

**RESERVED ON 04.04.2022**

**DELIVERED ON 01.06.2022**

**Court No. - 1**

**Case :-** CRIMINAL APPEAL No. - 61 of 2010

**Appellant :-** Sarafat and another

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

**Counsel for Appellant :-** Rahul Agnihotri, Amrendra Singh, Anil Kumar Mishra, Brijesh Kumar, Kamaljeet Mani Mishra, Nadeem Murtaza, Vivek Kumar Singh

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

**Connected with**

**Case :-** CRIMINAL APPEAL No. - 120 of 2010

**Appellant :-** Ajay

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

**Counsel for Appellant :-** Mukul Rakesh, A.K. Gupta, Abdul Rafay Siddiqui, Amrendra Singh, J P Mathur, Nagendra Mohan, Rahman Ahmad Siddiqui

**Counsel for Respondent :-** Govt. Advocate, Abhishek Misra

**Hon'ble Ramesh Sinha, J.**

**Hon'ble Mrs. Saroj Yadav, J.**

**(Per Ramesh Sinha, J. for the Bench)**

**(A) Introduction**

- (1) Three accused persons, **Sarafat, Noor Mohammad** and **Ajay**, were tried by the Additional Sessions Judge/F.T.C.-4, Lakhimpur Kheri in Sessions Trial No. 879 of 2004 : *State Vs. Sarafat and two others*, arising out of Case Crime No. 130 of 2004, under Sections 302, 504, 506 Indian Penal Code, 1860 (in short, “**I.P.C.**”) and Section 3 (2) (v) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (in short, “**S.C./S.T. Act**”), Police Station Nighasan, District Kheri.

- (2) Vide judgment and order dated 14.12.2009, the learned Additional Sessions Judge/F.T.C.-4, Lakhimpur Kheri, acquitted **Sarafat, Noor Mohammad** and **Ajay**, for the offences under Sections 504, 506 (2) I.P.C. and Section 3 (2) (v) of the S.C./S.T. Act, however, convicted and sentenced them under Section 302 read with Section 34 I.P.C. to undergo life imprisonment and fine of Rs.7,000/- each. In default of payment of fine, to undergo additional two years imprisonment.
- (3) Aggrieved by their aforesaid conviction and sentence, convicts/ appellants, **Sarafat** and **Noor Mohammad**, preferred before this Court Criminal Appeal No. 61 of 2010, whereas convict/appellant **Ajay** preferred Criminal Appeal No. 120 of 2010.
- (4) Since both the above-captioned appeals arise out of a common factual matrix and impugned judgment and order dated 14.12.2009, hence this Court is disposing of the above-captioned appeals by a common judgment.

**(B) Factual Matrix**

- (5) Shortly stated the prosecution case runs as under :-

Informant Brahmadeen (P.W.1) had filed a written report (Ext. Ka.1) before Police Station Nighasan, District Kheri on 19.04.2004, at 10:00 a.m., alleging therein that in the intervening night of 18/19.04.2004, at about 02:00 a.m.,

Sarafat, Noor Mohammad and Ajay (convicts/appellants) came in front of his house and started to drink water by plying handpump installed in front of his house, upon which his father (deceased Kadhiley) objected. Thereafter, all three persons (convicts/appellants) used abusive language against his father (deceased Kadhiley) and when his father (deceased Kadhiley) objected them from use of abusive language, then, all three persons (convicts/appellants) brought his father (deceased Kadhiley) towards road. Seeing that, he (P.W.1) and his sister Maina Devi (P.W.2) ran to save their father (deceased Kadhiley) but all three persons (convicts/appellants) murdered his father (deceased Kadhiley) with sword by inflicting it on his neck. On hue and cry, Gauri Shanker (P.W.3), Tulsi and a large number of other persons came there and challenged the convicts/appellants, then, all three persons (convicts/appellants), while threatening them to kill, ran towards south direction of the village. On account of fear, he did not go to lodge report in the night, however, he went to lodge report in the morning.

- (6) The informant (P.W.1) got the aforesaid report scribed from one person, namely, Ramesh, outside the police station Nighasan, district Kheri, who after scribing, read it over to him. He, thereafter, affixed his thumb impression on it and lodged at police station Nighasan, district Kheri.

- (7) The evidence of H.C. Bachnesh Singh (P.W.5) shows that on 19.04.2004, he was posted as Constable Moharrir at police station Nighasan, district Kheri. On the said date, at 10:00 a.m., on the basis of written report (Ext. Ka.1), he prepared chik F.I.R., bearing No. 84 of 2004, and registered a case crime no. 130 of 2004, under Sections 302, 504, 506 I.P.C. and Section 3 (2) (v) of the S.C./S.T. Act, against the accused persons. He proved F.I.R. (Ext. Ka.10).

In cross-examination, P.W.5 had deposed that no date has been mentioned in the order passed by the Circle Officer on the Chik F.I.R. He denied the suggestion that F.I.R. was lodged after 10:00 a.m.

- (8) A perusal of the chik FIR shows that the distance between the place of incident and police station Nighashan, district Kheri was 13 kilometers. It is significant to mention that the perusal of chik FIR also shows that on its basis, case crime no. 130 of 1994, under Sections 302, 504, 506 I.P.C. and Section 3 (2) (v) of S.C/S.T. Act was registered against convicts/appellants, Sarafat, Noor Mohammad and Ajay.
- (9) The evidence of P.W.4-S.I. Satyendra Kumar Verma shows that on 19.04.2004, he was posted as Sub-Inspector at Police Station Nighasan. On the said date, he sealed the corpse of the deceased Kadhiley and sent it for post-mortem after preparing 'panchayatnama' and other relevant papers viz speciman seal,

challan lash, paper no.33, photo lash, report to C.M.O. He proved Ext. Ka.2 to Ext. Ka. 8. He collected blood stained soil and plain soil in separate containers, sealed it and prepared recovery memo (Ext. K.9) in the presence of witnesses.

In cross-examination, P.W.4 had denied the suggestion that chik F.I.R. was not with him till the time of 'panchayatnama'. He also deposed that Circle Officer met him at the place of the incident but he did not remember the time of arrival of Circle Officer at the place of the incident.

- (10) The evidence of P.W.7-Athar Hussain shows that the investigation of Case Crime No. 130 of 2004, under Sections 302, 504, 506 I.P.C. and Section 3 (2) (v) of S.C./S.T. Act was conducted by Circle Officer of Polia, namely, Shri Ashok Kumar Verma and site plan of the aforesaid case (Ext. Ka. 13) was in his handwriting and signature. He identified the signature and handwriting of CO Shri Ashok Kumar Verma. He further deposed that charge-sheet (Ext. Ka.14) was also in the handwriting and signature of CO Shri Ashok Kumar Verma.

In cross-examination, P.W.7 had deposed that Circle Officer Ashok Kumar Verma was posted in the office of D.G.P. Brahmdeen (P.W.1), in his statement under Section 161 Cr.P.C., stated that three persons murdered his father by inflicting injuries of sword upon his neck. At the time of the incident, small kerosene oil lamp (Dibbi) was burning.

(11) The post-mortem of the corpse of the deceased Kadhiley was conducted on 20.04.2004, at 03:00 p.m., by Dr. J.P. Bhargav (P.W.6), who found on his person the ante-mortem injuries, enumerated hereinafter :-

1. I.W. 3 cm x 1 cm x bone deep over left ear.
2. I.W. 3 cm x 1 cm x bone deep over Rt. ear.
3. I.W. 1 cm x 1 cm x muscle deep over upper lip just below nose.
4. I.W. 3 cm x 1 cm x bone deep over lower lip and below front 3 incisor teeth found cut.
5. Contusion 30 cm x 20 cm over front of chest below Rt. collar bone on dissection underlying 1<sup>st</sup> to 4<sup>th</sup> ribs on both sides found fractured. Both pleurae, both lungs found lacerated & 1 litre clotted and fluid blood present in chest cavity.
6. Contusion 15 cm x 6 cm over Rt. side of head and 3 cm above Rt. ear. Underlying Rt. temporal parietal bone, occipital bone & left temporal & parietal bone found fractured. Brain and its membrane found lacerated.”

The cause of death spelt out in the autopsy report of the deceased Kadhiley was shock and haemorrhage as a result of ante-mortem injuries.

