

Rakesh Tiwari @ Bablu @ Akhilesh Tiwari vs State Of U.P. on 31 May, 2018

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Bench: Naheed Ara Moonis, Chandra Dhari Singh

HIGH COURT OF JUDICATURE AT ALLAHABAD

A.F.R.

RESERVED.

Criminal Appeal No. 6384 of 2010.

Appellant. Rakesh Tiwari @ Bablu @ Akhilesh.

Respondent. State of U.P.

Counsel for appellant. Surendra Pratap Singh, Arvind Kumar Tripathi, Ashok Kumar Pandey.

Counsel for respondent. Govt. Advocate.

Hon'ble Naheed Ara Moonis,J.

Hon'ble Chandra Dhari Singh,J.

(Delivered by Hon'ble Naheed Ara Moonis,J.) The instant appeal is arising out of judgment and order dated 26.8.2010 passed by the Additional Sessions Judge, Fast Track Court No.1, Basti in S.T. No. 142 of 2004 (State vs. Rakesh Tiwari @ Bablu @ Akhilesh) arising out of case Crime No. 339 of 2000, under section 302 I.P.C., police station Parsarampur, district Basti whereby the appellant has been awarded life imprisonment and Rs. 10,000/- fine under Section 302 I.P.C. In default of payment of fine the accused/appellant has to go additional sentence of one year.

The prosecution case in a short conspectus is that a first information report was lodged by Sita Ram Pandey in respect of the incident occurred at 8 A.M. on 1.11.2000 alleging therein that he is a resident of village Dhuniyabhiti, police station Parasrampur, district Basti. On 1.11.2000 his brother who is an Advocate by profession had left his house for civil court along with Parma Nand Shukla at 8 A.M. when he reached in front of the house of Setu Bhuj at that juncture Mithlesh, Shailesh Tiwari and Rakesh @ Babbu all sons of Ramdeen resident of village Chhapiya, police station Paikaliya,

district Basti came on a motorcycle and attacked upon him on account of old enmity of property dispute. All the three persons had whipped out country made pistol and revolver and made indiscriminate firing upon Deena Nath Pandey at this Parma Nanad Shukla had made hue and cry on account of which various persons came on the spot. The complainant Laxmi Narain and Setu Bhuj also reached at the spot. All the accused persons escaped towards Baijalpur on the motorcycle brandishing Katta and revolver. Deena Nath Pandey died on the spot. The complainant was also going to market from his house. He was accompanied with Bhav Nath Pandey son of Kashi Nath. All the persons had witnessed the incident and recognized the accused persons. The dead body of his brother was lying on the spot and had come to lodge the report to take action. A question was asked as the house of Setu Bhuj situate in which village it was answered by the complainant that it is in village Parsahwa. On this information the first information report was lodged at about 9.45 A.M. on the same day, which was registered as case crime No. 339 of 2000, under Section 302 I.P.C. at police station Parsarampur, district Basti against the accused persons, namely, Mithlesh, Shailesh and Rakesh @ Babbu, all sons of Ram Yagya.

The trial of accused Mithlesh and Shailesh was separated from the present accused/appellant Rakesh Tiwari @ Bablu @ Akhilesh who faced the trial in S.T. No. 148 of 2001 (State Vs. Mithlesh and others), S.T. No. 149 of 2001 (State Vs. Shailesh) arising out of case Crime No. 339 of 2000, under Section 302/34 I.P.C. and S.T. No. 288 of 2001) arising out of case Crime No. 58 of 2001, under Section 3/25 Arms Act, police station Parsarampur, district Basti. They were convicted by the learned Additional Special Judge, E.C. Act, Basti by order dated 11.5.2004 under Section 302/34 I.P.C. for life imprisonment with fine of Rs. 2,000/- each and in default of payment of fine both the accused persons were directed to serve additional sentence of one month. The accused Sailesh was acquitted of the charge under Section 3/25 Arms Act. Both the accused persons, namely, Mithlesh and Shailesh had challenged their conviction by filing the Criminal Appeal No. 3347 of 2004 (Mithlesh and another Vs. State of U.P.).

As the appellant Rakesh @ Bablu @ Akhilesh was absconding and after his arrest the charge sheet was submitted on 3.12.2001 by S.I. Jagdev Prasad Tiwari, his case was committed to the court of Sessions by the Chief Judicial Magistrate, Basti on 29.4.2004 and thereafter the charges were framed separately against the appellant for the offence punishable under Section 302 read with Section 34 I.P.C. by order dated 29.11.2007. The appellant abjured the charges and claimed to be tried. The prosecution was given opportunity to lead evidence and the examination in chief of Sita Ram Pandey, P.W. 1 the complainant was recorded and thereafter the case was transferred from the court of Ist. Additional Sessions Judge, Basti to the court of Sessions Judge, Basti on 26.11.2009.

To substantiate the charges against the appellant eight prosecution witnesses were examined. P. W. 1 Sita Ram Pandey the complainant and Parma Nand Shukla P. W. 2 as witnesses of fact, while the formal witness S.I. Sudama Yadav as P. W. 3 who had prepared the inquest report. S.I. Harish Chand the first Investigating Officer examined as P. W. 4. S.I. Keshav Prasad Dubey scribe of the first information report as P. W. 5, Dr. S. S. Dwivedi, Medical Officer who conducted the post mortem of the deceased examined as P. W. 6. S.I. Hari Shanker Rai the second Investigating Officer examined as P.W. 7 and Constable Vinay Kumar was examined as P. W. 8 who had proved and signed the papers prepared by the third investigating officer S.I. Jagdev Prasad Tiwari.

In the instant session trial except the charge sheet, the photo copies of the other documents were filed as the original documents relating to the papers prior to the submission of the charge sheet about the investigation were attached with S.T. No. 148 of 2001 (States Vs. Mithlesh) pertaining to the co-accused person and the same were transmitted to this court as the convicted accused persons had challenged their conviction before this court. Later on the photocopies were obtained from this court to facilitate the same in conducting the present trial of appellant Rakesh Tiwari @ Bablu, therefore, the first information report was exhibited as Exhibit Ka. 1, inquest report Exhibit Ka. 2, Photo nash and Police Form No. 379 as Exhibit Ka. 3 and the papers relating to inquest report and Police Form 33 and letters to the Chief Medical Officer and In-charge Police and sample of seal exhibited as Exhibit Ka. 4 to Ka. 8. The site plan marked as Exhibit Ka. 9, memo of blood stained and plain earth marked as Exhibit Ka. 10. The charge sheet submitted against co-accused Mithlesh exhibited as Exhibit Ka. 11, photocopy of the first information report against the co-accused Mithlesh exhibited as Exhibit Ka. 11, Chik FIR Exhibit Ka. 12 and G.D. entry Exhibit Ka. 13, the post mortem report exhibited as Exhibit Ka. 14. The charge sheet submitted against the appellant exhibited as Exhibit Ka. 15 and the report of the chemical examiner exhibited as Exhibit Ka. 16.

Dr. S.S. Dwivedi P. W. 7 had conducted the post mortem of the deceased on 1.11.2000 at 6.30 P. M., which was brought by Raj Nath Yadav and Mangaroo Ram police constables of police station Parsrampur, district Basti in sealed cover. On external examination the Doctor has found an average build male, eyes open, mouth half open, injured part were bleeding, clot of blood surrounding the wounds, rigor mortis present both the extremities. The following anti mortem injuries were found;

1. Firearm wound of entry on left chin lat. side size 1 x 0.8 x cavity deep direction upward oblique inverted colar with laceration. No blackening and tattooing present.
2. Firearm wound of exit on right side ear groove in area of 2.5 x 2 cm. X Cavity deep oblique out let fraction mostoil.
3. Firearm wound of entry on left zygomatic arch below cheek size 1 cm x 0.8 cm cavity deep gone up ward. Inverted color with laceration. No blackening and tattooing present.
4. Firearm wound of exit on frontal bone lateral aspect left side oblique, size 4 cm x 3 x bone deep base long roof small exverted margin fracture of frontal bone missing bones pieces.
5. Firearm wound of entry on left side chest. 11 cm below at 7' O clock position, size 1 cm x cavity deep,powder burn present, inverted color lacerated margin, no BT going oblique.
6. Firearm wound of entry inverted cross lacerated margin front of chest right side 14 cm medial to nipple at 6.30' O clock position size 1 cm x 0.8 cm. Cavity deep.
7. Firearm wound of exit mesentry comes out 2.5 cm below, right nipple at 7' O Clock position size 3 cm x 2.5 cm x cavity deep lacerated margin with oblique direction.

8. Firearm wound of exit 12 cm post auxiliary fold right side back 2 x 1.5 x cavity deep everted margin lacerated in nature.
9. Firearm wound lacerated lateral spining process crossing parallel making barrow, same entry exit same, size 1.2 cm x 0.6 cm x muscle deep. No BT roof of wound absent.
10. Firearm wound of entry on back 28 cm below C-7 prominence right side oblique size 1 cm x 0.8 cm x cavity deep. Inverted color lacerated margin. No BT oblique direction.
11. Firearm wound of exit on back C -7 prominence 18 cm away left side, size 1.8 cm x 1.2 cm x cavity deep.
12. Abraded contusion on left patella (knee), size 3 x 2 cm.
13. Contused abrasion on fore head front size 2 cm x 2 cm.

The eye witnesses of the incident, namely, Sita Ram Pandey the complainant and Parma Nand Shukla who were present at the time of the incident have been examined as P.W. 1 and P.W. 2 respectively. Their statements were recorded in the session trial of the co-accused persons, namely, Mithlesh and Shailesh.

The statement of P.W. 1 Sita Ram Pandey the complainant was recorded who had narrated the incident as mentioned in the first information report by submitting that on 1.11.2000 at about 8 A.M. he was going along with Laxmi Narain to Sringinari market. Deena Nath Pandey was going to civil court along with Parma Nand Shukla as he reached 50-60 paces away from the house of Setu Bhuj he saw that Deena Nath Pandey was going ahead from Parma Nand Shukla and had seen that Mithlesh, Shailesh and Rakesh @ Bablu came on a motorcycle they had intercepted his brother Deena Nath Pandey and had fired upon him. All the three persons had fired upon Deena Nath Pandey. On the hue and cry of Parma Nand Shukla the complainant Sita Ram Pandey along with Laxmi Narain, Setu Bhuj and Bhav Nath Pandey arrived there to save his brother. All the three accused persons escaped from the spot towards the south when he arrived at the spot his brother had succumbed to the injuries. It was also deposed by him that Sonkala had executed a will of some portion of her property in favour of his brother Deena Nath Pandey and his wife Ram Dulari. Vinay Kumar Pandey is the son of Deena Nath Pandey (the deceased). The remaining property was bequeathed to Vinay Kumar by Sonkala. The accused persons, namely, Mithlesh, Shailesh and Rakesh Tiwari @ Bablu had filed a case in the civil court with regard to this property and this was the reason of enmity. Mithlesh and other had lost the case and on account of this enmity prior to the present incident the accused persons had caused injury with bomb to Deena Nath Pandey. A report of which was lodged by the complainant's brother against the accused persons at police station Parsrampur, district Basti. The case against Mithlesh and Sailesh in respect of the present case has already been decided, which is S.T. No. 148 of 2001 appended along with S.T. No. 149 of 2001. He has proved the first information report, which was exhibited as Exhibit Ka. 1.

The P.W. 1 was put to lengthy cross examination by the defence. It was stated by him that Sonkali had executed a gift in favour of the wife of the deceased Ram Dulari. A will was executed in favour of Vinay Kumar by Deena Nath Pandey. In this regard the accused persons had filed objections in the court. With regard to the incident of causing injury with bomb prior to the incident it was stated that the first information report was registered against all the three accused persons by his brother. However, he denied that they were granted bail and had been acquitted. He has stated that on the day of incident he was going to market along with Laxmi Narain. Bhav Nath was also coming behind him. Srangivari is three kilometers away from his village. His brother is a practicing lawyer. His brother and Parma Nand had left the house and proceeded towards their destination before him. It cannot be said that whether my brother was going to Harraiya or district Basti. When his brother started to move to go to the civil court, he had not seen him on the day of incident. On the day of incident he along with Parma Nand was going. On the day of incident he did not notice as what his brother was wearing. After his death he has seen the body of his brother. At that time he has not seen whether he was wearing anything in his feet. His brother was aged about 45 to 46 years. He had not seen spectacle, pen or diary near his brother. His brother was using spectacle. He is not aware as to whether his brother was using spectacle while reading or while walking. His brother did not wear coat from his house. His brother never wear lungi. He is not able to say about the recovery of two lungis covered on his dead body. His house is 20 kilometers away from Harraiya. Bus as well as jeep both ply to go to Harraiya. He could not say as to whether his brother was going to catch jeep or other vehicle. All the accused persons came from the southern side and after hearing cry he reached towards his brother, which was 50 - 60 paces away. The complainant has stated that he could not say whether Parma Nand Shukla made hue and cry before or after the firing was made by the accused persons. He had scribed in the first informatoin report that all the three accused persons had fired at Deena Nath Pandey indiscriminately and at that time Parma Nand Shukla had cried. He had seen all the three accused persons were firing. He had scribed in the first informatoin report that various persons arrived there including Setu Bhuj at the spot. Thereafter the accused persons ran away towards Baijalpur. The complainant has admitted that he has not seen all the persons firing at the deceased but he has made description in the first information report of which he cannot say about any reason. He had denied the suggestion that he has not seen the face of Rakesh @ Bablu. He has stated that all the three persons were having small katta and revolver and had specified that accused persons were having small firearm weapons, which is known as katta or revolver. He had denied that he is saying about Katta and revolver in the hands of accused persons by imagination. When he saw the deceased was lying. He was lying in front of the house of Setu Bhuj. The door of house of Setu Bhuj is on western side. There is one hut in front of the house of Setu Bhuj. When the complainant was confronted with the statement given in S.T. No. 141 of 2001 he had stated that he had not disclosed about hut (Madai) in front of the house of Setu Bhuj while in the statement recorded earlier. However, he has stated that whatever statement he had made was seen by him and it was stated. When the report was written by him he was conscious and was not mentally puzzled. He arrived at about 9 o'clock and given the report to the police who had recorded the statement.

In his cross examination he had also stated that prior to the incident bomb was lobed upon his brother but he could not say about who were the accused persons. He has also stated that his brother was quite healthy and did not go to morning walk. His brother used to go to civil court and

some time remained at home. He could not say about what he used to eat while going to civil court. He was residing separately. He was not aware whether he used to take tiffin for lunch. He was 15-16 paces away from the place of incident. The motorcycle was parked under Neem tree and it was not in starting position. The Neem tree was 4-5 paces away from the place of incident. He could not also say about how many fire was made by each of the accused persons. He had heard 5-6 times of the firing, which was fired one and half hand away. They were all in close range and side by side. It is wrong to say that his brother used to go early in the morning for walk and in the darkness some unknown persons killed him. He has denied that he had not seen the incident or the first informatin report was written anti time.

Parma Nand Shukla who is the Samdhi of the deceased was examined as P.W. 2 and stated that he was accompanying with the deceased at the time of incident and when they reached in front of the house of Setu Bhuj all the accused persons fired from their respective weapons indiscriminately causing death of Deena Nath Pandey on the spot. In his examination in chief he had stated that the incident is of 8 A.M. On 1.11.2000 he had gone to the house of Deena Nath Pandey at about 7.30 A.M. He along with Deena Nath Pandey was going to civil court. He had also accompanied with him to go to Harraiya. He has personal work at Harraiya for which presence of Deena Nath Pandey was essentially required. He along with Deena Nath Pandey had travelled one and half kilometers and reached in front of the house of Setu Bhuj. In his presence Mithlesh, Sailesh and Rakesh arrived on a motorcycle, they had parked the motorcycle and were having small firearm weapon and started firing at Deena Nath Pandey. He succumbed to the injuries and on his shreik Sita Ram, Laxmi Narain, Bhav Nath and Setu Bhuj arrived there, since all the three accused persons were firing, hence he could not come forward to save him. The other witnesses also could not come forward to save Deena Nath Pandey. The accused persons threatened them that in case they will step forward they will be done to death. After killing all the accused persons went towards Baijalpur on the motorcycle.

P.W. 2 had also disclosed that there was a dispute between the accused persons and Deena Nath Pandey in respect of landed property. He was enquired by the Investigating Officer after four days of the incident. In his cross examination he had stated that the deceased Deena Nath Pandey is his Samdhi. Two years prior to the incident his daughter was married to the son of the deceased Vinay Kumar. He did not use to go to village Chhapiya. Accused Rakesh @ Bablu had never visited his village Mariyarpur. The other accused persons Shailesh and Mithlesh used to come. He never met with Rakesh @ Bablu. He had not recognised Rakesh @ Bablu at the time of incident. He had only recognised Mithlesh and Shailesh. He did not know the third person from before. P. W. 2 after looking the accused Rakesh @ Bablu who was present in the court had stated that he could not see the third person who had fired and on the disclosure the name of Rakesh @ Bablu by other persons he is disclosing the name of third person after the disclosure of the other persons.

He had further stated that at about 7.30 A.M. he reached at Dhuniyabhiti. He had not taken tea as his daughter was married there when he reached at the house of Deena Nath Pandey he was ready.

On being enquired by the court as to whether he had seen the accused Rakesh participating in the offence the witness had stated that the incident had taken place 9-10 years ago and at the time of

incident he was quite perplexed and he could not recognise the third person at the time of the incident. He could not say that the accused present in the court was also involved as a third person in the incident. He had stated that the deceased after receiving shots went 5-6 paces and then fell down hence he could not see that any blood was found between 5-6 feet. He had further stated that after the death of Deena Nath Pandey he remained there with the dead body while Sita Ram went to lodge the first information report. Thousand of persons had gathered at the place of incident. He had not put any sheet rather someone had put the sheet over the dead body. Deena Nath Pandey was wearing blue pant and white shirt. He is not able to tell about the relation. He had further stated that when he reached to the house of Deena Nath Pandey he was ready and he could not say that whether he was having spectacle, diary etc. with him. He had deposed that the complainant had also moved from his house along with him but he was 50-60 paces behind. Deena Nath Pandey was accompanying with him when the fire was made he had cried and was retracted a few paces. At his hue and cry Sita Ram and Laxmi Narain rushed to the spot. Setu Bhuj was at his home and he was also present. He was confronted with his statement under Section 161 Cr.P.C. who had admitted that he had given the same statement. He had denied that he has not seen the incident and on account of relation he is recording his statement falsely. He had denied that the deceased was killed in the early hours of morning by unknown persons. P.W. 2 was cross examined with regard to his statement, which was given in favour of the defence. P. W. 2 had again reiterated the statement, which was given by him to the Investigating Officer under Section 161 Cr. P.C. and stated that he had recognised all the accused persons, namely, Mithlesh, Shailesh and Rakesh @ Bablu at the time of the incident. He has again reiterated the statement, which was recorded in examination-in-chief that the accused persons had stopped the motorcycle in front of them and after alighting from motorcycle all who were having small firearm weapons started firing at Deena Nath Pandey and only then he had cried. He had again stated that he had given this statement. He was confronted with his statement given in S.T. No. 148 of 2001 (State Vs. Mithlesh), which he had asserted that he had given the statement that all the three accused persons came on motorcycle and started firing with their firearm weapons. He had admitted that he was stated in his earlier statement that Rakesh @ Bablu (present appellant) was driving the motorcycle. Later on he had stated that he had disclosed the name of Rakesh @ Bablu when the deceased's brother had disclosed his name. When he was confronted that he has not disclosed this fact in S.T. No.141 of 2001 when the witness has stated that he does not remember that he had given this statement. He had stated that he disclosed that Deena Nath Pandey told the name of Rakesh @ Bablu to him.

S.I. Keshav Prasad who was examined as P. W. 5 had deposed that he was posted as Head Moharrir on 1.11.2000 at police station Parsarampur and on the basis of the written report given by the complainant Sita Ram he had registered the first information report at 9.45 P.M. which was proved by him as Chick No. 228 of 2000 on the basis of which the G.D. Entry was made as G.D. No. 17. He had also recorded the statement of the complainant. He had proved the first information report, G.D. Entry. In his cross examination he has clearly stated that he had not mentioned the place of incident or the police station. He had denied that the first information report was registered anti time.

S.I. Sudama Yadav was examined as P.W. 3 who had conducted the inquest on 1.11.2000 at 10.20 A.M. at village Parsavapur. The deceased was lying in front of the door of Setu Bhuj. He had given

necessary details in inquest report. The inquest was signed by the witnesses, photocopy was proved by him as Exhibit Ka. 3 to Ka. 8. In his cross examination he had stated that no witness had disclosed the name of the accused persons at the time of inquest. He had seen the injury no. 7 and injury no. 11. There was no socks and shoe and slepeer beside the dead body. Nothing was recovered from the pocket of pant and shirt. No documents were recovered. He has also not found empty cartridges near the dead body.

The Doctor who had conducted autopsy of the deceased has examined as P.W. 6. He has proved the post mortem report as Exhibit Ka. 14. The deceased had sustained six fire arm wound of entry and five exit wound on vital part of the body, which were sufficient in the ordinary course to cause death.

The first investigating officer Harish Chand was examined as P. W. 4 who was earlier examined in S.T. No. 148 of 2001 as P.W. 8. He had deposed about the investigation in detail but nothing could be elicited to say that the investigation was done in partial manner. The defence has tried to make some improvement in the cross examination to create doubt about the manner of investigation by the Investigating Officer. He had specifically stated that he had made hectic search to arrest the accused persons. He had stated that the charge sheet was submitted against accused Mithlesh and Shailesh while the charge sheet against the accused/appellant Rakesh @ Bablu was submitted in abscondance. He had totally denied that on account of the complainant's relation with the deceased the first information report was registered in consultation with the police. He had also denied that the first information report had been lodged against the named accused persons on account of enmity.

Hari Shanker Rai was examined as second Investigating Officer as P.W. 7 who had stated that he was posted as Station Officer at Parsarampur on 13.3.2001. After the transfer of the earlier Investigating Officer he was entrusted with the investigation and during the course of investigation he had submitted the supplementary paper No. 7 on 28.4.2001 as the accused/appellant Rakesh @ Bablu was not arrested, hence he had moved an application under Section 299 Cr.P.C. to proceed with the case in the absence of accused/appellant Rakesh @ Bablu.

