Ramesh Chand Rai vs State Of U.P. on 6 July, 2018

Equivalent citations: AIRONLINE 2018 ALL 2695

Bench: Amreshwar Pratap Sahi, Rajeev Misra

HIGH COURT OF JUDICATURE AT ALLAHABAD

Reserved on: 6.2.2018 A.F.R.

Delivered on: 6.7.2018

Court No. - 40

Case :- CRIMINAL APPEAL No. - 162 of 2011

Appellant :- Ramesh Chand Rai

Respondent :- State Of U.P.

Counsel for Appellant :- Lav Srivastava,Arun Srivastava,N.D.Rai,Rajesh Pratap Singh,S.R.

Counsel for Respondent :- Govt. Advocate,Kailash Prakash Pathak

With

Case :- CRIMINAL APPEAL No. - 89 of 2011

Appellant :- Ganga Yadav

Respondent :- State Of U.P.

Counsel for Appellant :- Sheo Ram Singh,Janardan Yadav,P.C.Srivastava

Counsel for Respondent :- Govt. Advocate,K.P.Pathak

Hon'ble Amreshwar Pratap Sahi,J.

Hon'ble Rajeev Misra,J.

(Delivered by Hon'ble Rajeev Misra, J.)

1. The present criminal appeals originate out of the judgement and order dated 22.12.2010, passed by the Additional Sessions Judge, Court No. 9, Azamgarh in S.T. No. 401 of 2004 (State Vs. Ramesh Chand Rai and Another), under Section 302 I.P.C., P.S. Tahbarpur, District Azamgarh, S.T. No. 402 of 2004 (State Vs. Ramesh Chand Rai) under Sections 3/25 Arms Act, P.S. Tahbarpur, District Azamgarh and S.T. No. 403 of 2004 (State Vs. Ganga Yadav) under Sections 3/25 Arms Act, P.S. Tahbarpur, District Azamgarh, whereby the accused appellants have been convicted under Section 302 IPC and awarded rigorous imprisonment along with fine of Rs. 20,000/- each. Upon failure to deposit the amount of fine, the accused appellants are to further undergo simple imprisonment of two years. Moreover, the accused-appellants were also convicted under Section 3/25 Arms Act and thus, they are to undergo rigorous imprisonment of one year along with deposit of fine of Rs. 2,000/- each. Upon failure to deposit the amount of fine, the accused-appellants are to further undergo additional imprisonment of three months.

(2) We have heard Sri V. P. Srivastava, learned Senior Counsel assisted by Mr. P.C. Srivastava and Mr. Rajesh Pratap Singh, learned counsel for the appellants in both the Criminal Appeals, Mr. Saghir Ahmad, the learned A.G.A. alongwith Mr. Rishi Chaddha, learned A.G.A. Mr. Awdesh Kumar Shukla brief holder for the State and Mr. K. P. Pathak, learned counsel for the complainant.

3. As per the prosecution story, one of accused-appellants Ganga Yadav S/o Pati Ram Yadav was sent to jail for illegally possessing country made gun (Katta) and live cartridges. It was his apprehension that Bal Chand Yadav was responsible for his arrest regarding the aforesaid and accordingly, he bore enmity with Bal Chand Yadav . On 6.6.2004, the first informant Deep Chand Yadav along with Bechan Yadav, Liladhar Yadav and Dinesh Yadav riding on two separate bicycles were going from Manjhari Bazar via khadanja Marg to their village. As they reached the house of Maikuram of village Manjhari on the Khadanja Marg, Bal Chand Yadav brother of Deep Chand Yadav, who was riding his motorcycle crossed them. Ganga Yadav and Ramesh Chand Rai, who were riding another motorcycle and were coming behind Bal Chand Yadav overtook Bal Chand Yadav as he reached the house of Sahku Yadav of village Atapur at around 7:30 pm which is situate at the end of the Khadanja Marg, Ganga Yadav and Ramesh Chand Rai stopped Bal Chand Yadav. Thereafter, Ganga Yadav with his country made gun fired at Bal Chand Yadav on which he fell down along with his motorcycle and died on the spot.

4. Deep Chand Yadav, brother of the deceased Bal Chand Yadav, gave a written report (Ext. Ka.1) of the aforesaid occurrence on 6.6.2004 at P.S. Tahabarpur, District Azamgarh, which was in his hand writing. On the basis of the same, an F.I.R dated 6.6.2004 (Ext. Ka.13) was registered at P.S. Tahbarpur District Azamgarh as Case Crime No. 240 of 2004 under Section 302 IPC. P.S. Haidarpur, District Azamgarh. A perusal of the F.I.R. will go to show that the same was lodged at 21.05 i.e 9.05 pm, naming the accused-appellants. The distance between the place of occurrence and

the police station was shown to be 13 km, and the timing of the occurrence was shown as 7:30 pm.

5. Accordingly, the Investigating Officer P.W. 3 Suresh Yadav came on the spot on 6.6.2004 at around 12:00 pm along with two police constables He recovered the dead body and took the same along with him.

6. The inquest/panchayatnama (Ext. Ka.19) of the body of the deceased was conducted on the next day i.e. 7.6.2004. As per the panchayatnama/inquest report, the same commenced at 6:10 am and concluded at 7:25 am. In the opinion of the panch witnesses namely (I) Deep Chand Yadav (2) Pandhari Yadav (3) Ramnath Yadav (4) Indal Yadv (5) Madan Lal Guri, the cause of death of deceased Bal Chand Yadav was on account of the fire arm injuries found on his body. As such, the death of the deceased was characterized as Homicidal. One of the panch witnesses namely Deep Chand Yadav, who is the first informant was also produced by the prosecution as P.W.-1.

7. After the Inquest/panchayatnama of the deceased had been done, the Investigating Officer completed the paper formalities and sent the dead body of the deceased for post-mortem vide Police Form No. 13 dated 07.06.2004 (Ext. Ka.20). P.W.-6, Dr. Nand Lal conducted the autopsy upon the body of the deceased on 7.6.2004. The injuries found on the body of the deceased were recorded in the post-mortem report (Ext.Ka-30) which are reproduced herein below:-

> i. Firearm wound of entry 3cm. X 2cm. x neck cavity deep on left side neck 7cm. below left pinna. Blackening and tattooing present.
>
> ii. Firearm wound of exit 1.5 cm x 1.0 cm x neck cavity deep on right side neck to 5 cm below right pinna, wound is fresh and through injury no. 1.
>
> iii. Firearm wound of entry 2.0 cm x 2.0 cm x chest cavity deep. Left side back 2 cm. below injuries of left scapula, Blackening present. 5th rib is fractured on left side.
>
> iv. Firearm wound of exit 1.0 cm x 1.0 cm x chest cavity deep on front of left side of chest only 3.0 cm. medial to left nipple.
>
> v. Abrasion 8 cm x 4 cm on right side back just above right iliac crest.

