Reserved on 25.2.2022
Delivered on 20.5.2022
AFR

Court No. - 46
Case :- CRIMINAL APPEAL No. - 1862 of 1989
Appellant :- Ram Chandra
Respondent :- State
Counsel for Appellant :- P N Lal,R.L. Varma
Counsel for Respondent :- Dga,A.G.A.

Hon'ble Mrs. Sunita Agarwal,J.
Hon'ble Vikas Kunvar Srivastav,J.

(Delivered by Justice Sunita Agarwal)

1. Heard Sri R.L. Varma learned counsel for the appellant and Sri Roopak Chaubey learned A.G.A. for the State-respondent.

2. This appeal is directed against the judgment and order dated 11.8.1989 passed by the Special/Additional Sessions Judge, Shahjahanpur in Sessions Trial No. 470 of 1987 (State vs. Ram Chandra) arising out of Case Crime No. 235/1987, under Section 302 IPC, Police Station Jalalabad, District Shahjahanpur whereby appellant Ram Chandra has been convicted of the offence under Section 302 IPC and sentenced to life imprisonment.

3. The first information report of the incident, occurred on 25.7.1987 at about 6:00 PM, was lodged by Puttu son of Lakhan Kahar (PW-1) on the same day, i.e. 25.7.1987 at about 22:15 hours. As per the case of prosecution, the wife of the first informant named as Smt. Laraiti (deceased) was the daughter of one Jodha Kahar whose only son Maiku Lal had died a year before the incident and the wife of Jodha Kahar had predeceased him. The deceased Maiku Lal had no children. Jodha Kahar was survived by two daughters Laraiti, wife of the first informant and Kalawati mother of the appellant. A civil case about the inheritance of 40 Bighas of land of deceased Jodha was going on between the wife of the first informant and sons of his brother-in-law, namely Ram Chandra, Lala Ram and Roop Ram, residents of Village Mishripur, P.S. Sadar Bazar,

District Shahjahanpur, wherein 27.7.1987 was the date fixed.

It is the case of the first informant that the said civil litigation was the cause of enmity between the parties. On 25.7.1987 at about 6:00 PM, the wife of the first informant Smt. Laraiti was collecting “Nimouri” from the Neem tree of one Raja Ram son of Rameshwar Dayal near the village. From the North side, Ram Chandra son of Jodha came having 'tabal' in his hand and as soon as he reached near Smt. Laraiti, he hit in her head by 'tabal'. The first informant, Ashiq Ali son of Munir, Krishna Pal, Chhote son of Maiku, Badri son of Sipahi and other villagers ran towards him and at that time the accused-appellant gave another blow of 'tabal' on the neck of the deceased and ran away towards the North-East direction. The first informant and the witnesses chased him but could not nab him. The injured Smt. Laraiti was brought to her home and while they were arranging for the vehicle to take her to the hospital, she died at around 8:30 PM.

4. The factum of lodging of the written report on the date of the incident by PW-1 (the first informant) was proved by PW-5, the Head Constable posted in P.S. Jalalabad, District Shahjahanpur. He stated that the written report was given to him by the first informant (PW-1) and on the basis thereof, Check report was prepared as Check No. 100. PW-5 proved the Check report being in his handwriting and signature, marked as Exhibit Ka-2. The GD entry of the FIR was made at GD Rapat No. 75 Time 22:15 Hours on 25.7.1987, the original of which was produced in the Court. The certified copy of the carbon copy of the GD Rapat entry, prepared in the same process was filed and proved as Exhibit Ka-3. PW-5 had denied the suggestion of the report having been prepared Ante-time.

5. The inquest of the dead body was conducted on 26.7.1987 at about 8:30 AM in the house of the deceased and the inquest report is proved as Exhibit Ka-8.

6. PW-4, the Constable posted in P.S. Jalalabad at the time of the

incident, stated that the body of deceased Laraiti kept in a sealed cloth alongwith the sample seal and relevant papers was handed over to him and Pooran Chaukidar on 26.7.1987 at about 8:30 AM to carry for the postmortem and they moved to Shahjahanpur and handed over the dead body in the Police Lines Shahjahanpur. It was then sent for the postmortem and was handed over to the doctor in the sealed state alongwith the sample seal. The body was identified by them before the doctor and the postmortem was done. After completion of the postmortem, one sealed bundle of clothes of the deceased was submitted in the police station concerned alongwith all the relevant papers kept in two sealed envelops. PW-4 stated that during the entire process, no one had touched the dead body.

7. PW-6, the Doctor who conducted autopsy, stated on oath that on 26.7.1987 when he was posted in the District Hospital, the body of deceased Laraiti was brought by Constable Magan Singh CP No. 709 with Pooran in sealed state and the sample seal was tallied with the seal on the bundle of the dead body. It was then opened and the body was identified by two police personnel who brought it. The postmortem was conducted at about 4:15 PM. The external appearance of the dead body as indicated in the postmortem report:-

The age of the deceased about 60 years, average build body, Rigor Mortis passed on from upper extremity and was passing off from lower extremity. Eyes and mouth were closed.

The ante-mortem injuries found on the person of the deceased are:

(1) Incised wound 16 cm x 2 cm x Bone deep present over the Right side of the Head. 10 cm above the Right ear, Bone is cut underneath the injury. Margins are clean cut

(2) Incised wound 7 cm x 1 cm x muscle deep on the Right side lower part of neck 1 cm above the Right clavicle in middle. Margins clean cut.

