

**A.F.R.**

**Reserved On: 16.12.2022**

**Delivered On: 27.02.2023**

**Court No. - 47**

**Case :- CRIMINAL APPEAL No. - 1387 of 2009**

**Appellant :-** Tejvir

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

**Counsel for Appellant :-** Virendra Singh, Apul Misra, Kuldeep Singh Chahar, R S Saroj, Sheshadri Trivedi, Surendra Singh

**Counsel for Respondent :-** Govt. Advocate, Mithilesh Kumar Shukla, R.P. Dwivedi, Sheshadri Trivedi

with

**Case :- CRIMINAL APPEAL No. - 1648 of 2009**

**Appellant :-** Hari Om

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

**Counsel for Appellant :-** Virendra Singh, Apul Misra, Kuldeep Singh Chahar, Nasiruzzaman, Praveen Kumar Srivastava, R S Saroj, Ram Surat Saroj, Surendra Singh

**Counsel for Respondent :-** Govt. Advocate, Avanish Kumar Shukla, Mithilesh Kumar Shukla

with

**Case :- CRIMINAL APPEAL No. - 1685 of 2009**

**Appellant :-** Pramod Kumar @ Pappu

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

**Counsel for Appellant :-** Virendra Singh, Abhay Raj Singh, Apul Misra, Kuldeep Singh Chahar, Ram Saroj Saroj, Surendra Singh

**Counsel for Respondent :-** Govt. Advocate, Avanish Kumar Shukla, Mithilesh Kumar Shukla

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

**Hon'ble Ram Manohar Narayan Mishra, J.**

*(Delivered by Hon'ble Ram Manohar Narayan Mishra, J.)*

1. These Criminal Appeals have been preferred by the appellants against the impugned judgment and order dated 6.2.2009 passed by the Additional District and Sessions Judge, Firozabad, in S.T. No.235/2006, arising out of Case Crime No. 96 of 2005, under

Sections 147, 148, 149, 307 and 302 IPC and in S.T. Nos. 235A/2006, 235B/2006 and 235C/2006 (State of U.P. Vs. Tejvir and 2 others), arising out of Case Crime Nos.95 of 2005, 99 of 2005 and 9 of 2006, under Section 25 of Arms Act, Police Station Pachokhara, District Firozabad, whereby the accused-appellants Tejvir, Hariom and Pramod Kumar @ Pappu have been convicted under Sections 147, 148, 302/149 IPC and 25 of Arms Act and sentenced them as under:-

(I) Under Section 302/149 IPC they have to undergo imprisonment for life, with a fine of Rs.5,000/-each, with default stipulation;

(II) Under Section 148 IPC, they have to undergo one year imprisonment; No sentence was awarded under Section 147 IPC as Section 148 is aggravated form of offence of Section 147 IPC;

(III) Under Section 25 of Arms Act, they have to undergo one year imprisonment, with a fine of Rs.1,000/-each with default stipulation in their respective case. All the sentences are directed to run concurrently.

2. The main case under Section 147, 148, 307, 302 was registered vide Crime No. 96 of 2005, Police Station Pachokhara, District Firozabad, in which appellants and co-accused persons were named as accused. Other cases were registered under Section 25 of Arms Act against each of the appellants on the basis of recovery of firearm allegedly used in the offence, on their pointing out, and all the four cases were tried together by learned trial Court.

3. Heard learned counsel for the appellants, learned AGA for the State and perused the material placed on record. The appellants are held in jail custody as convict.

4. The prosecution case is based on a written report dated 11.11.2005 (Ex.Ka-1) submitted by the PW-1 the informant Vinod Kumar Dixit and son of deceased Brahm Dutt Dixit. The informant Vinod Kumar lodged the first information report at Police Station

Pachokhara (Tundla) District Firozabad and Chik FIR was registered by Constable Muharrir Hari Nandan Singh, vide Crime No.96 of 2005, under Sections 147, 148, 149, 307, 302 IPC on 11.11.2005 at 12:05 hours. The chik FIR is marked as Ex.Ka-3. In the FIR, it is alleged that on 11.11.2005 at 9:30 hours, deceased Brahm Dutt Dixit, who is father of the informant, was moving towards Pachokhara *Paith* (local village market) riding his motorcycle bearing Registration No.DL75R7268 and the informant was also following him along with his cousin Neeraj riding over his motorcycle bearing Registration No. UP73J1326. On the way to Pachokhara *Paith* from his native village Chhikau, the informant noticed that a Maruti Car was parked on the turn of orchard of Prem Singh near Gadhi Thakuran village and as soon as the father of informant reached near the car, his co-villagers Pramod @ Pappu and Tejvir, son of Sardar Singh, Vikas s\o Pramod and Hari Om Singh s\o Tejvir Singh and brother-in-law of Yogesh (name not known) disembarked from the Maruti car and Pramod abused the deceased stating that he had defeated him in Gram Pradhan election and he will not spare him and kill him and at that time accused Pramod, Tejvir, Vikas and Brother-in-law of Yogesh were armed with tamanchas (country made pistols). They had surrounded the deceased and before he could understand the matter, Pramod opened the FIR by *tamancha*, which he had taken in his hand. The fire shot by Pramod hit him and he fell down in the nearby field after walking some distance. Thereafter, accused persons namely, Vikas, Tejvir and Hariom had opened fire on him by their respective firearms. The deceased got seriously injured in the firing incident. The brother-in-law of Yogesh suddenly fired at informant, however, from which he got narrow escape. The witnesses Omprakash and Rajpal, who were working in nearby field, had seen the incident and came to the place of occurrence. On arrival of witnesses, the accused persons fled away from the place by their Maruti car. The deceased Brahm Dutt Dixit was