8. Having got the aforesaid formalities completed i.e. the inquest/panchayatnama and post-mortem of the body of the deceased, the Investigating officer namely Suresh Yadav (P.W.-3) again visited the place of occurrence on 7.6.2004. He recovered the motorcycle driven by the deceased Bal Chand Yadav i.e. Hero Honda motorcycle bearing registration No. UP. 50F-5900 and gave the same in the supurdigi of the first informant. He, thereafter, prepared its recovery memo dated 7.6.2004 (Ext. ka-2). He also recovered an empty cartridge from the place of occurrence and prepared its recovery memo dated 7.6.2004 (Ext. Ka-3). Thereafter, the Investigating Officer collected the sample of plain earth as well as earth mixed with blood and prepared its memo dated 7.6.2004 (Ext. Ka-4). One of the accused Ramesh Rai was arrested on 9.6.2004. Accordingly, an arrest memo dated 9.6.2004 (Ext. Ka-10) was prepared. On the same day on his pointing out a country made gun of 303 bore

(katta) was recovered and a memo of recovery to that effect dated 9.6.2004 (Ext. Ka-7) was prepared. Accordingly, the Investigating Officer lodged an F.I.R. dated 9.6.2004 against Ramesh Chand Rai with the police station Tahbarpur, District Azamgarh which was registered as Case Crime No. 246/04 under Sections 3/25 Arms Act (Ext. Ka-17). Subsequent, to the aforesaid the Investigating Officer prepared the site plan with index on 9.6.2004 (Ext. Ka-8) followed by another site plan with index dated 11.6.2004 (Ext. Ka-24). At this stage, the other accused Ganga Yadav surrendered in Court on 17.6.2004. The Investigating Officer took the accused Ganga Yadav on police remand on 22.6.2004 and on his pointing out a country made gun (katta) was recovered for which a recovery memo dated 22.6.2004 (Ext. Ka-5) was prepared. Accordingly, an F.I.R. dated 22.6.2004 (Ext. Ka-15) was lodged by the Investigating Officer Suresh Kumar Yadav against the other accused Ganga Yadav with the police station Tahberpur, District Azamgarh registered as Case Crime No. 297 of 2004 under Sections 3/25 Arms Act. Thereafter, the Investigating Officer prepared the site plan along with Index on 22.6.2004 (Ext. Ka-6) followed by another site plan with index prepared on 23.6.2004 (Ext. Ka-27). The recoveries were sent to the Forensic Laboratory which submitted its report dated 7.10.2004/18.10.2004 (Ext. Ka-31) and the report dated 29.1.2005 (Ext. Ka-32).

9. The Investigating Officer, S.I. Ram Sakal Yadav after having recorded the statement of various witnesses and having collected the material evidence, completed the investigation. He thereafter submitted the charge sheet dated 5.7.2004 in Case Crime No. 240 of 2004 under Section 302 IPC, whereby both the accused-appellants were charge sheeted for an offence under Section 302 IPC. Thereafter, the CJM, Azamgarh took cognizance vide order dated 20.7.2004. Subsequently, the Investigating Officer submitted the charge sheet dated 11.6.2004 in Case Crime No. 246 of 2004 under sections 3/25 Arms Act. Cognizance on the basis of the aforesaid was taken by the A.C.J.M., Azamgarh vide order dated 22.7.2004. Ultimately, the charge-sheet dated 23.6.2004 was submitted in Case Crime no. 297 of 2004 and cognizance was taken by the A.C.J.M, Azamgarh, vide order dated 22.07.2004. By separate orders dated 13.12.2004, the A.C.J.M., Azamgarh committed the cases to the court of sessions. Accordingly, S.T. No. 401 of 2004 (State Vs. Ramesh chand Rai and Another) under Section 302 IPC, PS. Tahbarpur, District Azamgarh, arising out of Case Crime No. 240 of 2004 under Section 302 IPC P.S. Tahbarpur, District Azamgarh, S.T. No. 402 of 2004 (State Vs. Ramesh Chand Rai) under sections 3/25 Arms Act, arising out Case Crime No. 246 of 2004 under Sections 3/25 Arms Act, P.S. Tahbarpur District Azamgarh and S.T. No. 403 of 2004 (State Vs. Ganga Yadav) under sections 3/25 Arms Act, P.S. Tahbarpur, District Azamgarh arising out of Case Crime No. 297 of 2004 under Sections 3/25 Arms Act came to be registered in the court of sessions.

10. Thereafter, the Court below vide separate orders dated 13.12.2004 framed the charges against the accused persons. Both the accused-appellants were charged firstly for an offence under Section 302/34 IPC and secondly, for an offence under sections 3/25 Arms Act.

11. The accused-appellants pleaded not guilty and demanded trial.

12. The prosecution in order to prove its case produced the following witnesses:-

P.W.1 Deep Chand Yadav First Informant P.W.2 Dinesh Yadav Eye witness P.W.3 Suresh Yadav Inestigating Officer of Case Crime No. 240 of 2004.

P.W.4 C.P. No. 546 Mohan Yadav Scribe of the F.I.R.

P.W.5 Ram Sakal Yadav Investigating Officer who conducted the investigation in the case under Section 3/25 Arms Act.

P.W.6 Dr. Nand Lal He conducted the post-mortem

13. Apart from relying upon the testimony of the aforesaid witnesses, the prosecution also relied upon certain documentary evidence which were duly exhibited. The same are catalogued herein below:-

Ext. Ka-1 Written Report Proved by P.W. 2 Ext. Ka-2 Recovery memo of motor cycle Proved by P.W. 2 Ext. Ka-3 Recovery memo of empty cartridge Proved by P.W.2 Ext. Ka-4 Recovery memo of blood stained and plain earth Proved by P.W.2 Ext. Ka-5 Recovery memo of country made gun of 303 bore.

Proved by P.W.2 Ext. Ka-6 Site plan with index Proved by P.W.2 Ext. Ka-7 Recovery memo of country made gun of 303 bore Proved by P.W.2 Ext. Ka-8 Site plan with Index Proved by P.W.2 Ext. Ka-9 Site plan with Index Proved by P.W.2 Ext. Ka-10 Memo of arrest of accused Ramesh Chand Rai Proved by P.W.2 Ext. Ka-11 Two katta of 303 bore and one empty cartridge of 303 bore sealed and sent to forensic laboratory Proved by P.W.2 Ext. Ka-12 Charge-sheet Proved by P.W. 2 Ext. Ka-13 F.I.R. dated 6.6.2004 Proved by P.W. 4 Ext. Ka-14 Nakal Report Proved by P.W. 4 Ext. Ka-15 F.I.R. dated 22.6.2004 Proved by P.W. 1 Ext. Ka-16 Nakal Tahreer Proved by P.W. 3 Ext. Ka-17 F.I.R. dated 9.6.2004 Proved by P.W. 1 Ext. Ka-18 Nakal Report relating to Case Crime No. 246/04 Proved by P.W.4 Ext. Ka-19 Panchayatnama/ Inquest report Proved by P.W.5 Ext. Ka-20 Police Form 13 Proved by P.W.5 Ext. Ka-21 Photonash letter R.I. Proved by P.W.5 Ext. Ka-22 Letter of R.I Proved by P.W.5 Ext. Ka-23 Letter of C.M.O Proved by P.W.5 Ext. Ka-24 Site plan with Index Proved by P.W.5 Ext. Ka-25 Charge-sheet Proved by P.W.5 Ext. Ka-26 Order dated 28.06.2004 passed by the District Magistrate Proved by P.W.5 Ext. Ka-27 Site Plan with Index Proved by P.W.5 Ext. Ka-28 Charge-sheet Proved by P.W.5 Ext. Ka-29 Order of District Magistrate, Azamgarh dated 28.6.2004 Proved by P.W.5 Ext. Ka-30 Post-mortem report Proved by P.W.6 Ext. Ka-31 Report of the forensic laboratory dated 18.10.2004.

