could not be said to be late reporting. The High Court has also relied upon the evidence of Chandra Shekhar Yadav (PW-4) that the FIR had been lodged in the police station when he was not present there and he was informed about it only on wireless and, therefore, he happened to reach the spot directly with ASI and started the investigation of the case and was busy there in drawing of Panchnama etc. right up to 11 p.m. and merely because the copy of FIR was received in the office of the circular officer on 13.4.1993, it should not lead to the conclusion that the FIR was ante-timed. The High Court has also found that if the dead body reached the police lines late at mid night and if it was shown in the record that it was received at 10 a.m. on 12.4.93, there was nothing significantly doubtful.*

**14.** *We have also gone through the record as well as the evidence of the investigating officer Chandra Shekhar Yadav (PW-4) and though the timing is slightly irregular, that alone would not be sufficient to reach a conclusion that the FIR was ante-timed. After all nothing was going to be gained by the prosecution by ante-timing the FIR. Had the FIR been ante-timed, the Panchnama could not have been commenced at 7.30 p.m. We do not find any significant cross examination of the Panchas and the police officers, particularly, on the aspect of timing thereof. We do not find this circumstance to be of such a nature so as to throw the whole prosecution story which was proved by two eye witnesses, one of them being the father of the boy."*

In inquest report, case crime number and sections are mentioned and all other columns of date time is properly filled. If some particulars are lacking or there are some omissions on related papers, only on this basis it cannot be inferred that at the time of the inquest, FIR was not in existence. It shows only lapse on part of the Investigating Officer and Officer who prepared the inquest report. S.I. Vijay Kumar Yadav (P.W.-5) has said that inquest report was prepared by S.I. Adarsh Tyagi under his direction, he has also proved his signatures on the inquest report. The statement of constable Harendra Singh (P.W.-10) that he handed over the dead bodies to the doctor on the next day at 11:00 am is against the documentary as well as the oral evidence on record. The postmortem Ex.Ka4 and Ex.Ka-5 and oral statement

of doctor R.K. Gupta confirm that postmortem was conducted in early morning of 10.09.2005 and it is also specifically mentioned that postmortem was conducted in artificial light under the orders of ADM (F) and CMS, SBD Hospital Saharanpur. Doctor has no interest in preparing false document or giving false statement in this regard. So there is no question of handing over the bodies to the doctor for post-mortem at 11:00 am. The statement is wholly incorrect and it appears that the witness has failed to recollect it. These discrepancies will not in any way adversely affect the prosecution case and no adverse inference can be drawn on its basis about ante-timing of papers.

18. Learned counsel further contended that no timing is mentioned in the case diary, the signatures of CO on case diary is undated. It is also not clear that which *parcha* of case diary on which date was sent to CO. The statement of scribe *Rao Killan* is not recorded by the Investigating Officer. The GD is on plain paper and not on printed proforma and it contains no seal of police department and signatures of CO on it, is also undated and all these facts have been admitted by the Investigating Officer and G.D./ chik writer in his cross-examination. Learned counsel contended that Investigating Officer has manipulated the papers in his own manner which was suitable for him.

Regarding GD, it has come in evidence that printed proforma was not available, hence it was prepared on plain paper. It is a settled principle of law that defects in the investigation itself cannot be a ground for acquittal so these discrepancies or omissions will not in any way adversely affect the prosecution case. In the case of ***C. Muniappan and Others vs State of Tamil Nadu, (2010) 9 SCC 567*** it has been held:

*“Defect in the investigation by itself cannot be a ground for acquittal. Investigation is not the solitary area for judicial scrutiny in a criminal trial. Where there has been negligence on the part of the investigating agency or omissions, etc, which resulted in defective investigation, there is a legal obligation on the part of the court to examine the prosecution evidence de hors such lapses carefully to find out whether the said evidence is reliable or not and to what extent it is reliable and as to whether such lapses affected the objects of finding out the truth. The conclusion of the trial in the case cannot be allowed to depend solely on the probity of investigation.”*

In the case of *Union of India vs. Prakash P. Hinduja and another*, AIR 2003 SC 2612, it has been held:

*“An error, illegality or defect in investigation cannot have any impact unless miscarriage of justice is brought about or serious prejudice is caused to the accused.”*

