A.F.R

Court No.- 1

Case:- CRIMINAL APPEAL NO. -1114 OF 2015

Appellant :- Prem Nath Yadava & Another

Respondent :- State of U.P.

Counsel for the Appellant :- H.S Tiwari

Counsel for the Respondent :- Govt. Advocate

Hon'ble Ramesh Sinha,J.

Hon'ble Vikas Budhwar,J.

(Oral judgment by Hon'ble Vikas Budhwar,J.)

1. This appeal has been preferred against the judgment and order dated 11.09.2015 passed by Additional Sessions Judge/Special Judge Gangster Court No. 5 Sultanpur, in Gangster Case No. 379 of 2012 (State Vs. Prem Nath and Another) arising out of case crime no. 157/2002, u/s 302/34, 504, 506 IPC, and Section 3(1) of the U.P. Gangster & Anti-Social Activities (Prevention) Act 1986, P.S. Kotwali Dehat, District Sultanpur whereby the appellants have been convicted u/ s 302 of IPC for life imprisonment and a fine of Rs. 10,000/- and in default of fine one year additional imprisonment, u/s 506 IPC for 2 years rigorous imprisonment and fine of Rs. 1,000/- each and in default of fine one month additional imprisonment.

2. The brief facts of the case is worded in the present appeal are that the FIR was registered on 15.02.2002 at 08:10 a.m. on the basis of the information provided by the complainant Sri Haivat Ram Yadav S/o Ramaudaan alleging that on 15.02.2002 at 7 O' clock in the morning Sri Haivat Ram along with his brother Latheru Ram had gone to the field to answer the nature's call and when they reached the garden/field then besides the tree the appellants who are two in number being Prem Nath Yadav S/o Mahaveer Yadav and Sanjay Yadav S/o Ram Niwas were hiding who are resident of the same village where the complainant is residing. On account of old rivalry, they suddenly came out from the

place where they were hiding behind the tree and hurled abuses and threatened to kill the complainant and his brother Latheru Ram S/o Ramaudaan Yadav and thereafter, they took out their country made pistol and with the intention of killing the complainant and his brother fired on account whereof the complainant lie down on the surface but the brother of the complainant being Latheru Ram sustained bullet injuries on his stomach as well as left hand and thereafter he became totally unconscious and fell down. Witnessing the said incident, the complainant started screaming for help and on that point of time Sher Bahadur S/o Bhagirathi and one Sri Mahendra Pratap S/o Ram Bahore who were coming on motorcycle came there and by that time the villagers also came at the place of occurrence and thereafter, both the accused had ran away from there while waving country made pistol in air hurling abuses and threatening to kill all of them.

3. Consequent to the same, FIR was lodged being case crime no. 157/2002, u/s 504, 506, 307 IPC against the appellants in P.S. Kotwali Dehat, District Sultanpur.

4. As per the records, it reveals that the time of the incident was somewhere at 7 O' clock in the morning on 15.02.2002 and thereafter, the informant brought the deceased who was in injured condition, in his house whereat number of villagers got assembled and he waited 20-25 minutes for the police to come, however, as nobody has come, so the complainant accompanied the victim and proceeded for the police station at 07:30 in the morning in a jeep and the distance of the police station from the house of the complainant/victim was 8 kms. Thereafter, the FIR was lodged and the criminal case as referred to above was registered. It has also come on record that the victim/deceased was put to medical examination on the same day i.e. 15.02.2002 at 09:20 a.m. in the police station itself wherein the Blood Pressure was found to be not recordable, pulse found not palpable and the cause of injury was found to be fire arm injury, serious in nature. Therefore, the deceased was sent to District Hospital at Sultanpur as his condition was quite critical wherein he succumbed to the armed injuries at 09:45 a.m. As the victim

died so section 302 of the IPC was also added and during the course of the investigation however, Section 3(1) of the U.P. Gangsters and Anti-Social Activities (Prevention) Act, 1986 was also put to motion. S.I. Indra Prakash Singh was handed over the investigation. During the course of investigation he recorded the statement of the witness, prepared the site plans and also recorded the statement of the deceased and also got recorded the victim's dying declaration. After the death of the victim, the inquest report was prepared and all the formalities relating to postmortem also conducted.

5. After concluding the investigation, the investigating officer submitted a charge sheet against the accused Prem Nath Yadav and Sanjay Yadav being the appellants. The file of the appellants was committed to the court of Session being Gangster Case No. 379 of 2012 arising out of case crime no. 157 of 2002. The learned trial court framed charges against the appellants u/s 302/34, 504, 506 IPC and Section 3(1) U.P. Gangster Act and Anti Social (Prevention) Act, 1986 accused denied the charges and claimed to trial.

6. To bring home the charges, the prosecution produced following witnesses, namely:-

1.	Haivat Ram Yadav	PW 1
2.	Sher Bahadur Singh	PW 2
3.	Dr. M.J. Sharma	PW 3
4.	Genda Lal Tiwari Head Constable	PW 4
5.	Dr. Anil Kumar Gupta	PW 5
6.	S.I. Sharafat Hussain	PW 6
7.	S. I. Indraprakash Singh	PW 7
8.	Jagdamba Prasad Mishra	PW 8
9.	Daljit Singh	PW 9

7. Apart from the aforesaid witnesses the prosecution submitted following documents which were proved by adducing the evidence.

1.	Recovery Memo of blood stained sand	Ex.Ka 1
2.	Recovery Memo of plain sand	Ex.Ka 2
3.	Postmortem Report	Ex.Ka 3
4.	Document Showing Information to Hospital	Ex.Ka 4
5.	Chik FIR	Ex.Ka 5
6.	G.D.	Ex.Ka 6
7.	G.D. (Gangster Act)	Ex.Ka 7
8.	Letter of Victim	Ex.Ka 8
9.	Report of Dr. Anil Kumar Gupta examining the victim	Ex.Ka. 9
10.	Information about the death of the victim in G.D. Carbon Copy	Ex.Ka. 10
11.	Panchayatnama	Ex.Ka 11
12-16	Photographs Letters Specimen Seal	Ex.Ka. 12-16
17.	Site Plan	Ex.Ka. 17
18.	Gang Chart	Ex.Ka. 18
19.	Document pertaining to the cases so litigated between the parties	Ex.Ka. 19
20.	Papers of case crime no. 331/1998	Ex.Ka. 20
21.	Chargesheet	Ex.Ka.21
22-28	Document of case crime no. 175/1995, 378/2001, 356/1996, 113/1996, 133A/1986, 206/2021	Ex.Ka.22-28

8. Heard Sri Arun Kumar Mishra, learned counsel for the appellants and Sri Dhananjay Kumar Singh, learned A.G.A. for the State-respondents. However, none appeared on behalf of the complainant to oppose the present appeal.

9. Learned counsel for the appellants had made manifold submissions namely:

(a) Appellants cannot be held to be guilty of committing of offences u/s 302/34, 504, 506 IPC and section 3(1) of U.P. Gangster &

Anti-Social Activities (Prevention) Act, 1986, as the very basis for putting the proceedings into motion culminating into conviction is an FIR, which is admittedly ante-timed.

(b) As the prosecution has failed to discharge its onus to prove that there was motive attributable for commission of the offences thus, the conviction of the appellants is thoroughly unjustified and the appellants are entitled to be acquitted.

(c) Even, if the version of the prosecution is taken into its face value, then the nature of the injuries vis-a-vis the site of the occurrence pursuant to the gun shot, does not in any manner, whatsoever, co-relate with the offences so sought to be alleged to have been committed by the appellants.

(d) Once the appellants have substantiated their defence with respect to *alibi* that they were not present at the time when the alleged occurrence took place while discharging their burden then in absence of proving it even otherwise there was no occasion to convict the appellants.

(e) The theory so propounded by the prosecution while relying the alleged dying declaration cannot be made the basis to convict the appellants particularly when the certificate of fitness has not been obtained from the doctor and the said statement is alleged to have been taken by the police, which makes it doubtful in nature.

(f) Lastly, defective investigation itself destroys the case of the prosecution and thus in any eventuality the appellants ought to have been acquitted in respect of the charges in question.

10. Learned counsel for the appellants, while elaborating his first submission with regard to the fact that the FIR so lodged by the complainant being Haivat Ram S/o Ramaudaan is ante-timed, has sought to argue that in any case, the time of the occurrence of the incident dated 15.02.2002 cannot be 7 O' clock in the morning, but it is between 4-5 O' clock in the morning. Further submission has been made that the real

story is, that the occurrence relating to the death of the deceased was in between 4-5 O' clock in the morning of the unlucky day dated 15.02.2002 whereon the deceased died and at that point of time, there was nobody present and thereafter, the FIR was being sought to be lodged. In order to buttress the said submission, learned counsel for the appellants has tried to convince this Court with regard to the fact that it is hardly possible that once the case of the prosecution, narrated in the FIR, is taken into its face value, then the sequence of the events would match so as to implicate the appellants, particularly, in view of the fact that the FIR is dated 15.02.2002 and in the statement of PW-1/ informant, it has been mentioned that at the time 7 O' clock in the morning, the victim along with the deceased had gone from their house to answer the nature's call and when they were in the garden/field, the appellants were alleged to have been hiding behind the tree and when the complainant and the deceased came within the vicinity of the tree, then suddenly armed with the country made pistol, the appellants, who are two in number, started firing and pursuant thereto, the victim/deceased sustained gunshot injuries in stomach and in the left hand and he fell down. According to learned counsel for the appellants, in the statement of PW-1, this much has come that from the field, the complainant brought his brother and he was stationed in the main door of their house and thereafter, they waited 20-25 minutes in anticipation that police would come, but as it did not come, so the complainant took the victim in a jeep at about 07:30 a.m. to the police station, which is approximately 8 Kms away from the house and they reached there at 08:00-08:10 a.m. and got the FIR registered. In nutshell, the argument of the counsel for the appellants is to the extent that the entire story is cooked up story and the FIR in question is ante-timed, as the death itself has occurred between 4-5 a.m, but in order to falsely implicate the appellants, it is being shown to be at 7 O' clock.