laid in a tempo driven by Satya Prakash, a co-villager of the informant and was transported up to Srinagar and from there, he was shifted in a car, which belonged to some person from market (*Paith*) and they took him to Kamayani Hospital of Agra, where he was declared dead. No treatment could be given to him in the hospital. The informant brought back the dead body and lodged the FIR at police station concerned on same date. After registration of the FIR, the Investigating Officer recovered two empty cartridges from two places near the place of incident and prepared its recovery memo (Ex.Ka-12) in presence of witnesses Nand Kishore and Virendra Kumar. On the same day, the Investigating Officer collected the plain and blood stained soil from the field, where the deceased fell down after receiving injuries and prepared recovery memo in presence of some witnesses which is marked as Ex.Ka-11. The inquest on the dead body of the deceased was conducted by the first Investigating Officer- S.I. Ramendra Pal Singh (PW-5) on the date of incident between 12:50 to 13:50 hours and inquest report was prepared by him which is Ex.Ka-5. The dead body was sent for post mortem in order to ascertain the real cause of death of deceased by the Officer who conducted inquest alongwith police papers and post mortem on the dead body of the deceased was conducted on the date of incident at 10:10 P.M. In post mortem report, cause of death was found by the Doctor due to coma, shock and hemorrhage, as a result of antemortem injuries. The post mortem report is marked as Ex.Ka-2. During investigation, accused Tejvir Singh was arrested on 14.11.2005 by S.O. Krishna Baldeo and his colleagues and at 10:00 A.M. on his pointing out a country made pistol of 0.315 bore used in the offence of murder of deceased Brahm Dutt Dixit was recovered, which is marked as Ex.Ka-13. Another accused Hariom was arrested by police on 21.11.2005 at 10:30 hours and a country made pistol of 0.315 bore was recovered at 10:05 hours on his pointing out, which was used in the offence. The recovery memo is

marked as Ex.Ka-14 and on 21.1.2006, S.O. and his team, during police custody remand of accused Pramod Kumar @ Pappu ordered by the CJM concerned, a country made pistol used in the offence was recovered on his pointing out at 17:40 hours and recovery memo thereof is marked as Ex.Ka17. The Investigating Officer prepared site plan of the place of incident, where deceased was shot by accused persons, at the instance of the informant, which is marked as Ex.Ka-10. The Investigating Officer, who investigated the cases of Arms Act to accused persons separately had also prepared the site plan for offence of recovery of firearm, which are marked as Ex.Ka-20 in respect of accused Pramod Kumar @ Pappu and Ex.Ka-27 in respect of accused Hariom. The Investigating Officer produced the firearms recovered at the pointing out of the accused persons before the District Magistrate and obtained his sanction order under Section 39 of Arms Act for prosecution of three accused persons under Section 25 Arms Act, which are placed on record as Ex.Ka-21, Ka-23 and Ka-28 in respect of Tejvir, Pramod @ Pappu and Hariom, respectively. During investigation, one accused, who is shown in FIR as brother-in-law of Yogesh was not traced and one named accused Vikas was declared juvenile and after filing of charge-sheet his case was separated and referred to Juvenile Court. Chargesheet was filed against accused Tejvir, Pramod and Hariom, after investigation, by the police after arriving at a finding regarding their complicity in the offence. The Investigating Officer sent the wearing apparels of the deceased worn by him at the time of incident, along with blood stained and plain soil recovered from the place of incident and the countrymade pistols, two empty cartridges recovered from the spot and a disfigured bullet recovered from the brain area of deceased during his post mortem examination for expert examination to FSL, Agra. One empty cartridge was found to be fired by the countrymade pistol allegedly recovered from the possession of accused Tejvir and in chemical examination

report of blood stained soil, human blood was found therein. The fouling matter lead, copper and nitrate were found from the barrel of countrymade pistols sent for ballistic examination.

5. Learned Chief Judicial Magistrate, Firozabad committed the case for trial to Court of Sessions as the same was exclusively triable by the Court of Session. The accused persons were not released on bail during investigation and trial and they faced the trial as under trial prisoner.

6. The accused persons Tejvir, Hariom and Pramod Kumar @ Pappu were charged by Court below in S.T. No. 235 2006 under Sections 147, 148, 149, 302/149, 307/149 IPC and in Connected S.T. Nos. 235A/2006, 235B/2006 and 235C/2006, the accused persons namely, Tejvir, Pramod Kumar @ Pappu and Hariom were charged under Section 25 of Arms Act, respectively.

7. During the course of trial, prosecution examined as many as 14 witnesses in support of its case. **PW1-** Vinod Kumar Dixit is the informant and son of the deceased, who has been produced as eye-witness, **PW-2** Rajpal Singh is produced as an independent witness, was present in the locality, when the incident of murder took place, **PW3** Neeraj is also examined as eye-witness, who is cousin of informant, **PW-4** Dr.R.K. Garg is author of the postmortem report, who has proved the postmortem report as Ex.Ka-2. He also proved the wearing apparels and articles worn by the deceased at the time of incident during his examination as Material Ex.1 to 12, PW-5- Head Constable Dharampal has proved the chik FIR and entries of G.D. regarding registration of case under Sections 302, 307, 147, 148, 149 IPC as Ka-3 and Ex.Ka-4 as at police station concerned on 11.11.2005 at 12:05 hours and ravangi and returning of G.D. entries of S.O. on the date of incident by his evidence during trial as Ex.Kha-1 and Kha-4. PW-6 Rajendra Pal Singh, retired Sub Inspector is produced as

Investigating Officer of the case under Section 302 IPC and has proved the inquest report as Ex.Ka-5, police papers sent alongwith dead body for postmortem as Ex.Ka-6 to Ka-9, site plan of the place of incident as Ka-10, recovery memo of two empty cartridges and blood stained and plain soil as Ex.Ka-11, Ka-12 as well as recovery memo of a countrymade pistol from accused Tejvir as Ex.Ka-13 and recovery memo of a countrymade pistol from accused Hariom as Ex.Ka-14. PW-7 S.O. Krishna Baldeo the second I.O. proved the statements of accused persons leading to recovery and recovery memo of firearm recovered at the pointing out of accused Pramod Kumar @ Pappu as Ex.Ka-17. PW-8- S.I. Suresh Chand was Investigating Officer of Crime No. 97 of 2005, State vs. Tejvir, under Section 25 Arms Act, proved the investigation proceeding, site plan of said case as Ex.Ka-20. PW-9 HCP (Rtd) Kripal Singh has proved the remaining investigation proceeding in the case No.97 of 2005 against accused Tejvir Singh chargesheet in the case as Ex.Ka21. PW-1-0 HCP Badan Singh has proved the investigation proceeding, site plan, prosecution sanction and filed under Crime No.9 of 2006, against Pramod @ Pappu Singh as Ex.Ka22, 23 and 24. PW-11- Constable Clerk Harinandan Singh has proved chik FIR of Case Crime No.97 of 2005, under Section 25 Arms Act and G.D. entries thereof as Ex.Ka-25, Ka-26. PW-12 S.I. Pratap Singh Solanki is a witness of recovery of firearm from accused Tejvir and Investigating Officer of Case Crime No.99 of 2005, under Section 25 Arms Act (State vs. Hariom) and he has proved the recovery of a countrymade pistol from accused Tejvir during investigation as material exhibit as well as site plan, prosecution sanction and chargesheet filed against accused Hariom in the Case Crime No. 99 of 2005, under Section 25 Arms Act as Ex.Ka-27, 28, 29 being Investigating Officer. He has also produced pistol recovered in Crime No.97 of 2005 as material exhibit. PW-13 Constable Rajveer Singh has proved chik FIR of Crime No.99 of 2005,

