RESERVED
A.F.R.

CRIMINAL APPEAL NO. 3587 OF 2006

SUNIL PASI.....APPELLANT

VERSUS

STATE OF U.P.....RESPONDENT.

CONNECTED WITH

CRIMINAL APPEAL NO.3573 OF 2006

VINOD AND ANOTHER.....APPELLANTS.

VERSUS

STATE OF U.P.....RESPONDENT.

HON'BLE VINOD PRASAD J.
HON'BLE SURENDRA SINGH J.

(Delivered by Hon'ble Vinod Prasad J.)

Three appellants herein Sunil Pasi (A-1), Vinod (A-2) and Harendra Singh (A-3), in above two connected criminal appeals, have challenged impugned judgment and order of their conviction and sentence dated 9.6.2006, recorded by Session's Judge, Deoria in S.T. No. 112 of 2005, State versus Sunil Pasi And Others, by which learned trial Judge has convicted all of them under sections 148 I.P.C. and (A-1) under section 302 I.P.C. and (A-2) and (A-3) under sections 148,302/149 I.P.C. P.S. Gauri Bazar, district Deoria. All the appellants were sentenced to 3 years RI U/S 148 I.P.C. and life imprisonment U/S 302 and 302/149 I.P.C. respectively. Both the sentences of all the appellants have been ordered to run concurrently.

Narrated concisely prosecution allegations against the appellants, as are evident from the written report Ext. Ka-1, lodged by the informant Manish Yadav PW1, and testimonies of fact

witnesses- informant PW1, Radhey Shyam Yadav PW2 and Ram Yadi PW4, are that on 15.6.2004 at 8 A.M., on his TVS victor motor cycle, informant P.W. 1 and his elder brother Ram Kripal Yadav (deceased) had gone to tempo stand under Baitalpur Block to fetch two masons and four laborers. Because laborers told them that they will come after sometimes, therefore, informant and the deceased sat down on two benches facing each other under a tin shed, in front of Lootan Gupta S/O Ram Suchit Gupta's tea shop situated close by besides Baitalpur Barpar road, to enjoy tea. At 8.50 A.M. three appellants (A-1) to (A-3) accompanied with two unknown socio criminis companions arrived at the said tea shop and in no time (A-1) shot the deceased at his back from his country made pistol from point blank range causing his instantaneous death. (A-2) and (A-3), thereafter, hurled bombs on the opposite side, on the road, making threatening utterances to facilitate their escape. Committing murder all the malefactors escaped towards the south. Soon after the murder 3-4 police personnel of police outpost Baitalpur arrived at the incident scene on their motor cycles.

After half an hour informant Manish Yadav PW1 got a written report, Ext. Ka-1, scribed from his uncle Shiv Charan Yadav about the murder and leaving the corpse of his elder brother at the murder spot in the guard of arrived police personnel, covered 8 kms distance to P.S. Gauri Bazar, and lodged his written report at 9.30A.M. same day.

HM Dhananjai Kumar Pandey, PW7 registered the crime by preparing chik FIR Ext. Ka-6, of crime no. 356 of 2004, under sections 147/148/149/302/504/506 I.P.C. and 7 Criminal Law Amendment Act. However, the corresponding crime registration GD entry, Ext. Ka-4, was prepared by HM Shiv Kumar PW5.

Station Officer Raghuvir Singh, PW8, was entrusted with investigation who was informed about the murder on RT set.

Receiving the message PW8 came to the incident scene where constable Ram Narain handed over Chik FIR and GD entry to him.

Commencing investigation S.O.(PW8) copied chik FIR and GD entry, penned down informant's statement and got inquest on the dead body performed under his supervision by SI Brij Raj Yadav, who had penned down inquest memo Ext. Ka-2 and other relevant papers Ext. Ka-11 to Ext. Ka-16. I.O also conducted spot inspection and sketched site plan Ext. Ka-7. From the spot I.O. collected splinters of bombs, empty cartridges, blood stained and plain earth and prepared their seizure memos Ext.Ka-8 to Ka-10. Subsequent thereto, I.O. recorded 161 Cr.P.C. statements of Raj Kumar Yadav, Radhey Shyam Yadav, Ram Yadi (PW4), Virendra Yadav, Shiv Charan Yadav (scribe) and other witnesses. Identities of two unknown assailants surfaced during the investigation as Vijai Pratap Mani @ Dablu Mani and Chhotai @ Jai Nath. Appellants (A-1) to (A-3) were arrested on 19.6.2004 and were interrogated by PW8. Noted here is the fact that pending investigation Vijai Pratap Mani @ Dablu Mani and Chhotai @ Jai Nath moved to the higher police authorities against their false implication in the incident and consequently, on their application, further investigation was ordered which was conducted by Circle Officer Arvind Kumar Pandey, PW6. Aforesaid Circle Officer visited the place of the incident and interrogated Vishambhar Singh, Kuber Singh, Ajai Mani, Mohan Yadav, Ravindra Yadav, Ram Asray Yadav, Lal Bahadur, Lootan Gupta (tea shop owner) and Fagu and recorded their statements. Concluding investigation PW6 laid charge sheet, in the court of CJM, Deoria, only against the present three appellants u/s 147,148,149,302,504,506,I.P.C., 7 Criminal Law Amendment Act and 2/3 Explosive Substances Act vide Ext Ka-5. Since Circle Office PW6, found implication of Vijai Pratap Mani @ Dablu Mani and Chhotai @ Jai Nath to be false, hence he exonerated and did not charge sheet

them. Thus in the incident participation of only three accused could be established. We have noted it as we will demonstrate later on that it is of much significance.

Dr. S.N. Singh, PW3 performed post mortem examination on the cadaver of the deceased on 15.6.2004 at 3P.M. and had prepared his autopsy report Ext. Ka-3. Deceased was found to be 32 years of age having an average built body and one forth day had lapsed since his death. Rigour mortis was present in his both the limbs and stomach contained 200ml of semi digested food. Small intestine had chyme and large intestine contained gases and fecal matter. On external examination following ante mortem injuries were detected on the corpse of the deceased:-

"(1) wound of entry of firearm 3 cm x 1.5 cm x chest cavity deep is present over Lt side of back 13 cm below the top of Lt shoulder (middle) margin of the wound are inverted Tattooing and singing of hair in the area of 7 cm around the wound .Bleeding present from the wound.

(2) Fire arm wound of exit 3.5 cm x 2 cm present on anterior side of chest , left side, 3cm below the lateral end of Lt clavicle, margin everted. It was communicating injury No. 1."

Chief Judicial Magistrate, Deoria, summoned (A-1) to (A-3) on the strength of laid charge sheet Ext. ka-5, and finding the disclosed offences triable exclusively by Sessions Court committed their case to the Sessions Court for trial on 16.6.2005 and consequently before the Sessions Judge, Deoria S.T. No. 112 of 2005,State versus Sunil and Others, was registered.

Learned Sessions Judge charged (A-1) with offences under sections 148 and 302 I.P.C. and (A-2) and (A-3) under sections 148 and 302/149 I.P.C. on 15.7.2005. None of the accused was charged for any other crime not even under Explosive Substances Act. Here we hasten to add that even during trial framed charges were never added or amended. This we have mentioned as we will demonstrate in the later part of this judgment that the said lapse on the part of

the trial Judge, per-se, has affected adversely the outcome of instant appeal. All the charges were read out and explained to all the accused who all abjured them and claimed to be tried and hence to establish their guilt Sessions Trial procedure was adopted.

During the trial prosecution examined, in all, eight witnesses out whom informant Manish Yadav, PW 1, Radhey Shyam Yadav, PW2 and Ram Yadi, PW4 were the fact witnesses. Rest of the formal witnesses included post mortem doctor S.N. Singh PW3, Head Constable Shiv Kumar PW5, Second investigating officer CO Arvind Kumar Pandey PW6, Head Constable D.K. Pandey PW 7, and first investigating Officer Raghuvir Singh PW8.