11. Learned A.G.A. has drawn the attention of the Court towards the statement of PW 5 being Dr. Anil Kumar Gupta who has conducted the medical examination of the deceased and according to him, in his statement so recorded on 18.10.2011, he has specifically stated that the

injuries so sustained by the deceased was at 07:00 AM. According to learned AGA the chain of event supports the prosecution case as admittedly at 07:00 a.m. of 15.02.2002 injuries were sustained by the deceased consequent thereto he was brought to his house and after waiting for 20-25 minutes the complainant proceeded to take injured/victim to the police station which was 8 Kms away, in a jeep and the FIR was registered at 08:10 a.m. and the medical examination being the injury report was also prepared at 09:20 a.m. and at 09:45 a.m, the deceased died, which is mentioned in the postmortem report. According to the learned AGA, there is no inconsistency or contradiction in the statement so as to suggest that the FIR in question is ante-timed and merely making the said allegation without proving the same the appellants cannot absolve themselves.

12. We have considered the submissions so raised by the appellants with relation to the theory, so propounded by them relatable to FIR being ante-timed. The learned counsel for the appellants has also sought to argue the issue of FIR being ante-timed, but he could not convince the Court as to how and under what circumstances, the FIR is ante-timed, merely on asking the same cannot said to be ante-timed, as for that very purpose, chain of events has to be proved so as to contend that the FIR is ante-timed. This Court while delving only the question of ante-timed FIR finds that the chain of the sequence of the events itself depicts that there is no contradiction or inconsistency in the statements of the prosecution witnesses and the narration of the allegations in the FIR so as to suggest that there is ante-timed FIR as even otherwise this Court finds that the allegation so made in the FIR itself goes to show that at about 7 O' clock in the morning, on 15.02.2002, the victim sustained gunshot injuries, thereafter, he was brought to his house as already discussed above and after waiting for 20-25 minutes, he was taken in a jeep to the police station, wherein at 18:10 a.m. the FIR was lodged. It is a matter of common sense that whenever there happens any causality or any emergent situation occurs then, obviously, a distance of 8 Kms can easily be covered within half an hour, particularly in a rural area during early morning hours. The Court further finds that theory of

the FIR being ante-timed has been engineered by the appellants just in order to save their skin as merely making references to certain facts, there is nothing on record to link anything, which could suggest that the FIR is ante-timed particularly when the chain of events and the sequence itself shows that the injures were sustained by the injured/victim at 7 O' clock in the morning and at 07:30, after waiting for 20-25 minutes, he was proceeded to police station and at 08:10 a.m, the FIR was lodged and the fact regarding the death of the deceased at 07:00 a.m, also finds place in the statement of PW 5, Dr. Anil Kumar Gupta. The Court further finds that there is nothing to show in the inquest report that the FIR is ante-timed, however, rather to the contrary, the inquest report supports the prosecution version. Hence, there is no reason to disbelieve or discard the conclusion drawn by the trial court that the FIR is not ante-timed.

13. The Hon'ble Apex Court in the case of **Mahraj Singh Vs. State of U.P.** reported in **(1994) 5 SCC 188** in paragraph no. 12 has observed as under:-

> *"12. FIR in a criminal case and particularly in a murder case is a vital and valuable piece of evidence for the purpose of appreciating the evidence led at the trial. The object of insisting upon prompt lodging of the FIR is to obtain the earliest information regarding the circumstance in which the crime was committed, including the names of the actual culprits and the parts played by them, the weapons, if any, used, as also the names of the eyewitnesses, if any. Delay in lodging the FIR often results in embellishment, which is a creature of an afterthought. On account of delay, the FIR not only gets bereft of the advantage of spontaneity, danger also creeps in of the introduction of a coloured version or exaggerated story. With a view to determine whether the FIR was lodged at the time it is alleged to have been recorded, the courts generally look for certain external checks. One of the checks is the receipt of the copy of the FIR, called a special report in a murder case, by the local Magistrate. If this report is received by the Magistrate late it can give rise to an inference that the FIR was not lodged at the time it is alleged to have been recorded, unless, of course the prosecution can offer a satisfactory explanation for the delay in despatching or receipt of the copy of the FIR by the local Magistrate. Prosecution has led no evidence at all in this behalf. The second external check equally important is the sending of the copy of the FIR along with the dead body and its reference in the inquest report. Even though the inquest report, prepared under Section 174 CrPC, is aimed at serving a statutory function, to lend credence to the prosecution case, the details of the FIR and the gist of statements recorded during inquest proceedings get reflected in the report. The absence of those details is indicative of the fact that the prosecution story was still in an embryo state and had not been given any shape and that the FIR came to be recorded later on after due deliberations and consultations and was then ante-timed to give it the colour of a promptly lodged FIR. In our opinion, on account of the infirmities as noticed above, the FIR has lost its value and authenticity and it appears to us that the same has been 'ante-timed and had not been recorded till the*

inquest proceedings were over at the spot by PW 8."

14. Yet in the case of **Ram Sanjiwan Singh and Others Vs. State of Bihar** reported in **(1996) 8 SCC 552** the Hon'ble Apex Court in paragraph nos. 9 and 10 has observed as under:-

> *"9.While referring to the main features of the prosecution case in earlier part of this judgment we have indicated how the assault on deceased Ramchandra Singh is said to have been mounted by the accused and how the said incident was allegedly witnessed by the eye-witnesses. To recapitulate, the prosecution case hinges on the eye-witness account of P.W.1 Rameshwar Prasad, P.W.3 Gazraj Singh, P.W.4 Shankar Singh and P.W.5 Sunil Singh. P.Ws.1 and 3 were the body guards of the deceased while P.W.4 was his nephew and P.W.5, the first informant, was his grandson. We have been taken through the evidence of these witnesses. We may state that evidence of these eye-witnesses has been relied upon by the Trial Court as well as by the High Court by giving cogent reasons. Having given our anxious consideration to the said evidence once again we find that their evidence has well stood the test of cross examination and was rightly accepted by both the aforesaid courts. These witnesses have supported the prosecution case in all material particulars. The picture which has been projected from this eye-witness account is to the effect that on 24th May 1972 at about 6.15 p.m. in front of the co-operative store in Sakchi Bazar, Jamshedpur while the deceased who was looking after that store was sitting on the western side of the verandah and was having a shave from a barber, he became the target of pistol shots and number of bullets were pumped in his body and in this assault all the present appellants are clearly indicted by the eye-witness account. It is also shown that the eye-witnesses who were standing on the eastern side of the verandah rushed on spot on witnessing this assault the accused who had come in company with other accused who were ultimately acquitted and for whose involvement we may not say anything further. Then the deceased in a profusely bleeding condition was taken to the Tata Memorial Hospital by P.W.4 Shankar Singh and informant Sunil Singh P.W.5. The Police Sub-Inspector incharge of Sakchi Police Station who had already received information regarding the firing in Sakchi Bazar had in the meantime rushed to the hospital where the deceased was removed and in the hospital at the earliest opportunity by about 7.00 p.m. he recorded the FIR given by the informant P.W.5 Sunil Singh. It has to be kept in view that the incident had taken place by about 6.15 in the evening and thereafter the deceased profusely bleeding had to be taken in a taxi after getting a taxi from the taxi stand and on reaching the hospital the deceased was examined by Dr. Saroj Kumar Das P.W.33 at 6.42 p.m. and he was declared 'Brought dead'. The doctor had found nine bullet injuries on the person of the deceased. Under these circumstances the evidence of P.W.44 Prayag Narain who was Office-In-charge of Sakchi Police Station has to be appreciated. He had broadly supported the prosecution version in connection with the prompt recording of FIR at the hospital . His evidence fully supports the version of complainant P.W.5 Sunil Singh. Prayag Narain P.W.44 stated that from April 1971 to June 1973 he was Officer In-charge, Sakchi Police Station and on 24th May 1972 at about 6.20 p.m. at the Police Station he got a telephonic message that there had been firing in the Sakchi Bazar which had led to chaos. He made a station diary about it and then left the police station at about 6.30 p.m. and reached near the TISCO Co-operative Store which he found deserted although the store was open. He found lot of blood on the verandah and an upturned chair besmeared with blood. He also found a small 'katori' meant for shaving and a brush there. He left Ranjit Singh, Sub-Inspector of Police to guard that place and himself proceeded at 6.55 p.m. to the Tata Memorial Hospital where he met Sunil Singh and got recorded the 'fardbeyan' of Sunil Singh by Lala Prasad Srivastava. It has to be appreciated that when Dr. Das P.W.33 declared that the deceased was brought dead in the hospital it was quite natural on the part of the police*

