

Neutral Citation No. - 2024:AHC:87197-DB

Judgment reserved on 05.02.2024

Judgment delivered on 14.05.2024

In Chamber

Case :- CRIMINAL APPEAL No. - 1189 of 1983

Appellant :- Khalil And Others

Respondent :- State of U.P.

Counsel for Appellant :- C.S. Saran,Arvind Kumar Mishra,Ganendra Pratap,Krishan Ji Khare,Mrityunjay Khare,Sanjay Singh,Shishir Kumar Dwivedi,Shivam Singh,Syed Mohmood

Counsel for Respondent :- D.G.A.

Hon'ble Siddharth,J.

Hon'ble Ram Manohar Narayan Mishra,J.

(Delivered by Hon'ble R.M.N. Mishra,J.)

1. Instant Criminal Appeal has been preferred against the judgment and order date 12.05.1983 passed by Special and Additional Session Judge, Ghazipur in S.T. No.257 of 1981 (State Vs. Khalil and others) arising out of Case Crime No.192 of 1981, P.S. Zamania, District Ghazipur under Section 302/34 IPC. The appellants have been convicted by the trial court for charge under Section 302/34 IPC and were directed to undergo life imprisonment.

2. Appellants Khalil, Zaheer and Jainuddin died during the pendency of present appeal under Section 302/34 IPC and therefore appeal was abated qua, them vide order dated 27.10.2021 passed in this Appeal.

3. Heard Sri Sanjay Singh and Sri Mrityunjay Khare, learned counsel for the surviving appellant Mofeed, Sri Gyan Narayan Kannoja, learned AGA-I and perused the material placed on record.

4. The prosecution version in brief is that informant Hakimuddin, a resident of village Khidirpur, P.S. Zamania, District Ghazipur lodged an FIR on the basis of written report Ext. Ka-1 at P.S. concerned on 20.09.1981 at 13:15 hours with averments that his son Shahabuddin was residing in Mumbai and worked there as Truck operator prior to the incident of his murder, his co-villager Khalil visited his son Shahabuddin in Bombay and had stolen a sum of Rs.56,000/- and fled away from there, regarding which his son has lodged an FIR in Bombay. The Bombay police visited the village of the informant and got accused Khalil and recovered around Rs.50,000/- stolen money from him. He was subsequently held in custody in Bombay on 14.09.1981, his son Shahabuddin and deceased came together in the village on 20.09.1981 at around 11:30 hours in the day, as co-villager Basheer who is brother of Khalil visited him and called him to the residence of Vakeel Khan in the village for the purpose of striking a settlement with regard to said case of theft. Shahabuddin visited the place of Vakeel alongwith his younger brother Badruddin, when he reached at the door of Vakeel Khan, his co-villager Vakeel Khan, Shafauddin, Maqbool Khan were sitting there, Shahabuddin also sat there. In the meanwhile Khalil, Zaheer and Jainuddin son of Jalil and Mofeed son of Gulam Pasool arrived there armed with lathi, knives and country made pistol, and as soon as they saw Shahabuddin there they attacked him. Jainuddin fired a shot at Shahabuddin by his country made pistol which hit him, thereupon Shahabuddin ran northwards via street in the village to save himself, but all the four accused persons chased him and caught hold of him in front of house of Gaya in the street, dragged him and dashed him on the ground, they attacked him by their respective weapons indiscriminately and he became seriously injured and fell on the ground, the accused left him there under impression that he died. The witnesses could not chase the miscreants due to heavy rain at the time of incident. Zaheer and Khalil were armed

with knives, Jainuddin was armed with country made pistol, Mofeed was armed with lathi; informant also rushed to the place of incident, on getting information of the incident he lifted his son Shahabuddin in injured condition. Shahabuddin who was seriously injured was moved to Zamania Hospital for his treatment, but he died at around quarter-past 12:00 hours within the limit of village Harpur. The incident was witnessed by his son Badruddin, Gaya and others. He got written report scribed by Tufail Khan, signed it and presented the same at police station on which FIR (Ext. Ka-2) was lodged at the police station against all the four accused persons.

5. Accused Zaheer and Khalil are real brothers, Jainuddin is son of Zaheer and Mofeed son of Gulam Rasool is close relative of the accused persons. Mofeed is brother-in-law of Zaheer and maternal uncle of Jainuddin.

6. PW7 S.O. Harinath Yadav, took over the investigation of the case. During investigation this fact surfaced that accused Khalil was chargesheeted for committing theft of Rs.56,250/- at greater Bombay on 12.07.1981 at around 30:30 pm at the residence of deceased Shahabuddin in Vadara Bombay 31. The accused Khalil was arrested in that case at his native village in district Ghazipur UP and was produced before the Court of Bombay. He was bailed out during the course of time, and both accused Khalil and deceased Shahabuddin came back to their village about one week and few days earlier to the incident. This criminal case of theft, allegedly committed by accused Khalil has been set-up by the prosecution as motive of the present offence, as the deceased was called at the place of Vakeel for arriving at a compromise with Khalil on the fateful day, but Khalil and his companions who are family members and relatives together brutally attacked him while seeing him at the door of Vakeel, in which he suffered fatal injuries and

died within a short span of time, while he was being carried to the hospital for treatment.

7. Inquest on dead body of the deceased was carried out by Investigating Officer on 20.09.1981 at around 13:15 hours in the precincts of police station Zamania, where dead body was brought by the informant and witness, and deceased was found wearing the old nylon bundy, one underwear and shirt; shirt was torn and blood stained. After carrying out the inquest proceedings the Investigating Officer prepared inquest report Ext. Ka-9 in his handwriting and signature, wherein he stated that in the opinion of panch witnesses the deceased died due to injuries suffered on his person. As many as 32 injuries were found on the person of the deceased during inquest. The inquest officer after conducting inquest proceedings sent the dead body alongwith requisite police papers, photonash Ext. Ka-6, chalannash Ext. Ka-7, letter to CMO Ext. Ka-8, letter for returning clothes of the deceased Ext. Ka-9. The dead body was moved in sealed cover in the custody of constable Ram Kumar Mishra and Ram Graih Singh who carried the dead body to mortuary and then postmortem house. The investigating officer who inspected the place of incident prepared the site plan in his handwriting and signature, on which Ext. Ka-10 was marked. The Investigating Officer recorded statement of the informant Hakimuddin, Badruddin son of Hakimuddin, Tufail scribed the report, Naseem witness of inquest, Maqbool Khan an eyewitness, Israr and others are witnesses of inquest. On 20.09.1981 he also recorded statements of witnesses Safauddin Khan, Vakeel Khan, Gaya and on 21.09.1981, he recorded statements of Smt. Jaina wife and Smt. Nazmimun Nisha, sister of the deceased. The accused persons could not be arrested, and three of them surrendered in the court on 24.09.1981. The investigating officer recorded their statements in the lockup of the district court, in which they denied their complicity in the offence. Accused Khalil was

arrested in Bombay, after this incident on account of his involvement in present case on 24.09.1981 a telegraphic information sent by Januah brother of deceased addressed to Bombay Police, and on receiving the information on 26.09.1981 the investigating officer got him transferred to district Ghazipur and on his production before the court on warrant 'B'; custody warrant was prepared by the Court, and he was sent to jail custody in the present case. The Investigating Officer submitted chargesheet Ext. Ka-11 on completing investigation on 20.10.1981.

