

RAVI MANDAL

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v.

STATE OF UTTARAKHAND

(Criminal Appeal No. 511 of 2011)

MAY 18, 2023

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[HRISHIKESH ROY AND MANOJ MISRA, JJ.]

Penal Code, 1860 – ss. 302, 34 and 201 – Arms Act, 1959 – ss. 4 and 25 – Acquittal under – FIR lodged by PW-1 (father of deceased) after finding dead body of his son at 0730 hours on 01.11.2001 in a forest, alleging that deceased was with ‘R’ and ‘G’ on 31.10.2001 at about 2100 hours – Later, he replaced ‘G’ with ‘S’ in written information – Both accused (R and S) were convicted by the Trial Court u/s.302 r/w. s.34, s.201 of IPC and ss. 4/25 of the Arms Act – Trial Court relied on testimonies of PW-2 and PW-5 to conclude that deceased was last seen alive in the company of the accused persons – Trial Court also noticed that as per FSL report the empty cartridge recovered from the spot was fired from the same pistol which was recovered from ‘S’ – High Court confirmed the conviction – On appeal, held: According to the testimony of police witnesses, it was the informant who gave information to the police about his son’s dead body – Whereas, according to PW-1 the police informed him that his son’s dead body has been found in the forest – In FIR there is no disclosure as to how the body was found in the forest – FIR did not name any witness who had seen the deceased with accused persons – Further, ‘S’ was not named as accused in FIR at the first instance and was only arrayed at later stage – Explanation offered by PW-2 is delayed disclosure – Similarly, explanation offered by PW-5 for his presence at the spot at the odd hours appears false – There is contradiction in PW-5’s statement made u/s. 161 and in his deposition before the Court as to presence of ‘G’ with deceased – Therefore, the testimony of PW-2 and PW-5 does not inspire confidence – Forensic report/ballistic report were not even put to ‘S’, while recording his statement u/s. 313 Cr.P.C. – In the case at hand, the evidence was not confidence inspiring as to uphold the conviction of the accused-appellants – Thus, impugned judgments and orders of the Trial Court set aside.

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A *Witnesses – Chance witness – Reliability of – Held: The law is settled, which is, evidence of a chance witness requires a very cautious and close scrutiny and a chance witness must adequately explain his presence at the place of occurrence – Deposition of chance witness whose presence at the place of incident remains doubtful should be discarded.*

B **Allowing the appeals, the Court**

C **HELD:** 1. The striking feature of the case is that the FIR of the case was lodged at 0730 Hours on 01.11.2001 after the dead body of informant's son was found in a forest. According to the testimony of police witnesses, it was the informant who gave information to the police about his son's dead body being found in the forest and thereafter, on the basis of the FIR, investigation commenced. Whereas, according to PW-1 the police informed him that his son's dead body has been found in the forest and thereafter, he went to the spot, brought the body to the police station and then lodged the report. This cleavage in the testimony of prosecution witnesses is important because it would throw a question as to whether the prosecution case is based on informant's own knowledge and information or on suggestions/guess work, may be at the instance of the police. [Para 19][18-H; E 19-A-C]

F 2. Prosecution case is primarily based on the evidence of the deceased being last seen alive with the two accused near the place of occurrence on or about the probable time of occurrence. Such evidence is forthcoming from two witnesses, namely, PW-2 and PW-5. Insofar as PW-2 is concerned, admittedly, he is not listed as a witness in the police report/charge sheet. He gave his statement to the police on an affidavit for the first time on 18.02.2002, that is, the date when the police report was prepared. This implies that he remained silent for as long as three and a half months. Hence, this Court is to examine whether there was a cogent explanation offered by PW-2. In the instant case, the only explanation offered by PW-2 for his three and a half month's silence is that he felt threatened. With regard to his threat perception, PW-2 stated that in the night of the incident when he witnessed 'R' and 'S' emerging from the forest, soon after the incident, he noticed their hands and clothes blood stained. On

spotting PW-2, those two accused threatened him by saying that if he tells to anyone about what he has seen, he would meet the same fate. PW-2 stated that with the arrest of the two accused his fear vanished, therefore, he is now appearing as a witness. If this was the reason for him not to make the disclosure earlier, there should have been a prompt disclosure by him once the accused were arrested. Notably, the two accused were arrested on 24.11.2001, yet, till 18.2.2002 no disclosure was made by him. Therefore, the explanation offered by him for the delay in making disclosure is not confidence inspiring. [Paras 22-24][20-E, G; 21-G-H; 22-A-B]

3. Further, the presence of PW-2 at the spot does not appear natural, particularly, at that odd hour of the night. To explain his presence at the scene of crime, PW-2 stated that his parents stay at another place, and therefore, to meet them he visited them that fateful night and on way return he could witness the incident. During cross examination, PW-2 stated that he usually takes dinner at 2100 Hours with his family; and that he used to visit his parents at least once a week. According to PW2, that fateful night he left his house to visit his parents after having dinner in his own house and on way return, at 0030 Hours he witnessed the incident. This explanation is not confidence inspiring, particularly, because his parents have not been interrogated or examined to corroborate PW-2's visit to their house at that odd hour of the night. In view of this Court, PW-2 is a mere chance witness, whose presence at the spot, at that hour, is not satisfactorily explained therefore, bearing in mind that he kept silent for unusually long i.e., for more than three and a half months, his testimony is not worthy of any credit. In view of this Court, the courts below erred by placing reliance on his testimony. [Para 25][22-B-E]

4. As regards the testimony of PW-5, he too, is a chance witness. As to when testimony of a chance witness could be relied, the law is settled, which is, that the evidence of a chance witness requires a very cautious and close scrutiny and a chance witness must adequately explain his presence at the place of occurrence. Deposition of a chance witness whose presence at the place of incident remains doubtful should be discarded. The explanation offered by PW-5 for his presence at the spot at that odd hour