On internal examination, right parietal bone was found fractured. In

stomach, semi digested food of about 200 gms. was present. In small intestine, gases were present; faecal matter was present in the large intestine. The cause of death indicated in the postmortem report is “Coma as a result of ante-mortem head injury”. The postmortem report was proved in the handwriting and signature of PW-6 as Exhibit Ka-4. PW-6 stated that both the injuries could be caused by sharp-edged weapon and were sufficient to cause death. The proximate time of death as indicated in the postmortem report was about one day.

8. In cross, PW-6 admitted that there might be a gap of 6-7 hours on both sides. On the nature of the wounds, he stated that incised wounds could have been caused by any sharp edged weapon such as Sword, Knife, Kanta, Khurpi or Kulhari.

9. The Investigating Officer had entered in the witness-box as PW-7. He proved that the initial investigation was conducted by one Senior Inspector I.H. Jafri and the investigation was handed over to him on 5.8.1987. He arrested accused Ram Chandra on 20.8.1987 and submitted the charge sheet on the same day, which was proved in his handwriting and signature as Exhibit Ka-5. PW-7 stated that the previous Investigating Officer had conducted the investigation between 25.7.1987 to 28.7.1987 and recorded statements of the witnesses namely the first informant Puttu, Ashiq Ali and Chhote and inspected the spot. The site plan on the record was proved in the handwriting and signature of the previous Investigating Officer, identified by PW-7, as Exhibit Ka-6.

PW-7, in cross, stated that he did not record the statement of any of accused nor he ever participated in the investigation alongwith the previous Investigating Officer I.H. Jafri.

10. The formal witnesses, in the instant case, proved the reports prepared by them from the inception of the case, i.e. lodging of the first information report to the submission of the charge sheet.

11. Nothing contrary to the case of the prosecution could be elicited

from their testimony.

12. Amongst the witnesses of fact, three in number, PW-1 is the first informant Puttu son of Lakhan, husband of the deceased. He stated on oath that he knew accused Ram Chandra who was son of his brother-in-law. His father-in-law was Jodha Kahar whose son and wife had died and whose agricultural land was inherited by Smt. Laraiti, the deceased as also the mother of accused-appellant Ram Chandra, namely Smt. Kalawati and that they both were legal heirs of deceased Jodha Kahar. Two sons of Smt. Kalawati namely Lala Ram and Roop Ram, brothers of accused Ram Chandra got prepared a forged Will of the land in dispute in their names and a case related to the Will was going on wherein the date fixed was about three days after of the incident. Smt. Laraiti had all hopes of success in the case and on account of this enmity, accused Ram Chandra caused murder of Smt. Laraiti (the deceased) so that the landed property may come to the share of him and his brothers.

While narrating the incident, PW-1 reiterated his version in the written report that two blows of 'tabal' were given by accused Ram Chandra to deceased Laraiti in the field of Raja Ram while she was collecting 'Nimouri' from the Neem tree and that he brought his wife to his house from the place of the incident, PW-1 stated that where Ram Chandra gave blow of 'tabal', he was cutting the grass and there he heard the cries of deceased Laraiti. The place where he was cutting the grass was at a distance of 30-40 paces from the place of the incident. On the alarm raised by him from that place itself, the witnesses Badri, Chhote, Krishna Pal and Ashiq Ali who were cutting grass nearby also reached the spot and witnessed the incident. On the hue and cries raised by them, the accused fled away towards the North-Eastern direction and the witnesses also chased the accused. The report of the incident was scribed by Awadhesh Kumar Shukla on his dictation and it was read over to him then he put his signature. The written report on the record was read over to this witness (PW-1) and he deposed that it was the same report which was

dictated by him. The written report is marked as Exhibit Ka-1 on the testimony of this witness. PW-1 further stated that he went to file the written report in P.S. Jalalabad alongwith the Chaukidar and it was lodged at around 10:15 PM.

In cross, PW-1 described the topography of the place of the incident and location of his house in the village. When the written report (Exhibit Ka-1" was put to this witness, in cross, he stated that he put his thumb impression on the same. He further stated that there was one Chaukidar in the village, and he called him and then after talking to him, the written report was scribed. On a suggestion, PW-1 categorically stated that the Investigating Officer did not ask him to call the Chaukidar rather he himself called him at about 7-7:30 PM and it became dark by then. After writing the report, he went to the police station and the Investigating Officer met him there only. PW-1 stated that the Investigating Officer came to the village after lodging of the report and after that he (PW-1) did not go to the police station. The body was taken for the postmortem at about 12:00 Noon by a tractor and he alongwith the police personnel accompanied it.

In cross, PW-1 further narrated the location of the Neem Tree in the field of Raja Ram. He then stated that after his wife got injured, he picked her and put her on a cot.

It is pertinent to note here that though the examination-in-chief of PW-1 was recorded on 2.5.1989 and he was cross-examined to some extent but without completion of his cross-examination, for the reasons best known to the Judicial Officer concerned, he had proceeded to record the statement of other witnesses of fact namely PW-2 and PW-3 on the same day.