witness P.W.44 to enquire from the complainant Sunil Singh P.W.5 as to how the incident bed happened and as Sunil Singh had by that time came to know that his grandfather was already dead he would naturally give his version about how the incident occurred without being required to further atrend upon the deceased. Under these circumstances recording of the 'fardbeyan' at 7.00 p.m. is rightly held by both the courts below a prompt recording of the First Information Report regarding the incident. In this connection we may also note one strong exception taken by learned senior counsel Shri Rajender Singh about the recording of FIR. He submitted that in fact FIR was recorded two days' late, that is, on 26th May 1972 because by that time a copy of the said FIR is said to have reached the Court of Judicial Magistrate, 1st Class and, therefore, the alleged recording of the FIR at 7.00 p.m. in the hospital is a concocted version and an attempt is made by the prosecution to ante-time and ante-date the FIR. It is not possible to agree with this contention for the simple reason that nothing substantial could be brought out in the cross examination either of Sunil Singh P.W.5 or the witness Prayag Narain P.W.44 to support such a contention. That apart, there are available on record positive checks by way of contemporaneous record indicating that the FIR must have been recorded by 7.00 p.m. in the hospital. It is the evidence or Prayag Narain P.W.44 that after the 'fardbeyan'was taken down at the hospital at 7.00 p.m. a formal FIR was registered immediately thereafter in the Police station and it is in evidence that the said case was registered as Crime Case No.15/72. The evidence of witness Prayag Narain P.W.44 further shows that after he reached the hospital and after he recorded the 'fardbeyan' he went to the morgue and he got performed the inquest Exh.4 over the dead body in presence of P.W.9 Bharat Singh Mohan Singh P.W.10 and Saatan Mukhi P.W.23. He found that the beard of the dead body was partly shaved. So far as the inquest report is concerned it is at Page 518 of the Paper Book. It is in form No.38 and in the reference column Sakhi Police Station Case No.15 of 24.5.72 under Sections 148, 149 and 302 IPC and Sections 25(a) and 27 of the Arms Act is clearly mentioned. This shows that by the time the inquest report was prepared in the morgue of the hospital itself Criminal Case No.15 was already got registered in the police station on the basis of 'fardbeyan' of P.W.5 Sunil Singh. This is one positive check of contemporaneous nature which shows that 'fardbeyan' had seen the light of the day prior to the preparation of the inquest report itself in the morgue of the hospital on that night.

10. The second positive check for lending credence to the 'fardbeyan' recorded at the hospital is supplied by another evidence of contemporaneous nature being seizure memo which is found at page 538 Of the Paper book. Evidence of witness prayag Narain P.W.44 shows that from the hospital he had gone to the site and had got the articles lying on the scene of offence seized. That seizure list Exh.3 also clearly refers to Sakchi Police Station Case No.15 dated 24.5.72 on the same lines on which the inquest report refers to the police case and the nature of the offences for which the case was registered. The time and date of seizure is shown to be 24th May 1972 at 12.30 o'clock at night. Nothing could be alleged against the preparation of the seizure list at that time. This also indicates that investigation which was triggered off pursuant to the recording of the FIR had resulted in all these subsequent steps during the course of investigation on the night of 24th May itself and were taken out pursuant to the recording of the FIR, first 'fardbeyan' at the hospital and then the formal FIR at Sakchi Police Station. Consequently it could not be said that the FIR was ante-timed or that it was not recorded as it was tried to be suggested by the prosecution. If it was registered only on 26th May, 1972 as suggested by the learned senior counsel for the appellants all the steps taken by the police pursuant to the recording of the FIR in the evening and night of 24th May, 1972 and which have clearly referred to the recording of the FIR and registering of the Criminal Case No.15 of 24.5.72 at the police station on the evening of that day itself would not have transpired at all. It was then submitted that this FIR had reached the Magistrate's Court only on 26th May 1972. It is easy to visualize that after all necessary immediate steps were taken after the recording of the FIR on the evening of 24th May 1972

if the FIR was sent on the next day to the Magistrate's Court it could not be said that it was in any way delayed. The fact that it was placed before the Magistrate on 26th May would only indicate that the clerk concerned must have brought it to the notice of the Magistrate on 26th May 1972 but that would not necessarily mean that copy of the FIR had not reached the Magistrate's office on the next day. Consequently it must be held that the First Information Report was promptly registered at the Police station hot on the heels of the happening of the incident on the evening of 24th May at Sakchi Bazar and that FIR reflected almost a contemporaneous account of what had taken place on spot. That recitals in this FIR clearly indicate that an assault was mounted on deceased Ramchandra Singh by accused including the present appellants nos.2 and 5 in Criminal Appeal No.348 of 1985. It had also indicate the involvement of appellants in Criminal Appeal No.387 of 1985 original accused no.10 Ram Sanjiwan Singh who is said to have fired pistol shot in air to scare away the public. It is true that FIR did not mention presence of accused no.6 Ganesh Gwala. But this circumstance which was heavily relied upon by the learned senior counsel for the appellants cannot advance the case of the accused any further for the simple reason that the FIR itself mentioned that there were two other persons whose names the first informant Sunil Singh did not know. This version of his in the 'fardbeyan' was fully supported by him at the stage of trial and nothing substantial could be brought out in his cross examination to shake this version. Consequently it must be held that the FIR fully corroborated the eye- witness account deposed to by first informant Sunil Singh P.W.5 and other eye-witnesses."

15. The Hon'ble Apex Court in the above noted judgments has clearly observed that in order to hold the FIR to be ante-timed or not, it is to be proved beyond doubt and merely on asking, the same cannot be held to be ante-timed, particularly when the chain/sequence of the events itself link so as to suggest that there is no possibility of the FIR to be ante-timed. As discussed above, the Court finds its inability to subscribe the argument of the counsel for the appellants that the FIR is ante-timed.

16. Learned counsel for the appellants has next contended that there was no motive behind commission of the offence culminating into conviction and thus, the appellants are entitled to be acquitted. Learned counsel for the appellants have though made an argument on the said issue but nothing has been brought on record to substantiate the same. On the other hand, learned AGA has invited the attention of this Court towards the discussion made by the trial court while giving specific finding that there was enmity and rivalry between the parties, which became the basis of commission of offence.

17. We have heard the argument of the appellants as well as learned AGA and perused the record in question and we find that it has come on record that the father of the complainant and the deceased had been inherited certain properties from the maternal side of his mother as

per the statements available on record of the appellant no. 1 being Prem Nath Yadava, who was related to the father of the complainant from the maternal side as complainant's grandfather (maternal) were 5 brothers, one of them, whose son was the applicant no. 1 and when certain landed property was inherited by father of the complainant, then the same became eyesore of Prem Nath Yadav being appellant no. 1. It has also come on record that the father of the appellant no. 1 being Sri Mahaveer, was murdered and criminal proceedings for the offence of murder was lodged and prosecuted against the deceased, Ram Sumiran and the complainant and others, which was pending at that point of time and thereafter, the conviction was made while punishing with 7 years rigorous imprisonment. One of the issues, which also assumes much importance, is relatable to the fact that the murder of the father of the appellant no. 1 being Mahaveer was committed in the year 2001 and the incident relatable to lodging of the FIR for committing offence against the appellants is of the year 2002, meaning thereby, it is a clear cut case of motive being attributed to the appellants, as it is a matter of common knowledge that whenever a person receives a blow on account of death of his blood relative, then obviously enmity starts residing in the heart. Meticulously analyzing the said issue, the trial court has come to the conclusion that merely because conviction was done in the year 2008 and the same will not matter at all, as what is to be seen is the fact that the father of the appellant was murdered in the year 2001 and the brother of the complainant was murdered in the year 2002, which is within a period of one year approximately.

18. In the statement, so made u/s 233 (2) Cr.P.C, the appellants themself have come up with the stand that there is a rivalry with the victim/complainant and once the same being the position coupled with the surrounding factors, the entire theory so sought to be propounded by the learned counsel for the appellants that there were no motive assigned behind the said offence, is patently misconceived, as this Court has no hesitation to accept the view taken by the court below and there is no reason to disbelieve or discard the same.

19. The Hon'ble Apex Court in the case of **Kunwarpal @ Surajpal And Ors. Vs. State of Uttarakhand And Anr.** reported in **2014 (16) SCC 560** in paragraph no. 16 has observed as under:-

> *"According to the complainant there was litigation between them and the accused persons leading to enmity. PW3 Atmaram has also stated that there was litigation between them and it culminated in the occurrence. Animosity is a double edged sword. While it can be a basis for false implication, it can also be a basis for the crime [Ruli Ram & Anr. Vs. State of Haryana (2002) 7 SCC 691; State of Punjab Vs. Sucha Singh & Ors. (2003) 3 SCC 153]. In the instant case there is no foundation established for the plea of false implication advanced by the accused and on the other hand evidence shows that enmity has led to the occurrence. The conviction and sentence imposed on the appellants is based on proper appreciation of evidence on record and does not call for any interference."*

20. In the case of **Inder Singh And Ors. Vs. State of Rajasthan** reported in **2015 2 SCC 734** the Hon'ble Apex Court in paragraph no. 19 has observed as under:-

> *"In that view of settled law, the facts of the present case as alleged in the FIR and as proved in the court leave no manner of doubt that the group of persons who chased deceased no.1-Inder Singh and caused his death and thereafter chased, surrounded and caused death of three more persons besides causing grievous injuries to the informant-Amar Singh was an assembly of five or more persons rightfully deserving to be designated as an unlawful assembly because by its action it showed that its common object was to commit offence. The subsequent acts clearly show that the unlawful assembly carried out its common object of committing serious offence of murder of four persons and grievous injuries to the informant. This Court, therefore, finds that the courts below committed no error in applying Section 149 of the IPC and convicting the members of the unlawful assembly for offences under Sections 302 and 307 of the IPC (with the aid of Section 149 IPC). Some argument was advanced on there being lack of any clear motive but that is not at all necessary or material when the offences have been proved by clear and cogent evidence including eye-witnesses."*