(12) It is significant to mention that in his deposition in the trial Court, Dr. J.P. Bhargav (P.W. 6) has reiterated the said cause of death and stated that ante-mortem injuries suffered by the

deceased person could be attributable by a sharp edged weapon like sword on 18/19.04.2004 at 2:00 a.m. He also deposed that the ante-mortem injuries of the deceased could also be caused during altercation or by pushing or hit by a hard object. He proved the post-mortem report (Ext. Ka. 12).

In cross-examination, P.W.6 had deposed that it is clear from the ante-mortem injuries that ante-mortem injuries could be attributable by two types of objects like sharp edged weapon and blunt object. Injuries no. 5 and 6 could be attributable when a person be hit by a big stone or became injured on falling on it.

- (13) The case was committed to the Court of Sessions by the Chief Judicial Magistrate, Lakhimpur Kheri on 19.08.2004 and the trial Court framed charges against appellants under Sections 302/34, 504, 506 (2) I.P.C. and Section 3(2) (v) of S.C./S.T. Act. They pleaded not guilty to the charges and claimed to be tried. Their defence was of denial.
- (14) During trial, in all, the prosecution examined seven witnesses viz. P.W.1-Brahmadeen, who is the informant of the case and son of the deceased Kadhiley; P.W.2-Maina Devi, who is the daughter of the deceased, P.W.3-Gauri Shanker, who is the nephew of the deceased Kadhiley, P.W.4-S.I. Satyendra Kumar Verma, who has prepared 'panchayatnama', photo lash, challan lash etc. and sent the corpse of deceased Kadhiley for post-mortem; P.W.5-H.C. Bachnesh Singh, who has lodged F.I.R. (Ext. Ka.10) on the basis of the written report (Ext. Ka.1);

P.W.6-Dr. J. P. Bhargav, who conducted the post-mortem of the corpse of the deceased Kadhiley; and P.W.7-Athar Hussain, who has proved the fact that the investigation of the case was conducted by CO Sri Ashok Kumar Verma.

- (15) Reverting to the testimony of the witnesses of fact, P.W.1-Brahmdeen, who is the informant of the case and son of the deceased Kadhiley, had deposed before the trial Court in his examination-in-chief that before one year ago, at 02:00 a.m., when Sarafat, Noor Mohammad and Ajay (convicts/appellants) were drinking water by plying handpump installed near to his house, his father (deceased Kadhiley) made objection, upon which convicts/appellants used abusive language against his father Kadhiley (deceased). Thereafter, when his father Kadhiley (deceased) asked the convicts/appellants not to use abusive language, convicts/appellants brought his father towards road. After that, when he (P.W.1) and his sister Maina (P.W.2) ran to save their father, then, convicts/appellants murdered their father by inflicting injuries on the neck of their father with sword. Meanwhile, Gauri Shanker (P.W.3) and Tulsi came there and upon being challenged by them, the convicts/appellants fled away towards south direction threatening them. Thereafter, on account of fear, he did not go to lodge the report in the night. In the morning, he got the report scribed from a person outside the police station on his own dictation and after scribing, the scribe read it over to him. He, thereafter, affixed

his thumb impression on it and lodged it at police station Nighasan. He proved the written report (Ext. Ka.1).

In cross-examination, P.W.1-Brahmadeen had deposed that on the date and time of the incident, his mother Shakuntala, his brother Sunder Lal and his wife went to attend marriage function of brother-in-law of his brother Sunder Lal at Munna Purwa, which is situated at a distance of 3 Kms. from his village. He, therefore, sent an information of the incident to them at 06:00 a.m. at village Munna Purwa, however, he deposed that he did not remember from whom the said information was sent to Munna Purwa. All the aforesaid family members came from Munna Purwa at 07:00 a.m. After reaching home, his brother Sunder Lal enquired from him about the incident. He further deposed that when his brother Sunder Lal came at home, he went after one hour of sunrise to police station Nighasan, which is situated about 18 Kms. away from his village, on foot and reached Nighasan at about 09:00 a.m. On the crossroad of Nighasan, he found a person named Ramesh. He narrated the whole incident to Ramesh, who after bringing paper and pen from stationery shop, scribed the report on his dictation. After that he affixed his thumb impression on the report and proceeded to lodge it to police station Nighasan. He further deposed that half an hour was spent in scribing the written report and after that he went to police station, where he sat about half an hour and thereafter, report was lodged. After lodging the report, the Inspector came along with him at the

place of occurrence on Jeep at 11:30 a.m. The Circle Officer did not come with the Inspector.

In cross-examination, P.W.1 had deposed that he went from the police station before the Inspector through bicycle. He went alone to lodge the report and returned back from there alone. He came home at about 12:00 O'clock. After one hour of reaching his house, the Inspector came. The corpse was lying there till he (P.W.1) and Inspector reached there. The Inspector sealed the corpse before him.

P.W.1 had further deposed in his cross-examination that eight years ago, a countrymade pistol 12 bore was not recovered from him. However, he went to jail in relation to a case pertaining to the said pistol and that case is still going on. Before 11 years ago, his father had lodged a case under Section 307 I.P.C. against Kamlesh and his son. The father of Ajay (convict/appellant), namely, Kamlesh, was the forest guard in his area and after that he became Forester therein. He denied the suggestion that he and his father Kadhiley were caught by Kamlesh while cutting wood in the forest. He also denied the suggestion that after cutting wood, he supplied that to Nepal. He also denied the suggestion that due to monitoring by Kamlesh of his family, his business of wood was closed. However, he himself stated that he went to the forest to cut '*wasti*' (by which wood is collected).

P.W.1 had further deposed in his cross-examination that hand-pump was installed 10-12 steps to the southern direction of the corridor. Anyone can drink water from handpump. His house and thatch are adjacent to corridor and his house is at a distance of 5-6 steps north of it. He was not living in this house. The house in which he was living, was 5-6 steps north of that house and at the time of incident, he was living in this house. His father Kadhiley (deceased) and his sister Maina Devi (P.W.2) used to live in thatch adjacent to corridor and none else were living there. First of all, sound of screaming of his father Kadhiley (deceased) came and after that sound of screaming of his sister Maina Devi (P.W.2) came. Maina Devi (P.W.2) was with his father. When he reached there, he saw the three accused (convicts/appellants) were assaulting his father. He saw a sword in the hand of Sarafat (convict/appellant no.1) and he did not see any weapon with the other accused. He saw Sarafat only (convict/appellant no.1) cutting his father's neck with sword and other two accused (Noor Mohammad and Ajay) caught hold his father Kadhiley (deceased). He did not see all three accused persons inflicting injuries on the neck of his father with sword.

P.W.1 had further deposed in his cross-examination that at the time of the incident, 'Dibbi' (a kerosene oil lamp), which was placed on '*Kathla*' (box made with soil), was burning inside the thatch. The sword injuries were inflicted upon Kadhiley

(deceased) after his falling on earth. When sword was inflicted upon Kadhiley (deceased), Kadhiley (deceased) was fallen flatways. Except sword, none of the convicts/appellants were having lathi and danda. He did not remember the number of sword blows inflicted upon the deceased Kadhiley.

P.W.1 had further deposed in cross-examination that Noor Mohammad and Sarafat (convicts/appellants) were working in Forest Department. Before the incident, he (P.W.1) and his father Kadhiley (deceased) brought small pieces of wood, then, Noor Mohammad and Sarafat (convicts/appellants) caught them (P.W.1 and his father Kadhiley). He denied the suggestion that as Noor Mohammad and Sarafat (convicts/appellants) restrained him (P.W.1) from bringing wood, hence he falsely implicated them.

- (16) P.W.2-Maina Devi, who is the sister of the informant P.W.1 Brahmadeen and daughter of the deceased Kadhiley, had deposed in her examination-in-chief that hand-pump was stationed in front of her house. One year and one month ago, at 02:00 a.m., Sarafat, Noor Mohammad (convict/appellant) of her village and their companion Ajay (convict/appellant) were drinking water by plying handpump. When her father (deceased Kadhiley) made objection to it, convicts/appellants used abusive language against him. Thereafter, her father Kadhiley asked the convicts/appellants not to use abusive language, then, convicts/appellants brought her father (Kadhiley). Thereafter,

she and her brother Brahamadeen (P.W.1) ran to save their father Kadhiley and raised alarm. On alarm, Gauri Shanker (P.W.3) and Tulsi came there. Meanwhile, three accused (convicts/appellant) murdered her father Kadhiley by cutting neck of her father (Kadhiley) with sword. Thereafter, on challenging, accused persons (convicts/appellants), while threatening to kill them, fled away towards south direction.

