



2026:AHC:22692-DB

Order Reserved On:-20.01.2026

Order Delivered On:-03.02.2026

HIGH COURT OF JUDICATURE AT ALLAHABAD

CRIMINAL APPEAL No. - 2996 of 2006

Jarafat And Others

.....Appellant(s)

Versus

State of U.P.

.....Respondent(s)

Counsel for Appellant(s)	:	Himanshu Ranjan Shukla, Manoj Singh, Ramesh Kumar Shukla, Sadrul Islam Jafri, V.P. Shukla, Vivek Kumar Shukla
Counsel for Respondent(s)	:	Akash Khare, Govt. Advocate, Hari Om

Court No. - 46

HON'BLE SIDDHARTH, J.

HON'BLE JAI KRISHNA UPADHYAY, J.

1. As per report of C.J.M. Hapur dated 8.5.2025.appellant no.2, Farukh and appellant no.3, Ekhlakh, have died.Therefore, appeal against appellant no.2, Farukh and appellant. no. 3, Ekhlakh, has been dismissed as abated on 20.01.2026.

2. Appeal has been heard only with regard to surviving appellant nos.1,4 and 5, namely, Jarafat, Mahboob and Mamnoon.

3. Heard Shri Ajay Kumar Pandey, learned counsel for the appellant nos. 1,4 and 5; Shri Akash Khare, learned counsel for the informant, Ms. Manju Thakur, learned A.G.A. 1st for State and perused the record and judgement of the trial court.

4. The present criminal appeal has been preferred against the Judgment and order dated 11-05-06 paassed by learned Additional District & Sessions Judge Hapur, Ghaziabad in S.T. No. 1429/98 (State Vs. Jarafat and others) Under Section 147,148,149,302 I.P.C. Police Station Garh Mukteshwar, District Ghaziabad (case crime no. 196 of 1993) convicting the appellants and sentencing them to under go one year's R.I. for committing offence under section 147 I.P.C.; two years R.I. for committing offence under section 148 I.P.C. and life imprisonment and fine of Rs. 10,000/- each for committing offence under section 302 readwith section 149 IPC. All the sentences shall run concurrently.

5. The prosecution case is that on 10.06.1993 at about 12:30 p.m., the informant, Khalid, was waiting on the road along with his brother, Isthtiyag,

for going to Hapur by bus when co-villagers, Jarafat, Farukh, Ekhlakh, Maroof, Mahboob and Mumnoon came. Jarafat and Ekhlakh were having licensed guns in their hands and other accused were having country made pistols. The accused stated that let us take revenge from Ishtiyahq regarding the murder of Latafat and then all of them started firing from their respective weapons on Ishtiyahq. Ishtiyahq fell down and died. Near the place of incident there is tube well of Mansoor Ali where Akeal, Khilafat and Mansoor Ali, were present and they saw the incident.

6. After firing on Ishtiyahq the accused persons ran away from the place of incident. The dead body of the deceased was lying on the spot when the informant went to lodge the F.I.R. On the same day at about 02:15 p.m., F.I.R. was lodged against the accused persons as case crime no. 196 of 1993, under sections- 147, 148, 149, 302 IPC. After completing the formalities of investigation charge sheet was submitted against the accused persons who denied the charges leveled against them under sections 147, 148, 302 read with 149 IPC, and sought trial.

7. To prove the prosecution case, the prosecution examined P.W.-1, Khalid (informant); P.W.-2, Khilafat; P.W.-3, Dr. A.P. Gupta; P.W.-4, Sub-inspector, Satyapal Singh (Investigating Officer) and P.W.-5, Constable, Girish Verma.

8. The statement of the accused under section 313 Cr.P.C. were recorded wherein they stated that the prosecution case is false and they have been falsely implicated in this case on account of enmity. The defence did not produced any evidence in support of their case.