Vinay Kumar CP was examined as P.W. 8 has stated that the investigation of the case was done by Sub Inspector Jagdev Prasad Tiwari from 6.5.2001 as he has retired and ill since long. He is not able to move, he has deposed that he was posted at police station Parsarampur. Supplementary report Nos. 11 and 12 were prepared by him dated 6.5.2001 and 16.6.2001 respectively, which was relating to the report of the Forensic Laboratory and for tracing out the accused/appellant Rakesh Tiwari @ Bablu and about his criminal antecedent. He had also filed a supplementary Paper No. 13 dated 17.6.2001 for preparing B. warrant, which was addressed to district jail Gonda on 20.6.2001. He had submitted supplementary report No. 14 on which the court has passed the order and the statement of the appellant Rakesh @ Bablu was recorded in district jail Gonda and thereafter the charge sheet No. 151-A of 2001 dated 20.6.2001 was submitted. He had proved the original charge sheet against Rakesh Tiwari @ Bablu vide Paper No. 3-A/1, which was in the writing of the Sub Inspector Jagdev Prasad Tiwari. It was proved by P.W. 8 and marked as Exhibit Ka. 15. In his cross examination he has stated that no statement was recorded by the Sub Inspector Jagdev Prasad Tiwari and he was not posted along with him at police station Parsarampur. He had denied that he was not posted

along with S.I. Jagdev Prasad Tiwari and has also denied that he had not seen Jagdev Prasad Tiwari reading or writing. He had also denied that he was not posted at police station Parsarampur.

After the prosecution evidence was closed the accused/appellant was examined under Section 313 Cr.P.C. who had denied the entire prosecution case and denied the prosecution case as well as the statements of the prosecution witnesses and has stated that he is not aware about the same. He has stated that he has been falsely implicated in the present case. He has nothing to do with the alleged incident.

In defense Vinay Kumar the son of the deceased Deena Nath Pandey was examined as D.W. 1 while Rakesh Tiwari @ Bablu the accused/appellant examined himself and appeared as D.W. 2. The defence has further stated that he wanted to rely upon the documents proved, which was adduced on behalf of the accused persons in S.T. No. 148 of 2001 (Mithlesh and others Vs. State of U.P.), which may be read in defense in the present case.

Vinay Kumar Pandey who has been examined as D.W. 1 is the son of the deceased Deena Nath Pandey while Rakesh Tiwari @ Bablu the accused/appellant was examined as D.W. 2. It was stated in defence that one day prior to the incident i.e. on 31.10.2000 in the evening both the witnesses went to Faizabad from village Dhuniyabhiti. It was stated by D.W.1 that the accused Rakesh Tiwari @ Bablu is his cousin who is a good player of cricket. On 1.11.2000 there was a tournament of cricket in Saket University and both of them had to participate. On 1.11.2000 in the morning of about 6 A.M. Lal Chand and Sarju Prasad came to Faizabad and informed that his father had been killed, hence he and Rakesh started to village Dhuniyabhiti and when arrived at village Parsarampur they came to know that Rakesh @ Bablu has also been named, hence they did not reach at the place of incident. D.W. 1 in his statement had stated that he and his mother were telling to the complainant that Rakesh @ Bablu and his brothers have no nexus in this murder but his Tau was not agreed and had made a false report. He had denied in his cross examination that he is deposing in favour of Rakesh under his influence.

D.W. 2 the appellant Rakesh @ Bablu has stated that the deceased was his brother in law in relation and his son Vinay Kumar used to play cricket with him on 31.10.2000 in the evening he along with Vinay Kumar had gone to Faizabad from village Dhuniyabhiti. Vinay Kumar was a student of B.A. in Saket University at Faizabad. He had gone along with Vinay Kumar as there was a cricket tournament and he had to participate along with Vinay Kumar. On 1.11.2000 in the morning Sarju and Lal Chand came to Faizabad and informed that father of Vinay Kumar was murdered at this they had proceeded from Faizabad and in the way they came to know that the appellant has been nominated in the murder of Deena Nath Pandey. He further stated that he is absolutely innocent and has no nexus with the incident of murder. He has no enmity with Deena Nath Pandey and has been falsely implicated. In his cross examination he had stated that he had disclosed about this fact to the police and in this regard his elder brother Mithlesh had given an application. He was arrested after 5-6 months of the incident. He was named in the first information report. He is deposing for the first time that he was going along with Vinay Kumar to Faizabad and was in his room. He had denied that he is deposing falsely. He had also denied that he was also present at 8 A.M. on 1.11.2000 along with other accused persons. It is wrong to say that his family had made influence upon Vinay Kumar

to depose in his favour. It is wrong to say that in order to save himself he has set up Vinay Kumar as a witness to depose in his favour and giving false statement.

After analysing the documentary and oral evidence of the prosecution witnesses who withstood searching cross examination the learned trial court has found that the prosecution has proved its case beyond all reasonable doubt and after hearing the counsel for the parties recorded the finding of guilt against the accused/appellant Rakesh @ Bablu under Section 302 I.P.C. and accordingly convicted and sentenced him to imprisonment for life. Further directing him to pay a fine of Rs. 10,000/- by the order impugned. The instant appeal has been heard along with Criminal Appeal No. 3347 of 2004 Mithlesh and another Vs. State of U.P. We have heard the learned senior counsel Sri V. P. Srivastava assisted by Sri S.P. Pandey for the appellants, learned A.G.A. Sri Syed Ali Murtaja on behalf of the State and have gone through the record of the case.

The learned counsel for the appellant has made the same submissions, which were advanced by him in the connected appeal filed by two accused persons, namely, Mithlesh and Shailesh.

The thrust of the argument of the learned counsel was that there was no motive for the appellant to commit the murder of Deena Nath Pandey. The death has occurred in the wee hours of the morning by unknown persons and on account of enmity the appellant has been implicated falsely. The place of incident is not proved. No independent witnesses have been examined by the prosecution and only the related witnesses have been examined. The blood stained clothes and soil were never produced before the court. The empty cartridges and live cartridges were also not produced by the Investigating Officer before the court. No evidence was collected with regard to the motorcycle. Some papers, which were recovered beside the deceased shows that he had some enmity with Sunder Singh of village Chitura but no investigation was done in this regard. There is great inconsistency in the inquest report with the post mortem report with regard to the nature of injuries mentioned therein, which clearly shows that these injuries were caused by some other persons in some different manner.

Lastly, the appellant Rakesh @ Bablu was not present at the time of the incident, which is clearly proved by the evidence of D.W.1 Vinay Kumar who had deposed that one day prior to the incident he had gone along with the appellant to Faizabad as there was a cricket match in the Saket University. Neither the son of the deceased nor the wife of the deceased the mother of D.W. 1 were made prosecution witness, therefore, the conviction recorded by the trial court against the appellant is not liable to be maintained.

The learned A.G.A. has however supported the findings recorded by the learned trial court and reiterated his submission advanced in the connected appeal and has submitted that the appellant remained away for a considerable period of time and on account of which his trial was separated. During the course of trial of the appellant the son of the deceased was produced in defense raising for the first time the plea of alibi, which does not find place in the trial of other accused persons. There was no whisper at all that the present accused/appellant had not accompanied with the other accused persons and involved in the ghastly incident. The Samdhi of the deceased has also been won over with the passage of time who had tried to twist the entire prosecution case. The trial court has

analyzed the evidence of the appellant D.W. 2 as well as the son of the deceased who has been produced as D.W. 1 in the present case and rightly arrived at the conclusion that the appellant was also involved in the commission of offense along with two other who are his real brother. All of them have shared common intention and hence the findings recorded by the trial court and convicting the appellant deserves to be maintained.

As far the motive is concerned there was enmity of the appellant with the deceased, it is evidently clear that the mother-in-law of the deceased Sonkala had transferred her property to the wife of the deceased and on account of this the accused persons were bearing enmity and the brother of the appellant Mithlesh had filed objection, which was not decided in their favour in 1994. Thereafter an incident had occurred in which the accused persons had injured the deceased by lobbing bomb upon him and as such the first information report was registered under Section 307 I.P.C. in 1997 as case crime No. 114 of 1997 by the deceased in which the accused persons were acquitted as the deposition of the deceased could not take place as he was murdered during the said trial and the accused persons were acquitted by the order dated 22.3.2004. The post mortem report of the deceased also fully corroborates the prosecution case with regard to the time of incident. There is no contradiction in the testimony of the Doctor who had conducted the post mortem of the deceased with the post mortem report. The prosecution case cannot be disbelieved merely on the ground that the witnesses are related to the deceased. The presence of the witnesses can also not be made doubtful that they are related to the deceased. The incident had occurred in broad day light the complainant as well as P.W. 2 Parmanand Shukla had witnessed the incident. Near the house of Setu Bhuj when all the accused persons who were armed with their respective weapons had started firing indiscriminately at the deceased. The statement of D.W. 2 Parmanand Shukla who was relative of the deceased being the Samdhi as his daughter was married with the son of the deceased, namely, Vinay was a natural witness. The circumstances were put to him to create doubt about his presence at the time of the incident. His presence at the spot was natural as he was accompanying with the deceased in connection with some personal work and the deceased who was an Advocate by profession was accompanying with him to facilitate in making license of ration card. P.W. 2 had no enmity with the accused persons to falsely implicate the accused/appellant and his brothers. Only to support his son in law Vinay he made contradictory statement about the participation of the appellant Rakesh and was declared hostile. The law is well settled that the statement of a witness who has been declared hostile by the prosecution is neither inadmissible nor is it of no value in its entirety. The statement particularly the examination in chief in so far it supports the case of the prosecution is admissible and has rightly been relied upon by the trial court. The evidence of P.W. 2 does not completely efface his evidence which is otherwise corroborated by other reliable evidence.

It has also been argued that there was discrepancy with regard to the nature of injury in the inquest report with the injuries mentioned in the post mortem report by the Doctor. Neither the inquest nor the post mortem report is a substantive piece of evidence. The inquest is conducted only to know about in what circumstances the deceased was done to death or whether it was unnatural death and what was the reason of death, what type of instrument had been used and who had attacked upon the deceased is out of the purview of Section 174 Cr.P.C. if there is any discrepancy found in the inquest report or the post mortem report it would not effect the fabric of the prosecution case to disbelieve the testimony of the oral witnesses.

Much has been argued by the learned counsel that the deceased's son who was produced as D.W. 1 has himself deposed that one day prior to the incident the accused/appellant had gone along with him to play cricket tournament at Saket University and on this count the statement of the deceased's son and wife were not recorded. They have not been made witness as they were not ready to depose falsely against the appellant Rakesh Tiwari @ Bablu. The appellant and the deceased's son Vinay who were produced as defense witnesses have laid much stress that they were not present on the day of incident and they were present at Saket University as there was a cricket tournament, which was fixed for 11.11.2000 and both of them were participating when they were informed on 1.11.2000 at 6 A.M. by Lal Chand and Sarju Prasad that his father has been killed only then they came to know about the incident and as the name of accused appellant has been nominated they did not arrive at the place of incident. Neither Lal Chand nor Sarju Prasad was produced by the defense witnesses who had informed about the death of Deena Nath Pandey. It is not at all clear as to when and how they received the information, which was divulged to both D.W.1 and D.W. 2 and if they had come to know about that the name of the appellant has been nominated, why it was not mentioned by the other accused persons in their statements under Section 313 Cr.P.C. This plea of alibi has been raised at a belated stage. This fact was never mentioned in the bail application moved on behalf of the appellant nor this fact was suggested to the prosecution witnesses P.W. 1 and P.W. 2 that the appellant was not present at the time of incident. Even in the statement under Section 313 Cr.P.C., which was recorded on 30.7.2010 the appellant has not stated anything about the plea of alibi and as such the plea of alibi has rightly been rejected by the learned trial court.

We have also considered the testimony of the defense witnesses in the light of the judgment of the Apex Court in the case of State of Haryana Vs. Ram Singh, 2002, (44) ACC 471 SC where it is observed that "the evidence tendered by defense witness cannot always be termed to be a tainted one. The defense witnesses are entitled to equal treatment and equal respect as that of the prosecution. The issue of credibility and the trustworthiness ought also to be attributed to the defense witnesses on a par with that of the prosecution".

In law alibi is used to express the defense in a criminal prosecution, where the party accused in order to prove that he could not have committed the crime charged against him, offers evidence that he was in a different place at that time. The plea taken should be capable of meaning that having regard to the time and place when and where he is alleged to have committed the offence he could not have been present. The plea of alibi postulate the physical impossibility of the presence of the accused at the scene of offence by reasons of his presence at another place.

The Apex Court in the case of Jayantibhai Bhenkarbhai Vs. State of Gujrat, 2002, 45 ACC 1026 (SC) has considered the law of plea of alibi and has held as under;

"The plea of alibi flows from Section 11 and is demonstrated by illustration (a). Sarkar on Evidence(Fifteenth Edition, p. 258) states the word 'alibi' is of Latin origin and means ``elsewhere'`. It is a convention term used for the defence taken by an accused that when the occurrence took place he was so far away from the place of occurrence that it is highly improbable that he would have participated in the crime. Alibi is not an exception(special or general) envisaged in the Indian Penal Code or

any other law. It is only a rule of evidence recognized in Section 11 of the Evidence Act that facts which are inconsistent with the fact in issue are relevant. The burden of proving commission of offence by the accused so as to fasten the liability of guilt on him remains on the prosecution and would not be lessened by the mere fact that the accused had adopted the defence of alibi. The plea of alibi taken by the accused needs to be considered only when the burden which lies on the prosecution has been discharged satisfactorily. If the prosecution has failed in discharging its burden of proving the commission of crime by the accused beyond any reasonable doubt, it may not be necessary to go into the question whether the accused has succeeded in proving the defence of alibi. But once the prosecution succeeds in discharging its burden then it is incumbent on the accused taking the plea of alibi to prove it with certainty so as to exclude the possibility of his presence at the place and time of occurrence. An obligation is cast on the Court to weigh in scales the evidence adduced by the prosecution in proving of the guilt of the accused and the evidence adduced by the accused in proving his defence of alibi. If the evidence adduced by the accused is of such a quality and of such a standard that the Court may entertain some reasonable doubt regarding his presence at the place and time of occurrence, the Court would evaluate the prosecution evidence to see if the evidence adduced on behalf of the prosecution leaves any slot available to fit therein the defence of alibi. The burden of the accused is undoubtedly heavy. This flows from Section 103 of the Evidence Act which provides that the burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence. However, while weighing the prosecution case and the defence case, pitted against each other, if the balance tilts in favour of the accused, the prosecution would fail and the accused would be entitled to benefit of that reasonable doubt which would emerge in the mind of the Court".

In the case of plea of alibi the burden is on the accused to prove that certainty so as to exonerate the possibility of his presence at the place and time of occurrence. Learned Sessions Judge has considered the testimonies of D.W. 1 and D.W. 2. Both have stated that they were present at Saket University Faizabad to participate in cricket tournament whereas the place of occurrence is in district Basti. The plea of alibi was raised at a very belated stage. The plea was even not taken when the bail application was moved by the accused appellants. Neither any suggestion was put to the prosecution witnesses nor stated in the statements recorded under Section 313 Cr.P.C. The prosecution in this case has successfully proved its case beyond reasonable doubt. The first information report was promptly lodged, the eye witnesses have named the appellant along with his two brothers, hence the Sessions Judge has rightly rejected the plea of alibi raised by the appellant.

The first information report has promptly been lodged by the brother of the deceased at 9.45 A.M. in respect of the incident, which had occurred at 8 A.M. There was no time for deliberation to falsely implicate the appellant and his brothers when the inquest was conducted the case crime number was mentioned and as such it cannot be said that the first information report was anti timed or both the prosecution witnesses were not present at the time of incident. The statement of P. W. 2 deposing that he had not recognized the appellant is a deliberate attempt on the part of the defense,

which shows that he was pressurized to depose in favour of the appellant.

The prosecution is also not bound to examine each and every person who has witnessed the incident and in the present case as the wife of the deceased and son were not the witnesses of the incident, hence they were not produced as prosecution witnesses. The sole testimony of the witnesses of fact stands corroborated by the testimony of the formal witnesses as well as by the prompt first information report and the medical evidence on record. Some discrepancy in the ocular count of a witness cannot be per se effect the credibility of the evidence of the witness unless the contradictions are material the same cannot be used to get the evidence in its entirety. Serious discrepancy ought not to obliterate and otherwise acceptable evidence merely because there is inconsistency in the evidence it is not sufficient to impair the credibility of the witness. It is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the court would be justified in discarding his evidence. In Appabhai and another Vs. State of Gujrat, 1988 Vol. 25 ACC 168 SC, the Apex Court had emphasis that while appreciating the evidence the court should not attach undue importance to minor discrepancy. The discrepancies, which do not shake the basic version of the prosecution case may be discarded. Similarly, the discrepancies, which are due to normal errors of perception or observation should not be given importance. The court by calling into aid its vast experience of men and matters in different cases must evaluate the entire material on record as a whole and should not disbelieve the evidence of a witness altogether, if it is otherwise trustworthy.

The Investigating Officer had collected various articles from the place of incident, which were sent for Sereologist who had confirmed that human blood was found, hence it cannot be said that the incident had not occurred at the place as stated by the prosecution witnesses. If the empty cartridges and the apparels of the deceased, which were sent for examination were not produced before the trial court it would not create any doubt that the Investigating Officer had not investigated the case in proper manner. The lapses on the part of the police in investigating the case would not belie the entire prosecution case and it will not accrue any benefit to the accused appellant.

From the statement of P.W. 2 Parma Nand Shukla it clearly transpires that though he has supported the prosecution case in his examination in chief but in cross examination he had tried to create doubt about recognising Rakesh @ Bablu, which clearly shows that he is deposing under some influence that he had deposed the name of Rakesh @ Bablu on the disclosure of complainant Sita Ram. The statement of P.W. 2 however proves certain facts viz death of the deceased at the spot, arrival of P. W. 2 along with the deceased at about 8 A.M. who had moved from the house at about 7.30 A.M. The brother of the deceased and other witnesses were coming behind from them and all had seen that the accused persons had fired at the deceased with their respective small firearm weapons. Deceased Deena Nath Pandey on account of receiving firearm injuries went to 5-6 paces and then fell in front of the house of Setu Bhuj. These facts are consistent with the statement of the witness, which recorded in the earlier S.T. No.148 of 2001 and in the present trial during the course of cross examination P.W. 2 under the influence of accused/appellant Rakesh @ Bablu has given some conflicting statement to create doubt. This discrepancy with regard to not identifying him when the incident had taken place will not create any doubt about the veracity of the prosecution case. Rather being an eye witness of the incident his testimony of material particular cannot be

doubted that the appellant was not present along with two other who had faced trial and was convicted way back in the year 2004.

It is well settled that the principle of falsus in uno falsus in omnibus has no application in India hence the prosecution case cannot be disbelieved only because P.W. 2 has deviated from his statement. In respect of the appellant his evidence cannot be held to be totally unreliable. The part of his statement can be taken into consideration for the purpose of finding out as to whether the appellant is guilty of commission of offense or not. It is trite that only because a witness for one reason or the other has to some extent retract from his earlier statement by itself may not be sufficient to discard the prosecution case in its entirety. It is permissible for a court of law to rely upon a part of the testimony of the witness who has been declared hostile. It is well settled law that the evidence of a hostile witness may not be totally rejected which is subject to close scrutiny, a portion thereof, which is consistent with the case of prosecution or defense may be accepted. The testimony of the prosecution witnesses merely because P.W. 1 who happens to be the real brother of deceased his testimony cannot be brushed aside as of being an interested witness. The eye witness account of both the prosecution witnesses are natural, cogent and convincing, which corroborate the manner of incident and their testimony cannot be disbelieved merely on account of some discrepancy in their statement, it will affect the probity of the entire prosecution case. The appellant in association with his two brothers Mithlesh and Shailesh on account of enmity and dispute with regard to landed property had eliminated the deceased in a very gruesome manner who died on the spot instantaneously, therefore, this court is not hesitant with the findings recorded by the learned trial court in convicting the appellant.

It is also pertinent to mention that the appellant was absconding since the date of incident i.e. 1.11.2000 and his case was committed to the court of Sessions by the Chief Judicial Magistrate on 29.4.2004. A Criminal trial is not an enquiry into the conduct of an accused for any purpose other than to determine whether he is guilty of the offence charged. In this connection, that piece of conduct can be held to be incriminatory which has no reasonable explanation except on the hypothesis that he is guilty. Conduct which destroys the presumption of innocence can alone be considered as material. In this regard, it is useful to refer Anant Chaintaman Lagu Vs. State of Bombay A.I.R. 1960 SC 500;

"Circumstantial evidence in this context means a combination of facts creating a network through which there is no escape for the accused, because the facts taken as a whole do not admit of any inference but of his guilt.....this conduct of the accused was so knit together as to make a network of circumstances pointing only to his guilt.....his methods was his own undoing; because even the long arm of coincidence could not explain the multitude of circumstances against him, and they destroyed the presumption of innocence with which law clothed him."

Thus from the material on record it has been proved beyond reasonable doubt that the appellant Rakesh Tewari @ Bablu absconded after the incident for a long period which is a very relevant conduct under Section 8 of the Indian Evidence Act.

On the basis of verbose and prolix discussions made above and after considering the material evidence available on record, we are of the considered opinion that findings of conviction recorded by the learned trial court are well substantiated by the evidence available on record. The trial court has appreciated the evidence in the right perspective, we do not find any tangible reason to interfere with the finding of conviction recorded for the offence punishable under Section 302 Indian Penal Code, therefore, the conviction recorded by the trial Court against the accused/appellant Rakesh Tewari @ Bablu under Section 302 I.P.C. is hereby maintained and affirmed.

The appeal is devoid of merit and is accordingly dismissed.

Let a copy of this judgment and order alongwith original record be transmitted to the learned trial court for information and compliance.