21. In the case of **Jagtar Singh Vs. State of Haryana** reported in **2015 7 SCC 675** the Hon'ble Apex Court in paragraph nos. 17 and 20 has observed as under:-

> *"17.Now so far as the issue relating to existence of motive is concerned, we consider it apposite to reproduce the finding of the High Court on this issue.*
>
> > *"There also, Jagtar Singh appellant is not on firmer footing. There is plethora of evidence available on record to prove that the first informant had filed an application for correction of Girdawari entries and the adjudication announced on the relevant date by the revenue officer was favourable to him. There is also material available on record that first informant had improved the land which he exchanged with the appellant to redress the grievance of the latter that the quality of the land which fell to their share in a partition was inferior. It was after the further exchange, as between the appellants on the one hand and PW-3 Harbans Singh on the other hand, that the latter had improved the quality of that land. It was obvious that the appellants entertained a feeling of envy*

> *towards the first informant and they had an eye upon the improved land under the cultivation of first informant. The favourable announcement of the Girdwari correction provided the proverbial combustible material to the appellants who have been proved on record to have announced thereafter that announcement of the verdict of the revenue officer notwithstanding, they would not allow the first informant to enter upon the land qua which Khasra girdwaries entries had been ordered to be corrected. It cannot, thus be said with any justification that the appellant had no motive to commit the impugned crime."*
>
> *20.In the light of these facts, which are duly proved by the prosecution with the aid of their eyewitnesses, we find no good ground to differ with the finding of the High Court and accordingly hold that there was a motive to commit the offence. We accordingly hold so."*

22. In the case of **Saddik @ Lalo Gulam Hussein Shaikh And Ors. Vs. State of Gujrat** reported in **2016 10 SCC 663** the Hon'ble Apex Court in paragraph no. 21 has observed as under:-

> *"21. It is settled legal position that even if the absence of motive, as alleged, is accepted, that is of no consequence and pales into insignificance when direct evidence establishes the crime. Therefore, in case there is direct trustworthy evidence of witnesses as to commission of an offence, the motive part loses its significance. Therefore, if the genesis of the motive of the occurrence is not proved, the ocular testimony of the witnesses as to the occurrence cannot be discarded only on the ground of absence of motive, if otherwise the evidence is worthy of reliance. [See: Hari Shankar Vs. State of U.P., (1996) 9 SCC 40; Bikau Pandey & Ors. Vs. State of Bihar, (2003) 12 SCC 616; Abu Thakir & Ors. Vs. State of Tamil Nadu, (2010) 5 SCC 91; State of U.P. Vs. Kishanpal & Ors., (2008) 16 SCC 73; and Bipin Kumar Mondal Vs. State of West Bengal, (2010) 12 SCC 91]."*

23. Yet the Hon'ble Apex Court in the case of **Raj Gopal Vs. Muthupandi @ Thavakkalai And Ors.** reported in **2017 11 SCC 120** in paragraph no. 14 has observed as under:-

> *"14.Equally, it is well established that motive does not have to be established where there is direct evidence. Given the brutal assault made on PW-1 by criminals, the fact that witnesses have turned hostile can also cut both ways, as is well known in criminal jurisprudence."*

24. The proposition of law so culled out by the Hon'ble Apex Court leads to an inescapable proposition that even lack of any clear motive is not the material, when the offences are proved by a clear and cogent evidence including eye witness, and the fact that when there are enough evidences, both ocular as well documentary, to prove existence of motive for commission of crime.

25. Thirdly, the learned counsel for the appellant has laid much emphasis upon the nature of the wounds of the deceased so as to contend that not only there is a great inconsistency in the medical examination of

the deceased qua the postmortem report but also in the statements of PW-3 and PW-5 being the persons, who conducted the postmortem and prepared the injury report. According to the learned counsel for the appellant, the injury report, so prepared by PW-5 being Dr. Anil Kumar Gupta does not show any blackening or sign of any burning/pealing of the skin, as whereas the report of PW-3 being Dr. M. J. Sharma, who conducted the postmortem, itself shows that there was blackening or charring. In nutshell, the argument of the learned counsel for the appellants is to the extent that once there is no conclusive opinion and the injury report and postmortem report are self-contradictory, then the said fact itself shows that the version contained in the FIR itself is false, concocted and has no basis whatsoever.

26. Learned AGA on the other hand submitted that the trial court had analyzed the issue in right perspective and there is no contradiction in the medico legal report vis-a-vis postmortem report.

27. We have heard the learned counsel for the parties and perused the documents available on record and we find that the view taken by the court below cannot be faulted, particularly, in view of the fact that the court below had meticulously analyzed each and every aspect of the matter and has come to the conclusion that the distance between the place, where the victim sustained firearm injures and fell down vis-a-vis the place, where the complainant was present was only four steps being a short distance and the distance between the place, where the victim sustained firearm injuries and fell down qua the place, where accused were hiding, was six steps and similarly, the distance between the place, where witness, who saw the incident, was present, vis-a-vis the place, where victim fell down and sustained injures was 40 steps. Though the court below has taken the view that distance cannot be measured by the steps as the steps may differ from person to person according to his height but the logic so advanced by the court below while taking clue from the site plan, which was prepared by the Investigating Officer was with relation to the fact that when gun shot injuries are sustained from the closeness of the person who has fired then blackening occurs near

the injuries.

28. Here, in the present case, record reveals that there was burning and blackening, which was noticed by PW-3 being Dr. M.J. Sharma, who conducted the postmortem and this becomes a crucial fact that it was a gun shot injury. Even though, much reliance has been placed upon the injury report, which was prepared by PW-5 being Dr. Anil Kumar Gupta, but in the opinion contained in the report, it has been mentioned that the cause of the injury was a firearm injury. Even otherwise, the injury report cannot be read in isolation, however, the same has to be read in-conformity and in consonance with the surrounding factors, evidences including the statements of the witnesses.

29. Learned counsel for the appellants have argued that there is a great inconsistency in the version of the prosecution vis-a-vis the receiving of the injuries, as according to the learned counsel for the appellants, it has been alleged in the FIR and in the statement in support thereof, that the deceased sustained injuries in front however, the deposition of PW 5 Dr. Anil Kumar Gupta who prepared the injury report reveals that the injury no. 3 was sustained at back, thus, the entire basis of hold the appellants guilty of commission of the said offence while convicting, has no legs to stand.

30. The argument so raised by the learned counsel for the appellants though appears to be attractive but it is not liable to be accepted as it has come on record that the deceased was accompanied with the complainant when the occurrence took place and the distance between the deceased and complainant was a short distance which was measured to be four steps and when the complainant saw the appellants with the country made pistol then the complainant lied down on the surface and the deceased/victim in order to save himself would have turned around just to run away while being confronted with the appellants, who are two in number standing in front of them in close vicinity. Thus, by no stretch of imagination, the theory propounded by the counsel for the appellants, can be accepted to be correct, as it is a matter of common knowledge that once a person is confronted with a

dangerous situation, which is not usual, then it is reflex, which matters and in order to save the life, human being just tries to run away. The court below has meticulously analyzed the said issue, while recording the specific finding that once the complainant tried to save himself while lying down on the ground then he cannot exactly say as to on which position either front or back, the gun shot injury were put to motion. Even otherwise, there is no reason to disbelieve and discard the finding recorded by the court below, which stands substantiated by facts based upon the ocular and documentary evidence.

31. Learned counsel for the appellants has next contended that the court below has not considered the plea of alibi, as at the time of occurrence, the appellants were not present. In order to buttress the said submission, learned counsel for the appellants has argued that the appellant not no. 1 who happens to be a railway employee and on the unlucky day, he was engaged in railway station at Haidargarh in connection with repairing work of electricity along with three other employees. In order to set up the plea of alibi, the appellants had produced DW-1 being Sri Surendra Chand Dwivedi Senior Section Engineer Electricity Northern Railway, Sultanpur, Sri B.S. Singh, Station Superintendent DW-2 and Dayashankar Singh, Technical one Northern Railway Power House, Sultanpur DW-4 and DW-5 Shyam Bihari Dubey Electrical Fitter Grade-I, Railway Station, Sultanpur. Learned counsel for the appellants, while substantiating the plea of alibi, had argued that from the statement of DW-2 itself, it is clear that he has deposed that from 13.02.2002 to 15.02.2002, he was posted as Station Master, Haidargarh and his duty was from 22:00 p.m in the night till 07:30 a.m, however, the electricity in the station colony became disrupted accordingly, information to the said effect was made to the Electricity Section, Sultanpur through phone and from Sultanpur four persons came including the appellant no. 1, arrived at Haidargarh in the morning on 13.02.2002 and worked from 13 to 14 February, 2002 and they proceeded to go back to their parent place of posting on 15.02.2002 after getting the certificate on 15.02.2002 at about 07:10-07:15 a.m. Learned counsel for the appellants has next contended that the statement

of DW-2 itself proves that appellant no. 1 was not present when the occurrence took place. Learned counsel for the appellants has made further submission that the certificate, being Ex.Ka-3, issued by the railways, itself shows that the appellant no. 1 left the workplace at Haidargarh Railway Station on 15.02.2002 at 07:10-07:15 a.m.