In cross-examination, P.W.2 had deposed that at the time of the incident, she did not solemnize her third marriage. After the death of her second husband, she used to reside at her parents' home (मायका) and not at her in-laws' home. Her relation with in-laws was cordial. It is not so that in-laws had driven away her. Her second husband hanged himself.

P.W.2 had further deposed in her cross-examination that when police reached at the place of occurrence, she was present near the deadbody of her father (Kadhiley). The police did not record the statement of her brother Brahmadeen (P.W.1) before her. After 2½ months of the incident, the police recorded her statement and during 2½ months, he used to reside at her parental home and the police came at her parental home frequently.

P.W.2 had further deposed that her brother (P.W.1) did not go to lodge report in the night. She further deposed that her brother (P.W.1) was going to lodge report but her brother (P.W.1) saw

the accused persons barricading the way, hence her brother returned back to home. She further deposed that when she saw the convicts/appellants assaulting her father, at that moment, her father was lying on the back. Noor Mohammad (convict/appellant) caught hold the leg of her father Kadhiley (deceased); Ajay (convict/appellant) caught hold the hand of her father Kadhiley; Sarafat (convict/appellant) assaulted her father with sword. Sarafat (convict/appellant) inflicted three blows of sword upon her father Kadhiley; one on her father's neck; second one on her father's nose; and third one was, the sword was pierced on her father's ear. Except sword, her father was not assaulted with any other weapon.

P.W.2 had further deposed that Pummy is her niece and the daughter of Sunder. At the time of incident, Pammi was sleeping near her father Kadhiley, whereas she was sleeping along with her sister Kanyawati on a cot inside the room. At the time of incident, there was no source of light. Her brother Brahmadeen (P.W.1) was having torch at the time of incident and she had also stated the same to the Circle Officer but if the same was not written in her statement recorded under Section 161 Cr.P.C., then, she could not tell reasons for it. The said torch was seen by the Circle Officer, in her presence in the morning. She further deposed that at the time of incident, she was standing in the corridor and her brother (P.W.1) also came behind her. She disclosed the place from where she saw the

incident, to the Circle Officer. She further deposed that when convicts/appellants fled away, Gauri Shanker (P.W.3) and Tulsiram came there. She further deposed that houses of her brothers Sunder and Brahmadeen (P.W.1) were in the same premises partitioned with '*Deharia*' (wall made with soil). At the time of incident, her brother Brahmadeen (P.W.1) did not come to wake up her nor she went to wake up to her brother Brahmadeen (P.W.1).

- (17) P.W.3-Gauri Shanker, who is the nephew of the deceased Kadhiley, had deposed in his examination-in-chief that the incident had occurred three years ago. His house is adjacent to the house of Kadhiley (deceased). On the date of incident, he was sleeping in his house. At about 02:00 a.m., on noise, he woke up; came outside his house; and saw towards the house of Brahmadeen (P.W.1) in the light of torch that Sarafat, Noor Mohammad and Ajay (convicts/appellants), while using abusive language, were dragging Kadhiley (deceased) and at the same time, Maina Devi (P.W.1) ran to save Kadhiley (deceased). Then, Sarafat, Noor Mohammad and Ajay (convicts/appellants) hit on the neck of Kadhiley with a sword, as a consequence of which, Kadhiley (deceased) died on the spot. Thereafter, convicts/appellants, while threatening to kill, ran away. Tulsi came there on alarm raised.

In cross-examination, P.W.3 had deposed that his house is on the western side of the house of Kadhiley. He denied that he reached on the spot when assailants fled away. He reached on the spot when accused assaulted the deceased. He denied that Brahmadeen (P.W.1) told the name of murderers to him. The exit of his house is towards southern direction. At the time of the incident, he was not sleeping in his house but he was awake; his family members were sleeping; he returned from the field after sprinkling medicine on wheat; and after taking food, he had just lying on the bed. He came outside the house on hearing the noise of Maina Devi (P.W.2). He did not listen the alarm of Kadhiley (deceased) '*Maar dala maar dala*'. When he reached the spot, Maina Devi (P.W.2) and Pammi were there and apart from them, no one was present in the house. When he came from home, he saw that Kadhiley was dead and was lying on the back; Maina Devi and Pammi were crying on clinging the deadbody of Kadhiley; and there were blood on their cloths.

P.W.3 had further deposed that there was no light on the spot but he had a torch. The police personnel did not see his torch nor memo of his torch was prepared. Apart from him, he did not see the torch of anyone. He further deposed that before this case, Kadhiley (deceased) had lodged a case under Section 307 I.P.C. against the accused, in which he was a witness. He was not aware whether the accused were acquitted or not in the said

case. In the said case, he had deposed before the Court that he had not seen the incident. He further deposed that Kadhiley (deceased) had lodged another case under Section 307 I.P.C. against the accused, wherein he was also a witness. He further deposed that from the place where the deadbody of Kadhiley was lying, inner portion of the house of Kadhiley was visible and a lamp was lighting inside the house of Kadhiley.

P.W.3 had further deposed that after cutting forest wood, he was preparing '*Jhabai*'. Kamlesh (father of convict/appellant Ajay), who was working as Forester, caught him once and asked him not to cut the wood again and since then, he had stopped the work of cutting wood. He denied the suggestion that on account of the aforesaid, he falsely deposed against the son of Kamlesh, namely, Ajay. He also denied that the incident did not occur before him.

P.W.3 had further deposed in his cross-examination that the deceased Kadhiley was the elder brother of his father. At the time of incident, Noor Mohammad and Sarafat (convicts/appellants) were working as 'Watch-man' in the forest. When he used to prepare '*Jhabai*' after cutting the wood from forest and sold that, his business was going on but when Noor Mohammad and Sarafat (convicts/appellants) did strictness, then, his business of preparing '*Jhabai*' after cutting the wood from forest was stopped. He denied the suggestion that on account of the aforesaid, he falsely deposed against Noor

Mohammd and Sarafat (convicts/appellants). He also denied that he had not seen any incident.

P.W.3 had also deposed in his cross-examination that Inspector had recorded his statement. The Investigating Officer of the case had recorded his statement after 1-1½ month from the date of incident. When the 'panchayatnama' of the deadbody was prepared, he was present but his statement was not recorded by the Inspector, who was preparing the 'panchayatnama' of the deadbody. His statement was recorded by another police personnel. The place where he was standing at the time of incident, was shown by him to the Inspector.

- (18) After completion of the prosecution evidence, statement of the convicts/appellants under Section 313 Cr.P.C. was recorded in which they have denied the entire prosecution case and had stated that Sarafat and Noor Mohammad (convicts/appellants) were the 'Watchman' in the Forest Department, whereas father of Ajay (convict/appellant), namely, Kamlesh, was the Forester in the Forest Department. The informant (P.W.1) and his family members used to cut wood of forest stealthily, therefore, they (convicts/appellants Sarafat, Noor Mohammad and father of convict/appellant Ajay, namely, Kamlesh) restrained the informant (P.W.1) and his family members from cutting the wood in the forest and due to this reason, the convicts/appellants were falsely implicated in the instant case.

- (19) The learned trial Court believed the evidence of Brahmadeen (P.W.1), Maina Devi (P.W.2) and Gauri Shanker (P.W.3) and found the appellants guilty for the offence punishable under Section 302 read with Section 34 I.P.C. and, accordingly, convicted and sentenced the appellants in the manner stated in paragraph-2 here-in-above. The trial Court, however, acquitted the appellants for the offences punishable under Sections 504, 506 (2) I.P.C. and Section 3(2)(v) of the S.C./S.T. Act.
- (20) It is pertinent to mention that the State of U.P. has not preferred any appeal under Section 378 (1) of the Code of Criminal Procedure against the acquittal of the appellants under Sections 504, 506 (2) I.P.C. and Section 3 (2) (v) of the S.C./S.T. Act.
- (21) As mentioned earlier, aggrieved by their conviction and sentences, convicts/appellants Sarafat and Noor Mohammad preferred Criminal Appeal No. 61 of 2010 before this Court and convict/appellant Ajay also preferred another appeal i.e. Criminal Appeal No. 120 of 2010.
- (22) Heard Shri Nagendra Mohan assisted by Shri Anil Kumar Mishra, learned Counsel for the convicts/appellant Ajay in Criminal Appeal No. 120 of 2010, Shri Nadeem Murtaza, learned Counsel for the convicts/appellants Sarafat and Noor Mohammad in Criminal Appeal No. 61 of 2010 and Smt. Smiti Sahai, learned Additional Government Advocate for the respondent/State.