Report of the Forensic Laboratory dated 7.10.2004.

Ext. Ka-32 Report of the forensic laboratory dated 29.1.2005.

14. After the prosecution witnesses had been examined all the incriminating material and circumstances were placed before the accused-appellants for their version regarding the incident in view of Section 313 Cr.P.C. The accused-appellants denied all the questions one by one by repeatedly saying that either it is false or they pleaded their ignorance regarding the same. However, in reply to question nos. 25 and 26, a departure was made wherein the accused-appellants stated that they have been falsely implicated on account of enmity. Further it was stated that they are innocent as the deceased was murdered in the night and the accused appellants have been falsely implicated. Thus the occurrence was admitted to the accused-appellants with the aforesaid rider with which we shall deal in the later part of the judgement.

15. In the light of the aforesaid, the following submissions were raised on behalf of the accused-appellants regarding their innocence and the fallacy in the prosecution case before the court below, A. The FIR is ante-timed B. P.W.-1 and P.W.-2 are not eye witnesses of the occurrence.

C. P.W.-2 has not seen the occurrence.

D. There is no motive on the part of the accused to commit the crime.

E. The place of occurrence is being changed.

F. There is no independent witness of the occurrence.

G. The recovery of weapon alleged to be used in the commission of the offence is doubtful.

16. The aforesaid submissions raised on behalf of the accused-appellants could neither singularly nor cumulatively dislodge the prosecution case and accordingly the court below convicted the accused-appellants of the charges levelled against them vide judgement and order dated 20.12.2010. Feeling aggrieved by the aforesaid judgement and order, the accused-appellants have now, come up in appeals.

17. Mr. V. P. Srivastava, the learned Senior Counsel assisted by Mr. P.C. Srivastava, Advocate for the accused-appellants critically placed the entire evidence before us and on the basis thereof, the following distinguishing facts of the present case were pointed out by him before us:

> I. In the FIR dated 06.06.2004, only one of the accused Ganga Yadav has been assigned the role of firing, whereas P.W.-1 Deep Chand Yadav the first informant in his testimony has assigned the role of firing to both the accused-appellants.
>
> II. P.W.-1 in his testimony has stated that he P.W.-1(Deep Chand Yadav) his 'Bhanja' (sister's son), Leela Dhar Yadav and his nephew Dinesh Yadav were riding on two different bicycles. However, Leela Dhar Yadav has not been produced in evidence.
>
> III. P.W.-2 in his testimony has stated that the four persons namely P.W.-2 Dinesh, P.W.-1 Deep Chand, Bechan and Leela Dhar were riding on two different bicycles.

However, Bechan has not been produced in evidence.

IV. PW.-2 in his testimony has assigned the role of firing to both the accused-persons, whereas in the FIR, the role of firing has been assigned to one of the accused namely Ganga Yadav.

V. None of the case law cited on behalf of the accused-appellants before the court below was considered being distinguishable on facts. The same is manifestly illegal.

VI. There is nothing on the record to connect the recovered motorcycle no. U.P. 50F-5900 with the accused-appellants.

VII. According to the FIR version of the prosecution case, P.W.-1 Deep Chand Yadav, Bechan Yadav and Leela Dhar Yadav were riding on two different bicycles. However, none of the bicycles have been recovered.

VIII. The dead body of the deceased was taken by the Investigating Officer in the mid-night of 06.06.2004/ 07.06.2004 in a private Jeep. Two police constables also accompanied the Investigating Officer at this point of time. However, the said two police constables who accompanied the Investigating Officer have not been produced in evidence.

IX. The material exhibits namely the country made guns and empty cartridge were not produced in the Court.

X. As per the postmortem report two shots were fired upon the deceased. There is no evidence regarding reloading of the country made gun used in the commission of the crime, but an empty cartridge was recovered from the place of occurrence (Ext. Ka-3).

XI. After the recovery of the empty cartridge from the place of occurrence, the Investigating Officer prepared the recovery memo dated 07.06.2004 (Ext. Ka.-3). However, the bore of the empty cartridge has not been mentioned therein.

XII. A country made gun which was recovered from the accused appellant Ganga Yadav was marked as (1/04) and the country made gun recovered from the accused appellant Ramesh Chand Rai was marked as (2/04). The empty cartridge recovered from the place of occurrence was marked as (EC-1). As per the Ballistic Report Smell and particles were found to be present in the two country made guns. EC-1, i.e., the empty cartridge tallied with 2/04, i.e., the country made gun recovered at the pointing out of Ramesh Chand Rai.

XIII After the permission had been accorded by the District Magistrate to sent the recoveries for ballistic report , the recoveries were not properly sealed and kept in the

manner as required in law which creates a doubt regarding the same.

XIV. The site plan does not mention the spot of recovery of the empty cartridge recovered by the Investigating Officer from the place of occurrence.

XV. By referring to the site plan it was urged by the learned Senior Counsel for the accused-appellants that the accused-appellants could not have committed the crime in question as the nature of the injuries sustained by the deceased could not have been caused in the manner the incident is alleged to have occurred by the prosecution.

XVI. Referring to the statements of the prosecution witnesses and by critically highlighting the places where the deceased and the prosecution witnesses met, the distance between the different places, where the witnesses had gone, the time spent on the way, the very presence of the prosecution witnesses at the time and place of occurrence was sought to be doubted.

18. On the basis of the aforesaid distinguishing facts Mr. V. P. Srivastava, the learned Senior Counsel crystallized his submissions under the following heads in support of the appeals:-

A. FIR is ante-timed.

B. Place of occurrence is doubtful.

C. P.W.-2 Dinesh Yadav is a chance witness.

D. The accused appellants have enmity with the deceased and therefore they have been falsely implicated. Moreover, no motive can be assigned to the accused appellants to commit the crime.

E. The role of firing has been improved in the testimony of the two eye witnesses namely P.W.-1 and P.W.-2 over the FIR version.

F. The manner of occurrence is wholly doubtful.

G. On the basis of the site plan the prosecution case was sought to be demolished by submitting that the incident could not have occurred in the manner as alleged by the prosecution in view of the nature of the injuries suffered by the deceased.

H. There is no source of light on the basis of which the prosecution witnesses could have seen the occurrence.

I. P.W. -5 is not an eye witness but a witness of fact.

J. P.W.-6 is not a reliable or credible witness.

K. Recoveries are doubtful.

L. Two persons namely, Liladhar Yadav and Bechan Yadav, who are alleged to be present on the spot, have not been produced in evidence.