8. Learned Chief Judicial Magistrate took cognizance of the offence and committed the case to the court of session as offence is specifically triable by court of session.

9. On commencement of trial, learned trial court framed charge under Section 302/34 IPC against all the four accused persons on 25.11.1981, they denied the charge and claimed to be tried. Prosecution examined PW1 Hakimuddin Khan, PW2 Shafauddin Khan as eyewitness, PW3 Ramkawal Mishra, constable police who carried dead body from the place of inquest to postmortem houses for postmortem, together with constable Rammoorat Singh, PW4 Ramjanm Singh, author of Chik FIR, PW5 Maqbool Khan as eyewitness, PW6 doctor S.K. Srivastava, who conducted autopsy (postmortem) on dead body, PW7 S.O. Harinath Yadav, Investigating Officer, PW8 Sohalrav Raje Bhosle who proved FIR lodged by the deceased Shahabuddin against accused Khalil in Bombay, PW9 Constable Sitaram Verma, who proved the copy of the GD of PS Bhawapur prepared on 03.08.1981 at about 03:10 pm regarding arrest of accused Khalil in regard to theft case lodged against him in Bombay.

10. The statements of accused persons were recorded by the trial court under Section 313 Cr.PC., after conclusion of prosecution evidence in which they stated that they have been falsely implicated in

the case due to enmity and the witnesses had deposed against them due to enmity.

11. The accused Khalil stated that he was arrested by Bombay Police prior to the incident and he got apprised of this incident when police approached him in regard to present case. He never visited Ghazipur after being released on bail by Bombay Court. The accused Mofeed Khan stated that three criminal cases and one case relating to land dispute were running between him and the witnesses and he will file papers in this regard. The witness Shafauddin (PW2) had opened fire on wife of the accused regarding which a case was pending. The accused persons have not adduced any evidence in defence, their defence is of denial.

12. Learned trial judge on appreciation of oral, documentary and formal evidence came to the conclusion that prosecution has successfully proved the case against the accused persons and their complicity in the murder of deceased Shahabuddin has been proved beyond reasonable doubt on the strength of evidence on record. The learned trial judge has convicted the appellants for charge under Section 302/34 IPC and sentenced them to undergo imprisonment for life by the impugned judgment dated 12.05.1983.

13. PW6 doctor S.K. Srivastava, on 21.09.1981 conducted postmortem examination at about 3:00 p.m. He found the following ante-mortem injuries on the body of Shahabuddin:-

1. Incised wound right side of forehead $\frac{1}{2}$ cm below right eye. Obliquely placed 2 cms x $\frac{1}{2}$ cm.
2. Incised wound forehead right side transversely placed 2 cms x $\frac{1}{2}$ cm x $\frac{1}{2}$ cm, 1 cm above injury No.1.

3. Incised wound right side mastoid region obliquely placed 3 cms x $\frac{1}{2}$ cm x $\frac{1}{2}$ cm, 1 cm below root of right ear.
4. Incised wound right eye brow transversely placed 2cm x $\frac{1}{2}$ cm x $\frac{1}{2}$ cm.
5. Incised wound lower lip transversely placed 2 cm x $\frac{1}{2}$ cm x $\frac{1}{2}$ cm.
6. Incised wound chest vertically placed 3 cms x $\frac{1}{2}$ cm x $\frac{1}{2}$ cm.
7. Stab wound left side of face, $\frac{1}{2}$ cm of Left eye ball measuring 3 cms x $\frac{1}{2}$ cm cranial cavity deep. On dissection fracture in base of skull seen.
8. Contusion left shoulder region 5 cms x 4 cms, 2 cms from right shoulder joints.
9. Incised wound transversely placed 2 cms x $\frac{1}{2}$ cm x $\frac{1}{2}$ cm bridge of nose.
10. Incised wound left shoulder region 2 cm x $\frac{1}{2}$ cm x 5 cm from left sternal.
11. Incised wound left side of face 2 cms x $\frac{1}{2}$ cm x $\frac{1}{2}$ cm, 1 cm below left alve of nose.
12. Incised wound left side of back scapular region 5 cms below spine of scapula left.
13. Abrasion left scapular region 5 cms x 4cms.
14. Contusion obliquely placed left side of neck in an area of 5 cms x 4 cms.
15. 2 incised wound scalp left parietal region. 2 cms apart each measuring 2 cms x $\frac{1}{2}$ cm x $\frac{1}{2}$ cm. 10 cms above left ear.
16. Fire arm wound of entry on right forearm in an area of 30 cms x 8 cms, on front and out side. Each wound measuring 25 cm x 0.25 cm muscle deep margin inverted. No tattooing and blackening seen. Dissection right to left, horizontally (15 small pellets recovered from muscles beneath this wound.)
17. Contused wound on right scapular region 5 cms x 4 cms, 1cm below right segment of scapula.

18. Incised wound below 4th, 5th finger of right hand measuring 2 cms x 1 cm muscle deep, vertically placed.

19. Contusion on right hand downward 5 cms x 4 cms x 3 cms below right wrist.

20. Fire arm wound of entry around umbilicus in an area of 5 cms x 8 cms each wound measuring 0.25 cms x 0.28, cms margin lacerated inverted. No tattooing and blackening seen. Direction behind upward-leftward. 6 small pellets recovered from muscles.

21. Abrasion right side of chest in an area of 5cms x 4cms x 3cms below right nipple.

22. Abrasion left hand 3 cms x 2 cms, 1cm below to the wrist.

23. Fire arm wound of entry left thigh front to outer side in an area of 12 cms x 6 cms, 18 cms above left knee. Obliquely 0.25 cms x 0.28 cms muscledeep. No blackening tattooing seen. Margin lacerated and inverted direction backward to onward. 7 small pallets recovered from muscles.

24. Abrasion left leg 5 cms x 4 cms, 3 cms below left knee.

25. Stab wound left side of neck. 3 cms x $\frac{1}{2}$ cm x 4 cms, 3 cms below left ear.

26. Fire arm wound of entry right thigh in an area of 10 cms x 8 cms each wound measuring 0.25 cms x 0.28 cms musclesdeep. No blackening tattooing seen. 6 small pellets recovered from muscles. Direction of wound backward to downward.

