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AFR

Judgment reserved on : 6.3.2024

Judgment delivered on :13.5.2024

Court No. -46

Case :- CRIMINAL APPEAL No. - 2751 of 1980

Appellant : Indra Pal
Respondent : State
Counsel for Appellant : Shashi Kant Agrawal,Pavan Kishore,Piyush Kishore Srivastava, Rajiv Lochan Shukla
Counsel for Respondent : A.G.A.

Hon'ble Siddharth, J.
Hon'ble Vinod Diwakar, J.

(Delivered by Hon'ble Vinod Diwakar, J.)

1. Heard Shri Rajiv Lochan Shukla and Shri Pavan Kishore, learned counsel for the appellant, Shri C.L. Singh, learned A.G.A. for the State-respondent, and perused the material placed on record.

2. Upon completing the investigation[1] the police filed the charge-sheet against the accused-appellant Indra Pal, and co-accused Sohanvir. The accused-appellants were charged under Section 302 read with section 34 IPC, wherein, they denied the prosecution case and claimed trial.

3. The learned trial court vide impugned judgment and order dated 26.11.1980 convicted the accused-appellant Indra Pal and co-accused Sohanvir, and vide order dated 27.11.1980 sentenced them to undergo life imprisonment for the offenses under Section 302 read with Section 34 I.P.C. Aggrieved by the impugned judgment of conviction

[1] In Case Crime No.171 of 1978, u/s 302 read with section 34 IPC registered at P.S. Jani, District Meerut

and order of sentence, the accused-appellants preferred the instant appeal before this Court.

4. The co-accused Sohanvir assailed the impugned judgment of conviction and order of sentence through separate Criminal Appeal bearing No.2741 of 1980, who died on 5.11.2011 during the pendency of the appeal, and thus, the appeal No.2741 of 1980 was dismissed as abated vide order dated 28.9.2021. The instant appeal bearing Criminal Appeal No.2751 of 1980 qua accused-appellant, Indra Pal, is being heard and decided by this judgment. Needless to say, both the appeals have arisen out of the common impugned judgment.

5. The prosecution case, in brief, is that a written complaint was lodged at Police Station Jani, District Meerut, on 31.5.1978 at 08:00 a.m. regarding the incident took place at 02:30 a.m. in the village Jani, by one Chamel Singh- father of the deceased- with the allegation that he along with his son Karamvir (since deceased) and Vijendra Singh (PW-2) were sleeping in his Gher[2], where a lantern was burning on the Jamun tree. It was at around 02:30 a.m., the accused-appellants and another person scaled over the wall and barged into his Gher. Karamvir was shot dead, and on the noise of firing, Chamel Singh and Vijendra Singh woke up and saw the accused-appellants along with a third person, who was crossing the wall of the Gher and accused Sohanvir and Indra Pal were standing a few paces away from his deceased son carrying pistols in their hands. The accused-appellant, Indra Pal, and co-accused, Sohanvir, were identified by Chamel Singh.

6. The motive assigned in the *Tehrir* is that Sohanvir son of Bhopal had an illicit relations with one Smt. Prasandi, who was a cousin of the informant Chamel Singh, and Karamvir made an attempt

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[2] **A second home in the village builds for ordinarily male members of the family, and cattle in rural India**

to stop the illicit relations, therefore, accused-appellant executed the murder of Karamvir.

7. On receipt of the information, the police registered the F.I.R. and, after that, proceeded to the place of occurrence for further proceedings; S.I. A.K. Chaudhary prepared the inquest report, and the blood-stained pillow cover and lantern were taken into possession and seizure memo was thus prepared accordingly. The Station House Officer prepared the site plan and recorded the statement of witnesses. During the investigation, Sarwan Singh Yadav (PW-5), S.H.O., was transferred, and further investigation was entrusted to S.I. Ranvir Singh, who, upon receipt of the investigation, conducted the pending investigation and upon its completion filed the charge-sheet. The post-mortem was conducted by Dr. G.N. Goel (PW-4) at P.L. Sharma Hospital, Meerut on 31.5.1978 at 04:45 p.m., and opined the cause of death was due to the gunshot injuries inflicted on the head of the deceased.

8. The prosecution examined five witnesses; PW-1 Jai Prakash is the witness to the inquest report; PW-2 Vijendra Singh is the solitary eyewitness of the case; PW-3 HC Madan Lal was posted as *Moharrir* at the Police Station and recorded the F.I.R.; PW-4 Dr. G.N. Goel has conducted the post-mortem of the deceased; PW-5 S.I. Sarwan Singh Yadav conducted the initial investigation and recorded the statement of the witnesses; and S.I. Ranvir Singh, who filed the charge-sheet, was not examined by the prosecution.

9. Besides ocular testimony, the prosecution proved an exhibited documentary evidence outlined hereinafter; the F.I.R. is marked and exhibited as Ex.Ka-6; Recovery Memo and Supurdginama of Lantern are marked and exhibited as Ex.Ka-7; Post-mortem Report is marked and exhibited as Ex.Ka-5; Panchayatnama is marked and exhibited as

Ex.Ka-2/1; a site plan with an index is marked and exhibited as Ex.Ka-8; Charge-sheet is marked and exhibited as Ex.Ka-9.

