

Jaikam Khan vs The State Of Uttar Pradesh on 15 December, 2021

Author: B.R. Gavai

Bench: B.V. Nagarathna, B.R. Gavai, L. Nageswara Rao

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REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.434-436 OF 2020

JAIKAM KHAN

...APPELLANT(S)

VERSUS

THE STATE OF UTTAR PRADESH

.... RESPONDENT(S)

WITH

CRIMINAL APPEAL NO.442 OF 2020

CRIMINAL APPEAL NO.437-439 OF 2020

CRIMINAL APPEAL NO. 440-441 OF 2020

JUDGMENT

B.R. GAVAI, J.

1. The present appeals arise out of the common judgment and order passed by the Division Bench of the High Court of Judicature at Allahabad dated 18th May, 2018, in Reference No.01 of 2016 and, Capital Case No.602 of 2016 and Capital Case No.844 of 2016, thereby confirming the judgment and order of conviction dated 2 nd January, 2016 and the order of death sentence dated 11 th January, 2016 awarded to original accused Nos. 1, 3 and 4 by the Additional Sessions Judge, Bulandshahr. Vide the said impugned judgment dated 18th May, 2018, the High Court has, however, allowed the appeal of the original accused No.2□Nazra and set aside the conviction under Section 302/34 of the Indian Penal Code, 1860 (hereinafter referred to as “the IPC”) and the death penalty awarded to her.

2. Being aggrieved, Criminal Appeal Nos. 434□436 of 2020 are filed by Jaikam Khan (Accused

No.3); Criminal Appeal Nos. 437-439 of 2020 are filed by Sajid (Accused No.4); and Criminal Appeal Nos. 440-441 of 2020 are filed by Momin Khan (Accused No.1); whereas Criminal Appeal No. 442 of 2020 is filed by Ali Sher Khan, the first informant (P.W.1) (hereinafter referred to as "P.W.1-Ali Sher Khan") being aggrieved by the order of acquittal of original accused No.2-Nazra.

3. Appellant-Momin Khan (A1), deceased Shaukeen Khan, P.W.1-Ali Sher Khan and Kallu Khan are the four sons of deceased Mausam Khan (father, aged about 85 years) and deceased Asgari (mother, aged about 80 years). Deceased Shanno (aged about 30 years) is the wife of deceased Shaukeen Khan, whereas deceased Samad (aged about 8 years) is the son of deceased Shaukeen Khan and deceased Muskan (aged about 15 years) is the niece of P.W.1-Ali Sher Khan.

4. Appellant-Jaikam Khan (A3) is the first cousin of deceased Shaukeen Khan, appellant-Momin Khan (A1) and P.W.1-Ali Sher Khan. Appellant-Sajid (A4) is the son of appellant-Jaikam Khan (A3). Original Accused No.2-Nazra, who was convicted by the trial Court and acquitted by the High Court, is the wife of appellant-Momin Khan (A1).

5. It is the prosecution case that deceased Shaukeen Khan and P.W.1-Ali Sher Khan were not in good terms with Momin Khan (A1) and his wife Nazra (A2). Therefore, deceased Mausam Khan (father) had separated all the brothers and allotted their respective share of properties. The houses of each one of them were in one compound. Deceased Mausam Khan (father) owned a brick-kiln. In the beginning, appellant-Momin Khan (A1) used to run the brick-kiln, but he did not give the money earned by him from the brick-kiln to deceased Mausam Khan (father) and his elder brother, deceased Shaukeen Khan. Therefore, deceased Mausam Khan (father) had dispossessed Momin Khan (A1) from the brick-kiln. Thereafter, deceased Mausam Khan and P.W.1-Ali Sher Khan were running the brick-kiln with the help of his brother deceased Shaukeen Khan. Jaikam Khan (A3) and Sajid (A4) were jealous with their growing business and so a case was also lodged for laying bricks over the disputed land. Thereafter enmity arose between them, and the younger brother Momin Khan (A1) joined the company of his uncle's son i.e. Jaikam Khan (A3) and Jaikam Khan (A3)'s son Sajid (A4).

6. On the fateful day of the incident, i.e., 23 rd January, 2014, at around 8.30 p.m., P.W.1-Ali Sher Khan and his brother-in-law, P.W.2-Jaan Mohammad, were present at home i.e. the place of incident. At that time, Momin Khan (A1) with his wife Nazra (A2) along with Jaikam Khan (A3) and Sajid (A4) came armed with knives and assaulted Mausam Khan (father), Asgari (mother), Shaukeen Khan (brother), Shanno (sister-in-law), Samad (nephew) and Muskan (niece) and killed them brutally. P.W.1-Ali Sher Khan and his brother-in-law, P.W.2-Jaan Mohammad, somehow managed to save their lives. On hearing the cries of the deceased and others, many villagers gathered and all four accused fled from the spot through the back-door.

7. Immediately after the incident, P.W.1-Ali Sher Khan and P.W.2-Jaan Mohammad went to Police Station Narora, District Bulandshahr. On the basis of the report given by P.W.1-Ali Sher Khan, a First Information Report (F.I.R.) came to be registered for the offence punishable under Section 302 read with Section 34 of the IPC. Upon completion of the investigation, a charge-sheet came to be filed before the concerned Judicial Magistrate. The case was committed to the court of Sessions.

8. The trial Judge framed charges for the offences punishable under Section 302/34 of the IPC and under Section 25/4 of the Indian Arms Act, 1878 (hereinafter referred to as “the Arms Act”). The accused pleaded not guilty and claimed to be tried. At the conclusion of the trial, the trial judge vide judgment and order dated 2nd January, 2016 convicted all the four accused for the offence punishable under Section 302/34 of the IPC and sentenced them to death vide order dated 11th January, 2016. The appellants—accused Nos. 1, 3 and 4 were also convicted for the offence punishable under Section 25/4 of the Arms Act and awarded rigorous imprisonment for a term of three years with a fine of Rupees Five Thousand and in case of default, they were to undergo additional imprisonment for a term of three months.

9. The trial judge vide the said order dated 11th January, 2016 also made a reference under Section 366(1) of the Code of Criminal Procedure, 1973 (hereinafter referred to as “Cr.P.C.”) to the High Court vide Reference No.1 of 2016 for confirmation of the death sentence awarded by it.

10. Being aggrieved thereby, all the four accused preferred appeals before the Division Bench of the High Court. The Division Bench of the High Court vide the impugned judgment, dismissed the appeals of appellants—accused Nos. 1, 3 and 4 and confirmed the death sentence awarded to them. However, the Division Bench of the High Court allowed the appeal of the accused No.2—Nazra and acquitted her of the charges under Section 302/34 of the IPC.

11. Being aggrieved thereby, Momin Khan (A—), Jaikam Khan (A—), Sajid (A—) and P.W.1—Ali Sher Khan are before this Court in the present appeals.

12. We have heard Smt. Nitya Ramakrishnan, learned Senior Counsel appearing on behalf of appellant—Momin Khan (A—) as well as acquitted original accused No.2—Nazra, Shri Dama Seshadri Naidu, learned counsel for appellants—Jaikam Khan (A—) and Sajid (A—), Shri Anant Agarwal, learned counsel for appellant—P.W.1—Ali Sher Khan and Shri Vinod Diwakar, learned Additional Advocate General appearing on behalf of the respondent—State of Uttar Pradesh.