under Section 25 Arms Act and G.D. entries thereof as Ex.Ka-30 and Ka-31 as its author. PW-14 Constable Ranveer Singh has proved the chik FIR of Crime No.9 of 2006, under Section 25 Arms Act and G.D. entries thereof as its author and same were exhibited as Ex.Ka-32 and Ka-33, during his evidence. PW-7 also produced the firearm recovered at pointing out of accused Pramod Kumar @ Pappu as ME.15 and clothing and slip as ME.16 and 17. He proved site plan of pistol recovery place as Ex.Ka-18 and charge-sheet in murder case as Ex.Ka-19.

8. The prosecution has examined three witnesses of fact in support of its case. The case is based on direct evidence of alleged eye-witness **PW-1** Vinod Kumar Dixit, who is informant and son of deceased and has supported FIR version in his statement being author of the written report Ex.Ka-1 on the basis of which FIR has been lodged in the murder case. It is stated that on 11.11.2005 at around 9:00 A.M. his father was going towards Pachokhara *Paith* from his native village Chhikau by his Hero Honda motorcycle whereas he and his cousin Neeraj (PW-2) were also going towards Pachokhara *Paith* by another motorcycle. As soon as his father reached near Orchard of Prem Singh, which situated on the way, a Maruti car was found to be parked on the road, the accused Pramod @ Pappu, Tejvir, Hariom, Vikas and one unknown person, who was residing at the residence of accused persons at that time, got down from the car and Pramod @ Pappu abused his father and stated that he had defeated him in Gram Pradhan election and today he will not be spared and killed. All the accused persons were armed with *tamancha* and first of all accused Pramod @ Pappu shot at his father by his *tamancha* which hit him and he fell down in the field lying in the corner of the road. Thereafter, four accused persons fired shots at him by their respective firearms indiscriminately. The witness cried for help but in the meanwhile the fifth person, whose name is not known, shot at him and his cousin with intention to kill, in

which they got narrow escape. The incident was seen by Omprakash and Rajpal, witnesses who are residents of Gadhi Takhuran, who were working in their field. Many persons also appeared on the spot apart from these witnesses. The accused persons ran towards Pachokhara by their car. His co-villager Satyapal reached on the spot taking his auto-rickshaw, in which his father was laid in the injured position and driven towards Srinagar *Paith* (market) and from there, he was shifted to a vehicle of the people of *Paith* and transported to Kamayani Hospital Agra, where he was declared dead. Thereafter, they came back with dead body of his father and laid the dead body in front of petrol pump at Pachokhara and dictated the written report to his cousin Ram Naresh Dixit and filed it at police station Pachokhara, on the basis of which, FIR was lodged. The witness verified his signature on written report, which was exhibited as Ex.Ka-1 during his statement. In cross-examination, the witness stated that the accused are his co-villagers and for that reason, the witness and accused persons are known to localites. His father started for Pachokhara *Paith* at around 9:20 A.M. from home. He was wearing slippers (*chappals*) in his feet. The place of incident lies one kilometer away from his home. It takes 2 to 3 minutes to reach the place of incident from his home. There are many turns in between his home and the place of incident. When he reached at the place of occurrence he saw his father sitting on his motorcycle, which was in start position. After receiving a shot, he fell down from the motorcycle and ran few steps after getting up and fell down in the adjoining field. He had pointed out the place of incident to the Investigating Officer. He has been produced from jail for recording of his statement in this case as he was held in jail custody in a criminal case under Section 307 IPC and out of two cases, one case was lodged at the instance of Devaki Nandan and the other by Godan Singh. In case lodged by Godan Singh, his cousin Neeraj is also accused along with co-accused. The accused persons were not masked at the time of

incident. His father had not told him the purpose for which he was going to *Paith* (local market), when he started from home. The *Paith* was held on every Friday. His father moved 2 to 3 minutes before him from the home. When Pramod shot at him his father was sitting on motorcycle and Pramod was standing. No blood stain was found by the Investigating Officer on road but it was found in the field because his father fell down he is not aware as to who took the motorcycle of his father and his and brought it back to home after the incident. At the time of spot inspection by Investigating Officer, motorcycles were not there. He also had not found the *slippers (chappals)* of his father worn by him in his feet. The witnesses were not present at the time of preparation of site plan. No field of Rajpal lies near the place of incident. Rajpal works at the place of Omprakash. He could not disclose the name of brother-in-law of Yogesh, who was residing at his place two months prior to the incident. He is not in a position to disclose the number of Maruti car used in the offence. It was seen for two months at the place of accused persons prior to the incident. It was white colored Maruti 800 and no number plate was displayed thereon. The field in which his father fell down was cultivated. The Investigating Officer collected blood stained soil from the field. No bullet or pellets were found by him in his presence. The accused persons shot at his father, when his father fell down in the field. The barrels of their pistols were 2:5 feet away from him. His father received no treatment at Kamayani Hospital and he was declared 'dead' by the doctor as soon as he got inside. The Investigating Officer has recorded his statement at the place of incident on the same day.