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- A appears false. According to PW-5, he was having an upset stomach, therefore, while watching a night show of a movie, to attend to nature's call, he came out of the cinema hall and, while he was easing himself, he got the chance to witness the incident. It be noted that the investigating officer (PW-10) and PW-7, a gram vendor in that cinema hall, have deposed that there are toilets in the cinema hall where no money is charged for their use. This falsifies the explanation of PW-5 that he went out of the cinema hall to ease himself because cinema hall charged money for use of the toilet. Otherwise also, PW-10 in his deposition had stated that he was not shown the place where PW-5 squatted to ease himself. [Paras 26-27][22-F-H; 23-A-C]

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- D Besides that, PW-5 is not consistent because, in his statement under section 161 Cr.P.C., with which he was confronted during the course of his deposition, he had indicted 'G' along with two accused persons by stating that all three were present with the deceased but, during his deposition in Court, he stated that 'G' was not present. He is also not consistent with regard to the place where his statement was recorded. At one place he states that it was recorded at the police station and at another place he states that it was recorded at his shop. [Para 28][23-C-D]
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- F 6. Another important feature of the case is that, according to PW-10, PW-5's statement was recorded by him on 01.11.2001 at PW5's house. What was the reason for the police to go to the residence of PW-5 to record his statement is not disclosed by the prosecution. This Court finds it inexplicable as to why police would go to PW-5's residence to record his statement when the FIR makes no disclosure about PW-5's presence at the scene of crime or with regard to his knowledge about the incident. All these circumstances give rise to a lingering doubt as to whether, on discovery of the dead body in the forest, the accused were implicated at the instance of the police on suspicion rather than on information received from persons conversant with the facts. [Para 29][23-D-F]
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- J 7. Upon evaluation of the testimony of PW-2 and PW-5 carefully and with due caution, as is required in the facts of the case, their testimony does not inspire our confidence as to sustain

the conviction. Unfortunately, the courts below accepted the same as gospel truth, without testing it on the anvil of settled legal principles, thereby resulting in grave miscarriage of justice. This Court, therefore, conclude that the prosecution has failed to prove beyond reasonable doubt that the deceased was last seen alive in the company of the accused near the spot at the relevant time. [Para 30][23-G-H; 24-A]

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8. In so far as recovery of the country made pistol and knife from the person of the accused at the time of their arrest is concerned, the same does not inspire our confidence for the following reasons – According to PW-10, while he was looking out for the suspects/accused, received an information from an informer that the accused were to come to a specified place at 1600 Hours. But, there is no record of receipt of the said information even though it is stated to have been received few hours before the action. Assuming that such information was received, there appears no effort to rope in a public witness even though a locality, as per statement of PW-10, was just 200 meters away from that spot. Lastly, what is most interesting is that the investigating officer, who investigated the case relating to the offence punishable under the Arms Act, prepared the site plan of the place of arrest/recovery on 06.12.2001 even though arrest was allegedly affected on 24.11.2001, which, in the facts of the case, would suggest that it was an exercise to complete the formality. Moreover, the site plan does not disclose the place where the Jeep was hidden in the forest to ambush the accused. Having regard to the circumstances noted above, including the fact that ‘S’ was not named as a suspect in the FIR and his name cropped up later in the statement of PW-5, whose statement was recorded on the same day at his residence, even though, he was not cited as a witness in the FIR, bearing in mind the statement of PW-1 that the police made him to submit the second report indicting ‘S’, this Court is of the view that the police had shown extraordinary interest in implicating ‘S’ and therefore, for all the reasons above, the alleged recovery of gun and knife shown from the appellants does not inspire our confidence. In considered view of this Court, it would be unsafe to rely on such recovery to sustain the conviction. Insofar as forensic report/ballistic report

- A is concerned, the same has not even been put to 'S', from whom the country made pistol was seized, while recording his statement under section 313 of Cr.P.C., therefore, in any event, it would have to be eschewed from consideration. [Paras 31-32][24-B-G]

9. On putting the prosecution evidence to strict scrutiny
- B and testing the same on the anvil of settled legal principles as discussed above, this Court finds the evidence not confidence inspiring as to uphold the conviction of the accused appellants. The courts below have failed to properly evaluate and test the evidence by applying the correct legal principles. In such circumstances, the judgments of the courts below are liable to be set aside. The appellants are acquitted of all the charges for which they have been tried and convicted. [Para 33][25-A-C]

Kali Ram v. State of Himachal Pradesh (1973) 2 SCC 808 : [1974] 1 SCR 722; Rajesh Yadav & Another v. State of Uttar Pradesh (2022) 12 SCC 200; Jarnail Singh & Others v. State of Punjab (2009) 9 SCC 719 : [2009] 13 SCR 774 – referred to.

Case Law Reference

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|---|-------------------|-------------|---------|
| D | [1974] 1 SCR 722 | referred to | para 23 |
| E | (2022) 12 SCC 200 | referred to | para 26 |
| | [2009] 13 SCR 774 | referred to | para 26 |

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No.511 of 2011.

- F From the Judgment and Order dated 07.04.2010 of the High Court of Uttarakhand at Nainital in CRLA No.54 of 2004.

With

Criminal Appeal No.2345 of 2011.

- G Gopal Jha, Adv. (Amicus Curiae), Ms. Ankita Gautam, Dr. A.K. Gautam, Ravi Mehrotra, Nitin Juyal, Ashok Mathur, Sanket, Ms. Babita Sant, Advs. for the Appellant.

- H Jatinder Kumar Bhatia, Krishnam Mishra, Param Kumar Mishra, Rajeev Kumar Dubey, Ashiwan Mishra, Kamlendra Mishra, Advs. for the Respondent.

The Judgment of the Court was delivered by
MANOJ MISRA, J.