13. Smt. Nitya Ramakrishnan, learned Senior Counsel appearing on behalf of the appellant—Momin Khan (A—) would submit that the entire case rests on the ocular testimony of P.W.1—Ali Sher Khan and P.W.2—Jaan Mohammad, who are said to have witnessed the incident from the kitchen and the cattle—shed of the house respectively. She submits that both of them are interested witnesses. It is submitted that the High Court has disbelieved the evidence of these two witnesses insofar as original accused No.2—Nazra is concerned. She submits that when the ocular testimony of P.W.1—Ali Sher Khan and P.W.2—Jaan Mohammad was found to be not trustworthy and reliable by the High Court with respect to accused No.2—Nazra, the High Court fell in grave error in convicting the other accused on the basis of the very same ocular evidence.

14. Learned Senior Counsel further submits that the prosecution has placed on record three site—plans at Exhibits Ka—51, Ka—52 and Ka—45. It is, however, submitted that in none of the site—plans, the location of the kitchen and the bathroom (which is supposed to be adjacent to cattle—shed) has been shown. She submits that as such, there is a serious doubt, as to whether P.W.1—Ali Sher Khan and P.W.2—Jaan Mohammad have really witnessed the incident. She further submits that even if

the prosecution case is to be believed, immediately after the occurrence of the incident, many villagers had assembled at the spot, however, though the statements of such witnesses were recorded, the prosecution has not examined a single witness. She, therefore, submits that an adverse inference needs to be drawn on account of non-examination of independent witnesses, though they were very much available.

15. Learned Senior Counsel further submits that both P.W.1 Ali Sher Khan and P.W.2 Jaan Mohammad have admitted in their evidence that they were possessing mobile phones. She submits that in normal circumstances, after such a dastardly incident had occurred, P.W.1 Ali Sher Khan and P.W.2 Jaan Mohammad would have informed the Police about it on their mobile phones. She submits that, however, the same has not been done by them. She further submits that though after recording of the statement under Section 313 Cr.P.C., the wife of Jaikam Khan (A3) had filed an application for producing the Call Detail Records (hereinafter referred to as "C.D.Rs.") of P.W.1 Ali Sher Khan and P.W.2 Jaan Mohammad, the said application was rejected by the trial judge. She submits that if the said C.D.Rs. would have been placed on record, they would have established the genuineness of the prosecution's case.

16. She further submits that the recovery of clothes as well as the recovery of weapons are all farcical. She submits that from the materials placed on record, it is clear that the prosecution has not come to the Court with clean hands. It is submitted that as per the Arrest Memo/Panchnama (Exhibit Ka49), the Investigating Officer (I.O.) had received an information that accused Nos. 1, 3 and 4 were standing at Rajghat Square to go somewhere. On the basis of the said information, the I.O. reached the said square and found the said accused at that spot. She submits that according to the prosecution, at around 2.00 a.m. in the morning on 24 th January, 2014, the said three accused were arrested. It is submitted that it is improbable that the accused, after committing such a heinous crime, would remain in such a close vicinity of the place of occurrence. She further submits that the arrest of the accused No.2 Nazra, which is shown at around 6.40 a.m., is also farcical.

17. Learned Senior Counsel would further submit that the trial court has grossly erred in convicting all the four accused and the High Court has erred in maintaining and confirming the death sentence against the accused Nos. 1, 3 and 4. She submits that in any case, neither the High Court nor the trial Court has given any reasons justifying the award of capital punishment. She submits that there is not even a whisper, as to why there is no possibility of the accused being reformed or rehabilitated and as to why there is no other alternative than to award the capital punishment.

18. Shri Dama Seshadri Naidu, learned counsel appearing on behalf of Jaikam Khan (A3) and Sajid (A4), submits that insofar as the said accused are concerned, the prosecution story is totally unbelievable. He submits that deceased Mausam Khan and Zafar Khan are the sons of Shakoor Khan. Jaikam Khan (A3) is the son of Zafar Khan. He submits that from the evidence of the prosecution witnesses, it is clear that there was a partition amongst Zafar Khan and deceased Mausam Khan long time ago. Not only that, but there was a further partition amongst the two branches of the family. He submits that the testimonies of these two witnesses, i.e., P.W.1 Ali Sher Khan and P.W.2 Jaan Mohammad, would reveal that there is no enmity between deceased Mausam Khan, deceased Shaukeen Khan and P.W.1 Ali Sher Khan on one side and Jaikam Khan

(A□

3) and Sajid (A□4) on the other. The alleged enmity was with Momin Khan (A□), who belonged to the branch of deceased Mausam Khan. He submits that, as such, the prosecution has utterly failed to prove any motive insofar as accused Nos. 3 and 4 are concerned.

19. Learned counsel submits that even the evidence of P.W.2□Jaana Mohammad was not trustworthy. Perusal of his evidence would reveal that he does not know anything about the family holdings.

20. Shri Naidu further submitted that the recovery of clothes and weapon is totally farcical. He submits that it is totally impossible that the accused Nos. 3 and 4, who are not the members of the family of Momin Khan (A□), would keep their bloodstained clothes at the house of Momin Khan (A□) after committing the crime. Learned counsel further submits that though fingerprints were taken from the recovered articles, the fingerprint expert's report is not placed on record and, therefore, an adverse inference needs to be drawn against the prosecution. Learned counsel further submits that all Forensic Science Laboratory ("F.S.L." for short) reports are marked during examination under Section 313 Cr. P.C., which is not permissible. He submits that, in any case, the said reports are inconclusive. Shri Naidu would further submit that since P.W.1□Ali Sher Khan and P.W.2□Jaana Mohammad are related witnesses, their evidence will have to be scrutinized with greater care and circumspection and it will not be safe to pass an order of conviction on their sole testimony without there being any corroboration.

21. Shri Vinod Diwakar, learned Additional Advocate General appearing on behalf of the respondent—State of Uttar Pradesh submitted that both the trial court and the High Court have concurrently, on the appreciation of the evidence, convicted the accused. He submits that no error could be noticed in the concurrent findings. He submits that merely because kitchen and bathroom are not shown in the site□plans, it cannot be a ground to disbelieve the ocular testimony of P.W.1□Ali Sher Khan and P.W.2□Jaana Mohammad. He submitted that the evidence of these two witnesses is corroborated by the F.I.R.

22. Learned counsel submitted that merely because there are certain discrepancies in the evidence of the witnesses, it cannot be a ground to disbelieve the ocular testimonies of the witnesses, which are otherwise cogent, reliable and trustworthy. He, therefore, submits that no interference is warranted in the appeals preferred at the behest of accused Nos. 1, 3 and 4 and the same deserve to be dismissed.

23. Shri Anant Agarwal, learned counsel appearing on behalf of P.W.1□Ali Sher Khan, would submit that when the Additional Sessions Judge on the basis of correct appreciation of evidence convicted accused No.2□Nazra, there was no reason for the High Court to reverse the same.

24. The learned counsel for respective parties, while supporting their contentions, have placed reliance on various decisions of this Court.

25. With the assistance of the learned counsel for the appellants, we have scrutinized the entire evidence in depth. Since the conviction of the accused appellants is largely based on the ocular testimonies of P.W.1□Ali Sher Khan and P.W.2□Jaan Mohammad, we find that it will be appropriate to reproduce relevant part of their examination□n□chief:

Examination□n□chief of P.W.1□Ali Sher Khan “My father had brick□klin and due to the same brick□klin, the accused □persons present in court namely Jaikam Khan, Shajid, Nazra too bore enmity. Nazra is wife of Mobin. Jaikam Khan is Mobin’s cousin and Sajid is Mobin’s nephew from his taau family.