Judgment certified and be placed on record.

Dt. 31.5.2018.

(Chandra Dhari Singh,J.) (Naheed Ara Moonis,J.) Sh.

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A.F.R. RESERVED.

Criminal Appeal No. 6384 of 2010.

Appellant. Rakesh Tiwari @ Bablu @ Akhilesh.

Respondent. State of U.P. Counsel for appellant. Surendra Pratap Singh, Arvind Kumar Tripathi, Ashok Kumar Pandey. S.P. Pandey, V.K. Maheshwari.

Counsel for respondent. Govt. Advocate.

Hon'ble Naheed Ara Moonis,J.

Hon'ble Chandra Dhari Singh,J.

(Delivered by Hon'ble Naheed Ara Moonis,J.) The instant appeal is arising out of judgment and order dated 26.8.2010 passed by the Additional Sessions Judge, Fast Track Court No.1, Basti in S.T. No. 142 of 2004 (State vs. Rakesh Tiwari @ Bablu @ Akhilesh) arising out of case Crime No. 339 of 2000, under section 302 I.P.C., police station Parsarampur, district Basti whereby the appellant has been awarded life imprisonment and Rs. 10,000/- fine under Section 302 I.P.C. In default of payment of fine the accused/appellant has to go additional sentence of one year.

The prosecution case in a short conspectus is that a first information report was lodged by Sita Ram Pandey in respect of the incident occurred at 8 A.M. on 1.11.2000 alleging therein that he is a resident of village Dhuniyabhiti, police station Parasrampur, district Basti. On 1.11.2000 his brother who is an Advocate by profession had left his house for civil court along with Parma Nand Shukla at 8 A.M. when he reached in front of the house of Setu Bhuj at that juncture Mithlesh, Shailesh Tiwari and Rakesh @ Babbu all sons of Ramdeen resident of village Chhapiya, police station Paikaliya, district Basti came on a motorcycle and attacked upon him on account of old enmity of property dispute. All the three persons had whipped out country made pistol and revolver and made indiscriminate firing upon Deena Nath Pandey at this Parma Nand Shukla had made hue and cry on account of which various persons came on the spot. The complainant Laxmi Narain and Setu Bhuj also reached at the spot. All the accused persons escaped towards Baijalpur on the motorcycle brandishing Katta and revolver. Deena Nath Pandey died on the spot. The complainant was also going to market from his house. He was accompanied with Bhav Nath Pandey son of Kashi Nath. All the persons had witnessed the incident and recognized the accused persons. The dead body of his brother was lying on the spot and had come to lodge the report to take action. A question was asked as the house of Setu Bhuj situate in which village it was answered by the complainant that it is in village Parsahwa. On this information the first information report was lodged at about 9.45 A.M. on the same day, which was registered as case crime No. 339 of 2000, under Section 302 I.P.C. at police station Parsrampur, district Basti against the accused persons, namely, Mithlesh, Shailesh and Rakesh @ Babbu, all sons of Ram Yagya.

The trial of accused Mithlesh and Shailesh was separated from the present accused/appellant Rakesh Tiwari @ Bablu @ Akhilesh who faced the trial in S.T. No. 148 of 2001 (State Vs. Mithlesh and others), S.T. No. 149 of 2001 (State Vs. Shailesh) arising out of case Crime No. 339 of 2000, under Section 302/34 I.P.C. and S.T. No. 288 of 2001) arising out of case Crime No. 58 of 2001, under Section 3/25 Arms Act, police station Parsrampur, district Basti. They were convicted by the learned Additional Special Judge, E.C. Act, Basti by order dated 11.5.2004 under Section 302/34 I.P.C. for life imprisonment with fine of Rs. 2,000/- each and in default of payment of fine both the accused persons were directed to serve additional sentence of one month. The accused Shailesh was acquitted of the charge under Section 3/25 Arms Act. Both the accused persons, namely, Mithlesh and Shailesh had challenged their conviction by filing the Criminal Appeal No. 3347 of 2004 (Mithlesh and another Vs. State of U.P.).

As the appellant Rakesh @ Bablu @ Akhilesh was absconding and after his arrest the charge sheet was submitted on 3.12.2001 by S.I. Jagdev Prasad Tiwari, his case was committed to the court of Sessions by the Chief Judicial Magistrate, Basti on 29.4.2004 and thereafter the charges were framed separately against the appellant for the offence punishable under Section 302 read with Section 34 I.P.C. by order dated 29.11.2007. The appellant abjured the charges and claimed to be tried. The prosecution was given opportunity to lead evidence and the examination in chief of Sita Ram Pandey, P.W. 1 the complainant was recorded and thereafter the case was transferred from the court of Ist. Additional Sessions Judge, Basti to the court of Sessions Judge, Basti on 26.11.2009.

To substantiate the charges against the appellant eight prosecution witnesses were examined. P. W. 1 Sita Ram Pandey the complainant and Parma Nand Shukla P. W. 2 as witnesses of fact, while the

formal witness S.I. Sudama Yadav as P. W. 3 who had prepared the inquest report. S.I. Harish Chand the first Investigating Officer examined as P. W. 4. S.I. Keshav Prasad Dubey scribe of the first information report as P. W. 5, Dr. S. S. Dwivedi, Medical Officer who conducted the post mortem of the deceased examined as P. W. 6. S.I. Hari Shanker Rai the second Investigating Officer examined as P.W. 7 and Constable Vinay Kumar was examined as P. W. 8 who had proved and signed the papers prepared by the third investigating officer S.I. Jagdev Prasad Tiwari.

In the instant session trial except the charge sheet, the photo copies of the other documents were filed as the original documents relating to the papers prior to the submission of the charge sheet about the investigation were attached with S.T. No. 148 of 2001 (States Vs. Mithlesh) pertaining to the co-accused person and the same were transmitted to this court as the convicted accused persons had challenged their conviction before this court. Later on the photocopies were obtained from this court to facilitate the same in conducting the present trial of appellant Rakesh Tiwari @ Bablu, therefore, the first information report was exhibited as Exhibit Ka. 1, inquest report Exhibit Ka. 2, Photo nash and Police Form No. 379 as Exhibit Ka. 3 and the papers relating to inquest report and Police Form 33 and letters to the Chief Medical Officer and In-charge Police and sample of seal exhibited as Exhibit Ka. 4 to Ka. 8. The site plan marked as Exhibit Ka. 9, memo of blood stained and plain earth marked as Exhibit Ka. 10. The charge sheet submitted against co-accused Mithlesh exhibited as Exhibit Ka. 11, photocopy of the first information report against the co-accused Mithlesh exhibited as Exhibit Ka. 11, Chik FIR Exhibit Ka. 12 and G.D. entry Exhibit Ka. 13, the post mortem report exhibited as Exhibit Ka. 14. The charge sheet submitted against the appellant exhibited as Exhibit Ka. 15 and the report of the chemical examiner exhibited as Exhibit Ka. 16.

Dr. S.S. Dwivedi P. W. 7 had conducted the post mortem of the deceased on 1.11.2000 at 6.30 P. M., which was brought by Raj Nath Yadav and Mangaroo Ram police constables of police station Parsrampur, district Basti in sealed cover. On external examination the Doctor has found an average build male, eyes open, mouth half open, injured part were bleeding, clot of blood surrounding the wounds, rigor mortis present both the extremities. The following anti mortem injuries were found;

1. Firearm wound of entry on left chin lat. side size 1 x 0.8 x cavity deep direction upward oblique inverted colar with laceration. No blackening and tattooing present.
2. Firearm wound of exit on right side ear groove in area of 2.5 x 2 cm. X Cavity deep oblique out let fraction mostoil.
3. Firearm wound of entry on left zygomatic arch below cheek size 1 cm x 0.8 cm cavity deep gone up ward. Inverted color with laceration. No blackening and tattooing present.
4. Firearm wound of exit on frontal bone lateral aspect left side oblique, size 4 cm x 3 x bone deep base long roof small exverted margin fracture of frontal bone missing bones pieces.
5. Firearm wound of entry on left side chest. 11 cm below at 7' O clock position, size 1 cm x cavity deep,powder burn present, inverted color lacerated margin, no BT going oblique.

6. Firearm wound of entry inverted cross lacerated margin front of chest right side 14 cm medial to nipple at 6.30' O clock position size 1 cm x 0.8 cm. Cavity deep.
7. Firearm wound of exit mesentry comes out 2.5 cm below, right nipple at 7' O Clock position size 3 cm x 2.5 cm x cavity deep lacerated margin with oblique direction.
8. Firearm wound of exit 12 cm post auxiliary fold right side back 2 x 1.5 x cavity deep everted margin lacerated in nature.
9. Firearm wound lacerated lateral spining process crossing parallel making barrow, same entry exit same, size 1.2 cm x 0.6 cm x muscle deep. No BT roof of wound absent.
10. Firearm wound of entry on back 28 cm below C-7 prominence right side oblique size 1 cm x 0.8 cm x cavity deep. Inverted color lacerated margin. No BT oblique direction.
11. Firearm wound of exit on back C -7 prominence 18 cm away left side, size 1.8 cm x 1.2 cm x cavity deep.
12. Abraded contusion on left patella (knee), size 3 x 2 cm.
13. Contused abrasion on fore head front size 2 cm x 2 cm.

The eye witnesses of the incident, namely, Sita Ram Pandey the complainant and Parma Nand Shukla who were present at the time of the incident have been examined as P.W. 1 and P.W. 2 respectively. Their statements were recorded in the session trial of the co-accused persons, namely, Mithlesh and Shailesh.

The statement of P.W. 1 Sita Ram Pandey the complainant was recorded who had narrated the incident as mentioned in the first information report by submitting that on 1.11.2000 at about 8 A.M. he was going along with Laxmi Narain to Sringerinari market. Deena Nath Pandey was going to civil court along with Parma Nand Shukla as he reached 50-60 paces away from the house of Setu Bhuj he saw that Deena Nath Pandey was going ahead from Parma Nand Shukla and had seen that Mithlesh, Shailesh and Rakesh @ Bablu came on a motorcycle they had intercepted his brother Deena Nath Pandey and had fired upon him. All the three persons had fired upon Deena Nath Pandey. On the hue and cry of Parma Nand Shukla the complainant Sita Ram Pandey along with Laxmi Narain, Setu Bhuj and Bhav Nath Pandey arrived there to save his brother. All the three accused persons escaped from the spot towards the south when he arrived at the spot his brother had succumbed to the injuries. It was also deposed by him that Sonkala had executed a will of some portion of her property in favour of his brother Deena Nath Pandey and his wife Ram Dulari. Vinay Kumar Pandey is the son of Deena Nath Pandey (the deceased). The remaining property was bequeathed to Vinay Kumar by Sonkala. The accused persons, namely, Mithlesh, Shailesh and Rakesh Tiwari @ Bablu had filed a case in the civil court with regard to this property and this was the reason of enmity. Mithlesh and other had lost the case and on account of this enmity prior to the present incident the accused persons had caused injury with bomb to Deena Nath Pandey. A report

of which was lodged by the complainant's brother against the accused persons at police station Parsrampur, district Basti. The case against Mithlesh and Sailesh in respect of the present case has already been decided, which is S.T. No. 148 of 2001 appended along with S.T. No. 149 of 2001. He has proved the first information report, which was exhibited as Exhibit Ka. 1.

The P.W. 1 was put to lengthy cross examination by the defence. It was stated by him that Sonkali had executed a gift in favour of the wife of the deceased Ram Dulari. A will was executed in favour of Vinay Kumar by Deena Nath Pandey. In this regard the accused persons had filed objections in the court. With regard to the incident of causing injury with bomb prior to the incident it was stated that the first information report was registered against all the three accused persons by his brother. However, he denied that they were granted bail and had been acquitted. He has stated that on the day of incident he was going to market along with Laxmi Narain. Bhav Nath was also coming behind him. Srangivari is three kilometers away from his village. His brother is a practicing lawyer. His brother and Parma Nand had left the house and proceeded towards their destination before him. It cannot be said that whether my brother was going to Harraiya or district Basti. When his brother started to move to go to the civil court, he had not seen him on the day of incident. On the day of incident he along with Parma Nand was going. On the day of incident he did not notice as what his brother was wearing. After his death he has seen the body of his brother. At that time he has not seen whether he was wearing anything in his feet. His brother was aged about 45 to 46 years. He had not seen spectacle, pen or diary near his brother. His brother was using spectacle. He is not aware as to whether his brother was using spectacle while reading or while walking. His brother did not wear coat from his house. His brother never wear lungi. He is not able to say about the recovery of two lungis covered on his dead body. His house is 20 kilometers away from Harraiya. Bus as well as jeep both ply to go to Harraiya. He could not say as to whether his brother was going to catch jeep or other vehicle. All the accused persons came from the southern side and after hearing cry he reached towards his brother, which was 50 - 60 paces away. The complainant has stated that he could not say whether Parma Nand Shukla made hue and cry before or after the firing was made by the accused persons. He had scribed in the first informatoin report that all the three accused persons had fired at Deena Nath Pandey indiscriminately and at that time Parma Nand Shukla had cried. He had seen all the three accused persons were firing. He had scribed in the first informatoin report that various persons arrived there including Setu Bhuj at the spot. Thereafter the accused persons ran away towards Baijalpur. The complainant has admitted that he has not seen all the persons firing at the deceased but he has made description in the first information report of which he cannot say about any reason. He had denied the suggestion that he has not seen the face of Rakesh @ Bablu. He has stated that all the three persons were having small katta and revolver and had specified that accused persons were having small firearm weapons, which is known as katta or revolver. He had denied that he is saying about Katta and revolver in the hands of accused persons by imagination. When he saw the deceased was lying. He was lying in front of the house of Setu Bhuj. The door of house of Setu Bhuj is on western side. There is one hut in front of the house of Setu Bhuj. When the complainant was confronted with the statement given in S.T. No. 141 of 2001 he had stated that he had not disclosed about hut (Madai) in front of the house of Setu Bhuj while in the statement recorded earlier. However, he has stated that whatever statement he had made was seen by him and it was stated. When the report was written by him he was conscious and was not mentally puzzled. He arrived at about 9 o'clock and given the report to the police who had recorded

the statement.

In his cross examination he had also stated that prior to the incident bomb was lobbed upon his brother but he could not say about who were the accused persons. He has also stated that his brother was quite healthy and did not go to morning walk. His brother used to go to civil court and some time remained at home. He could not say about what he used to eat while going to civil court. He was residing separately. He was not aware whether he used to take tiffin for lunch. He was 15-16 paces away from the place of incident. The motorcycle was parked under Neem tree and it was not in starting position. The Neem tree was 4-5 paces away from the place of incident. He could not also say about how many fire was made by each of the accused persons. He had heard 5-6 times of the firing, which was fired one and half hand away. They were all in close range and side by side. It is wrong to say that his brother used to go early in the morning for walk and in the darkness some unknown persons killed him. He has denied that he had not seen the incident or the first informatin report was written anti time.

Parma Nand Shukla who is the Samdhi of the deceased was examined as P.W. 2 and stated that he was accompanying with the deceased at the time of incident and when they reached in front of the house of Setu Bhuj all the accused persons fired from their respective weapons indiscriminately causing death of Deena Nath Pandey on the spot. In his examination in chief he had stated that the incident is of 8 A.M. On 1.11.2000 he had gone to the house of Deena Nath Pandey at about 7.30 A.M. He along with Deena Nath Pandey was going to civil court. He had also accompanied with him to go to Harraiya. He has personal work at Harraiya for which presence of Deena Nath Pandey was essentially required. He along with Deena Nath Pandey had travelled one and half kilometers and reached in front of the house of Setu Bhuj. In his presence Mithlesh, Sailesh and Rakesh arrived on a motorcycle, they had parked the motorcycle and were having small firearm weapon and started firing at Deena Nath Pandey. He succumbed to the injuries and on his shreik Sita Ram, Laxmi Narain, Bhav Nath and Setu Bhuj arrived there, since all the three accused persons were firing, hence he could not come forward to save him. The other witnesses also could not come forward to save Deena Nath Pandey. The accused persons threatened them that in case they will step forward they will be done to death. After killing all the accused persons went towards Baijalpur on the motorcycle.

P.W. 2 had also disclosed that there was a dispute between the accused persons and Deena Nath Pandey in respect of landed property. He was enquired by the Investigating Officer after four days of the incident. In his cross examination he had stated that the deceased Deena Nath Pandey is his Samdhi. Two years prior to the incident his daughter was married to the son of the deceased Vinay Kumar. He did not use to go to village Chhapiya. Accused Rakesh @ Bablu had never visited his village Mariyarpur. The other accused persons Shailesh and Mithlesh used to come. He never met with Rakesh @ Bablu. He had not recognised Rakesh @ Bablu at the time of incident. He had only recognised Mithlesh and Shailesh. He did not know the third person from before. P. W. 2 after looking the accused Rakesh @ Bablu who was present in the court had stated that he could not see the third person who had fired and on the disclosure the name of Rakesh @ Bablu by other persons he is disclosing the name of third person after the disclosure of the other persons.

He had further stated that at about 7.30 A.M. he reached at Dhuniyabhiti. He had not taken tea as his daughter was married there when he reached at the house of Deena Nath Pandey he was ready.

On being enquired by the court as to whether he had seen the accused Rakesh participating in the offence the witness had stated that the incident had taken place 9-10 years ago and at the time of incident he was quite perplexed and he could not recognise the third person at the time of the incident. He could not say that the accused present in the court was also involved as a third person in the incident. He had stated that the deceased after receiving shots went 5-6 paces and then fell down hence he could not see that any blood was found between 5-6 feet. He had further stated that after the death of Deena Nath Pandey he remained there with the dead body while Sita Ram went to lodge the first information report. Thousand of persons had gathered at the place of incident. He had not put any sheet rather someone had put the sheet over the dead body. Deena Nath Pandey was wearing blue pant and white shirt. He is not able to tell about the relation. He had further stated that when he reached to the house of Deena Nath Pandey he was ready and he could not say that whether he was having spectacle, diary etc. with him. He had deposed that the complainant had also moved from his house along with him but he was 50-60 paces behind. Deena Nath Pandey was accompanying with him when the fire was made he had cried and was retracted a few paces. At his hue and cry Sita Ram and Laxmi Narain rushed to the spot. Setu Bhuj was at his home and he was also present. He was confronted with his statement under Section 161 Cr.P.C. who had admitted that he had given the same statement. He had denied that he has not seen the incident and on account of relation he is recording his statement falsely. He had denied that the deceased was killed in the early hours of morning by unknown persons. P.W. 2 was crossed examined with regard to his statement, which was given in favour of the defence. P. W. 2 had again reiterated the statement, which was given by him to the Investigating Officer under Section 161 Cr. P.C. and stated that he had recognised all the accused persons, namely, Mithlesh, Shailesh and Rakesh @ Bablu at the time of the incident. He has again reiterated the statement, which was recorded in examination-in-chief that the accused persons had stopped the motorcycle in front of them and after alighting from motorcycle all who were having small firearm weapons started firing at Deena Nath Pandey and only then he had cried. He had again stated that he had given this statement. He was confronted with his statement given in S.T. No. 148 of 2001 (State Vs. Mithlesh), which he had asserted that he had given the statement that all the three accused persons came on motorcycle and started firing with their firearm weapons. He had admitted that he was stated in his earlier statement that Rakesh @ Bablu (present appellant) was driving the motorcycle. Later on he had stated that he had disclosed the name of Rakesh @ Bablu when the deceased's brother had disclosed his name. When he was confronted that he has not disclosed this fact in S.T. No.141 of 2001 when the witness has stated that he does not remember that he had given this statement. He had stated that he disclosed that Deena Nath Pandey told the name of Rakesh @ Bablu to him.

S.I. Keshav Prasad who was examined as P. W. 5 had deposed that he was posted as Head Moharrir on 1.11.2000 at police station Parsarampur and on the basis of the written report given by the complainant Sita Ram he had registered the first information report at 9.45 P.M. which was proved by him as Chick No. 228 of 2000 on the basis of which the G.D. Entry was made as G.D. No. 17. He had also recorded the statement of the complainant. He had proved the first information report, G.D. Entry. In his cross examinatioin he has clearly stated that he had not mentioned the place of

incident or the police station. He had denied that the first information report was registered anti time.

S.I. Sudama Yadav was examined as P.W. 3 who had conducted the inquest on 1.11.2000 at 10.20 A.M. at village Parsavapur. The deceased was lying in front of the door of Setu Bhuj. He had given necessary details in inquest report. The inquest was signed by the witnesses, photocopy was proved by him as Exhibit Ka. 3 to Ka. 8. In his cross examination he had stated that no witness had disclosed the name of the accused persons at the time of inquest. He had seen the injury no. 7 and injury no. 11. There was no socks and shoe and slepeer beside the dead body. Nothing was recovered from the pocket of pant and shirt. No documents were recovered. He has also not found empty cartridges near the dead body.

The Doctor who had conducted autopsy of the deceased has examined as P.W. 6. He has proved the post mortem report as Exhibit Ka. 14. The deceased had sustained six fire arm wound of entry and five exit wound on vital part of the body, which were sufficient in the ordinary course to cause death.

The first investigating officer Harish Chand was examined as P. W. 4 who was earlier examined in S.T. No. 148 of 2001 as P.W. 8. He had deposed about the investigation in detail but nothing could be elicited to say that the investigation was done in partial manner. The defence has tried to make some improvement in the cross examination to create doubt about the manner of investigation by the Investigating Officer. He had specifically stated that he had made hectic search to arrest the accused persons. He had stated that the charge sheet was submitted against accused Mithlesh and Shailesh while the charge sheet against the accused/appellant Rakesh @ Bablu was submitted in abscondance. He had totally denied that on account of the complainant's relation with the deceased the first information report was registered in consultation with the police. He had also denied that the first information report had been lodged against the named accused persons on account of enmity.

Hari Shanker Rai was examined as second Investigating Officer as P.W. 7 who had stated that he was posted as Station Officer at Parsarampur on 13.3.2001. After the transfer of the earlier Investigating Officer he was entrusted with the investigation and during the course of investigation he had submitted the supplementary paper No. 7 on 28.4.2001 as the accused/appellant Rakesh @ Bablu was not arrested, hence he had moved an application under Section 299 Cr.P.C. to proceed with the case in the absence of accused/appellant Rakesh @ Bablu.