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1. These two appeals are against the judgment and order of the High Court of Uttarakhand at Nainital (for short “the High Court”), dated 07.04.2010, dismissing Criminal Appeals Nos.54 and 59 of 2004 filed against the judgment and order of Additional Sessions Judge/Fast Track Court Haldwani, Nainital (for short “the Trial Court”) dated 28.01.2004, and, thereby, affirming the conviction and sentence awarded to the appellants detailed below: (i) life imprisonment under section 302 read with section 34 of the Indian Penal Code, 1860 (for short “IPC”) along with one year R.I. under section 201 IPC in Sessions Trial (S.T.) No.93/2002 (State vs. Shabbir Ahmad and Another); (ii) one year R.I. with fine of Rs.500/- under section 25 Arms Act to appellant Shabbir in S.T. No.104 of 2002 (State vs. Shabbir Ahmed); and (iii) one year R.I. with fine of Rs.500/- under section 4/25 of Arms Act to appellant Ravi Mandal in connected S.T. No.105 of 2002 (State vs. Ravi Mandal).

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Introductory Facts:

2. On 01.11.2001, Man Singh (PW-1), father of Chhotu @ Surjeet (the deceased), on finding his son’s dead body in a forest, 150 meters west of Government Inter College, lodged a first information report (FIR) at P.S. Lalkuan, Haldwani, district Nainital at about 7.30 hrs, alleging therein that, — on 31.10.2001, at about 2100 Hours, the deceased was with his friends Govind and Ravi Bangali (later identified as Ravi Mandal); Govind, a criminal, had been influencing his son to choose a wrong path; therefore, he suspects that these persons have killed his son and concealed his body in the forest. Thereafter, on 10.11.2001, PW-1 gave a written information to the police stating that it was not Govind but Shabbir who along with Ravi and one Mazhar Khan were with the deceased on that fateful night. In this written information, it was alleged that Babloo (PW-7) had misled him to take the name of Govind.

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3. During the course of investigation, the police effected arrest of the two accused, namely, the appellants herein, and disclosed recovery of a 12 bore country made pistol with one live cartridge from Shabbir and a knife from Ravi Mandal, giving rise to two separate cases against each of the two accused under the Arms Act.

4. On completion of investigation three charge sheets were laid giving rise to three sessions trials which were connected with each other

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- A and decided by a common judgment, which has been affirmed by the High Court.

Prosecution Evidence:

- B 5. To appreciate the arguments advanced in this case, it would be apposite to notice the testimony of the prosecution witnesses in brief.
B The prosecution examined 10 witnesses, the gist of their testimony is as under:

- (i) PW-1 – Man Singh - Informant (father of the deceased)

C He is not an eyewitness of the murder. He, however, proved lodging of the FIR on 01.11.2001 and stated that, — on 31.10.2001 in the evening Babloo (PW-7) came to his residence, told him that the deceased, Ravi Bangali and Govind were asking for food and have sent him to fetch food for them; on that request, PW-1's wife (Urmila Devi-PW-3) cooked food, packed it and gave it to Babloo, who left with the food; next day, he came to know that dead body of his son was lying in the forest; he then visited the place, brought the dead body to Lalkuan Police Station and lodged the report; later, when he came to know that Govind was not with his son, rather it was Shabbir along with others who were there, he gave the second report (Ex. Ka-2) to the police on 10.11.2001. During cross examination, PW-1 admitted that there were three or four criminal cases against his son (the deceased) wherein, he was on bail.

F With regard to the sequence of events on the date of lodging the FIR, PW-1 stated that, — a constable with two men came in the morning to inform him that dead body of his son is lying in the forest; on getting the information he went to that place and brought the body to the police station to lodge the FIR whereafter, the body was sealed and sent to Haldwani Hospital for autopsy. He also stated that papers relating to recovery of tiffin box; collection of blood-stained earth etc. were prepared at the police station and he signed those papers at the police station itself. PW-1 also clarified that the second report (i.e. Ex. Ka-2) was dictated by the Sub-Inspector at the police station and he wrote whatever was told to him.

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At the fag end of his cross-examination, PW-1 stated that he had informed the Sub-Inspector regarding financial transactions with Govind and also about Govind not refunding the money, which gave rise to enmity.

(ii) PW-2 - Chandan Singh

He deposed that, — (a) he knew Shabbir Ahmad and Ravi Mandal; (b) they had come to his shop with the deceased at about 1900 Hours on 31.10.2001 and from there they proceeded towards the cinema hall; (c) later, in the night of 31.10.2001/ 01.11.2001, at about 0030 Hours, he saw the accused-appellants emerging from the forest and walking fast; (d) at that time, hands of Shabbir were blood-stained and Ravi's clothes were also having blood stains, (e) seeing PW-2, they got nervous, Shabbir threatened PW-2 by saying that if PW-2 discloses what he has seen to any one, he would meet the same fate as Chhotu (the deceased); (f) next day morning, PW-2 learnt that dead body of Chhotu has been found in that forest.

To show the reason for his presence there, at that odd hour of the night, PW-2 stated that, — his parents have a separate house at Khatta, where he goes at least once a week; that night, after having dinner, while returning from his parents' house and proceeding towards his own house/shop, at about 0030 Hours, he witnessed the incident.

During cross examination, PW-2 stated that, — his shop is run from a room in his house; it remains open from 0500 Hours till 2300 Hours; his house comprises of 3 rooms where he resides with his wife and five sons; the usual time of his dinner is 2100 Hours.

A suggestion was put to PW-2 that mother of Ravi (one of the appellants) is PW-2's neighbour on whose land PW-2 had constructed his shop. This suggestion was denied by PW-2.

With regard to the delay in giving information to the police, PW-2 stated that he was petrified by the incident and when the accused were arrested, he could muster courage to make his statement. During cross-examination,

A PW-2 admitted that he had been arrested under section 60 of the Excise Act and is on bail. He feigned ignorance to a suggestion that his bail bonds were arranged by parents of Chhotu.

(iii) PW-3 – Urmila Devi-Mother of the deceased

B She proved that on 31.10.2001, Babloo (PW-7), who used to work at the cinema hall, came to her house to fetch food for the deceased, consequently, food was cooked and supplied by her.