The incident is of 23th January, 2014 and it was about 8.30 pm. on that day, my sister’s husband namely Jaan Mohammad had come at about 2 o’ clock in afternoon and was present at the house itself at the time of the incident. At the time of the incident, my father Mausam Khan, my mother Asgari, my brother Shaukeen Khan, his wife Sanno and his elder brother Saukeen Khan’ son Samad and my niece Muskan, my brother□n□law Jaan Mohammad and I were present at the house. Momin Khan, his wife Nazra, Jaikam Khan and his son Shajid entered our compound at about 8.30 pm from the direction of the house of Momin Khan. When I saw them, I was in the kitchen room. All these accused persons were holding knives in their hands. These four attacked my father with knife who was sleeping in veranda and when they attacked my father then I was witnessing it from kitchen room.

Hearing hue and cry raised by father, my niece Muskan came running then these four accused persons present in court ran behind her and cut her also with knife holding in their hands. My mother and nephew Samad were also there in the same veranda where Muskan was attacked. These four accused persons cut these two also with knives. Hearing this hue and cry, when my elder brother Saukeen came downstairs from upstairs, the accused persons killed him also near the gate. My sister□n□law Sanno, who had come downstairs hearing hue & cry, was killed by them going upstairs. My sister□n□law Sanno seeing the incident occurring downwards (sic.) ran away. My brother□n□law Jaan Mohammad was hiding anywhere in the house saving his life and he had also witnessed the incident. The accused persons had fled away after committing the incident. I due to fear could not save the dead persons. After the incident, I alongwith my brother□n□law Jaan Mohammad had gone to the police station and lodged the report at the police station. The complaint which was given by me at the police station is available on the file and the same is before me today which I myself had written down and had given at the police station. It was marked as Ext. ka□. All six persons had died on the spot. The accused persons present in court had committed all murders before me which was witnessed by me while hiding.” Examination□n□chief of P.W.2□Jaan Mohammad “1 □The incident took place on 23.01.2014. on the day of the incident, I had come to the house of my father□n□law Mausam Khan at Pilkhana village at 2 p.m. During the time of the incident, I was present at the house of my father□n□law Mausam Khan. The incident took place at around 8 pm. I know the accused persons who are present in the court namely Jaikam Khan, Sabid Khan, Momeen Khan and Naazra. I had firstly seen the accused persons at the house of my father□n□law Mausam Khan at the verandah. That time I had come out of bathroom and first time I had seen the accused persons from the place where the buffaloes are tethered and is adjacent to

bathroom. All these accused persons were holding knife and chhuriyan (small knife) in their hands. It would be a distance of 10-15 steps from where I had seen them for the first time. During the time of the incident, inverter powered light was on. I had seen the accused persons in the light of the inverter.

2 □My father□in□law Mausam Khan was offering Namaz on the cot at the verandah. All the accused persons who are present in the court started inflicting blows of knives and chhuriyan (small knife) on Mausam Khan and murdered him. When hearing the voice of Mausam Khan, Muskan came out, then these four persons ran behind her and these four accused persons killed her in the verandah. After this they killed my mother□in□law Asgari and Samad.

Hearing their outcry, Shaukeen Khan came down from the roof. These four persons caught Shaukeen Khan and killed him too. When hearing the outcry of Shaukeen Khan, his wife Shanno came down then these four accused persons ran behind her on the roof and these four killed her too after going up on the roof. I had seen all this incident under the shade of the place where the buffaloes are tethered and is near the bathroom. After committing the incident, these four accused persons had run away from there. After these accused persons had run away I came out from the place where I was hiding and my brother□in□law Ali Sher and I had raised alarm after coming out of the house.

People of the village had arrived on the alarm raised by us. We went inside the house and saw that all the people had died.

3 □There was a dispute over kiln between Momeen Khan and my father□in□law Mausam Khan. Momeen wanted to run the kiln but my father□in□law Mausam Khan was not willing to give kiln to Momeen. 2-3 years before the incident, Momeen had run the kiln and he had not given statement of accounts to Mausam Khan. Mausam Khan had taken the charge of kiln from Momeen and for the same reason he was angry.

4 □Accused Sajid is the nephew of accused Momeen. Jaikam is the cousin brother of Momin. Nazra is the wife of Momin. The four accused are from the same group.”

26. It could thus be seen that according to P.W.1□Ali Sher Khan, all the four accused entered the compound of his house at about 8.30 p.m. According to him, he saw them when he was in the kitchen. All the accused were holding knives in their hands. According to him, firstly, they attacked his father Mausam Khan, who was sleeping in the veranda. He was witnessing the same from the kitchen room. Hearing a hue and cry raised by his father, his niece Muskan came running and then these four accused ran behind her and cut her also with knives holding in their hands. His mother Asgari and nephew Samad were also there in the same veranda where Muskan was attacked. The accused cut them also with knives. Hearing the hue and cry, his elder brother Shaukeen Khan came downstairs from upstairs and the accused killed him also near the gate. His sister□in□law Shanno, who had come downstairs hearing the hue and cry, was also killed by them going upstairs. According to him, his brother□in□law, P.W.2□Jaan Mohammad, was hiding elsewhere. He further stated that all the accused had fled away after committing the murder. After the incident, he along

with his brother-in-law, P.W.2 Jaan Mohammad, had gone to the police station and lodged the report.

27. According to P.W.2 Jaan Mohammad, on the day of the incident i.e. 23rd January, 2014, he had come to the house of his father-in-law Mausam Khan at 2 p.m. He stated that the incident took place at around 8 p.m. He had seen the accused at the house of his father-in-law Mausam Khan in the veranda. That time, he had come out of bathroom and first time he had seen the accused from the place where the buffaloes are tethered, which is adjacent to the bathroom. All the accused were holding knives in their hands. According to him, his father-in-law Mausam Khan was offering Namaz on the cot in the veranda. All the accused started inflicting blows of knives on Mausam Khan and murdered him. After hearing the voice of Mausam Khan, Muskan came out, then the accused ran behind her and killed her in the veranda. Thereafter, they killed his mother-in-law Asgari and Samad. On hearing their outcry, Shaukeen Khan came down from the roof. The accused caught Shaukeen Khan and killed him too. After hearing the cries of Shaukeen Khan, his wife Shanno came down, then the accused ran behind her on the roof and killed her too after going up on the roof.

28. Both P.W.1 Ali Sher Khan and P.W.2 Jaan Mohammad are witnesses, who are closely related to the deceased as well as the accused No.1 Momin Khan. No doubt that, merely because the witnesses are interested and related witnesses, it cannot be a ground to disbelieve their testimony. However, the testimony of such witnesses has to be scrutinised with due care and caution. Upon scrutiny of the evidence of such witnesses, if the Court is satisfied that the evidence is creditworthy, then there is no bar on the court in relying on such evidence.

29. For this proposition, we may refer to the following observations of this Court in the case of Piara Singh and others v. State of Punjab¹:

“4.It is well settled that the evidence of interested or inimical witnesses is to be scrutinised with care but cannot be rejected merely on the ground of being a partisan evidence. If on a perusal of the evidence the court is satisfied that the evidence is creditworthy there is no bar in the Court relying on the said evidence.” 1 (1977) 4 SCC 452

30. We may also refer to the following observations of this Court in the case of Anil Phukan v. State of Assam²:

“3. This case primarily hinges on the testimony of a single eyewitness Ajoy PW

3. Indeed, conviction can be based on the testimony of a single eyewitness and there is no rule of law or evidence which 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 in basing conviction on his testimony alone. However, where the single eyewitness is not found to be a wholly reliable witness, in the sense that there are some circumstances which may show that he could have an interest in the prosecution, then the courts generally insist upon some independent

corroboration of his testimony, in material particulars, before recording conviction.