Vinay Kumar CP was examined as P.W. 8 has stated that the investigation of the case was done by Sub Inspector Jagdev Prasad Tiwari from 6.5.2001 as he has retired and ill since long. He is not able to move, he has deposed that he was posted at police station Parsarampur. Supplementary report Nos. 11 and 12 were prepared by him dated 6.5.2001 and 16.6.2001 respectively, which was relating to the report of the Forensic Laboratory and for tracing out the accused/appellant Rakesh Tiwari @ Bablu and about his criminal antecedent. He had also filed a supplementary Paper No. 13 dated 17.6.2001 for preparing B. warrant, which was addressed to district jail Gonda on 20.6.2001. He had submitted supplementary report No. 14 on which the court has passed the order and the statement of the appellant Rakesh @ Bablu was recorded in district jail Gonda and thereafter the charge sheet

No. 151-A of 2001 dated 20.6.2001 was submitted. He had proved the original charge sheet against Rakesh Tiwari @ Bablu vide Paper No. 3-A/1, which was in the writing of the Sub Inspector Jagdev Prasad Tiwari. It was proved by P.W. 8 and marked as Exhibit Ka. 15. In his cross examination he has stated that no statement was recorded by the Sub Inspector Jagdev Prasad Tiwari and he was not posted along with him at police station Parsarampur. He had denied that he was not posted along with S.I. Jagdev Prasad Tiwari and has also denied that he had not seen Jagdev Prasad Tiwari reading or writing. He had also denied that he was not posted at police station Parsarampur.

After the prosecution evidence was closed the accused/appellant was examined under Section 313 Cr.P.C. who had denied the entire prosecution case and denied the prosecution case as well as the statements of the prosecution witnesses and has stated that he is not aware about the same. He has stated that he has been falsely implicated in the present case. He has nothing to do with the alleged incident.

In defense Vinay Kumar the son of the deceased Deena Nath Pandey was examined as D.W. 1 while Rakesh Tiwari @ Bablu the accused/appellant examined himself and appeared as D.W. 2. The defence has further stated that he wanted to rely upon the documents proved, which was adduced on behalf of the accused persons in S.T. No. 148 of 2001 (Mithlesh and others Vs. State of U.P.), which may be read in defense in the present case.

Vinay Kumar Pandey who has been examined as D.W. 1 is the son of the deceased Deena Nath Pandey while Rakesh Tiwari @ Bablu the accused/appellant was examined as D.W. 2. It was stated in defence that one day prior to the incident i.e. on 31.10.2000 in the evening both the witnesses went to Faizabad from village Dhuniyabhiti. It was stated by D.W.1 that the accused Rakesh Tiwari @ Bablu is his cousin who is a good player of cricket. On 1.11.2000 there was a tournament of cricket in Saket University and both of them had to participate. On 1.11.2000 in the morning of about 6 A.M. Lal Chand and Sarju Prasad came to Faizabad and informed that his father had been killed, hence he and Rakesh started to village Dhuniyabhiti and when arrived at village Parsarampur they came to know that Rakesh @ Bablu has also been named, hence they did not reach at the place of incident. D.W. 1 in his statement had stated that he and his mother were telling to the complainant that Rakesh @ Bablu and his brothers have no nexus in this murder but his Tau was not agreed and had made a false report. He had denied in his cross examination that he is deposing in favour of Rakesh under his influence.

D.W. 2 the appellant Rakesh @ Bablu has stated that the deceased was his brother in law in relation and his son Vinay Kumar used to play cricket with him on 31.10.2000 in the evening he along with Vinay Kumar had gone to Faizabad from village Dhuniyabhiti. Vinay Kumar was a student of B.A. in Saket University at Faizabad. He had gone along with Vinay Kumar as there was a cricket tournament and he had to participate along with Vinay Kumar. On 1.11.2000 in the morning Sarju and Lal Chand came to Faizabad and informed that father of Vinay Kumar was murdered at this they had proceeded from Faizabad and in the way they came to know that the appellant has been nominated in the murder of Deena Nath Pandey. He further stated that he is absolutely innocent and has no nexus with the incident of murder. He has no enmity with Deena Nath Pandey and has been falsely implicated. In his cross examination he had stated that he had disclosed about this fact to the police

and in this regard his elder brother Mithlesh had given an application. He was arrested after 5-6 months of the incident. He was named in the first information report. He is deposing for the first time that he was going along with Vinay Kumar to Faizabad and was in his room. He had denied that he is deposing falsely. He had also denied that he was also present at 8 A.M. on 1.11.2000 along with other accused persons. It is wrong to say that his family had made influence upon Vinay Kumar to depose in his favour. It is wrong to say that in order to save himself he has set up Vinay Kumar as a witness to depose in his favour and giving false statement.

After analysing the documentary and oral evidence of the prosecution witnesses who withstood searching cross examination the learned trial court has found that the prosecution has proved its case beyond all reasonable doubt and after hearing the counsel for the parties recorded the finding of guilt against the accused/appellant Rakesh @ Bablu under Section 302 I.P.C. and accordingly convicted and sentenced him to imprisonment for life. Further directing him to pay a fine of Rs. 10,000/- by the order impugned. The instant appeal has been heard along with Criminal Appeal No. 3347 of 2004 Mithlesh and another Vs. State of U.P. We have heard the learned senior counsel Sri V. P. Srivastava assisted by Sri S.P. Pandey for the appellants, learned A.G.A. Sri Syed Ali Murtaja on behalf of the State and have gone through the record of the case.

The learned counsel for the appellant has made the same submissions, which were advanced by him in the connected appeal filed by two accused persons, namely, Mithlesh and Shailesh.

The thrust of the argument of the learned counsel was that there was no motive for the appellant to commit the murder of Deena Nath Pandey. The death has occurred in the wee hours of the morning by unknown persons and on account of enmity the appellant has been implicated falsely. The place of incident is not proved. No independent witnesses have been examined by the prosecution and only the related witnesses have been examined. The blood stained clothes and soil were never produced before the court. The empty cartridges and live cartridges were also not produced by the Investigating Officer before the court. No evidence was collected with regard to the motorcycle. Some papers, which were recovered beside the deceased shows that he had some enmity with Sunder Singh of village Chitura but no investigation was done in this regard. There is great inconsistency in the inquest report with the post mortem report with regard to the nature of injuries mentioned therein, which clearly shows that these injuries were caused by some other persons in some different manner.

Lastly, the appellant Rakesh @ Bablu was not present at the time of the incident, which is clearly proved by the evidence of D.W.1 Vinay Kumar who had deposed that one day prior to the incident he had gone along with the appellant to Faizabad as there was a cricket match in the Saket University. Neither the son of the deceased nor the wife of the deceased the mother of D.W. 1 were made prosecution witness, therefore, the conviction recorded by the trial court against the appellant is not liable to be maintained.

The learned A.G.A. has however supported the findings recorded by the learned trial court and reiterated his submission advanced in the connected appeal and has submitted that the appellant remained away for a considerable period of time and on account of which his trial was separated.

During the course of trial of the appellant the son of the deceased was produced in defense raising for the first time the plea of alibi, which does not find place in the trial of other accused persons. There was no whisper at all that the present accused/appellant had not accompanied with the other accused persons and involved in the ghastly incident. The Samdhi of the deceased has also been won over with the passage of time who had tried to twist the entire prosecution case. The trial court has analyzed the evidence of the appellant D.W. 2 as well as the son of the deceased who has been produced as D.W. 1 in the present case and rightly arrived at the conclusion that the appellant was also involved in the commission of offense along with two other who are his real brother. All of them have shared common intention and hence the findings recorded by the trial court and convicting the appellant deserves to be maintained.

As far the motive is concerned there was enmity of the appellant with the deceased, it is evidently clear that the mother-in-law of the deceased Sonkala had transferred her property to the wife of the deceased and on account of this the accused persons were bearing enmity and the brother of the appellant Mithlesh had filed objection, which was not decided in their favour in 1994. Thereafter an incident had occurred in which the accused persons had injured the deceased by lobbing bomb upon him and as such the first information report was registered under Section 307 I.P.C. in 1997 as case crime No. 114 of 1997 by the deceased in which the accused persons were acquitted as the deposition of the deceased could not take place as he was murdered during the said trial and the accused persons were acquitted by the order dated 22.3.2004. The post mortem report of the deceased also fully corroborates the prosecution case with regard to the time of incident. There is no contradiction in the testimony of the Doctor who had conducted the post mortem of the deceased with the post mortem report. The prosecution case cannot be disbelieved merely on the ground that the witnesses are related to the deceased. The presence of the witnesses can also not be made doubtful that they are related to the deceased. The incident had occurred in broad day light the complainant as well as P.W. 2 Parma Nand Shukla had witnessed the incident. Near the house of Setu Bhuj when all the accused persons who were armed with their respective weapons had started firing indiscriminately at the deceased. The statement of D.W. 2 Parmanand Shukla who was relative of the deceased being the Samdhi as his daughter was married with the son of the deceased, namely, Vinay was a natural witness. The circumstances were put to him to create doubt about his presence at the time of the incident. His presence at the spot was natural as he was accompanying with the deceased in connection with some personal work and the deceased who was an Advocate by profession was accompanying with him to facilitate in making license of ration card. P.W. 2 had no enmity with the accused persons to falsely implicate the accused/appellant and his brothers. Only to support his son in law Vinay he made contradictory statement about the participation of the appellant Rakesh and was declared hostile. The law is well settled that the statement of a witness who has been declared hostile by the prosecution is neither inadmissible nor is it of no value in its entirety. The statement particularly the examination in chief in so far it supports the case of the prosecution is admissible and has rightly been relied upon by the trial court. The evidence of P.W. 2 does not completely efface his evidence which is otherwise corroborated by other reliable evidence.

It has also been argued that there was discrepancy with regard to the nature of injury in the inquest report with the injuries mentioned in the post mortem report by the Doctor. Neither the inquest nor the post mortem report is a substantive piece of evidence. The inquest is conducted only to know

about in what circumstances the deceased was done to death or whether it was unnatural death and what was the reason of death, what type of instrument had been used and who had attacked upon the deceased is out of the purview of Section 174 Cr.P.C. if there is any discrepancy found in the inquest report or the post mortem report it would not effect the fabric of the prosecution case to disbelieve the testimony of the oral witnesses.

Much has been argued by the learned counsel that the deceased's son who was produced as D.W. 1 has himself deposed that one day prior to the incident the accused/appellant had gone along with him to play cricket tournament at Saket University and on this count the statement of the deceased's son and wife were not recorded. They have not been made witness as they were not ready to depose falsely against the appellant Rakesh Tiwari @ Bablu. The appellant and the deceased's son Vinay who were produced as defense witnesses have laid much stress that they were not present on the day of incident and they were present at Saket University as there was a cricket tournament, which was fixed for 11.11.2000 and both of them were participating when they were informed on 1.11.2000 at 6 A.M. by Lal Chand and Sarju Prasad that his father has been killed only then they came to know about the incident and as the name of accused appellant has been nominated they did not arrive at the place of incident. Neither Lal Chand nor Sarju Prasad was produced by the defense witnesses who had informed about the death of Deena Nath Pandey. It is not at all clear as to when and how they received the information, which was divulged to both D.W.1 and D.W. 2 and if they had come to know about that the name of the appellant has been nominated, why it was not mentioned by the other accused persons in their statements under Section 313 Cr.P.C. This plea of alibi has been raised at a belated stage. This fact was never mentioned in the bail application moved on behalf of the appellant nor this fact was suggested to the prosecution witnesses P.W. 1 and P.W. 2 that the appellant was not present at the time of incident. Even in the statement under Section 313 Cr.P.C., which was recorded on 30.7.2010 the appellant has not stated anything about the plea of alibi and as such the plea of alibi has rightly been rejected by the learned trial court.

We have also considered the testimony of the defense witnesses in the light of the judgment of the Apex Court in the case of State of Haryana Vs. Ram Singh, 2002, (44) ACC 471 SC where it is observed that "the evidence tendered by defense witness cannot always be termed to be a tainted one. The defense witnesses are entitled to equal treatment and equal respect as that of the prosecution. The issue of credibility and the trustworthiness ought also to be attributed to the defense witnesses on a par with that of the prosecution".

In law alibi is used to express the defense in a criminal prosecution, where the party accused in order to prove that he could not have committed the crime charged against him, offers evidence that he was in a different place at that time. The plea taken should be capable of meaning that having regard to the time and place when and where he is alleged to have committed the offence he could not have been present. The plea of alibi postulate the physical impossibility of the presence of the accused at the scene of offence by reasons of his presence at another place.

The Apex Court in the case of Jayantibhai Bhenkarbhai Vs. State of Gujrat, 2002, 45 ACC 1026 (SC) has considered the law of plea of alibi and has held as under;

"The plea of alibi flows from Section 11 and is demonstrated by illustration (a). Sarkar on Evidence(Fifteenth Edition, p. 258) states the word 'alibi' is of Latin origin and means ``elsewhere'`. It is a convention term used for the defence taken by an accused that when the occurrence took place he was so far away from the place of occurrence that it is highly improbable that he would have participated in the crime. Alibi is not an exception(special or general) envisaged in the Indian Penal Code or any other law. It is only a rule of evidence recognized in Section 11 of the Evidence Act that facts which are inconsistent with the fact in issue are relevant. The burden of proving commission of offence by the accused so as to fasten the liability of guilt on him remains on the prosecution and would not be lessened by the mere fact that the accused had adopted the defence of alibi. The plea of alibi taken by the accused needs to be considered only when the burden which lies on the prosecution has been discharged satisfactorily. If the prosecution has failed in discharging its burden of proving the commission of crime by the accused beyond any reasonable doubt, it may not be necessary to go into the question whether the accused has succeeded in proving the defence of alibi. But once the prosecution succeeds in discharging its burden then it is incumbent on the accused taking the plea of alibi to prove it with certainty so as to exclude the possibility of his presence at the place and time of occurrence. An obligation is cast on the Court to weigh in scales the evidence adduced by the prosecution in proving of the guilt of the accused and the evidence adduced by the accused in proving his defence of alibi. If the evidence adduced by the accused is of such a quality and of such a standard that the Court may entertain some reasonable doubt regarding his presence at the place and time of occurrence, the Court would evaluate the prosecution evidence to see if the evidence adduced on behalf of the prosecution leaves any slot available to fit therein the defence of alibi. The burden of the accused is undoubtedly heavy. This flows from Section 103 of the Evidence Act which provides that the burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence. However, while weighing the prosecution case and the defence case, pitted against each other, if the balance tilts in favour of the accused, the prosecution would fail and the accused would be entitled to benefit of that reasonable doubt which would emerge in the mind of the Court".

In the case of plea of alibi the burden is on the accused to prove that certainty so as to exonerate the possibility of his presence at the place and time of occurrence. Learned Sessions Judge has considered the testimonies of D.W. 1 and D.W. 2. Both have stated that they were present at Saket University Faizabad to participate in cricket tournament whereas the place of occurrence is in district Basti. The plea of alibi was raised at a very belated stage. The plea was even not taken when the bail application was moved by the accused appellants. Neither any suggestion was put to the prosecution witnesses nor stated in the statements recorded under Section 313 Cr.P.C. The prosecution in this case has successfully proved its case beyond reasonable doubt. The first information report was promptly lodged, the eye witnesses have named the appellant along with his two brothers, hence the Sessions Judge has rightly rejected the plea of alibi raised by the appellant.

The first information report has promptly been lodged by the brother of the deceased at 9.45 A.M. in respect of the incident, which had occurred at 8 A.M. There was no time for deliberation to falsely implicate the appellant and his brothers when the inquest was conducted the case crime number was mentioned and as such it cannot be said that the first information report was anti timed or both the prosecution witnesses were not present at the time of incident. The statement of P. W. 2 deposing that he had not recognized the appellant is a deliberate attempt on the part of the defense, which shows that he was pressurized to depose in favour of the appellant.

The prosecution is also not bound to examine each and every person who has witnessed the incident and in the present case as the wife of the deceased and son were not the witnesses of the incident, hence they were not produced as prosecution witnesses. The sole testimony of the witnesses of fact stands corroborated by the testimony of the formal witnesses as well as by the prompt first information report and the medical evidence on record. Some discrepancy in the ocular count of a witness cannot be per se effect the credibility of the evidence of the witness unless the contradictions are material the same cannot be used to get the evidence in its entirety. Serious discrepancy ought not to obliterate and otherwise acceptable evidence merely because there is inconsistency in the evidence it is not sufficient to impair the credibility of the witness. It is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the court would be justified in discarding his evidence. In Appabhai and another Vs. State of Gujrat, 1988 Vol. 25 ACC 168 SC, the Apex Court had emphasis that while appreciating the evidence the court should not attach undue importance to minor discrepancy. The discrepancies, which do not shake the basic version of the prosecution case may be discarded. Similarly, the discrepancies, which are due to normal errors of perception or observation should not be given importance. The court by calling into aid its vast experience of men and matters in different cases must evaluate the entire material on record as a whole and should not disbelieve the evidence of a witness altogether, if it is otherwise trustworthy.

The Investigating Officer had collected various articles from the place of incident, which were sent for Sereologist who had confirmed that human blood was found, hence it cannot be said that the incident had not occurred at the place as stated by the prosecution witnesses. If the empty cartridges and the apparels of the deceased, which were sent for examination were not produced before the trial court it would not create any doubt that the Investigating Officer had not investigated the case in proper manner. The lapses on the part of the police in investigating the case would not belie the entire prosecution case and it will not accrue any benefit to the accused appellant.

From the statement of P.W. 2 Parma Nand Shukla it clearly transpires that though he has supported the prosecution case in his examination in chief but in cross examination he had tried to create doubt about recognising Rakesh @ Bablu, which clearly shows that he is deposing under some influence that he had deposed the name of Rakesh @ Bablu on the disclosure of complainant Sita Ram. The statement of P.W. 2 however proves certain facts viz death of the deceased at the spot, arrival of P. W. 2 along with the deceased at about 8 A.M. who had moved from the house at about 7.30 A.M. The brother of the deceased and other witnesses were coming behind from them and all had seen that the accused persons had fired at the deceased with their respective small firearm weapons. Deceased Deena Nath Pandey on account of receiving firearm injuries went to 5-6 paces

and then fell in front of the house of Setu Bhuj. These facts are consistent with the statement of the witness, which recorded in the earlier S.T. No.148 of 2001 and in the present trial during the course of cross examination P.W. 2 under the influence of accused/appellant Rakesh @ Bablu has given some conflicting statement to create doubt. This discrepancy with regard to not identifying him when the incident had taken place will not create any doubt about the veracity of the prosecution case. Rather being an eye witness of the incident his testimony of material particular cannot be doubted that the appellant was not present along with two other who had faced trial and was convicted way back in the year 2004.

It is well settled that the principle of *falsus in uno falsus in omnibus* has no application in India hence the prosecution case cannot be disbelieved only because P.W. 2 has deviated from his statement. In respect of the appellant his evidence cannot be held to be totally unreliable. The part of his statement can be taken into consideration for the purpose of finding out as to whether the appellant is guilty of commission of offense or not. It is trite that only because a witness for one reason or the other has to some extent retract from his earlier statement by itself may not be sufficient to discard the prosecution case in its entirety. It is permissible for a court of law to rely upon a part of the testimony of the witness who has been declared hostile. It is well settled law that the evidence of a hostile witness may not be totally rejected which is subject to close scrutiny, a portion thereof, which is consistent with the case of prosecution or defense may be accepted. The testimony of the prosecution witnesses merely because P.W. 1 who happens to be the real brother of deceased his testimony cannot be brushed aside as of being an interested witness. The eye witness account of both the prosecution witnesses are natural, cogent and convincing, which corroborate the manner of incident and their testimony cannot be disbelieved merely on account of some discrepancy in their statement, it will affect the probity of the entire prosecution case. The appellant in association with his two brothers Mithlesh and Shailesh on account of enmity and dispute with regard to landed property had eliminated the deceased in a very gruesome manner who died on the spot instantaneously, therefore, this court is not hesitant with the findings recorded by the learned trial court in convicting the appellant.

It is also pertinent to mention that the appellant was absconding since the date of incident i.e. 1.11.2000 and his case was committed to the court of Sessions by the Chief Judicial Magistrate on 29.4.2004. A Criminal trial is not an enquiry into the conduct of an accused for any purpose other than to determine whether he is guilty of the offence charged. In this connection, that piece of conduct can be held to be incriminatory which has no reasonable explanation except on the hypothesis that he is guilty. Conduct which destroys the presumption of innocence can alone be considered as material. In this regard, it is useful to refer *Anant Chaintaman Lagu Vs. State of Bombay* A.I.R. 1960 SC 500;

"Circumstantial evidence in this context means a combination of facts creating a network through which there is no escape for the accused, because the facts taken as a whole do not admit of any inference but of his guilt.....this conduct of the accused was so knit together as to make a network of circumstances pointing only to his guilt.....his methods was his own undoing; because even the long arm of coincidence could not explain the multitude of circumstances against him, and they destroyed the

presumption of innocence with which law clothed him."

Thus from the material on record it has been proved beyond reasonable doubt that the appellant Rakesh Tewari @ Bablu absconded after the incident for a long period which is a very relevant conduct under Section 8 of the Indian Evidence Act.

On the basis of verbose and prolix discussions made above and after considering the material evidence available on record, we are of the considered opinion that findings of conviction recorded by the learned trial court are well substantiated by the evidence available on record. The trial court has appreciated the evidence in the right perspective, we do not find any tangible reason to interfere with the finding of conviction recorded for the offence punishable under Section 302 Indian Penal Code, therefore, the conviction recorded by the trial Court against the accused/appellant Rakesh Tewari @ Bablu under Section 302 I.P.C. is hereby maintained and affirmed.

The appeal is devoid of merit and is accordingly dismissed.

Let a copy of this judgment and order alongwith original record be transmitted to the learned trial court for information and compliance.

Judgment certified and be placed on record.