C During cross examination, she denied being a surety for the bail of Chandan (PW-2). However, she admitted that Chandan used to visit her house.

(iv) PW-4 – Smt. Mithilesh (Wife of Govind)

D PW-4 did not depose anything specific about the incident except that Shabbir had enmity with her husband and 8 to 10 days before the murder of Chhotu, Ravi Bangali and Shabbir had called her husband; in consequence, her husband left, but did not return thereafter; later, she received information from the police that her husband has been killed and the culprits caught.

E During cross examination, she admitted that the police had come to her house 2-3 days after the murder of Chhotu but, at that time, she had not informed the police that Govind and Chhotu had gone with the accused persons. She also admitted that the police made no enquiry from her and she did not lodge any complaint in respect of her husband's murder.

(v) PW-5 – Mahendra Khurana

G He stated that, — on 31.10.2001, while he was watching a night show at the cinema hall, he had to rush out to attend to nature's call, then he saw Chhotu (the deceased), Ravi Bangali and Shabbir going towards the forest; 2-3 minutes later, he heard sound of a gunshot and 5-7 minutes later, Ravi Bangali and Shabbir minus Chhotu were noticed running and talking to each other that they have settled their account with Chhotu as he had become a nuisance for them

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on account of his persistent demand for money. PW-5 stated that he did not disclose this fact to anyone in the night but in the morning, he came to know that Chhotu has been murdered.

During cross examination, he admitted that though toilet facility is available in the cinema hall but, on charge; therefore, he went out to ease himself. He stated that his statement was recorded in the morning, following the night of the incident; and for that purpose, he was called by the constable. On being confronted with his previous statement that he saw Govind, Chhotu, Ravi Bangali and Shabbir going towards the forest, PW-5 stated that he had disclosed the name of all, except Govind. He, however, admitted that he did not disclose to the police the place where he sat that night to ease himself.

(vi) PW-6 – Hanuman Prasad

He stated that, — on 31.10.2001 at about mid- night while he was returning from depot no.6, opposite to the cinema hall, he saw three persons, namely, Chhotu, Ravi Bangali and Shabbir talking to each other and going towards the forest; next day in the morning, he came to know that Chhotu has been murdered. He denied having seen Shabbir firing at the deceased. At this stage, the prosecution declared him hostile and sought his cross examination.

During cross examination by the prosecution, he denied that he gave a statement before the police about Shabbir shooting his companion and Ravi holding his leg.

During cross examination by the defence, he stated that he had not seen the incident and he had also informed the police that he had not seen the incident.

(vii) PW-7 – Babloo

He stated that, — on 31.10.2001, he met Chhotu at the gate of cinema hall; Chhotu asked him to get food for him from his residence; at that time, no one was present with Chhotu. PW-7 stated that he came to the residence of Chhotu, took food and brought it in three boxes but when

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- A he reached there with the food, he saw no one, therefore, he kept the food there. Next day morning, he came to know that Chhotu has been killed. At this stage, the prosecution declared him hostile and sought permission for his cross examination.
- B During cross examination by the prosecution, PW-7 admitted his signature on paper No.3/15 which was marked Ex. Ka-6. He also admitted that he gave a statement to the sub-inspector but denied that he saw Chhotu in the company of Shabbir and Ravi Bangali on 31.10.2001.
- C During cross examination at the instance of defence, PW-7 stated that he used to sell *chana* (gram) at the cinema hall; the cinema hall had toilets and no money is charged for use of those toilets. He also stated that during the course of investigation of this case, the police had beaten him and had detained him in the police lock-up for three days.
- D (viii) PW-8 – Dr. Anil Chandra K Sah (Autopsy surgeon)
He proved the autopsy report and stated that death of the deceased was due to shock and haemorrhage as a result of ante mortem gunshot.
- E (ix) PW-9 – Sub-Inspector Nanhe Lal (Investigating Officer of the cases under the Arms Act)
He proved the inquest report (Ex. Ka-7A) and autopsy related papers (Ex.K-8 to K-10). He also proved various stages of investigation of case crime No.756/01, under section 25 of Arms Act, and case crime No.757/01, under section 4/25 of Arms Act, as also submission of charge sheet and obtaining of sanction for prosecution under the provisions of the Arms Act.
- F During cross examination, PW-9 stated that on 06.12.2001 he prepared site plan of the place from where the accused were arrested and weapon was recovered. He sought to explain the delay in preparation of the site plan by stating that he was busy with other matters.
- G (x) PW-10 – SI Pramod Kumar Shah (Investigating Officer of the murder case)

He proved — registration of the FIR; visiting the spot with PW-9; inspection of the spot; preparation of site plan (Ex.Ka-15); lifting of: blood stained soil/plain soil, vide seizure memo Ex. Ka-4, and one empty 12 bore cartridge from the spot, vide seizure memo Ex.Ka-5 of which PW-1 is one of the witnesses; conducting inquest; recording statement of — complainant Man Singh (PW-1), Babloo (PW-7) and Mahender Khurana (PW-5); preparation of custody memo of the tiffin; recording statement of — Smt. Urmila Devi (PW-3) on 02.11.2001, Mithilesh (PW-4) on 03.11.2001, Hanuman (PW-6) on 07.11.2001; submission of application by Man Singh on 10.11.2001; and submission of charge sheet (EX.Ka-16). He also produced material exhibits etc. In addition to the above, he stated that accused Shabbir and Ravi Mandal were absconding, therefore, application to draw proceedings under section 82 of the Code of Criminal Procedure, 1973 (for short “Cr.P.C.”) was moved. Thereafter, on 24.11.2001 at 1530 Hours accused Shabbir and Ravi Mandal were arrested with a 12 bore country made pistol and knife respectively. He proved the arrest memo as Ex. Ka-17.