32. On the other hand, learned AGA has sought to argue that the plea of alibi so set up by the appellants, is not substantiated as even otherwise, the applicants were seen to have committed the crime by the complainant and further the same stands proved through the dying declaration of the deceased.

33. We had the occasion to consider the statement of DW-2 as well as the judgment of trial court and we find that a detailed discussion has been made by the court below in negating the plea of alibi taken by the appellants. We find that though DW-2 has deposed that the appellant no. 1 had come to Haidargarh in connection with electricity problem, but the said statement does not in any manner, whatsoever, support the appellants, particularly, in view of the fact that the Ex. Kha-3 happens to be the certificate. It has come on record that the same is a certificate, which is prepared by the respective employee (Appellant no. 1) and further DW-2 only signed the same. DW-5, in his statement, has also stated that the certificate is prepared by the concerned employee and not by railway officers. There is a very important issue, which needs to be noticed that Ex.Kha 3 had been filled by the appellant no. 1 showing the fact that he had worked at Haidargarh from 13.02.2002 to 14.02.2002 and on 15.02.2002, he proceeded from Haidargarh through S.L. Train, which commenced its journey from Haidargarh at 07:47 and reached Akbarganj at 08:28. This Court finds that once a certificate is being filled by an employee at Haidargarh then how could he give the time when the train is to reach at Akbarganj as it is not a case of the appellant that the certificate being Ex.Ka3 was issued in Akbarganj. However, rather to the contrary, the same was filled in Haidargarh itself. The vital document, which could have proved the fact as to whether the appellant was at Haidargarh in connection with an official work so deputed to him,

is a document being the pay sheet. The said document is also prepared by the official of railways duly verified at all levels. It has also come on record that the pay sheet was weeded out with the passage of time. It is not a case also that the appellant was not aware about the rules/orders/practice prevailing about the time frame of weeding of document. Here in the present case admittedly the occurrence took place on 15.02.2002 and it also within the knowledge of the appellant that criminal case was also going on. Thus, no attempts were made despite the fact that there is a provision for getting the records preserved in the wake of practice of being weeded out. The plea of alibi only succeeds if it is shown that the accused was far away from the place of occurrence at the relevant point of time and thus, he could not be present at the place, where the crime was committed.

34. The Hon'ble Apex Court in the case of **Dudh Nath Pandey Vs. State of U.P.** reported in (**1981) 2 SCC 166** in paragraph no. 19 has observed as under:-

> "*Counsel for the appellant pressed hard upon us that the defence evidence establishes the alibi of the appellant. We think not. The evidence led by the appellant to show that, at the relevant time, he was on duty at his usual place of work at Naini has a certain amount of plausibility but that is about all. The High Court and the Sessions Court have pointed out many a reason why that evidence cannot be accepted as true. The appellant's colleagues at the Indian Telephone Industries made a brave bid to save his life by giving evidence suggesting that he was at his desk at or about the time when the murder took place and further, that he was arrested from within the factory. We do not want to attribute motives to them merely because they were examined by the defence. Defence witnesses are entitled to equal treatment with those of the prosecution. And, Courts ought to overcome their traditional, instinctive disbelief in defence witnesses. Quite often, they tell lies but so do the prosecution witnesses. Granting that D. Ws. 1 to 5 are right, their evidence, particularly in the light of the evidence of the two Court witnesses, is insufficient to prove that the appellant could not have been present near the Hathi Park at about 9-00 A.M. when the murder of Pappoo was committed. The plea of alibi postulates the physical impossibility of the presence of the accused at the scene of offence by reason of his presence at another place. The plea can therefore succeed only if it is shown that the accused was so far away at the relevant time that he could not be present at the place where the crime was committed. The evidence of the defence witnesses, accepting it at its face value, is consistent with the appellant's presence at the Naini factory at 8-30 A.M. and at the scene of offence at 9.00 A.M. So short is the distance between the two points. The workers punch their cards when they enter the factory but when they leave the factory, they do not have to punch the time of their exit. The appellant, in all probability, went to the factory at the appointed hour, left it immediately and went in search of his prey. He knew when, precisely, Pappoo would return after dropping Ranjana at the school. The appellant appears to have attempted to go back to his work but that involved the risk of the time of his re-entry being punched again. That is how he was arrested at about 2- 30 P.M. while he was loitering near the pan-shop in front of the*

factory. There is no truth in the claim that he was arrested from inside the factory."

35. In the case of **Binay Kumar Singh Vs. State of Bihar (1997) 1 SCC 283** the Hon'ble Apex Court in paragraph nos. 22 and 23 has observed as under:-

"22. We must bear in mind that alibi not an exception (special or general) envisaged in the Indian Penal code or any other law. It is only a rule of evidence recognised in Section 11 of the Evidence Act that facts which are inconsistent with the fact in issue are relevant. Illustration (A) given under the provision is worth reproducing in this context:

> *"The question is whether A committed a crime at Calcutta on a certain date; the fact that on that date, A was at Lahore is relevant."*

23. The Latin word alibi means "elsewhere" and that word is used for convenience when an accused takes recourse to a defence line that when the occurrence took place he was so far sway from the place of occurrence that it is extremely improbable that he would have participated in the crime. It is basic law that in a criminal case, in which the accused is alleged to have inflicted physical injury to another person, the burden is on the prosecution to prove that the accused was present at the scene and has participated in the crime. The burden would not be lessened by the mere fact that the accused has adopted the defence of alibi The plea of the accused in such cases need be considered only when the burden has been discharged by the prosecution satisfactorily. But once the prosecution succeeds in discharging the burden it is incumbent on the accused, who adopts the plea of alibi to prove it with absolute certainty So as to exclude the possibility of his presence at the place of occurrence. When the presence of the accused at the scene of occurrence has been established satisfactorily by the prosecution through reliable evidence, normally the court would be slow to believe any counter evidence to the effect that he was elsewhere when the occurrence happened. But 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 scene when the occurrence took place, the accused would no doubt, be entitled to the benefit of that reasonable doubt. For that purpose, it would be a sound proposition to be laid down that in such circumstances, the burden on the accused is rather heavy. It follows, therefore, that strict proof is required for establishing the plea of alibi. This Court has observed so on earlier occasions (vide Dudh Nath pandey vs state of Utter Pradesh (1981) 2 SCC 166; state of Maharashtra vs Narsingrao Gangaram Pimple AIR 1984 SC 63)."

36. The Hon'ble Apex Court in the case of **Jayantibhai Bhenkarbhai Vs. State of Gujrat (2002) 8 SCC 165** in paragraph no. 18 and 19 has observed as under:-

"18. Section 11 of the Evidence Act, 1872 provides that facts not otherwise relevant are relevant if they are inconsistent with any fact in issue or relevant fact or if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or a relevant fact highly probable or improbable. Illustration (a) of Section 11 reads as under :

Illustrations

> *(a) The question is, whether A committed a crime at [Calcutta], on certain day. The fact that, on that day A was at [Lahore] is relevant.*
>
> *The fact that near the time when the crime was committed, A was at a distance from the place where it was committed,*

which would render it highly improbable, though not impossible, that he committed it, is relevant.

(b) xxx xxxxxx

19. 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 convenient 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 (a 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 guilty 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 plead 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 obligations 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 the 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."*

37. In the case of **Shaikh Sattar Vs. State of Maharashtra** reported in **(2010) 8 SCC 430** the Hon'ble Apex Court in paragraph nos. 34, 35, 36 has observed as under:-

"34. Except for making a bald assertion about his absence from his rented premises, the appellant miserably failed to give any particulars about any individual in whose presence, he may have read the Namaj in the morning. He examined no witness from Chikalthana before whom he may have read the Koran in the evening prior to the incident. He examined nobody, who could have seen him in the masjid during the night of the incident. Therefore, the trial court as also the High Court concluded that this plea of being away from the rented premises at the relevant time was concocted.

35. Undoubtedly, the burden of establishing the plea of alibi lay upon the appellant. The appellant herein has miserably failed to bring on record any facts or circumstances which make the plea of his absence even probable, let alone, being proved beyond reasonable doubt. The plea of alibi had to be proved with absolute certainty so as to completely exclude the possibility of the presence of the appellant in the rented premises at the relevant time. When a plea of alibi is raised by an accused it is for the accused to establish the said plea by positive evidence which has not been led in the present

case. We may also notice here at this stage the proposition of law laid down in the case of Gurpreet Singh Vs. State of Haryana, (2002) 8 SCC 18 as follows:

> *"This plea of alibi stands disbelieved by both the courts and since the plea of alibi is a question of fact and since both the courts concurrently found that fact against the appellant, the accused, this Court in our view, cannot on an appeal by special leave go behind the abovenoted concurrent finding of fact".*

36. But it is also correct that, even though, the plea of alibi of the appellant is not established, it was for the prosecution to prove the case against the appellant. To this extent, the submission of the learned counsel for the appellant was correct. The failure of the plea of alibi would not necessarily lead to the success of the prosecution case which has to be proved by the prosecution beyond reasonable doubt. Being aware of the aforesaid principle of law, trial court as also the High Court examined the circumstantial evidence to exclude the possibility of the innocence of the appellant."

38. In the case of **Jitendra Kumar Vs. State of Haryana** reported in **(2012) 6 SCC 204** the Hon'ble Supreme Court has observed in paragraph no. 64 as under:-

"64. The mere fact that the accused were residents of a village at some distance would be inconsequential. As per the statement of the witnesses, both these accused were seen by them in the house of Ratti Ram where the deceased was murdered. We are also unable to accept the contention that presence of PW10 and PW11 at the place of occurrence was doubtful and the statements of these witnesses are not trustworthy."