19. Before we proceed to examine the veracity of the varied submissions urged by the learned Senior Counsel for the accused-appellants, it would be appropriate to refer to the statements of the accused-appellants under Section 313 Cr.P.C., for better appreciation of the submissions so made. A glance at the said statements would clearly reveal that the accused-appellants have clearly admitted the happening of the occurrence in which they have been implicated. However, the only exception pleaded to the aforesaid admission is that the deceased was murdered in the night at some other place and the accused-appellants have been falsely implicated on account of enmity. The accused-appellants in their statements have neither explained the different place of occurrence as alleged, the timing of the incident which according to them was night and the alleged enmity in their statements under Section 313 Cr.P.C., nor they have themselves deposed before the court below as a witness to explain the same nor they have produced any witness to explain the alleged enmity and how on that basis the accused-appellants have been falsely implicated. Thus in view of the aforesaid, the only version of the occurrence before the Court is the prosecution version.

20. At this stage, it would be apt to refer to the cardinal rule of criminal jurisprudence that in a case of direct evidence (a) motive is not a relevant factor and (b) the prosecution can succeed only when the eye witnesses of the occurrence are held to be credible and reliable and their testimony is trustworthy, (c) if the defence has failed to or omitted to cross examine a witness on a particular issue then it cannot be raised in appeal.

21. Thus in the light of the aforesaid established legal position, the following three principal questions arise for determination in the present criminal appeals.

(I) Whether the prosecution story as disclosed in the F.I.R. is final and no elaboration of the same can be made in the testimony of the eye-witnesses.

(II) Whether the two eye-witnesses, i.e., P.W.-1 Deep Chand Yadav and P.W.-2 Dinesh Yadav are credible and reliable witnesses and their testimony is trustworthy.

(III) Whether the various factual submissions made by the learned counsel for the appellant are sufficient enough to conclude that the prosecution case is doubtful or the same is not established beyond reasonable doubt.

22. Mr. V.P. Srivastava, the learned Senior Counsel commenced his challenge to the conviction awarded by the Court below by submitting before us that there is a complete somersault in the prosecution case from the one stated in the F.I.R. and the one narrated in the testimony of the two prosecution eye witnesses. According to the learned Senior Counsel, the role of firing was assigned

to one of the accused namely Ganga Yadav in the F.I.R., but the same has been improved upon in the ocular version of the occurrence in the testimony of P.W. 1 Deep Chand Yadav and P.W. 2 Dinesh Yadav. He further submits that the aforesaid improvement has been occasioned after the inquest and the post-mortem report of the deceased had been prepared. Only to bring the ocular version of the occurrence in consonance with the medical evidence as well as the documentary evidence, such an improvement has been made which clearly creates a doubt in the prosecution case.

23. The issue as to whether the F.I.R. is the last word or the prosecution witnesses can elaborate the occurrence over and above the recital contained in the F.I.R. in their testimony is no longer res-integra. The Apex Court in the case of Manoj alias Bhau and others vs. State of Maharashtra as reported in 1999 (4) SCC, 268 has clearly observed in paragraph 4 that the F.I.R. need not be an encyclopedia of the evidene and what is required to be stated is the basic prosecution case. Paragraph 4 of the aforesaid judgement is quoted here under:-

> "The learned counsel appearing for the respondent-State on the other hand urged that the alleged embellishment and exaggeration pointed out by Mr Lalit, learned Senior Counsel appearing for the appellants do not relate to the substratum of the prosecution case and, therefore, the courts below were justified in relying upon the testimony of the aforesaid two witnesses in coming to the conclusion that it is the accused persons who assaulted the deceased with the respective weapons in their hands and this fact is corroborated by the medical evidence indicating the presence of injuries on the deceased which could be caused by the weapons which were found to be in the hands of the accused persons. According to the learned counsel for the respondent there is no justification in the comment of Mr Lalit that the presence of these two witnesses has become doubtful. In view of the respective contentions of the learned counsel appearing for the parties we think it appropriate to examine the evidence of the two eyewitnesses on whose evidence the conviction of the appellants is based. Ordinarily this Court does not reappreciate the evidence when two courts have already scanned and believed the same. But on going through the omissions and exaggerations from their earlier version we thought it fit to scrutinise the evidence of the aforesaid two witnesses to find out whether the so-called exaggerations and embellishments really pertain to the basic prosecution case so that the entire evidence has to be discarded as being untrustworthy or the Court would be justified in embarking upon an enquiry for the purpose of separating the chaff from the grain and accept the grain to base the conviction. PW 1 lodged the report at the police station at 9.30 p.m on 18-4-1990 intimating about the occurrence that took place at 9.00 p.m and the distance between the police station and the place of the occurrence is 3 km. Thus the information to the police has been given with the utmost promptitude. In the first information report itself the names of the 3 appellants had been given as the members of the unlawful assembly who assaulted the deceased Raju with different weapons in their hands. A graphic picture has been indicated as to how the accused persons called Raju and after Raju came down dragged him and surrounded him and thereafter assaulted him. In the course of the argument Mr

> Lalit, learned Senior Counsel had urged that the FIR is rather sketchy and a vivid account of the incident has not been stated therein. But it is too well settled that the first information report need not be an encyclopaedia of the evidence and what is required to be stated is the basic prosecution case. Judged from that standpoint no grievance can be made in respect of the first information report that was given by PW 1."

24. Again in the case of Subhash Kumar vs. State of Uttarakhand, reported in 2009 (6) SCC 641, it was observed by the Apex Court that the F.I.R. is not to be treated to be an encyclopedia of the prosecution case. The following observations have been made in paragraph 11, which is quoted here under:-

> "FIR as is well known is not to be treated to be an encyclopedia. Although the effect of a statement made in the FIR at the earliest point of time should be given primacy, it would not probably be proper to accept that all particulars in regard to commission of offence in detail must be furnished."

25. Thus, the submissions raised by the learned counsel for the appellants when judged in the light of the judgements of the Apex Court referred to above, it is explicitly clear that nothing much will turn upon the fate of the appeals on the basis of the submission made by the counsel for the accused-appellants that there is a complete change in the prosecution case from the one stated in the F.I.R. and the one stated in the testimony of the two eye-witnesses. Accordingly, we are of the view that the conviction awarded to the accused-appellants is not liable to be set aside on the aforesaid ground.

26. This takes us to the second question involved in the present appeals, i.e., whether the two eye-witnesses of the occurrence, namely, P.W.-1 Deep Chand Yadav and P.W.-2, Dinesh Yadav are credible and reliable and therefore, their testimony is worthy of trust.

27. P.W.-1 Deep Chand Yadav is an eye witness of the occurrence. He is the first informant and also the scribe of the written report dated 06.06.2004 (Ext. KA-1) on the basis of which the F.I.R. dated 06.06.2004 (Ext. Ka.13) was registered as Case Crime No.240 of 2004 under Section 302 I.P.C., P.S. Tahbarpur, District-Azamgarh. He is also one of the panch witness of the inquest report/Panchaytatnama dated 07.06.2004 (Ext. Ka.19).