10. PW-1 Jai Prakash stated that the Sub Inspector prepared the inquest report of the deceased- Karamvir at about 09:00-10:00 a.m., and he was a witness to the inquest report (Ex.Ka-1). Deceased Karamvir had sustained a firearm injury on his head. In his cross-examination, he stated that accused Sohanvir and his father were present during the inquest proceedings, but accused-appellant Indra Pal was not there. The dead body of the deceased Karamvir was lying on a cot. Besides this, the witness was not put to cross-examination, neither by the accused-appellant nor by the prosecution to prove the prosecution case.

11. PW-2 Vijendra Singh is the solitary eyewitness of the incident and the star prosecution witness, who has stated in his examination-in-chief that he was sleeping on one of the cots in the Gher, and his father, Chamel Singh, was sleeping in another cot. His brother Karamvir Singh was also sleeping beside him on a separate cot, and a burning lantern was hanging on the Jamun tree. Upon hearing the gunshot noise, he woke up and saw accused-appellant Sohanvir standing at a distance of two paces from the cot of the deceased Karamvir carrying a pistol in his hand, and accused Indra Pal was also standing there with a pistol. A third person was also standing there with a pistol, whom he did not know but could identify in his presentation. All the accused were staring at the deceased Karamvir, and after seeing the witness and his father, they ran away after crossing the southern side wall of the Gher. Karamvir died on the spot. After hearing the noise of gunshot, other co-villagers also arrived there. His father, Chamel Singh, died on 19.3.1979, who had reported the matter to the police and he could identify his signatures. The police come to the village at about 10:00 a.m. The witness was also threatened by the accused-appellant Indra Pal on 8.7.1980 not to

depose in the instant case. Otherwise, he would face the dire consequences, his father faced. The victim has also filed an application before the trial court in this regard. On the question put by the court, the witness said that he had stated in the Panchayat that his brother was killed by one Daya Ram and his son, with whom they had old enmity, and the said Panchayat was convened after 2-3 days of his brother's death. He is aware of whether his brother had requested the police to investigate the case by C.I.D. and had filed the application to the D.S.P. in this regard.

12. PW-3, Constable Madan Lal, stated that he had recorded the F.I.R. based on *Tahrir* received from Chamel Singh, the deceased's father.

13. PW-4 Dr. G.N. Goel, Medical Officer at P.L. Sharma Hospital, conducted the postmortem of the deceased Karamvir and observed the following injuries:

> *"(i) A gunshot wound of entry 2 cm. x 2 cm. x brain cavity deep on the left side of the head 7 cm. above the left ear.*
>
> *(ii) Blackening and charring around the wound.*
>
> *(iii) Gunpowder marks were seen on the back and left forearm.*
>
> *(iv) The frontal and parietal bones were found fractured.*
>
> *(v) The brain was lacerated.*
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> *(vi) The interior perennial fossa was also fractured.*
>
> *(vii) Six pellets were recovered from the head, and the same was sealed and handed over to the I.O.*
>
> *(viii) Cause of death was opined due to injuries sustained by the deceased in the brain, which is the vital organ of the body."*

14. PW-5, S.I. Sarwan Singh Yadav, in whose presence the police conducted the investigation, along with S.I. A.K. Chaudhary, prepared the Panchnama, collected the blood-soaked pillow and lantern, and prepared the site plan. He stated that he has recorded the statements of Jagsoran, Prahlad Singh and Prasandi.

15. After recording the statement of prosecution witnesses, the statement of accused-appellant Indra Pal was recorded under Section

313 Cr.P.C., who stated that he along with Sohanvir, Babu Ram and his father Uday Singh, were present at the time of the inquest proceedings and had been falsely implicated in this case because of the village rivalry. Had he been accused, why would he have been present at the time of inquest proceedings by police?

16. Shri Rajiv Lochan Shukla, learned counsel for the appellant, made the following submissions:

16.1 The original copy of the F.I.R., based on which the police investigation commenced, is missing from the record, and the same was not proved and exhibited by the trial court. Therefore, the entire investigation began after the registration of F.I.R. was vitiated under the law, and thus, the appellant shall be acquitted on this ground alone. In the absence of a fair investigation, a fair trial is not possible, which is the fundamental requirement under criminal jurisprudence.

16.2 The case diary, in which the I.O.'s proceedings were recorded, has not been exhibited.

16.3 The testimony of sole eyewitness Vijendra Singh (PW-2) cannot be relied upon because it contains material contradictions and improvements. PW-2's statement was contrary to the statement recorded by the police under Section 161 Cr.P.C., and no explanation was given as to why the Investigating Officer did not record certain material facts and he also resiled from the prosecution case.

16.4 The motive of the offence is absurd, and the prosecution has failed to prove the motive behind the commission of the offence.

16.5 PW-2's testimony is manifestly clear that he did not see the incident, and he only saw the accused-appellant after the commission of the crime.

16.6 PW-2 Vijendra Singh could not identify the accused persons as there was dark, and it was also not clear as to who shot the deceased Karamvir Singh.

16.7 The prosecution has not produced Jagshoran, the domestic help, and Prahlad Singh, whose houses were situated beside the place of the incident, for a reason best known to the prosecution. Prasandi, with whom the co-accused Sohanvir had an illicit relationship, was not examined by the prosecution, therefore, the prosecution has not presented the case as was, instead, they have come up with a different story to protect the real culprits.

16.8 No independent/public witness has been examined, and no recovery has been effected. The lantern was not shown hanging with the Jamun tree in the site plan, and the competent witness has not proved the site plan. The alleged clothes seized by the I.O. have not been produced before the court. No weapon of offence was recovered and produced in the court. No recovery has been effected from the accused-appellant, and the appellant was not seen committing murder.