9. **PW-2** Rajpal Singh also supported the FIR version and statement of PW-1, in his sworn testimony and stated that at the time of incident, he and Pandit Omprakash had gone to work in the field of potato in Gadhi Thakuran. They had seen the white colored Maruti car which came towards Chhikau at around 9:00 A.M. and was parked by

the side of Orchard of Prem Singh. The deceased Brahm Dutt Dixit came towards Chhikau at the same time by motorcycle and his son and nephew Neeraj were also going by their motorcycle behind him. The accused persons disembarked from the car as soon as they noticed the deceased and Pappu fired first shot by his pistol (*tamancha*) at deceased who fell down and again ran but fell down in the field of Thakur Bachhu Singh, thereafter, the accused persons fired at him by their respective weapons with intention to kill. The deceased had received three shots of bullets and unknown person fired a shot on witness Vinod, in which he got narrow escape. The mother of accused Pramod @ Pappu stood as a candidate in Gram Pradhan Election in which deceased Brahm Dutt Dixit was elected and to take revenge of the defeat, the accused persons had done away the deceased, who was Gram Pradhan at that time. In cross-examination, the witness has stated that he is resident of Village- Chaturpurawhich is 1-1/4 kms. far from the place of incident. This is not true to say that the place of incident is not visible from the field of Omprakash. In fact the field of Omprakash lies southwards to the road whereas the Orchard of Prem Singh and temple are towards the west of the road. First shot was fired by Pramod @ Pappu and the deceased fell down and again arose and ran but fell down in the field. The accused persons fired at him when he fell down in the field of Bachchu Singh. He is not taken the slippers (*chappals*) worn by the deceased.

10. **PW-3** Neeraj is nephew of the deceased who has stated that at the time of incident he was pillion rider of motorcycle driven by his cousin Vinod who is son of the deceased and he had witnessed the incident. He has also supported the FIR/prosecution version in his sworn testimony and has stated that election of Gram Pradhan was conducted in the year 2005, in which Vaijanti Devi, the mother of accused Pramod @ Pappu had also stood as a candidate. Pramod @ Pappu has also filled his candidature as a dummy candidate but

deceased won that election, which was the reason of his murder. The first shot was fired by Pramod @ Pappu and when he fell down in the field, Hariom, Vikas and Tejvir had fired at him. After receiving first shot he ran 4 to 5 steps and fell down in the field. He is not apprised of the number of Maruti car by which accused persons had reached on the spot. The witnesses had brought the deceased in the injured condition from the place of incident laying him in a auto-rickshaw of his co-villager Satya Prakash to Pachokhara *Paith* and thereafter took him to Kamayani Hospital, Agra by car of some person of *Paith*.

11. The incriminating circumstances appearing from the prosecution evidence were put to the accused appellants while recording their statements under Section 313 Cr.P.C., who claimed that they are innocent and not guilty. They also stated that the false evidence has been adduced against them by prosecution witnesses. False FIR was lodged against them. Investigating was not fair and impartial. The evidence regarding their complicity and murder of deceased is false. The defence, however, tendered no evidence in defence. Their defence is that of denial.

12. The postmortem report of the deceased Brahm Dutt Dixit has been authored by Dr. R.K. Garg, who was examined as **PW-4** during trial and he stated that he has conducted the postmortem on the body of the deceased on 11.11.2005 at 10:10 P.M. with permission of Incharge-District Magistrate and CMO- Firozabad. Deceased was aged about 68 years old. He compared the specimen seal with the seal affixed on clothes by which the dead body was wrapped and found it intact. At the time of postmortem examination following ante mortem injuries were found on his person:

- (1) firearm wound of entry of size 2.5cm X 1.5cm cranial cavity deep on right side, back of head, 3cm behind left ear, margins are inverted and lacerated, blackening and tattooing present;
- (2) firearm wound of entry of size 2cm X1.5cm X chest cavity deep

on left side of chest, 14cm below and lateral to left nipple at 5'O clock position, margins are inverted and lacerated, blackening and tattooing present;

- (3) firearm wound of exit of size 3.5cm X 2.5cm on back of chest, which was communicating to injury No.2. This injury was lying on back of chest downwards and on spinal cord, margins were averted and lacerated;
- (4) firearm wound of entry of size 1.5cm X 1.5 cm on left side of chest and abdominal cavity deep at outer space over the costa border, margins were inverted and lacerated, blackening and tattooing present;
- (5) firearm wound of exit 2.5cm X 2.0cm into abdominal cavity deep and chest cavity deep on right side of outer aspect of lower part of chest and above left costa border, margins are averted and lacerated; This injury was communicating to injury No.4.
- (6) abrasion of 6cm X 3.5cm on lower part of right knee.

13. In the opinion of Doctor, the death of deceased was due to coma, shock and hemorrhage as a result of above antemortem injuries, as described. It is also stated in the postmortem report (Ex.Ka-2) that the time of death was of half day back and one metallic piece of bullet was recovered from the cranial cavity. Riger-mortis was present in both lower and upper extremities. In internal examination, the temporal and occipital bones of skull were found fractured. T8 to T10 vertebra of neck were fractured. Spinal cord was fractured. Small intestine was lacerated and semi digested food was present. Large intestine was lacerated and faecal matter was present. The Doctor proved the clothes and belongings removed from the dead body at the time of postmortem as material Ex.1 to 12 during his examination as PW-4.