13. We may further record that the cross-examination of PW-3 was concluded on 2.5.1989 whereas the cross-examinations of PW-1 and PW-2 were not completed by the Court concerned. After more than two

months, i.e. 20.7.1989, when the case was taken up for cross-examination of the remaining witnesses, i.e. PW-1 and PW-2, it was transpired that PW-1 Puttu had died a month before and the report in that regard was submitted by the police station concerned on 22.6.1989. The trial Judge, therefore, noted that the attendance of PW-1 Puttu could not be procured for his cross-examination by the defence. PW-2, however, was cross-examined on 20.7.1989 itself.

14. We may further record that PW-2 & PW-3 both had been declared hostile on 2.5.1989, the first day when only the evidence of PW-3 was concluded.

From the statement of PW-2, Ashiq Ali son of Munir, in chief, it may be noted that he had fixed the time of the incident being at about 6:00 PM and stated that when the incident had occurred, he was present at some distance wherefrom he could see the spot but he could not witness the accused giving the blow of 'tabal' to the wife of Puttu (PW-1) and reached at the spot on hearing the alarm (cries). He had seen the accused Ram Chandra running away from the place of the incident but could not tell as to what was there in his hand as he went quite far away. He further stated that he saw the injuries of wife of Puttu (deceased) when he reached the spot. He then stated that he was not cutting the grass but he was in Khandhar of the village and reached at the place of the incident on hearing cries. This witness had been declared hostile at this stage and was permitted to be cross-examined by the prosecution.

In his incomplete cross recorded on the first day, i.e. 2.5.1989, PW-2 admitted that there existed a Neem tree in the field of Raja Ram and the same was also existing at the time of the incident and was also existing at the time of his deposition. Smt. Laraiti, the deceased used to collect 'Nimouri' and on the date of the incident, she also went there for the same purpose. Chhote, Badri and Krishna Pal were also present on the spot. On another question, PW-2 stated that the Investigating Officer had interrogated him but he did not give the statement that he was present in

the field of Raja Ram for grazing his cattle. He also denied his previous statement that accused Ram Chandra killed deceased Laraiti from 'tabal'. PW-2 further stated that though he went to identify accused Ram Chandra in jail but he knew him from before. He had denied having witnessed the accused hitting the deceased from 'tabal' and that he was making a wrong statement to save the accused. It is noted that the record indicates that the cross-examination of this witness was resumed on oath on 2.5.1989 after lunch but it was not completed. It is evident that without completion of the cross-examination of this witness, the statement of PW-3 was recorded and concluded.

On recall for cross-examination on 20.7.1989, this witness had retracted from his previous deposition in the Court and stated that he did not see the assailant who was running away from the place of the incident, inasmuch as, that person was running towards the North-East direction and he (PW-2) was coming from the South-West direction, that means they were on the opposite sides. He further stated that the person who was running away from the place of the incident was at a distance of about 100 yards from him and he could see only his back and not the front. At that time, sun had already been set.

Further, this witness (PW-2) also retracted from his previous statement about identification of accused Ram Chandra and stated that the complete identity of the accused was disclosed to him by the Investigating Officer and then he was simply asked to put his hand on the same person who was pointed out by the Investigating Officer.

15. PW-3 Chhote son of Maiku whose examination-in-chief and cross was completed on 2.5.1989 itself had completely denied his presence near the place of the incident or witnessing the incident. In cross, he retracted from his previous statement under Section 161 Cr.P.C. by stating that the Investigating Officer did not interrogate him and as to how his statement was written was not known to him. He (PW-3) then stated that he identified the accused as he knew him prior to the incident. In cross for

the accused, PW-3 stated that the Investigating Officer had disclosed the identity of the accused such as construction of his face and height to him prior to the identification parade but had denied that he identified the accused on the asking of the Investigating Officer and that he did not know the accused from before the incident.

16. To assail the judgment of conviction, it is argued by the learned counsel for the appellant that the incident had occurred in the dead of night and no one had seen the same. For this reason, the inquest was conducted on the next day, i.e. 26.7.1987 at about 8:30 AM.

17. It was argued that there are material contradictions in the statement of the prosecution witnesses about the time of lodging of the FIR and the dead body having been taken for the postmortem. The first informant (PW-1), the husband of deceased had falsely implicated the appellant on account of enmity as stated by him. The motive for false implication of the accused in a blind murder is evident from the record. No one had supported the case of the prosecution and the independent witnesses had turned hostile. Even the testimony of PW-1 could not be completed as he had died before completion of his cross-examination. It is urged that the cross-examination is the most important tool in the testimony of a witness to know the truth which can be culled out only in his cross. The evidence of PW-1, thus, would not be admissible. The first informant (PW-1) being a related and partison witness, he cannot be said to be a wholly reliable witness. There is, thus, no evidence of implication of the accused in the criminal case. The trial court had committed a grave error of law in recording conviction based on the testimony of PW-1.

18. Reliance is placed on the decision of the Lucknow Bench of this Court in **Jodhi @ Ayodhya vs. State of U.P.**[1] decided on 13th August, 2014 to assert that uncorroborated part of the testimony of PW-1 on account of non-completion of his cross-examination, has to be thrown away. The result is that the prosecution has not succeeded in proving its

1 2014 (87) ACC 543/Criminal Appeal No. 821 2007

case by definite evidence that the deceased Laraiti was killed by the accused Ram Chandra.