9. P.W.-1 proved the prosecution case as per the F.I.R. before the trial court and he further submitted that at the police station, Jabbar, wrote application on his dictation. Thereafter, it was read over to him and he put his signature thereon.

10. In his cross-examination he stated that murder of Latafat took place in 1992. There is distance of 250-300 feet between his house and house of the accused. The place of incident was 20-30 steps from his house. In the murder case of Latafat, apart from his brother, Ishtiyahq, three other accused were implicated. After the murder of Latafat, Ishtiyahq had left his village for 2-3 months, but again started living there. He further stated that he studies in *madarsa* at Kithore and since there was marriage of his relative he had taken leave from the *madarsa* on Thursday when normally *madarsa* is closed on Friday. He can write his name in Hindi and can read and write a bit of *Hindi*. Jabbar, had written the report of this case. Jabbar is son of Mansoor, who is also witness in this case. He denied knowledge about the enmity of Mansoor and Jabbar with the accused persons prior to murder of Ishtiyahq. He was going to Hapur with his brother, Ishtiyahq, because his brother had some

work there which he did not know. His brother has crossed the road for boarding the bus while he was on the other side of the road, near the mango tree, when the incident took place.

11. In further cross-examination, P.W.-1 stated that he has four brothers and in Veerampur, his maternal grandfather's house is situated, where marriage was to take place on 10.06.1993. Except the informant and his brother, Ishtiyag, their children and other family members had gone to attend the marriage. He received information about the incident at his house, but he does not remembers who gave information. He reached the place of incident at 12-12:30 p.m., and found that police was present on the place of incident. He admitted that at the place where his brother was murdered for reaching police station time of 1-1/2(one and a half) hours is required. He received information about murder of his brother, Ishtiyag, at Veerampur at about 10-10:30 p.m. When he reached the place of incident, report was already written by Jabbar and he was made to sign the same. He does not knows who dictated the report to Jabbar because he was quite nervous at that time. He does not knows what was written in the report. He does not lives in the village and resides at Kithore and studies there. He had gone to attend the marriage at Veerampur from where he was called. He did not talked to any of the witnesses. The dead body of the deceased was sealed before him .

12. P.W-2, Khilafat, stated that he was sitting on the tube well of Mansoor Ali at about 12:30 p.m., along with Arbaz and Khalid (P.W.-1) and Ishtiyag (deceased) were standing at a distance of 10 steps from them when the accused persons came. Sarfaraz and Ekhlakh, were having guns and others were having country made pistols. They stated that let us take revenge of murder of Latafat and they fired on Ishtiyag, who died on the spot. Brother of Ishtiyag, Khalid (P.W.-1), was standing on the other side of the road. He saw the incident with his own eyes. He remained at the place of incident for one hour and, thereafter, went to his house.

13. In his cross-examination, he stated that Ishtiyag was his nephew as per the village relationship. He further stated that he was not interrogated by the investigating officer regarding the incident. He could not state from which direction the accused persons came and who were on front and who were behind. All of them fired from the distance of 4-5 steps. Ishtiyag died on the place of he fell. He raised alarm after the deceased fell down and the accused vanished. He went near Ishtiyag. He was neither moving nor speaking and he understood that he has died. He neither touched nor turned him. There were 20 other persons gathered around but he cannot tell name of anyone.

14. He further admitted in his cross-examination that his father-in-law, Bunda and his brothers-in-law, namely, Islam, Hokab, Sabir, Saurav and Aasam, lived in his village. His father-in-law, Bunda, was fired upon and in that case, Ekhlakh, (deceased, appellant no.-3) was also an accused. There were cases registered against his brothers-in-laws also. Now they have gone