- (23) Shri Abhishek Mishra, learned Counsel for the complainant did not appear.

(C) ARGUMENTS ON BEHALF OF THE CONVICTS/ APPELLANTS

- (24) Shri Nagendra Mohan assisted by Shri Anil Kumar Mishra, learned Counsel for the convicts/appellant Ajay in Criminal Appeal No. 120 of 2010 has argued as under :-

I. The alleged incident was said to be occurred on 18/19.04.2004, at 02:00 a.m., whereas the F.I.R. of the alleged incident was lodged on 19.04.2004 at 10 a.m. The distance between the place of the incident and police station Nighasan was 13 Kms. Thus, there was an unexplained delay of about eight hours in lodging the FIR which indicates that the alleged eyewitnesses i.e. P.W.1, P.W.2 and P.W.3 were not present at the scene of occurrence;

II. There was no motive on the part of the convicts/appellants to commit the murder of the deceased Kadhiley. However, motive for falsely implicating the convicts/appellants was available on the part of the informant (P.W.1) and his family members inasmuch as informant (P.W.1) and his family members used to cut the wood of forest by theft and the convicts/appellants Sarafat, Noor Mohammad and father of convict/appellant

Ajay, namely, Kamlesh, being Watchman and Forester, respectively, used to restrain the informant (P.W.1) and his family members from cutting the wood from the forest illegally.

- III. P.W.1, P.W.2 and P.W.3, the alleged eyewitnesses, were son, daughter and nephew of the deceased Kadhiley and they were interested witnesses, hence testimonies of all three eyewitnesses being interested testimony cannot be said trustworthy;
- IV. Though at the time of incident, the prosecution had alleged that the independent witnesses were also present but none of the independent witness was produced by the prosecution to prove the prosecution case.
- V. The alleged incident occurred on 18/19.04.2004, at 02:00 a.m. in a dark night and, hence identification of convicts/ appellants was not possible as there was no source of light available. Prosecution story of '*Dibbi*' (a kerosene oil lamp), placed on '*Kuthla*' (box made with soil) in the thatch of the deceased Kudhiley burning and P.W.3 Gauri Shanker armed with torch at the time of incident, is incredible as during investigation also no alleged '*Dibbi*' (a kerosene oil lamp) and no torch were seized by the Investigating Officer and therefore, in absence of any source of light, claim by the witnesses that they had

identified the convicts/appellants, was impossible and is not creditworthy.

- VI. The evidence of PW-1, PW-2 and PW-3 indicates that there was prior enmity between the deceased Kadhiley and convicts/appellants because of which false implication cannot be ruled out;
- VII. The investigation of the case was tainted as the blood stained clothes were not seized by the Investigating Officer at the time of panchayatnama. P.W.3-Gauri Shanker had deposed in his cross-examination that when he reached at the place of occurrence, Maina Devi (P.W.2) and Pammi were crying by clinging the deadbody of the deceased Kadhiley and stains of blood was present on the cloths of Maina Devi (P.W.2) and Pammi. But the Investigating Officer did not seize the clothes of Maina Devi (P.W.2) and Pammi;
- VIII. The prosecution story does not find any corroboration from medical evidence. In the F.I.R., it was alleged that all the three convicts/appellants murdered the deceased Kadhiley by inflicting injuries with sword. All the alleged three eye-witnesses had deposed before the trial Court that at the time of incident, Sarafat (convict/appellant) assaulted the deceased with sword, whereas other two convicts, namely, Noor Mohammad and Ajay only caught

hold the legs and hands of the deceased Kadhiley. However, injuries no. 5 and 6, are contusions, which could be attributable by blunt object like lathi and danda but the prosecution had denied the use of any blunt object like lathi and danda in the alleged incident. Hence, looking to the aforesaid contradictions, convicts/appellants be granted benefit of doubt.

- (25) Shri Nadeem Murtaza, learned Counsel for the convicts/appellants in Criminal Appeal No. 61 of 2010 has supported the aforesaid arguments and argued that he has nothing to add further.

**(D) ARGUMENTS ON BEHALF OF THE RESPONDENT/STATE**

- (26) Mrs. Smiti Sahai, learned Additional Government Advocate for the respondent/State, on the other hand, has vehemently opposed the aforesaid submissions of the learned Counsel for the convicts/appellants and has argued as under :-

- I. The prosecution version stood proved beyond all reasonable doubt on the basis of testimonies of witnesses of facts i.e. P.W.1, P.W.2 and P.W.3 during the trial proving the charge framed against the convicts/appellants.
- II. The delay in lodging the FIR has been satisfactorily explained by P.W.1 and P.W.2 in their respective

[24]

testimonies. Both these witnesses have categorically stated that the incident was occurred on 18/19.04.2004, at 02:00 a.m. but on account of fear, informant (P.W.1) did not go to the police station for lodging the report of the incident and he went to the police station only in the morning.

III. At the time of incident, there was sufficient light at the place of incident to recognize the convicts/appellants as P.W.1 and P.W.2 had deposed that at the time of incident, ‘*Dibbi*’ (a kerosene oil lamp) placed beneath thatch was burning, whereas P.W.3 had deposed that he was having torch at the time of incident.

IV. The medical evidence on record fully corroborates the ocular testimonies, and despite embellishments and deviations, is not going to change the texture of prosecution case.

V. The recorded conviction of the convicts/appellants is based upon cogent and clinching evidence and the sentence of imprisonment for life awarded to them is also supported by relevant considerations.

VI. So far as minor contradictions in the statement of the prosecution witnesses viz. P.W.1, P.W.2 and P.W.3 are concerned, she argued that there is much gap in recording

the examination-in-chief and cross-examination of P.W.1, P.W.2 and P.W.3, hence possibility of minor contradictions in their statements cannot be ruled out and on that basis, the convicts/appellants cannot be granted benefit of doubt as the prosecution has proved its case beyond all reasonable doubts on the basis of evidence available on record.

VII. Hence, the impugned order passed by learned trial Court does not suffer from any illegality, infirmity or perversity warranting any interference by the Court.

**(E) ANALYSIS**

**E.1. Delay in lodging the F.I.R.**

(27) The first issue relates to the credibility of the F.I.R. Learned counsel for the convicts/appellants has questioned its reliability on the ground that there was unexplained delay of 8 hours in lodging of the F.I.R. which has rendered the entire prosecution liable to be rejected.

(28) It is pertinent to mention here that the issue whether prosecution case is liable to be thrown out merely on the ground of delay itself or not has been examined by the Apex Court in a catena of decisions and this Court deem it apt to refer to some of the authorities on the issue.

(29) In **Ravinder Kumar and another Vs. State of Punjab** : AIR

2001 SC 3576, the Apex Court has observed as under :-

"The attack on prosecution cases on the ground of delay in lodging FIR has almost bogged down as a stereotyped redundancy in criminal cases. It is a recurring feature in most of the criminal cases that there would be some delay in furnishing the first information to the police. It has to be remembered that law has not fixed any time for lodging the FIR. Hence a delayed FIR is not illegal. Of course a prompt and immediate lodging of the FIR is the ideal as that would give the prosecution a twin advantage. First is that it affords commencement of the investigation without any time lapse. Second is that it expels the opportunity for any possible concoction of a false version. Barring these two plus points for a promptly lodged FIR the demerits of the delayed FIR cannot operate as fatal to any prosecution case. It cannot be overlooked that even a promptly lodged FIR is not an unreserved guarantee for the genuineness of the version incorporated therein.