19. Learned AGA, on the other hand, submitted that in a case where cross-examination of a witness could not be completed, his testimony cannot be thrown away in toto. Reliance is placed on the decision of the Apex Court in **Rajesh Yadav & another etc. vs. State of U.P.**[2] to assert that the issue of admissibility of evidence in a case where the cross-examination of a witness is not over has been addressed by the Apex Court and it was held therein that in a given case it has to be decided by the Court as to admissibility of evidence of the witness whose cross-examination was not over.

As per the submissions of the learned AGA though the cross-examination of PW-1 could not be completed but his deposition in the Court on 2.5.1989 in the examination-in-chief and cross cannot be thrown away in totality rather if his evidence is read alongwith the evidence of the hostile witness PW-2, coupled with the fact of lodging of a prompt first information report, it is proved that the murder of deceased Laraiti was committed by accused-appellant Ram Chandra at about 6:00 PM in the field of Raja Ram.

20. Heard learned counsels for the parties and perused the record. Before entering into the factual aspect of the case, we find it apt to discuss the law relating to appreciation of testimony of a hostile witness.

21. It is settled law that the testimony of a witness who though produced by the prosecution in the witness-box but turned to depose in favour of the opposite party, is not to be discarded as a whole. There are two categories of hostile witness, one who may depose in favour of the parties in whose favour it is meant to be giving through his chief examination, while later on change his view in favour of the opposite side. The second category is where a witness does not support the case of the party starting from chief examination. This classification has to be

2 2022 (3) ADJ 114 (SC)/Criminal Appeal Nos. 339-340 of 2014

borne in mind by the Court while analysing the testimony of a hostile witness. Reference be made to the decision of the Apex Court in **Rajesh Yadav** (supra) (Para 21) emphasis added.

22. We may note that, in the instant case, PW-2 who has been declared hostile falls in the first category as he supported the case of the prosecution to some extent in chief examination and then became hostile, whereas PW-3 would fall in the second category as he did not support the case of the prosecution from the beginning, i.e. in the chief examination itself.

With respect to the first category in which PW-2 falls, it is settled that the Court is not denuded of its power to make an appropriate assessment of the evidence rendered by such a witness. It was observed in **Rajesh Yadav** (supra) that even a chief examination could be termed as evidence. Such evidence would become complete after the cross-examination. Once evidence is completed, the said testimony as a whole is meant for the Court to assess and appreciate qua a fact. Therefore, not only the specific part in which a witness has turned hostile but the circumstances under which it happened can also be considered, particularly in a situation where the chief-examination was completed and there are circumstances indicating the reasons behind the subsequent statement, which could be deciphered by the Court. It is held therein that it is well within the powers of the Court to make an assessment in a matter before it and come to the correct conclusion.

The decision in **C. Muniappan v. State of T.N.**[3] of the Apex Court was noted therein to reiterate that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution choose to treat him as hostile and cross-examined him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent their version is found to be dependable on a careful scrutiny thereof.

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3 (2010) 9 SCC 567

23. It is settled from a catena of decisions of the Apex Court that the evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or the defence can be relied upon. The law that can be summarised from the above noted decisions is that the evidence of a hostile witness cannot be discarded as a whole, and relevant parts thereof which are admissible in law, can be used by the prosecution or the defence. [Reference **State of U.P. vs. Ramesh Prasad Misra and another**[4] and **Subbu Singh v. State by Public Prosecutor**[5]]

24. Analyzing the testimony of the prosecution witnesses of fact, we may record, at the out set, that nothing could be elicited in favour of the prosecution case from the statement of PW-3 who had turned hostile and completely retracted from his previous statement. His testimony also cannot be read in favour of the defence as he had completely denied his presence at or near the place of the incident and also admitted that he knew accused before the incident and for this reason he had identified him in the identification parade conducted by the police.

25. We then proceed to analyze the testimony of another hostile witness, PW-2, in light of the above discussed legal position stated by the Apex Court to appreciate the testimony of a hostile witness.

Analyzing the testimony of PW-2, we may note that he had fixed the place, time and date of the incident, which is in corroboration with the case of the prosecution. From the testimony of PW-2, it is proved that the incident had occurred in the field of Raja Ram at about 6:00 PM when deceased Smt. Laraiti was collecting 'Nimouri' near the Neem tree. PW-2 also proved his presence at a place wherefrom he could witness the place of the incident and that he had reached at the place of the incident on hearing the cries and also seen the accused Raja Chandra running away from the said place. PW-2 also stated in chief that when he went at the

4 (1996) 10 SCC 360
5 (2009) 6 SCC 462

spot he had seen the injuries of the deceased.

From the above statement of PW-2 in chief, it is evident that he had only denied having seen accused Ram Chandra hitting the deceased with 'tabal' at the place of the incident and stated that he did not see any weapon in the hands of accused Ram Chandra while he was running away from the spot of the incident.