39. In the case of **Jumni and Others Vs. State of Haryana** reported in **2014 11 SCC 355** the Hon'ble Supreme Court has observed in paragraph no. 20 as under:-

"20. It is no doubt true that when an alibi is set up, the burden is on the accused to lend credence to the defence put up by him or her. However the approach of the court should not be such as to pick holes in the case of the accused person. The defence evidence has to be tested like any other testimony, always keeping in mind that a person is presumed innocent until he or she is found guilty."

40. While analyzing the plea of alibi so sought to be raised by the appellants, this Court finds that the appellants have not been able to prove beyond doubt that nobody was present there at the time when the unlucky occurrence took place, as the circumstances prove otherwise, which has been already discussed in detail.

41. Much emphasis has been laid down by the learned counsel for the appellants that the dying declaration of deceased is not reliable and the same cannot be put into motion while convicting the appellants. Elaborating the said submission, learned counsel for the appellants had

argued that in the present case in hand, dying declaration was recorded by the police personnel and further the certificate of fitness was also not obtained from the doctor and there is a cloud regarding the fact that as to whether dying declaration was recorded or not, as according to the learned counsel for the appellants, the deceased was in a critical condition and he might have died before recording of the dying declaration.

42. Dying declaration gets its root from Section 32 (1) of the Evidence Act, 1872, which reads as under:-

> *"when it relates to cause of death. —When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question."*

43. As per Section 32 (1) of the Evidence Act 1872, whenever the statement is made by a person as to the cause of his death or as to any of the circumstances of the transaction, which resulted in his death, such statements are relevant whether the person, who made them was or was not, at the time when they were made, under expectation of death.

44. The Hon'ble Apex court in the case of **Paras Yadav and Others Vs. State of Bihar** reported in **1999 2 SCC 126** had the occasion to consider the contingency, wherein the statement so recorded by the Sub-Inspector, has been treated as valid dying declaration, the Hon'ble Apex Court in paragraph nos. 5, 8, 9 and 10 has observed as under:-

> "*5. The learned Counsel referred to the evidence of P.W. 1, Basgeet Yadav who has stated that at 8.00 p.m., he rushed to the newly built bridge and saw Sambhu Yadav lying there and he was bleeding. Sambhu, on being asked, informed that Paras Yadav, Tulsi and Munshi surrounded him and Paras gave a chhura blow. Similarly, P.W. 2, Bachu Das stated that he alongwith Jagannath was going home on bicycle and when they reached at the distance of 200 yards from Ghogha Chowk, they saw five persons going away. They were Paras, Munshi, Tulsi and Satan and fifth person could not be identified. At Ghogha Chowk, they saw Sambhu falling down in an injured condition. On inquiry, Sambhu told that Munshi, Tulsi and Satan caught hold of him and Paras gave a Chhura blow. The statement to the aforesaid effect was made by Sambhu to Sub- Inspector. Similarly, P.W. 4, Ramchander Raut also stated that he rushed to the place of occurrence after hearing the noise and found that Sambhu had fallen down on the pitch road. On inquiry, Sambhu told that he was stabbed by Paras while Tulsi, Munshi*

and Satan had caught hold of him. P.W. 5 Kanchan Yadav, deposed similarly and has stated that Sambhu told him that he was sur-rounded by Munshi, Tulsi, Satan and Paras and Paras stabbed him on abdomen. He also deposed it with regard to the enmity between Sambhu and others accused on account of the land dispute.

8.It has been contended by the learned Counsel for the appellants that the Investigating Officer has not bothered to record the dying declaration of the deceased nor the dying declaration is recorded by the Doctor. The Doctor is also not examined to establish that the deceased was conscious and in a fit condition to make the statement. It is true that there is negligence on the part of Investigating Officer. On occasions, such negligence or ommission may give rise to reasonable doubt which would obviously go in favour of the accused. But in the present case, the evidence of prosecution witnesses clearly establishes beyond reasonable doubt that the deceased was conscious and he was removed to the hospital by bus. All the witnesses deposed that the deceased was in a fit state of health to make the statements on the date of incident. He expired only after more than 24 hours. No justifiable reason is pointed out to disbelieve the evidence of number of witnesses who rushed to the scene of offence at Ghogha Chowk. Their evidence does not suffer from any infirmity which would render the dying declarations as doubtful or unworthy of the evidence. In such a situation, the lapse on the part of the Investigating Officer should not be taken in favour of the accused, may be that such lapse is committed designedly or because of negligence. Hence, the prosecution evidence is required to be examined de hors such ommissions to find out whether the said evidence is reliable or not. For this purpose, it would be worthwhile to quote the following observations of this Court from the case of Ram Bihari Yadav v. State of Bihar and others, J.T. (1998) 3 SC

> *290. "In such cases, the story of the prosecution will have to be examined de hors such ommissions and contaminated conduct of the officials otherwise the mischief which was deliberately done would be perpetuated and justice would be denied to the complainant party and this would obviously shake the confidence of the people not merely in the law enforcing agency but also in the administration of justice."*

9. In this view of the matter with regard to Paras Yadav, in our view, there is no reason to disbelieve the oral dying declaration as deposed by number of witnesses and as recorded in farbdeyan of deceased Sambhu Yadav. The farbdeyan was recorded by the Police Sub-Inspector on the scene of occurrence itself, within few minutes of the occurrence of the incident. Witnesses also rushed to the scene of offence after hearing hulla gulla. The medical evidence as deposed by p.w. 11 also corroborates the prosecution version. Hence, the courts below have rightly convicted Paras Yadav for the offence punishable under Section 302 I.P.C.

10. The next question would be with regard to the conviction of accused nos. 2 and 3. that is Satan Yadav and Tulsi Sonar under Section 302 read with Section 34 I.P.C. In our view the learned Counsel for the appellants rightly pointed out that the prosecution version with regard to the part played by accused nos. 2 and 3 is inconsistent. Some witnesses deposed that the deceased informed that accused nos. 2 and 3 surrounded him while other witnesses deposed that the deceased told that they gave fist blows or slaps while some witnesses state that the deceased told that Tulsi Sonar and Satan Yadav caught hold of the deceased. Considering, the aforesaid inconsistencies in the dying declaration as deposed by the witnesses with regard to the part played by accused nos. 2 and 3, and as there is no direct evidence in our view, it cannot be said that prosecution has proved beyond reasonable doubt that accused nos. 2 and 3 are guilty for the offence punishable under Section 302 read with Section 34, I.P.C.

45. In the case of **Laxmi (Smt) Vs. Om Prakash and Others** reported in **2001 6 SCC** in paragraph nos. 1 and 30 has observed as

under:-

> *"1. Nemo moriturus praesumitur mentire __ No one at the point of death is presumed to lie. A man will not meet his Maker with a lie in his mouth __ is the philosophy in law underlying admittance in evidence of dying declaration. A dying declaration made by person on the verge of his death has a special sanctity as at that solemn moment, a person is most unlikely to make any untrue statement. The shadow of impending death is by itself the guarantee of the truth of the statement made by the deceased regarding the causes or circumstances leading to his death. A dying declaration, therefore, enjoys almost a sacrosanct status, as a piece of evidence, coming as it does from the mouth of the deceased victim. Once the statement of the dying person and the evidence of the witnesses testifying to the same passes the test of careful scrutiny of the Courts, it becomes a very important and a reliable piece of evidence and if the Court is satisfied that the dying declaration is true and free from any embellishment such a dying declaration, by itself, can be sufficient for recording conviction even without looking for any corroboration__is the statement of law summed up by this Court in Kundula Bala Subrahmanyam Vs. State of A.P., (1993) 2 SCC 684. The Court added - such a statement, called the dying declaration, is relevant and admissible in evidence provided it has been made by the deceased while in a fit mental condition. The above statement of law, by way of preamble to this judgment, has been necessitated as this appeal, putting in issue acquittal of the accused respondents from a charge under Section 302/34 IPC, seeks reversal of the impugned judgment and invites this court to record a finding of guilty based on the singular evidence of dying declaration made by the victim. The law is well settled: dying declaration is admissible in evidence. The admissibility is founded on principle of necessity. A dying declaration, if found reliable, can form the basis of conviction. A court of facts is not excluded from acting upon an uncorroborated dying declaration for finding conviction. A dying declaration, as a piece of evidence, stands on the same footing as any other piece of evidence. It has to be judged and appreciated in the light of the surrounding circumstances and its weight determined by reference to the principles governing the weighing of evidence. It is, as if the maker of the dying declaration was present in the court, making a statement, stating the facts contained in the declaration, with the difference that the declaration is not a statement on oath and the maker thereof cannot be subjected to cross-examination. If in a given case a particular dying declaration suffers from any infirmities, either of its own or as disclosed by other evidence adduced in the case or circumstances coming to its notice, the court may as a rule of prudence look for corroboration and if the infirmities be such as render the dying declaration so infirm as to prick the conscience of the court, the same may be refused to be accepted as forming safe basis for conviction. In the case at hand, the dying declarations are five. However, it is not the number of dying declarations which will weigh with the court. A singular dying declaration not suffering from any infirmity and found worthy of being relied on may form the basis of conviction. On the other hand if every individual dying declaration consisting in a plurality is found to be infirm, the court would not be persuaded to act thereon merely because the dying declarations are more than one and apparently consistent.*
>
> *30. A dying declaration made to a police officer is admissible in evidence, however, the practice of dying declaration being recorded by investigating officer has been discouraged and this Court has urged the investigating officers availing the services of Magistrate for recording dying declaration if it was possible to do so and the only exception is when the deceased was in such a precarious condition that there was no other alternative left except the statement being recorded by the investigating officer or the police officer later on relied on as dying declaration. In Munnu Raja and Anr. Vs. The State of Madhya Pradesh - AIR 1976 SC 2199, this Court observed - investigating officers are naturally interested in the success of the investigation and the practice of the investigating officer himself recording a dying declaration during the course of an investigation ought not to be encouraged. The dying declaration recorded by the investigating*