back to their village, Todi. Bunda, did not did *pairvavi* of this case, Salman and others, the accused, belong to the one family, but he is not giving statement against them because of his earlier enmity with them. He further stated that Ishtiyag had no land. The land was recorded in the name of his father and he had three brothers, namely, Harun, Khalid and Jahid, who used to live in the village at the time of incident in the same house. He does not knows in how many cases Ishtiyag was implicated and in how many cases his brothers were implicated. He did not go to the place of incident again after the incident on the same day. Police never interrogated him. He admitted that he was *challaned* under section 27 of the Arms Act once. His son is Hasrat, who was tried in a case and acquitted. The second case against him was regarding dowry. There is no case of theft registered against his son. He stated that he was not co-accused of Ishtiyag(deceased) in any case nor he knows how many times Ishtiyag went to jail. He denied that the incident took place at about 10:00 a.m., and he called Khalid (P.W.-1) from Veerampur. He stated that Khalid was present on the scene of incident.

15. P.W.-3, Dr. A.P. Gupta, the autopsy doctor, found following ante-mortem injuries on the body of the deceased, Ishtiyag.

(i). *Gun shot wound of entry of size 4 cm x 4 cm x chest and abdominal cavity deep on right side of abdomen on chest 9 cm below right nipple and breast margins inverted and tattoing of surrounding area of size 12 cm x 10 cm blood present inside wound.*

(ii). *Gun shot wound of entry of size 3 cm x 3 cm x chest cavity deep located on left side 3 cm below left nipple on breast inverted margins dark blood present inside wound tattoing of surrounding area of size 12 cm x 10 cm.*

(iii). *Gun shot of entry in size 2.5 cm x 2.5 cm x 3 cm much deep on right upper and lower end and elbow margins inverted.*

(iv). *Gun shot wound of exit of size 6 cm x 4 cm x bone deep of right elbow joint and right radius continuity between injury number 3 and 4 established.*

(v). *Gun shot wound of entry of size 1 cm x 1 cm x, muscle deep, margins inverted right side tattoing of surrounding area of neck and below base of root of neck.*

(vi) *Gun shot wound of exit of size 1.5 cm x 1.5 cm cavity deep on left side of neck.*

(vii). *Wound of exit traveling upwards on the joint of neck and shoulder on the left upper arm outer side.*

(viii). Fire arm wound of entry size 1 cm x 1 cm muscle deep on left pelvis up to buttock tattooing present around.

16. The doctor found rigor mortis present on the entire body of the deceased. His stomach was empty which proved that he had not consumed anything since last three hours. He opined that maximum period of death of the deceased could extend to 36 hours.

17. P.W.-4 proved that he was investigating officer of this case. He got the case registered in his presence and started the investigation. He recorded the statement of P.W.-1; got the inquest conducted; made site plan and recorded the statement of eye witness, Ekhlakh and Mansoor Ali. He recorded the statements of all the accused in District- Meerut on 19.06.1993 and after taking custody remand of accused, Farukh, got .315 bore country made pistol recovered from the mango grove on 25.06.1993. On the same day Mumnoon, Mahbood and Maroof also got .315 bore country made pistols recovered from the same grove. He collected soil samples from the place of incident and two empty cartridges of 12 bore and two empty cartridges of .315 and made their recovery memo. He proved his signatures and hand writings on the recovery memo. He further stated that accused, Jarafat, Ekhlakh had licensed guns which they had deposited with the arms dealer at Hapur. He was entrusted with the investigation of this case on 10.6.1993 and on 28.6.1993 he submitted the charge-sheet against them.