28. Mr. V.P. Srivastava, the learned Senior Counsel submits that irrespective of the aforesaid facts, it is an undisputed fact that P.W.-1, Deep Chand Yadav is the brother of the deceased Bal Chand Yadav. He therefore submits that in view of this admitted fact the testimony of P.W.-1, Deep Chand Yadav is required to be looked into with circumspection.

29. We may at this stage refer to the judgement of Apex Court in the case of Gangabhavani Vs. Rayapati Venkat Reddy & Others, 2013 (15) SCC 298, wherein the Apex Court in Paragraphs 11, 12, 13 and 14 has observed as under:-

"11. It is a settled legal proposition that the evidence of closely related witnesses is required to be carefully scrutinised and appreciated before any conclusion is made to rest upon it, regarding the convict/accused in a given case. Thus, the evidence cannot be disbelieved merely on the ground that the witnesses are related to each other or to the deceased. In case the evidence has a ring of truth to it, is cogent, credible and trustworthy, it can, and certainly should, be relied upon.

12. In State of Rajasthan v. Smt. Kalki and Anr. AIR 1981 SC 1390, this Court held:

5A. As mentioned above the High Court has declined to rely on the evidence of P.W. 1 on two grounds: (1) she was a "highly interested" witness because she "is the wife of the deceased".....For, in the circumstances of the case, she was the only and most natural witness; she was the only person present in the hut with the deceased at the time of the occurrence, and the only person who saw the occurrence. True it is she is the wife of the deceased; but she cannot be called an 'interested' witness. She is related to the deceased. 'Related' is not equivalent to 'interested. A witness may be called 'interested' only when he or she derives some benefit from the result of a litigation; in the decree in a civil case, or in seeing an accused person punished. A witness who is a natural one and is the only possible eye witness in the circumstances of a case cannot be said to be 'interested'. In the instant case P.W. 1 had no interest in protecting the real culprit, and falsely implicating the Respondents.

13. In Sachchey Lal Tiwari v. State of U.P. AIR 2004 SC 5039, while dealing with the case this Court held:

7....Murders are not committed with previous notice to witnesses; soliciting their presence. If murder is committed in a dwelling house, the inmates of the house are natural witnesses. If murder is committed in a street, only passersby will be witnesses. Their evidence cannot be brushed aside or viewed with suspicion on the ground that they are mere 'chance witnesses'. The expression 'chance witness' is borrowed from countries where every man's home is considered his castle and everyone must have an explanation for his presence elsewhere or in another man's castle. It is quite unsuitable an expression in a country where people are less formal and more casual, at any rate in the matter explaining their presence.

14. In view of the above, it can safely be held that natural witnesses may not be labelled as interested witnesses. Interested witnesses are those who want to derive some benefit out of the litigation/case. In case the circumstances reveal that a witness was present on the scene of the occurrence and had witnessed the crime, his deposition cannot be discarded merely on the ground of being closely related to the victim/deceased."

30. Referring to the statement in chief of P.W.-1, Deep Chand Yadav, the learned Senior Counsel submits that the presence of P.W.-1, Deep Chand Yadav at the time and place of occurrence is

doubtful. He therefore submits that as P.W.-1, Deep Chand Yadav cannot be presumed to be present at the time and place of occurrence, he is neither a credible nor a reliable witness and therefore, his testimony is not worthy of trust.

31. P.W.-1, Deep Chand Yadav in his statement-in- chief has categorically stated regarding his presence at the time and place of occurrence. He has also detailed the manner of occurrence. This witness was extensively cross-examined by the defence. However, in the cross-examination the defence could not dislodge this witness nor the defence could cull out any such material on the basis of which the said witness can be doubted as unreliable, uncredible and therefore, not worthy of trust. Once the testimony of P.W.-1, Deep Chand Yadav remains intact, the same cannot be discarded on whimsical grounds.

32. With regard to P.W.-2, Dinesh Yadav, the learned Senior Counsel submits that P.W.-2, Dinesh Yadav apart from not being a reliable or a credible witness is also a chance witness. The term chance witness has been examined by the Apex Court and it has been held that this concept of chance witness is alien to our country. How and why, P.W.-2, Dinesh Yadav came to be present at the time and place of occurrence has categorically been stated in his testimony. The testimony of this witness also stands corroborated with the testimony of P.W.-1. Both these prosecution witnesses have been consistent in narrating the story which the prosecution set out to prove. It is the consistent case of the prosecution that four persons riding on two different bicycles,i.e., P.W.-1 Deep Chand Yadav, P.W.-2, Dinesh Yadav, Leela Dhar Yadav and Dinesh Yadav were coming from Manjhari Bazar to their home when the occurrence took place. Therefore, the testimony of PW.-1 as well a P.W.-2 categorically explains the reason for their presence at the time and place of occurrence and therefore, it cannot be said that P.W.-2, Dinesh Yadav is a chance witness. We may at this stage refer to the judgement of Apex Court in the case of Hiralal Pandey and Ors. Vs. State of U.P. , (2012) 5 SCC 216, wherein the Apex Court repelled the argument that the evidence of second eye witness could not have been discarded on the ground that he was a chance witness. Following was observed by the Apex Court in paragraph 9 which is reproduced herein under:-

> 9. Mr. R.K. Das, learned Senior Counsel appearing for the State, submitted that the presence of PW-1 at the spot of occurrence is supported by three circumstances: (a) that his motorcycle was found lying at the spot; (b) that his pant was torn and (c) DW-1 admitted to have seen the motorcycle lying on the western side of the road. He submitted that PW-1 therefore was present at the place of occurrence and was an eyewitness to the firing. He submitted that PW-2 could not be treated as a chance witness as the incident took place on the road and only passers-by on the road would be witnesses to any such incident which took place on the road and their evidence could not be brushed aside on the ground that they are chance witnesses. He cited Thangaiya Vs. State of T.N [(2005) 9 SCC 650] in which this Court has held that if a murder is committed in a street, only passers-by will be the witnesses and their evidence could not be brushed aside or viewed with suspicion on the ground that they were mere chance witnesses.

33. The defence has examined this witness in detail. Referring to the statements made by this witness in his statement-in-chief an attempt was made to dislodge the testimony of this witness. According to the learned Senior Counsel, the presence of P.W.-2, Dinesh Yadav at the time and place of occurrence does not stand to reason. He submits that P.W.-2, Dinesh Yadav in his testimony has categorically stated that before arriving at the place of occurrence this witness after meeting the deceased had visited other places and therefore, he could not have been present at the time and place of occurrence. The said issue was raised before the Court below also and the same was dealt with in detail. The trial court judiciously evaluated the entire evidence on the issue that P.W.2 could not have been present at the time of occurrence. Having undertaken the said exercise, the trial court found that it has come in evidence that the deceased and P.W.2 had last met at the betel shop. However, the defence in the cross-examination of P.W.2 did not specifically questioned P.W.2 on the point whether the deceased after partaking the betel leafs, immediately departed from Manjhari Bazar. As the defence failed to cross-examine P.W.2 on the said issue, the argument that P.W.2 and deceased departed from the betel shop and thereafter as P.W.2 went to purchase the cloth as such, P.W.2 could not be present at the time of occurrence, was repelled. Nothing new has been placed before us on the basis of which the said finding recorded by the Trial Court could be termed as illegal, perverse or erroneous.

