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JAI PRAKASH

v.

STATE OF UTTAR PRADESH AND OTHERS

(Criminal Appeal Nos.1790-1791 of 2019)

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NOVEMBER 28, 2019

**[R. BANUMATHI, A.S. BOPANNA AND  
HRISHIKESH ROY, JJ.]**

*Penal Code, 1860 :*

- C      *ss. 302 and 120B – Prosecution under – Conviction of three of the four accused by trial court, relying on two eye-witnesses – In appeal, High Court acquitted all the accused – Appeal to Supreme Court – Held : There are material inconsistencies in the version of eye-witnesses – There is also discrepancy between the medical evidence and oral evidence – There are material lapses in the investigation – Such discrepancies raise serious doubt about the prosecution case – Accused were rightly acquitted by High Court.*
- D      *Constitution of India :*

- E      *Art. 136 – Jurisdiction under – Scope of – Held : In exercise of power u/Art. 136, the Court would not ordinarily interfere with the findings of High Court unless it is satisfied that such a finding is vitiated by some glaring infirmity in the appraisement of evidence or such finding is perverse or arbitrary.*

**Dismissing the appeals, the Court**

- F      **HELD:** 1. As per the complaint/FIR and also the statement of PW-1, after his morning walk and after relieving himself while he was coming back home, he saw the respondents-accused Nos.1, 2 and 4 sitting in the flour mill of accused No.3 with arms in their possession. Case of the prosecution is that there was previous enmity between the family of appellant and accused No.2 which was the cause of murder of the deceased. When that being the motive and if the accused were so found armed with weapons in the flour mill of accused No. 3, the question arises as to why the appellant sent his brother-deceased to purchase *gutkha* from the shop. This has not been explained by the appellant.
- G      **H** [Para 15][1066-E-F]

2. If the accused were looking for vengeance from brother of the complainant (PW1) and the deceased, why the respondents-accused allowed the complainant (PW1) to let go unharmed; more so, when PW-1 was normally in the habit of going for morning walk. If the motive for the crime is accepted, then all the brothers would be targets; but here attack was on only the deceased brother and PW-1 was spared although attackers were fully armed and near the place of occurrence. Case of the prosecution does not appear to be natural that the respondents-accused Nos.1, 2 and 4 have attacked the deceased who happened to pass through the flour mill by chance after purchase of *gutkha*. [Para 16] [1067-B-C]

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3. PW-3 stated that on the date of occurrence, he along with another person had gone to the house of complainant (PW-1) to discuss about the electric decoration work for the marriage ceremony of daughter of someone in their *mohalla*. Admittedly, the deceased was the electrician by profession who was to attend to the electric work and the decoration. It is not explained as to why the deceased who was to attend to the electric work and the decoration work, instead of discussing the need of the prospective clients i.e. PW-3, would go out to purchase *gutkha*. Curiously, the person (the actual client) did not accompany PW-3 and the other person to the house of the deceased for discussion. This raises serious doubts about the presence of PW-3 in the scene of occurrence and the case of the prosecution. [Para 17] [1067-D-F]

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4. As per the deposition of PW-1, there was a *goomty* from which *gutka* could be purchased, at a distance of just fifteen steps from the house of the appellant and the shop from where the deceased had gone to buy the *gutkha* was at a distance of about 150-200 steps; again said 100-125 steps from the house of the appellant. It has nowhere been stated when the deceased could not have gotten *gutkha* right near his house and why should he go to a shop at some distance away from the house. PW-1 firstly stated that he gave money to the deceased going to purchase *gutkha*, however subsequently, he stated that in the shop credit account was maintained. The reason stated for deceased going at a little bit far away place to purchase *gutkha* leaving his