18. In his cross-examination he admitted that the informant himself wrote the report at the police station and made his signature. He did not compared the report for the purpose of ascertaining who has written the same. He received information of the incident at 14:15 hours at the police station and went at the place of incident but he has not noted in the case diary the time when he started the investigation. He can not tell when he prepared the site plan and collected plain and blood stained earth and prepared other documents. He denied that the inquest report was prepared in his absence and he later put his signatures thereon. He had not seen the inquest but copied the report in his case diary. It was prepared under his direction. He admitted that he has not put his signatures on the inquest report (Ext. A-3) because it was prepared by Sub-inspector, Ram Prakash, on his direction. He admitted that in the inquest report the date of information was mentioned, but not the time. Section 302 IPC is mentioned below and section 147, 148, 149 IPC are mentioned above because at that time the F.I.R. was not lodged. He admitted that in the site plan he has not shown any tree under which the witnesses were sitting. He does not knows whether there was any tree on the tube well of Mansoor Ali or not. He cannot tell whether the clothes of the deceased were sent by the autopsy doctor. He failed to inform the court whether there were any sign of firing on the clothes of the deceased or not. He did not enquired from dealer about the licensed guns of accused, Jarafat and Khalid. He did not got any F.S.L. report from the expert regarding the matching of the weapons from the empty cartridges recovered from the spot

because he was transferred to another police station. He stated that he recorded the statement of Khilafat on 10.06.1993.

19. P.W.-5 is a formal witness and his testimony is not of much relevance.

20. Learned counsel for the appellant submits that the recovery memo (Ex. Ka. 10), shows that 2 empty cartridges of 12 bore and 2 empty cartridges of .315 Bore were recovered from the place of occurrence on 10.06.1993 in the presence of Jabbar and Asif Ali; recovery memo (Ex. Ka. 12), shows that a country-made pistol of .315 bore was recovered from an open place on 25.06.1993 at 12:45 a.m., (midnight) on the pointing out of the accused, Mamnoon, in the presence of Jabbar and Islam; recovery Memo (Ex. Ka. 13), shows that a country-made pistol of .315 bore was recovered from an open place on 25.06.1993 at 01:10 AM (midnight) on pointing out of the accused, Mahboob, in the presence of Jabbar and Islam; recovery memo (Ex. Ka. 14), shows that a country-made pistol of .315 bore was recovered from an open place on 25.06.1993 at 02:45 a.m. (midnight) on the pointing out of the accused, Maroof, in the presence of Jabbar and Islam; recovery memo (Ex. Ka. 15), shows that a country-made pistol of .315 bore was recovered from open place on 25.06.1993 at 12:15 AM (midnight) on the pointing out of the accused, Farooq, in the presence of Jabbar and Islam; the prosecution has failed to examine, Jabbar and Islam, who are the prime witness of recovery of ballistics; the prosecution has failed to have the cartridge or the recovered country-made pistols recovered, scientifically examined; in the absence of an F.S.L., report and in view of the non-examination of the recovery witnesses, coupled with the fact that the examined eyewitness, P.W.-1, has denied his presence at the place of occurrence and P.W.-2 is an interested witness, the accused cannot be connected with the alleged weapons and reliance has been placed upon the judgments of Apex Court in the Case of **Sukhwant Singh v. State of Punjab (1995) 3 SCC 367)-Para 21 and Mahavir Singh v. State of Madhya Pradesh ((2016) 10 SCC 220) - Para 23-27.**

21. Learned counsel for appellant further submits that the post mortem report (Ex. Ka. 2) shows five firearm wounds of entry and three exit wounds, but there is no injury that can be caused by a 12 bore gun; The post-mortem report indicates that there was no food present in the stomach of the deceased at the time of death; this circumstance makes it highly improbable that the incident occurred at 12:30 PM in the month of June and instead suggests that the incident took place during the morning hours; the Post-Mortem was conducted by Dr. A.P.Gupta (P.W.3), who, in his cross-examination, has stated that he has failed to note the presence of holes in the clothes of deceased. Learned counsel has relied upon the judgment of Apex Court in the case of **Ram Narain Singh v. State of Punjab ((1975) 4 SCC 497) -Para 14,** in support of his submissions

22. His argument also is that statement of informant and eye witness, Khalid

(P.W.1), shows that he was not present at the place of the incident, and when he arrived, the report was already written, and he only signed the report; the alleged informant and eyewitness, Khalid (P.W.-1), turned hostile during cross-examination; however, the prosecution neither declared him hostile nor subjected him to cross-examination further.