It is only when the courts find that the single eyewitness is a wholly unreliable witness that his testimony is discarded in toto and no amount of corroboration can cure that defect. It is in the light of these settled principles that we shall examine the testimony of PW 3 Ajoy.

4. Ajoy PW 3, on his own showing, is the nephew of the deceased. He had accompanied the deceased to the place of occurrence when the latter went to recover the loan from Anil, appellant. This 2 (1993) 3 SCC 282 witness, therefore, is a relative of the deceased and an interested witness. Of course, mere relationship with the deceased is no ground to discard his testimony, if it is otherwise found to be reliable and trustworthy. In the normal course of events, a close relation would be the last person to spare the real assailant of his uncle and implicate a false person. However, the possibility that he may also implicate some innocent person along with the real assailant cannot be ruled out and therefore, as a matter of prudence, we shall look for some independent corroboration of his testimony, to decide about the involvement of the appellant in the crime. Since, there are some doubtful aspects in the conduct of Ajoy PW 3, it would not be safe to accept his evidence without some independent corroboration, direct or circumstantial.” [Emphasis supplied]

31. Undisputedly, both P.W.1 Ali Sher Khan and P.W.2 Jaan Mohammad are witnesses, who are closely related to the deceased and the accused No.1 Momin Khan. Therefore, we find that it will be necessary to scrutinise their evidence with more care, caution and circumspection.

32. Even if the evidence of P.W.1 Ali Sher Khan and P.W.2 Jaan Mohammad is taken at its face value, the accused have murdered six deceased at different places. As per the admission given by P.W.1 Ali Sher Khan, the house of the accused No.1 Momin Khan is 15 steps away from the place where he was hiding in the compound. According to him, there are a total of 5 rooms in the house where the incident took place. He has stated in his cross-examination that Shaukeen Khan was murdered in the Angan of the house and his father Mausam Khan was murdered in the veranda. His niece Muskan was also murdered in the veranda. His mother Asgari and nephew Samad were murdered in the room which is 15 steps away from the kitchen, whereas deceased Shanno was murdered in a room upstairs. He has further admitted that the aforesaid room cannot be seen from the kitchen and the door of the aforesaid room opens towards south.

33. It will be relevant to refer to P.W.1 Ali Sher Khan’s deposition in his cross-examination.

“Site map was prepared by the police on my pointing. There is a courtyard in my house. There is a room built in the South of the courtyard whose door opens in the courtyard. The room which I have told in South is a kitchen. The door of this kitchen opens in North. There is a gate in Western wall of the courtyard.”

34. It would further be relevant to refer to the following deposition of P.W.9 Brahmesh Kumar Yadav, i.e. the I.O.

“I had prepared site map on the day of occurrence on 24.1.14. I had prepared the site map of the scene of occurrence at the instance of the case complainant. I do not remember at what time I started to prepared the site map. I don't even remember how much time I took to prepare the site map. I don't remember at what time I stopped preparing the site map. I don't remember whether I had marked case complainant's hiding place in the site map or not. This is correct to state that the place, from where the case complainant has stated to hide and see the accused persons, is not shown in the site map. I had prepared the site map of the scene of”

35. A perusal of the evidence of the P.W.1 Ali Sher Khan and the evidence of P.W.9 Brahmesh Kumar Yadav would reveal that the first site plan (Exhibit Ka 51) was prepared by P.W.9 Brahmesh Kumar Yadav on P.W.1 Ali Sher Khan's pointing out the details.

36. It will be appropriate to reproduce all the three site plans, which are as under: “ ”

37. It could thus be seen that all the three site plans (Exhibits Ka 51, Ka 52 and Ka 45) have been prepared by P.W.9 Brahmesh Kumar Yadav, the I.O. The first site plan (Exhibit Ka 51) was prepared on 24 th January, 2014. The second site plan (Exhibit Ka 52) was prepared on 28 th January, 2014 and the third site plan (Exhibit Ka 45) was prepared on 29th January, 2014.

38. The first site plan (Exhibit Ka 51) shows the places where the dead bodies of the deceased were found. Serial No.1 in the said site plan is the place where the dead body of deceased Shaukeen Khan was found. Serial No.2 is the spot where the dead body of deceased Mausam Khan was found. Serial No.3 is the spot where the dead body of deceased Shanno Begam was found. Serial No.4 is the spot where the dead body of deceased Muskan was found. Serial No.5 is the spot where the dead body of deceased Asgari was found. Serial No.6 is the spot where the dead body of deceased Samad was found. The arrow marks in the said site plan show the direction in which the accused fled away from the rear gate. It is to be seen that in the said site plan, the room on the southern side is not shown.

39. The second site plan (Exhibit Ka 52) is with regard to the recovery of weapons made at the instance of the accused from the field of the deceased Shaukeen Khan.

40. The third site plan (Exhibit Ka 45), which is drawn in connection with Case Crime No.26 of 2014 under Section 25/4 of the Arms Act, also shows the places from where the weapons alleged to have been used in the crime, were recovered at the instance of the accused.

41. In the last two site plans at Exhibit Ka 52 and Exhibit Ka 45, a room has been shown on the southern side.

42. According to the evidence of P.W.1 Ali Sher Khan, the room in which he hid himself in the south, is the Kitchen. As per his evidence, the door of the kitchen opens to the north, whereas as per the third site plan (Exhibit Ka

45), the gate of the said room on southern side, opens towards west.

43. As per the version of P.W.2□Jaan Mohammad, he has witnessed the incident from the place where the buffaloes are tethered, which is adjacent to the bathroom. Though the bathroom is not shown in the site□plan, believing it to be adjacent to the place where buffaloes are tethered, it will be in the south□west corner.

44. As per the testimonies of P.W.1□Ali Sher Khan and P.W.2□Jaan Mohammad, firstly Mausam Khan was assaulted and done away with in veranda, whereas deceased Shaukeen Khan was done away with in the court□yard. Deceased Muskan, Asgari and Samad were assaulted in the rooms, which are in the middle portion of the house. According to these witnesses, Shanno Begam was assaulted upstairs. If the version of these two witnesses is compared with the site□plans, then the position that emerges would reveal that P.W.1□Ali Sher Khan, at the most, could have witnessed the assault on deceased Shaukeen Khan, whereas P.W.2□Jaan Mohammad could have witnessed the assault on deceased Mausam Khan and deceased Shaukeen Khan. However, since from the perusal of the first site□plan (Exhibit Ka□51), it could be seen that the dead□bodies of deceased Muskan, Samad, and Asgari were inside the house, and the dead□body of deceased Shanno Begam was upstairs, it is difficult to believe that these two witnesses could have also seen the accused assaulting Shanno Begam, Muskan, Asgari and Samad. It is further to be noted that P.W.9□Brahmesh Kumar Yadav in his cross□examination has admitted that P.W.1□Ali Sher Khan and P.W.2□Jaan Mohammad had not told him about their hideouts and that is why it was not mentioned in the site□plan.

45. We are therefore of the view that these two witnesses cannot be considered to be wholly reliable to base an order of conviction solely on their testimonies.

46. It will be relevant to refer to the following observation of this Court in the case of Vadivelu Thevar & another v. The State of Madras³:

“11.....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 dis□proving a fact. Generally speaking, oral testimony in this context may be classi□fied into three categories, namely:

(1) Wholly reliable.

3 (1957) SCR 981 (2) Wholly unreliable.