14. Learned counsel for the appellants submitted that prosecution examined three witnesses of fact, out of whom PW-1 Vinod Kumar

Dixit is son of the deceased, PW-2 Rajpal Singh has been examined as independent and eye-witness and PW-3 Neeraj has also been examined as eye-witness, who is nephew of the deceased. The public witnesses of recovery of empty cartridge shells and blood stained soil were not examined by prosecution during trial, which casts doubt on the factum of recovery of empty cartridge shells and blood stained soil. The state of firearm injuries found on the person of the deceased in postmortem report is not in consonance with the eye-witness account, which casts doubt on trajectory of firearm shots stated in eye-witness account of the incident given by PW-1, PW-2 and PW-3. The nature of injuries are to be considered minutely along with the way in which they are alleged to be caused to the deceased as per the deposition of the witnesses but same is not found in the present case. To appreciate the nature of injuries, it is necessary to appreciate minutely the statement of PW-4 Dr. R.K. Garg, who conducted the postmortem examination on the dead body of the deceased. Further, the postmortem examination report proved by PW-4 has to be minutely appreciated along with the description of the injuries made in the deposition. It is also necessary to estimate as to how the gunshots would have been caused to the deceased and the actual seriatim, in which the injuries would have been caused to the deceased. He further submitted that the dead body of the deceased was not brought to the police station concerned by the informant and witnesses from Agra but was kept on the road near the petrol pump situated opposite a school. This conduct of the witnesses also creates a good deal of doubt about their presence on the spot when the incident occurred. He next submitted that on appreciation of witnesses of fact, there is a great deal of contradictions therein, which clearly establish the fact that they had in fact not seen the incident and they appeared on the spot after the occurrence. The eye-witnesses propounded by the prosecution are infact not eye-witness. Deceased might have been killed by some other unknown

miscreants and due to rivalry and animosity prevailed during Gram Pradhan election, the accused persons were falsely named. The Maruti car, in which accused persons are said to have appeared at the time of incident and seen on the place of incident by the witnesses could not be traced during investigation. Even the slippers (*chappals*) worn by the deceased were not found or recovered by the Investigating Officer or witnesses from the place of incident. He further submitted that the Investigating Officer said to have conducted the local inspection of place of occurrence in the evening of the date of incident on pointing out of the informant (PW-1) but the motorcycles of the deceased and witness could not be found there and the witness could not explain as to who and when brought them to his house after the incident. Lastly, he submitted that it was not physically possible for the deceased to run or walk few paces after receiving gunshot injury on his head, keeping in view the enormity of his head injury allegedly caused by gunshot. Thus, the statement of witnesses on this point is also not possible or believable. PW-2 Rajpal is said to have working in nearby field alongwith Om Prakash and is made eye-witness on that count but from his evidence itself no such field could be located nearby the place of incident. In site plan also, the field where witnesses Om Prakash and Rajpal are said to have been working has not been indicated by the Investigating Officer in site plan. Thus, his presence on the spot is also highly doubtful. The appellants are languishing in jail for more than 17 years.

15. Per contra, learned AGA submitted that this is a case based on direct evidence and eye-witness account of the witnesses. The occurrence took place in the day light and minor discrepancies and contradictions pointed out in the cross-examination of witnesses cannot be taken as a ground to disbelieve their testimony. There is no factual or legal error in impugned judgment passed by the learned trial Court in appreciation of evidence and same is liable to be affirmed in

present appeal.

16. A perusal of impugned judgment of learned trial court, which is under challenge in present appeal, reveals that the learned Additional Sessions Judge has observed therein that it is true that investigation was defective in some respect such as motorcycles, which was being ridden by the deceased and the other ridden by PW-3 and informant and slippers (*chappals*) worn by the deceased at the time of incident were not recovered. These things were not searched out by the Investigating Officer during investigation. The tempo, on which the deceased was laid firstly from the place of incident, was not inspected by the Investigating Officer. He also did not inspect the car through which the deceased was sent to Kamayani Hospital, Agra. He did not indicate the place the in site plan from where the witnesses had seen the occurrence. He did not show the agricultural field of the named witness Omprakash and he did not collect blood stained clothes of witnesses. He also failed to locate the Maruti car used by the accused persons in the offence but in view of all these factors which are components of defective investigation, the prosecution case cannot be treated as doubtful, if the same has been otherwise proved by the prosecution. He cited **Hemraj vs. Rajaram, 2004 (1) CRIMES 317 (SC)**, **Gayasuddin vs. State of Bihar, 2004 (1) CRIMES 90 (SC)**, **Dhananjay @ Shera vs. State of Punjab, 2004 (2) CRIMES 2 (SC)**, **A.K. Mansoori vs. State of Gujarat, 2002 (2) SCJ 38**, **State of Orisha vs. D. Naik, 2002 (2) CRIMES 286 (SC)** in support of his finding.

17. Learned trial judge also observed that the prosecution case cannot be doubted due to the fact that informant Vinod Kumar Dixit has stated in his written report as well as in his sworn testimony before the Court as PW-1 that 5th accused, who is not named in the FIR who was known as brother-in-law (*sala*) of the co-villager Yogesh, could not be traced during investigation and the allegation of opening of FIR

by said 5th accused at PW-1 Vinod Kumar Dixit with intention to kill could not be proved and the accused persons were acquitted of the charge under Section 307/149 IPC, accordingly. As prosecution case has been proved by eye-witness account given by the witnesses of fact and same has been corroborated by the evidence of Dr. R.K. Garg, who conducted post mortem examination on dead body of the deceased. Therefore, if there is any difference in ballistic experts report and eye-witnesses account that will also not result in affecting the reliability of prosecution case. The motive entrusted by prosecution has been duly proved in evidence although the same is treated as double edged sword which cuts both way and accused persons can be falsely implicated on account of motive as well as motive also acts as a motivational factor on the part of the accused persons to commit the offence. Therefore, on the basis of eye-witness account of prosecution witnesses and medical evidence, this fact is proved without any doubt that the accused are the persons who are author of the crime and defence case that the accused persons were falsely implicated in the case on the account of enmity of Gram Pradhan election has got no force. The prosecution case can also not be disbelieved on account of the fact that in present case FIR was not sent to jurisdictional Magistrate promptly as provided under Section 157 Cr.P.C. and he cited a judgment of Hon'ble Apex Court in the case of **Girish Chandra Mahato, 2006 (1) CAR 125 (SC)** in support of this finding. He also dispelled the contention of defense that some delay was caused in recording the statement of witness Neeraj. Therefore, his statement cannot be relied upon. He cited a judgment of Apex court in **Mohd. Khalid vs. State of West Bengal, 2002 (7) SCC 334** and **Prithvi Singh vs. Mamraj, 2004 (2) CRIMES 170 (SC)**, wherein it is held that the delayed examination of a witness by Investigating Officer cannot be a ground to disbelieve the prosecution version, as there may be several reasons of such delay. However, in such cases, the Court