23. In this regard reliance has been placed on the following judgments;

i. Sat Paul v. Delhi Admin ((1976) 1 SCC 727) - Para 30 to 57.

ii. Ramesh Harijan v. State of U.P ((2012) 5 SCC 777) - Para 23 to 32

24. The eyewitness, Khilafat (P.W.-2), is an interested witness and harboured animosity against the accused, as he was previously involved in a past case in which his father-in-law was shot, wherein appellant no. 3 (Ekhlakh), along with his brothers-in-law, were implicated.

25. The testimony of eyewitness, Khilafat (P.W.-2), is riddled with loopholes and does not corroborates either the statements of other prosecution witnesses or the incident in question. His statement indicates that, in all probability, he was not present at the scene of occurrence and is merely reiterating hearsay information. Moreover, his statement was never recorded under Section 161 Cr.P.C., and he has deposed for the first time directly before the learned Trial Court.

26. The eyewitness, Khilafat (P.W.-2), is also an unreliable witness, as he has stated that P.W-1, Khalid, was present at the place of occurrence, whereas P.W-1, in his own statement, has categorically denied his presence at the scene of the incident.

27. The investigating officer in his cross-examination has said that he didn't record the time of investigation in his case diary, nor the time of recovery of soil and also no time has been mentioned on inquest report, and, there is no signature of the IO; there is overwriting of sections in the *panchayatnama*; allegation in the F.I.R was regarding shootout from licensed guns, and during the investigation, the accused stated that their licensed guns are kept with the dealer, the I.O. didn't investigate this fact; no ballistic report was collected; statement of P.W.2 who claims to be eye-witness, was also not recorded u/s 161 Cr.P.C by the investigating officer.

28. Learned AGA and learned counsel for informant have submitted that the prosecution has proved its case beyond doubt in this case. The minor omissions on the part of the witnesses and mistakes committed by the investigating officer during investigation are not of such nature as would discard the prosecution case *in toto*. He has submitted that it is a case of broad day light murder and the appellants are named accused, who do not

deserves any latitude by this Court. The appeal is devoid of merits and may be dismissed.

29. After hearing the rival submissions, we find that in this case fire arm injuries were caused to the deceased by different weapons and implication of six persons were made without assigning them any specific injury caused by any specific fire arm. In this case the opinion of ballistic expert was of considerable importance since the fire arm and the cartridges recovered by the investigating officer were required to be matched, but it was not done.

30. Mere recovery of weapons, on the pointing out of the accused persons from open place without recording any prior disclosure statement of the accused further makes the prosecution case doubtful. Moreover the witnesses of recovery namely, Jabbar and Islam, were not produced in witness box to prove the same.

31. The incident in dispute took place at 12:30 p.m., on 10.06.1993, but the stomach of the deceased was empty which raises doubt about the prosecution case. The defence case that the time of the incident may have been in the early morning sounds credible. The stand of the witnesses of the prosecution that since the deceased was going to attend the marriage, therefore, he did not consumed anything on the day of incident and prior to his death, cannot be believed keeping in view the ordinary human conduct. Further P.W.-1 has stated that he received the information of incident at 10-10:30 a.m., at Veerampur and then he came to the place of incident at 12-12:30 p.m. Therefore, it appears that the deceased died before 10-10:30 p.m., and hence his stomach was found empty. The medical evidence contradicts the prosecution case in this regard and is a serious lacuna in the prosecution case again.

32. The most vital contradiction is found between the statements of P.W.-1 and P.W.-2. Both claimed to be eye witness of the incident and statements of both the aforesaid witnesses were not recorded by the investigating officer of the police. They appeared directly before the court in the witness box.