In the case of *Sambhu alias Bijoy Das and another vs. State of Assam* AIR 2010 SC 3300, it has been held that:

*“If the prosecution case is established by the evidence adduced, any failure or omission on the part of the Investigating Officer cannot render the case of the prosecution doubtful.”*

19. Prosecution has also relied on another piece of evidence, the recovery of weapons (knife & chhuri) used in the incident. The Investigating Officer-SHO, Vijay Kumar Yadav (P.W.-5) has made these recoveries and in his examination in chief on this point he has said that on 14.09.2005 at 04:30 am on the information received from informer, he arrested the accused Sayeed alias Shahid and on his interrogation he disclosed that he has concealed the knife used in the incident near Kotha of Maqbool Nursery under the trees and at 06:30 a.m. at the instance of the accused, blood stained knife was recovered from the aforesaid place. The knife was sealed on the spot and the recovery memo marked as Ex.Ka-20 was prepared. The copy of the recovery memo was given to the accused and his thumb impression was obtained. He has further stated that he also prepared the site plan of the place of recovery marked at Ex.Ka-21 and has also proved the knife as material Ex.-1. The witness has further stated that on 20.09.2005 at 7:00 am, he arrested the other accused Zahid and on his interrogation he disclosed that the knife used in the alleged incident has been concealed by him near Moonji Field of Maqbool and at the instance of the accused Zahid, the said knife was recovered at 7:50 am which was sealed on the spot and recovery memo of Ex.Ka-22 was prepared. He has further stated that he prepared the site plan of the place of recovery marked as Ex.Ka-23 and has also proved the knife as material Ex.2.

Learned counsel for the appellants contended that there is no independent witness of recovery and it has been made from open public

place where any person can reach without any hindrance or obstruction. The only evidence about recovery is the sole testimony of Investigating Officer, Vijay Kumar Yadav. Hence it cannot be relied.

Vijay Kumar Yadav (P.W.-5) by his oral evidence has proved the fact of recovery and there is nothing in his cross-examination which affect the reliability of the witness. Merely because he is a police person and Investigating Officer, his oral evidence cannot be discarded. The recovered knives has been sent for chemical examination and its report also confirms that the knife recovered at the instance of accused- Zahid was stained with human blood. So the forensic report also corroborates the oral testimony of (P.W.-5) Vijay Kumar Yadav. The evidence of recovery is admissible under Section 27 of the Evidence Act.

**20.** Learned counsel for the appellants lastly contended that there is no motive of the incident. Neither in the FIR nor in the oral statements of the witnesses, any motive has been assigned. The Investigating Officer has tried to assign the motive through the mouth of accused themselves in their confessional statements.

In this respect, it is sufficient to say that it is a case of direct evidence where eye witness account of the incident has been produced by the prosecution, the motive is immaterial. It is a settled principle of law that in case of direct evidence, motive becomes irrelevant but if the prosecution assigns any motive then it has to prove it. In this case prosecution has not assigned any motive, hence there is no relevance of motive.

**21.** The remaining witnesses are formal in nature, Constable Brahmpal Singh (P.W.-7) is chik and GD writer of crime number 453/05 under Section 4/25 and S.I. Ashok Kumar (P.W.-8) and S.I. Adesh Kumar (P.W.-9) are the Investigating Officers of cases under Section 4/25 of Arms Act. The aforesaid witnesses have proved the papers and the proceedings conducted by them.

**22.** The oral testimony of accused informant/ eye witness Furkan (P.W.-1) and injured witness Abdul Qadir (P.W.-2) is reliable, both these witnesses

have supported the prosecution case and have corroborated the FIR version and their oral testimony is fully corroborated by medical evidence and there is no contradiction between the two. The eye witness account of the incident produced by the prosecution is reliable and trustworthy and also gets support from the medical evidence. The weapons used in the incident have been recovered at the instance of the accused and recovery is also proved which further corroborates the prosecution case. So from evidence on record the prosecution case stands proved. There is no perversity or illegality in the findings recorded by the trial court. The findings of conviction recorded by trial court are liable to be upheld. The sentence awarded is also appropriate and needs no interference. This criminal appeal is liable to be dismissed.

22. According, the criminal appeal is hereby *dismissed*.

23. Copy of this judgment along with lower court record be transmitted to the learned trial court immediately.

**Order Date :- 27.9.2021**

C. MANI