In his depositions informant PW1, supported his FIR version and narrated the same story which he had got slated in Ext. Ka-1, already mentioned herein above, and therefore for the sake of brevity we do not repeat them. Besides supporting his aforesaid version, informant further stated that at the time of the incident he and the deceased were sitting on two benches facing each other east and west. After the incident scribe Shiv Charan Yadav had accompanied him to the police station for lodging of the FIR. He has also proved his signature on the inquest report and has further deposed that he had signed the recovery memos also which were prepared by the first I.O. PW8. Albeit, at one point informant has deposed that the incident was witnessed by him alone but he immediately made correctional statement in the second breath and stated that gathered public, who had witnessed the murder, had informed him the names of two unknown assailants as Vijai Pratap Mani @ Dablu Mani and Chhotai @ Jai Nath, non-charge sheeted accused. He has admitted that many cases were pending against the deceased from various police stations of Gauri Bazar and Chauri Chaura etc. regarding heinous offences of murder, decoity, abduction, rape, Gangster's Act, criminal intimidation, forgery,

Goonda Act, NSA etc. His depositions reveal that he had negated presence of Raj Kumar Yadav and Radhy Shyam Yadav PW2 at the time of the incident. Resiling from his 161 Cr.P.C. statements he has deposed in para 22 and 23 of his deposition that the two appellants Vinod and Harendra Singh had exploded bombs on the road in the opposite direction of the tea shop where he and the deceased were sitting. He has further stated that he waited for half an hour and then had proceeded for the police station. He has also deposed in para 28 and 29 of his examination that police outpost Baitalpur was at a distance of fifty paces from the place of the incident and soon after the murder 3 or 4 police personnel of the said outpost had arrived at the murder spot on their motor cycles but he had not informed them about the murderers nor had disclosed their identities even though he had a conversations with them so much so that those police personnel had told him that he can go and lodge the FIR at the police station leaving the deceased corpse in their guard and he (informant) had followed suit. Without ambiguity informant has admitted that prior to informing the I.O. during recording of his interrogatory statement u/s 161 Cr.P.C. he had not disclosed the names of the assailants to anybody. Informant has further admitted that he had signed the FIR inside the police station where he had stayed for one and half hour.PW1 further deposed that after his return to the spot all alone from the police station, police personnel of Baitalpur out post were present there and they (police of out post) remained present till the police of P.S. Gauri Bazar had arrived at the incident scene later on. Depositions of the informant further indicates that he was not sure whether he was informed about the names of unknown assailants prior to dictating of Ext. Ka-1 or subsequent thereto. He was also not confident as to whether he came to know about their identities prior to recording of his 161 statement or not? PW1 informant has admitted that prior to the

murder he had no acquaintances with those two unknown assailants and subsequent to the incident he had not heard about them. Very significantly informant PW1 has admitted that in fact assailants wanted to annihilate him because of already existing political rivalry with him since prior to the incident and therefore he used to shield himself from them. There are some laconic and insignificant omissions and contradictions in his depositions and since nothing turns on them we eschew to record them for the sake of brevity.

Radhey Shyam Yadav, PW2, deposed in the trial that he was returning to his house from cobbler's shop of Ashraf, where he had gone to purchase shoes but did not purchase it as the same were not sold on credit. When this witness was close by the crime spot then the incident happened. PW2 admitted that at that time but for cobbler’s shop no other shop was open. About the actual incident he has testified that (A-2) & (A-3) were throwing bombs to deter the public, whereas Dablu Mani and Chhotai were armed with country made pistols and were instigating. He has further deposed that he had come to district Deoria for excursion and there were many big cobblers shops in Deoria town. He has admitted a conglomeration of people at Lootan's tea shop at the time of the incident. PW2 has contradicted informant PW1 regarding the manner in which actual incident happened and has disclosed altogether a nascent version. According to his depositions Vinod (A-2) was armed both with fire arm and bombs and had also fired shots during the incident. Vijai Pratap Mani @ Dablu Mani and Chhotai @ Jai Nath were also carrying fire arms besides bombs and were instigating standing from behind the shop, from were 10-15 shots were fired and during course of the incident 2-4-10 bombs were hurled. He had no conversation with the police of P.S. Baitalpur. He is a relative of the informant and the deceased and has admitted that Rinki, cousin sister of the informant, (daughter of Rama Shankar, uncle of

informant) has been married to his younger brother Ram Pravesh Yadav. PW2 too had not informed the police personnel about the murderers while claiming that he had witnessed the incident. Toeing line of the informant this witness PW2 had also not disclosed the identities of any of the assailants to anybody prior to recording of his 161 Cr.P.C. statement and he had acknowledged his acquaintances with a sub Inspector of P.S. Gauri Bazar. He admitted that four days after the murder that the I.O. had interrogated him.

Ram Yadi, PW4, last eye witness of fact has turned hostile and did not support the prosecution allegations and since in his evidence we do not find anything worth recording therefore we rest here our mentioning of his statements.

Amongst formal witnesses, Dr. S.N.Singh, PW3 has proved deceased post mortem examination report and besides testifying those very facts already mentioned herein above and has further deposed that no tea contents were found in the stomach of the deceased and had he been shot dead while consuming tea, the contents of tea should have been present in his stomach. According to him deceased must have taken meal four hours prior to his death and it was an incident of a single shot from a close range with no other injury.

Another formal witness Shiv Kumar PW5, has stated that the FIR about the incident was registered by PW7 Dhananjai Pandey and he had prepared the crime registration GD which he has proved.

Second investigating Officer/ Circle Officer Arvind Kumar PW6, has testified various investigatory steps taken by him, which have already been noted earlier by us and hence we do not repeat them for the sake of our convenience.

Head Moharrir, Dhananajai Pandey PW 7 has evidenced registration of FIR by him and preparing of chik FIR Ext. Ka- 6. He has further deposed that copy of the FIR was dispatched to CJM,

Deoria on 16.6.2004.

First investigating Officer Raghuvir Singh PW8 described in extenso various investigatory steps taken by him and has further proved recoveries made from the spot as material Exts. 1 to 3. He has admitted presence of police personnel of police outpost Baitalpur at the incident scene when he had arrived there after receiving information on the RT set. PW8 has admitted criminal history of the deceased. He has also deposed that during the incident many people were present at Lootan's tea shop. He however, has denied the defence suggestion that the FIR was cooked up after his return from the spot.

All the accused in their examination u/s 313 Cr.P.C. denied incriminating prosecution evidences put to them and pleaded the defence of their false implication and occurrence taking place in the night when the deceased was all alone but they have not examined any defence witness.

Session's Judge, Deoria/trial Judge, vide his impugned judgment and order dated 9.6.2006, found prosecution witnesses reliable and their testimonies confidence inspiring, resultantly has held appellants guilty of murder and consequently convicted and sentenced them as has already been slated in the opening paragraph of this judgment, hence instant appeal by the appellants challenging the impugned judgment and order and thereby their conviction and sentence.

We have heard Sri G.S. Chaturvedi, Sr. advocate assisted by Sri P.C. Srivastava advocate for the appellants in support of this appeal and Sri Sangam Lal Kesarvani, learned AGA for the respondent State and have gone through and examined entire trial court record critically and carefully.