should examine the statement of such witness carefully and minutely. The FIR in present case has been lodged promptly on the same day within three hours of the incident. Therefore, if any delay is there, the same is self explained, keeping in view the sequence of events unfolded in prosecution evidence, after the incident. The learned trial court has also dispelled the defence contention that keeping the body of the deceased near the petrol pump in front of a school after taking it back from Agra, does not sound natural and prosecution failed to prove the place where the dead body was recovered. Learned trial court has stated that the inquest has been conducted on the place where dead body was kept after taking it back from Agra as per evidence of prosecution. The plain and blood stained earth was taken into possession by police and the same was also chemically examined in FSL. Learned trial court has also turned down the contention of the defense as PW-1 and PW-3 are interested witnesses being family member of the deceased, their evidence cannot be believed in absence of witnesses of locality inasmuch as PW-2 Rajpal is an independent witness and witness of locality. Trial court has concluded that the eye-witness account given by the witnesses of fact is corroborated by medical evidence and report of ballistic experts and this fact is proved beyond all reasonable doubts that the accused persons armed with deadly weapons created an unlawful assembly and committed riot and murder of the deceased Brahm Dutt Dixit on the date, time and place of incident as mentioned in FIR and proved in prosecution evidence. The prosecution has successfully proved its case beyond all reasonable doubt for charge under Section 147, 148, 149, 302 IPC as well as separate charges under Section 25 Arms Act against accused Tejvir, Hariom and Pramod Kumar @ Pappu as well as they were convicted and sentenced for said offences.

18. The question that requires determination in present appeal is whether the prosecution has been able to establish the guilt of accused

appellants beyond reasonable doubt on the basis of evidence adduced in support of its case that accused appellants have committed the offence. In present case, the factum of murder of deceased Brahm Dutt Dixit is not disputed by defence. PW-4 Dr. R.K. Garg, who has conducted postmortem examination on the person of deceased, has stated in his evidence that the postmortem examination of the deceased was conducted on 11.11.2005 at about 10:00 A.M. and approximate time of death was half day noon. The cause of death was hemorrhage and shock due to antemortem injuries shown in postmortem report. He also stated in his evidence that the firearm injuries found on the person of the deceased were sufficient to cause death and this fact is also not disputed by the defence. The defence side has disputed the allegation that the present appellants are the author of the crime and defense version is that the death of the deceased was caused by some other persons at some other place and time on the date of incident and accused appellants were roped in, by the witnesses due to enmity developed due to Gram Pradhan Election. In present case, motive attributed by the prosecution in FIR version against appellants has been proved in evidence on the basis of statements of witnesses of fact PW-1 Vinod Kumar Dixit, PW-2 Rajpal Singh and PW-3 Neeraj Kumar. However, the motive acts as a double edged sword which cuts both way. The motive instigates a person to commit the offence as well as it also drives a person to falsely implicate the other person in a crime and it depends on the fact and circumstances as well as quality of the evidence adduced during trial as to what inference is to be discerned on account of establishment of motive in a criminal case.

19. This case is based on direct witness of witnesses. Therefore, it is to be seen as to what is the degree of reliability of their sworn testimony before the Court in the light of their previous statement recorded by the Investigating Officer under Section 161 Cr.P.C.

20. Section 162 Cr.P.C. is reproduced as under:-

**“162. Statements to police not to be signed: Use of statements in evidence-** (1) No statement made by any person to a police officer in the course of an investigation under this Chapter, shall, if reduced to writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose, save as hereinafter, provided, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made: Provided that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the Court, by the prosecution, to contradict such witness in the manner provided by section 145 of the Indian Evidence Act, 1872 (1 of 1872 ); and when any part of such statement is so used, any part thereof may also be used in the re- examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination. (2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of clause (1) of section 32 of the Indian Evidence Act, 1872 (1 of 1872 ), or to affect the provisions of section 27 of that Act.

21. Hon'ble Apex Court in the case of **Dhanabal And Anr vs State Of Tamil Nadu, AIR 1980 SC 628**, has held that the statement under Section 164 Cr.P.C. can be used as corroborative evidence.

22. In the present case, the incident is said to have taken place on 11.11.2005 at 9:30 A.M. at the turn of groove of Prem Singh near

village Ghadhi Thakuran and near the paved road leading to Ram Nagar and Chchikau. Chchikau is the native place of the deceased, witnesses and accused persons. The case of the prosecution is that the deceased was firstly shot at by accused Pramod Kumar @ Pappu by his firearm while he was sitting on motorcycle and he was stopped by accused persons when he was on the way of local market (*paith*) and witnesses Vinod and Neeraj were behind him on their separate motorcycles. After receiving first gunshot injury while sitting on motorcycle, he fell down and thereafter he was again shot by other accused persons by their respective firearms, when he fell down in the nearby cultivated field of Bachchu Singh. The site plan is proved as Ex.Ka-10 by the Investigating Officer (PW-6). The blood stained soil was found in the said field by the Rajendra Pal Singh(PW-6), who is first Investigating Officer of the case. Two empty cartridge shells are also shown to be on dirt road adjacent to paved road in site plan. PW-6 Investigating Officer has admitted that the empty cartridge shells were not found in the field or paved road where deceased was said to have received firearms injuries. However, the FSL report of blood stained earth collected from the field of Bachchu Singh on the date of incident human blood was found therein and on that basis it appears that the dead body was lying in the field of Bachchu Singh, which lies nearby the paved road.