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- A prospective clients for decoration of electric work is not quite convincing. [Para 18] [1067-G-H; 1068-A]
  - 5. The High Court observed that PW-3 was a chance witness and expressed doubts about the presence of PW-3 in the scene of occurrence and there is no good reason to take a different view. [Para 19] [1068-D]
  - 6. There are several material discrepancies between the evidence of PW-1 and PW-3 as to the occurrence. The Court is conscious of the well settled position that the minor discrepancies not touching upon the core of the prosecution case, would not affect the credibility of the witnesses or the prosecution case. Of course, PWs 1 and 3 have given their evidence in the court nearly after a decade; but they are said to have witnessed the occurrence from a close distance. Whether there was scuffle between the deceased and the respondents-accused is an integral part of the main incident and the witnesses are expected to be consistent in their version. The inconsistencies in the version of PWs 1 and 3 as to whether there was a scuffle or not is not explained by the prosecution which again raises serious doubts about the prosecution case. [Para 20] [1068-E-H; 1069-A]
  - 7. As per post-mortem report, there were four firearm lacerated wounds. PWs 1 and 3 have not explained the fourth firearm injury; nor they have made any mention of the accused firing multiple shots. This discrepancy between the medical evidence and the oral evidence assumes significance in view of the elaborated depositions made by the witnesses and the FIR which explains minute detail of the entire incident.[Para 21] [1069-B-C]
  - 8.1. There are also several lapses in the investigation of the case like non-recovery of “empties” fired from the guns on the deceased, non-recovery of fire arms used by the respondents-accused etc. It is well-settled that any omission on the part of the Investigating Officer cannot go against the prosecution case. If the Investigating Officer has deliberately omitted to do what he ought to have done in the interest of justice, it means that such acts or omissions of Investigating Officer should not be taken in favour of the accused. The prosecution case of course, H cannot be doubted merely on the ground of non-recovery of

weapons and other piece of evidence. But in the present case, an elaborately written FIR was registered immediately after the occurrence. When the Investigating Officer had taken care even to recover packet of *kissan gutkha* from the scene of occurrence, curiously, the “empties” of the fired cartridges were not recovered. The material pieces of evidence like “empties” were lost; but this vital omission has not been explained. This factum assumes importance particularly, in view of the fact that the FIR is alleged to have been registered promptly. Any act of commission/omission of the Investigating Officer cannot go to the advantage of the accused. But in a case of this nature where FIR is said to have been registered within half an hour of the occurrence and the investigation also commenced then and there, there is no reason as to why the “empties” and “bursts” from the scene of occurrence were not recovered.[Para 22] [1069-D-H]

8.2. Furthermore, as per the evidence of Investigating Officer (PW-5), the accused were arrested on the very next day of occurrence. Despite that, the weapons used by them were not recovered. Of course, the case of the prosecution has to be examined *de hors* such omissions of the Investigating Officer like non-recovery of weapons etc. But material discrepancies in the evidence of PWs 1 and 3 coupled with the unnaturalness of the prosecution case, non-recovery of weapons and empties raise serious doubts about the prosecution case. [Para 23] [1070-E]

9. The duty of the appellate court is to consider and appreciate the evidence adduced by the prosecution and arrive at an independent conclusion. Like the trial court, the appellate court also must be satisfied of its conclusion. In exercise of power under Article 136 of the Constitution of India, the Supreme Court would not ordinarily interfere with the findings of the High Court unless it is satisfied that such a finding is vitiated by some glaring infirmity in the appraisement of evidence or such finding is perverse or arbitrary. In the present case, the High Court has analysed entire evidence and recorded its finding as to how the trial court has gone wrong in not appreciating the material inconsistencies in the prosecution case. The findings recorded by the High Court in acquitting the respondents-accused Nos.1,

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- A **2 and 4 does not suffer from any infirmity warranting interference with the impugned judgment. The appeals filed by the complainant and the State of Uttar Pradesh are liable to be dismissed.**  
**[Para 24] [1071-F-H; 1071-A-B]**

*State of Uttar Pradesh v. Punni and Others (2008) 11*

- B **SCS 153 : [2008] 1 SCR 85 –relied on.**

**Case Law Reference**

<b>[2008] 1 SCR 85</b>	<b>relied on</b>	<b>Para 24</b>
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CRIMINAL APPELLATE JURISDICTION: Criminal Appeal

- C Nos. 1790-1791 of 2019

From the Judgment and Order dated 16.11.2018 of the High Court of Judicature AT Allahabad in Criminal Appeal No. 2403 of 2005 with Criminal Appeal No. 5829 of 2005

With

- D Criminal Appeal Nos. 1792-1793 of 2019.