Assailing the impugned judgment it was vehemently urged by appellants counsels that the same is illegal, indefensible and has

been recorded contrary to the weight of evidence on record and testimonies of witnesses. Learned trial court completely ignored significant evidences creating a doubt in the prosecution case and vetted the entire case discriminately with lop sided approach, which is per-se defective and hence his entire analysis is faulty. Evidences favourable to the accused and crumbling edifice of the prosecution version was eschewed and no attempt was made to sift grain from the chaff. First information report is the outcome of deliberations and concoction and was prepared at the police station in connivance with the informant and the police to eliminate political rivals of the informant. It was submitted with vehemence that both PW1 and PW2 are wholly unreliable witnesses and their depositions are un-creditworthy. They are got up witnesses and neither of them were present at the spot nor had seen the incident. Their testimonies are tutored, full of embellishments, concoctions, and contradictions and must be discarded and it is very unsafe to rely upon them. Impeaching the credibility of PW1 & PW2 it was submitted that their evidences are so much at variance with each other on all material aspects of the incident that it cannot be reconciled and in absence of any other convincing evidence none of two could be relied upon. Investigation of the crime is perfunctory and has left much to be desired. From the very inception of the trial, illegality was allowed to creep in, which has caused irreparable prejudice to the appellants. Trial court wrongly and illegally applied sections 148/ 149 I.P.C. on the facts of the case and committed manifest error of law in not charging the accused under section 2/3 Explosives Substances Act, without which conviction of two of the appellants Vinod and Harendra Singh cannot be sustained. Much emphasis was laid for the argument that the contour of impugned judgment indicate that the trial judge was not analysing the case to find out the truth by separating grain from the chaff but it accepted the prosecution case

without looking into it's intrinsic inherent improbabilities, defects, un-naturality and unworthiness. Deceased was a man of criminal proclivities and had several enemies behind his soul who were always in the look out to annihilate him and any one of them had committed his murder in darkness and informant grabbed that opportunity to root out his rivals after discovery of deceased dead body by cooking up a false case implicating the appellants. Concludingly it was submitted that the instant appeals be allowed by setting aside appellants convictions and sentences and they be acquitted of the charges leveled against them.

Learned AGA rebutting the submissions, contrarily argued that the impugned judgment requires no interference by this court and appeal lacks merit and deserves dismissal. It is a day light incident, with eye witness account and consistent supportive medical evidence. PW 1 and PW 2 being related and natural witnesses will not exonerate real culprits to rope in innocent persons submitted learned AGA. It was further contended that section 34 I.P.C. can be utilized to convict the appellants and no prejudice will be caused to the appellants in that respect. It was further submitted that nondisclosure of names of the assailants at the earliest opportunity has been explained by the witnesses which explanation is trustworthy and convincing and therefore on that score prosecution case cannot be thrown out. It was further contended that the recoveries made at the spot indicates that bombs were used in the commission of the murder and more than one accused had participated in the incident. Closing the submissions it was contended that convictions and sentences of the appellants be confirmed and their appeals be dismissed.

In the light of rival submissions we have scanned trial court record and have critically appreciated evidences of all the prosecution witnesses for judging the sustainability or otherwise of

the impugned judgment. Two types of contentions- legal and factual were raised by the appellants counsels and therefore, ab-initio, we take up and deal with factual aspects.

Assailing impugned judgment appellant's counsels harangued that none of the facts alleged by the prosecution has been established beyond a pale of reasonable doubt. From the beginning upto lodging of FIR all are sham and cooked up story. Deceased was done to death in early hours of morning when he was all alone and none had witnessed his murder and only after discovery of his dead body that the entire prosecution story was feigned by the informant in connivance with the police personals only to implicate informant's enemies. In the light of aforesaid contentions when prosecution evidences are critically appreciated, it transpires that the two facts witnesses, informant PW1 and PW 2, are not reliable and no implicit reliance can be placed on their testimonies. They contradicted each other on all broad material aspects of the matter, so much so that even in manner of assault and actual incident they have castigated each other. We don't find them truthful and creditworthy witnesses when their evidences are appreciated and analyzed on the anvil of naturality, probability and acceptability. To start with, prosecution version of informant accompanying the deceased on a motor cycle to the scene of murder remained an unproved fact indicating that informant PW1 was not present at the spot at the time of the incident. In this respect we find that prosecution allegation that informant and deceased had gone to tempo stand in block Baitalpur on motor cycle to fetch two masons and four laborers prior to the incident does not find any mention either in the written report, Ext Ka 1, nor the same was divulged to the I.O. during interrogatory statement under section 161 Cr.P.C. by any of the fact witness, so much so that even in his examination-in- chief, informant PW1, has not deposed it in the court. He, for the

first time, divulged it during his cross examination. Thus the said allegation is an improvement and an embellishment, which does not inspire any confidence at all. It seems that the said improvement was done by the informant only to probabalise his presence at the incident scene and to be an eye witness of the murder. This conclusion is further cemented by the fact that no labour or mason was interrogated by the I.O. nor any of them is a witness of charge sheet. Informant also failed to disclose their names and identities and hence prosecution version in respect of that part of story that informant had accompanied the deceased on a motor cycle to the incident spot to fetch labours and mason is only his ipse dixit without having any amount of credibility in it. What is still weird is the fact that there is no reference of any number of motor cycle either in the case diary nor the same was stated during trial nor the investigating officer had seen and seized it. Attour, it is alleged that informant had gone to the spot and to the police station on it but even in the GD entry of registration of crime there is no reference of any motor cycle. It is still more unnatural that even PW2, Radhey Shyam Yadav, who is the relative of the informant, also did not mention about it anywhere. PW 4 another witness of fact had turned hostile and did not support the prosecution case at all and therefore his evidence in all these respect is valueless. In such a scenario it is very difficult for us to believe that informant had accompanied the deceased on motor cycle at the spot prior to the incident. We, therefore, find such an allegation unbelievable and disproved. Such a dicey evidence is further discredited because of uncertainty of purpose mentioned by the informant for going to the spot which remains an un-established fact. Nowhere it is mentioned for what construction masons and laborers were required? Informant and PW2 are conspicuously silent over said aspect of the matter. In the F.I.R. and in 161 Cr.P.C. statement said fact and motor cycle both are missing. This fact, in

conjunction with other circumstances pointed out herein below, makes presence of PW1, at the spot during the incident, very dicey and diminishes the credibility of his testimonies. Genesis of incident and genuineness of FIR version thus is shrouded in mystery.

Further, it is of significance that first informant PW1 had not sustained any injury during the incident which could have established his presence at the spot. It is still more bizarre that informant escaped unhurt, albeit, according to his own depositions assailants were in his look out to do away with him and not the deceased and he used to shield himself from them. It was testified by him in para 40 of his deposition that "*All the three accused were my blood thirsty and I used to live shielding myself".* Had such a claim by the informant been true there was no earthly reason for the assailants to spare him and murder the deceased as he (informant) was in their closet sight without any hindrance. It is recollected that some of the murderers even carried bombs with them and consequently there was no difficulty for them to fatally assault the informant that too from a slapping distance. Presence of PW1 at the spot is further diminished because of the fact that he had not spotted PW2 at the time of the incident although PW2 claims himself to be witness of the incident and from para 13 of his cross examination it is well proved that he is a close relative of the informant. In para 18 it was clearly stated by the informant that " *Raj Kumar Yadav belongs to my village. Radhey Shaym belonged to village Tenubai. I have not seen them at the spot."* Presence of first informant further becomes doubtful as he, in para 36, stated that none of the accused carried two types of weapons, which statement is contradicted by PW2 when he stated in para 11 that " *None of five accused carried two weapons. Out of Harendra and Vinod, Vinod had hurled bomb. Vinod had not made any country made fire. Then said Vinod had also made fire by country made pistol on deceased*

brother. Rest of the two had also fired at Manish. Vinod had Katta and bomb both." It is recollected here according to PW1, vide para 42 of his testimony, only a single fire was made from country made pistol whereas according to PW 2 many fires were made by various accused during the incident vide paras 10 and 11 of his testimonies. He has deposed "

10. *From that tea shop 10 paces towards south there is a kiosk. It is a beetle kiosk. I don't know name of beetle shop owner. Behind kiosk accused had also fired. They were firing towards north where deceased brother was sitting.*

11. From the shelter of kiosk 10-15 fires were made. 10 paces both accused hurled 2-4-10 bombs. Smoke engulfed from bomb explosion. None of five accused carried two weapons. Out of Harendra and Vinod, Vinod had hurled bomb. Vinod had not made any country made fire. Then said Vinod had also made fire by country made pistol on deceased brother. Rest of the two had also fired at Manish. Vinod had Katta and bomb both."