23. If we meticulously examine the statement of said eye-witnesses, which is sheet anchor of prosecution case, we find therein that there is inherent infirmities and improvements are made therein as stated in statements under Section 161 Cr.P.C. The PW-1, Vinod Kumar Dixit is star witness of the case and he is also informant of the case and in his written report, he has stated that at the time of incident, he was coming behind his father along with his cousin, riding his motorcycle. However, his father was going to *paith* and he was also going to *paith* on that date in Pachokhara. He was not aware of the purpose for which

his father was going to *paith* but he was moving to *paith* with a view to purchase vegetables. The time of incident is shown as around 9:30 A.M. on 11.11.2005. He stated in his written report that firstly accused persons stopped his father and Pramod threatened to kill him. All the accused persons were armed with firearms (countrymade pistols). As soon as his father came to understand the situation, Pramod fired a shot on his father which hit him and he fell down in the nearby field and thereafter Tejvir, Vikas and Hariom also fired shots on him, whereas informant and witnesses had made improvement in their sworn testimony and stated that after having suffered first gunshot injury, his father fell down on the ground from motorcycle and thereafter he ran some paces and fell down in the nearby cultivated field of Bachchu Singh where accused persons fired shots at him by their respective countrymade pistols. In FIR, PW-1 has stated that after the first shot fired by Pramod on his father, all the three accused persons Tejvir, Vikas and Hariom fired shots at him when he fell down in the field but as PW-1 he stated in his examination-in-chief, when his father fell down in the field after being hit by firearm shot of Pramod, all the four accused persons opened indiscriminate fire on him. When he cried for help, the fifth person whose name was not known to him fired a shot towards him in which he got a narrow escape. PW-2 Rajpal Singh, PW-3 Neeraj also stated that four accused persons fired shot on the deceased when he fell down in the agricultural field after being hit by first shot. This is an important improvement in the prosecution evidence from FIR version and statement of witnesses under Section 161 Cr.P.C.

24. Hon'ble Apex Court in **Ram Briksh @ Jalim Vs. State of Chhatisgarh, AIR 2016 SC 2381, Tomso Bruno and Another vs. State of U.P., (2015) 7 SCC 178 (SC)**, held that where the improvement was made by the witness in his statement before the Court than that what was made to the Investigating Officer under

Section 161 Cr.P.C. same could not be relied on. In **Vimal Suresh Kamble vs. Chaluvera Pinake (2003) 3 SCC 175**, Hon'ble Apex Court held that the prosecution cannot seek to prove a fact during trial through a witness, which such witness has not stated to police during investigation. The evidence of that witness regarding the said improved fact is of no significance.

25. PW-1, PW-2 and PW-3 could not state during cross-examination as to, in which position the deceased was lying in the agricultural field whether he was in "supine" position or in "prone" position. PW-1 could not state whether the deceased was squirming after being shot or not. This fact has emerged in the statement of these witnesses of fact that the accused Pramod fired a shot at the deceased when he was sitting on his motorcycle and was confronted by the accused persons on the road near Gadhi Thakuran but no blood stain was found by the Investigating Officer when he visited the spot even in the evening of the incident at the instance of PW-1. Even PW-1 stated that in his statement that there was no blood stain on the road. According to the Investigating Officer, two empty cartridge shells were recovered from the spot when he visited the spot at the date of incident on the pointing out of PW-1. The cartridge shells are neither recovered from the road on which the deceased received first shot nor from the field where he received other two firearm shots as apparent from the postmortem report and statement of witnesses. The investigating Officer has stated that two cartridge shells were recovered from the paved road and dirt road near the spot. PW-1 has also admitted in his evidence that no empty cartridge shell was recovered from the field where deceased was lying in injured condition. The public witnesses of recovery Naval Kishore Pachori and Virendra Kumar Pachori were not produced in evidence during trial. The witnesses of fact have also not stated in their statement regarding statement that which part of the dead body was firstly hit by firearm shot allegedly caused by accused Pramod. PW-1

stated that the accused had shot at his father by leaning towards him when he was lying in the field. In site plan (Ex.Ka-10), the paved road on which the deceased was fired first shot allegedly by accused Pramod Kumar @ Pappu is not straight road but it is curved and the place of incident is marked as 'B'. Therefore, the statement of PW-1 and PW-3 that they were coming behind the deceased on their motorcycle and heard the threatening words used by the accused Pramod Kumar @ Pappu to the deceased and had seen the accused Pramod Kumar @ Pappu to open first fire on deceased while he was sitting on his motorcycle does not inspire confidence, as the road is shown to be curved, where the incident is said to have commenced, a person coming from behind will not be in a position to see and hear whatever occurred on the said curved road. This site plan is admittedly prepared by the Investigating Officer at the pointing of PW-1.

26. On perusal of the injuries of the deceased scribed in the postmortem report and the statement of the witnesses, it appears that the first shot was caused in the head of the deceased and that too from point blank range as this firearm injury was surrounded by blackening and tattooing. A piece of bullet was found to be stucked in the cranial cavity and in internal examination, the temporal and occipital bones were found broken. T8 to T10 vertebra of neck were found to be fractured. Keeping in view the grave nature of these skull injuries, it is very difficult to comprehend that after having fallen from motorcycle after receiving these injuries, the deceased would have got up and tried to run few paces and ultimately fall down in the nearby field where he was again hit by accused persons and received two firearm injuries on his chest.

27. The witnesses have stated that one accused whose name was not known subsequently it was found that he was brother-in-law of Yogesh had opened his firearm with intention to kill oon PW-1, to which he got narrow escape but that person could not be traced during

investigation and no role has been assigned to him in evidence. This fact has established in evidence of fact as well as on the basis of medical evidence that the deceased had suffered three gunshot injuries in the incident and he was in a very critical position but the conduct of the witnesses PW-1 and PW-2 who are his son and nephew moving him from the place of incident to all along Agra, to get him examined in Kamayani Hospital does not sound natural. They neither got examined him in Firozabad nor in Tundla and straightway rushed to Agra as per their own version. However, no documentary evidence has emerged regarding their movement to Kamayani Hospital Agra alongwith the body of the deceased and back to the place where inquest has been conducted. The conduct of the witnesses, as per their own version that after being declared the injured as 'dead' by the doctors of Kamayani Hospital, Agra they came back to Pachokhara and place the dead body in front of a school near petrol pump instead of producing the same at police station, which was lying in the vicinity of said place. This conduct shows that the sequence of the events had not taken place in the manner as narrated in the FIR as well as in the statement of witnesses of fact. PW-2 Rajpal is produced as an eye-witness and he alongwith Omprakash are named as witnesses in the FIR itself. This fact has emerged in the FIR that at the time of incident Rajpal and Omprakash were working nearby fields and they rushed to the spot and had seen the incident. PW-2 has tried to give graphic account of the incident in his evidence but has admitted that no field belonging to him was lying nearby. He is a resident of village Chaturpura. He was working in the field of Omprakash and he alongwith Omprakash was engaged in chchapai (covering of potato plants by soil) and rushed to the spot. In site plan of the place of incident of murder, no field of Omprakash has been indicated by the Investigating Officer.