(3) Neither wholly reliable nor wholly unreliable.

In the first category of proof, the court should have no difficulty in coming to its conclusion either way — it may convict or may acquit on the testimony of a sin□gle witness, if it is found to be above re□proach or suspicion of interestedness, incompetence or subornation. In the sec□ond category, the court equally has no difficulty in coming to its conclusion. It is in the third category of cases, that the court has to be circumspect and has to look for corroboration in material partic□ulars by reliable testimony, direct or cir□cumstantial.....”

47. As already discussed hereinabove, we are of the view that though P.W.1□Ali Sher Khan could have witnessed the assault on deceased Shaukeen Khan and P.W.2□Jaan Mohammad could have witnessed the assault on deceased Shaukeen Khan and deceased Mausam Khan, it is difficult to believe that they could have witnessed the assault on the other four deceased persons. We are also of the view that the said witnesses cannot be said to be wholly unreliable. They would fall in the category of 'neither wholly reliable nor wholly unreliable' and as such, we are of the view that a greater degree of care and caution would be required and a corroboration in material particulars by reliable testimony, direct or circumstantial, would be necessary to pass an order of conviction.

48. We, therefore, find it necessary to consider the other circumstances relied on by the prosecution. The other circumstances, on which the prosecution relies, are as under:

A. Arrest of the accused immediately after the incident;

B. Recovery of the weapons alleged to have been used in the crime at the instance of the accused. C. Recovery of the bloodstained clothes alleged to have been worn by the accused while committing the crime.

D. Motive.

We will now deal with the evidence placed on behalf of the prosecution with regard to each of the circumstances.

A. Arrest of the accused immediately after the incident:

49. Insofar as the arrest of accused Nos.1, 3 and 4 is concerned, P.W.9□Brahmesh Kumar Yadav (I.O.), states that, on the basis of written complaint, Crime No.25 of 2014 came to be registered for the offence punishable under Section 302/34 of the IPC. He stated that thereafter, he immediately reached at the complainant's house along with the force. It was crowded there. He recorded the statement of the complainant□P.W.1□Ali Sher Khan. He stated that when they were at the scene of occurrence with the police force, they received information through informer that the accused of the aforesaid case were present at Rajghat Chauraha looking for a chance to go somewhere. Relying on this information, when they reached at Rajghat Chauraha, three persons were there in the passenger shed. The informer went away after showing those three men and they arrested them at 2.00 a.m. in the morning of 24 th January, 2014. They revealed their names as Momin Khan, Jaikam Khan and Sajid. According to him, the accused stated that they had committed those six murders in association with Nazra and all the accused told them that they had thrown away the weapons with which they had committed the crime and they could get those recovered. His further evidence states about the recovery of those weapons, with which we will deal later in this judgment. He further states that when they were returning to the police station with accused, leaving a few policemen behind at the scene of occurrence, accused No.2□Nazra, met at Rajghat Chauraha, seeing whom Momin Khan (A□) said that she was his wife. She was arrested at 6.40 a.m. and everyone was presented at the police station at 6.50 a.m. on 24th January, 2014.

50. P.W.1□Ali Sher Khan, in his cross□examination, states that he does not know how far the road of Rajghat is from his house. He further states that he cannot say even by guessing.

51. P.W.2□Jaan Mohammad admitted in his cross□examination that the house of deceased Mausam Khan is at a distance of one furlong from Rajghat road. He further clarified that by one furlong he means half kilometre.

52. It is thus difficult to believe that accused Nos. 1, 3 and 4 were waiting at Rajghat square, which is at a distance of hardly half a kilometre from the place of occurrence, waiting for the Police to come and arrest them. The alleged informer has neither been named nor has he been examined. It is further difficult to believe that accused No.2□Nazra was wandering in the village and coincidentally at 6.40 a.m., crossed paths with P.W.9□Brahmesh Kumar Yadav (I.O.), when he was returning to the police station along with other accused.

53. In this respect, it will also be relevant to refer to the testimony of P.W.2□Jaan Mohammad.

“When we went to the police station to get the report written, Momin and Nazra, as well as Jaikam and Sajid were present at the police station.” It is thus clear admission of P.W.2□Jaan Mohammad that when he and P.W.1□Ali Sher Khan had gone to the police station to give the written report, Momin Khan (A□), Nazra (A□2), Jaikam Khan (A□3) and Sajid (A□4) were already present there in the police station. According to the prosecution, the crime is registered on 23 rd January, 2014 at 10.00 p.m. when both P.W.1□Ali Sher Khan and P.W.2□Jaan Mohammad were present. If the version of P.W.2□Jaan Mohammad, that all the four accused were present at the police station when they had gone to lodge the FIR, is to be believed, then the arrest of the accused Nos. 1, 3 and 4 at 2.00 a.m. on 24 th January, 2014 and arrest of accused No.2 at 6.40 a.m. on the same day, to say the least, is mysterious.

B. Recovery of the weapons alleged to have been used in the crime at the instance of the accused.

54. Insofar as the recovery of the weapons alleged to have been used in the crime at the instance of the accused is concerned, the prosecution has relied on the arrest□cum□recovery memo, which is at Exhibit Ka□49.

55. We have already dealt with this aspect in the said memo with regard to the arrest of the accused. The relevant part of the said memo reads thus:

“The aforesaid three persons were asked about the incident, Momeen Khan told that he had dispute with his father over partition. In the beginning he used to run kiln, later on it was given to Shaukin Khan. The means of his livelihood came to an end, he was in trouble. Jaikam and Sajid had enmity with his brothers. Thus he took help of Jaikam and Sajid and killed his parents and family of Shaukin in a planned manner after inflicting serious injuries over their neck, head and mouth. They had thrown the knives at the back of house and field with which they caused the death. Accused told that they could get the weapon used in murder recovered. We came to the house of

Shaukin at Village Pilkhana along with all the aforesaid accused in the hope of recovery of weapon used. All the three accused live in the same compound. Momeen walked forward, entered the middle house where his mother used to sleep and took out a daav having wooden handle around 7 fingers and blade around 1 balisht 1 finger that was bloodstained from the rubbish beneath staircase. He handed over the weapon at around 3 am and told that he caused death with it. Field unit is on the spot, photographs were clicked. Recovery of weapon was made in presence of public witnesses Khemkaran s/o Tara Singh, Vilal s/o Usman Khan r/o Pilkhana. Another accused Jaikam s/o Jafar Khan walked forward into the field at the back of his house and got a knife measuring 1 balisht 6 fingers handle recovered in presence of aforesaid witnesses at around 3:15 o'clock and stated that he caused death with the same. Its photograph was clicked and fingerprint taken and after sometime fingerprint team went away. After much time accused Sajid walked into the field behind the house of Shaukin and took out a knife measuring 1 balisht 5 fingers. Its blade is fitted with plastic arc. He got it recovered and stated that he caused death with it. The three aforesaid knives were bloodstained. Thus blade was wrapped into a cotton, kept in separate clothes, sealed and stamped on the spot and sample seal was prepared. Memo was dictated by me to H.C.P. Sadar Singh in electric and torch light and documents were prepared." Though the memo shows that the said recoveries were made in the presence of public witnesses, no public witness has been examined to support the same. It will be relevant to refer to the celebrated judgment of the Privy Council in the case of Pulukuri Kottayya and others v.

King Emperor⁴ ".....On normal principles of construction their Lordships think that the proviso to S. 26, added by s. 27, should not be held to nullify the substance of the section. In their Lordships' view it is fallacious to treat the "fact discovered" within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that "I will produce a knife concealed in the roof of my house" does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is 4 AIR 1947 PC 67 concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added "with which I stabbed A.", these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant."