Such were never the case of the informant at any point of time and such a nascent version spelt out for the first time in court only indicates that in fact none of the two fact witnesses were present during the incident and they vacillated on their imaginations. As noted earlier, it seems that prosecution has come out with such a story subsequent to the detection of deceased murder, in connivance with the investigating officer, only to establish presence of the informant PW1 during the incident and therefore we reject said part of prosecution story as unconvincing and unbelievable.

Another unsatisfactory and unconvincing important feature of the prosecution story, which belies the presence of the informant at the spot during occurrence, is that, though the incident is alleged to have occurred only fifty paces from police outpost Baitalpur but neither the informant nor any other eye witness including PW2,

though closely related with the deceased, made any effort to seek police help from that outpost. They made no effort to rush to the outpost and inform the police regarding happening of the incident. They even made no attempt to rush the deceased to the hospital for medical aid. Against all canons of natural human conduct, as is expected from a man of ordinary prudence, they (both informant PW1 & PW2), at the earliest opportunity, soon after the incident, even did not divulged the names of assailants to the police personnel of Police outpost Baitalpur, who had arrived at the murder spot on motor cycles soon after the murder. It were they (police personnel) who had guarded the deceased corpse, when informant had gone to the police station to lodge his report. None of prosecution eye witnesses informed those police personnel the names of the murderers, the direction of their escape and the manner in which incident had happened. Conduct of both the witnesses of fact, PW1 and PW2, are so surreal, weird and incomprehensible that it makes very difficult for us to rely on their testimonies. Had informant and PW 2 been present at the spot they would not have eschewed any attempt to inform arrived police personnel to about the identities of the assailants, weapons used, and the manner in which the murder was executed. Their passive resilence is most surreal and unnatural, which does not inspire any confidence at all. To put forth our point we refer transliteration of paragraphs 28 and 29 of the testimonies of PW1 as follows:-

"28. Police Chowki is towards east at a distance of 50 paces from the place of incident. Police came after the incident. 3-4 police personnel had come. I did not tell police personnel that accused had run in this direction after the murder.

29.Chowki people did not ask the name of accused. They had come on motor cycle. I did not inform police personnel the names of accused persons. Because I was crying and panicked therefore I did not inform the names. Before informing the names of accused to the Inspector(I.O.) I did not inform the names of those accused to anybody. Those police personnel were guarding the corpse. They had told that they are guarding the corpse and I can go to the police

station. When I was weeping then 2-4 people had collected there out of whom only maternal uncle accompanied me to the police station.....We had gone to the police station on motor cycle.....We were at the police station for 1-1 ½ hours. I have studied up to VIII. Head constable had taken my signature."

Further PW 1 had mentioned in para 31 of his depositions that when he had returned to the spot then those police personnel were present. His further testimony that he had informed the names of the accused with their weapons to the I.O. at the time when the inquest was being conducted and he had signed the inquest report after reading it's contents which contained the names of the accused persons is falsified by the inquest memo itself which is Ext Ka 2. PW1, informant had further deposed that he had waited crying at the spot for half an hour and when people told him to go to the police station then he had gone to lodge the FIR. All the above facts coupled with the weird conduct of not seeking police help only at a distant of 50 paces during and after the incident and to get immediate medical aid for the injured relative improbablises his presence at the spot and his chilling silence clamour and reverberates of his being a wholly unreliable witness. At this juncture we would like to refer some of the exampler judicial pronouncements by the apex court supporting our analysis on similar conduct of witnesses.

In **DIN DAYAL VERSUS RAJ KUMAR alis RAJU AND OTHERS : AIR 1999 SC 537** apex court has held as under:-

"3. What is contended by the learned Counsel for the appellant is that the High Court should not have discarded the evidence of these 4 witnesses particularly when the trial Court after carefully scrutinising it held that it was reliable and trustworthy. We find that the High Court has given good reasons for taking a different view. It has pointed the improbability of the version given by them. The witnesses had not accompanied the deceased to the hospital nor had taken any trouble of going and informing the police about what had happened. After seeing the incidence they quietly went back to their home. It cannot be said that the view taken by the High Court that the conduct of the witnesses was not natural is unreasonable.

They were not merely eye-witnesses. They were closely connected with the deceased. The High Court was, therefore, justified in not placing any reliance upon their evidence.

4. Witness Din Dayal had accompanied the deceased to the hospital but after reaching there he did not disclose the name of the accused to the Police Constable who was on duty even though he disclosed other facts regarding the incident. This circumstance has been relied upon by the High Court together with some other reasons for doubting truthfulness of the evidence of this witness. The High Court has also referred to the improvements made by Din Dayal and those improvements clearly indicate that they were deliberately made with a view to make the presence of other eye-witnesses acceptable. Having gone through the evidence we find that the view taken by the High Court is not unreasonable and no interference is called for by this Court."

In **Daljit Singh versus State Of Punjab:AIR 1999 SC 324,** apex court has observed as under:-

"5. P.W. 3-Sulakhan Singh, who claimed to have seen the incident while standing his workshop situated on the Kahnuwan Road was contradicted by the police statement wherein he had stated that he was standing near his house. He did try to explain this inconsistency by explaining that his house and workshop are situate in the same building. This witness had also not rushed to the place where his brother had fallen down in injured condition. Instead of inquiring what was his condition he went along with Balbir Singh in search of the accused. This unnatural conduct creates a serious doubt regarding his witnessing the incident. Sulakhan Singh has admitted that even though they went in search of the assailants, they did not enquire from anyone if they had seen them. He also stands contradicted by P.W. 4-Gurdip Singh who had stated that he and Sulkhan Singh had taken injured Dharam Singh in a car to the hospital. We are inclined to accept this part of the evidence of Gurdip Singh as it stands corroborated by the FIR wherein also it is stated that he and Sulakhan Singh had taken the injured to the hospital. If that is so, his version that he had gone with Balbir Singh in search of the assailants stands falsified. Thus a serious doubt arises as regards the presence of Balbir Singh and Sulakhan Singh at the time of the incident.

6. P.W. 4-Gurdip Singh, had not seen the incident because he had come out of the workshop only after hearing the noise of firing. He has merely stated in his evidence that he had seen two Sikh young boys running away on a Hero Honda motor cycle. He did not identify them. If really appellant Jaspal Singh was standing near the place of the incidence, as stated by the other witnesses, then this witness would have definitely noted his presence and would have

identified him because the workshop of Jaspal Singh is situated at a short distance of about 200 yards from his workshop.

7. Thus the evidence which was led by the prosecution to prove its case was not such on the basis of which the appellants could have been convicted. We, therefore, allow these appeals, set aside the judgment and order passed by the Designated Court and acquit the appellants of the charges levelled against them."

In **Badam Singh versus State of M.P.: AIR 2004 SC 26,** it has been held by the apex court as follows:-

"*17. The first striking feature of the case is the highly unnatural conduct of the alleged eye witnesses. It is really surprising that having witnessed a ghastly occurrence all the three started running from the place of occurrence and kept on running till they reached village Achhroni at about 8 p.m. It is difficult to believe that they ran for 21/2 hours to cover a distance of about a mile. According to PW-8, the distance between Kachnaria to Achhroni is about 11/2 miles and according to PW-4 the distance from Kachnaria to village Bandala where the occurrence took place is about 1 kilometer. It appears unnatural that the three eye witnesses who were no other than Forest Officer and forest guards got so scared that they started running in such a manner that they did not even bother to go to the nearest village Bandala, two furlongs away or to inform the villagers. Nor did they stop to inform the villagers of the villages through which they passed, so that they may visit the place of occurrence and find out whether the deceased was really dead. Normally, one would have expected them to visit the place of occurrence after the appellant had left if only to verify whether the victim was really dead, and to render help if necessary, since the deceased was known to them. In any event their natural conduct would have been to inform the villagers of the nearest village so that they could go to the place of occurrence and render whatever help was possible. If they really started running at about 5.30 p.m., it would not have taken them about 21/2 hours to cover a distance of one mile. It is in the evidence of PW-4 that the occurrence took place at 5.30 p.m. and they boarded the bus at Achhroni at 9.30 p.m. after waiting for about 11/2 hours at Achhroni. It is therefore apparent that they had reached Achhroni at about 8.00 p.m. and that they took 21/2 hours to cover a distance of one mile, even when they claimed to be running in such manner that they did not even bother to stop in any village even to report the incident to the villagers. To say the least, their evidence does not inspire confidence. Their conduct is highly unnatural. Their version that they kept on running and did not inform anyone about the occurrence, is not believable. If they really did so, they would not have taken 21/2 hours to cover a distance of 1 mile. The possibility therefore of*

having come to the place of occurrence much later, and being told about the occurrence by others, cannot be ruled out."