34. The question which arises for our consideration is whether the defence cross-examined this witness on the aforesaid issues specifically and secondly, whether during the course of cross-examination the credibility of this witness was dislodged.

35. From the perusal of the cross-examination of P.W.-2, Dinesh Yadav we find that this witness was specifically cross-examined regarding his presence at the time and place of occurrence by referring to the places of meeting with the deceased, the subsequent jobs undertaken by this witness and the fact that while the deceased was riding a motorcycle, this witness was riding a bicycle. In spite of all the effort made the defence could neither dislodge this witness nor could the defence cull out any such fact in his cross-examination on the basis of which, his testimony can be said to be unworthy of trust.

36. What will be the effect on the failure on the part of the defence in not cross-examining a witness on the material issue has been succinctly explained in the case of Gangabhavani (Supra) in paragraphs 17 and 18 which are reproduced herein below:-

> "17. This Court in Laxmibai (Dead) Thr. L.Rs. and Anr. v. Bhagwantbuva (Dead) Thr. L.Rs. and Ors. AIR 2013 SC 1204 examined the effect of non-cross examination of witness on a particular fact/circumstance and held as under:
>
> 31. Furthermore, there cannot be any dispute with respect to the settled legal proposition, that if a party wishes to raise any doubt as regards the correctness of the statement of a witness, the said witness must be given an opportunity to explain his statement by drawing his attention to that part of it, which has been objected to by the other party, as being untrue. Without this, it is not possible to impeach his credibility. Such a law has been advanced in view of the statutory provisions

> enshrined in Section 138 of the Evidence Act, 1872, which enable the opposite party to cross-examine a witness as regards information tendered in evidence by him during his initial examination in chief, and the scope of this provision stands enlarged by Section 146 of the Evidence Act, which permits a witness to be questioned, inter-alia, in order to test his veracity. Thereafter, the unchallenged part of his evidence is to be relied upon, for the reason that it is impossible for the witness to explain or elaborate upon any doubts as regards the same, in the absence of questions put to him with respect to the circumstances which indicate that the version of events provided by him, is not fit to be believed, and the witness himself, is unworthy of credit. Thus, if a party intends to impeach a witness, he must provide adequate opportunity to the witness in the witness box, to give a full and proper explanation. The same is essential to ensure fair play and fairness in dealing with witnesses.
>
> 18. Thus, it becomes crystal clear that the defence cannot rely on nor can the court base its finding on a particular fact or issue on which the witness has not made any statement in his examination-in-chief and the defence has not cross examined him on the said aspect of the matter."

37. The doubt raised by the learned counsel for the appellants regarding the credibility and reliability of P.W.2 fall in the category of fanciful doubts, which cannot form the basis of acquittal. The Apex Court has deprecated the practice of granting acquittal on the basis of fanciful doubts, as is apparent from the observations quoted herein below made in Criminal Appeal No. 31 of 2018 State of Himanchal Pradesh Vs. Raj Kumar, reported in AIR 2018 SC 329 :-

> "15. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to be truthful in the given circumstances of the case. Once that impression is formed, it is necessary for the court to scrutinize the evidence more particularly keeping in view the drawbacks and infirmities pointed out in the evidence and evaluate them to find out whether it is against the general tenor of the prosecution case. Jeewan Lal (PW-1) is the son of the deceased Meena Devi residing with her and the Accused in the same house, and a natural witness to speak about the occurrence. Evidence of PW-1 is cogent and natural and is consistent with the prosecution case....."

38. Thus, we have no hesitation in concluding that both P.W.-1 and P.W.-2 who are the eye-witnesses of the occurrence in question are credible and reliable witnesses and therefore, their testimony is worthy of turst.

39. Mr. V. P. Srivastava, the learned Senior Counsel thereafter strenuously urged before us by submitting that the accused-appellants have been falsely implicated on account of enmity. He further submits that no motive can be attached to the accused-appellants in committing the crime. But before proceeding to consider this submission of the learned counsel for the appellants, on the question of false implication on account of enmity as well as the absence of motive on the part of the

accused appellants in committing the crime, it would be prudent to have the meaning of the word 'Motive' as understood in criminal jurisprudence and how the Courts have considered it to be a relevant factor in the commission of crime. We may refer to the following observations made in paragraphs 17, 18 and 19 of the judgement of the Apex Court in the case of Bipin Kumar Mondal v. State of West Bengal as reported in JT 2010 (7) SC 37, wherein the following was observed:-

> "17. During the cross-examination of all of the witnesses, nothing had transpired for which their evidence may be discarded. The witnesses were natural and most probable and their presence at the place of occurrence immediately after the commission of crime is expected, being close relatives and neighbours. No reason could be given as to why such close relations of the appellant would depose against him. Undoubtedly, there is nothing on record to show as what could be the motive behind the murder of his wife and son by the appellant. However, it can be difficult to understand the motive behind the offence. The issue of motive becomes totally irrelevant when there is direct evidence of a trustworthy witness regarding the commission of the crime. In such a case, particularly when a son and other closely related persons depose against the appellant, the proof of motive by direct evidence loses its relevance. In the instant case, the ocular evidence is supported by the medical evidence. There is nothing on record to show that the appellant had received any grave or sudden provocation from the victims or that the appellant had lost his power of self control from any action of either of the victims.
>
> Motive :
>
> 18. In fact, motive is a thing which is primarily known to the accused himself and it may not be possible for the prosecution to explain what actually prompted or excited him to commit a particular crime. In Shivji Genu Mohite Vs. State of Maharashtra, AIR 1973 SC 55, this Court held that in case the prosecution is not able to discover an impelling motive, that could not reflect upon the credibility of a witness proved to be a reliable eye-witness. Evidence as to motive would, no doubt, go a long way in cases wholly dependent on circumstantial evidence. Such evidence would form one of the links in the chain of circumstantial evidence in such a case. But that would not be so in cases where there are eye- witnesses of credibility, though even in such cases if a motive is properly proved, such proof would strengthen the prosecution case and fortify the court in its ultimate conclusion. But that does not mean that if motive is not established, the evidence of an eye-witness is rendered untrustworthy.
>
> 19. It is settled legal proposition that even if the absence of motive as alleged is accepted that is of no consequence and pales into insignificance when direct evidence establishes the crime. Therefore, in case there is direct trustworthy evidence of witnesses as to commission of an offence, the motive part loses its significance. Therefore, if the genesis of the motive of the occurrence is not proved, the ocular testimony of the witnesses as to the occurrence could not be discarded only by the reason of the absence of motive, if otherwise the evidence is worthy of reliance. (Vide

Hari Shankar Vs. State of U.P., (1996) 9 SCC 40; Bikau Pandey & Ors. Vs. State of Bihar, (2003) 12 SCC 616; and Abu Thakir & Ors. Vs. State of Tamil Nadu, (2010) 5 SCC 91).":

40. Infact, the law on the subject now stands crystallized and it is by now well established by a catena of decisions that the question of motive becomes irrelevant in the case of direct evidence vide judgments in Pedda Narayana & Ors vs State Of Andhra Pradesh, reported in AIR 1975 SC 1252, Bipin Kumar Mondal v. State of West Bengal JT 2010 (7) SC 379, State of Uttar Pradesh v. Krishna Master, reported in (2011) 1 SCC (Cri) 381.