PW-10 stated that on 15.01.2002 the country made pistol, empty cartridge recovered from the spot and live cartridge seized at the time of arrest were sent to Forensic Science Laboratory (FSL), Agra for examination and its report has been submitted, as per which, EC-1 (empty cartridge found near the dead body) was fired from the pistol which was recovered from Shabbir. During cross examination, at the instance of accused Shabbir, PW-10 stated that, — in the FIR Shabbir was not named; PW-10 reached the place of occurrence at about 0800 Hours; the dead body was lying at the spot; the statement of Man Singh was recorded at the spot on 01.11.2001; Man Singh had informed him that Chhotu (the deceased) had not been coming home since last 10-12 days before the incident, however, no information regarding Chhotu was given earlier; Mahender Khurana (PW-5) had told that in the night he had seen Govind with Ravi, Chhotu and Shabbir going towards the forest; Man Singh on 01.11.2001 had stated that Govind had borrowed

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- A Rs.16,000/- from Chhotu; Man Singh's (PW-1's) statement was recorded thrice; Chandan Singh (PW-2) gave an affidavit on 18.02.2002, prior to that he did not come; Urmila Devi, whose statement was recorded on 02.11.2001 at her residence, did not disclose that PW-2 had seen the accused persons; and Mithilesh's (PW-4's) statement was recorded twice, one on 03.11.2001 and the other on 05.12.2001. PW-10 also stated that on their arrest Shabbir and Ravi had confessed that before killing Chhotu, they had killed Govind.
- B PW-10 further stated that statement of Mahender Khurana (PW-5) was recorded on 01.11.2001 at his residence; and PW-5 had not disclosed the place where he sat to ease himself that fateful night.
- C With regard to the sequence of events on the day of arrest of the two accused, PW-10 stated that, — on 24.11.2001, he had received information from an informer that at 1600 Hours accused persons were to come to their house; the said information was received at about 1430 Hours; on receipt of the information, PW-10 and his team arrived at the spot in their Jeep, which was hidden in the forest at some distance; after 10-15 minutes, PW-10 saw the accused persons coming and were accordingly arrested. PW-10 accepted that he did not try to rope in any public witness because the spot where arrest was effected was 200 meters away from the locality. PW-10 also stated that the site plan of the place of arrest and recovery was prepared on 06.12.2001 at his instance. PW-10 denied the suggestions that, — the dead body was brought by the complainant to the police station; the second complaint (Ex.Ka-2) was got written at his instance; and the accused were falsely implicated by preparing false documents while sitting at the police station.
- D PW-10 admitted that, — the deceased had criminal antecedents and had gone to jail many times; Mahender Khurana (PW-5) had not come to him for getting his statement recorded, rather PW-10 went to his house to record his statement; Mahender Khurana's statement was recorded four hours after information was provided by Man
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Singh (PW-1) on 01.11.2011; Mahender Khurana in his A statement had told that Govind was also present.

Statement under section 313 of the Criminal Procedure Code, 1973 (Cr.P.C.):-

6. In his statement recorded under section 313 Cr.P.C., Ravi B Mandal denied the incriminating circumstances put to him. He also denied recovery of the knife and claimed that nothing incriminating was recovered from his possession. However, he led no evidence in defence.

7. Similarly, Shabbir Ahmad in his statement under section 313 Cr.P.C. denied the incriminating circumstances appearing against him and stated that nothing incriminating was recovered from his possession. However, what is pertinent to note is that the ballistic expert report with regard to the use of the pistol allegedly recovered from Shabbir was not put to him while recording his statement under section 313 Cr.P.C. C

Trial Court Findings:-

8. The Trial Court relied on the testimonies of PW-2 (Chandan Singh) and PW-5 (Mahendra Khurana) to conclude that the deceased was last seen alive in the company of the accused going towards that forest/place from where body of the deceased was recovered; that PW-5 heard noise of gunshot coming from the forest soon after the deceased and the two accused entered that forest and, soon thereafter, saw the accused exiting that place minus the deceased. This, according to the Trial Court, was a clinching circumstance. The Trial Court also used the testimony of other witnesses including PW-6 to corroborate the testimony of the two main witnesses with regard to the deceased being last seen alive with the two accused around midnight in that area from where, next day morning, dead body of the deceased was recovered. The Trial Court noticed that there was no dispute with regard to the presence of moonlight on that night and there was no challenge to the capacity of the witnesses to identify the accused and the deceased. The Trial Court also noticed that as per FSL report the empty cartridge recovered from the spot was fired from the same pistol which was recovered from the possession of Shabbir. And since the autopsy report had confirmed that death of the deceased was caused by use of firearm, the Trial Court concluded that it was proved beyond doubt that the accused persons had committed murder of the deceased and to hide the evidence dumped the body of the deceased in the forest. They were thus convicted and sentenced accordingly. D E F G H

A High Court Findings:-

9. The High Court upheld the conviction upon finding the prosecution evidence reliable and corroborative of each other.
10. We have heard Ms. Ankita Gautam for the appellant Ravi Mandal; Mr. Gopal Jha, learned Amicus Curiae, for Shabbir; and Mr. B Jatinder Kumar Bhatia for the State of Uttarakhand, and have perused the record.

Submissions on behalf of the appellant Ravi Mandal:-

11. On behalf of Ravi Mandal, it was submitted that insofar as the evidence of the deceased being last seen in the company of the two accused is concerned, neither PW-1 (father of the deceased) nor PW-3 (mother of the deceased) had seen the deceased in the company of the two accused on 31.10.2001. Babloo (PW-7) though disclosed that on 31.10.2001 he met Chhotu (the deceased) but he did not depose about any of the two accused being with him. Insofar as the testimony of PW-2 (Chandan Singh) is concerned, no reliance is to be placed on it as he is not a witness arrayed in the chargesheet and there is no cogent explanation as to why he did not make a disclosure earlier. Moreover, he is a chance witness whose presence at the spot finds no proper explanation. Similarly, PW-5 too is a chance witness whose explanation for his presence at the spot, at that odd hour, is falsified by statement of PW-7 and PW-10. And insofar as PW-6 is concerned, he has been declared hostile. Thus, there is no reliable evidence of the deceased being last seen alive with the two accused.