R. Basant, Ajay Kumar Mishra, Basva Prabhu S. Patil, Sr. Advs.,

Manoj K. Mishra, Rajiv Trivedi, Jyoti Mishra, M. Krishnan G, Shashank

Shekhar Singh, Ms. Ruchira Goyal, M/s. Nazish Fatima, Ajay Singh,

- E Debasish Mukherjee, Manish Pratap Singh, Ramjee Pandey,

P. K. Sharma, Uday Prakash Yadav, Kafeel Ahmad, Sujit Kr., Abhisth

Kumar, Kartikeya Bhargava, Rohit Amit Sthalekar, Advs. for the appearing parties.

The Judgment of the Court was delivered by

- F **R. BANUMATHI, J.**

1. Leave granted.

- G 2. These appeals arise out of the impugned judgment dated 16.11.2018 passed by the High Court of Judicature at Allahabad in Criminal Appeal Nos.2403 and 5829 of 2005 whereby the High Court allowed the appeals thereby setting aside the conviction of respondents-accused Nos.1, 2 and 4 passed by the trial court under Sections 302 IPC and 120B IPC and acquitted them of the charges under Sections 302 IPC and 120-B IPC.

3. Being aggrieved by the acquittal, the appellant-complainant has preferred Criminal Appeals arising out of SLP(Crl.) Nos.269-70 of 2019. The State of Uttar Pradesh has filed the other Criminal Appeals arising out of SLP(Crl.) Nos.288-89 of 2019.

4. Briefly stated case of the prosecution is as under:-

Complainant-Jai Prakash and deceased Ravi Prakash are real brothers. On 17.11.1992 shortly prior to 09.00 am, the appellant-complainant came back home after relieving himself near the Urai bus stand. At that time, he noticed the accused persons sitting with arms in their possession in the flour mill of Shankar Teli-accused No.3 (since acquitted by the trial court). Complainant came to his house. At that time, Sanjay Mishra and Ajay Kumar (PW-3) came to the house of deceased for discussion regarding the work of electric decoration in connection with the marriage of daughter of one Maiku Soni. The appellant sent Ravi Prakash to bring *gutkha* for Ajay Kumar (PW-3) and Sanjay Mishra. After purchasing *gutkha* when the deceased was returning from the shop and reached in front of accused No.3-Shankar Teli's flour mill, accused Bhupendra Yadav (A2) armed with double barrelled gun, accused Raju Teli (A4) armed with single barrelled gun and accused Lallu @ Lal Diwan (A1) armed with country made pistol, caught hold of the deceased Ravi Prakash. Ravi Prakash tried to free himself by raising alarm. Accused Bhupendra Yadav fired bullet in the chest of the deceased Ravi Prakash, accused Raju Teli fired in the leg and accused Lallu @ Lal Diwan fired in the jaw of the deceased. Ravi Prakash fell down on the spot. Appellant-Jai Prakash, Ajay Kumar (PW-3) and Sanjay Mishra who saw the occurrence rushed to the spot to save the deceased Ravi Prakash. On seeing them coming, accused persons came out of the flour mill and fled away from the scene of occurrence.

5. As per the complainant, motive for the commission of the offence was the previous enmity harboured by accused Bhupendra Yadav with the family of the appellant due to newspaper publishing regarding the activities of accused Bhupendra Yadav by another brother of the appellant namely Om Prakash, in the weekly journal August Nama. Due to which, accused Bhupendra Yadav had beaten up Om Prakash and Om Prakash lodged complaint against accused Bhupendra Yadav. Sometimes prior to the occurrence, accused Bhupendra Yadav had beaten

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- A up the appellant also and on the basis of the complaint, a case was registered against accused Bhupendra Yadav. According to the appellant, as a consequence of the said enmity, Ravi Prakash was fired at by the accused and murdered.