33. Section 161 Cr.P.C. provides the examination of witness by police. Sub Section (1) provides that any police officer making an investigation under this Chapter, may examine orally any person supposed to be acquainted with the facts and circumstances of the case and such person shall be bound to answer truly all questions relating to such case under Sub Section (2). Under Sub Section (3) the police officer may reduce into writing any statement made to him in the course of an examination under this section; and if he does so, he shall make a separate and true record of the same. Section 161 Cr.P.C. is extracted here-in-below:-

"161-Examination of witnesses by police:- (1) Any police officer making an

investigation under this Chapter, or any police officer not below such rank as the State Government may, by general or special order, prescribe in this behalf, acting on the requisition of such officer, may examine orally any person supposed to be acquainted with the facts and circumstances of the case.

(2) Such person shall be bound to answer truly all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.

(3) The police officer may reduce into writing any statement made to him in the course of an examination under this section; and if he does so, he shall make a separate and true record of the statement of each such person whose statement he records.

Provided that statement made under this sub-section may also be recorded by audio-video electronic means"

34. Section 162 Cr.P.C. provides that 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. The proviso appended to Sub Section (1) of Section 162 provides 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, 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. Section 162 Cr.P.C. is extracted here-in-below:-

"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. Explanation. - An omission to state a fact or circumstances in the statement referred to in sub-section (1) may amount to contradiction if the same appears to be significant and otherwise relevant having regard to the context in which such omission occurs and whether any omission amounts to a contradiction in the particular context shall be a question of fact."

35. Section 145 of the Indian Evidence Act, 1872 provides cross-examination of a witness regarding previous statements in writing. It provides that 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. Section 145 of the Indian Evidence Act, 1872 is extracted here-in-below:-

"145. Cross Examination as to previous statement 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."

36. In view of above, the police officer investigating any offence may examine orally any person supposed to be acquainted with the facts and circumstances of the case and reduce into writing any statement made by him. The said statement cannot be used in any inquiry or trial in respect of any offence under investigation but the said statement may be used to contradict the said witness for the purpose of explaining any matter referred in his cross-examination by the witness. The accused may contradict the said witness in cross-examination in the manner provided under Section 145, in which his writing may also be got proved. Since the right has been given to the accused in the proviso to Section 162(1), therefore, the statement of such

witness recorded under Section 161 Cr.P.C. would be material for his defence at the time of cross-examination. It is settled in law that every accused shall be afforded sufficient opportunity of defence during trial to prove his innocence, therefore, statute also provides to supply all the relevant material to the accused. The statements recorded under section 161 Cr.P.C. are also required to be furnished to the accused under Section 207(iii) Cr.P.C. Section 207(iii) Cr.P.C. is extracted hereinbelow:-

" 207 Supply to the accused of copy of police report and other documents:-

In any case where the proceeding has been instituted on a police report, the Magistrate shall without delay furnish to the accused, free of cost, a copy of each of the following;

(i).....

(ii).....

(iii) the statements recorded under Sub-Section (3) of section 161 of all persons whom the prosecution proposes to examine as its witnesses, excluding therefrom any part in regard to which a request for such exclusion has been made by the police officer under Sub-Section (6) of section 173;

(iv).....

(v).....

Provided that the Magistrate may, after perusing any such part of a statement as is referred to in clause (iii) and considering the reasons given by the police officer for the request, direct that a copy of that part of the statement or of such portion thereof as the Magistrate thinks proper, shall be furnished to the accused;

Provided further that if the Magistrate is satisfied that any document referred to in clause (v) is voluminous, he shall, instead of furnishing the accused with a copy thereof, direct that he will only be allowed to inspect it either personally or through pleader in Court."

37. A Coordinate Bench of this Court, in the case of **Gopal Krishna versus State AIR 1964 All 481**, has observed that "it is obvious that though the police is not bound to make a record of the statement of the witnesses under Section 161 as a matter of obligation, but it is their duty to do so, when the witness is a material witness for unfolding the prosecution story. It is also clear that a failure on their part to comply with the requirements of Section 161(3), though does not render the subsequent statement of the witness at the

trial inadmissible, it does greatly impair the value of the evidence of that witness. Thus the Court opined that the statement of such witness loses much of its weight and the value of the testimony furnished by the witnesses produced at the trial has to be assessed. The relevant paragraph 19 to 23 is extracted here-in-below:-

"19. Section 161(3) runs as follows:

"The police officer may reduce into writing any statement made to him in the course of an examination under this section"

20. Section 164(1) also provides that "Any Presidency Magistrate, any Magistrate of the First Classmay record any statement or confession made to him in the course of an investigation under this Chapter.