26. For this reason only this witness was declared hostile by the prosecution and in his incomplete cross-examination on the first date, i.e. 2.5.1989, PW-2 also fixed the presence of other witnesses namely Chhote, Badri and Krishna Pal at the place of the incident which is in line with the statement in the written report lodged by PW-1 as also the statement of PW-1 before the Court. PW-2 also admitted, in cross, that he was interrogated by the Investigating Officer though he had retracted from the contents of his statement. PW-2 also admitted that he went to identify accused Ram Chandra and he knew him before the incident. PW-2, on recall, when examined on 20.7.1989, after a period of two months, after the death of PW-1 the first informant, retracted even from his previous version in the Court made on 2.5.1989 to the extent that he had seen accused Ram Chandra running away from the spot and that he had identified the accused before the police on his own. From the testimony of PW-2, at least, it is proved that the deceased was attacked in the field of Raja Ram near the Neem tree where she used to go to collect 'Nimouri' on the fateful day at about 6:00 PM. The date, time and place of the incident, thus, had been proved by PW-2.

27. The star witness of the prosecution is PW-1, who was husband of the deceased and the first informant. In his deposition in the Court, PW-1 proved his version in the FIR with regard to the place, date, time and the manner of the incident and the presence of the eye-witnesses on the spot. He also proved the written report lodged by him at about 10:15 PM as Exhibit Ka-1. PW-1 also proved the enmity with the accused, which according to him was the motive of causing the murder of his wife. He

also proved that he took his injured wife from the field of Raja Ram to his house wherein she had succumbed to her injuries. The inquest was conducted on the next day, i.e. 26.7.1989 in the house of the first informant.

28. It was, thus, proved by the prosecution witnesses that the homicidal death of the deceased Smt. Laraiti was caused outside her house and she was taken to her house by PW-1 (her husband) after she received injuries in the field of Raja Ram.

All the above facts could not be disputed by the learned counsel for the appellant in his arguments.

Further, PW-1 was consistent in his testimony, which could not be completed on account of his death. His testimony is clear to the extent that he was the eye-witness of the incident and he had seen the accused-appellant causing injuries to his wife by a sharp edged weapon (tabal) which had resulted in her death. The motive for the offence committed by accused-appellant has also been proved by PW-1 in his examination-in-chief. From the perusal of the testimony of PW-1, it is evident that he proved the written report (Exhibit Ka-1) and its content and the fact that he went to the police station alongwith the village Chaukidar to lodge the first report and the Investigating Officer reached the spot after getting the said information. The inquest was conducted and the body was sent for postmortem. The narration of fact by PW-1 with regard to the lodging of the first information report by giving a written report as also the inquest conducted in his house is corroborated from the documentary evidences on record.

The issue which has been raised by the learned counsel for the appellant is that since the cross-examination of PW-1 could not be completed, his testimony cannot be relied to convict the appellant. The contention is that the corroboration of an oral testimony is required by cross-examination of the witness, which is an important tool to cull out

falsity in the version of the witness in his examination-in-chief. The testimony of PW-1 on account of his death, remained uncorroborated and hence the trial court had committed a grave error of law in relying upon his version to convict the accused-appellant.

29. To deal with this submission, we may first go through the authoritative pronouncements of the Apex Court, wherein the guidelines to deal with such a situation has been laid down.

30. However, before appreciation of the legal position, we would like to record our assessment of the circumstances indicating the reasons behind the subsequent statement of PW-2 dated 20.7.1989, wherein he had retracted from his previous statement in-chief and cross, recorded on 2.5.1989.

31. We may record that the manner in which the trial court, in the instant case, had proceeded to examine the witnesses cannot be approved of.

We may also note that the trial Judge while recording his finding had also expressed his dissatisfaction in the manner in which his predecessor trial Judge had recorded the statements of the prosecution witnesses of fact. The record reflects that three prosecution witnesses of facts were examined on the same day, i.e. on 2.5.1989, but not in the correct order of examination. We are not able to understand as to why the trial court had proceeded to record the statements of PW-2 and PW-3 without completing the cross-examination of PW-1 on 2.5.1989. We are also astonished with pain to note that even deposition of PW-2 Ashiq Ali was not completed on 2.9.1989 and when his cross-examination had continued after lunch, this witness (PW-2) though was administered oath but his cross-examination was not proceeded, for the reasons best known to the Presiding Officer concerned. It is not understandable nor acceptable that the trial Judge had proceeded to record the statement of PW-3 without completing the testimony of PW-1 and PW-2 in the chronological order.

32. Surprisingly enough, the deposition of PW-3 was completed on the same day, i.e. 2.5.1989 and the cross-examination of PW-1 and PW-2 could not be resumed before 20.7.1989, for about two months. The explanation for delay in the cross-examination of PW-1 and PW-2 and their non-examination on the date of their appearance, obviously, could not be given by the prosecution on the query made by the Court. However, it is evident from the record that a report dated 22.6.1989 was received on summoning of PW-1 and PW-2 Ashiq Ali for cross-examination that PW-1, Puttu had died about a month before. The reasons for retraction of PW-2 from his previous version in the Court recorded on 2.5.1989 after death of PW-1, the husband of deceased, are not far to seek.

33. It seems from the record of the instant case that the defence had succeeded in manipulating the trial Judge who had recorded statements of the witnesses of fact and in order to frustrate the case of the prosecution, the testimony of PW-1 and PW-2 was not completed on the first date, i.e. 2.5.1989. Nothing could be discerned about the role of the prosecuting officer after such a long time as we are deciding the case of the year 1989 in the year 2022. However, this much can be concluded that the trial Judge who had recorded the statements of the prosecution witnesses of fact (PW-1 to PW-3) did not act fairly. The right of the parties, whether defence or the prosecution, for a fair trial has been seriously hampered in the present case.