27. Abrasion right knee 2 cms x 3 cms.

28. Incised wound right side of neck 5 cms x 3 cms x 1 cm margin clean cut.

29. Stab wound right side of back 2 cms x $\frac{1}{2}$ cm x $\frac{1}{4}$ cm at the lower of D-8 transversely placed.

30. Abrasion right side of back 4 cms x 3cms at the level of D-5.

31. Abrasion left side of back in an area of 5 cms x 4 cms at the level of D-11.

32. Lacerated injury on occiput transversely placed 4 CMS x ½ cm bone deep. On dissection occipital bone was found fractured.

14. According to Dr. S.K.Srivatava, the deceased died due to ante-mortem injuries sustained by him and the death might have occurred at about 11:30 on 20.9.81. In the opinion of PW6 Dr. S.K. Srivastava death might have occurred at 11:30 am on 20.09.1981 incised and stab wounds may be been caused by knife and abrasion and contusion by some blunt object like Lathi. The deceased would have sustained at least four shots of fire arm. This is more probable that incised wounds had been caused by sharp edged weapon. Stomach of the deceased was empty. Liquid faeces and foul gases were present in small intestine and hard faecal matter and gases were present in large intestine (colon) bladder was empty. He found that the deceased sustained injury from gun shot besides knife and lathi, and the deceased died due to shock and haemorrhage caused by ante-mortem injuries. He opined that injuries of deceased were sufficient in ordinary course to cause death.

15. S.I., Harinath Yadav (PW7) after recording the statement of witnesses at the police-station, came to the place of occurrence on the same day and prepared site-plan (Ext. Ka-10). He also found the mark of pellets in the Varandah of Vakeel Khan which was made of mud. He also found the mark where deceased fell down and received injuries. At that place, the accused could not be apprehend. In the meantime, the accused surrendered before the court and their statement was recorded after completing investigation. SI, Harinath Yadav submitted chargesheet (Ext. Ka-1) against the accused. The case was committed to the court of session by C.J.M., Ghazipur where the charges mentioned above were framed against them.

16. PW1, Hakimuddin, the father of the deceased, supported the FIR version and he says that he arrived at the place of occurrence soon after the assault upon the deceased and the witnesses narrated him how the deceased was assaulted. PW2 Safaaddin and PW5 Maqbool Khan have given ocular testimony about the murder of deceased. PW3 constable Ram Kawal Misra says that he carried the dead body and produced it before doctor for post-mortem examination. PW4 constable Moharrir Ram Janam Singh has proved the Chick FIR and copy of GD. PW6 Dr. S.K. Srivastava has deposed about the ante-mortem injuries found on the person of Shahabuddin. PW7 Harinath Yadava deposed about the investigation of the case. PW8 Raje Bhosale has deposed about the FIR lodged by Shahabuddin against the accused Khalil. He also proved the FIR and other memos and says that he arrested accused Khalil on 03.08.1981 in village in Musti Bhararkol district Ghazipur and subsequently recovered Rs.50,000 from one Mahfooj Khan (the nephew of accused Khalil) on 24.08.1981 in Mohalla Charbag, Lucknow at the pointing of Khalil. He proved the charge-sheet against accused Khalil about the alleged theft. PW9 constable Sita Ram has proved the copy of G.D. of P.S. Bhawarkol prepared on 03.08.1981 at about 3:10 pm about the arrest of Khalil accused. Its copy is exhibit Ka-15.

17. Learned counsel for the surviving appellant Mofeed submitted that except the appellant Mofeed, the other three convicts/appellants have already died and the appeal has been abated by the orders of this Court in regard to deceased appellants. He is on bail in present appeal by the order of this Court dated 15.07.1985. Learned counsel for the appellants also filed written arguments in the present appeal, he submitted that in the FIR role of opening fire by country made pistol on deceased Shahabuddin has been assigned to appellant Jainuddin and role of causing stab injuries on deceased by knives have been assigned

to convict Zaheer and Khalil. The surviving appellant Mofeed has been assigned role of causing lathi blow to the deceased in evidence. In FIR itself it is stated that accused Mofeed wielded latahi, when the accused persons attacked the deceased. He further submitted that as many as 13 witnesses are named in the chargesheet, out of whom 8 are named as eyewitness, but only three of them namely Hakimuddin (PW1), Shafauddin (PW2), and Maqbool Khan (PW3) were examined before trial court as an eyewitnesses. PW2 Safauddin is inimical to accused side. The deceased alleged to have fallen in front of the house of one Gaya Aheer, but the Investigating Officer has not named him as witness of the incident. PW1 Hakimuddin the informant and father of the deceased was examined by the learned trial court on 19.02.1983. He has stated in his evidence that he was not present on the spot because of his crippledness and heavy rain fall all the time of incident.

18. He further stated that his son was killed by Zaheer, Khalil, Mofeed and Jainuddin in front of the house of Gaya Aheer, even in FIR he has stated that on hearing about the incident he went to the place where his son fell down after being injured and he carried him to the hospital by laying him on a cot with the assistance of villagers, but he died on way in the village Harpur and there after he carried him to police station Zamania which is more than kose from his village.

19. Learned counsel further contended that there is material contradictions in the statement of PW2. From postmortem report of the deceased they stated that Jainuddin opened single fire on deceased, but in postmortem report of the deceased, he appears to have received minimum 4-5 fire arm injuries. This anomaly reflects that PW2 was not present on the place of occurrence. He also contended that no motive has been assigned to the appellant Mofeed, he is aged about 75 years at

present. He has been falsely implicated on account of his being relative of co-accused.

20. PW6 Maqbool has also stated in his cross-examination in 9th line of page 52 of paper book that Jainuddin had opened single fire upon the deceased, but the doctor who carried out postmortem examination stated that there were minimum 4 fire arm shots on the person of the deceased. Thus, medical evidence is not supportive of ocular testimony.

21. According to prosecution story and statement of investigating officer, the place on which the deceased was finally attacked and had fell in injured condition was muddy. This fact has also surfaced in evidence that there was heavy rain fall at that time, but the investigating officer has not mentioned anything in his panchayatnama that there was no mud on the body of the deceased, similarly the investigating officer has categorically stated in his statement before the court that there no mud was found on the body of the deceased. Doctor who conducted the postmortem has also stated that there was no mud on the body of the deceased. The absence of mud on the body of the deceased clearly belies the entire prosecution story regarding place of occurrence.

22. The witness who stated in their statement under Section 161 CR.P.C. before the investigating officer that deceased was wearing tahmat (lungi) when the incident occurred in their statement before the court they stated that he was not having lungi on his person, no lungi or lower garment was found on the person of the deceased in inquest report and postmortem proceedings. It is strange that a person would visit the place of a co-villager in connection with striking some compromise in presence of so many persons without having worn any trouser and lungi and only having Kamij, Banyan and underwear on his person.