*The word "may" as used in S. 164 came up for comment in the case of **Nazir Ahmad v. King Emperor, AIR 1936 PC 253 (2)** and their Lordships were pleased to observe as follows:*

*"It can hardly be doubted that a magistrate would not be obliged to record any confession made to him if, for example, it were that of a self-accusing mad man or for any other reasons the magistrate thought it to be incredible or useless for the purposes of justice. Whether a magistrate records any confession is a matter of duty and discretion and not of obligation" In the case of **Purushottam Jethanand v. State of Kutch, AIR 1954 SC 700** it was held:*

*"There can be no doubt that the right which the accused had got of obtaining the copies of the statements made by witnesses during investigation is a very valuable right and that the wholesale refusal to grant the same will be a serious irregularity which would vitiate the entire trial as held by the **Privy Council in Kottaya v. Emperor, AIR 1947 PC 67.**"*

*21. In the case of **Tilkeshwar Singh v. State of Bihar, (S) AIR 1956 SC 238** it was held that while the failure to comply with the requirements of Section 161(3) of the Cr PC might affect the weight to be attached to the evidence of the witnesses, it does not render it inadmissible.*

22. On the basis of these authorities, it is obvious that though the police are not bound to make a record of the statement of the witnesses under S. 161 as a matter of obligation, it is their duty to do so when the witness is a material witness for unfolding the prosecution story. It is also clear that a failure on their part to comply with the requirements of S. 161(3), though does not render the subsequent statement of the witness at the trial inadmissible, it does greatly impair the value of the evidence of that witness. We are,

therefore, of opinion that the statements of the P.W.-1 and P.W.-2 at the trial though admissible in evidence have lost much of their weight on account of the fact that his statement was not recorded under Section 161 of the Cr PC.

23. In the light of above discussion of the legal question involved in the case, the value of the testimony furnished by the witnesses produced at the trial has to be assessed."

38. A Division Bench of this Court, in the case of **Shankar Lal and others versus State AIR 1954 All 779**, has held that It is not safe to convict an accused person on the statements of witnesses, who have not been effectively and completely cross-examined because appellants were denied a valuable right conferred on them by law.

39. While P.W.-2 stated that P.W.-1 was present at the scene of occurrence P.W.-1 denied the same in his cross-examination and stated that he was attending a marriage at Veerampur, when he received information about the incident, at 10-10:30 a.m., on the date of incident. Thereafter, he came and signed the application which was already written by Jabbar for the purpose of lodging F.I.R. He also did not proved the contents of the F.I.R. and stated that he does not knows what was written in the report. He further stated that he is not very well versed in *Hindi* language and can only write his name and can read and write a bit of *Hindi* only. Compared to the statement of P.W.-1 the statement of P.W.-2 appears to be in total contradiction with what P.W.-1 stated in his cross-examination before the trial court.

40. P.W.-2 stated that P.W.-1 was present at the scene of occurrence and he saw the incident from his own eyes. P.W.-2 had enmity with the accused persons because of the case of firing on his father-in-law, Bunda, by Ekhlakh one of the accused in this case and his other companions. Therefore, P.W.-2 being interested witness cannot be ruled out. Minor contradictions and discrepancies in the statements of the witnesses can definitely be ignored, but in this case there are gross contradictions in the testimonies of P.W.-1 and P.W.-2 which go to the root of the veracity of the prosecution case and cannot be ignored.