56. As already discussed hereinabove, since no public witness has been examined to support the said memo, the statement made therein will have to be scrutinised with greater caution and circumspection. All the statements made therein with regard to the confession of committing the crime would not be admissible in evidence. Only such information, which distinctly relates to the discovery of facts will be admissible under Section 27 of the Indian Evidence Act, 1872 (hereinafter

referred to as ‘the Evidence Act’). The evidence of P.W.9□Brahmesh Kumar Yadav (I.O.) would reveal that immediately after the F.I.R. was lodged, he had come to the spot of incident for further investigation. According to him, the accused Nos. 1, 3 and 4 were arrested at around 2.00 a.m. on 24 th January, 2014. Even according to him, the police party was very much there at the spot. One of the alleged recoveries is from the room where deceased Asgari used to sleep. The other two recoveries are from open field, just behind the house of deceased Shaukeen Khan, i.e., the place of incident. It could thus be seen that the recoveries were made from the places, which were accessible to one and all and as such, no reliance could be placed on such recoveries.

C. Recovery of the bloodstained clothes alleged to have been worn by the accused while committing the crime.

57. The recovery memo of bloodstained clothes (Exhibit Ka□34) also makes for an interesting reading. Perusal of the aforesaid memo shows that the police party along with three sons and two daughters of the accused No.1□Momin Khan and accused No.2□Nazra came to the house of the accused No.1□Momin Khan. At that place, Hina @ Yasmeen, daughter of accused No.1□Momin Khan and accused No.2□Nazra, in the presence of her grandparents, viz., Akhlaq and Shakila and neighbours Jabbar and Kishan Chandra and other villagers unlocked her house and took out her things. At that time, Maumin saw some clothes under the bed in the room. On seeing the clothes, many villagers identified and told that the clothes were the same which Momin Khan (A□) and others had worn in the evening of 23rd January, 2014. The clothes were identified separately, in which Momin Khan (A□) was wearing jeans of blue colour and blue shirt having black and white squares, Jaikam Khan (A□3) was wearing kurta of cream colour and printed readymade sweater of brown colour, Sajid (A□4) was wearing pants of light black colour and printed shirt of light yellow, red black colour and Nazra (A□2) was wearing printed salwar kurta of light red colour.

58. As per the prosecution witnesses, the accused had run away from the rear gate of the compound, which is towards north. As per the evidence of P.W.1□Ali Sher Khan, the house of Momin Khan (A□1) is at a distance of 10□15 steps away from the place of the incident. According to the prosecution witnesses, immediately after the incident occurred, many villagers had gathered at the spot. In these circumstances, it is again a mystery as to how all the four accused fled from the spot, came back at the said spot, changed their clothes and again went away. It is also a mystery as to how the accused Nos. 3 and 4, who are not residing in Momin Khan’s (A□) house, had changed their clothes and kept them at Momin Khan’s (A□) house. This coupled with the fact that the F.S.L. reports are inconclusive, creates a great shadow of doubt on the genuineness of the said recovery. In any case, the said clothes are not recovered on the memorandum of the accused under Section 27 of the Evidence Act and as such, the said circumstance could not have been used against the accused.

D. Motive

59. No doubt that, in case of direct evidence and the ocular testimony of the eye□witness being found to be trustworthy, reliable and cogent, it will not be necessary for the prosecution to prove the motive for the crime. However, in the present case, as we have already held hereinabove, that the testimony of the eye□witnesses could not be said to be wholly reliable, the motive aspect would be a

relevant factor.

60. As per the prosecution version, the main motive behind the crime was with regard to the dispute over the management of the brick kiln between the accused No.1 Momin Khan on one hand and deceased Mausam Khan, deceased Shaukeen Khan and P.W.1 Ali Sher Khan on the other hand. In the F.I.R., P.W.1 Ali Sher Khan has stated that the accused Nos. 3 and 4 were jealous with his business and a case was also lodged for laying bricks over the land. It is further stated that since then, enmity grew between the family and younger brother Momin Khan (A1) joined the company of his uncle's son Jaikam Khan (A3) and Jaikam Khan's (A3) son Sajid (A4). No doubt, that the F.I.R. is not a substantive piece of evidence, however, it will be relevant for scrutinising the credibility of the first informant. Though in his cross-examination, P.W.1 Ali Sher Khan has stated that Momin Khan (A1) had a rift with him, the reason for Momin Khan's (A1) rift with his parents and brothers was, due to him not giving an account of the money earned from brick kiln to them. He has further stated that his father, deceased Mausam Khan, had relieved Momin Khan (A1) from the duty of brick kiln in 2010 and since then Momin Khan (A1) bore enmity against him. He has further stated that due to the same brick kiln, accused Nos. 2, 3 and 4, viz., Nazra, Jaikam Khan and Sajid respectively, too bore enmity against him.

61. In his cross-examination, P.W.1 Ali Sher Khan has clearly admitted that it is Momin Khan and family who had dispute with him over the property of brick kiln. The said dispute was over details of accounts. He has admitted that accused Nos. 3 and 4 had nothing to do with regard to brick kiln of his father deceased Mausam Khan. It will be relevant to refer to the original hindi version of the evidence of P.W.1 Ali Sher Khan, which is as under:

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62. P.W.1 Ali Sher Khan has categorically admitted in his cross-examination that the shares in the agricultural land between his father deceased Mausam Khan and Zafar Khan, father of Jaikam Khan (A3), were separate. He has further admitted that the names of Zafar Khan and his four sons have been entered in the records and he has seen that Khatauni was recorded in the name of Zafar's sons, Jaikam Khan and Yameen.

63. It will also be relevant to refer to the admission of P.W.2 Jaan Mohammad in his cross-examination, which is as under:

“It is correct that Jaikam Khan and Sajid Khan had no dispute with Mausam Khan. It is also correct that Jaikam Khan and Sajid Khan had no partnership in the Kiln of Mausam Khan and Alisher.”

64. It could thus be seen that the alleged motive, if any, is attributable to the accused No.1 Momin Khan. P.W.1 Ali Sher Khan and P.W.2 Jaan Mohammad have admitted that Jaikam Khan (A3) and Sajid (A4) had nothing to do with the brick kiln business of deceased Mausam Khan. They have further admitted that there was no dispute with regard to brick kiln amongst his father

deceased Mausam Khan on one hand and accused Nos. 3 and 4 on the other hand. It is further to be noted that even according to P.W.1 Ali Sher Khan, the dispute between his father deceased Mausam Khan and accused No.1 Momin Khan with regard to brick kiln took place in the year 2010. Though P.W.1 Ali Sher Khan states in his cross examination that heated exchanges regarding brick kiln took place between Momin Khan (A1) and his father deceased Mausam Khan, during last 3-4 years, no incident, which would cause provocation to lead to such dastardly act, has been brought on record. On the contrary, he admitted in his cross examination that though quarrel took place between his father deceased Mausam Khan and Momin Khan (A1), no quarrel took place between Momin Khan (A1), deceased Shaukeen Khan and himself. He further admitted that decisions were taken through the relatives but Momin Khan (A1) did not accept it.

65. It could thus be seen that with regard to Jaikam Khan (A3) and Sajid (A4), the prosecution has utterly failed to prove any motive and has also failed to prove any strong motive insofar as Momin Khan (A1) is concerned.