When there is criticism on the ground that FIR in a case was delayed the court has to look at the reason why there was such a delay. There can be a variety of genuine causes for FIR lodgment to get delayed. Rural people might be ignorant of the need for informing the police of a crime without any lapse of time. This kind of unconversantness is not too uncommon among urban people also. They might not immediately think of going to the police station. Another possibility is due to lack of adequate transport facilities for the informers to reach the police station. The third, which is a quite common bearing, is that the kith and kin of the deceased might take some appreciable time to regain a certain level of tranquility of mind or sedativeness of temper for moving to the police station for the purpose of furnishing the requisite information. Yet another cause is, the persons who are supposed to give such information themselves could be so physically impaired that the police had to reach them on getting some nebulous information about the incident.

We are not providing an exhausting catalogue of instances which could cause delay in lodging the FIR. Our effort is to try to point out that the stale demand made in the criminal courts to treat the FIR vitiated merely on the ground of delay in its lodgment cannot be approved as a legal corollary.

In any case, where there is delay in making the FIR the court is to look at the causes for it and if such causes are not attributable to any effort to concoct a version no consequence shall be attached to the mere delay in lodging the FIR. [Vide Zahoor vs. State of UP (1991 Suppl.(1) SCC 372; Tara Singh vs. State of Punjab (1991 Suppl.(1) SCC 536); Jamna vs. State of UP (1994 (1) SCC 185). In Tara Singh (Supra) the Court made the following observations:

"It is well settled that the delay in giving the FIR by itself cannot be a ground to doubt the prosecution case. Knowing the Indian conditions as they are we cannot expect these villagers to rush to the police station immediately after the occurrence. Human nature as it is, the kith and kin who have witnessed the occurrence cannot be expected to act mechanically with all the promptitude in giving the report to the police. At times being grief-stricken because of the calamity it may not immediately occur to them that they should give a report. After all it is but natural in these circumstances for them to take some time to go to the police station for giving the report." "

(30) In **State of Himanchal Pradesh Vs. Gian Chand** : AIR

2001(1) SC 2075, the Apex Court has observed as under :-

"Delay in lodging the FIR cannot be used as a ritualistic formula for doubting the prosecution case and discarding the same solely on the ground of delay in lodging the first information report. Delay has the effect of putting the Court in its guard to search if any explanation has been offered for the delay, and if offered, whether it is satisfactory or not. If the prosecution fails to satisfactorily explain the delay and there is possibility of embellishment in prosecution version on account of such delay, the delay would be fatal to the prosecution. However, if the delay is explained to the satisfaction of the court, the delay cannot by itself be a ground for disbelieving and discarding the entire prosecution case."

(31) In view of the aforesaid dictum of the Apex Court, the legal position which emerges out is that it is settled principle of criminal jurisprudence that mere delay in lodging the FIR may not prove fatal in all cases, but in the given circumstances of the

case delay in lodging the FIR can be one of the factors which may corrode the credibility of the prosecution version but delay in lodging the FIR cannot be a ground itself for throwing away the entire prosecution version as given in the FIR and later substantiated by the evidence, unless there are indications of fabrication. The Court has further to seek explanation for delay and check the truthfulness of the version to inquire and if the court is satisfied then the case of prosecution cannot fall on this ground alone.

(32) In the instant case, the incident was occurred in the intervening night of 18/19.04.2004, at 02:00 a.m., whereas the F.I.R. of the incident was lodged on 19.04.2004 at 10:00 a.m. by Brahmadeen (P.W.1), the son of deceased. The distance between the place of occurrence and the police station Nighasan was 13 Kms. Thus, in order to ascertain whether the prosecution has come up with any satisfactory explanation for the delay in lodging the F.I.R., it would be useful to look into the evidence of PW1 and PW2 in this regard.

(33) PW1, Brahmadeen, informant, in his examination-in-chief, had deposed that on account of fear, he could not go to lodge the report in the night. In his cross-examination, he had categorically deposed that at the time of incident, his mother Shakuntala, his brother Sunder Lal and his wife went to in-law's house of his brother Sunder Lal at Munna Purwa, which is situated 3 Kms. away from his village, for attending the

marriage function of brother-in-law of his brother Sunder Lal. In the morning at 06:00 a.m., he sent the information with regard to the incident to his brother Sunder Lal, his wife and mother Shakuntala, who, on receiving the information of the incident, returned back to his village at about 07:00 a.m. Thereafter, he proceeded to police station for lodging the report of the incident at police station Nighasan on foot and reached Nighasan at 09:00 a.m. On the crossroad of Nighasan, he found a person named Ramesh and he narrated the incident to him. Thereafter, the said Ramesh, after bringing a paper and pen from the stationery shop, scribed the report on his dictation and after that he affixed his thumb impression on that and proceeded to lodge the report at Police Station Nighasan. He categorically stated that half an hour was consumed in scribing the report and after that he went to police station Nighasan, wherein he sat at police station Nighasan at about half an hour. He proved the written report (Ext. Ka.1).

(34) P.W.2-Smt. Maina Devi, in cross-examination, had deposed that her brother (P.W.1) was going to lodge the report of the incident in the night but he (P.W.1) returned back to home on seeing that convicts/appellants was barricading the way in southern direction of her house.

(35) Thus, from the relevant extracts of the statement of PW1 and PW2, it transpires that although there was some delay in lodging the F.I.R. but the same cannot be attributed to the

informant or can be said to be deliberate with the object of implicating the convicts/appellants. The delay in lodging the F.I.R., in our opinion, has been satisfactory explained by P.W.1 and P.W.2.

## **E.2 Evidence of ‘interested witnesses’**

- (36) The contention of the learned Counsel for the convicts/appellants is that all the prosecution witnesses P.W.1, P.W.2 and P.W.3 (so called eye-witnesses) are all related and interested witnesses as they are son, daughter and nephew, respectively, to the deceased Kadhiley, hence their evidence cannot be said to be a trustworthy.
- (37) To prove its case, the prosecution has relied upon the evidence of three eye-witnesses viz. PW-1 Brahmadeen, PW-2 Maina Devi and PW-3 Gauri Shanker. PW-1, who is the son of the deceased, had deposed that on the day of incident i.e. in the intervening night of 18/19.04.2004, at about 2:00 am, convicts/appellants Sarafat, Noor Mohammad and Ajay, were drinking water from the hand-pump installed in front of his house, upon which his father Kadhiley (deceased) had made objection. Thereafter, convicts/appellants used abusive language against his father Kadhiley, to which his father Kadhiley asked convicts/appellants not to use abusive language. After that convicts/appellants brought his father Kadhiley towards road. On seeing this, he (P.W.1) and his sister Maina Devi (P.W.2) ran to save his father Kadhiley but convicts/appellants were

inflicting injuries on the neck of his father Kadhiley with sword, as a consequence of which, his father Kadhiley died on spot. On hue and cry, Gauri Shanker (P.W.3) and Tulsi were also came there and they challenged the convicts/appellants. After that, convicts/appellants, while threatening to kill them, ran away towards southern direction. PW-1 also deposed that he did not immediately went to the police station due to the fear of the convicts/appellants and lodged his report on 19.04.2014 at 10:00 a.m. He also deposed that a case under Section 307 I.P.C. was contested between the deceased Kadhiley and Kamlesh and his son before 11 years ago. During the course of his cross-examination, PW-1 was questioned in detail about the location of the incident and the position of the deceased. He also deposed that first of all, he heard the noise of his father Kadhiley and after that he heard the noise of his sister Maina Devi. At the time of the incident, Maina Devi (P.W.2) was with his father Kadhiley. His house and thatch where his father (deceased) and his sister (P.W.2) used to live, were joined with a corridor. At the time of incident, he was at his house, which was 5-6 steps away from the house where his father Kadhiley and Maina Devi (P.W.2) were living. He denied the fact that he had written in the report that all the three convicts/appellants murdered his father by inflicting injuries on the neck of his father with sword, but he deposed that when he reached at the place of incident, he saw sword in the hands of Sarafat (convict/appellant) and no weapon was seen by him in the hands of other

convicts/appellants. P.W.1 had also deposed that lamp was burning inside the thatch of his father Kadhiley. P.W.2 – Maina Devi specifically deposed about the proximity of her house from the house of her brothers Brahmadeen (P.W.1) and Sunder Lal. She denied that at the time of incident, she went to wake up his brother Brahmadeen nor his brother Brahmadeen came her house to wake up her. She furnished a cogent reason to be present at the place of incident stating that she being daughter of the deceased Kadhiley was sleeping on a cot inside the house along with his sister Kanyawati. During his deposition, PW-2 specifically referred to the role and presence of the convicts/appellant Sarafat being armed with sword and other convicts/appellants caught hold the legs and hands of the deceased Kadhiley. PW-3 Gauri Shanker, in similar terms, deposed about the place where convicts/appellants inflicted injuries on the person of the deceased. PW-3 stated that at the time of incident, he was sleeping in his house, which is adjacent to the house of the deceased Kadhiley. On hearing the noise of Maina Devi (P.W.2), he came outside his house and saw in the light of his torch that while using abusive language, Sarafat, Noor Mohammad and Ajay were pulling the deceased Kadhiley and then Maina Devi (P.W.2) ran to save his father. After that Sarafat, Noor Mohammad and Ajay hit with sword on the neck of the deceased Kadhiley, as a consequence of which, the deceased Kadhiley died instantaneously. Thereafter, the

convicts/ appellants, while threatening to kill them, fled away.