34. Coming to the argument of the learned counsel for the appellant that the testimony of PW-1 cannot be read in evidence and has to be discarded in toto as his cross-examination could not be completed, we may gain benefit from the decision of the Apex Court in **Rajesh Yadav** (supra), wherein while dealing with the Section 3 of the Evidence Act, 1872, the Apex Court had discussed the methods for analysing the matters before the Court, i.e. the evidence in proving the existence of a fact. It was observed that the entire enactment (the Evidence Act) is meant to facilitate the Court to come to an appropriate conclusion in proving a fact.

There are two methods by which the court is expected to come to such a decision. (i) the Court can come to a conclusion on the existence of a fact by merely considering the matters before it, in forming an opinion that it does exist. This belief of the Court is based upon the assessment of the matters before it. (ii) Alternatively, the Court can consider the said existence as probable from the perspective of a prudent man who might act on the supposition that it exists.

The question as to the choice of the options is best left to the Court to decide. The said decision might impinge upon the quality of the matters before it.

It was observed that a judge has to transform into a prudent man and assess the existence of a fact after considering the matters through that lens instead of a judge. It is only after undertaking the said exercise can he resume his role as a judge to proceed further in the case.

It was further noted that the provision in Section 3 of the Evidence Act indicates that the court is concerned with the existence of a fact both in issue and relevant, as against a whole testimony. Thus, the concentration is on the proof of a fact for which a witness is required. Therefore, a court can appreciate and accept the testimony of a witness on a particular issue while rejecting it on others since it focuses on an issue of fact to be proved. However, the evidence of a witness as whole is a matter for the court to decide on the probability of proving a fact which is inclusive of the credibility of the witness. Whether an issue is concluded or not is also a Court's domain.

It was further noted that evidence of a witness can be divided into three categories broadly, namely, (i) wholly reliable; (ii) wholly unreliable; and (iii) neither wholly reliable nor wholly unreliable. The manner in which the testimony of a witness would be appreciated depends upon the category in which it was considered by the Court.

As to the law relating to appreciation of the testimony of a hostile

witness, we would like to refer to the foregoing paragraphs of this judgment to note that the evidence of a hostile witness is not to be rejected as a whole.

As noted in **Rajesh Yadav** (supra), the Court can also assess the circumstance in which a witness had turned hostile, as discussed above.

35. We may further note that the Apex Court in **Rajesh Yadav** (supra) while expressing deep anguish over to manner in which long adjournments had been granted by the trial Judge therein permitting an act of manoeuvring, had referred to its earlier decision in **Vinod Kumar v. State of Punjab**[6]. It was reiterated that in **Vinod Kumar** (supra) the Apex Court while dealing with the situation where a witness after rendering testimony in line with the prosecution's version, completely abandoned it, in view of the long adjournments given by the trial court had observed that a fair trial is to be fair both to the defence and the prosecution as well as to the victim. The appropriate course on the part of the trial Judge was to finish the cross-examination on the day the said witness was examined. It was noted that no reason in the said case was assigned to defer the cross-examination and then recording it after a delay of 20 months, giving room for the witness to be gained over. While appreciating the testimony of a hostile witness therein, it was held by the Apex Court in **Vinod Kumar** (supra) that the evidence in entirety of the prosecution witness cannot be brushed aside. The delay in cross-examination had resulted in his prevarication from the examination-in-chief but the part of his testimony, which supported the case of the prosecution was relied upon.

Having noted the relevant paragraphs of the decision in **Vinod Kumar** (supra), the Apex Court in **Rajesh Yadav** (supra) while referring to Section 33 of the Evidence Act has held in paragraph '24' as under:-

> *"**24.** Section 33 is an exception to the general rule which mandates*

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adequate facility for cross examining a witness. However, in a case where a witness after the completion of the chief examination and while subjecting him to a substantial and rigorous cross examination, did not choose to get into the witness box on purpose, it is for the court to utilize the said evidence appropriately. The issues over which the evidence is completed could be treated as such by the court and then proceed. Resultantly, the issues for which the cross examination is not over would make the entire examination as inadmissible. Ultimately, it is for the court to decide the aforesaid aspect. "

Having noted the law laid down by the Apex Court in **Vinod Kumar** (supra) and **Rajesh Yadav** (supra), it is settled that the part of the testimony of a witness whose cross-examination is not over, would not make the entire examination as inadmissible. The evidence of the hostile witness who after examination-in-chief had abandoned the case of the prosecution because of the long delay in completing his testimony, cannot be read in favour of the defence or against the prosecution. It is for the Court to utilize the said evidence appropriately and decide that the issues over which the evidence is completed could be read in evidence and the issues for which the cross-examination is not over, as inadmissible. As has been held in **Rajesh Yadav** (supra) ultimately it is for the court to decide the aforesaid aspect.

36. In light of the above, having noticed the circumstances in which the cross-examination of PW-1, the first informant, could not be completed, we find that it is not one of those cases where non-completion of cross-examination of the witness would result in rejection of the whole testimony of PW-1, the eye-witness.