16.9 The prosecution has miserably failed to connect the accused with the commission of the offence. The testimony of PW-2 is full of contradictions and embellishments and can not be relied upon.

16.10 Further, the prosecution has failed to prove the corroboration. The deposition of PW-2 should be disbelieved as it ought to be, in view of the evidence surfaced during trial. Other materials on record do not show the accused's complicity in the offence; thus, the appellant is liable to be acquitted of the charges. The prosecution could not establish the illicit relationship between the co-accused Sohanvir and one Smt. Prasandi, therefore, the sole motive for commission of offense is absurd and non conclusive.

16.11 Finally, it's not safe to rely upon the testimony of the solitary eyewitness, which is full of contradictions and embellishments without corroboration.

17. Learned counsel for the appellant relied upon the judgments of the Supreme court in the cases of **(i) Kuna alias Sanjaya Behera v.**

State of Odisha[3]**; (ii) Ramji Suriya and Another v. State of Maharashtra**[4]**; and (iii) Amar Singh v. NCT of Delhi** [5] on the issue that the testimony of the sole eyewitness must be examined with caution, especially when he is an interested witness as the PW-2 is the real brother of deceased, and there is high likelihood to implicate the appellant falsely.

18. *Per contra*, learned A.G.A. states that the evidence of sole witnesses PW-2 is coherent, consistent, cogent, and fully corroborated by the medical evidence. Thus, the prosecution has proved the charges beyond a reasonable doubt. The conviction and sentence of the accused-appellant do not merit interference. The court below was justified in relying on the testimony of PW-2, which is duly proved and corroborated by the testimony of Dr. G.N. Goel (PW-4), who conducted the Post-mortem of the deceased. There are no material contradictions in the evidence adduced on behalf of the prosecution. In normal circumstances, PW-2 Vijendra Singh, being the brother of the deceased, would be most reluctant to spare the actual assailants and falsely mention the names of the other persons responsible for causing the death of his brother. He further submits that the report lodged by Chamel Singh, father of the deceased, if proven, would have suggested that he would be the last person to have falsely implicated the accused persons in his son's murder, leaving the real culprits. Thus, the fact that PW-2 Vijendra Singh is the deceased's brother, is insufficient to discredit his sworn testimony. There does not appear to be any exaggeration of falsehood in his evidence.

19. Learned A.G.A. further contends that merely because a minor contradiction/inconsistency cropped up in the witness's evidence, it cannot be a ground to disbelieve the truthfulness of the testimony of PW-2. He submits that the grain has to be separated from the chaff to

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3 (2018) 1 SCC 296
4 AIR 1983 SC 810
5 (2021) 114 ACC 931 SC

find out the truth from the testimony of the PW-2 and relied on the judgments of the Supreme Court in **Shakila Abdul Gafar Khan v. Vasant Raghunath Dhoble**[6], **State of A.P. v. Pullagummi Kasi Reddy Krishna Reddy**[7], **and Rupinder Singh Sandhu v. State of Punjab**[8].

20. The principal argument of Shri Rajiv Lochan Shukla, learned counsel for the appellant is that the prosecution failed to produce the original F.I.R.; therefore, the entire proceedings arising out of the impugned F.I.R. were vitiated, and hence, the appellant may be acquitted. In this regard, it's become necessary to scrutinize the law carefully regarding the evidentiary value of F.I.R.

21. Shri Shukla, primarily assailed the impugned order on the ground that the original F.I.R. is missing and has not been produced in the court; therefore, the entire investigation commenced after that is vitiated under law. Therefore, the law about the evidentiary value of F.I.R. assumes significance and is thus imperative to have a re-look in this regard. As observed by the Privy Council in ***Emperor v. Khwaja Nazir Ahmad***[9] the receipt and recording of information report by the police is not a condition precedent to the setting in motion of a criminal investigation. Nor does the statute provide that such information report can only be made by an eyewitness. The First Information Report under Section 154(1) Cr.P.C. is not even considered substantive evidence. It can only be used to corroborate or contradict the informants' evidence in court. Undue or unreasonable delay in lodging the First Information Report invariably gives rise to suspicion, which puts the court on guard to look for the plausible motive and explanation for the delay and consider its effect on the trustworthiness or otherwise of the prosecution version[10].

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6 (2003) 7 SCC 749
7 (2018) 7 SCC 623
8 (2018) 16 SCC 475
9 I.L.R. (1945) Lah.1; AIR1945 P.C18
10 Jitendra Chandra Sahib v. State of Tripura, 1996 (3) GLR 197

22. Once the complaint of the petitioner disclosed the commission of a cognizable offense, the proper course according to law as provided by Section 154 (1) of the Code of Criminal Procedure is to register the F.I.R. and then investigate the same and the *vice-versa* could not be resorted to, legally.

23. In any circumstance, it is the responsibility of the defense counsel to ascertain whether a statement has been regarded as a First Information Report (F.I.R.) or is recorded as a statement taken during the investigative process outlined in Section 162 of the Code of Criminal Procedure. The defense counsel should then confront the concerned witness regarding any omissions or contradictions within that statement.