Dt. 31.5.2018.

(Chandra Dhari Singh,J.) (Naheed Ara Moonis,J.) Sh.

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A.F.R. RESERVED.

Criminal Appeal No. 6384 of 2010.

Appellant. Rakesh Tiwari @ Bablu @ Akhilesh.

Respondent. State of U.P. Counsel for appellant. Surendra Pratap Singh, Arvind Kumar Tripathi, Ashok Kumar Pandey. S.P. Pandey, V.K. Maheshwari.

Counsel for respondent. Govt. Advocate.

Hon'ble Naheed Ara Moonis,J.

Hon'ble Chandra Dhari Singh,J.

(Delivered by Hon'ble Naheed Ara Moonis,J.) The instant appeal is arising out of judgment and order dated 26.8.2010 passed by the Additional Sessions Judge, Fast Track Court No.1, Basti in S.T.

No. 142 of 2004 (State vs. Rakesh Tiwari @ Bablu @ Akhilesh) arising out of case Crime No. 339 of 2000, under section 302 I.P.C., police station Parsarampur, district Basti whereby the appellant has been awarded life imprisonment and Rs. 10,000/- fine under Section 302 I.P.C. In default of payment of fine the accused/appellant has to go additional sentence of one year.

The prosecution case in a short conspectus is that a first information report was lodged by Sita Ram Pandey in respect of the incident occurred at 8 A.M. on 1.11.2000 alleging therein that he is a resident of village Dhuniyabhiti, police station Parasrampur, district Basti. On 1.11.2000 his brother who is an Advocate by profession had left his house for civil court along with Parma Nand Shukla at 8 A.M. when he reached in front of the house of Setu Bhuj at that juncture Mithlesh, Shailesh Tiwari and Rakesh @ Babbu all sons of Ramdeen resident of village Chhapiya, police station Paikaliya, district Basti came on a motorcycle and attacked upon him on account of old enmity of property dispute. All the three persons had whipped out country made pistol and revolver and made indiscriminate firing upon Deena Nath Pandey at this Parma Nanad Shukla had made hue and cry on account of which various persons came on the spot. The complainant Laxmi Narain and Setu Bhuj also reached at the spot. All the accused persons escaped towards Baijalpur on the motorcycle brandishing Katta and revolver. Deena Nath Pandey died on the spot. The complainant was also going to market from his house. He was accompanied with Bhav Nath Pandey son of Kashi Nath. All the persons had witnessed the incident and recognized the accused persons. The dead body of his brother was lying on the spot and had come to lodge the report to take action. A question was asked as the house of Setu Bhuj situate in which village it was answered by the complainant that it is in village Parsahwa. On this information the first information report was lodged at about 9.45 A.M. on the same day, which was registered as case crime No. 339 of 2000, under Section 302 I.P.C. at police station Parsarampur, district Basti against the accused persons, namely, Mithlesh, Shailesh and Rakesh @ Babbu, all sons of Ram Yagya.

The trial of accused Mithlesh and Shailesh was separated from the present accused/appellant Rakesh Tiwari @ Bablu @ Akhilesh who faced the trial in S.T. No. 148 of 2001 (State Vs. Mithlesh and others), S.T. No. 149 of 2001 (State Vs. Shailesh) arising out of case Crime No. 339 of 2000, under Section 302/34 I.P.C. and S.T. No. 288 of 2001) arising out of case Crime No. 58 of 2001, under Section 3/25 Arms Act, police station Parsarampur, district Basti. They were convicted by the learned Additional Special Judge, E.C. Act, Basti by order dated 11.5.2004 under Section 302/34 I.P.C. for life imprisonment with fine of Rs. 2,000/- each and in default of payment of fine both the accused persons were directed to serve additional sentence of one month. The accused Sailesh was acquitted of the charge under Section 3/25 Arms Act. Both the accused persons, namely, Mithlesh and Shailesh had challenged their conviction by filing the Criminal Appeal No. 3347 of 2004 (Mithlesh and another Vs. State of U.P.).

As the appellant Rakesh @ Bablu @ Akhilesh was absconding and after his arrest the charge sheet was submitted on 3.12.2001 by S.I. Jagdev Prasad Tiwari, his case was committed to the court of Sessions by the Chief Judicial Magistrate, Basti on 29.4.2004 and thereafter the charges were framed separately against the appellant for the offence punishable under Section 302 read with Section 34 I.P.C. by order dated 29.11.2007. The appellant abjured the charges and claimed to be tried. The prosecution was given opportunity to lead evidence and the examination in chief of Sita

Ram Pandey, P.W. 1 the complainant was recorded and thereafter the case was transferred from the court of Ist. Additional Sessions Judge, Basti to the court of Sessions Judge, Basti on 26.11.2009.

To substantiate the charges against the appellant eight prosecution witnesses were examined. P. W. 1 Sita Ram Pandey the complainant and Parma Nand Shukla P. W. 2 as witnesses of fact, while the formal witness S.I. Sudama Yadav as P. W. 3 who had prepared the inquest report. S.I. Harish Chand the first Investigating Officer examined as P. W. 4. S.I. Keshav Prasad Dubey scribe of the first information report as P. W. 5, Dr. S. S. Dwivedi, Medical Officer who conducted the post mortem of the deceased examined as P. W. 6. S.I. Hari Shanker Rai the second Investigating Officer examined as P.W. 7 and Constable Vinay Kumar was examined as P. W. 8 who had proved and signed the papers prepared by the third investigating officer S.I. Jagdev Prasad Tiwari.

In the instant session trial except the charge sheet, the photo copies of the other documents were filed as the original documents relating to the papers prior to the submission of the charge sheet about the investigation were attached with S.T. No. 148 of 2001 (States Vs. Mithlesh) pertaining to the co-accused person and the same were transmitted to this court as the convicted accused persons had challenged their conviction before this court. Later on the photocopies were obtained from this court to facilitate the same in conducting the present trial of appellant Rakesh Tiwari @ Bablu, therefore, the first information report was exhibited as Exhibit Ka. 1, inquest report Exhibit Ka. 2, Photo nash and Police Form No. 379 as Exhibit Ka. 3 and the papers relating to inquest report and Police Form 33 and letters to the Chief Medical Officer and In-charge Police and sample of seal exhibited as Exhibit Ka. 4 to Ka. 8. The site plan marked as Exhibit Ka. 9, memo of blood stained and plain earth marked as Exhibit Ka. 10. The charge sheet submitted against co-accused Mithlesh exhibited as Exhibit Ka. 11, photocopy of the first information report against the co-accused Mithlesh exhibited as Exhibit Ka. 11, Chik FIR Exhibit Ka. 12 and G.D. entry Exhibit Ka. 13, the post mortem report exhibited as Exhibit Ka. 14. The charge sheet submitted against the appellant exhibited as Exhibit Ka. 15 and the report of the chemical examiner exhibited as Exhibit Ka. 16.

Dr. S.S. Dwivedi P. W. 7 had conducted the post mortem of the deceased on 1.11.2000 at 6.30 P. M., which was brought by Raj Nath Yadav and Mangaroo Ram police constables of police station Parsrampur, district Basti in sealed cover. On external examination the Doctor has found an average build male, eyes open, mouth half open, injured part were bleeding, clot of blood surrounding the wounds, rigor mortis present both the extremities. The following anti mortem injuries were found;

1. Firearm wound of entry on left chin lat. side size 1 x 0.8 x cavity deep direction upward oblique inverted color with laceration. No blackening and tattooing present.
2. Firearm wound of exit on right side ear groove in area of 2.5 x 2 cm. X Cavity deep oblique out let fraction mostoil.
3. Firearm wound of entry on left zygomatic arch below cheek size 1 cm x 0.8 cm cavity deep gone up ward. Inverted color with laceration. No blackening and tattooing present.

4. Firearm wound of exit on frontal bone lateral aspect left side oblique, size 4 cm x 3 x bone deep base long roof small exverted margin fracture of frontal bone missing bones pieces.
5. Firearm wound of entry on left side chest. 11 cm below at 7' O clock position, size 1 cm x cavity deep,powder burn present, inverted color lacerated margin, no BT going oblique.
6. Firearm wound of entry inverted cross lacerated margin front of chest right side 14 cm medial to nipple at 6.30' O clock position size 1 cm x 0.8 cm. Cavity deep.
7. Firearm wound of exit mesentry comes out 2.5 cm below, right nipple at 7' O Clock position size 3 cm x 2.5 cm x cavity deep lacerated margin with oblique direction.
8. Firearm wound of exit 12 cm post auxiliary fold right side back 2 x 1.5 x cavity deep everted margin lacerated in nature.
9. Firearm wound lacerated lateral spining process crossing parallel making barrow, same entry exit same, size 1.2 cm x 0.6 cm x muscle deep. No BT roof of wound absent.
10. Firearm wound of entry on back 28 cm below C-7 prominence right side oblique size 1 cm x 0.8 cm x cavity deep. Inverted color lacerated margin. No BT oblique direction.
11. Firearm wound of exit on back C -7 prominence 18 cm away left side, size 1.8 cm x 1.2 cm x cavity deep.
12. Abraded contusion on left patella (knee), size 3 x 2 cm.
13. Contused abrasion on fore head front size 2 cm x 2 cm.

The eye witnesses of the incident, namely, Sita Ram Pandey the complainant and Parma Nand Shukla who were present at the time of the incident have been examined as P.W. 1 and P.W. 2 respectively. Their statements were recorded in the session trial of the co-accused persons, namely, Mithlesh and Shailesh.

The statement of P.W. 1 Sita Ram Pandey the complainant was recorded who had narrated the incident as mentioned in the first information report by submitting that on 1.11.2000 at about 8 A.M. he was going along with Laxmi Narain to Sringeri market. Deena Nath Pandey was going to civil court along with Parma Nand Shukla as he reached 50-60 paces away from the house of Setu Bhuj he saw that Deena Nath Pandey was going ahead from Parma Nand Shukla and had seen that Mithlesh, Shailesh and Rakesh @ Bablu came on a motorcycle they had intercepted his brother Deena Nath Pandey and had fired upon him. All the three persons had fired upon Deena Nath Pandey. On the hue and cry of Parma Nand Shukla the complainant Sita Ram Pandey along with Laxmi Narain, Setu Bhuj and Bhav Nath Pandey arrived there to save his brother. All the three accused persons escaped from the spot towards the south when he arrived at the spot his brother had succumbed to the injuries. It was also deposed by him that Sonkala had executed a will of some

portion of her property in favour of his brother Deena Nath Pandey and his wife Ram Dulari. Vinay Kumar Pandey is the son of Deena Nath Pandey (the deceased). The remaining property was bequeathed to Vinay Kumar by Sonkala. The accused persons, namely, Mithlesh, Shailesh and Rakesh Tiwari @ Bablu had filed a case in the civil court with regard to this property and this was the reason of enmity. Mithlesh and other had lost the case and on account of this enmity prior to the present incident the accused persons had caused injury with bomb to Deena Nath Pandey. A report of which was lodged by the complainant's brother against the accused persons at police station Parsrampur, district Basti. The case against Mithlesh and Sailesh in respect of the present case has already been decided, which is S.T. No. 148 of 2001 appended along with S.T. No. 149 of 2001. He has proved the first information report, which was exhibited as Exhibit Ka. 1.

The P.W. 1 was put to lengthy cross examination by the defence. It was stated by him that Sonkali had executed a gift in favour of the wife of the deceased Ram Dulari. A will was executed in favour of Vinay Kumar by Deena Nath Pandey. In this regard the accused persons had filed objections in the court. With regard to the incident of causing injury with bomb prior to the incident it was stated that the first information report was registered against all the three accused persons by his brother. However, he denied that they were granted bail and had been acquitted. He has stated that on the day of incident he was going to market along with Laxmi Narain. Bhav Nath was also coming behind him. Srangivari is three kilometers away from his village. His brother is a practicing lawyer. His brother and Parma Nand had left the house and proceeded towards their destination before him. It cannot be said that whether my brother was going to Harraiya or district Basti. When his brother started to move to go to the civil court, he had not seen him on the day of incident. On the day of incident he along with Parma Nand was going. On the day of incident he did not notice as what his brother was wearing. After his death he has seen the body of his brother. At that time he has not seen whether he was wearing anything in his feet. His brother was aged about 45 to 46 years. He had not seen spectacle, pen or diary near his brother. His brother was using spectacle. He is not aware as to whether his brother was using spectacle while reading or while walking. His brother did not wear coat from his house. His brother never wear lungi. He is not able to say about the recovery of two lungis covered on his dead body. His house is 20 kilometers away from Harraiya. Bus as well as jeep both ply to go to Harraiya. He could not say as to whether his brother was going to catch jeep or other vehicle. All the accused persons came from the southern side and after hearing cry he reached towards his brother, which was 50 - 60 paces away. The complainant has stated that he could not say whether Parma Nand Shukla made hue and cry before or after the firing was made by the accused persons. He had scribed in the first informatoin report that all the three accused persons had fired at Deena Nath Pandey indiscriminately and at that time Parma Nand Shukla had cried. He had seen all the three accused persons were firing. He had scribed in the first informatoin report that various persons arrived there including Setu Bhuj at the spot. Thereafter the accused persons ran away towards Baijalpur. The complainant has admitted that he has not seen all the persons firing at the deceased but he has made description in the first information report of which he cannot say about any reason. He had denied the suggestion that he has not seen the face of Rakesh @ Bablu. He has stated that all the three persons were having small katta and revolver and had specified that accused persons were having small firearm weapons, which is known as katta or revolver. He had denied that he is saying about Katta and revolver in the hands of accused persons by imagination. When he saw the deceased was lying. He was lying in front of the house of Setu

Bhuj. The door of house of Setu Bhuj is on western side. There is one hut in front of the house of Setu Bhuj. When the complainant was confronted with the statement given in S.T. No. 141 of 2001 he had stated that he had not disclosed about hut (Madai) in front of the house of Setu Bhuj while in the statement recorded earlier. However, he has stated that whatever statement he had made was seen by him and it was stated. When the report was written by him he was conscious and was not mentally puzzled. He arrived at about 9 o'clock and given the report to the police who had recorded the statement.

In his cross examination he had also stated that prior to the incident bomb was lobed upon his brother but he could not say about who were the accused persons. He has also stated that his brother was quite healthy and did not go to morning walk. His brother used to go to civil court and some time remained at home. He could not say about what he used to eat while going to civil court. He was residing separately. He was not aware whether he used to take tiffin for lunch. He was 15-16 paces away from the place of incident. The motorcycle was parked under Neem tree and it was not in starting position. The Neem tree was 4-5 paces away from the place of incident. He could not also say about how many fire was made by each of the accused persons. He had heard 5-6 times of the firing, which was fired one and half hand away. They were all in close range and side by side. It is wrong to say that his brother used to go early in the morning for walk and in the darkness some unknown persons killed him. He has denied that he had not seen the incident or the first informatin report was written anti time.

Parma Nand Shukla who is the Samdhi of the deceased was examined as P.W. 2 and stated that he was accompanying with the deceased at the time of incident and when they reached in front of the house of Setu Bhuj all the accused persons fired from their respective weapons indiscriminately causing death of Deena Nath Pandey on the spot. In his examination in chief he had stated that the incident is of 8 A.M. On 1.11.2000 he had gone to the house of Deena Nath Pandey at about 7.30 A.M. He along with Deena Nath Pandey was going to civil court. He had also accompanied with him to go to Harraiya. He has personal work at Harraiya for which presence of Deena Nath Pandey was essentially required. He along with Deena Nath Pandey had travelled one and half kilometers and reached in front of the house of Setu Bhuj. In his presence Mithlesh, Sailesh and Rakesh arrived on a motorcycle, they had parked the motorcycle and were having small firearm weapon and started firing at Deena Nath Pandey. He succumbed to the injuries and on his shreik Sita Ram, Laxmi Narain, Bhav Nath and Setu Bhuj arrived there, since all the three accused persons were firing, hence he could not come forward to save him. The other witnesses also could not come forward to save Deena Nath Pandey. The accused persons threatened them that in case they will step forward they will be done to death. After killing all the accused persons went towards Baijalpur on the motorcycle.

P.W. 2 had also disclosed that there was a dispute between the accused persons and Deena Nath Pandey in respect of landed property. He was enquired by the Investigating Officer after four days of the incident. In his cross examination he had stated that the deceased Deena Nath Pandey is his Samdhi. Two years prior to the incident his daughter was married to the son of the deceased Vinay Kumar. He did not use to go to village Chhapiya. Accused Rakesh @ Bablu had never visited his village Mariyarpur. The other accused persons Shailesh and Mithlesh used to come. He never met

with Rakesh @ Bablu. He had not recognised Rakesh @ Bablu at the time of incident. He had only recognised Mithlesh and Shailesh. He did not know the third person from before. P. W. 2 after looking the accused Rakesh @ Bablu who was present in the court had stated that he could not see the third person who had fired and on the disclosure the name of Rakesh @ Bablu by other persons he is disclosing the name of third person after the disclosure of the other persons.

He had further stated that at about 7.30 A.M. he reached at Dhuniyabhiti. He had not taken tea as his daughter was married there when he reached at the house of Deena Nath Pandey he was ready.

On being enquired by the court as to whether he had seen the accused Rakesh participating in the offence the witness had stated that the incident had taken place 9-10 years ago and at the time of incident he was quite perplexed and he could not recognise the third person at the time of the incident. He could not say that the accused present in the court was also involved as a third person in the incident. He had stated that the deceased after receiving shots went 5-6 paces and then fell down hence he could not see that any blood was found between 5-6 feet. He had further stated that after the death of Deena Nath Pandey he remained there with the dead body while Sita Ram went to lodge the first information report. Thousand of persons had gathered at the place of incident. He had not put any sheet rather someone had put the sheet over the dead body. Deena Nath Pandey was wearing blue pant and white shirt. He is not able to tell about the relation. He had further stated that when he reached to the house of Deena Nath Pandey he was ready and he could not say that whether he was having spectacle, diary etc. with him. He had deposed that the complainant had also moved from his house along with him but he was 50-60 paces behind. Deena Nath Pandey was accompanying with him when the fire was made he had cried and was retracted a few paces. At his hue and cry Sita Ram and Laxmi Narain rushed to the spot. Setu Bhuj was at his home and he was also present. He was confronted with his statement under Section 161 Cr.P.C. who had admitted that he had given the same statement. He had denied that he has not seen the incident and on account of relation he is recording his statement falsely. He had denied that the deceased was killed in the early hours of morning by unknown persons. P.W. 2 was cross examined with regard to his statement, which was given in favour of the defence. P. W. 2 had again reiterated the statement, which was given by him to the Investigating Officer under Section 161 Cr. P.C. and stated that he had recognised all the accused persons, namely, Mithlesh, Shailesh and Rakesh @ Bablu at the time of the incident. He has again reiterated the statement, which was recorded in examination-in-chief that the accused persons had stopped the motorcycle in front of them and after alighting from motorcycle all who were having small firearm weapons started firing at Deena Nath Pandey and only then he had cried. He had again stated that he had given this statement. He was confronted with his statement given in S.T. No. 148 of 2001 (State Vs. Mithlesh), which he had asserted that he had given the statement that all the three accused persons came on motorcycle and started firing with their firearm weapons. He had admitted that he was stated in his earlier statement that Rakesh @ Bablu (present appellant) was driving the motorcycle. Later on he had stated that he had disclosed the name of Rakesh @ Bablu when the deceased's brother had disclosed his name. When he was confronted that he has not disclosed this fact in S.T. No.141 of 2001 when the witness has stated that he does not remember that he had given this statement. He had stated that he disclosed that Deena Nath Pandey told the name of Rakesh @ Bablu to him.

S.I. Keshav Prasad who was examined as P. W. 5 had deposed that he was posted as Head Moharrir on 1.11.2000 at police station Parsarampur and on the basis of the written report given by the complainant Sita Ram he had registered the first information report at 9.45 P.M. which was proved by him as Chick No. 228 of 2000 on the basis of which the G.D. Entry was made as G.D. No. 17. He had also recorded the statement of the complainant. He had proved the first information report, G.D. Entry. In his cross examinatioin he has clearly stated that he had not mentioned the place of incident or the police station. He had denied that the first information report was registered anti time.

S.I. Sudama Yadav was examined as P.W. 3 who had conducted the inquest on 1.11.2000 at 10.20 A.M. at village Parsavapur. The deceased was lying in front of the door of Setu Bhuj. He had given necessary details in inquest report. The inquest was signed by the witnesses, photocopy was proved by him as Exhibit Ka. 3 to Ka. 8. In his cross examination he had stated that no witness had disclosed the name of the accused persons at the time of inquest. He had seen the injury no. 7 and injury no. 11. There was no socks and shoe and slepeer beside the dead body. Nothing was recovered from the pocket of pant and shirt. No documents were recovered. He has also not found empty cartridges near the dead body.

The Doctor who had conducted autopsy of the deceased has examined as P.W. 6. He has proved the post mortem report as Exhibit Ka. 14. The deceased had sustained six fire arm wound of entry and five exit wound on vital part of the body, which were sufficient in the ordinary course to cause death.

The first investigating officer Harish Chand was examined as P. W. 4 who was earlier examined in S.T. No. 148 of 2001 as P.W. 8. He had deposed about the investigation in detail but nothing could be elicited to say that the investigation was done in partial manner. The defence has tried to make some improvement in the cross examination to create doubt about the manner of investigation by the Investigating Officer. He had specifically stated that he had made hectic search to arrest the accused persons. He had stated that the charge sheet was submitted against accused Mithlesh and Shailesh while the charge sheet against the accused/appellant Rakesh @ Bablu was submitted in abscondance. He had totally denied that on account of the complainant's relation with the deceased the first information report was registered in consultation with the police. He had also denied that the first information report had been lodged against the named accused persons on account of enmity.

Hari Shanker Rai was examined as second Investigating Officer as P.W. 7 who had stated that he was posted as Station Officer at Parsarampur on 13.3.2001. After the transfer of the earlier Investigating Officer he was entrusted with the investigation and during the course of investigation he had submitted the supplementary paper No. 7 on 28.4.2001 as the accused/appellant Rakesh @ Bablu was not arrested, hence he had moved an application under Section 299 Cr.P.C. to proceed with the case in the absence of accused/appellant Rakesh @ Bablu.