Presence of first informant, PW1, at the scene of the incident is also doubtful because he efforted to rope in two innocent persons in the crime but failed during investigation as well as during trial, when application of the prosecution, under section 319 Cr.P.C. to summon Vijai Pratap Mani @ Dublu Mani and Chhotai was rejected by the court. No charge sheet was submitted against them and their complicity in the crime was found to be false by the Circle Officer. According to the deposition of the informant in para 36, even though he had come to know the names of these two unknown assailants prior to lodging of FIR but he had not mentioned their names in his written report nor he informed the I.O. about them. During the trial also learned trial Judge did not find it appropriate to summon them on the prosecution application and therefore participation of only three accused in the crime surfaced. This fruitless effort by the informant projects dicey nature of his evidence on which no implicit reliance can be placed. Here we hasten to add that we don't mean to say that *falsus in uno, falsus in omnibous* applies to our jurisprudential system but what we impress upon is the fact that a witness if proved to be a got up and unreliable witness cannot be relied upon only by merely reading his testimonies pedantically ignoring relevant damaging evidences occurring in his depositions. In this respect we rely upon the decision of the apex court in **Pohlu versus State of Haryana :2005 SCC (Cr) 1496= 2006 CrLJ 532,** where in it has been held by the apex court as follows:-

"*What is apparent however, is that PW 1 has sought to shift the place of occurrence where Hukam Chand is said to have been assaulted. Though, according to her, she was assaulted inside the house in the sahan and some blood had dropped in the sahan, and her clothes had also got blood stained, the investigating officer has categorically stated that he did not find blood at any place either at the alleged place of occurrence or in the sahan or on the clothes of the informant. Moreover, this witness named only three accused*

persons in the FIR. Later she added the name of Prem Singh, and in the course of deposition in the Court she also implicated Raj Kumar. These facts lead us to hold that she is not a wholly reliable witness on whom the Court can place implicit reliance.

.....

.....

From the deposition of this witness it appears that in the course of the investigation he had stated *that his father had been assaulted only by Ishwar, and not by others. In the course of deposition he sought to involve all the accused persons. Having considered the evidence of this witness in its entirety, we are satisfied that he is also not a reliable witness on whom implicit reliance can be placed and his credibility has been sufficiently impeached in his cross-examination. In fact so far as this witness is concerned he named Raj Kumar and Prem Singh for the first time in the course of his deposition, and it appears that he had not even mentioned their names in the course of the investigation."*

To the same effect is yet another decision by the apex court in **Daljit Singh versus State of Punjab:AIR 1999SC 324** wherein it has been observed by the apex court as under:-

"5. P.W. 3-Sulakhan Singh, who claimed tohave seen the incident while standing his workshop situated on the Kahnuwan Road was contradicted by the police statement wherein he had stated that he was standing near his house. He did try to explain this inconsistency by explaining that his house and workshop are situate in the same building. This witness had also not rushed to the place where his brother had fallen down in injured condition. Instead of inquiring what was his condition he went along with Balbir Singh in search of the accused. This unnatural conduct creates a serious doubt regarding his witnessing the incident. Sulakhan Singh has admitted that even though they went in search of the assailants, they did not enquire from anyone if they had seen them. He also stands contradicted by P.W. 4-Gurdip Singh who had stated that he and Sulkhan Singh had taken injured Dharam Singh in a car to the hospital. We are inclined to accept this part of the evidence of Gurdip Singh as it stands corroborated by the FIR wherein also it is stated that he and Sulakhan Singh had taken the injured to the hospital. If that is so, his version that he had gone with Balbir Singh in search of the assailants stands falsified. Thus a serious doubt arises as regards the presence of Balbir Singh and Sulakhan Singh at the time of the incident.

6. P.W. 4-Gurdip Singh, had not seen the incident because he

had come out of the workshop only after hearing the noise of firing. He has merely stated in his evidence that he had seen two Sikh young boys running away on a Hero Honda motor cycle. He did not identify them. If really appellant Jaspal Singh was standing near the place of the incidence, as stated by the other witnesses, then this witness would have definitely noted his presence and would have identified him because the workshop of Jaspal Singh is situated at a short distance of about 200 yards from his workshop.

7. Thus the evidence which was led by the prosecution to prove its case was not such on the basis of which the appellants could have been convicted."

At the cost of repetition we recollect that a striking feature of the prosecution case which compels us to disbelieve presence of first informant and PW2 at the spot is that according to the informant, vide para 40 of his deposition, appellant's were inimical to him and he shied away from them but not a scratch was caused to him during the incident and his escape certainly was not providential. Assailants, on the other hand had no animosity with the deceased and there was no motive for them to kill him.

This brings us to another argument that since there was no motive for the appellants to murder the deceased and consequently their participation in the crime is highly improbable. We are conscious of the fact that in cases of an eye witness account motive relegates into the background but that does not mean that even a proved unreliable and a planted witness be believed without scanning intrinsic worth of his depositions on the touch stone of improbabilities. When the presence of a witness is challenged on the ground that the whole case is cooked up and witnesses are got up to settle private scores then motive for false implication do assumes a bit of importance to judge the veracity and credibility of that witness. Judging from all the above angles we find informant PW1 is wholly an unreliable and untrustworthy witness on whom no implicit reliance can be placed.

Radheyshyam Yadav PW 2, is also an incredible and

untrustworthy witness whose testimonies do not inspire any confidence and are liable to be rejected. Gist of his evidences indicates that he is related to the informant and the deceased and, as is clear from his evidence,he is a chance witness from the point of view of time and purpose for which he claims himself to be present at the spot. Reason for his presence at the spot is self- contradictory and wholly absurd without any urgency nobody goes to purchase shoes so early in the morning and that too to a satellite taken although the main city has numerable shoe shops. Not only P.W.2 contradicted informant in respect of manner of actual assault but he also did not inform the police regarding the incident when it had reached at the spot soon after the murder. His evidence also suffers from the same vices as that of the informant PW1. Description about the incident narrated by him, in para 10,11 and 14 of his depositions, contradicts informant PW1 in every respect about the manner of assault, weapons carried by each accused and post occurrence conduct. Transliteration of his depositions in those paragraphs are as follows:-

"*10. From that tea shop kiosk is 10 paces. That kiosk is beetle kiosk. Name of beetle shop owner is not known. Fire was made by persons behind ki*osk. *They were firing towards north where brother of deceased was sitting.*

11-From behind kiosk 10-15 fires were made. 10 paces both accused threw 2-4-10 bombs. Blast caused smoke. Five accused did not carry two weapons. Out of Harendra and Vinod ,Vinod threw bomb. Vinod did not made fire by country made pistol. Then stated that Vinod also fired from Country made pistol on the deceased brother. Rest of the two also fired at Manish.

12. Vinod had country made pistol and bomb both.

13.....

14. Till police did not arrive I was on the spot. Gauri Bazar police arrived. Baitalpur arrived earlier. Sub Inspector of Baitalpur arrived first. I and Manish did not had conversation after the incident at the spot. He proceeded for the police station immediately after the incident. He went alone. Don't know by what convenes he went. I had no conversation with SI or constable of Baitalpur."