12. In addition to the above, it was argued that the testimony regarding recovery of weapons from the accused does not appear convincing as there is no public witness to it; the site plan of the place of arrest and recovery was prepared several days after the alleged recovery which would suggest that there existed no place of recovery and arrest but, as an after thought, to complete the formality, the site plan was prepared.

- G 13. It was also argued that there is material discrepancy in the deposition of witnesses as to whether the FIR was lodged before, or after the dead body was brought to the police station. The statement of PW-1 suggests that he was informed by the police about his son's body being found, whereupon he went to the spot and brought the dead body to the police station to lodge the FIR; whereas, police witnesses state H

that they proceeded to the spot after PW-1 had lodged the report and at the spot they carried out inquest proceeding. It was urged that this discrepancy creates doubt as to whether the prosecution case was developed on guess work at the instance of the police. This doubt gets doubled because the name of Govind appeared in the first written report. And when it was found that Govind had already expired, the name of Govind was substituted with Shabbir. It was argued that from the evidence led, it is clear that the deceased was a person with criminal antecedents and therefore, could have had several enemies. Hence, according to the defence counsel, it is a case where in the night someone killed the son of PW-1; upon discovering his body, story was developed on the basis of guess work and so were the accused implicated. It was urged that the Trial Court and the High Court did not properly test the prosecution evidence and, therefore, the judgments of the two courts below are liable to be set aside.

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Submissions on behalf of the appellant Shabbir:-

14. The learned Amicus Curiae representing Shabbir adopted the submissions made by the learned counsel representing appellant Ravi Mandal and added that Shabbir was not named in the initial report. The statement of the witnesses would suggest that money was lent to Govind. Chhotu (the deceased) was demanding his money back from Govind and therefore, Govind had the motive. Consequently, on the basis of suspicion, the name of Govind was mentioned but when it was found that Govind is not traceable, or was possibly killed, Shabbir's name was substituted in place of Govind. In such circumstances, the implication of Shabbir is shrouded in suspicion and the prosecution story insofar as it relates to Shabbir, is not acceptable. The learned Amicus Curiae claimed that the alleged recovery of country made pistol is bogus and false which has no public witness to support. The ballistic report has also been questioned on the ground that there is no explanation as to why the country made pistol was not sent for forensic examination before 15.01.2002, when it was allegedly recovered on 24.11.2001. It was also argued that the ballistic report has not been put to the accused while recording his statement under section 313 Cr.P.C., hence it would have to be eschewed from consideration.

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Submissions on behalf of the State:-

15. Per contra, learned counsel for the State submitted that PW-7 proved that the deceased had called for food to the cinema hall; PW-

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- A 1 and PW-3 have corroborated PW-7 by stating that the food was supplied for three persons including the deceased; and PW-2 and PW-5 have proved that they saw the deceased and the two accused together at around midnight near the place from where dead body of the deceased was recovered next day morning. Therefore, the chain is complete to nail the accused. It was argued that the defence has not been able to demonstrate that PW-5 and PW-2 were inimical to the accused. Hence, there is no reason for them to lie. Moreover, defence has not questioned the capacity of either PW-2 or PW-5 to recognise the accused and Chhotu. There is also no question put to PW-5 to doubt the presence of moonlight. All the witnesses have stated that it was a full moonlight and
- B there is no challenge to this statement. In such circumstances, the testimony of PW-5 is reliable. Consequently, the Trial Court and the High Court were justified in placing reliance on the same.

- C 16. With regard to the testimony of PW-2, the learned counsel for the State submitted that PW-2 might not have been prompt in making a disclosure to the police about the incident, but his testimony cannot be discarded merely on that ground because, here is a case where the accused were criminals, apprehension in the mind of witnesses cannot be ruled out.

- D 17. In respect of the testimony of PW-6, it was argued that he too supported the prosecution case with regard to the deceased being with the accused that fateful evening; therefore, his testimony could be used to corroborate the testimony of other witnesses.

- E 18. The learned counsel for the State summed up his submissions by stating that the last seen circumstance has been proved to the hilt; the recovery of country made pistol has also been proved which along with forensic report connects the recovered weapon with the empty cartridge found at the spot; the autopsy report/ medical evidence proves that death was a consequence of gunshot and also accepts the possibility of death in the night hours of 31.10.2001 when the deceased was last seen alive with the accused therefore, the chain of circumstances is complete,
- F leaving no room of doubt with regard to the guilt of the accused. Hence, the conviction recorded by the Trial Court, affirmed by the appellate court, calls for no interference.

Discussion and Analysis:-

- G 19. We have considered the rival submissions and have perused H the records carefully. The striking feature of the case is that the FIR of

the case was lodged at 0730 Hours on 01.11.2001 after the dead body of informant's son was found in a forest. According to the testimony of police witnesses, it was the informant who gave information to the police about his son's dead body being found in the forest and thereafter, on the basis of the FIR, investigation commenced. Whereas, according to PW-1 the police informed him that his son's dead body has been found in the forest and thereafter, he went to the spot, brought the body to the police station and then lodged the report. This cleavage in the testimony of prosecution witnesses is important because it would throw a question as to whether the prosecution case is based on informant's own knowledge and information or on suggestions/guess work, may be at the instance of the police.

20. In the FIR there is no disclosure as to how the body was found in that forest. The only disclosure in the FIR is that on 31.10.2001 at about 2100 Hours, the informant's son was seen in the company of his friends Govind (non-accused) and Ravi Bangali. As to who had seen the deceased in the company of the aforesaid two persons is not disclosed in the FIR. No doubt, an FIR is not required to be an encyclopedia and there is no requirement to name all the witnesses from whom information is sourced, but, what is important is that, in the FIR, in addition to Ravi Bangali, suspicion is expressed against one Govind, who is stated to be a criminal and a person influencing informant's son to take a wrong path, and there is no disclosure about Shabbir i.e. one of the appellants. What is also strikingly absent in the FIR is that Chhotu (the deceased) and his friends, on that fateful evening, were to watch a night show of a movie and, therefore, Chhotu had sent PW-7 to fetch food from his parents (i.e. PW-1 and PW-3).