6. Regarding the occurrence, PW-1-Jai Prakash got the complaint written by one Munni Lal and on the same day at 09.30 am, the appellant lodged the same before the Police Station Rath, District-Hamirpur. Based on the complaint, FIR in Crime No.474 of 1992 (Ex.-Ka.3) was registered against the accused under Sections 302 IPC and 120B IPC. Investigation of the case was taken up by the Investigating Officer-PW-5-SI-Shobha Mani Tripathi. The Investigating Officer went to the place of occurrence and under his instructions, SI-R.N. Singh held inquest on the body of deceased Ravi Prakash. The dead body of Ravi Prakash was sent to hospital for post-mortem examination. SI-R.N. Singh took sample of simple and blood-stained earth from the scene of occurrence and recovered a pair of *chappal* of the deceased (Ex.-Ka.10) and packet of *kisaan gutkha* (Ex.-Ka.11) and prepared recovery memo.

7. On the same day i.e. 17.11.1992 at about 04.15 pm, dead body of Ravi Prakash was sent to Rajkiya Purush Chikitsalaya, Rath where post-mortem was conducted on the dead body by Dr. B.K. Gupta (PW-2) who noted the following injuries:-

- E (i) A firearm lacerated wound of entry on left side of chest, 4 cm below the medial left clavicle and 3 cm left to midline of chest.  
(ii) Multiple firearm lacerated wound of exit on left side of scapular region, 3 cm left to midline of back.  
F (iii) A firearm lacerated wound of entry on right side lower jaw, 5 cm right to the tip of chin.  
(iv) A firearm lacerated wound of entry on back of right thigh, 7.5 cm above the knee joint.  
G (v) A firearm lacerated wound of entry on right thigh, 20 cm above the knee joint.  
(vi) A firearm lacerated wound of exit on antero right thigh, 10 cm above knee joint.

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(vii) Multiple abrasion on medial aspect of right leg above the A  
medial malleolus.

PW-2-Doctor opined that the death of the deceased was due to haemorrhagic shock as a result of ante-mortem injuries and issued Ex.-Ka.2-Post-Mortem Certificate. After completion of investigation, charge sheet was filed against all the four accused under Sections 302 IPC and B  
120B IPC.

8. When questioned, all the accused denied the charges and pleaded not guilty. To bring home the guilt of the accused, the prosecution examined total six witnesses - eye witnesses PWs 1 and 3 and Doctor-PW-2 and IO (PW-5) and other witnesses. Upon consideration of the evidence, the trial court convicted accused Nos.1, 2 and 4 under Sections 302 IPC and 120B IPC and sentenced them to undergo life imprisonment. The trial court held that the evidence of eye witness-PW-1-Jai Prakash, brother of deceased and PW-3-Ajay Kumar are natural and acceptable. The trial court held that PW-3-Ajay Kumar has given satisfying reasons for his presence at the house of PW-1 and the presence of PW-3 outside the house of PW-1 is natural and cannot be doubted. Insofar as the question of non-examination of Sanjay Mishra and other persons in the *mohalla*, the trial court held that in the present social conditions and circumstances, independent witnesses are apprehensive that if they appear as witnesses in the criminal cases, their future will not be safe and therefore, non-examination of the independent witnesses will not affect the prosecution case. After referring to the post-mortem report and the evidence of PW-2-Doctor, the trial court held that the medical evidence corroborates the evidence of PWs 1 and 3. The trial court also held that non-recovery of the guns and the contradictions pointed by the accused in the evidence of PWs 1 and 3, would not affect the case of the prosecution. With those findings, the trial court convicted accused Nos.1, 2 and 4. However, the trial court gave benefit of doubt to accused No.3-Shankar Teli and acquitted him. C  
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9. Being aggrieved, the respondents-accused Nos.1, 2 and 4 have preferred appeals before the High Court. By referring to the contents of the FIR (Ex.-Ka.3), the High Court held that within short time, it is least possible for an illiterate person like PW-1 to lodge a complaint with such details and the possibility cannot be ruled out that the First G