24. There are situations where the complainant is the initial person to visit the police station and provide details about an alleged crime directly to the officer-in-charge, who promptly records the statement before any other actions. In such instances, the statement can be immediately marked as an exhibit on the record without being initially making for identification and subsequently marking it as a regular exhibit after the Investigating Officer's testimony. However, unless these circumstances are evident from the record, it is advisable for the trial court to adopt the procedure initially marking the statement first for identification and then as a regular exhibit. These observations stem from numerous cases where statements recorded during the investigative process were treated as F.I.R.s without any objection from the defense counsel or without the trial court deliberating on whether the statement was obtained during the investigation or before it commenced.

25. The absence of the First Information Report, therefore, by itself cannot destroy the prosecution case[11]. But this will make a prosecution case suspicious[12].

26. It is necessary to stress that the statement recorded under Section 161 Cr. P.C. shall not be used for any purpose except to contradict a witness in the manner prescribed in the proviso to Section 162 (1) Cr.P.C.[13]

27. So far as Shri Rajeev Lochan Shukla's next argument is concerned, the trial court has committed a grave error by believing the testimony of solitary eyewitness Vijendra Singh (PW-2) without corroboration, which is supplemented by the weak motive attributed to the commission of the offense, and absurd investigation.

28. The Supreme court in **State of U.P. v. Kishanpal**[14] case has held that the motive may be considered as a circumstance that is relevant for assessing the evidence, but if the evidence is clear and unambiguous and the circumstances prove the guilt of the accused, the same is not weakened even if the motive is not a very strong one. It is also settled law that the motive loses all its importance in a case where direct evidence of eyewitnesses is available because even if there may be a very strong motive for the accused persons to commit a particular crime, they cannot be convicted if the evidence of eyewitnesses is not convincing. In the same way, even if there may not be an apparent motive if the evidence of the eyewitnesses is clear and reliable, the absence or inadequacy of motive cannot stand in the way of conviction.

29. The Supreme court in **Bipin Kumar Mondal v. State of West Bengal**[15] has held that motive is a thing that is particularly known to

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11 Jagdish B. Rao v. Govt. of Union Territory of Goa Daman & Div, 1976 Cr.LJ 132 at page 134
12 Chandrika Ram Kahar v. Emperor, 1922 Pat. 535
13 Baldev Singh v. State of Punjab 1992(1) PATLJR 1144
14 (2008) 16 SCC 73
15 (2010) 12 SCC 91

the accused himself, and it may not be possible for the prosecution to explain what actually prompted or excited the accused to commit a crime. The motive is distinct from "object and means" which innervates or provokes an action. Unlike "intention", "motive" is not the yardstick of a crime. A lawful act with an ill motive would not constitute an offense but it may not be true when an unlawful act is committed with best of the motive. Unearthing "motive" is akin to an exercise of manual brain-mapping. At times, it becomes herculean task to ascertain the traces of a "motive". The three-Judge Bench of the Supreme court in **Surendra Singh v. State (Union Territory of Chandigarh)**[16] case has further elucidated that the motive is infallibly a crucial factor, and is a substantial aid for evincing the commission of an offense, but the absence thereof is, however, not such a quintessential component which can be construed as fatal to the case of the prosecution, especially when all other factors point towards the guilt of the accused and testaments of eyewitnesses to the occurrence of a malfeasance are on record.

30. As the PW-2 Vijendra Singh is the only eyewitness to the incident, who was examined by the prosecution and was sleeping beside the deceased on a separate cot and had seen the appellant carrying a pistol in his hand standing a few paces away from the cot on which the deceased was lying. Chamel Singh was also present at the spot; he was a police witness but could not be produced in the court for examination as he had died before the trial court could summon him. The other police witnesses, Jagmohan, Prabhat Singh and Smt. Prasandi, were not summoned by the prosecution to prove the prosecution's case; therefore, it is prudent to examine the law about the admissibility of evidence of the sole eyewitness. The relevant portion of the testimony of PW-2 is extracted herein under, for ready reference:

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16 **(2021) 20 SCC 24**

"11. हमारे व दयाराम तथा उसके लड़को के ताल्लुकात ठीक है न मेल है न रंजिश हैं इन्द्रपाल से मेरी कोई रंजिश नहीं थी, सोहनवीर से भी हमारी कोई रंजिश नहीं थी। गांव में मेरे पिता के मारे जाने के 2-3 दिन बाद एक पंचायत हुई थी। जिसमें मेरे मामा व गांव के अन्य आदमी भी थे।

प्रश्न- क्यो ऐसा है कि पंचायत में मेरे भाई ज्ञानेन्द्र ने यह कहा कि मेरे पिता व मेरे भाई को दयाराम व उसके लड़को ने मारा है?

उत्तर- मेरे भाई ने पंचायत में यह बात कही थी।"

"14. परसन्दी को मै जानता हूँ, वह मेरी फूफी है और उम्र करीब 55-60 साल होगी। उसके सगे भाई हरपाल सिंह है। हरपाल सिंह के चार लड़के है। मेरे पिता जी की उम्र 65 वर्ष थी। मै बाबूराम को जानता हूँ, वह अदालत में मौजूद है, उनकी उम्र का मुझे पता नहीं। हमारी इनसे कोई रंजिश नहीं है।"

31. The Supreme Court in **Vadivelu Thevar v. State of Madras**[17] has carved out three categories of witnesses; *(i) wholly reliable, (ii) wholly unreliable, and (iii) neither wholly reliable nor wholly unreliable,* and thus held:

> *"In view of these considerations, we have no hesitation in holding that the contention that in a murder case, the court should insist upon plurality of witnesses, is much too broadly stated. Section 134 of the Indian Evidence Act has categorically laid it down that "no particular number of witnesses shall in any case be required for the proof of any fact." The legislature determined, as long ago as 1872, presumably after due consideration of the pros and cons, that it shall not be necessary for proof or disproof of a fact, to call any particular number of witnesses. In England, both before and after the passing of the Indian Evidence Act, 1872, there have been a number of statutes as set out in Sarkar's I Law of Evidence -9th Edition, at pp. 1 100 and 1 101, forbidding convictions on the testimony of a single witness. The Indian Legislature has not insisted on laying down any such exceptions to the general rule recognized in s. 134 quoted above. The section enshrines the well-recognized maxim that "Evidence has to be weighed and not counted". Our Legislature has given statutory recognition to the fact that administration of justice may be hampered if a particular number of witnesses were to be insisted upon. It is not seldom that a crime has been committed in the presence of only one witness, leaving aside those cases which are not of uncommon occurrence, where determination of guilt depends entirely on circumstantial evidence. If the Legislature were to insist upon plurality of witnesses, cases where the testimony of a single witness only could be available in proof of the crime, would go unpunished. It is here that the discretion of the presiding judge comes into play. The matter thus must depend upon the circumstances of each case and the quality of the evidence of the single witness whose testimony has to be either accepted or rejected. If such a testimony is found by the court to be entirely reliable, there is no legal*

[17] **AIR 1957 SC 614**

impediment to the conviction of the accused person on such proof. Even as the guilt of an accused person may be proved by the testimony of a single witness, the innocence of an accused person may be established on the testimony of a single witness, even though a considerable number of witnesses may be forthcoming to testify to the truth of the case for the prosecution. Hence, in our opinion, it is a sound and well- established rule of law that the court is concerned with the quality and not with the quantity of the evidence necessary for, proving or disproving a fact. Generally speaking, oral testimony in this context may be classified into three categories, namely:

(1) Wholly reliable.

(2) Wholly unreliable.

(3) Neither wholly reliable nor wholly unreliable."

32. The Supreme court in **Harchand Singh & Anr. v. State of Haryana**[18]**,** held that **(i)** the function of the court in a criminal trial is to find whether the person arraigned before it as the accused is guilty of the offense with which he is charged. For this purpose, the court scans the material on record to find whether there is any reliable and trustworthy evidence upon the basis of which it is possible to found the conviction of the accused and to hold that he is guilty of the offense with which he is charged; **(ii)** the court can base the conviction of the accused on a charge of murder upon the testimony of a single witness if the same was found to be convincing and reliable. If in a case the prosecution leads two acts of evidence, each one of which contradictions and strikes at the other and shows it to be unreliable, the result would necessarily be that the court would be left with no reliable and trustworthy evidence upon which the conviction of the accused might be based. Inevitably, the accused would have the benefit of such a situation.

33. A perusal of the trial court judgment would reveal that the conviction is based on the testimony of PW-2, the sole eyewitness of the incident. While recording the finding of the conviction against the accused-appellant, the trial court believed that there was no question to disbelieve the testimony of PW-2 Vijendra Singh, who is the real

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[18] (1974) 3 SCC 397

brother of the deceased and was present at the time of the incident. PW-2 clearly stated in his deposition that the accused-appellant was standing near his brother when he woke up after hearing the gunshot; he could identify two of the assailants, whereas the third assailant could not be identified. As the deceased was from his village and had illicit relations with Smt. Prasandi, who is a relative of PW-2; therefore, the accused decided to eliminate the deceased, who was coming his way to continue his illicit relationship with Smt. Prasandi. There was sufficient light, and the site plan also indicates the source of light. There is also no ground to disbelieve that the lantern was burning inside Gher and the accused was standing two paces away from the cot of the deceased and, after that, scaled over the wall. The registration of the chik F.I.R. was exhibited by PW-3, Police constable Madan Lal, who has recorded the *Tehrir; therefore*, it's become inconsequential whether the F.I.R. was exhibited or not. Normally, PW-2 Vijendra Singh, being the brother of the deceased, would be most reluctant to spare the real assailant and falsely mention the name of the other person for murdering his brother. Lastly, the testimony of PW-2 was found convincing and reliable.

34. In the light of the findings of the trial court, it becomes imperative to examine the witnesses on two aspects; firstly, the motive, and secondly, the act performed by the accused in the commission of the crime. It is an admitted case of the prosecution that accused Sohanvir had illicit relations with Smt. Prasandi, and the deceased was coming in their way to object to the same. Therefore, the accused persons decided to eliminate the deceased. This is the sole motive behind the commission of murder to prove the motive and for the act performed in commission of murder; the testimony of sole eyewitness PW-2 Vijendra Singh, the brother of the deceased assumes significance because he is the solitary eyewitness.

35. The facts and the evidence placed before the trial court by the prosecution- suggest that the appellant's conviction is solely based on the testimony of PW-2, the eyewitness who saw appellant was carrying the pistol in hand, when he woke up after hearing the gunshot noise and found the deceased in pool of blood on the cot.

36. In this case, the touchstone of legal exposition is the testimony of PW-2, the sole eye witness, and PW-5, who conducted the investigation.