66. The matter does not end at this. There are various other inconsistencies and lacunae in the prosecution case.

67. According to P.W.1 Ali Sher Khan and P.W.2 Jaan Mohammad, a large number of villagers had gathered at the spot after the incident. However, none of the independent witnesses have been examined by the prosecution. Since the witnesses examined on behalf of the prosecution are interested witnesses, non-examination of independent witnesses, though available, would make the prosecution version doubtful. Reference in this respect could be placed on the following observations of this Court in the case of State of Rajasthan v. Teja Singh and others⁵:

“5. In regard to the next argument of the appellant's counsel that the High Court was wrong in assuming that other villagers were sitting with PWs 6, 7 and 9, assuming that it is an error even then there can be no doubt as could be seen from the prosecution case that other villagers whether sitting with PWs 6, 7 and 9 or not did rush to the scene of occurrence, therefore, it is clear that apart 5 (2001) 3 SCC 147 from the said eyewitnesses produced by the prosecution many other villagers would have at least seen the last part of the occurrence including the escape of the accused and the accused not being strangers to the villagers could have been easily identified by them. By not examining those independent witnesses, the prosecution has failed to produce the available independent corroborative evidence to support the evidence of interested witnesses, namely, PWs 6, 7 and 9 because of which the High Court was justified in drawing adverse inference against the prosecution...”

68. The evidence of P.W.9 Brahmesh Kumar Yadav (I.O.) would show that though fingerprints were taken at the spot, the fingerprint expert's report is not placed on record. Similarly, his further evidence would reveal that though he had come to the spot with the dog squad, report of the dog squad is also not placed on record. In our view, the said also casts a doubt with regard to the genuineness of the prosecution case.

69. Apart from that, it could be seen that, though it is the assertion of P.W.1□Ali Sher Khan and P.W.2□Jaana Mohammad that they together had gone to the police station to lodge the report, the same has been contradicted by the evidence of P.W.4□Manveer Singh, who was the Constable Clerk at the police station. He has stated in his evidence thus:

“The complainant had come at the police station with the written complaint. Only Alisher had come to me at the Police Station with the written complaint. No other one had come.”

70. Coupled with the fact that though P.W.1□Ali Sher Khan and P.W.2□Jaana Mohammad, had mobile phones, they had not informed the Police on phone, also casts a serious doubt with regard to the genuineness of the prosecution case.

71. Insofar as the reliance placed by Shri Vinod Diwakar, learned AAG on the burden not being discharged by the accused and no explanation given by them in their Section 313 Cr.P.C. statement is concerned, it is trite law that only after the prosecution discharges its burden of proving the case beyond reasonable doubt, the burden would shift on the accused. It is not necessary to reiterate this proposition of law. It will suffice to refer to the following observations of this Court in the case of Joydeb Patra and others v. State of West Bengal⁶:

“10. We are afraid, we cannot accept this submission of Mr Ghosh. This Court has repeatedly held that the burden to prove the guilt of the accused beyond reasonable doubt is on the prosecution and it is only when this burden is discharged that the accused could prove any fact within his special knowledge under Section 106 of the Evidence Act to establish that he was not guilty. In *Sucha Singh v. State of Punjab* [(2001) 4 SCC 375 : 2001 SCC (Cri) 717] this Court held: (SCC p. 381, para 19) “19. We pointed out that Section 106 of the Evidence Act is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt, but the section would apply to cases where the prosecution has succeeded in proving facts for which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of special knowledge regarding such facts failed to offer any explanation which might drive the court to draw a different inference.” Similarly, in *Vikramjit Singh v. State of Punjab* [(2006) 12 SCC 306 : (2007) 1 SCC (Cri) 732] this Court reiterated: (SCC p. 313, para 14) “14. Section 106 of the Evidence Act does not relieve the prosecution to prove its case beyond all reasonable doubt. Only when the prosecution case has been proved beyond all reasonable doubt, the burden in regard to such facts which was within the special knowledge of the accused may be shifted to the accused for explaining the same.”

Of course, there are certain exceptions to the said rule e.g. where burden of proof may be imposed upon the accused by reason of a statute.” In that view of the matter, we do not find any merit in the said submissions.

72. While coming to the conclusion that the prosecution has failed to bring home the guilt of the accused beyond reasonable doubt, we are at pains to observe the manner in which the present case has been dealt with by the trial court as well as by the High Court, particularly, when the trial court awarded death penalty to the accused and the High Court confirmed it. The trial court and the High Court were expected to exercise a greater degree of scrutiny, care and circumspection while directing the accused to be hanged till death.

73. Though there are serious infirmities on various counts in the judgment of the trial court, we refer to only one paragraph of the said judgment:

“The above mentioned recovery of blood stained clothes of the accused Momin, Jaikam, Sajid and Nazra also proves the involvement of them in the crime. The above recovery also indicates to this fact that the entire episode of the murders was a pre-planned one and that a comprehensive strategy was chalked out for it. All the accused gathered at the house of the accused Momin prior to committing the murders. They already knew that on committing murders by sharp weapons, the splashes of blood would hurl at their clothes because of which, if they don't change their clothes, they would be not be able to hide their crime during being absconded. That is why, they had already managed additional clothes for them in the house of the accused Momin. After committing the crime, they as per the planning, went to Momin's house, changed their clothes and ran away. Opening the lock of their home by sons and daughters of Momin on the third day of the occurrence also indicates that either Momin's all sons and daughters were at home at the time of the occurrence and they left from the house with the accused after the occurrence or Momin's and Nazra's kids were not at all present there in the house at the time of occurrence and that all the kids were sent to their grand-parent's house prior to the occurrence. Since the crime was committed in a well and pre – planned way, it seems more probable that the kids were sent to their grand-parent's home prior to the occurrence. If this probability is accepted, the arrest of the accused Nazra after the occurrence, and the arrest of the remaining three accused viz Momin, Sajid and Jaikam at the Rajghat Chauraha at 2.00 'O' clock at night not taking place but in the morning at 6.30 'O' clock becomes important. It indicates that Nazra, after the occurrence, was gone to her kids for meeting them and delivering them the keys of home. Thereafter, as per the pre-planned program, she had to reach the same Rajghat Chauraha, where the remaining three accused had already been arrested at night. All the accused may have planned to gather at the same Chauraha and run away together from here and that is why, they kept on waiting for Nazra at the same place till 2.00 o' Clock at night. It is impossible because of this reason also that if the occurrence took place around 8.30 pm, the three accused Momin, Zaikam and Sajid had sufficient time after perpetrating this crime, to run away very far. However, standing at Rajghat Chauraha till 2.00 am, indicates that they were waiting there for Nazra to come.”

74. To say the least, we are shocked at the aforesaid finding. The narration makes for an interesting reading as a story. However, all the observations are nothing but conjectures and surmises, without

there being any evidentiary support to them. It is really surprising, as to how the Additional Sessions Judge could have dealt with the present case in such a casual manner when he was considering the question of life and death of four accused.

75. At this stage, we would like to remind ourselves as well as all the Courts in the country the golden principle to be followed in criminal jurisprudence. This Court, speaking through legendry H.R. Khanna, J., in the case of *The State of Punjab v. Jagir Singh, Baljit Singh and Karam Singh*⁷ observed thus:

“23. A criminal trial is not like a fairy tale wherein one is free to give flight to one's imagination and phantasy. It concerns itself with the question as to whether the accused arraigned at the trial is guilty of the crime with which he is charged. Crime is an event in real life and is the product of interplay of different human emotions. In arriving at the conclusion about the guilt of the accused charged with the commission of a crime, the court has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses. Every case in the final analysis would have to depend upon its own facts. Although the benefit of every reasonable doubt should be given to the accused, the courts should not at the same time reject evidence which is ex facie trustworthy on grounds which are fanciful or in the nature of conjectures.” 7 (1974) 3 SCC 277

76. We are amazed by the manner in which the High court has dealt with the present matter. It will be apposite to refer to the following observations of the High Court with regard to the recovery of clothes.