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- A Information Report has been lodged after discussion and on the advice of Om Prakash. After referring to the deposition of PW-1 and PW-3, the High Court held that the presence of the witnesses at the place and at the time of occurrence appears to be doubtful. After referring to Post-Mortem Report, the High Court further held that in the Post-Mortem Report, it is mentioned that the large intestine of deceased was full and therefore, death might have taken place before Ravi Prakash attended nature call as generally, people attend the call of nature in the morning and it is least possible that the deceased has not attended the call of nature before 09.00 am. Doubting the presence of PW-3 at the place and time of occurrence, the High Court held that PW-3 could not properly explain the reason as to why he went to the house of PW-1 and his version appears unnatural. Pointing out that there was motive for Om Prakash to instigate his brother PW-1 to make false allegations against the accused on the murder of his brother Ravi Prakash, the High Court held that accused Nos.1, 2 and 4 deserve to be given benefit of doubt.
- B With those findings, the High Court allowed the appeals filed by the accused and set aside their conviction and sentence passed by the trial court and acquitted them.
- C 10. Taking us through the evidence and the judgment of the trial court as well as the High Court, Mr. R. Basant, learned Senior counsel for the appellant has submitted that PW-1 has clearly stated each and every detail of the incident which is amply corroborated by the evidence of PW-3 and the evidence of PWs 1 and 3 are natural and their evidence is consistent with the medical evidence as well as the case of the prosecution. It was further submitted that considering the well-settled position, the trial court recorded the finding that the general public are reluctant to come forward to depose before the court and it is not proper to reject the case of the prosecution for non-examination of the independent witnesses. It was submitted that the High Court erred in holding that non-examination of the independent witnesses and Munni Lal-scribe of the complaint is fatal to the prosecution case. Learned Senior counsel further submitted that the lapses in the investigation like non-sending of the blood-stained earth and sample earth taken from the scene of occurrence and non-recovery of “empties” from the scene of occurrence and other lapses would not affect the prosecution case and the High Court erred in reversing the conviction and acquitting the accused.
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11. Mr. Basava Prabhu S. Patil, learned Senior counsel appearing for accused No.2-Bhupendra Yadav submitted that the motive is attributed to Om Prakash-brother of PW-1 and when the accused were having such enmity with Om Prakash, it is not known as to why the accused should attack Ravi Prakash and no injury was caused to PW-1 who was easily available to the accused even before Ravi Prakash passed through the flour mill of Shankar Teli (PW-3). The learned Senior counsel further submitted the PW-3 is a chance witness and as such, his presence in the house of PW-1 is not natural and PW-3 could not have witnessed the incident. It was further submitted that the High Court rightly pointed out the improbability of the occurrence that the accused who were waiting in Shankar Teli's flour mill, would not have anticipated that Ravi Prakash would pass through the flour mill and considering the improbability of the prosecution case, the High Court rightly reversed the conviction and the impugned judgment warrants no interference.

12. Mr. P.K. Sharma, learned counsel appearing for accused No.4-Raju Teli submitted that the conduct of PW-1, brother of deceased was unnatural as he made no attempt to save his younger brother rather he was interested only in preparing the complaint (Ex.-Ka.3) and going to the police station. Learned counsel further submitted that the Post-Mortem Report shows four gun-shot injuries which are not in consonance with the oral evidence and the discrepancies between the oral and medical evidence has not been properly explained. The learned counsel submitted that PW-3 is a chance witness and the High Court rightly held that his presence in the house of PW-1 at the time of incident is unnatural. It was submitted that the prosecution case is highly doubtful since during the investigation, neither the fire arms were recovered nor the "empties" of the cartridges have been recovered from the place of occurrence and no ballistic opinion had been obtained by the prosecution to prove that the injury on the person of the deceased were caused by the alleged fire arms used by the accused.

13. Mr. Kartikeya Bhargava, learned counsel appearing for accused No.1-Lallu @ Lal Diwan submitted that there were contradictions between the evidence of PWs 1 and 3 as to whether there was scuffle prior to the incident and this has not been properly appreciated by the trial court. The learned counsel further submitted that the multiple bruises found on the body of deceased has not been properly explained by the prosecution and the High Court rightly reversed

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- A the conviction of the accused and the impugned judgment warrants no interference.