Vinay Kumar CP was examined as P.W. 8 has stated that the investigation of the case was done by Sub Inspector Jagdev Prasad Tiwari from 6.5.2001 as he has retired and ill since long. He is not able to move, he has deposed that he was posted at police station Parsarampur. Supplementary report

Nos. 11 and 12 were prepared by him dated 6.5.2001 and 16.6.2001 respectively, which was relating to the report of the Forensic Laboratory and for tracing out the accused/appellant Rakesh Tiwari @ Bablu and about his criminal antecedent. He had also filed a supplementary Paper No. 13 dated 17.6.2001 for preparing B. warrant, which was addressed to district jail Gonda on 20.6.2001. He had submitted supplementary report No. 14 on which the court has passed the order and the statement of the appellant Rakesh @ Bablu was recorded in district jail Gonda and thereafter the charge sheet No. 151-A of 2001 dated 20.6.2001 was submitted. He had proved the original charge sheet against Rakesh Tiwari @ Bablu vide Paper No. 3-A/1, which was in the writing of the Sub Inspector Jagdev Prasad Tiwari. It was proved by P.W. 8 and marked as Exhibit Ka. 15. In his cross examination he has stated that no statement was recorded by the Sub Inspector Jagdev Prasad Tiwari and he was not posted along with him at police station Parsarampur. He had denied that he was not posted along with S.I. Jagdev Prasad Tiwari and has also denied that he had not seen Jagdev Prasad Tiwari reading or writing. He had also denied that he was not posted at police station Parsarampur.

After the prosecution evidence was closed the accused/appellant was examined under Section 313 Cr.P.C. who had denied the entire prosecution case and denied the prosecution case as well as the statements of the prosecution witnesses and has stated that he is not aware about the same. He has stated that he has been falsely implicated in the present case. He has nothing to do with the alleged incident.

In defense Vinay Kumar the son of the deceased Deena Nath Pandey was examined as D.W. 1 while Rakesh Tiwari @ Bablu the accused/appellant examined himself and appeared as D.W. 2. The defence has further stated that he wanted to rely upon the documents proved, which was adduced on behalf of the accused persons in S.T. No. 148 of 2001 (Mithlesh and others Vs. State of U.P.), which may be read in defense in the present case.

Vinay Kumar Pandey who has been examined as D.W. 1 is the son of the deceased Deena Nath Pandey while Rakesh Tiwari @ Bablu the accused/appellant was examined as D.W. 2. It was stated in defence that one day prior to the incident i.e. on 31.10.2000 in the evening both the witnesses went to Faizabad from village Dhuniyabhiti. It was stated by D.W.1 that the accused Rakesh Tiwari @ Bablu is his cousin who is a good player of cricket. On 1.11.2000 there was a tournament of cricket in Saket University and both of them had to participate. On 1.11.2000 in the morning of about 6 A.M. Lal Chand and Sarju Prasad came to Faizabad and informed that his father had been killed, hence he and Rakesh started to village Dhuniyabhiti and when arrived at village Parsarampur they came to know that Rakesh @ Bablu has also been named, hence they did not reach at the place of incident. D.W. 1 in his statement had stated that he and his mother were telling to the complainant that Rakesh @ Bablu and his brothers have no nexus in this murder but his Tau was not agreed and had made a false report. He had denied in his cross examination that he is deposing in favour of Rakesh under his influence.

D.W. 2 the appellant Rakesh @ Bablu has stated that the deceased was his brother in law in relation and his son Vinay Kumar used to play cricket with him on 31.10.2000 in the evening he along with Vinay Kumar had gone to Faizabad from village Dhuniyabhiti. Vinay Kumar was a student of B.A. in Saket University at Faizabad. He had gone along with Vinay Kumar as there was a cricket tournament

and he had to participate along with Vinay Kumar. On 1.11.2000 in the morning Sarju and Lal Chand came to Faizabad and informed that father of Vinay Kumar was murdered at this they had proceeded from Faizabad and in the way they came to know that the appellant has been nominated in the murder of Deena Nath Pandey. He further stated that he is absolutely innocent and has no nexus with the incident of murder. He has no enmity with Deena Nath Pandey and has been falsely implicated. In his cross examination he had stated that he had disclosed about this fact to the police and in this regard his elder brother Mithlesh had given an application. He was arrested after 5-6 months of the incident. He was named in the first information report. He is deposing for the first time that he was going along with Vinay Kumar to Faizabad and was in his room. He had denied that he is deposing falsely. He had also denied that he was also present at 8 A.M. on 1.11.2000 along with other accused persons. It is wrong to say that his family had made influence upon Vinay Kumar to depose in his favour. It is wrong to say that in order to save himself he has set up Vinay Kumar as a witness to depose in his favour and giving false statement.

After analysing the documentary and oral evidence of the prosecution witnesses who withstood searching cross examination the learned trial court has found that the prosecution has proved its case beyond all reasonable doubt and after hearing the counsel for the parties recorded the finding of guilt against the accused/appellant Rakesh @ Bablu under Section 302 I.P.C. and accordingly convicted and sentenced him to imprisonment for life. Further directing him to pay a fine of Rs. 10,000/- by the order impugned. The instant appeal has been heard along with Criminal Appeal No. 3347 of 2004 Mithlesh and another Vs. State of U.P. We have heard the learned senior counsel Sri V. P. Srivastava assisted by Sri S.P. Pandey for the appellants, learned A.G.A. Sri Syed Ali Murtaja on behalf of the State and have gone through the record of the case.

The learned counsel for the appellant has made the same submissions, which were advanced by him in the connected appeal filed by two accused persons, namely, Mithlesh and Shailesh.

The thrust of the argument of the learned counsel was that there was no motive for the appellant to commit the murder of Deena Nath Pandey. The death has occurred in the wee hours of the morning by unknown persons and on account of enmity the appellant has been implicated falsely. The place of incident is not proved. No independent witnesses have been examined by the prosecution and only the related witnesses have been examined. The blood stained clothes and soil were never produced before the court. The empty cartridges and live cartridges were also not produced by the Investigating Officer before the court. No evidence was collected with regard to the motorcycle. Some papers, which were recovered beside the deceased shows that he had some enmity with Sunder Singh of village Chitura but no investigation was done in this regard. There is great inconsistency in the inquest report with the post mortem report with regard to the nature of injuries mentioned therein, which clearly shows that these injuries were caused by some other persons in some different manner.

Lastly, the appellant Rakesh @ Bablu was not present at the time of the incident, which is clearly proved by the evidence of D.W.1 Vinay Kumar who had deposed that one day prior to the incident he had gone along with the appellant to Faizabad as there was a cricket match in the Saket University. Neither the son of the deceased nor the wife of the deceased the mother of D.W. 1 were made

prosecution witness, therefore, the conviction recorded by the trial court against the appellant is not liable to be maintained.

The learned A.G.A. has however supported the findings recorded by the learned trial court and reiterated his submission advanced in the connected appeal and has submitted that the appellant remained away for a considerable period of time and on account of which his trial was separated. During the course of trial of the appellant the son of the deceased was produced in defense raising for the first time the plea of alibi, which does not find place in the trial of other accused persons. There was no whisper at all that the present accused/appellant had not accompanied with the other accused persons and involved in the ghastly incident. The Samdhi of the deceased has also been won over with the passage of time who had tried to twist the entire prosecution case. The trial court has analyzed the evidence of the appellant D.W. 2 as well as the son of the deceased who has been produced as D.W. 1 in the present case and rightly arrived at the conclusion that the appellant was also involved in the commission of offense along with two other who are his real brother. All of them have shared common intention and hence the findings recorded by the trial court and convicting the appellant deserves to be maintained.

As far the motive is concerned there was enmity of the appellant with the deceased, it is evidently clear that the mother-in-law of the deceased Sonkala had transferred her property to the wife of the deceased and on account of this the accused persons were bearing enmity and the brother of the appellant Mithlesh had filed objection, which was not decided in their favour in 1994. Thereafter an incident had occurred in which the accused persons had injured the deceased by lobbing bomb upon him and as such the first information report was registered under Section 307 I.P.C. in 1997 as case crime No. 114 of 1997 by the deceased in which the accused persons were acquitted as the deposition of the deceased could not take place as he was murdered during the said trial and the accused persons were acquitted by the order dated 22.3.2004. The post mortem report of the deceased also fully corroborates the prosecution case with regard to the time of incident. There is no contradiction in the testimony of the Doctor who had conducted the post mortem of the deceased with the post mortem report. The prosecution case cannot be disbelieved merely on the ground that the witnesses are related to the deceased. The presence of the witnesses can also not be made doubtful that they are related to the deceased. The incident had occurred in broad day light the complainant as well as P.W. 2 Parma Nand Shukla had witnessed the incident. Near the house of Setu Bhuj when all the accused persons who were armed with their respective weapons had started firing indiscriminately at the deceased. The statement of D.W. 2 Parmanand Shukla who was relative of the deceased being the Samdhi as his daughter was married with the son of the deceased, namely, Vinay was a natural witness. The circumstances were put to him to create doubt about his presence at the time of the incident. His presence at the spot was natural as he was accompanying with the deceased in connection with some personal work and the deceased who was an Advocate by profession was accompanying with him to facilitate in making license of ration card. P.W. 2 had no enmity with the accused persons to falsely implicate the accused/appellant and his brothers. Only to support his son in law Vinay he made contradictory statement about the participation of the appellant Rakesh and was declared hostile. The law is well settled that the statement of a witness who has been declared hostile by the prosecution is neither inadmissible nor is it of no value in its entirety. The statement particularly the examination in chief in so far it supports the case of the prosecution is admissible

and has rightly been relied upon by the trial court. The evidence of P.W. 2 does not completely efface his evidence which is otherwise corroborated by other reliable evidence.

It has also been argued that there was discrepancy with regard to the nature of injury in the inquest report with the injuries mentioned in the post mortem report by the Doctor. Neither the inquest nor the post mortem report is a substantive piece of evidence. The inquest is conducted only to know about in what circumstances the deceased was done to death or whether it was unnatural death and what was the reason of death, what type of instrument had been used and who had attacked upon the deceased is out of the purview of Section 174 Cr.P.C. if there is any discrepancy found in the inquest report or the post mortem report it would not effect the fabric of the prosecution case to disbelieve the testimony of the oral witnesses.

Much has been argued by the learned counsel that the deceased's son who was produced as D.W. 1 has himself deposed that one day prior to the incident the accused/appellant had gone along with him to play cricket tournament at Saket University and on this count the statement of the deceased's son and wife were not recorded. They have not been made witness as they were not ready to depose falsely against the appellant Rakesh Tiwari @ Bablu. The appellant and the deceased's son Vinay who were produced as defense witnesses have laid much stress that they were not present on the day of incident and they were present at Saket University as there was a cricket tournament, which was fixed for 11.11.2000 and both of them were participating when they were informed on 1.11.2000 at 6 A.M. by Lal Chand and Sarju Prasad that his father has been killed only then they came to know about the incident and as the name of accused appellant has been nominated they did not arrive at the place of incident. Neither Lal Chand nor Sarju Prasad was produced by the defense witnesses who had informed about the death of Deena Nath Pandey. It is not at all clear as to when and how they received the information, which was divulged to both D.W.1 and D.W. 2 and if they had come to know about that the name of the appellant has been nominated, why it was not mentioned by the other accused persons in their statements under Section 313 Cr.P.C. This plea of alibi has been raised at a belated stage. This fact was never mentioned in the bail application moved on behalf of the appellant nor this fact was suggested to the prosecution witnesses P.W. 1 and P.W. 2 that the appellant was not present at the time of incident. Even in the statement under Section 313 Cr.P.C., which was recorded on 30.7.2010 the appellant has not stated anything about the plea of alibi and as such the plea of alibi has rightly been rejected by the learned trial court.

We have also considered the testimony of the defense witnesses in the light of the judgment of the Apex Court in the case of State of Haryana Vs. Ram Singh, 2002, (44) ACC 471 SC where it is observed that "the evidence tendered by defense witness cannot always be termed to be a tainted one. The defense witnesses are entitled to equal treatment and equal respect as that of the prosecution. The issue of credibility and the trustworthiness ought also to be attributed to the defense witnesses on a par with that of the prosecution".

In law alibi is used to express the defense in a criminal prosecution, where the party accused in order to prove that he could not have committed the crime charged against him, offers evidence that he was in a different place at that time. The plea taken should be capable of meaning that having regard to the time and place when and where he is alleged to have committed the offence he could

not have been present. The plea of alibi postulate the physical impossibility of the presence of the accused at the scene of offence by reasons of his presence at another place.

The Apex Court in the case of Jayantibhai Bhenkarbhai Vs. State of Gujrat, 2002, 45 ACC 1026 (SC) has considered the law of plea of alibi and has held as under;

"The plea of alibi flows from Section 11 and is demonstrated by illustration (a). Sarkar on Evidence(Fifteenth Edition, p. 258) states the word 'alibi' is of Latin origin and means ``elsewhere''. It is a convention term used for the defence taken by an accused that when the occurrence took place he was so far away from the place of occurrence that it is highly improbable that he would have participated in the crime. Alibi is not an exception(special or general) envisaged in the Indian Penal Code or any other law. It is only a rule of evidence recognized in Section 11 of the Evidence Act that facts which are inconsistent with the fact in issue are relevant. The burden of proving commission of offence by the accused so as to fasten the liability of guilt on him remains on the prosecution and would not be lessened by the mere fact that the accused had adopted the defence of alibi. The plea of alibi taken by the accused needs to be considered only when the burden which lies on the prosecution has been discharged satisfactorily. If the prosecution has failed in discharging its burden of proving the commission of crime by the accused beyond any reasonable doubt, it may not be necessary to go into the question whether the accused has succeeded in proving the defence of alibi. But once the prosecution succeeds in discharging its burden then it is incumbent on the accused taking the plea of alibi to prove it with certainty so as to exclude the possibility of his presence at the place and time of occurrence. An obligation is cast on the Court to weigh in scales the evidence adduced by the prosecution in proving of the guilt of the accused and the evidence adduced by the accused in proving his defence of alibi. If the evidence adduced by the accused is of such a quality and of such a standard that the Court may entertain some reasonable doubt regarding his presence at the place and time of occurrence, the Court would evaluate the prosecution evidence to see if the evidence adduced on behalf of the prosecution leaves any slot available to fit therein the defence of alibi. The burden of the accused is undoubtedly heavy. This flows from Section 103 of the Evidence Act which provides that the burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence. However, while weighing the prosecution case and the defence case, pitted against each other, if the balance tilts in favour of the accused, the prosecution would fail and the accused would be entitled to benefit of that reasonable doubt which would emerge in the mind of the Court".

In the case of plea of alibi the burden is on the accused to prove that certainty so as to exonerate the possibility of his presence at the place and time of occurrence. Learned Sessions Judge has considered the testimonies of D.W. 1 and D.W. 2. Both have stated that they were present at Saket University Faizabad to participate in cricket tournament whereas the place of occurrence is in district Basti. The plea of alibi was raised at a very belated stage. The plea was even not taken when

the bail application was moved by the accused appellants. Neither any suggestion was put to the prosecution witnesses nor stated in the statements recorded under Section 313 Cr.P.C. The prosecution in this case has successfully proved its case beyond reasonable doubt. The first information report was promptly lodged, the eye witnesses have named the appellant along with his two brothers, hence the Sessions Judge has rightly rejected the plea of alibi raised by the appellant.

The first information report has promptly been lodged by the brother of the deceased at 9.45 A.M. in respect of the incident, which had occurred at 8 A.M. There was no time for deliberation to falsely implicate the appellant and his brothers when the inquest was conducted the case crime number was mentioned and as such it cannot be said that the first information report was anti timed or both the prosecution witnesses were not present at the time of incident. The statement of P. W. 2 deposing that he had not recognized the appellant is a deliberate attempt on the part of the defense, which shows that he was pressurized to depose in favour of the appellant.

The prosecution is also not bound to examine each and every person who has witnessed the incident and in the present case as the wife of the deceased and son were not the witnesses of the incident, hence they were not produced as prosecution witnesses. The sole testimony of the witnesses of fact stands corroborated by the testimony of the formal witnesses as well as by the prompt first information report and the medical evidence on record. Some discrepancy in the ocular count of a witness cannot be per se effect the credibility of the evidence of the witness unless the contradictions are material the same cannot be used to get the evidence in its entirety. Serious discrepancy ought not to obliterate and otherwise acceptable evidence merely because there is inconsistency in the evidence it is not sufficient to impair the credibility of the witness. It is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the court would be justified in discarding his evidence. In Appabhai and another Vs. State of Gujrat, 1988 Vol. 25 ACC 168 SC, the Apex Court had emphasis that while appreciating the evidence the court should not attach undue importance to minor discrepancy. The discrepancies, which do not shake the basic version of the prosecution case may be discarded. Similarly, the discrepancies, which are due to normal errors of perception or observation should not be given importance. The court by calling into aid its vast experience of men and matters in different cases must evaluate the entire material on record as a whole and should not disbelieve the evidence of a witness altogether, if it is otherwise trustworthy.

The Investigating Officer had collected various articles from the place of incident, which were sent for Sereologist who had confirmed that human blood was found, hence it cannot be said that the incident had not occurred at the place as stated by the prosecution witnesses. If the empty cartridges and the apparels of the deceased, which were sent for examination were not produced before the trial court it would not create any doubt that the Investigating Officer had not investigated the case in proper manner. The lapses on the part of the police in investigating the case would not belie the entire prosecution case and it will not accrue any benefit to the accused appellant.

From the statement of P.W. 2 Parma Nand Shukla it clearly transpires that though he has supported the prosecution case in his examination in chief but in cross examination he had tried to create doubt about recognising Rakesh @ Bablu, which clearly shows that he is deposing under some

influence that he had deposed the name of Rakesh @ Bablu on the disclosure of complainant Sita Ram. The statement of P.W. 2 however proves certain facts viz death of the deceased at the spot, arrival of P. W. 2 along with the deceased at about 8 A.M. who had moved from the house at about 7.30 A.M. The brother of the deceased and other witnesses were coming behind from them and all had seen that the accused persons had fired at the deceased with their respective small firearm weapons. Deceased Deena Nath Pandey on account of receiving firearm injuries went to 5-6 paces and then fell in front of the house of Setu Bhuj. These facts are consistent with the statement of the witness, which recorded in the earlier S.T. No.148 of 2001 and in the present trial during the course of cross examination P.W. 2 under the influence of accused/appellant Rakesh @ Bablu has given some conflicting statement to create doubt. This discrepancy with regard to not identifying him when the incident had taken place will not create any doubt about the veracity of the prosecution case. Rather being an eye witness of the incident his testimony of material particular cannot be doubted that the appellant was not present along with two other who had faced trial and was convicted way back in the year 2004.

It is well settled that the principle of falsus in uno falsus in omnibus has no application in India hence the prosecution case cannot be disbelieved only because P.W. 2 has deviated from his statement. In respect of the appellant his evidence cannot be held to be totally unreliable. The part of his statement can be taken into consideration for the purpose of finding out as to whether the appellant is guilty of commission of offense or not. It is trite that only because a witness for one reason or the other has to some extent retract from his earlier statement by itself may not be sufficient to discard the prosecution case in its entirety. It is permissible for a court of law to rely upon a part of the testimony of the witness who has been declared hostile. It is well settled law that the evidence of a hostile witness may not be totally rejected which is subject to close scrutiny, a portion thereof, which is consistent with the case of prosecution or defense may be accepted. The testimony of the prosecution witnesses merely because P.W. 1 who happens to be the real brother of deceased his testimony cannot be brushed aside as of being an interested witness. The eye witness account of both the prosecution witnesses are natural, cogent and convincing, which corroborate the manner of incident and their testimony cannot be disbelieved merely on account of some discrepancy in their statement, it will affect the probity of the entire prosecution case. The appellant in association with his two brothers Mithlesh and Shailesh on account of enmity and dispute with regard to landed property had eliminated the deceased in a very gruesome manner who died on the spot instantaneously, therefore, this court is not hesitant with the findings recorded by the learned trial court in convicting the appellant.

It is also pertinent to mention that the appellant was absconding since the date of incident i.e. 1.11.2000 and his case was committed to the court of Sessions by the Chief Judicial Magistrate on 29.4.2004. A Criminal trial is not an enquiry into the conduct of an accused for any purpose other than to determine whether he is guilty of the offence charged. In this connection, that piece of conduct can be held to be incriminatory which has no reasonable explanation except on the hypothesis that he is guilty. Conduct which destroys the presumption of innocence can alone be considered as material. In this regard, it is useful to refer Anant Chaintaman Lagu Vs. State of Bombay A.I.R. 1960 SC 500;

"Circumstantial evidence in this context means a combination of facts creating a network through which there is no escape for the accused, because the facts taken as a whole do not admit of any inference but of his guilt.....this conduct of the accused was so knit together as to make a network of circumstances pointing only to his guilt.....his methods was his own undoing; because even the long arm of coincidence could not explain the multitude of circumstances against him, and they destroyed the presumption of innocence with which law clothed him."

Thus from the material on record it has been proved beyond reasonable doubt that the appellant Rakesh Tewari @ Bablu absconded after the incident for a long period which is a very relevant conduct under Section 8 of the Indian Evidence Act.

On the basis of verbose and prolix discussions made above and after considering the material evidence available on record, we are of the considered opinion that findings of conviction recorded by the learned trial court are well substantiated by the evidence available on record. The trial court has appreciated the evidence in the right perspective, we do not find any tangible reason to interfere with the finding of conviction recorded for the offence punishable under Section 302 Indian Penal Code, therefore, the conviction recorded by the trial Court against the accused/appellant Rakesh Tewari @ Bablu under Section 302 I.P.C. is hereby maintained and affirmed.

The appeal is devoid of merit and is accordingly dismissed.

Let a copy of this judgment and order alongwith original record be transmitted to the learned trial court for information and compliance.

Judgment certified and be placed on record.

Dt. 31.5.2018.