23. He lastly submitted that from perusal of the statements of PW 1,2 and 6, it is manifest that there was raining at the time of incident, but the doctor has categorically stated that no blood was found on the body of the deceased. This fortifies defence suggestion given to the witnesses that occurrence took place at some other place and not in the manner and mode as propounded by the prosecution. Even Vakeel Khan at whose place the deceased and witnesses allegedly assembled to arrive at compromise with accused Khalil and where the occurrence began has not been examined during trial, and thus, prosecution has withheld this material witnesses who could have deposed regarding genesis and beginning of the occurrence.

24. In postmortem report, stomach of the deceased was found empty, whereas incident is said to have occurred at about 11:30 am. As per prosecution version this reflects that the occurrence took place in early hours of the day and for that reason the deceased could not have taken any meal on that day, otherwise undigested or semi-digested food must have been found in his stomach. The accused is aged around 80 years at present.

25. With the above submissions, he prayed for setting aside the impugned judgment, at least with regard to surviving appellant Mofeed and his consequent acquittal.

26. Per contra, learned A.G.A. appearing for the State submitted that the prosecution case is based on eyewitness account of witnesses Shafauddin (PW2), (PW5) Maqbool which is supported with medical evidence given by PW6 doctor S.K. Srivastava, the author of the postmortem report of the deceased and corroborative evidence given by the Investigation Officer of the case. The prosecution has suggested specific motive behind commission of offence against accused Khalil and other accused persons being family members and relatives of

Khalil were sharing common intention with Khalil to eliminate the deceased. The deceased had lodged an FIR of theft against convict Khalil regarding commission of theft in Bombay at his place, when he visited him in Bombay and recovery of stolen property was effected at pointing out of him from Lucknow, when he was arrested in connection with said theft from Bhararkol in District Ghazipur and was produced before the Court in Bombay. He was enlarged on bail by orders of Bombay Court and the deceased and accused Khalil arrived their native place around 12 days earlier to the date of incident. The enmity of accused Khalil and deceased culminated in commission of this offence and deceased was called at the place of Vakeel on the pretext of striking a compromise with accused Khalil in respect of said theft case. There is no any legal or factual error or infirmity in appreciation of evidence and marshalling of facts carried out by trial court while giving verdict of guilt and sentencing the appellant by the impugned judgment. Accused Khalil had strong motive to commit the crime and other convicts are his brothers or relative. The motive has been proved by prosecution at the outset. The appeal is devoid of merit and is liable to be dismissed.

27. On perusal of evidence on record it reveals that Shahabuddin deceased is the son of Hakimuddin complainant. He had a transport business in Bombay and used to ply trucks. 2-3 months before the occurrence, accused Khalil went to Bombay. He committed theft of Rs 56,200/- belonging to Shahabuddin and ran a way from there. The case of theft was instituted by Shahabuddin against him at P.S. Rafi Ahmad Kidwai Marg Bombay. P.W.8 S.I. Sohal Rao Raje Bhosale, prepared chick FIR On 30.7.1981 and its copy as (Ext.Ka-12). During the course of investigation of that case, SI, Sohal Rao Rajje Bhosale came to village Khidirpur on 2.8.81 where the accused was not available. After receiving information about his presence, he went to

village Machati in P.S. Bhawarkol of this district and arrested accused Khalil on 03.08.1981 at the pointing of Shahabuddin. He again took accused Khalil under police custody from the court of 29-Metropolitan Magistrate, Bombay and came to Lucknow along with him. He recovered Rs 50,000/- from one. Mahfooj Khan s/o Basheer Khan at the pointing of accused in Lucknow. He prepared recovery memo regarding this and its copy is (Ext.Ka-13). After completing investigation, he submitted charge-sheet against Khalil before the Court of magistrate concerned in Bombay. The proceeding of that case is however stayed due to pendency of present case, two-three years before the incident of this case, one Shamsuddin was murdered. Accused Zahir, and Shahabuddin deceased were co-accused in that case. The aforesaid case was pending at the time of murder of Shahabuddin. Zahir accused was released on bail in the theft case. Safafuddin accused got himself bailed out in the aforesaid murder case and came to village Khidirpur two days before the murder. On 20.9.1981 at about 10 a.m. the complainant was sitting at his home in the morning with his sons Shahabuddin and Badaruddin. It was raining lightly at that time. Basheer, the brother of accused Khalil, came there and requested that they should go and the matter relating to theft of Rs.56,000/- should be compromised. He asked them to come at the door of one Vakil. Both Shahabuddin and Badaruddin thereafter went to the house of Vakeel in village Khirdipur. Complainant however remained at his house as he is a lame person and also due to rain. P.W.2 Shafaudddin was taking rest in his house after taking break fast at about 10 a.m. on 20.9.81. The brother of Khalil went there and asked him to accompany him as the matter relating to the dispute of Rs.56,250/- was to be settled. He also went to the house of Vakeel Khan where people had to assemble. One Maqbool was already present who stated that when he arrived, Shahabuddin the deceased and his brother Badaruddin also came there. They all sat in the verandah of Vakeel Khan. On one cot, he, Vakil,

Maqbool and Badaruddin sat and in the east of his cot, deceased Shahabuddin sat at another cot. They started waiting for arrival of other person. At about 10.45 a.m., accused Jainud in, Zahir, Khalil and Mofeed came there. It was also raining at that time. Immediately after the arrival Jainuddin fired upon Shahabuddin from his country- made pistol. He got up from from the cot and ran towards north. All the four accused namely Zahir, Khalil, Jainuddin and Mofeed chased him. P.W.2 Safauddin and other who were sitting there, ran behind them raising alarm. When deceased Shaabuddin reached in front of the house of Gaya in th street accused Mofeed and Jainuddin caught him and threw him on the ground. Accused Zahir and Khalil started stabbing him with knives which they had. Mofeed had wielded lathi before dashing the deceased on the ground. Safauddin and others stayed at some distance from the deceased and saw the accused assaulting the deceased. They ran towards west after inflicting numerous injuries, It was downpower at that time also. The witnesses could not apprehend the accused as they were unarmed. Accused Jainudd is armed with country- made pistol and accused Zahir and Khalil had knife and accused Mofeed had lathi. Shortly thereafter, Hakimuddin came at the spot. Maqsood also arrived. They came to the place of occurrence after hearing about the serious injuries of the deceased.

28. Finding the deceased fallen and crying at the place of occurrence they took the injured to hospital. At the spot, the witnesses narrated the entire story to the complainant. By the time he reached upto village Harpur, injured Shahabuddin died. Hakimuddin then came with the dead body to PS. Zamania. He dictated the F IR at the police-station to one Tufeil Khan. It is exhibit as Ka-1. He presented the written report (Ext. Ka-1) to Daroga who recorded his statement at the police-station.