41. With the aid of relevancy of 'Motive' in a case of direct evidence, we shall now proceed to consider the merits of the aforesaid submission of the learned counsel for the appellants.

42. Mr. V. P. Srivastava, the learned Senior Counsel in challenge to the conviction awarded to the accused-appellants by the court below, submitted that the accused-appellants have been falsely implicated in the case on account of enmity. The accused-appellant Ramesh Chand Rai in reply to question no. 25 in his statement under Section 313 Cr.P.C., (at page 78 of the paper-book), then also in reply to question no. 26 (at page 78 of the paper-book) and the accused-appellant no. 2 Ganga Yadav in reply to question no. 25 (at page 90 of the paper-book) and then in reply to question no.26 (at page 90 of the paper book) have categorically stated that they have been falsely implicated on account of enmity. However, the enmity so alleged has not been explained. Admittedly, the burden to prove the false implication of the accused-appellants on the ground of enmity was upon the accused-appellants themselves. However, no evidence was led by the accused-appellants to establish the alleged enmity and how on the basis of the same the accused-appellants have been falsely implicated. Thus a half hearted attempt has been made to dislodge the prosecution case in the garb of false implication. In the case in hand both the accused-appellants have been implicated in the crime in question as per the F.I.R. version of the prosecution case and also in the oral testimony of P.W.1 and P.W.2 who have specifically assigned the role of firing to both the accused-appellants. The defence in the cross-examination of the two prosecution eye witnesses has not been able to establish that the accused-appellants have been falsely implicated. Once there is no evidence adduced by the defence in this regard and the prosecution witnesses remaining intact even after going through the furnace of cross examination, there is no material before the Court on the basis of which it could be accepted that the accused-appellants have been falsely implicated. Consequently, the said submission does not create any dent in the prosecution case.

43. It was next contended that the FIR is ante-timed. The aforesaid submission was sought to be supported from the fact that the timing of the occurrence mentioned in the F.I.R. is 7:30PM whereas P.W.-1, the first informant, in his testimony has stated that the occurrence occurred at 7:00 PM. However P.W.-1 in his testimony has clearly explained that initially the timing of the occurrence was mentioned as 7:00 PM but was corrected as 7:30 PM. Nothing adverse could be culled out from the cross-examination of P.W.-1 on this issue. Once the defence has failed to dislodge the testimony of P.W.-1, Deep Chand Yadav, who is the first informant and also the scribe of the written report (Ext. Ka.-1) on the bais of which the F.I.R. was registered, the prosecution story regarding the timing of the F.I.R. remains intact. Accordingly the challenge led to the prosecution case on this score fails.

44. Another ground urged before us to doubt the judgement of the court below was that the prosecution has failed to adduce two persons as witnesses namely, Liladhar Yadav and Bechan Yadav, who are alleged to have witnessed the occurrence.

45. We may however refer to the judgement of the Apex Court in the case of Rohtash Kumar vs State of Haryana, reported in 2013 (14) SCC 434, wherein this very issue regarding the failure of the prosecution to adduce a particular witness has been considered in detail. Paragraphs 8 to 17 of the aforesaid judgement are relevant which are reproduced herein under-

> "8. A common issue that may arise in such cases where some of the witnesses have not been examined, though the same may be material witnesses is, whether the prosecution is bound to examine all the listed/cited witnesses.
>
> This Court, in Abdul Gani & Ors. v. State of Madhya Pradehs, AIR 1954 SC 31, has examined the aforesaid issue and held, that as a general rule, all witnesses must be called upon to testify in the course of the hearing of the prosecution, but that there is no obligation compelling the public prosecutor to call upon all the witnesses available who can depose regarding the facts that the prosecution desires to prove. Ultimately, it is a matter left to the discretion of the public prosecutor, and though a court ought to and no doubt would, take into consideration the absence of witnesses whose testimony would reasonably be expected, it must adjudge the evidence as a whole and arrive at its conclusion accordingly, taking into consideration the persuasiveness of the testimony given in the light of such criticism, as may be levelled at the absence of possible material witnesses.
>
> 9. In Sardul Singh v. State of Bombay, AIR 1957 SC 747, a similar view has been reiterated, observing that a court cannot, normally compel the prosecution to examine a witness which the prosecution does not choose to examine, and that the duty of a fair prosecutor extends only to the extent of examination of such witnesses, who are necessary for the purpose of disclosing the story of the prosecution with all its essentials.
>
> 10. In Masalti v. State of U.P., AIR 1965 SC 202, this Court held that it would be unsound to lay down as a general rule, that every witness must be examined, even though, the evidence provided by such witness may not be very material, or even if it is a known fact that the said witness has either been won over or terrorised. "In such cases, it is always open to the defence to examine such witnesses as their own witnesses, and the court itself may also call upon such a witness in the interests of justice under Section 540 Cr.P.C.". (See also: Bir Singh & Ors v. State of U.P., (1977) 4 SCC 420).
>
> 11. In Darya Singh & Ors. v. State of Punjab, AIR 1965 SC 328, this Court reiterated a similar view and held that if the eye-witness(s) is deliberately kept back, the Court may draw inference against the prosecution and may, in a proper case, regard the

failure of the prosecutor to examine the said witnesses as constituting a serious infirmity in the proof of the prosecution case.

12. In Reghubir Singh v. State of U.P., AIR 1971 SC 2156, this Court held as under:

"...Material witnesses considered necessary by the prosecution for unfolding the prosecution story alone need be produced without unnecessary and redundant multiplication of witnesses. The appellant's counsel has not shown how the prosecution story is rendered less trustworthy as a result of the non-production of the witnesses mentioned by him. No material and important witness was deliberately kept back by the prosecution. Incidentally we may point out that the accused too have not considered it proper to produce those persons as witnesses for controverting the prosecution version....." (Emphasis added)

13. In Harpal Singh v. Devinder Singh & Anr., AIR 1997 SC 2914, this Court reiterated a similar view and further observed:

"....The illustration (g) in Section 114 of the Evidence Act is only a permissible inference and not a necessary inference. Unless there are other circumstances also to facilitate the drawing of an adverse inference, it should not be a mechanical process to draw the adverse inference merely on the strength of non-examination of a witness even if it is a material witness....."

14. In Mohanlal Shamji Soni v. Union of India & Anr., AIR 1991 SC 1346, this Court held:

"10. It is cardinal rule in the law of evidence that the best available evidence should be brought before the Court to prove a fact or the points in issue. But it is left either for the prosecution or for the defence to establish its respective case by adducing the best available evidence and the Court is not empowered under the provisions of the Code to compel either the prosecution or the defence to examine any particular witness or witnesses on their sides. Nonetheless if either of the parties withholds any evidence which could be produced and which, if produced, be unfavourable to the party withholding such evidence, the Court can draw a presumption under illustration. (g) to Section 114 of the Evidence Act.... In order to enable the Court to find out the truth and render a just decision, the salutary provisions of Section 540 of the Code (Section 311 of the new Code) are enacted whereunder any Court by exercising its discretionary authority at any stage of enquiry, trial or other proceeding can summon any person as a witness or examine any person in attendance though not summoned as a witness or recall or re-examine any person in attendance though not summoned as a witness or recall and re-examine any person already examined who are expected to be able to throw light upon the matter in dispute; because if judgments happen to be rendered on inchoate, inconclusive and speculative presentation of facts, the ends of justice would be defeated."