37. Admittedly, PW-2, a solitary eyewitness of the incident, is the deceased's brother and, therefore, is a related and interested witness. He claims to have slept beside the deceased and woke up after hearing the gunshot. PW-2 supported the case of the prosecution in the chief examination, whereas, in cross-examination, he stated that he knows one Daya Ram of his village, who has three sons, and all live with their parents, and further said that we had a panchayat at his village after 2-3 days of the date of the incident in which his maternal uncle and other co-villagers were present. On a court question, the witness admitted that his brother Gyanendra had stated that one Daya Ram and his son had murdered the deceased. He further stated that his family was not happy with the police investigation and had requested the C.O. to transfer the investigation to the C.B.C.I.D. When the witness was confronted with the statement under Section 161 Cr.P.C., he stated that he had not given such statement to the Investigating Officer and did not know why he recorded his statement under Section 161 Cr.P.C. that the accused Indra Pal was standing two paces away from the cot of the deceased and he was carrying a pistol. He further stated that he had not told the Investigating Officer that the third person was also standing there carrying a gun in his hand. He has also not told to the Investigating Officer that the accused scaled the wall, but he has told that the accused went south, and his father has

told the incident to his servant Jagshoran and one Jai Prakash Jogi, but the Investigating Officer did not record their statements.

38. When the PW-2, the solitary eyewitness was confronted with the statement recorded by the I.O. under Section 161 Cr.P.C. he showed ignorance of certain relevant facts, which are extracted below:

> *23. सुबह मेरे घेर से सोहनवीर को गिरफ्तार नही किया। सोहनवीर व इन्द्रपाल की तलाशी रात में नही कराई थी। मैने दरोगा जी को मुलजिमान के तलाश कराने की बात नही बताई थी, पता नही मेरे बयान मे उन्होने कैसे लिख लिया। यह गलत है कि मेरी आंख गोली चलने के बाद खुली और मैने केवल तीन आदमीयों को दीवार फाँदते देखा था जिनको मै पहचान नही सका। मैने दरोगा जी को बयान दिया था कि मुलजिमान व एक अन्य आदमी को दीवार फाँदते हुऐ देखा है। दरोगा जी को पिच्छली दक्षिणी दीवार फाँदना बताया था पता नही उन्होंने क्यों नही लिखा। ऐसा नही है कि मै वहाँ नही था और चूंकि रिपोर्ट लिखा दी है। इसलिये बयान दे रहा हूँ।"*

39. Given the aforesaid improvements and deliberations, it becomes necessary to corroborate the solitary witness's testimony with other circumstantial evidence, and the evidence of PW-2 must be scrutinized with great caution and circumspection.

40. The PW-1, a witness to the inquest report, has shown ignorance as to who had gone to the police station to register the F.I.R. and how many cots were present near the place of the incident. He is unaware of who was present during the inquest proceedings. The Investigating Officer PW-5 stated that he had seized blood-soaked soil, lantern and prepared the site plan, and after that second Investigating Officer, Shri Ranveer Singh, after taking the statement of Jagshoran and Prahlad Singh, filed the charge-sheet. On examination by the prosecution, nothing in the testimony of PW-5 suggests that he had made any efforts to recover the gun, the weapon of offence or sent the pellets recovered from the deceased to the F.S.L. for corroboration.

41. In the matter of appreciation of evidence of witnesses, it is not the number of witnesses but the quality of their evidence that is relevant, as there is no requirement under the law of evidence that any particular number of witnesses is to be examined to prove/disprove

effect. The evidence must be weighed and not counted. The testimony of PW-2 fails to pass the standard of test of a creditworthy witness. There is no doubt the conviction can be based on the testimony of a sole eyewitness, and there is no rule of law for evidence that says to the contrary, provided the sole witness passes the test of reliability. So long as the single eyewitness is a wholly reliable witness, the courts have no difficulty basing conviction on his testimony alone.

42. The trial court recorded the finding that the charge framed under Section 302 read with Section 34 I.P.C. is proved against the accused persons and, therefore, hold guilty both the appellant and co-accused Sohanveer, who had died during the pendency of the instant appeal before this Court, therefore, the appeal is dismissed as abated qua accused Sohanveer. Therefore, we proceed to deal with the evidence come-forth qua appellant- Indrapal.

43. Succinctly, as per the trial court, three accused persons had committed the crime: accused Sohanveer (since died) and Indra Pal were carrying a gun, and a third accused was also there who could not be identified, as per PW-2, and the deceased had died because of a single gunshot injury on his head, P.W.4 stated. There is no material on the trial court record to establish a common intention on the part of the appellant, Indra Pal, to commit murder. Assistance has been taken from **Krishnamurti v. State of Karnataka**[19].

> *"26.Section 34 I.P.C. makes a co-perpetrator, who had participated in the offence, equally liable on the principle of joint liability. For Section 34 to apply there should be common intention between the co-perpetrators, which means that there should be community of purpose and common design or pre-arranged plan. However, this does not mean that co-perpetrators should have engaged in any discussion, agreement or valuation. For Section 34 to apply, it is not necessary that the plan should be pre-arranged or hatched for a considerable time before the criminal act is performed. Common intention can be formed just a minute before the actual act happens. Common intention is necessarily a psychological fact as it requires prior meeting of minds. In such cases, direct evidence normally will not be available and in most cases, whether or not*

[19] (2022) 7 SCC 521

there exists a common intention has to be determined by drawing inference from the facts proved. This requires an inquiry into the antecedents, conduct of the co-participants or perpetrators at the time and after the occurrence.The manner in which the accused arrived, mounted the attack, nature and type of injuries inflicted, the weapon used, conduct or acts of the co-assailants/perpetrators, object and purpose behind the occurrence or the attack etc. are all relevant facts from which inference has to be drawn to arrive at a conclusion whether or not the ingredients of Section 34 I.P.C. are satisfied. We must remember that Section 34 I.P.C. comes into operation against the co-perpetrators because they have not committed the principal or main act, which is undertaken/performed or is attributed to the main culprit or perpetrator. Where an accused is the main or final perpetrator, resort to Section 34 I.P.C. is not necessary as the said perpetrator is himself individually liable for having caused the injury/offence. A person is liable for his own acts. Section 34, or the principle of common intention, is invoked to implicate and fasten joint liability on other co-participants."