14. We have carefully considered the contentions and perused the impugned judgment and materials on record. The point falling for consideration is as contended by the appellants, whether the High Court

- B without properly appreciating the evidence erred in setting aside the conviction of the respondents-accused Nos.1, 2 and 4.

15. Case of the prosecution is that at about 09.00 am on 17.11.1992, while returning from the shop after purchasing *gutkha*, deceased Ravi Prakash reached the front of flour mill of Shankar Teli, accused

- C Bhupendra Yadav (A2) having double barrelled gun, accused Raju Teli (A4) armed with single barrelled gun and accused Lallu @ Lal Diwan (A1) armed with country made pistol (*tamancha*), caught hold of Ravi Prakash and Ravi Prakash raised alarm and tried to free himself from the grip of the accused. At that time, accused Bhupendra Yadav, Raju Teli and Lallu @ Lal Diwan fired from their respective weapons and

- D fired shot on the chest, leg and jaw of Ravi Prakash respectively due to which Ravi Prakash fell down on the spot. Appellant Jai Prakash (PW-1), Ajay Kumar (PW-3) and Sanjay Mishra rushed to the spot to save Ravi Prakash and on seeing them, all the three accused escaped from the place of occurrence. As per the complaint/FIR (Ex.-Ka.3) and also

- E the statement of PW-1, after his morning walk and after relieving himself at the Urai bus stand, while coming back home, he saw the respondents-accused Nos.1, 2 and 4 sitting in the flour mill of Shankar Teli with arms in their possession. Case of the prosecution is that there was previous enmity between the family of appellant and accused Bhupendra Yadav which is the cause of murder of Ravi Prakash. When that being the

- F motive and if the accused were so found armed with weapons in the flour mill of Shankar Teli, the question arises as to why the appellant sent his brother-Ravi Prakash to purchase *gutkha* from the shop of one Choco Kori. This has not been explained by the appellant.

- G 16. The respondents-accused Nos.1, 2 and 4 armed with weapons were sitting in the flour mill of Shankar Teli and were talking to each other. The motive alleged by the prosecution is that about two years prior to the occurrence, Om Prakash-brother of the appellant-Jai Prakash had written about the illegal activities of accused Bhupendra Yadav and brought out news in the newspaper due to which accused Bhupendra Yadav had assaulted Om Prakash. In this regard, Om Prakash had

lodged a criminal case in the police station and FIR has been registered and due to this enmity, the accused are alleged to have committed murder of Ravi Prakash. Both the appellant-Jai Prakash and Ravi Prakash are brothers of Om Prakash. If the accused were looking for vengeance of Om Prakash-brother of Ravi Prakash, why the respondents-accused allowed Jai Prakash (PW-1) to let go unharmed; more so, when PW-1 was normally in the habit of going for morning walk. If the motive for the crime is accepted, then all brothers of Om Prakash would be targets; but here attack was on only the deceased brother and PW-1 was spared although attackers were fully armed and near the place of occurrence. As pointed out by the High Court, case of the prosecution does not appear to be natural that the respondents-accused Nos.1, 2 and 4 have attacked Ravi Prakash who happened to pass through the flour mill by chance after purchase of *gutkha*.

17. PW-3-Ajay Kumar stated that on the date of occurrence i.e. 17.11.1992, he along with Sanjay Mishra had gone to the house of Jai Prakash (PW-1) to discuss about the electric decoration work for the marriage ceremony of daughter of one Maiku Soni in their *mohalla*. Admittedly, Ravi Prakash was the electrician by profession who was to attend to the electric work and the decoration. It is not explained as to why deceased Ravi Prakash who was to attend to the electric work and the decoration work, instead of discussing the need of the prospective clients i.e. PW-3, would go out to purchase *gutkha*. Curiously, Maiku did not accompany Ajay Kumar (PW-3) and Sanjay Mishra to the house of Ravi Prakash for discussion. As pointed out by the High Court, neither Maiku nor any member of the family had gone with PW-3 to talk about the decoration for the marriage ceremony of daughter of Maiku. This raises serious doubts about the presence of PW-3 in the scene of occurrence and the case of the prosecution.