This witness is a home guard. He was earlier posted at

Baitalpur. He is related with the informant as informant's cousin sister Rinki is the wife of his brother Ram Pravesh Yadav. He, however, was not interrogated by the I.O. immediately after the incident but his statement was recorded belatedly after four days of the incident, without any satisfactory explanation coming forth, although he was present at the spot at the time of arrival of the I.O. According to his claim he did not divulge the incident to anybody for four days, prior to recording of his 161 Cr.P.C. statement. Cause of his presence at the spot that he had come to Baitalpur to purchase shoes is wholly puerile. He had come to Deoria on an excursion trip and there, in down town Deoria, there are many cobbler shops, then why he will go to a satellite town of Baitalpur to purchase shoes. On an overall scrutiny of his evidence we find him also to be a worthless witness who not only deposed contradictory statements than that of PW1 but also belied his presence at the spot. As has been pointed out herein above PW1 has stated that he had not seen PW2 during the incident and this makes presence of PW2 extremely doubtful and his depositions vulnerable and prone to be rejected. We find it highly unsafe to act on his evidence and to us he is also a got up witness. For these reasons we discard his evidence also.

Other factors which further jab down prosecution case are the facts that neither the scribe Sheo Charan Yadav, who is the maternal uncle of the deceased and the informant nor any other person including the tea shop owner Lootan Gupta, outside whose shop the murder was committed, entered into the witness box to get accused punished. Another so called independent witness PW4 Ram Yadi turned hostile and did not support prosecution case at all. Thus there is absence of any independent corroboration of the prosecution story. In view of unsatisfactory nature of evidences of PW 1 and 2, without any independent corroboration, it is very unsafe to rely on them and to believe the prosecution story spelt out by

them during the trial.

Turning towards the FIR, which again is an unsatisfactory features of the prosecution case, we find that it is a dicey piece of corroborative document. First of all it was lodged belatedly as according to the case of the informant himself he waited at the spot for quite half an hour and meanwhile police personnel of police outpost had arrived at the incident scene and then informant proceeded to the police station only when he was told by the public to lodge the FIR and in such fact scenario it is not difficult to conclude that time was consumed to fabricate a story. Secondly that informant himself admitted that he had signed the written report Ext. Ka-1 at the police station itself. This creates a doubt regarding scribing of the FIR at the place of the incident and indicates that probably it was fabricates at the police station itself as was suggested by the defence. Further, according to the informant he had proceeded for the police station on his motor cycle along with his maternal uncle but, as concluded above, there is no reference of any motor cycle either in the FIR or in the GD entry of registration of FIR nor the maternal uncle entered into the witness box to support the informant. Moreover, according to the informant he had gone to the police station accompanied with his maternal uncle but PW 2, on the other hand, contradicted him by deposing that he had gone there all alone. Thus there is incongruity between PW1 and 2 on the material aspect as to who had gone to the police station to lodge the FIR. Shiv Charan Yadav, the maternal uncle, did not enter into witness box to lend credence to informant's claim regarding his presence along with his motor cycle and scribing of FIR by him. Chik FIR was also dispatched to the Magistrate the following day although it was lodged early in the morning. We also find it abnormal that Chik FIR and the GD entry of registration of crime was penned down by two different police personnel PW5 and PW7, and it seems the

reason was that time was shrinking and therefore to expedite registration of FIR that such an unusual course was adopted. This view finds it's support from other circumstances as well and they are that informant had waited at the police station for two hours when he had gone to lodge his report and although he is a witness of inquest memo yet he did not narrate names of culprits nor their weapons while mentioning his opinion regarding cause of deceased death. Here we add that we don't mean to say that mentioning of those facts are legally required under section 172 of the Code but what we impress upon is the fact that had informant been present at the spot knowing well about the incident it would have been an irresistible impulse for him not to divulge the names of accused at that point of time against all natural human conduct. To us this is one of the circumstance to judge appellant's contention as to whether PW1 was an eye witness of the murder or not? It seems that the inquest was conducted first and FIR was registered later on and that is why the FIR was registered also under section 147 I.P.C. although nobody was armed with any blunt object and furthermore different times were recorded in the inquest memo and chik FIR regarding time of registration of FIR. In the chik FIR time of registration of FIR is mentioned as 9.30 A.M. whereas in the inquest the time is recorded as 9.40 A.M. Although the difference is not much but what is important to note is that at the time when inquest was conducted, time recorded in chik FIR was not known to the person conducting inquest. It seems that because FIR was not in existence as alleged by the prosecution that is why it was dispatched to the Magistrate following day and not on the same day. It seems also because of this reason there is no reference in the chik FIR about 2/3 Explosive Substances Act. Introduction of Motor cycle and labour story are still a later development significantly missing from the earlier prosecution versions during investigation. Compliance of

157 of the Code has a solemn purpose to rule out fabrication of a story against the accused and to lend credence to the prosecution version. Delay in dispatching special report to the concerned Magistrate, in a given facts and circumstances like the present one do caste a doubt on the genuineness of the prosecution version if no satisfactorily explanation comes forth. Albeit, said aspect by itself is not sufficient to dislodge entire prosecution story but on the facts of the present appeal we find it to discredit prosecution version for the reasons that neither the informant nor another eye witness PW 2 are reliable witnesses, PW4, the third eye witness, turned hostile, two people were roped in as assailants by the informant during investigation but their implications was found to be false by the second I.O., Circle Officer did not charge sheet them. Session's Judge, also did not find sufficient reasons to summon them wielding his power under section 319 of the Code. There are glaring defects and inherent contradictions in the testimonies of two fact witnesses PW1 and PW2. It is noted here that according to the prosecution case FIR was registered at 9.30A.M. and hence there was no difficulty is dispatching FIR to the Magistrate that day itself. This in our opinion creates a doubt regarding genuineness of registration of FIR at the time alleged by the prosecution and indicates that the same is the outcome of deliberations and concoction at a later time. It is because of this reason that time spelt out by the informant does not fit in well with the time mentioned in the documents. Significant omissions of important aspects about the incident in the FIR, leaving many gray areas to be suitably adjusted later on as per the situation, also supports our opinion that the earliest version was registered in a haste with chik FIR and GD being prepared by two different persons to rope in innocent persons in the murder of a person who had criminal proclivities. In what we have said herein above delay in dispatching the FIR to the Magistrate assumes significance and

cannot be ignored specially when the appellant accused defence case is that of cooking up the entire case and murder being a blind murder. In this respect we draw support from a apex court decision rendered in **Bijoy Singh versus State of Bihar: AIR 2002 SC 1949** wherein it has been held as follows:-

"7. Sending the copy of the special report to the Magistrate as required under Section 157 of the Criminal Procedure Code is the only external check on the working of the police agency, imposed by law which is required to be strictly followed. The delay in sending the copy of the FIR may by itself not render the whole of the case of the prosecution as doubtful but shall put the Court on guard to find out as to whether the version as stated in the Court was the same version as earlier reported in the FIR or was the result of deliberations involving some other persons who were actually not involved in the commission of the crime. Immediate sending of the report mentioned in Section 157, Cr. P.C. is the mandate of law. Delay wherever found is required to be explained by the prosecution. If the delay is reasonably explained, no adverse inference can be drawn but failure to explain the delay would require the Court to minutely examine the prosecution version for ensuring itself as to whether any innocent person has been implicated in the crime or not. Insisting upon the accused to seek an explanation of the delay is not the requirement of law. It is always for the prosecution to explain such a delay and if reasonable, .plausible and sufficient explanation is tendered, no adverse inference can be drawn against it.