29. P.W. 4 constable Mohrrir Ram Janam Singh prepared chick FIR (Ext.Ka-2) on the basis of written report (Ext.Ka-1) at 1.15 p.m. and made entries in the G.D, (Ext.Ka-3). SI, Harnath Yadava started investigation of the case soon after the FIR was lodged in his presence. He sent SI, Fateh Bahadur Singh and other police personnel to the spot. He took the dead body thereafter in the police custody and conducted the inquest proceeding. He prepared panchayatnama (Ext.Ka-5) besides challan-nash (Ext.Ka-6) and letters for post-mortem etc. (Ex t. Ka-7 to Ka 9). He despatched the dead body for post-mortem examination to mortuary at Head Quarter through constables, Ram Kawal Misra (P.W3) and Ram Ugrah Singh.

30. According to PW6 Dr. S.K.Srivatava, the deceased died due to ante-mortem injuries sustained by him and the death might have occurred at about 11:30 on 20.09.1981. He found that the deceased sustained injury from gun shot besides Knife and lathi, the deceased died due to shock and haemorrhage caused by ante-mortem injuries. The deceased would not have been able to speak on account of injury No.7. The incised wounds were not more than 2 cm deep. He did not notice any mud or soil on dead body, 34 pellets were recovered from dead body injuries were of such nature that the injured would have died within 15-20 minutes after being injured.

31. SI, Harinath Yadava (P.W.7) testified that after recording the statement of witnesses at the police-station he came to the place of occurrence on the same day and prepared site-plan (Ext. Ka-10). He also found the mark of pellet in the Verandah of Vakeel Khan. He also found no blood mark where deceased fell down after receiving injuries. At that place, the accused could not be apprehended. In the meantime, the accused surrendered before the court and their statements were recorded. After completing investigation, SI Harinath Yadava submitted

charge-sheet (Ext.Ka-11) against the accused. The accused were committed to the court of sessions by C.J.M. ,Ghazipur where the charges mentioned above were framed against them. P.W.1 Hakimuddin, the father of the deceased, supported the prosecution case and he says that he arrived at the place of occurrence soon after the assault upon the deceased and the witnesses narrated him how the deceased was assaulted. P.W.2 Safaaddin and PW5 Maqbool Khan have given ocular testimony about the murder of deceased. P.W.3 constable Ram Kawal Misra says that he brought the dead body and produced it before doctor for post-mortem examination. P.W.4 constable Mohrrir Ram Janam Singh has proved FIR the chik/and copy of G.D. P,W.6 Dr. S K, Srivastava has deposed about the ante-mortem injury found on the person of Shahabuddin. P. W.7 Harinath Yadava deposed in regard to the investigation of the case.

32. P.W. 8 S.I. Raje Bhosale has deposed about the FIR lodged by Shahabuddin against the accused, Khalil in Bombay prior to this incident. He also proved the FIR and recovery memos and says that he arrested accused Khalil on 03.08.1981 in village in Musti and subsequently recovered Rs 50,000 from Mahfooj Khan (the nephew of accused Khalil) on 24.08.1981 in Mohalla Charbag, Lucknow, at the pointing of Khalil. He proved the charge-sheet against accused Khalil about the alleged theft.

33. P.W.9 constable Sita Ram has proved the copy of GD. of P.S. Bhawarkol prepared on 03.08.1981 at about 3.10 p.m. regarding the arrest of Khalil accused. Its copy is exhibit Ka-15.

34. The accused denied the prosecution theory and stated that they were falsely implicated due to enmity. Accused Zahir says that the witness Safaaddin had fired upon his wife and the case about it is pending against him. He will file its papers. He says that he had 3 cases

against the witnesses. Accused Khalil stated that he was arrested by police in Bombay court and he learnt about the present case only when the Magistrate inquired from the police. He says that he has not returned to village Khirdipur after bail from Bombay court. All the accused stated that the witnesses were deposing against them falsely.

35. No evidence was adduced in defence. Their defence is of denial. We have re-appreciated and re-suretimsed the evidence adduced during trial and meticulously examined the material on record in the light of submissions of learned counsel for the appellant and learned A.G.A. appearing for State. Appellant Mofeed is at present 71 years of age as per his statement under Section 313 Cr.P.C. recorded during trial.

36. Much emphasis which has been laid by learned counsel for the appellant on the fact that according to statement of prosecution witnesses the incident took place at the time when there was heavy rain. According to prosecution version the deceased ran to save him after after receiving a gun shot but he was thrown on the ground in the street by the appellant Mofeed and co-accused Jainuddin the deceased was over powered by the Mofeed and when he fell down the appellant Khalil and Zaheer gave a number of knife blows to him. According to Investigating Officer the lane in which decease was lying in injured condition and later died, while being carried to hospital was muddy road, but surprisingly neither the investigating officer nor the doctor who conducted postmortem on dead body of the deceased has mentioned no where that dead body was smeared with mud, this creates a serious doubt on the place of occurrence propounded in prosecution version.

37. In FIR as well as in evidence this fact has surfaced on the date of incident it was raining since last night, there was average in rainfall when the deceased came to place of Vakeel who negotiate some

settlement with accused persons on call of Basheer the brother of accused Khalil, but when the deceased ran to rescue himself for being hit by one firearm injury and he was brutally assaulted by knives and lathi blow and fell down in the lane after some distance of the house of Vakeel, and his father Hakimuddin visited him on being apprised of the incident there was heavy rain fall. According to PW1 he lifted his son Shahabuddin who was seriously injured from the place and carried him on a cot to move him to hospital, but he died onway within the limit of village Harpur. He carried him to police station and on asking of the police officer there he got a written report scribed by his co-villager Tufail Khan and presented the same at Police Station, on which basis Chik FIR Ext. Ka-2 was registered by Constable Moharir Ramjanam Singh (PW4). Although PW2 Safaaddin stated in cross examination that yet rain started on the date of incident from 11:00 am and continued upto 12:30 hours, he yet further stated that the place where Shahabuddin fell on being brutally assaulted was covered by bricks(kharanja) and there was no mud thereon. If we believe the statement of investigating officer who conducted the spot inspection and prepared the site plan of the both the places of incident, and proved the same before the court below that the place was kachcha (muddy), then inspite of rainfall at least clothes of the deceased must have been smeared with mud on the other hand, if the kharanja was laid on the road, no question arises of body and clothes of the deceased smeared with mud. There is disharmony on this point in eye witness account and evidence of investigating officer.