On screaming, Tulsi came.

- (38) Having carefully considered the depositions of P.W.1, P.W.2 and P.W.3, there is no material inconsistency regarding the nature or genesis of the incident. All the three witnesses have deposed to (i) the presence of the deceased at the place of incident; (ii) the presence of the convicts/appellants at the place of occurrence; and (iii) convicts/appellants while using abusive language pulled out the deceased and killed the deceased with sword; as a result of which the deceased died instantaneously.
- (39) It is well-settled in law that mere fact that relatives of the deceased are the only witnesses is not sufficient to discredit their cogent testimonies. The Apex Court in **Mohd. Rojali v. State of Assam** : (2019) 19 SCC 567 reiterated the distinction between “interested” and “related” witnesses and has held that the mere fact that the witnesses are related to the deceased does not impugn the credibility of their evidence if it is otherwise credible and cogent. The relevant extract of the report is reproduced as under :-

“13. As regards the contention that all the eye-witnesses are close relatives of the deceased, it is by now well settled that a related witness cannot be said to be an ‘interested’ witness merely by virtue of being a relative of the victim. This Court has elucidated the difference between ‘interested’ and ‘related’ witnesses in a plethora of cases, stating that a witness may be called interested only when he or she derives some benefit from the result of a litigation, which in the context of a criminal case would mean that the witness has a direct or indirect interest in seeing

the accused punished due to prior enmity or other reasons, and thus has a motive to falsely implicate the accused (for instance, see *State of Rajasthan v. Kalki*, (1981) 2 SCC 752; *Amit v. State of Uttar Pradesh*, (2012) 4 SCC 107; and *Gangabhavani v. Rayapati Venkat Reddy*, (2013) 15 SCC298). Recently, this difference was reiterated in *Ganapathi v. State of Tamil Nadu*, (2018) 5 SCC 549, in the following terms, by referring to the three-Judge bench decision in *State of Rajasthan v. Kalki* (supra):

“14. “Related” is not equivalent to “interested”. A witness may be called “interested” only when he or she derives some benefit from the result of a litigation; in the decree in a civil case, or in seeing an accused person punished. A witness who is a natural one and is the only possible eye witness in the circumstances of a case cannot be said to be “interested”...”

14. In criminal cases, it is often the case that the offence is witnessed by a close relative of the victim, whose presence on the scene of the offence would be natural. The evidence of such a witness cannot automatically be discarded by labelling the witness as interested. Indeed, one of the earliest statements with respect to interested witnesses in criminal cases was made by this Court in *Dalip Singh v. State of Punjab*, 1954 SCR 145, wherein this Court observed:

“26. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person...”

15. In case of a related witness, the Court may not treat his or her testimony as inherently tainted, and needs to ensure only that the evidence is inherently reliable, probable, cogent and consistent. We may refer to the observations of this Court in *Jayabalan v. Union Territory of Pondicherry*, (2010) 1 SCC 199:

“23. We are of the considered view that in cases where the Court is called upon to deal with the evidence of the interested witnesses, the approach of the Court while appreciating the evidence of such witnesses must not be pedantic. The Court must be cautious in appreciating and

accepting the evidence given by the interested witnesses but the Court must not be suspicious of such evidence. The primary endeavour of the Court must be to look for consistency. The evidence of a witness cannot be ignored or thrown out solely because it comes from the mouth of a person who is closely related to the victim.”

- (40) Keeping in mind the aforesaid dictum of the Apex Court and also considering the testimonies of P.W.1, P.W.2 and P.W.3 as well as on perusal of the impugned order, this Court find that the evidence on the record has been carefully evaluated by the trial Court. There is no basis to discredit the presence of the three eye-witnesses i.e. P.W.1, P.W.2 and P.W.3 and nothing has been elicited out in the course of the cross-examination to doubt their presence. The nature of the injuries found to have been sustained by the deceased is consistent with the account furnished by the eye-witnesses.

**E.3 Contradictions in the statements of the eye-witnesses P.W.1, P.W.2 and P.W.3**

- (41) From examination of the statements made by the witnesses PWs-1, 2 and 3, it would apt to mention here that it cannot be said that the omissions/improvements in the version of the witnesses makes their testimony untrustworthy due to contradiction therein. As a matter of fact, from a close scrutiny of the Case Diary, this Court find that the statements of the witnesses had been recorded by the Investigating Officer in a concised form by confining the same to the substance of the statement, without going into every details and therefore, it is

possible that the minute details which the witnesses had deposed before the Court were not recorded by the police in the statement recorded under Section 161 Cr.P.C.

- (42) Section 145 of the Indian Evidence Act, 1872, lays down the manner in which cross-examination of the witnesses is to be made as to any previous statement made in writing. Section 145 of the Evidence Act is quoted herein below :-

**"145. Cross-examination as to previous statements in writing.--**A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him."

- (43) In **V. K. Mishra and another Vs. State of Uttarakhand and another** : (2015) 9 SCC 588, the Apex Court also had the occasion to consider the correct manner of proving contradictions as to any previous statement made by a witness. Upon interpretation of Section 145 of the Evidence Act, the following observations have been made by the Apex Court in paragraph 19 of the aforesaid decision, which are as follows :-

"19. Under Section 145 of the Evidence Act when it is intended to contradict the witness by his previous statement reduced into writing, the attention of such witness must be called to those parts of it which are to be used for the purpose of contradicting him, before the writing can be used. While recording the deposition of a witness, it become the duty of the trial court to ensure that the part of the police statement with which it is intended to contradict the witness is brought to the

notice of the witness in his cross-examination. The attention of witness is drawn to that part and this must reflect in his cross-examination by reproducing it. If the witness admits the part intended to contradict him, it stands proved and there is no need to further proof of contradiction and it will be read while appreciating the evidence. If he denies having made that part of the statement, his attention must be drawn to that statement and must be mentioned in the deposition. By this process the contradiction is merely brought on record, but it is yet to be proved. Thereafter when investigating officer is examined in the court, his attention should be drawn to the passage marked for the purpose of contradiction, it will then be proved in the deposition of the investigating officer who again by referring to the police statement will depose about the witness having made that statement. The process again involves referring to the police statement and culling out that part with which the maker of the statement was intended to be contradicted. If the witness was not confronted with that part of the statement with which the defence wanted to contradict him, then the court cannot *suo motu* make use of statements to police not proved in compliance with Section 145 of the Evidence Act that is, by drawing attention to the parts intended for contradiction."

- (44) In the instant case, this Court finds that the Counsel for the appellants had failed to invite the attention of the witnesses PWs-1, 2 and 3 as to any previous statements in writing so as to contradict the witnesses. On the contrary, an attempt has been made to prove such contradictions.
- (45) It is pertinent to mention here that from depositions of the prosecution witnesses i.e. P.Ws. 1, 2 and 3, it transpires that the examination-in-chief of P.W.1 was recorded by the trial Court on 18.05.2005, whereas his cross-examinations was recorded before the trial Court on five different dates i.e. on 24.05.2005, 02.09.2005, 18.11.2005, 12.06.2006 and 11.10.2006. The

examination-in-chief of P.W.2 was recorded before the trial Court on 18.05.2005 and her cross-examination was recorded before the trial Court on 11.10.2006. The examination-in-chief of P.W.3 and some part of his cross-examination were recorded before the trial Court on 04.11.2006, whereas some part of his cross-examination was recorded on 11.12.2006. Thus, it clearly shows that there were quite long gaps/intervals between recording the examination-in-chief and cross-examination of the eye-witnesses (P.Ws. 1, 2 and 3). Hence, it is quite possible that contradictions as pointed out by the learned Counsel for the appellants could be made on account of loss of memory. More so, sense of observation differs from person to person.