44. To attract the applicability of Section 34 I.P.C., the prosecution is obligated to establish a common intention before a person can be vicariously convicted for the criminal act of another. The ultimate act should be done in furtherance of common intention. Common intention requires a pre-arranged plan, which can even be formed at the spur of the moment or simultaneously just before or even during the attack. For proving common intention, the prosecution can rely upon direct proof of prior concert or circumstances which necessarily lead to that inference. However, incriminating facts must be incompatible with the accused's innocence and incapable of explanation by any other reasonable hypothesis. By Section 33 of I.P.C., a criminal act in Section 34 I.P.C. includes omission to act. Thus, a co-perpetrator who has done nothing but has stood at the place of incident while the offence was committed may be liable for the offence since in crimes, as in other things, "they also serve who only stand and wait". Thus, common intention or crime sharing may be by an overt or covert act, by active presence or at a distant location, but there should be a measure of jointness in committing the act.

45. On conjoint reading of Section 34 with Section 33 IPC, it infers that there should be a common intention of all the co-accused persons,

which means a community of purpose and shared desire. Common intention does not by itself mean engaging in any discussion or agreement to prepare a plan or hatch a conspiracy for committing the offence. Common intention is a psychological fact, and it can be formed a minute before the actual happening of the incident or even during the occurrence of the incident. A mere common intention *per se* may not attract Section 34 I.P.C. unless the accused has done some act in furtherance of the commission of the crime.

46. In the instant case, the statement of PW-2 does not suggest as to who fired on the deceased, particularly given the testimony of PW-4, which suggests that the deceased had died due to a single gunshot injury on his head, which became fatal to the deceased; no overt act is attributed to the appellant; not has seen that the appellant fired at deceased and he died because of his gunshot, as per the prosecution, the testimony of PW-2 does not inspire the confidence of the Court; it was co-accused Sohanvir, who allegedly had illegal relations with one Smt. Prasandi. No evidence on record could suggest that both the accused have shared a common intention or appellant has done any overt act in furtherance of the commission of the crime and finally the PW-2 could not identify the assailants (reference is invited to para 36). On this ground, the appellant also deserves the benefit of the doubt.

47. On examination of testimony of PW-5, the first investigating officer, we observe that he did not send the seized pellets to the F.S.L. for its examination, nor was any effort made to recover the weapon of offence, the blood-soaked soil seized from the place of incidence, was also not sent to the F.S.L. for chemical examination, which would have indeed corroborated the version given by the witness. No explanation is forthcoming for the failure of the prosecution to not send the pellets recovered from the deceased and blood-soaked soil to

the F.S.L., which could have strengthened the version given by PW-2 Vijendra Singh at least, in the testimony of PW-5.

48. In **Ram Nihare Yadav v. State of Bihar**[20]**,** the Supreme court, while dealing with the effect of shoddy investigation of cases, held that if primacy is given to such negligent investigation or to the omission and lapses committed in the course of investigation, it will shake the confidence of people not only in law enforcing agencies, but also in the administration of justice. The Supreme court in **Surendra Paswan v. State of Jharkhand**[21]**,** further delineated that in the instant case not only the I.O. sent the seizure to the FSL and made no effect to the recovery of weapon of offence but the prosecution's the solitary star witness who resiled in cross-examination making his testimony doubtful, and "dis-proved"; because the sample was not sent may constitute a deficiency in the investigation, but the same did not corrode the evidentiary value of the eyewitnesses, if proved unshakable.

49. In essence, the cumulative effect of both oral testimony and documentary evidence is paramount, to assess the sterling quality and admissibility of the evidence presented during the trial. The court must weigh the credibility and reliability of both oral and documentary evidence to determine their overall probative value. To assess evidence as of sterling quality, the court should consider various factors, including consistency, corroboration, relevancy, and authenticity. Additionally, the court should evaluate the demeanor of the witnesses, the clarity and coherence of the testimony, and veracity of the documentary evidence.

50. It would have been certainly making the prosecution case at better footing if the Investigating Officer (PW-5) had sent the pellets recovered from the deceased and blood-soaked soil to the Forensic

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20 (1998) 4 SCC 517
21 (2003) 12 SCC 360

Science Laboratory and had made efforts to recover the weapon of offence, i.e. gun for comparison. However, the report of the ballistic expert and F.S.L. report would have, in any case, been the nature of an expert opinion, and the same is not conclusive evidence. The failure of the Investigating Officer in sending the blood-soaked soil pellets recovered from the deceased cannot be utterly proved fatal for prosecution, if the same is fully established from the testimony of the sole eyewitness (PW-2), whose presence cannot be doubted as he was sleeping beside the deceased on a separate cot but a testimony of PW-2 by itself does not inspire the confidence of the court, therefore, become a relevant fact to be considered by this Court.