38. It is natural that due to heavy rainfall no blood stained could be found on the place of incident, where deceased was said to be assaulted by all the accused persons in their own way. However, it is strange that no blood stained has been collected or taken by the investigating officer from the Varamda of Vakeel Khan where the

witnesses and deceased were present to participate in a meeting convened at the instance of accused side, this fact has surfaced in evidence that deceased was first assaulted by firearm shot opened by accused Jainuddin whereupon he ran to save himself, but later overpowered by assailants.

39. The Investigating Officer (PW7) stated in his evidence that he noticed marks of pellets on 4-5 places in Varamda (Sai) of Vakeel Khan and walls were muddy which was broken on those places. He did not find any blood stain there. The Investigating Officer has prepared a joint site plan of the house of Vakeel Khan where the incident occurred and deceased was alleged shot by appellant Jainuddin there and also the place where he fell on the ground for being fatally assaulted. PW7 has not located said pellets marks in site plan Ext. Ka.10.

40. Accused Khalil, Zaheer, Mofeed surrendered on 14.09.1981 in the Court of Judicial Magistrate, Ghazipur and accused Vakeel Khan was arrested near Bombay few days prior to 26.09.1981 when PW7 received information regarding the arrest and he was produced before Ghazipur Court under custody after being transferred from Bombay. He has not made efforts to obtain police custody remand of the accused persons for recovery of weapons of offence i.e. country made pistol, knives, and lathi. Thus in the present case there is no recovery of any weapon of offence what so ever. Deceased Shahabuddin was brutally assaulted and suffered 32 injuries in the incident, which includes 4 firearm injuries, 12 injuries from blunt object and 16 incised/stab wounds, which were found by medical witness Dr. S.K. Srivastava (PW6) proved as sufficient to cause death, but this fact cannot be the last sight. There are many inconsistencies in ocular and medical evidence in this case, which shouts the prosecution version in suspicion and doubt.

41. PW1 Hakimuddin, the father of the deceased is not an eye witness, he has stated in his evidence that on 20.09.1981 at about 10:00 am Basheer who is brother of accused Khalil visited his house where he was sitting with his sons Shahabuddin and Badruddin and asked them to come to place of Vakeel Khan so that a compromise could be struck in regard to the case of theft of Rs.56,000/- and on his asking, his sons Shahabuddin and Badruddin came to the door of Vakeel, he could not visit the place of Vakeel as he was crippled and it was drizzling at that time. The time of incident of brutally assault the deceased is shown in evidence of five witnesses, as being 11:30 am. This fact also surfaced in evidence also when deceased and his brother came to the place of Vakeel, witnesses were present there. The deceased sat on a Bamboo cot and his one leg was on another cot on which witnesses were sitting. After some time accused persons suddenly appeared and accused Jainuddin opened fire on Shahabuddin as soon as they saw him. It is unnatural that a person who had taken nothing since morning to 11:00 hours (approximately) as in villages people take meal/breakfast earlier than urban people. In postmortem examination report the stomach of deceased was empty and in small intestine liquid faeces and foul gases were present and hard faecal matter and gases were present in large intestine. Had he taken any meal or breakfast in the morning some semi digested or undigested food matter would have been present in stomach. This state of stomach and abdominal organs of the deceased create a serious doubt about the time of incident.

42. The deceased is shown to have sustained 12 injuries; injury No.8 contusion left shoulder region 5 cms x 4 cms, 2 cms from right shoulder joints; injury No.13 abrasion left scapular region 5 cms x 4cms; injury No.14 contusion obliquely placed left side of neck in an area of 5 cms x 4 cms; Injury No.17 contused wound on right scapular region 5cm x 4cm, 1 cm below right segment of scapula; injury No.19

contusion on right hand downward 5 cms x 4 cms x 3 cms below right wrist; injury No.21 abrasion right side of chest 5cm in an area of 5 cm x 4 cm x 3cms below right nipple; injury No.22 abrasion left hand 3 cms x 2 cms, 1cm below to the wrist; injury No.24 abrasion left leg 5 cms x 4 cms, 3 cms below left knee; injury No.27 abrasion right knee 2 cms x 3 cms; injury No.30 abrasion right side of back 4 cms x 3cms at the level of D-5; injury No.31 abrasion left side of back in an area of 5 cms x 4 cms at the level of D-11; and injury No.32 lacerated injury on occiput transversely placed 4 CMS x ½ cm bone deep. On dissection occipital bone was found fractured and same are attributed to present appellant Mofeed.

43. Some of these injuries might have been caused due to dashing the deceased on ground and the other particularly injury No.32 must have been caused by mechanical violence. Four firearm injuries were detected by doctor on the person of the deceased which are reiterated as under:-

.....16. Fire arm wound of entry on right arm and forearm in an area of 30 cms x 8 cms, on front and out side. Each wound measuring 25 cm x 0.25 cm muscle deep margin inverted. No tattooing and blackening seen. Dissection right to left, horizontally (15 small pellets recovered from muscles beneath this wound.)

20. Fire arm wound of entry around umbilicus in an area of 5 cms x 8 cms each wound measuring 0.25 cms x 0.28, cms margin lacerated inverted. No tattooing and blackening seen. Direction behind upward-leftward. 6 small pellets recovered from muscles.

23. Fire arm wound of entry left thighfront to outer side in an area of 12 cms x 6 cms, 18 cms above left knee. Obliquely 0.25 cms x 0.28 cms muscle deep. No blackening tattooing seen. Margin lacerated and inverted direction backward to onward. 7 small pallets recovered from muscles.

26. Fire arm wound of entry right thigh in an area of 10 cms x 8 cms each wound measuring 0.25 cms x 0.28 cms muscles deep. No blackening tattooing seen. 6 small pellets recovered from muscles. Direction of wound backward to downward.”

44. Aforementioned firearm injuries are attributed to accused Jainuddin, who is said to have opened one firearm shot by his country made pistol on the deceased at Varanda of Vakeel Khan. He firstly saw the deceased in sitting condition. PW6 doctor S.K. Srivastava has stated categorically in his cross-examination that he did not find any mud on the dead body at the time of postmortem. The deceased might have suffered at least four firearm shots. Injury No.7 and 32 must have resulted into unconsciousness of the injured. The incised wounds were not more than ½ cm of depth, these were caused by some sharp edged weapon. The abrasion found on the back of the deceased might have resulted due to dragging. The nature of injuries reveal that deceased should have died within 15-20 minutes after receiving the injuries.