(Chandra Dhari Singh,J.) (Naheed Ara Moonis,J.) Sh.

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A.F.R. RESERVED.

Criminal Appeal No. 6384 of 2010.

Appellant. Rakesh Tiwari @ Bablu @ Akhilesh.

Respondent. State of U.P. Counsel for appellant. Surendra Pratap Singh, Arvind Kumar Tripathi, Ashok Kumar Pandey. S.P. Pandey, V.K. Maheshwari.

Counsel for respondent. Govt. Advocate.

Hon'ble Naheed Ara Moonis,J.

Hon'ble Chandra Dhari Singh,J.

(Delivered by Hon'ble Naheed Ara Moonis,J.) The instant appeal is arising out of judgment and order dated 26.8.2010 passed by the Additional Sessions Judge, Fast Track Court No.1, Basti in S.T. No. 142 of 2004 (State vs. Rakesh Tiwari @ Bablu @ Akhilesh) arising out of case Crime No. 339 of 2000, under section 302 I.P.C., police station Parsarampur, district Basti whereby the appellant has been awarded life imprisonment and Rs. 10,000/- fine under Section 302 I.P.C. In default of payment of fine the accused/appellant has to go additional sentence of one year.

The prosecution case in a short conspectus is that a first information report was lodged by Sita Ram Pandey in respect of the incident occurred at 8 A.M. on 1.11.2000 alleging therein that he is a resident of village Dhuniyabhiti, police station Parasrampur, district Basti. On 1.11.2000 his brother who is an Advocate by profession had left his house for civil court along with Parma Nand Shukla at 8 A.M. when he reached in front of the house of Setu Bhuj at that juncture Mithlesh, Shailesh Tiwari and Rakesh @ Babbu all sons of Ramdeen resident of village Chhapiya, police station Paikaliya, district Basti came on a motorcycle and attacked upon him on account of old enmity of property dispute. All the three persons had whipped out country made pistol and revolver and made indiscriminate firing upon Deena Nath Pandey at this Parma Nanad Shukla had made hue and cry on account of which various persons came on the spot. The complainant Laxmi Narain and Setu Bhuj also reached at the spot. All the accused persons escaped towards Baijalpur on the motorcycle brandishing Katta and revolver. Deena Nath Pandey died on the spot. The complainant was also going to market from his house. He was accompanied with Bhav Nath Pandey son of Kashi Nath. All the persons had witnessed the incident and recognized the accused persons. The dead body of his brother was lying on the spot and had come to lodge the report to take action. A question was asked as the house of Setu Bhuj situate in which village it was answered by the complainant that it is in village Parsahwa. On this information the first information report was lodged at about 9.45 A.M. on the same day, which was registered as case crime No. 339 of 2000, under Section 302 I.P.C. at police station Parsarampur, district Basti against the accused persons, namely, Mithlesh, Shailesh and Rakesh @ Babbu, all sons of Ram Yagya.

The trial of accused Mithlesh and Shailesh was separated from the present accused/appellant Rakesh Tiwari @ Bablu @ Akhilesh who faced the trial in S.T. No. 148 of 2001 (State Vs. Mithlesh and others), S.T. No. 149 of 2001 (State Vs. Shailesh) arising out of case Crime No. 339 of 2000, under Section 302/34 I.P.C. and S.T. No. 288 of 2001) arising out of case Crime No. 58 of 2001, under Section 3/25 Arms Act, police station Parsarampur, district Basti. They were convicted by the learned Additional Special Judge, E.C. Act, Basti by order dated 11.5.2004 under Section 302/34 I.P.C. for life imprisonment with fine of Rs. 2,000/- each and in default of payment of fine both the accused persons were directed to serve additional sentence of one month. The accused Sailesh was acquitted of the charge under Section 3/25 Arms Act. Both the accused persons, namely, Mithlesh and Shailesh had challenged their conviction by filing the Criminal Appeal No. 3347 of 2004 (Mithlesh and another Vs. State of U.P.).

As the appellant Rakesh @ Bablu @ Akhilesh was absconding and after his arrest the charge sheet was submitted on 3.12.2001 by S.I. Jagdev Prasad Tiwari, his case was committed to the court of Sessions by the Chief Judicial Magistrate, Basti on 29.4.2004 and thereafter the charges were framed separately against the appellant for the offence punishable under Section 302 read with Section 34 I.P.C. by order dated 29.11.2007. The appellant abjured the charges and claimed to be tried. The prosecution was given opportunity to lead evidence and the examination in chief of Sita Ram Pandey, P.W. 1 the complainant was recorded and thereafter the case was transferred from the court of Ist. Additional Sessions Judge, Basti to the court of Sessions Judge, Basti on 26.11.2009.

To substantiate the charges against the appellant eight prosecution witnesses were examined. P. W. 1 Sita Ram Pandey the complainant and Parma Nand Shukla P. W. 2 as witnesses of fact, while the formal witness S.I. Sudama Yadav as P. W. 3 who had prepared the inquest report. S.I. Harish Chand the first Investigating Officer examined as P. W. 4. S.I. Keshav Prasad Dubey scribe of the first information report as P. W. 5, Dr. S. S. Dwivedi, Medical Officer who conducted the post mortem of the deceased examined as P. W. 6. S.I. Hari Shanker Rai the second Investigating Officer examined as P.W. 7 and Constable Vinay Kumar was examined as P. W. 8 who had proved and signed the papers prepared by the third investigating officer S.I. Jagdev Prasad Tiwari.

In the instant session trial except the charge sheet, the photo copies of the other documents were filed as the original documents relating to the papers prior to the submission of the charge sheet about the investigation were attached with S.T. No. 148 of 2001 (States Vs. Mithlesh) pertaining to the co-accused person and the same were transmitted to this court as the convicted accused persons had challenged their conviction before this court. Later on the photocopies were obtained from this court to facilitate the same in conducting the present trial of appellant Rakesh Tiwari @ Bablu, therefore, the first information report was exhibited as Exhibit Ka. 1, inquest report Exhibit Ka. 2, Photo nash and Police Form No. 379 as Exhibit Ka. 3 and the papers relating to inquest report and Police Form 33 and letters to the Chief Medical Officer and In-charge Police and sample of seal exhibited as Exhibit Ka. 4 to Ka. 8. The site plan marked as Exhibit Ka. 9, memo of blood stained and plain earth marked as Exhibit Ka. 10. The charge sheet submitted against co-accused Mithlesh exhibited as Exhibit Ka. 11, photocopy of the first information report against the co-accused Mithlesh exhibited as Exhibit Ka. 11, Chik FIR Exhibit Ka. 12 and G.D. entry Exhibit Ka. 13, the post mortem report exhibited as Exhibit Ka. 14. The charge sheet submitted against the appellant exhibited as Exhibit Ka. 15 and the report of the chemical examiner exhibited as Exhibit Ka. 16.

Dr. S.S. Dwivedi P. W. 7 had conducted the post mortem of the deceased on 1.11.2000 at 6.30 P. M., which was brought by Raj Nath Yadav and Mangaroo Ram police constables of police station Parsrampur, district Basti in sealed cover. On external examination the Doctor has found an average build male, eyes open, mouth half open, injured part were bleeding, clot of blood surrounding the wounds, rigor mortis present both the extremities. The following anti mortem injuries were found;

1. Firearm wound of entry on left chin lat. side size 1 x 0.8 x cavity deep direction upward oblique inverted colar with laceration. No blackening and tattooing present.

2. Firearm wound of exit on right side ear groove in area of 2.5 x 2 cm. X Cavity deep oblique out let fraction mostoil.
3. Firearm wound of entry on left zygomatic arch below cheek size 1 cm x 0.8 cm cavity deep gone up ward. Inverted color with laceration. No blackening and tattooing present.
4. Firearm wound of exit on frontal bone lateral aspect left side oblique, size 4 cm x 3 x bone deep base long roof small exverted margin fracture of frontal bone missing bones pieces.
5. Firearm wound of entry on left side chest. 11 cm below at 7' O clock position, size 1 cm x cavity deep,powder burn present, inverted color lacerated margin, no BT going oblique.
6. Firearm wound of entry inverted cross lacerated margin front of chest right side 14 cm medial to nipple at 6.30' O clock position size 1 cm x 0.8 cm. Cavity deep.
7. Firearm wound of exit mesentry comes out 2.5 cm below, right nipple at 7' O Clock position size 3 cm x 2.5 cm x cavity deep lacerated margin with oblique direction.
8. Firearm wound of exit 12 cm post auxiliary fold right side back 2 x 1.5 x cavity deep everted margin lacerated in nature.
9. Firearm wound lacerated lateral spining process crossing parallel making barrow, same entry exit same, size 1.2 cm x 0.6 cm x muscle deep. No BT roof of wound absent.
10. Firearm wound of entry on back 28 cm below C-7 prominence right side oblique size 1 cm x 0.8 cm x cavity deep. Inverted color lacerated margin. No BT oblique direction.
11. Firearm wound of exit on back C -7 prominence 18 cm away left side, size 1.8 cm x 1.2 cm x cavity deep.
12. Abraded contusion on left patella (knee), size 3 x 2 cm.
13. Contused abrasion on fore head front size 2 cm x 2 cm.

The eye witnesses of the incident, namely, Sita Ram Pandey the complainant and Parma Nand Shukla who were present at the time of the incident have been examined as P.W. 1 and P.W. 2 respectively. Their statements were recorded in the session trial of the co-accused persons, namely, Mithlesh and Shailesh.

The statement of P.W. 1 Sita Ram Pandey the complainant was recorded who had narrated the incident as mentioned in the first information report by submitting that on 1.11.2000 at about 8 A.M. he was going along with Laxmi Narain to Sringtonari market. Deena Nath Pandey was going to civil court along with Parma Nand Shukla as he reached 50-60 paces away from the house of Setu Bhuj he saw that Deena Nath Pandey was going ahead from Parma Nand Shukla and had seen that

Mithlesh, Shailesh and Rakesh @ Bablu came on a motorcycle they had intercepted his brother Deena Nath Pandey and had fired upon him. All the three persons had fired upon Deena Nath Pandey. On the hue and cry of Parma Nand Shukla the complainant Sita Ram Pandey along with Laxmi Narain, Setu Bhuj and Bhav Nath Pandey arrived there to save his brother. All the three accused persons escaped from the spot towards the south when he arrived at the spot his brother had succumbed to the injuries. It was also deposed by him that Sonkala had executed a will of some portion of her property in favour of his brother Deena Nath Pandey and his wife Ram Dulari. Vinay Kumar Pandey is the son of Deena Nath Pandey (the deceased). The remaining property was bequeathed to Vinay Kumar by Sonkala. The accused persons, namely, Mithlesh, Shailesh and Rakesh Tiwari @ Bablu had filed a case in the civil court with regard to this property and this was the reason of enmity. Mithlesh and other had lost the case and on account of this enmity prior to the present incident the accused persons had caused injury with bomb to Deena Nath Pandey. A report of which was lodged by the complainant's brother against the accused persons at police station Parsrampur, district Basti. The case against Mithlesh and Sailesh in respect of the present case has already been decided, which is S.T. No. 148 of 2001 appended along with S.T. No. 149 of 2001. He has proved the first information report, which was exhibited as Exhibit Ka. 1.

The P.W. 1 was put to lengthy cross examination by the defence. It was stated by him that Sonkali had executed a gift in favour of the wife of the deceased Ram Dulari. A will was executed in favour of Vinay Kumar by Deena Nath Pandey. In this regard the accused persons had filed objections in the court. With regard to the incident of causing injury with bomb prior to the incident it was stated that the first information report was registered against all the three accused persons by his brother. However, he denied that they were granted bail and had been acquitted. He has stated that on the day of incident he was going to market along with Laxmi Narain. Bhav Nath was also coming behind him. Srangivari is three kilometers away from his village. His brother is a practicing lawyer. His brother and Parma Nand had left the house and proceeded towards their destination before him. It cannot be said that whether my brother was going to Harraiya or district Basti. When his brother started to move to go to the civil court, he had not seen him on the day of incident. On the day of incident he along with Parma Nand was going. On the day of incident he did not notice as what his brother was wearing. After his death he has seen the body of his brother. At that time he has not seen whether he was wearing anything in his feet. His brother was aged about 45 to 46 years. He had not seen spectacle, pen or diary near his brother. His brother was using spectacle. He is not aware as to whether his brother was using spectacle while reading or while walking. His brother did not wear coat from his house. His brother never wear lungi. He is not able to say about the recovery of two lungis covered on his dead body. His house is 20 kilometers away from Harraiya. Bus as well as jeep both ply to go to Harraiya. He could not say as to whether his brother was going to catch jeep or other vehicle. All the accused persons came from the southern side and after hearing cry he reached towards his brother, which was 50 - 60 paces away. The complainant has stated that he could not say whether Parma Nand Shukla made hue and cry before or after the firing was made by the accused persons. He had scribed in the first informatoin report that all the three accused persons had fired at Deena Nath Pandey indiscriminately and at that time Parma Nand Shukla had cried. He had seen all the three accused persons were firing. He had scribed in the first informatoin report that various persons arrived there including Setu Bhuj at the spot. Thereafter the accused persons ran away towards Baijalpur. The complainant has admitted that he has not seen all the persons

firing at the deceased but he has made description in the first information report of which he cannot say about any reason. He had denied the suggestion that he has not seen the face of Rakesh @ Bablu. He has stated that all the three persons were having small katta and revolver and had specified that accused persons were having small firearm weapons, which is known as katta or revolver. He had denied that he is saying about Katta and revolver in the hands of accused persons by imagination. When he saw the deceased was lying. He was lying in front of the house of Setu Bhuj. The door of house of Setu Bhuj is on western side. There is one hut in front of the house of Setu Bhuj. When the complainant was confronted with the statement given in S.T. No. 141 of 2001 he had stated that he had not disclosed about hut (Madai) in front of the house of Setu Bhuj while in the statement recorded earlier. However, he has stated that whatever statement he had made was seen by him and it was stated. When the report was written by him he was conscious and was not mentally puzzled. He arrived at about 9 o'clock and given the report to the police who had recorded the statement.

In his cross examination he had also stated that prior to the incident bomb was lobed upon his brother but he could not say about who were the accused persons. He has also stated that his brother was quite healthy and did not go to morning walk. His brother used to go to civil court and some time remained at home. He could not say about what he used to eat while going to civil court. He was residing separately. He was not aware whether he used to take tiffin for lunch. He was 15-16 paces away from the place of incident. The motorcycle was parked under Neem tree and it was not in starting position. The Neem tree was 4-5 paces away from the place of incident. He could not also say about how many fire was made by each of the accused persons. He had heard 5-6 times of the firing, which was fired one and half hand away. They were all in close range and side by side. It is wrong to say that his brother used to go early in the morning for walk and in the darkness some unknown persons killed him. He has denied that he had not seen the incident or the first informatin report was written anti time.

Parma Nand Shukla who is the Samdhi of the deceased was examined as P.W. 2 and stated that he was accompanying with the deceased at the time of incident and when they reached in front of the house of Setu Bhuj all the accused persons fired from their respective weapons indiscriminately causing death of Deena Nath Pandey on the spot. In his examination in chief he had stated that the incident is of 8 A.M. On 1.11.2000 he had gone to the house of Deena Nath Pandey at about 7.30 A.M. He along with Deena Nath Pandey was going to civil court. He had also accompanied with him to go to Harraiya. He has personal work at Harraiya for which presence of Deena Nath Pandey was essentially required. He along with Deena Nath Pandey had travelled one and half kilometers and reached in front of the house of Setu Bhuj. In his presence Mithlesh, Sailesh and Rakesh arrived on a motorcycle, they had parked the motorcycle and were having small firearm weapon and started firing at Deena Nath Pandey. He succumbed to the injuries and on his shreik Sita Ram, Laxmi Narain, Bhav Nath and Setu Bhuj arrived there, since all the three accused persons were firing, hence he could not come forward to save him. The other witnesses also could not come forward to save Deena Nath Pandey. The accused persons threatened them that in case they will step forward they will be done to death. After killing all the accused persons went towards Baijalpur on the motorcycle.

P.W. 2 had also disclosed that there was a dispute between the accused persons and Deena Nath Pandey in respect of landed property. He was enquired by the Investigating Officer after four days of the incident. In his cross examination he had stated that the deceased Deena Nath Pandey is his Samdhi. Two years prior to the incident his daughter was married to the son of the deceased Vinay Kumar. He did not use to go to village Chhapiya. Accused Rakesh @ Bablu had never visited his village Mariyarpur. The other accused persons Shailesh and Mithlesh used to come. He never met with Rakesh @ Bablu. He had not recognised Rakesh @ Bablu at the time of incident. He had only recognised Mithlesh and Shailesh. He did not know the third person from before. P. W. 2 after looking the accused Rakesh @ Bablu who was present in the court had stated that he could not see the third person who had fired and on the disclosure the name of Rakesh @ Bablu by other persons he is disclosing the name of third person after the disclosure of the other persons.

He had further stated that at about 7.30 A.M. he reached at Dhuniyabhiti. He had not taken tea as his daughter was married there when he reached at the house of Deena Nath Pandey he was ready.

On being enquired by the court as to whether he had seen the accused Rakesh participating in the offence the witness had stated that the incident had taken place 9-10 years ago and at the time of incident he was quite perplexed and he could not recognise the third person at the time of the incident. He could not say that the accused present in the court was also involved as a third person in the incident. He had stated that the deceased after receiving shots went 5-6 paces and then fell down hence he could not see that any blood was found between 5-6 feet. He had further stated that after the death of Deena Nath Pandey he remained there with the dead body while Sita Ram went to lodge the first information report. Thousand of persons had gathered at the place of incident. He had not put any sheet rather someone had put the sheet over the dead body. Deena Nath Pandey was wearing blue pant and white shirt. He is not able to tell about the relation. He had further stated that when he reached to the house of Deena Nath Pandey he was ready and he could not say that whether he was having spectacle, diary etc. with him. He had deposed that the complainant had also moved from his house along with him but he was 50-60 paces behind. Deena Nath Pandey was accompanying with him when the fire was made he had cried and was retracted a few paces. At his hue and cry Sita Ram and Laxmi Narain rushed to the spot. Setu Bhuj was at his home and he was also present. He was confronted with his statement under Section 161 Cr.P.C. who had admitted that he had given the same statement. He had denied that he has not seen the incident and on account of relation he is recording his statement falsely. He had denied that the deceased was killed in the early hours of morning by unknown persons. P.W. 2 was crossed examined with regard to his statement, which was given in favour of the defence. P. W. 2 had again reiterated the statement, which was given by him to the Investigating Officer under Section 161 Cr. P.C. and stated that he had recognised all the accused persons, namely, Mithlesh, Shailesh and Rakesh @ Bablu at the time of the incident. He has again reiterated the statement, which was recorded in examination-in-chief that the accused persons had stopped the motorcycle in front of them and after alighting from motorcycle all who were having small firearm weapons started firing at Deena Nath Pandey and only then he had cried. He had again stated that he had given this statement. He was confronted with his statement given in S.T. No. 148 of 2001 (State Vs. Mithlesh), which he had asserted that he had given the statement that all the three accused persons came on motorcycle and started firing with their firearm weapons. He had admitted that he was stated in his earlier statement that Rakesh

@ Bablu (present appellant) was driving the motorcycle. Later on he had stated that he had disclosed the name of Rakesh @ Bablu when the deceased's brother had disclosed his name. When he was confronted that he has not disclosed this fact in S.T. No.141 of 2001 when the witness has stated that he does not remember that he had given this statement. He had stated that he disclosed that Deena Nath Pandey told the name of Rakesh @ Bablu to him.

S.I. Keshav Prasad who was examined as P. W. 5 had deposed that he was posted as Head Moharrir on 1.11.2000 at police station Parsarampur and on the basis of the written report given by the complainant Sita Ram he had registered the first information report at 9.45 P.M. which was proved by him as Chick No. 228 of 2000 on the basis of which the G.D. Entry was made as G.D. No. 17. He had also recorded the statement of the complainant. He had proved the first information report, G.D. Entry. In his cross examination he has clearly stated that he had not mentioned the place of incident or the police station. He had denied that the first information report was registered anti time.

S.I. Sudama Yadav was examined as P.W. 3 who had conducted the inquest on 1.11.2000 at 10.20 A.M. at village Parsavapur. The deceased was lying in front of the door of Setu Bhuj. He had given necessary details in inquest report. The inquest was signed by the witnesses, photocopy was proved by him as Exhibit Ka. 3 to Ka. 8. In his cross examination he had stated that no witness had disclosed the name of the accused persons at the time of inquest. He had seen the injury no. 7 and injury no. 11. There was no socks and shoe and slepeer beside the dead body. Nothing was recovered from the pocket of pant and shirt. No documents were recovered. He has also not found empty cartridges near the dead body.

The Doctor who had conducted autopsy of the deceased has examined as P.W. 6. He has proved the post mortem report as Exhibit Ka. 14. The deceased had sustained six fire arm wound of entry and five exit wound on vital part of the body, which were sufficient in the ordinary course to cause death.

The first investigating officer Harish Chand was examined as P. W. 4 who was earlier examined in S.T. No. 148 of 2001 as P.W. 8. He had deposed about the investigation in detail but nothing could be elicited to say that the investigation was done in partial manner. The defence has tried to make some improvement in the cross examination to create doubt about the manner of investigation by the Investigating Officer. He had specifically stated that he had made hectic search to arrest the accused persons. He had stated that the charge sheet was submitted against accused Mithlesh and Shailesh while the charge sheet against the accused/appellant Rakesh @ Bablu was submitted in abscondance. He had totally denied that on account of the complainant's relation with the deceased the first information report was registered in consultation with the police. He had also denied that the first information report had been lodged against the named accused persons on account of enmity.

Hari Shanker Rai was examined as second Investigating Officer as P.W. 7 who had stated that he was posted as Station Officer at Parsarampur on 13.3.2001. After the transfer of the earlier Investigating Officer he was entrusted with the investigation and during the course of investigation he had submitted the supplementary paper No. 7 on 28.4.2001 as the accused/appellant Rakesh @

Bablu was not arrested, hence he had moved an application under Section 299 Cr.P.C. to proceed with the case in the absence of accused/appellant Rakesh @ Bablu.