28. In site plan of the place of murder i.e. the incident is shown to

have caused on the paved road near village Gadhi Thakuran. The place where the deceased was said to have fallen after receiving first shot and thereafter received two other shots is shown in the field of Bachchu Singh. This road communicates to Taragarh and Chchikau, the village of deceased and two witnesses, which is southwards to the groove of Prem Singh, resident of Gadhi Thakuran and its eastwards a *khadanja* road is shown which communicates with paved road in west side of this *khadanja* road, a temple is indicated. PW-2 has stated in his evidence that he was near the temple when the incident took place and from there he rushed to the spot. He had seen that in the field of Bachchu Singh, all the accused persons had fired shots on deceased, he could not tell as to how many bullets hit him. The accused persons had reached the spot by a white colored Maruti car. His own village Chaturpura situates 1 to 1-1/2 kms away from the place of incident. The field in which he and Omprakash were working at the time of incident belongs to nephew of Omprakash. This field is around 200 paces far from the place of incident and from that field the place of incident is visible clearly. The field of Omprakash lies to southwards of the road on which the incident occurred. This field was not situated in westwards of the road. The groove of Prem Singh and temple are situated in west of the main road. The maruti car was parked near groove of Prem Singh. He had not removed the slippers (*chappals*) worn by the deceased. He had not helped in lying the deceased in tempo on the place of incident. PW-1 has also stated in his cross-examination that when his father fell down in the field, witness Rajpal and Omprakash appeared at the place of occurrence. He had got the written report scribed by his cousin Ram Naresh Dixit. The field in which Omprakash and Rajpal were working lies 50 to 60 meters far from the place of incident and he had indicated that place to the Investigating Officer. PW-1 has admitted that Rajpal is co-accused in a case under Section 307 IPC alongwith him. He also stated that the

inquest on dead body of the deceased was carried out in front of petrol pump where dead body was placed from taking it back from Agra. However, the Investigating Officer has stated that in inquest report that it was carried out near police station. From the statement of Investigating Officer, PW-1 and 2, this fact is apparent that no field of Omprakash lies in the vicinity of the place of incident where PW-2 and Omprakash were said to be working. The field of Omprakash is located in the statement of witnesses on some distance from the road where incident occurred and groove and temple lie southwards of paved road and not westwards of the main road as told by PW-2. Therefore, the presence of PW-2 is highly doubtful at the time of incident. The other witness Omprakash has not been produced during trial.

29. The improvement in sworn testimony before the Court from FIR version in the statement of PW-1 and the improvement made by the PW-3 Neeraj from his statement under Section 161 Cr.P.C. appear to have been made with a view to fill in the lacunae in their previous version as recorded under Section 161 Cr.P.C. The non tractability of the Maruti car, by which the accused persons emerged on the spot, the failure of PW-1 and PW-3 to explain as to when and by whom the motorcycles of the witnesses and deceased was brought to home, the improvement in sequence of events on the spot, non explanation of the position in which the deceased was lying after being hit by three bullets, non explanation of the reason by PW-1 and PW-3 as to why the deceased was carried to Agra straightway instead of producing him in nearby hospitals situated in Firozabad and Tundla, laying of dead body of the deceased in front of the petrol pump nearby the police station instead of producing the same at police station, speaks volume and make the sworn testimony of these witnesses of fact not only suspicious but their very presence on the spot at the time of incident appears to be doubtful, irrespective of the fact that they have tried to

give an eye-witness account of the incident and their presence on the spot at the time of incident and their eye-witness account also becomes highly suspicious and not found worthy of credence. Therefore, the prosecution case in present case for charge under Section 302, 147, 148 IPC is not proved beyond reasonable doubt in respect of accused appellants and they deserve to be acquitted from all these charges by extending them benefit of doubt.

30. Similar is the position for charges under Section 25 of Arms Act, with regard to the present appellants which has also been tried by learned trial court alongwith charge under Section 147, 148, 302/149 IPC as the one countrymade pistol is said to have been recovered from the pointing out of each of the present appellants, which are said to have been used in the commission of offence as per the prosecution version on the basis of their disclosure statement after their arrest under Section 27 of Evidence Act in police custody.

31. These firearms are not recovered from their immediate possession after their arrest. One firearm has been allegedly recovered from the pointing out of the Pramod Kumar @ Pappu after getting his police custody by the orders of learned CJM. Out of three firearms, one empty cartridge shell recovered near the place of incident, is found to have been fired by the firearm allegedly recovered from the pointing out of accused Tejvir as per FSL report. The other empty cartridge shell was not found to be fired by any of the firearms recovered on the pointing out of accused persons. No public witness has been enjoined in the recovery of these firearms alleged recovered on the pointing out of the accused persons in respect of their presence. Therefore, the recovery of firearms allegedly used in the offence is also not proved in the present case beyond reasonable doubt, keeping in view the consideration, tenure and nature of the evidence adduced during trial.

32. In view of the discussions made above, we have found that there

is no cogent and reliable evidence on record to prove the charges against accused appellants, for which they have tried, convicted and sentenced by learned trial Court. The case of the prosecution with regard to charges, for which the accused appellants are tried and convicted by trial court are not found to have been proved beyond reasonable doubt. Therefore, we have no hesitation in allowing these appeals.

33. Accordingly, the present appeals are **allowed**.

34. The impugned judgment and order of the trial court, as aforesaid, is set aside.

35. The appellants namely, **Tejvir, Hari Om and Pramod Kumar @ Pappu** are acquitted of all the charges, for which they have been tried. They shall be released forthwith from jail custody unless wanted in any other case, subject to compliance of Section 437 Cr.P.C. to the satisfaction of the trial court, concerned. The material exhibits shall be disposed of after lapse of period of appeal and in case any appeal or petition is filed against the judgement, after disposal of said appeal or petition by the Court.

36. The trial court shall issue release order to Jail concerned in compliance of this judgement.

37. Let the lower court record alongwith the certified copy of this order be sent to trial court concerned for compliance.

**Order Date :-27.02.2023**

Kamarjahan