- (46) In **Narayan Chetanram Chaudhary & Anr. v. State of Maharashtra** :(2000) 8 SCC 457, the Apex Court has considered the minor contradictions in the testimony, while appreciating the evidence in criminal trial and has held that only contradictions in material particulars and not minor contradictions can be a ground to discredit the testimony of the witnesses. Relevant portion of Para 42 of the judgment reads as under :-

“42. Only such omissions which amount to contradiction in material particulars can be used to discredit the testimony of the witness. The omission in the police statement by itself would not necessarily render the testimony of witness unreliable. When the version given by the witness in the court is different in material particulars from that disclosed in his earlier statements, the case of the prosecution becomes doubtful and not otherwise. Minor contradictions are bound to

appear in the statements of truthful witnesses as memory sometimes plays false and the sense of observation differ from person to person. The omissions in the earlier statement if found to be of trivial details, as in the present case, the same would not cause any dent in the testimony of PW 2. Even if there is contradiction of statement of a witness on any material point, that is no ground to reject the whole of the testimony of such witness.....”

- (47) Having regard to the ratio of law laid down in **Narayan Chetanram Chaudhary (supra)** and **V. K. Mishra (supra)**, this Court is of the view that learned Counsel for the convicts/appellants had failed to prove the contradictions in the statements, made by the prosecution witnesses as per the requirement of law and therefore, they could not be permitted to avail the benefit of such alleged contradictions, if any, in the testimony of the prosecution witnesses and further such contradictions do not erode the credibility of the prosecution witnesses since the basic facts stated by them before the police do not contradict their earlier statements in such a manner so that both their statements cannot co-exist. Moreover, this Court finds that the version given by P.Ws-1, 2 and 3 broadly bears up the same story without any vital contradictions and therefore, their evidence is found to be trustworthy.

#### **E.4. Motive**

- (48) Learned Counsel for the appellants/convicts has argued that there is nothing on record which may attract or warrants the commission of offence at deadly hours of night. According to

him, there was no motive on the part of the convicts/appellants to commit the murder of the deceased Kadhiley.

- (49) It transpires from perusal of the impugned judgment and order dated 14.12.2009 that convicts/appellants themselves had shown previous enmity with the informant by filing list Kha-8 as earlier also a report was made against the convicts/appellants for the deadly attack on the informant by them. Paper No. Kha 8/2 filed before the trial Court related to the report of the incident occurred on 13.05.1996, at 12 O'clock in the night when accused Kamlesh, Ajai, Sarafat and Noor Mohammad (convicts/appellants) armed with lathi, danda and countrymade pistol had entered the house of the informant and with intention to kill him fired upon the informant and also inflicted injuries upon other family members of the informant with *lathi* and *danda*. Paper No. Kha 8/4 filed before the trial Court related to the report of the incident occurred on 23.05.1994 at mid night when Kamlesh and other accused persons entered the house of the informant and fired on the chest of the informant. Paper No. Kha 9/2 filed before the trial Court is related to the judgment in Case Crime No. 83 of 1994. The trial Court, after considering the aforesaid documents, came to the conclusion that these documents shows that before the incident, convicts/appellants had entered into the house of the informant and fired upon him with intention to kill him and further in the statement recorded under Section 313 Cr.P.C., convicts/appellants themselves

admitted the fact that there was enmity with the informant. The trial Court had also found that vide orders dated 31.08.2009 and 23.09.2009 passed in Sessions Trial No. 991 of 1997 : *State Vs. Sarafat*, which was relating to the incident when the convicts/appellants entered into the house of the informant and caused injuries with intention to kill him, the trial Court had convicted the convicts/appellants. In these backgrounds, the trial Court had come to the conclusion that the prosecution had established the motive to commit the murder of the deceased.

- (50) On due consideration, this Court is of the view that the trial Court has rightly come to the conclusion that there was motive on the part of the convicts/appellants to commit the murder of the deceased.

#### **E.5. Non-examination of Independent Witness**

- (51) It has been contended by the learned Counsel for the appellants that though at the time of incident, the prosecution had alleged that the independent witnesses were also present but none of the independent witness was produced by the prosecution to prove the prosecution case.
- (52) In **Surinder Kumar v. State of Punjab** : (2020) 2 SCC 563, the Apex Court has observed that merely because prosecution did not examine any independent witness, would not necessarily lead to conclusion that accused was falsely implicated.

(53) In **Rizwan Khan v. State of Chhattisgarh** : (2020) 9 SCC 627, after referring to **State of H.P. v. Pardeep Kumar** (2018) 13 SCC 808, the Apex Court has observed that the examination of independent witnesses is not an indispensable requirement and such non-examination is not necessarily fatal to the prosecution case.

(54) In **Gulam Sarbar v. State of Bihar** : (2014) 3 SCC 401, the Apex Court has held as under :-

"19. In the matter of appreciation of evidence of witnesses, it is not the number of witnesses but quality of their evidence which is important, as there is no requirement under the Law of Evidence that any particular number of witnesses is to be examined to prove/disprove a fact. It is a time-honoured principle that evidence must be weighed and not counted. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy or otherwise.

The legal system has laid emphasis on value provided by each witness, rather than the multiplicity or plurality of witnesses. It is quality and not quantity, which determines the adequacy of evidence as has been provided by Section 134 of the Evidence Act. Even in probate cases, where the law requires the examination of at least one attesting witness, it has been held that production of more witnesses does not carry any weight.

Thus, conviction can even be based on the testimony of a sole eyewitness, if the same inspires confidence. (Vide *Vadivelu Thevar v. State of Madras* [AIR 1957 SC 614: 1957 Cri LJ 1000] , *Kunju v. State of T.N.* [(2008) 2 SCC 151: (2008) 1 SCC (Cri) 331] , *Bipin Kumar Mondal v. State of W.B.* [(2010) 12 SCC 91: (2011) 2 SCC (Cri) 150 : AIR 2010 SC 3638] , *Mahesh v. State of M.P.* [(2011) 9 SCC 626 : (2011) 3 SCC (Cri) 783], *Prithipal Singh v. State of Punjab* [(2012) 1 SCC 10 : (2012) 1 SCC (Cri) 1] and *Kishan Chand v. State of Haryana* [(2013) 2 SCC 502 : (2013) 2 SCC (Cri) 807: JT (2013) 1 SC 222].)"

- (55) Applying the law laid down by the Apex Court in the aforesaid decisions to the facts of the case on hand and when, as observed by the trial Court, the prosecution witnesses have fully supported the case of the prosecution, more particularly P.W.1, P.W.2 and P.W.3 and they are found to be trustworthy and reliable, non-examination of the independent witnesses is not fatal to the case of the prosecution.
- (56) Nothing is on record that Tulsi son of Tekan and other persons as mentioned in the FIR reached the spot were mentioned as witnesses in the chargesheet. In any case, P.W.1, P.W.2 and P.W.3 have fully supported the case of the prosecution and, therefore, non-examination of the aforesaid persons shall not be fatal to the case of the prosecution.

#### **E.6. Source of Light on Spot**

- (57) Learned Counsel for the appellant has contended that availability of source of light has not been mentioned in the written report submitted by the informant P.W.1. According to him, though P.W.1 had stated before the trial Court that '*Dibbi*' (a kerosene oil lamp) was lighting under *chappar* of the deceased at the time of the incident, whereas P.W.2 had stated that there was no source of light and P.W.3 claimed to see the incident in the light of torch but during investigation, the Investigating Officer had neither seized the alleged '*Dibbi*' (a kerosene oil lamp) nor seized the torch, hence in absence of any source of light, claim of P.W.1, P.W.2 and P.W.3 that they had

identified the convicts/appellants was impossible and is not trustworthy.