41. We find that P.W.-1 had not supported the prosecution case at all in his cross-examination. Rather he denied the prosecution case in *toto* while he claimed himself to be eye witness of the incident and in his examination-in-chief, he denied the prosecution case before the trial court. Therefore the only eye witness of the incident remained was P.W.-2 whose testimony is conflict with the testimony of P.W.-1 and he was found to be having enmity with one of the accused of earlier incident caused by co-accused, Ekhlakh, against his father-in-law, Bunda. Therefore, there is nothing in the cross-examination of P.W.-1 which corroborates the prosecution case in this case.

42. While P.W.-1 is wholly unreliable witness. P.W.-2 proved the prosecution case in consonance with the F.I.R., but he cannot be said to be wholly reliable witness. Keeping in view the fact that he is interested witness, having enmity with the accused side, therefore, for accepting his testimony corroboration of his testimony was required which we do not find the in the present case. The testimony of P.W.-1 is totally at war with the testimony of P.W.-2 therefore we find unsafe to rely upon the testimony of P.W.-2 only to uphold the conviction and sentence of the surviving appellants.

43. There is every possibility of P.W.-2 appearing before the court to take revenge from the co-accused, Ekhlakh, and his companions because of enmity of his father-in-law and brothers-in-law with him.

44. We must reiterate that where the statement of prosecution witness/witnesses is not recorded by the investigating officer under section 161 Cr.P.C., and they appear directly before the trial court, the defence is deprived of its opportunity to cross-examine the witnesses regarding their previous statements made before the investigating officer of police. Therefore, the testimony of such witnesses is required to be dealt with caution since such testimony takes away the right of the defence to cross-examine/ confront them with their earlier statements which is necessary in criminal trial for bringing the truth out from the witnesses.

45. In this case, in the statement of the accused recorded under section 313 Cr.P.C., they denied their involvement in the incident and also alleged false implication on account of enmity. In the case of **Pramila Vs. State of U.P., (2021) 12 SCC 550**, the Apex Court has held that in the examination of accused under section 313 Cr.P.C., requirement of standard of proof beyond reasonable doubt does not applies. The burden lies on the prosecution to prove the charge. The accused is only required to create a doubt regarding the prosecution case and then it is for the prosecution to establish its case beyond reasonable doubt. The failure of the accused to set up the plea of *alibi* in their statement under section 313 Cr.P.C., will also not support the prosecution case because the statement of accused under section 313 Cr.P.C. is no evidence. It is neither on oath nor the prosecution gets opportunity to cross-examine the accused. Therefore, the burden of the prosecution to prove its case does not gets diluted. In the present case we find that the testimonies of P.W.-1 and P.W.-2 are not reliable and there was no other witness of fact produced before the trial court whose testimonies could have been relied upon for the purpose of corroboration.

46. Under the totality, facts and circumstances of this case, we find that the prosecution has failed to prove its case beyond reasonable doubts against the surviving appellants.

47. Before parting we must bring on record that we are not oblivious of the law that even if witness turns hostile, the part of his testimony proving the prosecution case should be accepted. In this case the part of the testimony of P.W.-1 although supports the prosecution case, but considering the fact that he was not interrogated by the investigating officer ever and he has subsequently denied his presence on the place of incident and has also not proved the contents of the F.I.R., we find it unsafe to rely upon his testimony to uphold the conviction and the sentence of the surviving appellants.

48. Accordingly, we **set aside** the judgment and order passed by the trial court with regard to surviving appellant nos. 1, 4 and 5.

49. The criminal appeal is **allowed** qua appellant nos. 1, 4 and 5, namely, **Jarafat, Mahboob and Mamnoon** only.

50. The appellants aforesaid are on bail. Their bail bonds are cancelled and sureties are discharged. They need not to surrender.

51. Office is directed to return the trial court record and also notify this judgment to the trial court.

February 3, 2026
Abhishek

(Jai Krishna Upadhyay,J.) (Siddharth,J.)