officer in the presence of the doctor and some of the friends and relations of the deceased was excluded from consideration as failure to requisition the services of a Magistrate for recording the dying declaration was not explained. In Dalip Singh Vs. State of Punjab AIR 1979 SC 1173 this Court has permitted dying declaration recorded by investigating officer being admitted in evidence and considered on proof that better and more reliable methods of recording dying declaration of injured person were not feasible for want of time or facility available. It was held that a dying declaration in a murder case, though could not be rejected on the ground that it was recorded by a police officer as the deceased was in a critical condition and no other person could be available in the village to record the dying declaration yet the dying declaration was left out of consideration as it contained a statement which was a bit doubtful."

46. Yet in another decision in the case of **Laxman Vs. State of Maharashtra** reported in (**2002) 6 SCC 710** the Hon'ble Apex Court in paragraph nos. 3 and 5, has observed as under:-

"3.The juristic theory regarding acceptability of a dying declaration is that such declaration is made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the man is induced by the most powerful consideration to speak only the truth. Notwithstanding the same, great caution must be exercised in considering the weight to be given to this species of evidence on account of the existence of many circumstances which may affect their truth. The situation in which a man is on death bed is so solemn and serene, is the reason in law to accept the veracity of his statement. It is for this reason the requirements of oath and cross-examination are dispensed with. Since the accused has no power of cross-examination, the court insist that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness. The court, however has to always be on guard to see that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. The court also must further decide that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant. Normally, therefore, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eyewitnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. A dying declaration can be oral or in writing and in any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. In most cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a magistrate or a doctor or a police officer. When it is recorded, no oath is necessary nor is the presence of a magistrate is absolutely necessary, although to assure authenticity it is usual to call a magistrate, if available for recording the statement of a man about to die. There is no requirement of law that a dying declaration must necessarily be made to a magistrate and when such statement is recorded by a magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise.

5.The court also in the aforesaid case relied upon the decision of this court in Harjeet Kaur VS. State of Punjab 1999(6) SCC 545 case wherein the magistrate in his evidence had stated that he had ascertained from the doctor whether she was in a fit condition to make a statement and obtained an endorsement to that effect and merely because an endorsement was made not on the declaration but on the application would not render the dying declaration suspicious in any manner. For the reasons already indicated earlier, we have no hesitation in coming to the conclusion that the observations of this court in Paparambaka Rosamma & Ors. vs. State of Andhra Pradesh *1999 (7) SCC 695 to the effect that "in the absence of a medical certification that the injured was in a fit state of mind at the time of making the declaration, it would be very much risky to accept the subjective satisfaction of a magistrate who opined that the injured was in a fit state of mind at the time of making a declaration" has been too broadly stated and is not the correct enunciation of law. It is indeed a hyper-technical view that the certification of the doctor was to the effect that the patient is conscious and there was no certification that the patient was in a fit state of mind specially when the magistrate categorically stated in his evidence indicating the questions he had put to the patient and from the answers elicited was satisfied that the patient was in a fit state of mind where-after he recorded the dying declaration. Therefore, the judgment of this court in* Paparambaka Rosamma & Ors. vs. State of Andhra Pradesh *1999 (7) SCC 695 must be held to be not correctly decided and we affirm the law laid down by this court in* Koli Chunilal Savji & Another vs. State of Gujarat *1999(9) SCC 562 case."*

47. In the case of **Kaliya Vs. Madhya Pradesh** reported in **2013 10 SCC 758** the Hon'ble Apex Court in paragraph no. 10, has observed as under:-

"10. This Court has examined the issue of putting a thumb impression on the dying declaration by 100% burnt person in State of Madhya Pradesh v. Dal Singh & Ors*. AIR 2013 SC 2059, and after considering a large number of cases including Mafabhai Nagarbhai Raval v. State of Gujarat, AIR 1992 SC 2186;* Laxmi v. Om Prakash & Ors*., AIR 2001 SC 2383; and* Govindappa & Ors. v. State of Karnataka*, (2010) 6 SCC 533 came to the conclusion as under:-*

> *"The law on the issue can be summarised to the effect that law does not provide who can record a dying declaration, nor is there any prescribed form, format, or procedure for the same. The person who records a dying declaration must be satisfied that the maker is in a fit state of mind and is capable of making such a statement. Moreover, the requirement of a certificate provided by a Doctor in respect of such state of the deceased, is not essential in every case.*
>
> *Undoubtedly, the subject of the evidentiary value and acceptability of a dying declaration, must be approached with caution for the reason that the maker of such a statement cannot be subjected to cross-examination. However, the court may not look for corroboration of a dying declaration, unless the declaration suffers from any infirmity.*
>
> *So far as the question of thumb impression is concerned, the same depends upon facts, as regards whether the skin of the thumb that was placed upon the dying declaration was also burnt. Even in case of such burns in the body, the skin of a small part of the body, i.e. of the thumb, may remain intact. Therefore, it is a question of fact regarding whether the skin of the thumb had in fact been completely burnt, and*

if not, whether the ridges and curves had remained intact."

48. In the case of **State of Madhya Pradesh Vs. Dal Singh And Ors.** reported in **2013 14 SCC 159** the Hon'ble Apex Court in paragraph nos. 20, 21 has observed as under:-

> *"20. The law on the issue can be summarised to the effect that law does not provide who can record a dying declaration, nor is there any prescribed form, format, or procedure for the same. The person who records a dying declaration must be satisfied that the maker is in a fit state of mind and is capable of making such a statement. Moreover, the requirement of a certificate provided by a Doctor in respect of such state of the deceased, is not essential in every case.*
>
> *21. Undoubtedly, the subject of the evidentiary value and acceptability of a dying declaration, must be approached with caution for the reason that the maker of such a statement cannot be subjected to cross-examination. However, the court may not look for corroboration of a dying declaration, unless the declaration suffers from any infirmity. "*

49. Recently also the Hon'ble Apex Court in the Case of **Gulzari Lal Vs. State of Haryana** reported in **2016 4 SCC 583** in paragraph no. 21, 24 has observed as under:-

> *"21.We find no infirmities with the statements made by the deceased and recorded by the Head Constable Manphool Singh (PW-7). A valid dying declaration may be made without obtaining a certificate of fitness of the declarant by a medical officer. The law regarding the same is well-settled by this Court in the decision of Laxman v. State of Maharashtra, AIR 2002 SC 2973, wherein this Court observed thus:*
>
> > *"3. There is no requirement of law that a dying declaration must necessarily be made to a magistrate and when such statement is recorded by a magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise."*
>
> *22. Further, clarity on the issue may be established by the judgment of this Court in the case of Paras Yadav & Ors. v. State of Bihar, 1999(1) SCR 55, wherein this Court addressed the question regarding the dying declaration that was not recorded by the doctor and where the doctor had not been examined to say that the injured was fit to give the statement. It has been held by this Court as under :*
>
> > *"8....In such a situation, the lapse on the part of the Investigating Officer should not be taken in favour of the accused, may be that such lapse is committed designedly or because of negligence. Hence, the prosecution evidence is required to be examined de hors such omissions to find out whether the said evidence is reliable or not."*

> *23. In reference to the position of law laid down by this Court, we find no reason to question the reliability of the dying declaration of the deceased for the reason that at the time of recording his statement by Head Constable, Manphool Singh (PW-7),he was found to be mentally fit to give his statement regarding the occurrence. Further, evidence of Head Constable Manphhol Singh (PW-7) was shown to be trustworthy and has been accepted by the courts below. The view taken by the High Court does not suffer from any infirmity and the same is in order.*
>
> *24. The conviction by the High Court was based not only on the statements made by Maha Singh (deceased) but also on the un-shattered testimony of the eye- witness Dariya Singh (PW-1) and the statement of the independent witness Rajinder Singh (PW-11).”*

50. Addressing the issue of dying declaration in the light of law propounded by the Hon’ble Apex Court as extracted hereinabove, it will reveal that the incident occurred at 7 O’ clock in the morning on 15.02.2002 and the deceased sustained two firearm injuries, one is on the stomach and the second is in the left hand. As per the prosecution case, the deceased was brought to his house and after waiting 20-25 minutes thereafter, they proceeded for the police station, which was 8 kms away from the house, in a jeep and then the FIR was lodged at 08:10 a.m. From the analysis of the statement so recorded by the prosecution witness, it has come on record that PW-7 being the Sub-Inspector Indraprakash recorded the dying declaration and according to him, the deceased named the appellants with respect to commission of the offence. Much argument has been raised from the side of the appellants that first of all, any statement recorded as a dying declaration by the police is totally unworthy and secondly, the certificate of doctor was obtained, thirdly, the deceased was not in a condition to give the statement and fourthly, no statement had been given by the deceased as dying declaration.