Vinay Kumar CP was examined as P.W. 8 has stated that the investigation of the case was done by Sub Inspector Jagdev Prasad Tiwari from 6.5.2001 as he has retired and ill since long. He is not able to move, he has deposed that he was posted at police station Parsarampur. Supplementary report Nos. 11 and 12 were prepared by him dated 6.5.2001 and 16.6.2001 respectively, which was relating to the report of the Forensic Laboratory and for tracing out the accused/appellant Rakesh Tiwari @ Bablu and about his criminal antecedent. He had also filed a supplementary Paper No. 13 dated 17.6.2001 for preparing B. warrant, which was addressed to district jail Gonda on 20.6.2001. He had submitted supplementary report No. 14 on which the court has passed the order and the statement of the appellant Rakesh @ Bablu was recorded in district jail Gonda and thereafter the charge sheet No. 151-A of 2001 dated 20.6.2001 was submitted. He had proved the original charge sheet against Rakesh Tiwari @ Bablu vide Paper No. 3-A/1, which was in the writing of the Sub Inspector Jagdev Prasad Tiwari. It was proved by P.W. 8 and marked as Exhibit Ka. 15. In his cross examination he has stated that no statement was recorded by the Sub Inspector Jagdev Prasad Tiwari and he was not posted along with him at police station Parsarampur. He had denied that he was not posted along with S.I. Jagdev Prasad Tiwari and has also denied that he had not seen Jagdev Prasad Tiwari reading or writing. He had also denied that he was not posted at police station Parsarampur.

After the prosecution evidence was closed the accused/appellant was examined under Section 313 Cr.P.C. who had denied the entire prosecution case and denied the prosecution case as well as the statements of the prosecution witnesses and has stated that he is not aware about the same. He has stated that he has been falsely implicated in the present case. He has nothing to do with the alleged incident.

In defense Vinay Kumar the son of the deceased Deena Nath Pandey was examined as D.W. 1 while Rakesh Tiwari @ Bablu the accused/appellant examined himself and appeared as D.W. 2. The defence has further stated that he wanted to rely upon the documents proved, which was adduced on behalf of the accused persons in S.T. No. 148 of 2001 (Mithlesh and others Vs. State of U.P.), which may be read in defense in the present case.

Vinay Kumar Pandey who has been examined as D.W. 1 is the son of the deceased Deena Nath Pandey while Rakesh Tiwari @ Bablu the accused/appellant was examined as D.W. 2. It was stated in defence that one day prior to the incident i.e. on 31.10.2000 in the evening both the witnesses went to Faizabad from village Dhuniyabhiti. It was stated by D.W.1 that the accused Rakesh Tiwari @ Bablu is his cousin who is a good player of cricket. On 1.11.2000 there was a tournament of cricket in Saket University and both of them had to participate. On 1.11.2000 in the morning of about 6 A.M. Lal Chand and Sarju Prasad came to Faizabad and informed that his father had been killed, hence he and Rakesh started to village Dhuniyabhiti and when arrived at village Parsarampur they came to know that Rakesh @ Bablu has also been named, hence they did not reach at the place of incident. D.W. 1 in his statement had stated that he and his mother were telling to the complainant that Rakesh @ Bablu and his brothers have no nexus in this murder but his Tau was not agreed and had made a false report. He had denied in his cross examination that he is deposing in favour of

Rakesh under his influence.

D.W. 2 the appellant Rakesh @ Bablu has stated that the deceased was his brother in law in relation and his son Vinay Kumar used to play cricket with him on 31.10.2000 in the evening he along with Vinay Kumar had gone to Faizabad from village Dhuniyabhiti. Vinay Kumar was a student of B.A. in Saket University at Faizabad. He had gone along with Vinay Kumar as there was a cricket tournament and he had to participate along with Vinay Kumar. On 1.11.2000 in the morning Sarju and Lal Chand came to Faizabad and informed that father of Vinay Kumar was murdered at this they had proceeded from Faizabad and in the way they came to know that the appellant has been nominated in the murder of Deena Nath Pandey. He further stated that he is absolutely innocent and has no nexus with the incident of murder. He has no enmity with Deena Nath Pandey and has been falsely implicated. In his cross examination he had stated that he had disclosed about this fact to the police and in this regard his elder brother Mithlesh had given an application. He was arrested after 5-6 months of the incident. He was named in the first information report. He is deposing for the first time that he was going along with Vinay Kumar to Faizabad and was in his room. He had denied that he is deposing falsely. He had also denied that he was also present at 8 A.M. on 1.11.2000 along with other accused persons. It is wrong to say that his family had made influence upon Vinay Kumar to depose in his favour. It is wrong to say that in order to save himself he has set up Vinay Kumar as a witness to depose in his favour and giving false statement.

After analysing the documentary and oral evidence of the prosecution witnesses who withstood searching cross examination the learned trial court has found that the prosecution has proved its case beyond all reasonable doubt and after hearing the counsel for the parties recorded the finding of guilt against the accused/appellant Rakesh @ Bablu under Section 302 I.P.C. and accordingly convicted and sentenced him to imprisonment for life. Further directing him to pay a fine of Rs. 10,000/- by the order impugned. The instant appeal has been heard along with Criminal Appeal No. 3347 of 2004 Mithlesh and another Vs. State of U.P. We have heard the learned senior counsel Sri V. P. Srivastava assisted by Sri S.P. Pandey for the appellants, learned A.G.A. Sri Syed Ali Murtaja on behalf of the State and have gone through the record of the case.

The learned counsel for the appellant has made the same submissions, which were advanced by him in the connected appeal filed by two accused persons, namely, Mithlesh and Shailesh.

The thrust of the argument of the learned counsel was that there was no motive for the appellant to commit the murder of Deena Nath Pandey. The death has occurred in the wee hours of the morning by unknown persons and on account of enmity the appellant has been implicated falsely. The place of incident is not proved. No independent witnesses have been examined by the prosecution and only the related witnesses have been examined. The blood stained clothes and soil were never produced before the court. The empty cartridges and live cartridges were also not produced by the Investigating Officer before the court. No evidence was collected with regard to the motorcycle. Some papers, which were recovered beside the deceased shows that he had some enmity with Sunder Singh of village Chitura but no investigation was done in this regard. There is great inconsistency in the inquest report with the post mortem report with regard to the nature of injuries mentioned therein, which clearly shows that these injuries were caused by some other persons in

some different manner.

Lastly, the appellant Rakesh @ Bablu was not present at the time of the incident, which is clearly proved by the evidence of D.W.1 Vinay Kumar who had deposed that one day prior to the incident he had gone along with the appellant to Faizabad as there was a cricket match in the Saket University. Neither the son of the deceased nor the wife of the deceased the mother of D.W. 1 were made prosecution witness, therefore, the conviction recorded by the trial court against the appellant is not liable to be maintained.

The learned A.G.A. has however supported the findings recorded by the learned trial court and reiterated his submission advanced in the connected appeal and has submitted that the appellant remained away for a considerable period of time and on account of which his trial was separated. During the course of trial of the appellant the son of the deceased was produced in defense raising for the first time the plea of alibi, which does not find place in the trial of other accused persons. There was no whisper at all that the present accused/appellant had not accompanied with the other accused persons and involved in the ghastly incident. The Samdhi of the deceased has also been won over with the passage of time who had tried to twist the entire prosecution case. The trial court has analyzed the evidence of the appellant D.W. 2 as well as the son of the deceased who has been produced as D.W. 1 in the present case and rightly arrived at the conclusion that the appellant was also involved in the commission of offense along with two other who are his real brother. All of them have shared common intention and hence the findings recorded by the trial court and convicting the appellant deserves to be maintained.

As far the motive is concerned there was enmity of the appellant with the deceased, it is evidently clear that the mother-in-law of the deceased Sonkala had transferred her property to the wife of the deceased and on account of this the accused persons were bearing enmity and the brother of the appellant Mithlesh had filed objection, which was not decided in their favour in 1994. Thereafter an incident had occurred in which the accused persons had injured the deceased by lobbing bomb upon him and as such the first information report was registered under Section 307 I.P.C. in 1997 as case crime No. 114 of 1997 by the deceased in which the accused persons were acquitted as the deposition of the deceased could not take place as he was murdered during the said trial and the accused persons were acquitted by the order dated 22.3.2004. The post mortem report of the deceased also fully corroborates the prosecution case with regard to the time of incident. There is no contradiction in the testimony of the Doctor who had conducted the post mortem of the deceased with the post mortem report. The prosecution case cannot be disbelieved merely on the ground that the witnesses are related to the deceased. The presence of the witnesses can also not be made doubtful that they are related to the deceased. The incident had occurred in broad day light the complainant as well as P.W. 2 Parma Nand Shukla had witnessed the incident. Near the house of Setu Bhuj when all the accused persons who were armed with their respective weapons had started firing indiscriminately at the deceased. The statement of D.W. 2 Parmanand Shukla who was relative of the deceased being the Samdhi as his daughter was married with the son of the deceased, namely, Vinay was a natural witness. The circumstances were put to him to create doubt about his presence at the time of the incident. His presence at the spot was natural as he was accompanying with the deceased in connection with some personal work and the deceased who was an Advocate by profession was

accompanying with him to facilitate in making license of ration card. P.W. 2 had no enmity with the accused persons to falsely implicate the accused/appellant and his brothers. Only to support his son in law Vinay he made contradictory statement about the participation of the appellant Rakesh and was declared hostile. The law is well settled that the statement of a witness who has been declared hostile by the prosecution is neither inadmissible nor is it of no value in its entirety. The statement particularly the examination in chief in so far it supports the case of the prosecution is admissible and has rightly been relied upon by the trial court. The evidence of P.W. 2 does not completely efface his evidence which is otherwise corroborated by other reliable evidence.

It has also been argued that there was discrepancy with regard to the nature of injury in the inquest report with the injuries mentioned in the post mortem report by the Doctor. Neither the inquest nor the post mortem report is a substantive piece of evidence. The inquest is conducted only to know about in what circumstances the deceased was done to death or whether it was unnatural death and what was the reason of death, what type of instrument had been used and who had attacked upon the deceased is out of the purview of Section 174 Cr.P.C. if there is any discrepancy found in the inquest report or the post mortem report it would not effect the fabric of the prosecution case to disbelieve the testimony of the oral witnesses.

Much has been argued by the learned counsel that the deceased's son who was produced as D.W. 1 has himself deposed that one day prior to the incident the accused/appellant had gone along with him to play cricket tournament at Saket University and on this count the statement of the deceased's son and wife were not recorded. They have not been made witness as they were not ready to depose falsely against the appellant Rakesh Tiwari @ Bablu. The appellant and the deceased's son Vinay who were produced as defense witnesses have laid much stress that they were not present on the day of incident and they were present at Saket University as there was a cricket tournament, which was fixed for 11.11.2000 and both of them were participating when they were informed on 1.11.2000 at 6 A.M. by Lal Chand and Sarju Prasad that his father has been killed only then they came to know about the incident and as the name of accused appellant has been nominated they did not arrive at the place of incident. Neither Lal Chand nor Sarju Prasad was produced by the defense witnesses who had informed about the death of Deena Nath Pandey. It is not at all clear as to when and how they received the information, which was divulged to both D.W.1 and D.W. 2 and if they had come to know about that the name of the appellant has been nominated, why it was not mentioned by the other accused persons in their statements under Section 313 Cr.P.C. This plea of alibi has been raised at a belated stage. This fact was never mentioned in the bail application moved on behalf of the appellant nor this fact was suggested to the prosecution witnesses P.W. 1 and P.W. 2 that the appellant was not present at the time of incident. Even in the statement under Section 313 Cr.P.C., which was recorded on 30.7.2010 the appellant has not stated anything about the plea of alibi and as such the plea of alibi has rightly been rejected by the learned trial court.

We have also considered the testimony of the defense witnesses in the light of the judgment of the Apex Court in the case of State of Haryana Vs. Ram Singh, 2002, (44) ACC 471 SC where it is observed that "the evidence tendered by defense witness cannot always be termed to be a tainted one. The defense witnesses are entitled to equal treatment and equal respect as that of the prosecution. The issue of credibility and the trustworthiness ought also to be attributed to the

defense witnesses on a par with that of the prosecution".

In law alibi is used to express the defense in a criminal prosecution, where the party accused in order to prove that he could not have committed the crime charged against him, offers evidence that he was in a different place at that time. The plea taken should be capable of meaning that having regard to the time and place when and where he is alleged to have committed the offence he could not have been present. The plea of alibi postulate the physical impossibility of the presence of the accused at the scene of offence by reasons of his presence at another place.

The Apex Court in the case of Jayantibhai Bhenkarbhai Vs. State of Gujrat, 2002, 45 ACC 1026 (SC) has considered the law of plea of alibi and has held as under;

"The plea of alibi flows from Section 11 and is demonstrated by illustration (a). Sarkar on Evidence(Fifteenth Edition, p. 258) states the word 'alibi' is of Latin origin and means ``elsewhere''. It is a convention term used for the defence taken by an accused that when the occurrence took place he was so far away from the place of occurrence that it is highly improbable that he would have participated in the crime. Alibi is not an exception(special or general) envisaged in the Indian Penal Code or any other law. It is only a rule of evidence recognized in Section 11 of the Evidence Act that facts which are inconsistent with the fact in issue are relevant. The burden of proving commission of offence by the accused so as to fasten the liability of guilt on him remains on the prosecution and would not be lessened by the mere fact that the accused had adopted the defence of alibi. The plea of alibi taken by the accused needs to be considered only when the burden which lies on the prosecution has been discharged satisfactorily. If the prosecution has failed in discharging its burden of proving the commission of crime by the accused beyond any reasonable doubt, it may not be necessary to go into the question whether the accused has succeeded in proving the defence of alibi. But once the prosecution succeeds in discharging its burden then it is incumbent on the accused taking the plea of alibi to prove it with certainty so as to exclude the possibility of his presence at the place and time of occurrence. An obligation is cast on the Court to weigh in scales the evidence adduced by the prosecution in proving of the guilt of the accused and the evidence adduced by the accused in proving his defence of alibi. If the evidence adduced by the accused is of such a quality and of such a standard that the Court may entertain some reasonable doubt regarding his presence at the place and time of occurrence, the Court would evaluate the prosecution evidence to see if the evidence adduced on behalf of the prosecution leaves any slot available to fit therein the defence of alibi. The burden of the accused is undoubtedly heavy. This flows from Section 103 of the Evidence Act which provides that the burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence. However, while weighing the prosecution case and the defence case, pitted against each other, if the balance tilts in favour of the accused, the prosecution would fail and the accused would be entitled to benefit of that reasonable doubt which would emerge in the mind of the Court".

In the case of plea of alibi the burden is on the accused to prove that certainty so as to exonerate the possibility of his presence at the place and time of occurrence. Learned Sessions Judge has considered the testimonies of D.W. 1 and D.W. 2. Both have stated that they were present at Saket University Faizabad to participate in cricket tournament whereas the place of occurrence is in district Basti. The plea of alibi was raised at a very belated stage. The plea was even not taken when the bail application was moved by the accused appellants. Neither any suggestion was put to the prosecution witnesses nor stated in the statements recorded under Section 313 Cr.P.C. The prosecution in this case has successfully proved its case beyond reasonable doubt. The first information report was promptly lodged, the eye witnesses have named the appellant along with his two brothers, hence the Sessions Judge has rightly rejected the plea of alibi raised by the appellant.

The first information report has promptly been lodged by the brother of the deceased at 9.45 A.M. in respect of the incident, which had occurred at 8 A.M. There was no time for deliberation to falsely implicate the appellant and his brothers when the inquest was conducted the case crime number was mentioned and as such it cannot be said that the first information report was anti timed or both the prosecution witnesses were not present at the time of incident. The statement of P. W. 2 deposing that he had not recognized the appellant is a deliberate attempt on the part of the defense, which shows that he was pressurized to depose in favour of the appellant.

The prosecution is also not bound to examine each and every person who has witnessed the incident and in the present case as the wife of the deceased and son were not the witnesses of the incident, hence they were not produced as prosecution witnesses. The sole testimony of the witnesses of fact stands corroborated by the testimony of the formal witnesses as well as by the prompt first information report and the medical evidence on record. Some discrepancy in the ocular count of a witness cannot be per se effect the credibility of the evidence of the witness unless the contradictions are material the same cannot be used to get the evidence in its entirety. Serious discrepancy ought not to obliterate and otherwise acceptable evidence merely because there is inconsistency in the evidence it is not sufficient to impair the credibility of the witness. It is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the court would be justified in discarding his evidence. In Appabhai and another Vs. State of Gujrat, 1988 Vol. 25 ACC 168 SC, the Apex Court had emphasis that while appreciating the evidence the court should not attach undue importance to minor discrepancy. The discrepancies, which do not shake the basic version of the prosecution case may be discarded. Similarly, the discrepancies, which are due to normal errors of perception or observation should not be given importance. The court by calling into aid its vast experience of men and matters in different cases must evaluate the entire material on record as a whole and should not disbelieve the evidence of a witness altogether, if it is otherwise trustworthy.

The Investigating Officer had collected various articles from the place of incident, which were sent for Sereologist who had confirmed that human blood was found, hence it cannot be said that the incident had not occurred at the place as stated by the prosecution witnesses. If the empty cartridges and the apparels of the deceased, which were sent for examination were not produced before the trial court it would not create any doubt that the Investigating Officer had not investigated the case in proper manner. The lapses on the part of the police in investigating the case would not belie the

entire prosecution case and it will not accrue any benefit to the accused appellant.

From the statement of P.W. 2 Parma Nand Shukla it clearly transpires that though he has supported the prosecution case in his examination in chief but in cross examination he had tried to create doubt about recognising Rakesh @ Bablu, which clearly shows that he is deposing under some influence that he had deposed the name of Rakesh @ Bablu on the disclosure of complainant Sita Ram. The statement of P.W. 2 however proves certain facts viz death of the deceased at the spot, arrival of P. W. 2 along with the deceased at about 8 A.M. who had moved from the house at about 7.30 A.M. The brother of the deceased and other witnesses were coming behind from them and all had seen that the accused persons had fired at the deceased with their respective small firearm weapons. Deceased Deena Nath Pandey on account of receiving firearm injuries went to 5-6 paces and then fell in front of the house of Setu Bhuj. These facts are consistent with the statement of the witness, which recorded in the earlier S.T. No.148 of 2001 and in the present trial during the course of cross examination P.W. 2 under the influence of accused/appellant Rakesh @ Bablu has given some conflicting statement to create doubt. This discrepancy with regard to not identifying him when the incident had taken place will not create any doubt about the veracity of the prosecution case. Rather being an eye witness of the incident his testimony of material particular cannot be doubted that the appellant was not present along with two other who had faced trial and was convicted way back in the year 2004.

It is well settled that the principle of falsus in uno falsus in omnibus has no application in India hence the prosecution case cannot be disbelieved only because P.W. 2 has deviated from his statement. In respect of the appellant his evidence cannot be held to be totally unreliable. The part of his statement can be taken into consideration for the purpose of finding out as to whether the appellant is guilty of commission of offense or not. It is trite that only because a witness for one reason or the other has to some extent retract from his earlier statement by itself may not be sufficient to discard the prosecution case in its entirety. It is permissible for a court of law to rely upon a part of the testimony of the witness who has been declared hostile. It is well settled law that the evidence of a hostile witness may not be totally rejected which is subject to close scrutiny, a portion thereof, which is consistent with the case of prosecution or defense may be accepted. The testimony of the prosecution witnesses merely because P.W. 1 who happens to be the real brother of deceased his testimony cannot be brushed aside as of being an interested witness. The eye witness account of both the prosecution witnesses are natural, cogent and convincing, which corroborate the manner of incident and their testimony cannot be disbelieved merely on account of some discrepancy in their statement, it will affect the probity of the entire prosecution case. The appellant in association with his two brothers Mithlesh and Shailesh on account of enmity and dispute with regard to landed property had eliminated the deceased in a very gruesome manner who died on the spot instantaneously, therefore, this court is not hesitant with the findings recorded by the learned trial court in convicting the appellant.

It is also pertinent to mention that the appellant was absconding since the date of incident i.e. 1.11.2000 and his case was committed to the court of Sessions by the Chief Judicial Magistrate on 29.4.2004. A Criminal trial is not an enquiry into the conduct of an accused for any purpose other than to determine whether he is guilty of the offence charged. In this connection, that piece of

conduct can be held to be incriminatory which has no reasonable explanation except on the hypothesis that he is guilty. Conduct which destroys the presumption of innocence can alone be considered as material. In this regard, it is useful to refer Anant Chaintaman Lagu Vs. State of Bombay A.I.R. 1960 SC 500;

"Circumstantial evidence in this context means a combination of facts creating a network through which there is no escape for the accused, because the facts taken as a whole do not admit of any inference but of his guilt.....this conduct of the accused was so knit together as to make a network of circumstances pointing only to his guilt.....his methods was his own undoing; because even the long arm of coincidence could not explain the multitude of circumstances against him, and they destroyed the presumption of innocence with which law clothed him."

Thus from the material on record it has been proved beyond reasonable doubt that the appellant Rakesh Tewari @ Bablu absconded after the incident for a long period which is a very relevant conduct under Section 8 of the Indian Evidence Act.

On the basis of verbose and prolix discussions made above and after considering the material evidence available on record, we are of the considered opinion that findings of conviction recorded by the learned trial court are well substantiated by the evidence available on record. The trial court has appreciated the evidence in the right perspective, we do not find any tangible reason to interfere with the finding of conviction recorded for the offence punishable under Section 302 Indian Penal Code, therefore, the conviction recorded by the trial Court against the accused/appellant Rakesh Tewari @ Bablu under Section 302 I.P.C. is hereby maintained and affirmed.

The appeal is devoid of merit and is accordingly dismissed.

Let a copy of this judgment and order alongwith original record be transmitted to the learned trial court for information and compliance.

Judgment certified and be placed on record.

Dt. 31.5.2018.

(Chandra Dhari Singh,J.) (Naheed Ara Moonis,J.) Sh.