45. This issue of inconsistency between medical evidence and ocular testimony has been addressed in impugned judgment on Page 14,15 and 16 of impugned judgment in following manner:-

.....Learned counsel for the accused argued that ocular testimony is not consistent with the medical evidence and must be rejected. P.W.6 Dr S.K. Srivastava deposed that the fire arm in jury found on the dead body of Shahabuddin, must have been caused by not less than 4-5 shots. P.W.2 Safauddin and P.w.5 Magbul Khan stated that only one shot was fired upon the deceased while he was sitting in the verandah of Vakil Khan. In jury-report (Ext.Ka-4) shows that deceased had four arm wounds. All the wounds were muscle deep. One fire arm wound was around the umbilicus and 2 fire arm wounds were on the left and right thighs and one fire arm wound was on the right fore-arm and arm. The direction of pellets was horizontal on the arm and upward in the injuries near- the umbilicus and was downward on the thighs. The small wounds indicate that there was dispersal in the pellet. The post-mortem report (Ext.Ka- 4) and the deposition of P.W.6 Dr. S.K.Srivastava proves the above fact. The nature of injury clearly indicates that there was dispersal in the pellets. The Naksha-nash

showing the location of injury prepared by P.W.7. SI Harinath Yadava would show the location of injuries. Dr. S.K.Srivastava assumed the role of ballistic expert in giving a definite statement about the number of fire shots fired upon the deceased. While a person is sitting on a cot, a portion of thighs could be covered by belly and the distance between the portion of two thighs and umbilicus and middle of the arm would not a be much. Dr. S.K. Srivastava has not given any data for his specific statement. Admittedly he is not a ballistic expert. A perusal of naksha-nash clearly indicates that the fire arm injuries on the body of Shahabuddin is quite possible by gun shot. It is clear that shot was not fired while the accused was standing. Where the pellets of a cartridge dispersal in an area of 20 cm, the direction of all the pellets would not be the same. The pellets in the upper extremity of the wound caused by dispersal of the deceased could obviously upward whereas the direction of pellets in the lower extremity. would be downward. The pellets in the centre would be straight. The pellets in the centre may be parallel to the barrel. The argument of the learned counsel for the accused is therefore not acceptable. There is also no ground to assume that the distribution of the pellets during the course of dispersal would be equal or that there is no possibility of some pellet causing injuries in irregular manner. The positive deposition of P.W. 2 Safaaddin and P.W.5 Maqbul Khan, therefore, cannot be rejected on this score. In fact, the deposition of P.W. 6 Dr. S.K. Srivastava appears to be vague generalization on wrong assumption. No one could say with certainty about the number of shots unless he has complete idea of location of limbs and the manner in which a person is sitting or standing at the time of fire. Direction of pellets in this case is only vague and meaningless in this case as the injuries of fore-arm are muscle deep only.

46. There is a difference between medical expert is of medical witnesses and a ballistic expert, latter is more skilled witness to explain the trajectory of ammunition after it strikes a part of the body of victim. The eyewitness have testified that PW1 Jainuddin fired a shot first of all at the deceased Shahabuddin when he was sitting in Verandha of Vakeel by a country made pistol. The deceased suffered a shot and ran towards north being perturbed, all the four accused persons chased him. The witnesses also ran behind the assailants, and when the injured reached near the house of Gaya, Mofeed and Jainuddin grabbed him and threw him on the ground, thereupon Zaheer and Khalil assaulted him by knives, accused Mofeed assaulted him with lathi. The witness and others were watching the incident from some distance. The accused

fled away towards west after badly assaulting the deceased, it was heavy raining at that time. Similar deposition has been given by PW5 Maqbool Khan, the other eye-witness in his evidence. Thus, from perusal of evidence on record it appears that witnesses have stated that accused Jainuddin fired a single shot at the deceased when he was sitting in Verandha of Vakeel Khan on a cot.

47. PW2 Safauddin stated in cross-examination that Basheer visited his house at 10:00 am on the fateful day and asked him to come to the place of Vakeel Khan with a view to arrive at compromise regarding theft case of Rs.56,250/-, when he reached there at Verandha of Vakeel Khan some people were assembled there, he sat on a cot alongside Vakeel Khan, Maqbool (PW3) and Badruddin. Deceased Shahabuddin was sitting on a separate cot lying in its east, they were waiting for arrival of other people. The assailants Khalil, Jainuddin, Zaheer and Mofeed reached there around quarter to 11:00. Shahabuddin was sitting west facing, his left leg was on the cot on which the witness was sitting and his right leg was on his own thigh.

48. On perusal of firearm injuries noticed in the postmortem report authored by PW6 Dr. S.K. Srivastava we find that out of four firearm injuries found on person of the deceased in postmortem report, first firearm wound of entry was on right forearm and second firearm wound of entry was around umbilicus (navel), the third firearm wound was on left thigh, whereas fourth firearm wound was on right thigh. The dimension of all the wounds were almost similar i.e. 0.25 cm x 0.28 cm. No blackening or tattooing was found around the wounds. This implies that fire was shot from some distance and not from close range, as longer distance of object from barrel of firearm would result in more dispersal of pellets, usually shot gun projectiles do not move out of the body unless a shot size is sufficiently large or of large caliber buck-

shorts or rifled slugs are used or the firing has taken place from a sufficiently near distance on the part of the body hit is not massive. On close examination of the firearm injuries found on person of the deceased, we find that one wound was on right arm and forearm and other wound was around umbilicus, its direction was behind upwards leftwards, the third wound was on left thigh front to outer side muscle deep and fourth firearm wound was on right thigh muscle-deep. These wounds appears to have been caused by pellets, but it is difficult to subscribe above reasoning of trial court that all these 4 firearms wounds could have been caused by single shot from a country made pistol due to dispersal of pellets. The injuries are not in one direction, some on left side and some on right side. PW2 Safauddin has stated that the deceased was sitting on cot, spreading his one leg on other cot and his right leg was placed on his own thigh, in this sitting posture it is difficult to comprehend that all the firearm injuries were result of single shot due to dispersal of pellets. The doctor who conducted postmortem examination on dead body is not a ballistic expert, but being medical expert he is skilled in examining the characteristic of injuries, particularly caused by mechanical balance. On perusal of the injuries it appears that these injuries might have been caused by one firearm, but it is difficult to believe that all these four firearm injuries has been caused by one single shot. As many as 34 pellets were recovered from dead body during postmortem examination from these firearm wounds. No ballistic examination of these pellets was carried out at the instance of investigating officer, at least to ascertain as to which nature of cartridge was used in the offence of which these pellets were constituent. No pellets were recovered from the place of firing.

49. The Hon'ble Supreme Court in recent judgment in **Pruthiviraj Jayantibhai Vanol Vs. Dinesh Dayabhai Vala and others** in Criminal

Appeal No.177 of 2014 in judgment dated 26.07.2021 observed as under:-

“.....17. Ocular evidence is considered the best evidence unless there are reasons to doubt it. The evidence of PW-2 and PW-10 is unimpeachable. It is only in a case where there is a gross contradiction between medical evidence and oral evidence, and the medical evidence makes the ocular testimony improbable and rules out all possibility of ocular evidence being true, the ocular evidence may be disbelieved. In the present case, we find no inconsistency between the ocular and medical evidence. The High Court grossly erred in appreciation of evidence by holding that muddamal no.5 was a simple iron rod without noticing the evidence that it had a sharp turn edge.”