51. So far as the question of dying declaration to be recorded by the police personnel is concerned, the same cannot be outrightly ruled out, as the Hon’ble Apex Court in a judgment, so extracted hereinabove, has clearly observed in categorical terms that there is no prescribed form, format or procedure for recording of dying declaration, but the only condition is that the person, who records dying declaration, is satisfied that the maker is in a fit state of mind, capable of making such statement irrespective of issuance of certificate of fitness by the doctor. Even otherwise, there is no prohibition that the police personnel should

not record dying declaration, as the position is even otherwise that the dying declaration was recorded by a police officer is also admissible in evidence.

52. The Court finds from the record that the deceased was brought to the police station at 08:00-08:10 a.m. on 15.02.2022 and medico legal report was prepared at 09:20 a.m. and between 09:20 and 09:45 a.m, the dying declaration was recorded by the police personnel being PW-7, when the deceased named the appellants, who had committed the offence. The time for recording the dying declaration was too short to wait for the Magistrate to arrive or take certificate of fitness from the doctor as in the case in hand, PW-7 waited either for the doctor or for the Magistrate to arrive, then by that time, it would have been too late for recording the dying declaration. This Court has to adopt a pragmatic approach as this Court cannot travel into the mind of the person, who was recording the dying declaration, as he was the best suited person to take decision for recording the dying declaration. Nonetheless, there is nothing on record to suggest that there was any animosity of PW-7 with the appellants. There is also no cross-examination conducted by the defence on the question of dying declaration, particularly, in view of the fact that the deceased was brought to the police station at 08:00-08:10 a.m. and medico legal examination was conducted at 09:20 a.m. on the same day giving 25 minutes time to PW-7 to get the dying declaration recorded and thereafter, victim succumbed at 09:45 a.m.

53. Dying declaration cannot be merely discarded on the ground that the same has been recorded by police personnel or certificate of fitness was not obtained. The court below has thoroughly examined each and every aspect of the matter and thereafter proceeded to record the clear cut finding convicting the appellants. Even otherwise, it has come on record that the deceased sustained gunshot injuries and further the fact that there is no clinching evidence adduced by the appellants to hold otherwise.

54. Lastly, learned counsel for the appellants has argued that there have been inherent defects in the investigation so conducted by the

Investigating Officer, which go into the root of the matter and thus, the investigation of the appellants is not sustainable in the eyes of law. Elaborating the said submission, learned counsel for the appellants has drawn the attention of the Court towards the fact that first of all, it was within the knowledge of the Investigation Officer that the plea of alibi was taken by the appellants in relation to the fact that on the date of occurrence, the appellants were not present and they were far away at Haidargarh then the Investigation Officer ought to have examined the defence witness. Secondly, it was argued that the investigation is thoroughly defective and has not been conducted as per the provisions contained under the Cr.P.C., 1973 and read with provisions contained under the Evidence Act and thus, the appellants are entitled to the benefit of the same while acquitting from the aforesaid charges.

55. Though, the argument so raised by the learned counsel for the appellants appears to be attractive, but it cannot detain the Court any further as defect in the investigation by itself cannot be a ground for acquittal and it is the legal obligation of the Court to examine the prosecution evidence de hors such lapses carefully to find out whether the said evidence is reliable or not.

56. The Hon'ble Apex Court in the case of ***Amar Singh vs. Balwinder Singh and Others 2003 (2) SCC 518*** in paragraph no. 15 has observed as under :-

> *"15. Coming to the last point regarding certain omissions in the DDR, it has come in evidence that on the basis of the statement of PW4 Amar Singh, which was recorded by PW14 Sardara Singh, S.I. in the hospital a formal FIR was recorded at the Police Station at 9.20 p.m. In accordance with Section 155 Cr.P.C. the contents of the FIR were also entered in the DDR, which contained the names of the witnesses, weapons of offence and place of occurrence and it was not very necessary to mention them separately all over again. It is not the case of the defence that the names of the accused were not mentioned in the DDR. We fail to understand as to how it was necessary for the investigation officer to take in his possession the wire gauze of the window from where A-1 is alleged to have fired. The wire gauze had absolutely no bearing on the prosecution case and the investigating officer was not supposed to cut and take out the same from the window where it was fixed. It would have been certainly better if the investigating agency had sent the fire arms and the empties to the Forensic Science Laboratory for comparison. However, the report of the Ballistic Expert would in any case be in the nature of an expert opinion and the same is not conclusive. The failure of the investigating officer in sending the fire arms and the empties for comparison cannot completely throw out the prosecution case when the same is fully established from the testimony of eye-witnesses whose presence on the spot cannot be doubted as they all received gun shot injuries in the incident.* In

> Karnel Singh v. State of M.P. *(1995) 5 SCC 518 it was held that in cases of defective investigation the court has to be circumspect in evaluating the evidence but it would not be right in acquitting an accused person solely on account of the defect and to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective.* In *Paras Yadav & Ors. v. State of Bihar* (1999) 2 SCC 126 *while commenting upon certain omissions of the investigating agency, it was held that it may be that such lapse is committed designedly or because of negligence and hence the prosecution evidence is required to be examined de hors such omissions to find out whether the said evidence is reliable or not. Similar view was taken in Ram Bihari Yadav v. State of Bihar (1998) 4 SCC 517 when this Court observed that in such cases the story of the prosecution will have to be examined de hors such omissions and contaminated conduct of the officials, otherwise, the mischief which was deliberately done would be perpetuated and justice would be denied to the complainant party and this would obviously shake the confidence of the people not merely in the law enforcing agency but also in the administration of justice. In our opinion the circumstances relied upon by the High Court in holding that the investigation was tainted are not of any substance on which such an inference could be drawn and in a case like the present one where the prosecution case is fully established by the direct testimony of the eye-witnesses, which is corroborated by the medical evidence, any failure or omission of the investigating officer cannot render the prosecution case doubtful or unworthy of belief."*

57. In the case of ***C. Muniappan & Ors. Vs. State of Tamil Nadu reported in 2010 (9) SCC 567,*** the Hon'ble Apex Court in Paragraph no. 55 has observed as under :-

> *"55. There may be highly defective investigation in a case. However, it is to be examined as to whether there is any lapse by the I.O. and whether due to such lapse any benefit should be given to the accused. The law on this issue is well settled that the defect in the investigation by itself cannot be a ground for acquittal. If primacy is given to such designed or negligent investigations or to the omissions or lapses by perfunctory investigation, the faith and confidence of the people in the criminal justice administration would be eroded. Where there has been negligence on the part of the investigating agency or omissions, etc. which resulted in defective investigation, there is a legal obligation on the part of the court to examine the prosecution evidence de hors such lapses, carefully, to find out whether the said evidence is reliable or not and to what extent it is reliable and as to whether such lapses affected the object of finding out the truth. Therefore, the investigation is not the solitary area for judicial scrutiny in a criminal trial. The conclusion of the trial in the case cannot be allowed to depend solely on the probity of investigation. (Vide Chandra Kanth Lakshmi v. State of Maharashtra, AIR 1974 SC 220; Karnel Singh v. State of Madhya Pradesh, (1995) 5 SCC 518; Ram Bihari Yadav v. State of Bihar, AIR 1998 SC 1850; Paras Yadav v. State of Bihar, AIR 1999 SC 644; State of Karnataka v. K. Yarappa Reddy, AIR 2000 SC 185; Amar Singh v. Balwinder Singh, AIR 2003 SC 1164; Allarakha K. Mansuri v. State of Gujarat, AIR 2002 SC 1051; and Ram Bali v. State of U.P., AIR 2004 SC 2329)."*

58. Analysing the factual and legal position as laid down by the Hon'ble Apex Court while applying the same on the facts of the case, this Court finds that there might be certain defects in the investigation so conducted by the Investigating Officer, but the same cannot *ipso facto* be a ground to hold that the appellants are not guilty, as even otherwise, there exists ocular and documentary evidence, which proves that the

appellants have committed the said offence. Notably, there exists dying declaration of the deceased, statement of PW-1 (complainant) as well as the relevant fact that the appellants could not produce any evidence to show that they are entitled to the benefit of *alibi* and other crucial fact that the motive stood proved, as it also acted as a catalyst for commission of the crime.

59. We are of the opinion that the finding and the conclusion recorded by the trial court are based on correct appreciation of evidence and do not suffer from error.

60. Accordingly, the present appeal fails and is **dismissed** and the judgment and order dated 11.9.2015 passed by Additional Sessions Judge/Special Judge Gangster Court No. 5 Sultanpur, in Gangster Case No. 379 of 2012 (State Vs. Prem Nath and Another) arising out of case crime no. 157/2002, u/s 302/34, 504, 506 IPC, and Section 3(1) of the U.P. Gangster & Anti-Social Activities (Prevention) Act 1986, P.S. Kotwali Dehat, District Sultanpur, whereby the appellants have been convicted u/s 302 of IPC for life imprisonment and a fine of Rs. 10,000/- and in default of fine one year additional imprisonment, u/s 506 IPC for 2 years rigorous imprisonment and fine of Rs. 1,000/- each and in default of fine one month additional imprisonment is confirmed.

61. The appellants shall undergo and serve the remaining sentence awarded by the trial court concerned.

62. Let a copy of this order along with original record be transmitted to the trial court concerned for necessary information and its compliance.

(Vikas Budhwar, J.) **(Ramesh Sinha, J.)**

Date:- 6.1.2022
Nisha