37. On due consideration of the law discussed above, in the facts of the present case, we find that PW-1 in his examination-in-chief proved the mode and manner of occurrence and that the murder had been caused by the accused. He proved his presence on the spot as also the place of the occurrence and the presence of other witnesses on the spot who later turned hostile. In the cross-examination of PW-1, the first informant,

which commenced on 2.5.1989, he proved the factum of lodging of the written report as Exhibit Ka-1 at the date and the time indicated in the Check report i.e. 25.7.1987 at about 10:15 PM. He also proved that he went alongwith the village Chaukidar to lodge the first information report and after lodging of the same, the police came on the spot, conducted the inquest and took the body for the postmortem. The place of the incident being the field of Raja Ram was also proved by this witness namely PW-1 in his cross-examination. Nothing contrary could be found from the record with this part of testimony of PW-1 which stood proved from his incomplete cross-examination. The above noted part of the testimony of PW-1, therefore, is to be appreciated alongwith the surrounding circumstances of the case, i.e. the other evidence on record.

38. From the record, it is proved that the first information report of the incident was a prompt report as it was lodged on the same day at about 10:15 PM, when the incident had occurred at about 6:00 PM. PW-1 proved that after injuries were caused to his wife by accused Ram Chandra by 'tabal', he carried his wife to his house and while he was making arrangements to take her to the hospital, she had succumbed to her injuries. He then called the village Chaukidar and got the written report scribed, went to the police station alongwith the village Chaukidar to lodge the report. The time taken by PW-1 in lodging the report stood explained from his testimony and the circumstances on record that the incident had occurred in the open field and the deceased did not die on the spot. The place of the occurrence and the reason why the deceased was present on the said place, as narrated by PW-1, is corroborated from the version of PW-2 in his first examination , both in chief and cross made on 2.5.1989.

39. We may further note that even after PW-2 was declared hostile and further retracted from his previous statement on recall after two months, from his testimony, his presence near the place of incident cannot be disputed. On appreciation of the whole testimony of the PW-2, a hostile

witness, it is evident that the incident in question had occurred on 25.7.1987 at about 6:00 PM near the Neem tree existing in the field of Raja Ram where the deceased went to collect 'Nimouri' in her usual way.

It is also proved that PW-2 was present near the place of the incident and reached on hearing the cries of PW-1 (husband of the deceased) and had seen one person running away from the place of the incident as also the injuries of the deceased.

40. On a conjoined reading of the statement of PW-1 and PW-2, the case of the prosecution is found proved as to the mode and manner of occurrence and the involvement of accused Ram Chandra. Other supporting evidence from the record, i.e. medical evidence also corroborates the ocular version of PW-1, the injuries caused on the person of the deceased, which were cause of her death. Both the injuries are of sharp-edged weapon and as per the opinion of the doctor, it could occur from the weapon assigned in the hands of appellant Ram Chandra, which is 'tabal', as per the version in the first information report and the statement of PW-1.

We may further note that 'tabal' is a weapon which is very close to 'Talwar' (sword) which was opined by the doctor being the possible weapon relating to injuries of the deceased. It is also proved that the injuries sustained on the deceased were sufficient to cause her death. The fact that PW-1, the first informant, could not take his wife to the hospital would be of no consequence.

41. The Investigating Officer (PW-7) proved that after lodging of the first information report, which was entered in the General Diary on the same day, i.e. 25.7.1987, the investigation was conducted by the another Investigating Officer namely I. H. Jafri who prepared the site plan in his handwriting. The site plan 'Exhibit Ka-6' dated 26.7.1987 gives the complete description of the place of the incident and the presence of the witnesses and the accused on the spot.

42. The motive assigned to the accused for causing death of Smt. Laraiti being a civil dispute, had not been disputed by the defence. The presence of motive in a case of eye-witness account is a relevant circumstance which show the evil intent of the accused and becomes relevant to show that the accused who had the motive to commit the crime actually committed it. It is settled that the relevancy of motive would primarily depend upon the facts and circumstances of the given case. In an eye-witness account though motive is not of much of relevance, presence and proof of motive affords a key or pointer to scan the evidence in the case in that perspective and the motive in such a case becomes satisfactory circumstance of corroboration. [Reference **State of U.P. vs. Moti Ram and others**[7]]

43. In light of the above discussion, considering the attending circumstances of the case and the motive with which the accused-appellant committed the murder of Smt. Laraiti, we are of the firm opinion that there is no infirmity in the decision of the trial court in convicting the accused-appellant for the offence of murder under Section 302 IPC.

The punishment inflicted upon the appellant is minimum. No interference, as such, is required.

The judgment and order dated 11.8.1989 passed by the Special/Additional Sessions Judge, Shahjahanpur in Sessions Trial No. 470 of 1987 (State vs. Ram Chandra) arising out of Case Crime No. 235/1987, under Section 302 IPC, Police Station Jalalabad, District Shahjahanpur is hereby affirmed.

The appeal deserves to be dismissed, accordingly.

44. Before parting with this judgment, we may find it profitable and necessary to note certain observations of the Apex court in **Vinod Kumar** (supra), wherein the Court had expressed deep anguish in a

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situation therein wherein the cross-examination of the witness was deferred without any reason.