18. Next, as per the deposition of PW-1, there is a *goomty* placed on the square platform of Munna Musalman from which *gutka* can be taken out. This *goomti* is at a distance of just fifteen steps from the house of the appellant and the shop of Choco Kori where Ravi Prakash had gone to buy the *gutkha* is at a distance of about 150-200 steps; again said 100-125 steps from the house of the appellant. It has nowhere been stated when the deceased could not have gotten *gutkha* right near his house and why should he go to a shop at some distance away from the house. Of course, PW-1 firstly stated that he gave money to Ravi

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- A Prakash to purchase *gutkha*, however subsequently, he stated that in the shop of Choco Kori, credit account was maintained. The reason stated that Ravi Prakash had gone to the shop of Choco Kori at a little bit far away place to purchase *gutkha* leaving his prospective clients for decoration of electric work is not quite convincing.
- B 19. PW-3-Ajay Kumar is a resident of mohalla Mughalpura, town and PS Rath, District-Hamirpur. In his evidence, PW-3 stated that he along with Sanjay Mishra had gone to the house of PW-1. PW-3 further stated that he called PW-1 outside and when he was talking to PW-1, PW-1 asked Ravi Prakash to bring *gutkha* from the shop for Ajay Kumar and Sanjay Mishra. As discussed earlier, when PW-3 had gone to the house of PW-1 to discuss about the electric decoration work for the marriage ceremony of daughter of Maiku, neither Maiku nor any member of his family accompanied PW-3 to discuss about the electric work in the marriage ceremony of daughter of Maiku. In his cross-examination, PW-3 could not explain the reason as to why he went to the house of PW-1. The High Court observed that PW-3 is a chance witness and expressed doubts about the presence of PW-3 in the scene of occurrence on 17.11.1992 and we do not find any good reason to take a different view.
- C 20. There are several material discrepancies between the evidence of PW-1 and PW-3 as to the occurrence. PW-3 has stated that when Ravi Prakash passed through the way, the respondents-accused came out of the flour mill and there was a scuffle for sometime with Ravi Prakash and the accused fired the bullet shots from their guns and the pistol. On the other hand, PW-1 has only stated that the respondents-accused have fired at Ravi Prakash and has not stated anything about the scuffle. The witnesses who have deposed in the court after considerable lapse of time of course, cannot be expected to have photographic memory of the case. We are conscious of the well settled position that the minor discrepancies not touching upon the core of the prosecution case, would not affect the credibility of the witnesses or the prosecution case. Of course, PWs 1 and 3 have given their evidence in the court in 2003-04 near after a decade; but they are said to have witnessed the occurrence from a close distance. Whether there was scuffle between Ravi Prakash and the respondents-accused is an integral part of the main incident and the witnesses are expected to be consistent in their version. The inconsistencies in the version of PWs 1 and 3 as to
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whether there was a scuffle or not is not explained by the prosecution A which again raises serious doubts about the prosecution case.

21. **Medical Evidence:** As per the deposition of PWs 1 and 3, accused Bhupendra Yadav fired at the deceased on his chest; Lallu @ Lal Diwan fired on the jaw and Raju Teli fired on the leg of the deceased. As per post-mortem report dated 17.11.1992, there were four firearm lacerated wounds. Apart from the injuries on the chest, jaw and the leg, there was fire arm injury on the right thigh 2 cm above the knee. PWs 1 and 3 have not explained the fourth firearm injury; nor they have made any mention of the accused firing multiple shots. This discrepancy between the medical evidence and the oral evidence assumes significance in view of the elaborated depositions made by the witnesses and the FIR which explains minute detail of the entire incident.