21. The prosecution story which develops later is to the effect that PW-7 (Babloo) was sent by Chhotu to fetch food for him and his friends from his house and Chhotu's mother (PW-3) sent the food in tiffin boxes. This part of the story is completely absent in the FIR even though it was lodged by father of the deceased who, as per his deposition, was having information about it. All of this would give rise to a suspicion as to whether the later improvements in the story were to create link evidence with the help of newly introduced witnesses. This suspicion is fortified by PW-10's deposition that during investigation PW-1 had disclosed that the deceased had not been coming home and, therefore, to test whether the request of PW-7 to pack food for the deceased was

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- A real or not, PW-1 had followed PW-7 and then he saw Chhotu, Ravi Bangali together and at some distance Shabbir was also there. Notably, PW-1 made no such disclosure during his deposition in Court. It is therefore clear that there was a deliberate attempt to multiply the witnesses. Another important improvement in the prosecution case is
- B with regard to its edifice i.e. the motive. Initially, the motive for the crime was enmity with Govind. But, later, when Govind was found not alive, he was replaced by Shabbir as an accused. All these circumstances taken cumulatively create a doubt in our mind as to whether it is a quintessential case of a blind murder (i.e. taking place at a secluded place in the darkness of night where no one could witness the crime),
- C therefore, to solve the case, while groping for witnesses, the prosecution story kept evolving, either on the basis of information received from time to time, or on guess work emanating from strong suspicion, or police suggestions. In that backdrop, in our view, this is a case where the testimony of prosecution witnesses, regardless of they having no proven grudge against the accused, was required to be strictly scrutinised with a degree of circumspection to ascertain whether it is credible, reliable/trustworthy and truthful, before basing a conviction thereupon.

22. In light of the above, when we scrutinise the prosecution evidence, we find that the prosecution case is primarily based on the evidence of the deceased being last seen alive with the two accused near the place of occurrence on or about the probable time of occurrence i.e. around midnight of 31.10.2001/ 01.11.2001. Such evidence is forthcoming from two witnesses, namely, PW-2 (Chandan Singh) and PW-5 (Mahender Khurana). Insofar as PW-6 is concerned, we do not consider him reliable, because, firstly, he was set up as an eye witness of Shabbir firing a gun shot at the deceased but he denied having witnessed such gunshot and, secondly, during cross examination, he stated that he had not seen the incident.

23. Insofar as PW-2 is concerned, admittedly, he is not listed as a witness in the police report/charge sheet. He gave his statement to the police on an affidavit for the first time on 18.02.2002, that is, the date when the police report was prepared. This implies that he remained silent for as long as three and a half months. In *Kali Ram v. State of Himachal Pradesh*¹, a three Judge bench of this Court, while discarding the testimony of one of the witnesses who made a delayed disclosure of

H ¹(1973) 2 SCC 808

the incriminating circumstances of which he was aware much earlier, A
held/observed:

“14. ... We find it difficult to accept this part of the deposition of Parma Nand. Parma Nand admits that he came to know of the murder of Dhianu and Nanti about four days after those persons were found to have been murdered. It would, therefore, follow that Parma Nand came to know of the murder of Dhianu and Nanti on or about October 4, 1968. Had the accused left for the house of Dhianu deceased on the evening of September 29 and had Parma Nand PW come to know that Dhianu and Nanti were murdered in their house, this fact must have aroused the suspicion of Parma Nand regarding the complicity of the accused. Parma Nand, however, kept quiet in the matter and did not talk of it. The statement of Parma Nand was recorded by the police on December 11, 1968. **If a witness professes to know about a gravely incriminating circumstance against a person accused of the offence of murder and the witness keeps silent for over two months regarding the said incriminating circumstance against the accused, his statement relating to the incriminating circumstance, in the absence of any cogent reason, is bound to lose most of its value.** No cogent reason has been shown to us as to why Parma Nand kept quiet for over two months after coming to know of the murder of Dhianu and Nanti about the fact that the accused had left for the house of the deceased shortly before the murder. We are, therefore, not prepared to place any reliance upon the second part of the deposition of Parma Nand.”

(Emphasis supplied) F

24. Taking note of the legal principle extracted above, we have to examine whether, for the delay in disclosure, there was a cogent explanation offered by PW-2. In the instant case, the only explanation offered by PW-2 for his three and a half month's silence is that he felt threatened. With regard to his threat perception, PW-2 stated that in the night of the incident when he witnessed Ravi Bangali and Shabbir Ahmad emerging from the forest, soon after the incident, he noticed their hands and clothes blood stained. On spotting PW-2, those two accused threatened him by saying that if he (PW-2) tells to anyone about what he has seen, he would meet the same fate. PW-2 stated that with the arrest of the two accused his fear vanished, therefore, he is now appearing as G H

- A a witness. In our view, if this was the reason for him not to make the disclosure earlier, there should have been a prompt disclosure by him once the accused were arrested. Notably, the two accused were arrested on 24.11.2001, yet, till 18.2.2002 no disclosure was made by him. Therefore, in our considered view, the explanation offered by him for the delay in making disclosure is not confidence inspiring.
- B 25. Assuming that we accept the explanation for the delay in making the disclosure, considering the place and time of occurrence, the presence of PW-2 at the spot does not appear natural, particularly, at that odd hour of the night. To explain his presence at the scene of crime, PW-2 stated that his parents stay at another place in Mohalla Khatta
- C and, therefore, to meet them he visited them that fateful night and on way return he could witness the incident. During cross examination, PW-2 stated that he usually takes dinner at 2100 Hours with his family; and that he used to visit his parents at least once a week. According to PW-2, that fateful night he left his house to visit his parents after having dinner in his own house and on way return, at 0030 Hours he witnessed the incident. This explanation is not confidence inspiring, particularly, because his parents have not been interrogated or examined to corroborate PW-2's visit to their house at that odd hour of the night. In our view, PW-2 is a mere chance witness, whose presence at the spot, at that hour, is not satisfactorily explained therefore, bearing in mind that he
- D kept silent for unusually long i.e. for more than three and a half months, his testimony is not worthy of any credit. In our view, the courts below erred by placing reliance on his testimony.