- (58) In **State of Uttar Pradesh v. Naresh and Ors.** : (2011) 4 SCC 324, the Apex Court observed that it is settled legal proposition that FIR is not an encyclopedia of the entire case. It may not and need not contain all the details. Naming of the accused therein may be important but not naming of an accused in FIR may not be a ground to doubt the contents thereof in case the statement of the witness is found to be trustworthy. The court has to determine after examining the entire factual scenario whether a person has participated in the crime or has been falsely implicated. The informant fully acquainted with the facts may lack necessary skill or ability to reproduce details of the entire incident without anything missing from the same. Some people may miss even the most important details in narration.
- (59) In view of the aforesaid dictum, this Court is of the view that non-mentioning the availability of '*Dibbi*' (a kerosene oil lamp) and torch by the informant P.W.1 in the written report is not fatal for the prosecution.
- (60) So far as other contentions of the learned Counsel for the appellant regarding absence of source of light on spot is concerned, the evidence of P.W.1 shows that at the time of the incident, '*Dibbi*' (a kerosene oil lamp) was lighting under

*chappar* of the deceased Kadhiley. The evidence of P.W.2 shows that though she had stated that there was no source of light at the time of the incident. P.W.3-Gauri Shanker had stated before the trial Court that though he had not seen any source of light on the spot but he was having a torch at the time of the incident. P.W.3-Gauri Shanker had also stated that from the place where the deadbody of the deceased was lying, the inner portion of the house of the deceased was visible, where 'Dibbi' (a kerosene oil lamp) was burning. All these circumstances have established the fact that the prosecution witnesses had pointed out the source of light in any manner on spot at the time of the incident.

(61) So far as non-seizure of 'Dibbi' (a kerosene oil lamp) and torch by the Investigating Officer is concerned, no doubt, the Investigating Officer had committed mistake in not seizing the 'Dibbi' (a kerosene oil lamp) and torch under recovery memo but the benefit of same cannot be permitted to be given to the convicts/appellant, particularly when eye-witnesses of the incident P.W.1, P.W.2 and P.W.3 had supported the prosecution case beyond reasonable doubt.

(62) At this juncture, it would be apt to mention that in **Nathuni Yadav vs State of Bihar** : (1998) 9 SCC 238, with regard to identification in the dark, the Apex Court observed as under :-

"9.... Even assuming that there was no moonlight then, we have to gauge the situation carefully. The proximity at

which the assailants would have confronted with the injured, the possibility of some light reaching there from the glow of stars, and the fact that the murder was committed on a roofless terrace are germane factors to be borne in mind while judging whether the victims could have had enough visibility to correctly identify the assailants. Over and above those factors, we must bear in mind the further fact that the assailants were no strangers to the inmates of the tragedybound house, the eyewitnesses being well acquainted with the physiognomy of each one of the killers.

We are, therefore, not persuaded to assume that it would not have been possible for the victims to see the assailants or that there was possibility for making a wrong identification of them. We are keeping in mind the fact that even the assailants had enough light to identify the victims whom they targeted without any mistake from among those who were sleeping on the terrace. If the light then available, though meager, was enough for the assailants why should we think that the same light was not enough for the injured who would certainly have pointedly focused their eyes on the faces of the intruders standing in front of them."

- (63) In the instant case, from perusal of the testimonies of P.W.1, P.W.2 and P.W.3, it transpires that there is evidence about the availability of light near the place of occurrence. Even otherwise there may not have been any source of light is hardly considered relevant in view of the fact that the parties were known to each other from earlier. The criminal jurisprudence developed in this country recognizes that the eye sight capacity of those who live in rural areas is far better than compared to

the town folks. Identification at night between known persons is acknowledged to be possible by voice, silhouette, shadow, and gait also. Therefore, this Court do not find much substance in the submission of the convicts/ appellants that identification was not possible in the night to give them the benefit of doubt.

#### **E.7. Medical Evidence**

(64) Learned Counsel for the convicts/appellants had contended that in the F.I.R., it has been stated that all three convicts/appellants armed with sword had murdered the deceased but P.W.1, P.W.2 and P.W.3 had deposed before the trial Court that at the time of the incident, Sarafat (convict/appellant) assaulted the deceased with sword, whereas other two convicts, namely, Noor Mohammad and Ajay only caught hold the legs and hands of the deceased Kadhiley. According to him, injuries no. 5 and 6 are contusions, which could be attributable by blunt object like lathi and danda but the prosecution witnesses had denied the use of any blunt object like lathi and danda in the alleged incident, hence, the prosecution story does not find any corroboration from medical evidence as the prosecution has failed to explain the injuries no. 5 and 6 sustained by the deceased Kadhiley.

(65) From the testimonies of P.W.1 and P.W.2 recorded before the trial Court, it appears that Sarafat (convict/appellant) inflicted the injuries with sword on the neck of the deceased Kadhiley, whereas other two convicts/appellants, Noor Mohammad and

Ajay, were caught hold the legs and hands of the deceased Kadhiley. P.W.1-Brahmadeen, in his cross-examination, had denied that he has mentioned in the F.I.R. that all three accused (convicts/appellants) had murdered by inflicting injuries on the neck of his father with sword. P.W.1 had also deposed that if the aforesaid fact has been mentioned in the F.I.R., then, he could not tell the reasons thereof. Thus, the trial Court has rightly observed that the meaning of the prosecution could not be that all the three accused (convicts/appellants) had sword and all of them had inflicted injuries to the deceased with sword but it means that the deceased was murdered by the accused, in order to fulfill their common intention, with sword.

(66) It is true that the FIR is certainly the starting point of the investigation, but it is well within the rights of the prosecution to produce witness statements as they progress further into the investigation and unearth the specific roles of accused persons. The FIR as is known, only sets the investigative machinery, into motion. Thus, the plea of the appellants in this regard has no substance.

(67) P.W.6 Dr. J.P. Bhargava, who conducted the post-mortem of the deceased Kadhiley, had found six ante-mortem injuries on the person of the deceased, as referred in paragraph-11 hereinabove, out of which, four were incised wounds and two were contusions. P.W.6 Dr. J.P. Bhargava, in his cross-examination, had deposed before the trial Court that the death

of the deceased could be caused on 18/19.04.2004 at 2:00 p.m.; incised wounds on the person of the deceased could be attributable by sharp edged weapons. In cross-examination, P.W.6 had deposed that ante-mortem injuries of the deceased could be attributable by two objects; (i) sharp edged weapon; (ii) blunt object. P.W.6 had further deposed that injuries no.5 and 6 could be attributable if injured was hit by big stone or injured was fallen on it. The evidence of P.W.1-Brahmadeen and P.W.2-Maina Devi shows that convicts/appellants dragged the deceased on the way; pushed him on the ground; and assaulted him with sword. Considering the aforesaid, the trial Court came to the conclusion that it is possible that during dragging the deceased; pushing him on the ground; and thereafter assaulted him, injuries no. 5 and 6 i.e. contusions could be attributable to the deceased.

- (68) Considering the facts and circumstances of the case, this Court is of the view that it cannot be said that medical evidence does not corroborate the testimonies of the prosecution witnesses. Hence the submission of the learned Counsel for the appellant has no substance in this regard.

#### **F. Conclusion**

- (69) From the above analysis, this Court is of the view that the prosecution has proved its case beyond reasonable doubt against convicts/appellants and their conviction and sentence

for the murder of deceased Kadhiley in the intervening night of 18/19.4.2004 by the impugned judgment is fully justified.

(70) In view of the foregoing discussions, the conviction and sentence of the appellants, **Sarafat, Noor Mohammad** and **Ajay**, for the murder of deceased Kadhiley by means of the impugned order dated 14.12.2009 does not call for any interference by this Court.

Appellants **Sarafat, Noor Mohammad** and **Ajay** are in jail and they shall serve out the sentence as ordered by the trial Court by means of impugned order dated 14.12.2019.

(71) Both the above-captioned appeals stand **dismissed**.

(72) Let a copy of this judgment and the original record be transmitted to the trial court concerned forthwith for information and necessary compliance.

**(Mrs. Saroj Yadav, J.)      (Ramesh Sinha, J.)**

**Order Date :- 1<sup>st</sup> June, 2022**

Ajit/-