51. It is the responsibility not only of the investigating agency but also of the courts to ensure that the investigation is conducted fairly and does not infringe upon an individual's freedom except as prescribed by the law. Equally integral to criminal law is the principle that the investigating agency bears a significant responsibility to conduct an investigation without bias or unfairness. The investigation should not, at first glance, suggest a prejudiced mindset, and every endeavor should be made to hold the guilty accountable under the law, as no one is above it, irrespective of their societal status or influence.

52. By applying the ratio culled out in **Vadivelu Thevar v. State of Madras (supra)**, we can safely conclude that where the case rests on the testimony of the sole eyewitness, who did not even see the act of firing on the deceased, he woke up after hearing the gunshot and show the accused's were standing two paces away from the deceased staring at the deceased, the same must not be wholly reliable. Additionally, PW-2 has resiled from his statement when contradiction with 161 Cr.P.C. statement. The relevant portion is extracted herein below:

> *"17. दरोगा जी ने इस घटना के बारे मे मुझ से पूछंताछ की थी, पहले पिता जी का बयान लिया बाद को मेरा लिया था। मैने दरोगा जी को गोली की आवाज सुनकर खाट से ऊतर कर खड़े होने की बात बताई थी। यदि मेरे बयान में यह बात नही है तो इसकी कोई*

वजह नहीं बता सकता। दरोगा जी ने मुझ से मेरे पिता जी के खाट से ऊतर कर मेरे पीछे खड़े हो जाने की पूछी नही थी इसलिये नही बताई। मैने यह बात दरोगा जी को नही बताई कि मैने देखा कि इन्द्रपाल करमवीर की खाट से 2 कदम दूर खड़ा है और उसके हाथ मे पिस्तोल है। "मेने दरोगा जी को यह बात भी नही बताई कि "सोहनवीर उसकी वगल मे खड़ा था और उस के हाथ मे भी पिस्तोल थी।" मैने दरोगा जी को यह भी नही बताया कि "तीसरा आदमी भी वही खड़ा था और उसके हाथ में भी पिस्तोल थी।" मैने दरोगा जी को यह बात कि दीवार कूद कर भाग गये बताई थी लेकिन यह बात नही बताई कि ठिठके और दक्षिण की तरफ दीवार कूद कर भाग गये। मैने दरोगा जी को यह बात बताई थी कि पिता जी ने करमवीर को आवाज दी वह नही बोला और नवज देखकर कहा कि यह खत्म हो गया यदि उन्होंने मेरे बयान में यह बात न लिखा हो तो कोई वजह नही बता सकता। मै तो रो रहा था लेकिन मेरे पिता ने घटना और लोगो को बताई थी। मेरे नौकर जगशोरन को भी बताई थी। और जय प्रकाश जोगी को भी बताई थी वह इस मुकदमे में गवाह नही है। जो नाम मैने बताये थे उनके बयान दरोगा जी ने मेरे सामने नही लिये।"

53. In this case except the evidence of PW-2, the related and interested witness, we do not find any other evidence which at least gives some assurance. We think it is highly dangerous to convict the appellant on this kind of evidence when there are strong circumstances to show that the testimony of the sole eyewitness needs corroboration, either from ocular testimony or documentary/scientific evidence. In this case, there is no way of separating the grain from the chaff since even the overt act attributed to appellant Indra Pal also becomes doubtful in the light of the medical evidence and serious contradiction and embellishment in the testimony of PW-2.

54. Based on the forgoing discussions, we have concluded that **(i)** the prosecution could have produced either Smt. Prasandi or her relatives so that the motive could be well established. The police have neither recorded the statement of Smt. Prasandi nor her relatives, and neither has produced the evidence that could justify the motive behind the commission of murder, **(ii)** the testimony of PW-2 cannot be relied upon in the facts and circumstances of the case because of reason; **a)** that there are serious discrepancy in the statement of PW-2 with respect to the motive of the crime; **b)** the manner in which the crime has been committed, has not been explained by the witness; **c)** PW-2

becomes evasive to most of the relevant questions and showed ignorance when confronted with statement u/s 161 Cr.P.C. recorded by I.O.; **d)** admitted that a panchayat was convened in his village soon after his brother's murder and his brother had told that Karamvir was murdered by one Dayaram and his sons; **e)** he had seen three unidentified assailants scaling the wall, towards South, but could not identifiable; **(iii)** non-examination of servant Jagshoran and Jai Prakash by the prosecution, their names are mentioned in the *tehrir*; **(v)** the recovery was not effected; **(vi)** no scientific evidence was gathered or sent for the F.S.L. to link the weapon of offence to the crime.

55. As a result, the conviction and sentence passed against the appellant vide impugned judgment of conviction dated 26.11.1980 and order of sentence dated 27.11.1980, passed by VIth Additional Sessions Judge, Meerut in Sessions Trial No. 433 of 1979 titled State v. Sohanvir and Another, arising out of Case Crime No 171 of 1978, under Section 302/34 I.P.C., registered at Police Station Jani, District Meerut, is hereby set aside and the appellant is acquitted of all the charges. Thus, the appeal is **allowed**.

56. Office is directed to send back the record of this appeal to the trail court concerned along with a copy of this order for compliance of section 437-A Cr.P.C.

Order Date :- 13.5.2024
Shafique/A. Tripathi

(Vinod Diwakar, J.) **(Siddharth, J.)**