The relevant paragraphs of the report are noted as under:-

*"**57.** Before parting with the case we are constrained to reiterate what we have said in the beginning. We have expressed our agony and anguish the manner in which trials in respect of serious offences relating to corruption are being conducted by the trial courts:*

***57.1.** Adjournments are sought on the drop of a hat by the counsel, even though the witness is present in court, contrary to all principles of holding a trial. That apart, after the examination-in-chief of a witness is over, adjournment is sought for cross-examination and the disquieting feature is that the trial courts grant time. The law requires special reasons to be recorded for grant of time but the same is not taken note of.*

***57.2.** As has been noticed earlier, in the instant case the cross-examination has taken place after a year and 8 months allowing ample time to pressurize the witness and to gain over him by adopting all kinds of tactics.*

***57.3.** There is no cavil over the proposition that there has to be a fair and proper trial but the duty of the court while conducting the trial to be guided by the mandate of the law, the conceptual fairness and above all bearing in mind its sacrosanct duty to arrive at the truth on the basis of the material brought on record. If an accused for his benefit takes the trial on the path of total mockery, it cannot be countenanced. The Court has a sacred duty to see that the trial is conducted as per law. If adjournments are granted in this manner it would tantamount to violation of rule of law and eventually turn such trials to a farce. It is legally impermissible and jurisprudentially abominable. The trial courts are expected in law to follow the command of the procedure relating to trial and not yield to the request of the counsel to grant adjournment for non-acceptable reasons.*

***57.4.** In fact, it is not all appreciable to call a witness for cross-examination after such a long span of time. It is imperative if the examination-in-chief is over, the cross-examination should be completed on the same day. If the examination of a witness continues till late hours the trial can be adjourned to the next day for cross-*

examination. It is inconceivable in law that the cross-examination should be deferred for such a long time. It is anathema to the concept of proper and fair trial.

57.5. *The duty of the court is to see that not only the interest of the accused as per law is protected but also the societal and collective interest is safe-guarded. It is distressing to note that despite series of judgments of this Court, the habit of granting adjournment, really an ailment, continues. How long shall we say, "Awake! Arise!". There is a constant discomfort. Therefore, we think it appropriate that the copies of the judgment be sent to the learned Chief Justices of all the High Courts for circulating the same among the learned trial Judges with a command to follow the principles relating to trial in a requisite manner and not to defer the cross-examination of a witness at their pleasure or at the leisure of the defence counsel, for it eventually makes the trial an apology for trial and compels the whole society to suffer chicanery. Let it be remembered that law cannot allowed to be lonely; a destitute."*,

We may further note the observations of the Apex Court in **Rajesh Yadav** (supra) in paragraph '39' as under:-

*"**39.** Before we part with this case, we are constrained to record our anguish on the deliberate attempt to derail the quest for justice. Day in and day out, we are witnessing the sorry state of affairs in which the private witnesses turn hostile for obvious reasons. This Court has already expressed its views on the need for a legislative remedy to curtail such menace. Notwithstanding the above stated directions issued by this court in Vinod Kumar (supra), we take judicial note of the factual scenario that the trial courts are adjourning the cross examination of the private witnesses after the conclusion of the cross examination without any rhyme or reason, at the drop of a hat. Long adjournments are being given after the completion of the chief examination, which only helps the defense to win them over at times, with the passage of time. Thus, we deem it appropriate to reiterate that the trial courts shall endeavor to complete the examination of the private witnesses both chief and cross on the same day as far as possible. To further curtail this menace, we would expect the trial courts to take up the examination of the private witnesses first, before proceeding with that of the official witnesses. A copy of this judgment shall be circulated to all the trial courts, to be*

facilitated through the respective High Courts."

The Apex Court while taking judicial notice of the factual scenario in **Rajesh Yadav** (supra) reiterated that the appropriate course for the trial court is to make endeavour to complete the examination of the private witnesses, both chief and cross, on the same day, as far as possible, and also to take up the examination of the private witnesses first, before proceeding with that of the official witnesses. This approach is needed to ensure fair and proper trial which is the duty of the trial Court and also to curb the menace where the private witnesses turned hostile for obvious reasons because of long adjournments, permitting an act of manoeuvring.

45. Though in the instant case, wherein the trial was conducted in the year 1989, nothing much could be said on the conduct of the trial Judge who had recorded the statements of the prosecution witnesses of fact (PW-1 to PW-3), however, as a guidance to conduct the trial in a prudent manner, it is imperative to notify the abovenoted judgment of the Apex Court to the Sessions Court throughout the State of U.P., as a reminder to the caution and directions issued by the Apex Court in **Vinod Kumar** (supra) reiterated in **Rajesh Yadav** (supra).

46. We, therefore, direct that the copy of the judgment and order dated 4th February, 2022 of the Apex Court in **Rajesh Yadav and another etc. vs. State of U.P. (Criminal Appeal Nos. 339-340 of 2014)** reported in **2022 (3) ADJ (SC)** be circulated amongst all the trial Judges in the State of U.P. by the Registrar General, High Court, Allahabad.

With the above observations and directions, on merits, the appeal is **dismissed**.

The appellant is in jail.

The office is directed to transmit back the lower court record along with a certified copy of this judgment for information and necessary

compliance.

Necessary steps shall be taken by the court below to notify this judgment to all concerned.

The compliance report be furnished to this Court through the Registrar General, High Court, Allahabad.

(Vikas Kunvar Srivastav,J.) (Sunita Agarwal,J.)

Order Date :- 20.5.2022
Brijesh