50. The Hon'ble Supreme Court in recent judgment dated 21.02.2024 **Ram Singh Vs. State of U.P. in Criminal Appeal No.206 of 2024** while deciding the criminal appeal filed by the convict against conviction and sentence for charge under Section 301 and 302 IPC observed and place reliance on previous judgment in *Munna Lal Vs. State of U.P., (2023) SCC Online SC 80*, wherein the Court opined that since no weapon of offence was seized *in that case*, no ballistic report was called for and obtained. This Court took the view that failure to seize the weapon of offence on the facts and in the circumstances of the case, had the effect of denting the prosecution story so much so that the same together with non-examination of material witnesses constituted a vital circumstance amongst others for granting the appellants the benefit of doubt.

51. The firearm injuries shown in postmortem report do not appear to have been caused by one single shot even due to dispersal of pellets, on taking a meticulous examination of the wounds and in our considered opinion there is glaring inconsistency between ocular testimony and medical evidence in regard to firearm injuries.

52. As regards the contention of learned counsel for the appellant is that the deceased was found wearing a long shirt (kamiz), banyan and underwear on the place of occurrence and no lower garments was found on his persons appears highly unusual. We find substance in this argument as the case is not that appellant was assaulted while sitting or sleeping within four corners of his house. The prosecution case is that accused Khalil was having grudge and motive against the deceased due to fact that few months earlier to this incident he has visited the place of deceased in Bombay, where he was operating some transport vehicles, as both belonged to same village. The accused Khalil visited him and had stolen Rs.56,250/- of the deceased from his place in Bombay and fled away from there. The deceased lodged an FIR of commission of theft against accused Khalil at police station in Bombay, and he was subsequently arrested from village in Bhawarपुर, District Ghazipur and Rs.50,000/- was recovered from Charbagh, Lucknow at the house of Mahfooz Khan son of Basheer Khan at the pointing out of Khalil. Accused Khalil was subsequently enlarged on bail in said theft case. Deceased was an accused in a case of murder and in which warrant was issued against him. He visited the court and got the warrant cancelled two days prior to the incident. Thus, he was on enimical terms with some other people also. This fact also surfaced in evidence that both the victim and accused Khalil came back to the village from Bombay on same day. A week before this incident on fateful day one Basheer, the brother of accused Khalil visited the house of deceased where he was staying with his father and brother at around 10:00 am and asked them to come to the house of Vakeel Khan, so that a compromise may be arrived with regard to said theft case. After departure of Basheer, the deceased went to the house of Vakeel Khan alongwith his brother Badruddin at around 11:00 am, where he was firstly shot at by accused Jainuddin and subsequently was assaulted by other accused persons by knives and lathi. It is rather highly unusual if

not improbable that a person will visit a place for settlement of some dispute thronged by a number of people in his village, without wearing lower garments. This fact is also noticeable that the witnesses who stated in their statements under Section 161 Cr.P.C. that at the time of incident deceased was wearing a tahmad (lungi) below his waist, was left behind, having got opened during the incident and could not be traced due to heavy rain, but all the three witnesses have categorically stated in their evidence before the Court that deceased was not wearing any lower garments like tahmad (lungi) at the time of incident, and he was wearing underwear only beneath his shirt. However, the investigating officer in his statement has stated that the witnesses stated in their statement under Section 161 Cr.P.C. that deceased was wearing a tahmat at the time of incident, which got missing during the incident due to heavy rainfall.

53. Thus, the contradiction in the statement of witnesses on this point is proved by evidence of investigating officer, as this contradiction was putforth by counsel for defence during cross-examination of investigating officer under Section 145 of Evidence Act. The Investigating Officer stated in his evidence that he came to know that when the deceased was being chased by miscreants, his lungi fell down and it is because of this reason that the dead body was found in chaddhi, banyan and Kameez only. He replied to the query in this regard that he tried and searched for lungi, but he could not get it. This apparent contradiction with regard to wearing of lungi by deceased at the time of incident, in statement of eyewitnesses and in investigation investigating officer also casts a doubt on prosecution versions.

54. An important witness Vakeel Khan at whose place the meeting between deceased and accused side was convened on fateful day on the pretext of arriving at a compromise has not been produced during investigation. Although he named as a witness in chargesheet. He was

best suited to testify regarding genesis of the incident. Similarly one Badruddin, the real brother of deceased who accompanied him at the time of incident has also not been examined in support of prosecution case, for reasons best known to the informant side and prosecutor. Had they been examined, they would be in a position to throw light on certain vexed questions involved in this case. A suggestion has been made by defence during cross examination of the witnesses that in fact deceased was brutally assaulted and killed at some other place at wee hours of the day by some other persons and not at the time and place as propounder in prosecution version of this case.

55. PW2 Safaudding has admitted in his evidence there was inimical relations between him and accused persons due to some litigations. PW2 and 3, the eye witnesses have resiled from their earlier statements recorded by investigating officer on various counts which reflects from their testimony. PW2 has specifically stated in cross-examination that accused emerged at the Verandah of Vakeel Khan after 8-9 minutest on arrival of deceased and his brother Badruddin. It is also difficult to apprehend that when the accused had hatched a conspiracy to eliminate the deceased by calling him at the place of Vakeel Khan, what prompted them to invite the witnesses on that place who could have deposed against them.

56. PW5 Maqbool Khan has admitted that scribe of FIR Tufail is his real brother. Deceased was lifted from place of incident by laying him on a cot. He has also admitted that he never saw the deceased roaming in village in shirt and underwear.

57. In view of foregoing discussion based on reappraisal and rescrutinization of evidence on record, we find some substantial dent in prosecution version and ocular testimony of the witnesses regarding their presence on the place of incident and witnessing the same appears doubtful particularly on alleged time and place. The place of incident is

also not duly proved. In our considered opinion the prosecution has failed to prove its case beyond reasonable doubt and judgment of trial court is not sustainable and deserves to be set-aside. Accordingly, the appeal stands **allowed**.

58. The impugned judgment and order is set-aside, the surviving appellant Mofeed is acquitted of charge under Section 302/34 IPC, he need not surrender, this bail bonds are cancelled and sureties are discharged. He is directed to appear before the court below within ten days and furnish a personal bond and two surety bonds on prescribed proforma to the satisfaction of the trial court in compliance of Section 437 A of Cr.P.C.

59. Lower court record record be sent back to court concerned for necessary compliance.

Order Date :- 14.05.2024

Ashish/-