8. In the instant case the copy of the report referred to in Section 157, Cr. P.C. is shown to have been received by the Magistrate on 27th August, 1991. Even though there is a mention in the FIR that its copy was sent through special messenger, yet no date or time of sending the said report is mentioned. The Magistrate, receiving the copy of the report, has also not noted the time of its receipt on 27th August, 1991. We are the opinion that the Magistrates receiving reports under Section 157, Cr. P.C., particularly when it relates to the commission of heinous crime are required to note not only the date but also the time of the receipt of the copy thereof. Mr. B.B. Singh, learned counsel appearing for the State has pointed out the existence of various circumstances which may perhaps be the cause of delay in sending the copy of the report and its receipt by the Magistrate but surely there is a difference between the "may be" and "must be". The prosecution has apparently failed to explain the delay in sending the copy of the said report in terms of Section 157, Cr. P.C. to the Magistrate of the area. This aspect has been highlighted by the learned counsel of the appellant to content

that many of the accused were innocent and wrongly roped in the case allegedly on account of enmity existing between the complainant and the accused party. There is some substance in such a submission."

It further becomes evident that ocular version is inconsistent with medical evidence and this also creates a doubt in the prosecution version. According to depositions of informant PW1 he and deceased had started from their resident after eating two breads (*Roti)*. They have arrived at Baitalpur in 10-15minutes and it took them 5-10 minutes to search for the mason and labours. After that deceased consumed tea as well. However in the autopsy report semi digested food was found in the stomach of the deceased. When autopsy doctor was questioned he opined that it will take four hours for the food to become semi digested vide para 9 of his testimony. He further deposed in para 12 in no uncertain terms, that deceased must have taken meal 4 hours before. This possibility that after sustaining injury deceased digestive system would have functioned some more time was also ruled out by the doctor when he deposed that it was a case of instantaneous death vide para 14 of his testimony. Vide para 10 doctor even ruled out possibility of deceased having consumed tea. Thus what we find is there was irreconcilable evidence of the doctor vis-a vis ocular version which further crumbles edifice of prosecution version.

Investigation into the crime is yet another unsatisfactory aspect. No attempt was made by the I.O. to inquire into the aspect of informant's presence at the scene. No attempt was made to record the statement of the eye witnesses without any delay. Motor cycle was not traced out. Neither in the chik FIR nor in the inquest memo nor in the crime registration GD nor in the papers prepared at the time of inquest there is any reference of 2/3 Explosives Substances Act. No blood stained cloths of the informant etc. were seized. There is discrepancies in noting of time in documents. All

these faults do not still confidence in investigation being fair and above board.

Now coming to the most serious contentious issue that non charging the two accused who were alleged to have hurled bombs during the course of incident with offences u/s 2/3 Explosive Substances Act, makes their participation in the murder disproved, we find much force in the submission as only role assigned to them is of exploding bombs on the other side on road to facilitate escape. They never attempted to cause any injury to the deceased. The submission is that for that act those accused were never put to trial and hence their guilt is not established. If, for the crime committed by two bomb hurling accused, they were never charged how can they be convicted for the charge of murder as in that eventuality shooting down of the deceased would have been individual act of sole appellant Sunil (A-1) only at the spur of the moment all of a sudden which is the prosecution version. It is significant to take note of the fact that charge sheet was also submitted under section 2/3 Explosive Substances Act and hence it was incumbent upon the learned trial Judge to charge the two accused with that offence. In the impugned judgment learned trial Judge had not adverted to the said aspect of the matter at all. We are at a loss to note that we have failed to fathom out any reason as to why that charge was not framed against the two appellants (A-2) & (A-3). It is needless to say that offence u/s 2/3 Explosive Substances Act is entirely a different offence from offence of murder u/s 302 I.P.C. and hence section 464 Cr.P.C. does not have any application in the present appeal in as much as failure of justice has in-fact occasioned and *ex-facie* prejudice has been caused to the two accused (A-2) and (A-3). For judging prejudice we peep into the charges framed against those appellants and it is very disturbing to note that in framed charge dated 15.7.2005, there was absolutely no

reference at all for the two appellants Vinod (A-2) and Harendra Singh (A-3) to have hurled bombs during the incident. First charge is only for offence u/s 148 I.P.C. and second is u/s 302/149 I.P.C. For the sake of clarity we reproduce those charges as under-

> *"I, Vikramajeet Singh, Sessions Judge, Deoria, hereby charge you (1) Vinod and (2) Harendra Singh, as follows :-*
>
> *Firstly, that you, alongwith co-accused Sunil Pasi, and two others, on 15.6.2004, at about 8.50 a.m., in qasba Baitalpur, Police Station Gauri Bazar, District Deoria, were members of unlawful assembly, with the common object of committing murder of Ram Kripal, son of Ramakant Yadav, r/o- village Mukundpur, Police Station Gauri Bazar, District Deoria, and in prosecution of the said common object of the said unlawful assembly, committed the offence of rioting and at that time were armed with bombs and thereby committed an offence/punishable under Section 148, I.P.C., and within my cognizance.*
>
> *Secondly, that on the aforesaid date, time and place, co-accused Sunil Pasi did commit murder of Ram Kripal aforesaid by intentionally and knowingly causing his death, in prosecution of the common object of your said unlawful assembly, and you are, thereby, guilty of causing the said offence punishable under Section 302 I.P.C. read with section 149 I.P.C. and within my cognizance.*
>
> *And I hereby direct that you be tried by this Court on the aforesaid charges.*
>
> *July 15, 2005."*

With such framed charges appellants certainly could not have been convicted for the offence u/s 148,302/149 I.P.C. No doubt both (A-2) and (A-3) accompanied (A-1) came to the murder scene together and they also escaped from the incident scene together after the murder but in absence of any charge of exploding the bombs during the incident or making any fires does not necessarily indicate census-id-idum between them with common object to do away with the deceased and therefore we are in grave doubt as to whether section 149 I.P.C. can ever be utilized against them. In this respect we refer some of apex court decisions which are as follows:-

Anil versus Administration of Daman and Diu (2008)1 SCC (Cr) 72 it has been held as under:-

"5*5. The ingredients for commission of offence under Section 364 and 364-A are different. Whereas the intention to kidnap in order that he may be murdered or may be so disposed of as to be put in danger as murder satisfies the requirements of Section 364 of the Penal Code, for obtaining a conviction for commission of an offence under Section 364-A thereof it is necessary to prove that not only such kidnapping or abetment has taken place but thereafter the accused threatened to cause death or hurt to such person or by his conduct gives rise to a reasonable apprehension that such person may be put to death or hurt or causes hurt or death to such person in order to compel the Government or any foreign State or international intergovernmental organisation or any other person to do or abstain from doing any act or to pay a ransom.*

***56.** It was, thus, obligatory on the part of the learned Sessions Judge, Daman to frame a charge which would answer the description of the offence envisaged under Section 364-A of the Penal Code. It may be true that the kidnapping was done with a view to get ransom but the same should have been put to the appellant while framing a charge. The prejudice to the appellant is apparent as the ingredients of a higher offence had not been put to him while framing any charge.*

……

***58.** We, therefore, are of the opinion that the appellant could not have been convicted under Section 364-A of the Act."*

In Sou. Vijaya @ Baby, Appellant v. State of Maharashtra: AIR 2003 SC 3787 it has been held by the apex court as under:-

"Though in a given case defective charge does not vitiate trial in terms of S. 464 of the Criminal Procedure Code 1974, (for short 'the Code') where the omission is vital and even the substance of accusations is totally different from what is sought to be established by the prosecution, and there is no evidence on record to attribute knowledge of commission of the offence by the other accused that can be an additional factor for acquitting the accused. Looked at from any angle conviction of the appellant-accused A-2 cannot be maintained and is set aside."