- E 26. As regards the testimony of PW-5 (Mahender Khurana) he too, is a chance witness. As to when testimony of a chance witness F could be relied, the law is settled, which is, that the evidence of a chance witness requires a very cautious and close scrutiny and a chance witness must adequately explain his presence at the place of occurrence. Deposition of a chance witness whose presence at the place of incident remains doubtful should be discarded (*See: Rajesh Yadav & Another v. State of Uttar Pradesh²; and, Jarnail Singh & Others v. State of Punjab³.*)

G 27. The explanation offered by PW-5 for his presence at the spot at that odd hour appears false. According to PW-5, he was having an

H ² (2022) 12 SCC 200

³ (2009) 9 SCC 719

upset stomach, therefore, while watching a night show of a movie, to attend to nature's call, he came out of the cinema hall and, while he was easing himself, he got the chance to witness the incident. It be noted that the investigating officer (PW-10) and PW-7, a gram vendor in that cinema hall, have deposed that there are toilets in the cinema hall where no money is charged for their use. This falsifies the explanation of PW-5 that he went out of the cinema hall to ease himself because cinema hall charged money for use of the toilet. Otherwise also, PW-10 (the investigating officer) in his deposition had stated that he was not shown the place where PW-5 squatted to ease himself.

28. Besides that, PW-5 is not consistent because, in his statement under section 161 Cr.P.C., with which he was confronted during the course of his deposition, he had indicted Govind, Ravi Bangali and Shabbir by stating that all three were present with the deceased but, during his deposition in Court, he stated that Govind was not present. He is also not consistent with regard to the place where his statement was recorded. At one place he states that it was recorded at the police station and at another place he states that it was recorded at his shop.

29. Another important feature of the case is that, according to PW-10 (investigating Officer), PW-5's statement was recorded by him on 01.11.2001 at PW-5's house. What was the reason for the police to go to the residence of PW-5 to record his statement is not disclosed by the prosecution. We find it inexplicable as to why police would go to PW-5's residence to record his statement when the FIR makes no disclosure about PW-5's presence at the scene of crime or with regard to his knowledge about the incident. All these circumstances give rise to a lingering doubt in our mind as to whether, on discovery of the dead body in the forest, the accused were implicated at the instance of the police on suspicion rather than on information received from persons conversant with the facts.

30. For all the reasons above, when we evaluate the testimony of PW-2 and PW-5 carefully and with due caution, as is required in the facts of the case, we find that their testimony does not inspire our confidence as to sustain the conviction. Unfortunately, the courts below accepted the same as gospel truth, without testing it on the anvil of settled legal principles, thereby resulting in grave miscarriage of justice. We, therefore, conclude that the prosecution has failed to prove beyond

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- A reasonable doubt that the deceased was last seen alive in the company of the accused near the spot at the relevant time.

31. In so far as recovery of the country made pistol and knife from the person of the accused at the time of their arrest is concerned, the same does not inspire our confidence for the following reasons —

- B According to PW-10, the investigating officer, while he was looking out for the suspects/accused, received an information from an informer that the accused were to come to a specified place at 1600 Hours. But, there is no record of receipt of the said information even though it is stated to have been received few hours before the action. Assuming that such information was received, there appears no effort to rope in a public witness even though a locality, as per statement of PW-10, was just 200 meters away from that spot. Lastly, what is most interesting is that the investigating officer, who investigated the case relating to the offence punishable under the Arms Act, prepared the site plan of the place of arrest/recovery on 06.12.2001 even though arrest was allegedly effected
- C on 24.11.2001, which, in the facts of the case, would suggest that it was an exercise to complete the formality. Moreover, the site plan does not disclose the place where the Jeep was hidden in the forest to ambush the accused. Having regard to the circumstances noted above, including the fact that Shabbir was not named as a suspect in the FIR and his name cropped up later in the statement of PW-5, whose statement was recorded on the same day at his residence, even though, he was not cited as a witness in the FIR, bearing in mind the statement of PW-1 that the police made him to submit the second report indicting Shabbir, we are of the view that the police had shown extraordinary interest in implicating Shabbir and therefore, for all the reasons above, the alleged recovery of gun and knife shown from the appellants does not inspire our confidence. In our considered view, it would be unsafe to rely on such recovery to sustain the conviction.

- G 32. Insofar as forensic report/ballistic report is concerned, the same has not even been put to Shabbir, from whom the country made pistol was seized, while recording his statement under section 313 of Cr.P.C., therefore, in any event, it would have to be eschewed from consideration.

Conclusion:-

- H 33. In light of the discussion above, we are of the considered view that the case in hand is a quintessential case where to solve out a

blind murder, occurring in a forest in the darkness of night, bits and pieces of evidence were collected which warranted a strict scrutiny before basing a conviction thereupon. On putting the prosecution evidence to strict scrutiny and testing the same on the anvil of settled legal principles as discussed above, we find the evidence not confidence inspiring as to uphold the conviction of the accused appellants. In our view, the courts below have failed to properly evaluate and test the evidence by applying the correct legal principles. In such circumstances, the judgments of the courts below are liable to be set aside. Consequently, the appeals are allowed. The impugned judgment and orders of the High Court and the Trial Court are set aside. The appellants are acquitted of all the charges for which they have been tried and convicted.

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34. The appellants are reportedly on bail, they need not surrender. Their bail-bonds, if any, are discharged. In case they are not on bail, they shall be released forthwith unless wanted in any other case.

Ankit Gyan

Appeals allowed.

(Assisted by : Manish Tomar and Aarsh Choudhary, LCRAs)