22. There are also several lapses in the investigation of the case like non-recovery of “empties” fired from the guns on the deceased, non-recovery of fire arms used by the respondents-accused etc. It is well-settled that any omission on the part of the Investigating Officer cannot go against the prosecution case. If the Investigating Officer has deliberately omitted to do what he ought to have done in the interest of justice, it means that such acts or omissions of Investigating Officer should not be taken in favour of the accused. In his cross-examination, PW-5-Investigating Officer has stated that the broken pieces of cartridges, bursts and empty shells of the cartridges were not found on the site of the incident. PW-4-Sub-Inspector of Police has also not made reference about the “empty shells of cartridges” in the scene of occurrence. The prosecution case of course, cannot be doubted merely on the ground of non-recovery of weapons and other piece of evidence. But in the present case, an elaborately written FIR was registered immediately after the occurrence i.e. at 09.30 am. The Sub-Inspector of Police (PW-5) had promptly taken up the investigation and on the direction of PW-5, SI-R.N. Singh took sample earth and the blood-stained earth from the scene of occurrence and recovered a pair of footwear of the deceased and packet of *kissan gutkha* and prepared recovery memo of the same which are marked as Ex.-Ka.10 and Ex.-Ka.11 respectively. When the Investigating Officer had taken care even to recover packet of *kissan gutkha* from the scene of occurrence, curiously, the “empties” of the fired cartridges were not recovered. The material pieces of evidence like “empties” were lost; but this vital omission has not been explained.

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- A This factum assumes importance particularly, in view of the fact that the FIR is alleged to have been registered promptly at 09:30 a.m. of the occurrence which occurred at 09:00 am. The inquest was also conducted at 10:00 a.m. and the investigation also promptly started. The accused-respondents allegedly ran away from the scene of occurrence immediately after shooting at the deceased thus, they could not have possibly removed the cartridges, pieces, etc. themselves. This is not the case of the prosecution. It is also not the case of the prosecution that the area was cleaned and somebody has removed the “empties”. In such view of the matter, the non-recovery of “bursts and empty shells of cartridges” and “broken pieces of cartridges” from the scene of occurrence raises serious
- B doubt about the actual place of occurrence. As pointed out earlier, any act of commission/omission of the Investigating Officer cannot go to the advantage of the accused. But in a case of this nature where FIR is said to have been registered within half an hour of the occurrence and the investigation also commenced then and there, we find no reason as to why the “empties” and “bursts” from the scene of occurrence were not recovered.

23. Furthermore, as per the evidence of Investigating Officer Shobha Mani Tripathi (PW-5), the accused were arrested on the very next day of occurrence i.e. 18.11.1992. Even though the accused were arrested on the very next day, the weapons used by them were not recovered. Of course, the case of the prosecution has to be examined de hors such omissions of the Investigating Officer like non-recovery of weapons etc. But material discrepancies in the evidence of PWs 1 and 3 coupled with the unnaturalness of the prosecution case, non-recovery of weapons and empties raise serious doubts about the prosecution case.

- F 24. The duty of the appellate court is to consider and appreciate the evidence adduced by the prosecution and arrive at an independent conclusion. Like the trial court, the appellate court also must be satisfied of its conclusion. In exercise of power under Article 136 of the Constitution of India, in *State of Uttar Pradesh v. Punni and others* **(2008) 11 SCS 153**, while dealing with the order of acquittal passed by the High Court, the Supreme Court held that it would not ordinarily interfere with the findings of the High Court unless it is satisfied that such a finding is vitiated by some glaring infirmity in the appraisement of evidence or such finding is perverse or arbitrary. In the present case, the High Court has analysed entire evidence and recorded its finding as
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to how the trial court has gone wrong in not appreciating the material inconsistencies in the prosecution case. The findings recorded by the High Court in acquitting the respondents-accused Nos.1, 2 and 4 does not suffer from any infirmity warranting interference with the impugned judgment. The appeals filed by the complainant and the State of Uttar Pradesh are liable to be dismissed.

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25. In the result, the impugned judgment dated 16.11.2018 passed by the High Court of Judicature at Allahabad in Criminal Appeal Nos.2403 and 5829 of 2005 is affirmed and the criminal appeals arising out of SLP(Crl.) Nos.269-70 of 2019 filed by the appellant-Jai Prakash and criminal appeals arising out of SLP(Crl.) Nos.288-89 of 2019 filed by the State of Uttar Pradesh stand dismissed.

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Kalpana K. Tripathy

Appeals dismissed.