In Sukhram versus State of Maharastra: AIR 2007 SC 3050 it has been laid down by the apex court as under:-

"11. We have perused the Trial Courts record. We find that though charge for offence punishable under Section 302 of IPC had been framed against appellant A-1, no such charge was framed against appellant A-2, even with the aid of Section 34 IPC. The only charge framed against A-2 was for an offence punishable under Section 201 read with Section 34 of IPC. True that Section 222 Cr.P.C. clothes the Court with the power to convict a person of an offence which is minor in comparison to the one for which he is charged and tried, but by no stretch of imagination, offences under Sections 304-B and 498-A IPC, under which appellant A-2 was convicted by the Trial Court, could be said to be minor offences in relation to that under Section 201 IPC, for which he was charged. In fact, the three offences are distinct and belong to different categories. The ingredients of the offences under the said Sections are vastly different. Therefore, Section 222 Cr.P.C. had no application on facts in hand.

12. At this junction, we may also note that conviction of appellant A-2 by the High Court under Section 302 IPC cannot also be held to be valid when tested on the touchstone of the provision contained in Section 464(2)(a) Cr.P.C. If it was convinced that a failure of justice had, in fact, been occasioned, the High Court was required to follow the procedure laid down in the Section, which was not done. That apart, even on the proven facts on record, a case for conviction under Section 302 IPC was not made out against the said appellant.

13. Bearing in mind this factual and legal backdrop, we are of the opinion that the High Court was not justified in convicting appellant A-2 for having committed a major offence punishable under Section 302 IPC."

In **Main Pal Versus State of Haryana: AIR 2010 SC3292** it has been held by the apex court as under:-

"11. As noticed above, in this case, the charge was that appellant committed trespass into the house of Prakashi Devi for assaulting Prakashi Devi, and assaulted the said Prakashi Devi and outraged her modesty. The accused concentrated his cross-examination with reference to the said charge and elicited answers showing that he did not assault or outrage the modesty of Prakashi Devi. He did not try to challenge the evidence let in to show that he had tried to outrage the modesty of Sheela Devi, as he was not charged with such an offence. The evidence of PW-1 and PW-2 was that the appellant did not touch or tease or abuse Prakashi Devi. Their evidence was that he touched/caught the hand of Sheela Devi and when she raised an alarm he ran away. When the charge was that the accused attempted to commit trespass into the house of Prakashi Devi with intent to outrage the modesty of Prakashi Devi,

the conclusion of the appellate court and the High Court that there was no failure of justice if he is punished for the offence of having assaulted Sheela Devi and outraging her modesty, is opposed to principles of fair play and natural justice embodied in sections 211, 212, 215 and 464 of the Code. When the accused is charged with having entered the house of Prakashi Devi and assaulted the said Prakashi Devi with intent to outrage her modesty and when the accused defended himself in regard to the said charge and concentrated on proving that the said charges were not true, he cannot be convicted for having assaulted and outraging the modesty of someone else, namely Sheela Devi. The accused did not have any opportunity to meet or defend himself against the charge that he assaulted Sheela Devi and outraged her modesty. Nor did he proceed with his defence on the understanding that he was being charged with having committed the offence with reference to Sheela Devi. One of the fundamental principles of justice is that an accused should know what is the charge against him so that he can build his defence in regard to that charge. An accused cannot be punished for committing an offence against 'Y' when he is charged with having committed the offence against 'X' and the entire defence of the accused was with reference to charge of having committed offence against 'X'."

Yet another glaring defect in framing of charge is that on the own showing of the prosecution it was not a case of any unlawful assembly at all with no applicability of section 147/149 I.P.C. and in fact the charge should have been framed only with the aid of section 34 I.P.C as participation of five persons during the incident was not proved at all. It is recollected here that the I.O. had found participation of two other accused Chhotai @ Jai Nath and Dablu Mani @ Vijai Pratap Mani false and had not charge sheeted them. This had dwindled the number of assailants to less than five. During the trial also prosecution application u/s 319 Cr.P.C. to summon them as accused was rejected and hence at no point of time participation of more than three accused surfaced. In such a view framing of charge u/s 302/149 I.P.C. and also charging the appellants u/s 148 I.P.C. was wholly illegal. We cannot resist the temptation of observing that the learned trial Judge was not oblivious of the case being tried by him and he committed patent illegality and ex facie

error in charging the accused. Time and again apex court as well as this court has cautioned trial courts to be careful in framing of charges and we remind the trial courts again of the same. Framing of charge is not an empty formality and section 464 Cr.P.C. is no escape goat for the trial courts to eschew their most solemn act of charging the accused with correct charges. As a note of caution we point out that nobody can be prosecuted and punished except for the offence time being in force is the Constitutional mandate and hence framing appropriate charge is inherent in it. Drawing a distinction between 'common intention' and 'common object' is such an elementary thing in a criminal trial that we cannot but express our serious displeasure and unhappiness over framing of charges in the case at hand and we say no more.

Before we part away with this appeal we note that findings and observations recorded by the learned trial Judge in the impugned judgment are contrary to the evidences on record and are lopsided and does not indicate dispassionate analysis of entire material on record to fathom out the truth. To note a few of them the mentioning of fact at page 3 of the impugned judgment that *"Vinod and Harendra assaulted with bomb which did not hit"* is contrary to the evidence on record. It is the conspicuous case of the prosecution that both the aforesaid accused exploded bombs on the opposite side on the road and they never attempted to hit the deceased. Likewise the mentioning of fact that incident occurred due to political rivalry is also against evidence on record as there is no reliable evidence in that respect but for a single line *ipse dixit* of the informant in his cross examination. Similarly the finding at page 4 of the impugned judgment that " *Witness clearly states that except the three present in court accused, he had not seen anybody else committing the murder"* is also contrary to the evidences on record as according to the informant Chhotai @ Jai Nath and Dablu Mani @

Vijai Pratap Mani had also participated in the crime and had fired shots. Going by the analogy drawn and slated by the learned trial Judge, even (A-2) and (A-3) did not participate in the murder. A perusal of findings at pages 4/5 of the impugned judgment not only indicates that it were oxymoron but also shows them to be perverse. Further, the evidences, which according to the trial Judge are insignificant are so glaringly damaging, noticeable and important that they could not have been ignored or brushed aside. As has been pointed out here in above no prudent person would have arrived at such a conclusion as has been arrived at by the learned trial Judge if he would have examined, sift and weighed evidences to separate grain from the chaff, which he never endeavoured. At page 5 learned trial Judge has himself mentioned that the bombs were not hurled aiming at the deceased but that does not make any difference as their "*crime falls within the ambit of section 302/149 I.P.C. and charge for the same has also been framed"* is again a perverse finding as no charge for hurling of bombs was framed and when only participation of three accused surfaced no unlawful assembly exited. Furthermore findings at page 6 of the impugned judgment regarding FIR and arrival of police personnel and non-disclosure of the names of the assailants to them by the witnesses is also incomprehensible and perverse findings being contrary even according to the opinion of the apex court as well. Ignoring criminal background of the deceased and defence version of him being shot dead in loneliness is yet another defect of significance in the impugned judgment. Furnishing a wholly unacceptable explanation regarding inconsistency between medical and ocular version against too settled expert view is yet again an error committed by the learned trial Judge. Other findings are also discredited by evidence on record.

The residue of our discussion is that the prosecution has failed

to bring home the charges against the appellants by leading cogent and reliable evidences and all the accused are entitled to the benefit of doubt.

Resultantly both the appeals being Criminal Appeal No. 3587 of 2006, Sunil Pasi Versus state of U.P. and Criminal Appeal No.3573 of 2006 Vinod and another versus State of U.P. are allowed. Impugned judgment of conviction and sentence dated 9.6.2006 recorded by Session's Judge, Deoria, in S.T. No. 112 of 2005, State versus Sunil Pasi And Others, relating to P.S. Gauri Bazar, district Deoria is hereby set aside and all the three appellants Sunil Pasi, Vinod and Harendra Singh are acquitted of all the charges against them. The two appellants Vinod and Harendra Singh are on bail, they need not surrender, their personal and surety bonds are discharged. Appellant Sunil Pasi is in jail, he shall be released from jail forthwith.

Let a copy of this order be intimated to the trial court.

Dt/3.5.2013
Rk/Arvind/Tamang-