“It has been urged that in order to prove the recovery of the clothes, no independent witness was produced. It is correct that the prosecution only produced the formal witness to prove the recovery, but on the other hand the disclosure of this fact about the room having been opened by the keys provided by Hina, the daughter of accused Momin was not rebutted by the defence which could have been done by producing Hina in order to deny any such recovery.”

77. The finding is not only contrary to the well settled law interpreting Section 27 of the Evidence Act but also attempts to put a burden on the accused, which does not shift unless prosecution has proved the case beyond reasonable doubt.

78. The following observations of the High Court would also fall in the ambit of conjectures and surmises:

“There is yet another dimension which deserves mention namely, with the multiple nature of injuries and six persons being slaughtered simultaneously, the same cannot be an act of a single assailant. The presence, therefore, of the three assailants Momin, Jaikam and Sajid cannot be ruled out as there is no doubt that such nature of assault in the natural course of things would be carried out by more than one person.”

79. Another finding of the High Court, which makes for an interesting reading and is foreign to criminal jurisprudence is thus:

“The question of motive in relation to Jaikam and Sajid may not be immediate and they being a separate family may be correct. This however by itself may not be sufficient to dilute the connection of Sajid and Jaikam with Momin. However on this count, we find that the trial court has raised a presumption about jealousy amongst the families on account of Mausam Khan having developed his business and augmented his earnings through a brick klin. This part of the discussion of the trial court does not find sufficient corroboration from the evidence on record, and therefore, the motive appears to be remote and not a very strong motive. This, however, does not mean to say that there was no connection with Jaikam and Sajid with Momin, who did appear to be on friendly terms and this fact is reflected from the statement of the witnesses particularly, PW□ and PW□, where they have indicated an attitude of vengeance being present for certain reasons. Thus even though a strong motive may not have been established and the reasonings of the trial court may be a little stretched, yet the same would not wipe out their presence particularly when the ocular testimony to establish their presence when the offence was committed.”

80. Further, it can be seen that, the very same Judges of the High Court refused to believe the very same evidence of prosecution witnesses in respect of accused No.2□Nazra. The High Court observed thus:

“The arrest of Smt. Nazra has been shown from a public place in the morning at about 6.40 am whereas Smt. Nazra claims to be present at the police station with her children. There is no independent witness of her arrest. On cross□examination, PW□ 9 the investigating officer has stated that he does not remember as to whether Smt. Nazra was at the police station with her children or not. He however denies her arrest at the police station. PW□ in his cross□examination on 20.03.2015 has stated that when he went to the police station for lodging of the first information report, then Momin, Jaikab, Sajid and Nazra were all present at the police station. This testimony of PW□ corroborates his presence at the police station with PW□ informant who has admitted having gone to the police station with his brother□n□law PW□. The story of arrest of Nazra at 6:40 am the next day morning in these circumstances as set up by the prosecution is therefore clearly doubtful. This aspect further adds to the doubts expressed above.”

81. We ask a question to ourselves, if the arrest of the accused No.2□Nazra was from a public place, was the arrest of the accused Nos. 1, 3 and 4 from any other place than the place from where the accused No.2□Nazra was apprehended. If according to the High Court, there is no independent witness of her arrest, is there any independent witness for arrest of accused Nos. 1, 3 and 4. If on the basis of evidence of P.W.2□Jaan Mohammad, who has deposed in his cross□examination, that, when he went to the police station for lodging the F.I.R., he found Momin Khan (A□), Jaikam Khan

(A□3), Sajid (A□4) and Nazra (A□2) present in the police station, which, according to the High Court, is corroborated by the testimony of P.W.1□Ali Sher Khan and, therefore, the story of arrest of Nazra (A□2) at 6.40 a.m. was found to be unbelievable, then how was it different from the arrest of accused Nos. 1, 3 and 4, which was shown to be at 2.00 a.m. on 24 th January, 2016, i.e., much after the time of lodging the F.I.R. The High Court further goes on to have an academic discussion with regard to the possibility, preponderance of probability, a scientist conducting his experiments with great care, choosing between two or more possibilities, and preponderates of one over the other, etc. The law, however, that is fully settled, is that, it is the duty of the prosecution to prove the case beyond reasonable doubt.

82. We may gainfully refer to the following observations of this Court in the case of Anand Ramachandra Chougule v. Sidarai Laxman Chougala and others⁸:

“10. The burden lies on the prosecution to prove the allegations beyond all reasonable doubt. In contradistinction to the same, the accused has only to create a doubt about the prosecution case and the probability of its defence. An accused is not required to establish or prove his defence beyond all reasonable doubt, unlike the prosecution. If the accused takes a defence, which is not improbable and appears likely, there is material in support of such defence, the accused is not required to prove anything further. The benefit of doubt must follow unless the prosecution is able to prove its case beyond all reasonable doubt.

11. The fact that a defence may not have been taken by an accused under Section 313 CrPC again cannot absolve the prosecution from proving its case beyond all reasonable doubt. If there are materials which the prosecution is unable to answer, the weakness in the defence taken cannot become the strength of the prosecution to claim that in the circumstances it was not required to prove anything. In *Sunil Kundu v. State of Jharkhand* [*Sunil Kundu v. State of Jharkhand*, (2013) 4 SCC 422 : (2013) 2 SCC (Cri) 427], this Court observed : (SCC pp. 433□34, para 28) “28. ... When the prosecution is not able to prove its case beyond reasonable doubt it cannot take advantage of the fact that the accused have not been able to probalilise their defence. It is well settled that the prosecution must stand or fall on its own feet. It cannot draw support from the weakness of the case of the accused, if it has not proved its case beyond reasonable doubt.””

83. We, therefore, find that the prosecution has utterly failed to prove the case beyond reasonable doubt. The conviction and death sentence imposed on the accused is totally unsustainable in law.

Insofar as the appeal filed by the P.W.1□Ali Sher Khan with regard to acquittal of accused No.2□Nazra is concerned, it is sans any merit.

84. In the result:

(a) Criminal Appeal Nos. 440□441 of 2020 filed by Momin Khan (Accused No.1); Criminal Appeal Nos. 434□436 of 2020 filed by Jaikam Khan (Accused No.3); and Criminal Appeal Nos. 437□439 of 2020 filed by Sajid (Accused No.4) are allowed;

(b) Momin Khan (Accused No.1), Jaikam Khan (Accused No.3) and Sajid (Accused No.4) are directed to be released forthwith, if not required in any other offence.

(c) Criminal Appeal No. 442 of 2020 filed by P.W.1□Ali Sher Khan, is dismissed.

85. The appeals are disposed of in the above terms. All pending applications shall also stand disposed of.

86. Before we part with the judgment, we must appreciate the valuable assistance rendered by Smt. Nitya Ramakrishnan, learned Senior Counsel appearing on behalf of accused No.1 as well as acquitted original accused No.2, Shri Dama Seshadri Naidu, learned counsel for accused Nos. 3 and 4, and Shri Vinod Diwakar, learned Additional Advocate General appearing on behalf of the State of Uttar Pradesh.

....., J.

[L. NAGESWARA RAO], J.

[B.R. GAVAI], J.

[B.V. NAGARATHNA] NEW DELHI;

DECEMBER 15, 2021