15. In Banti @ Guddu v. State of M.P., AIR 2004 SC 261, this Court held:

> "In trials before a Court of Session the prosecution "shall be conducted by a Public Prosecutor". Section 226 of the Code of Criminal Procedure, 1973 enjoins on him to open up his case by describing the charge brought against the accused. He has to state what evidence he proposes to adduce for proving the guilt of the accused. .....If that version is not in support of the prosecution case it would be unreasonable to insist on the Public Prosecutor to examine those persons as witnesses for prosecution.
>
> When the case reaches the stage envisages in Section 231 of the Code the Sessions Judge is obliged "to take all such evidence as may be produced in support of the prosecution". It is clear form the said section that the Public Prosecutor is expected to produce evidence "in support of the prosecution" and not in derogation of the prosecution case. At the said stage the Public Prosecutor would be in a position to take a decision as to which among the presence cited are to be examined. If there are too many witnesses on the same point the Public Prosecutor is at liberty to choose two or some among them alone so that the time of the Court can be saved from repetitious depositions on the same factual aspects. .....This will help not only the prosecution in relieving itself of the strain of adducing repetitive evidence on the same point but also help the Court considerably in lessening the workload. Time has come to make every effort possible to lessen the workload, particularly those courts crammed with cases, but without impairing the cause of justice. .....It is open to the defence to cite him and examine him as a defence witness....."

16. The said issue was also considered by this Court in R. Shaji (supra), and the Court, after placing reliance upon its judgments in Vadivelu Thevar v. State of Madras; AIR 1957 SC 614; and Kishan Chand v. State of Haryana, JT 2013(1) SC 222), held as under:

> "22. In the matter of appreciation of evidence of witnesses, it is not the number of witnesses, but the quality of their evidence which is important, as there is no requirement in the law of evidence stating that a particular number of witnesses must be examined in order to prove/disprove a fact. It is a time- honoured principle, that evidence must be weighed and not counted. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy, or otherwise. The legal system has laid emphasis on the value provided by each witness, as opposed to the multiplicity or plurality of witnesses. It is thus, the quality and not quantity, which determines the adequacy of evidence, as has been provided by Section 134 of the Evidence Act. Where the law requires the examination of at least one attesting witness, it has been held that the number of witnesses produced over and above this, does not carry any weight."

17. Thus, the prosecution is not bound to examine all the cited witnesses, and it can drop witnesses to avoid multiplicity or plurality of witnesses. The accused can also examine the cited, but not

examined witnesses, if he so desires, in his defence. It is the discretion of the prosecutor to tender the witnesses to prove the case of the prosecution and "the court will not interfere with the exercise of that discretion unless, perhaps, it can be shown that the prosecution has been influenced by some oblique motive." In an extra- ordinary situation, if the court comes to the conclusion that a material witness has been withheld, it can draw an adverse inference against the prosecution, as has been provided under Section 114 of the Evidence Act. Undoubtedly, the public prosecutor must not take the liberty to "pick and choose" his witnesses, as he must be fair to the court, and therefore, to the truth. In a given case, the Court can always examine a witness as a court witness, if it is so warranted in the interests of justice. In fact, the evidence of the witnesses, must be tested on the touchstone of reliability, credibility and trustworthiness. If the court finds the same to be untruthful, there is no legal bar for it to discard the same. "

Thus in the light of the aforesaid ratio, the submission made by the learned counsel for the appellants regarding the failure on the part of the prosecution to adduce Liladhar Yadav and Bechan Yadav is not such an infirmity that it can make a dent in the prosecution case.

46. Mr. V.P. Srivastava, the learned Senior counsel, in continuation of his challenge to the conviction awarded by the court below to the accused appellants next submitted that the place of occurrence as well as the manner of occurrence is doubtful. The said submission need not detain us for long. While considering the issue of false implication of the accused appellants on the ground of enmity, we had examined in detail the statement of the accused-appellants under section 313 Cr.P.C. In continuation of the same we concluded that the accused appellants have neither adduced themselves as witness, nor they have adduced any witnesses in support of the defence taken by them that the deceased was murdered at night at a defferent place and the accused-appellants have been falsely implicated on account of enmity. Therefore, the only version of the same occurrence before the court is the prosecution version. However, since in spite of the aforesaid factual position, the argument has been raised doubting the place of occurrence and the manner of occurrence, we are accordingly dealing with the same.

47. Regarding the issue that the place of occurrence is doubtful, we may at the very outset observe that the doubt, raised by the learned Senior Counsel for the appellants is a fanciful doubt. The recovery of the dead body of the deceased from the place of occurrence, recovery of the motorcycle of the deceased from the place of occurrence (Ext. Ka.2), the recovery of plain earth and the earth mixed with blood from the place of occurrence (Ext. Ka.4) are all part of the same transaction as such relevant under section 6 of the Indian Evidence Act and can be inferred against the accused-appellants under Section 8 of the Evidence Act. The material exhibits referred to above were not contradicted by the defence during the course of trial and therefore, they fall in the category of un-impeccable evidence. In the light of the aforesaid evidences on record, the submission so raised is purely hypothetical.

48. On the issue that the manner of occurrence is doubtful, we may take note of the fact that this issue was also raised before the court below and was repelled . The trial court found that the testimony of P.W.-2 stands corroborated by the medical evidence. A fragile attempt was made before us also to establish that the occurrence could not have been committed in the manner alleged by the prosecution. The said attempt was made with reference to the various points mentioned in the site plan. In our considered opinion once the testimony of P.W.-1 and P.W.-2 remains intact coupled with the fact that there is no other version of the occurrence except the prosecution version, the failure on the part of the defence in not cross-examining the accused regarding the manner of occurrence nothing will turn in favour of the accused-appellants. In view of the above we hold that the said submission is devoid of any substance.

49. The prosecution case was thereafter sought to be demolished by the learned Senior Counsel by submitting that since there was no source of light, the two eye-witnesses could not have seen the occurrence. The occurrence has taken place on 06.06.2004 at 7.30PM which is the month of June. P.W.-2 in his statement has categorically stated that on the day of the incident it was not a dark night as the moon was up. Therefore, there was sufficient moonlight to see the nearby objects. Apart from the above the defence did not examine the eye-witness on this issue.

50. Rest of the submission raised by the learned Senior Counsel for the appellants need not be dealt with by us as even after careful scrutiny of the case in the light of the said submission the conviction awarded by the court below shall remain intact.

51. For all the reasons given herein above, the present criminal appeals fail. They are accordingly dismissed. The appellants are in jail. They shall serve the sentence awarded by the court below.

Order Date :- 6.7.2018 Arshad