

(2006) 07 AHC CK 0107
In the Allahabad High Court
Case No : Criminal Appeal No. 1194 of 1988

Kundan Singh Rawat, Neelam alias Sunder Dei and Narendra
alias Teetu APPELLANT

Vs

State of U.P. RESPONDENT

Date of Decision : 06-07-2006

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 174, 313, 315
Evidence Act, 1872 — Section 138, 145, 146, 157
Penal Code, 1860 (IPC) — Section 147, 148, 149, 302

Citation : (2006) 07 AHC CK 0107

Hon'ble Judges : Imtiyaz Murtaza, J; Amar Saran, J

Bench : Division Bench

Advocate : G.C. Saxena, for the Appellant; A.G.A. and R.K. Singh, for the Respondent

Final Decision : Dismissed

Judgement

Amar Saran, J.—This Criminal appeal arises from the judgment of IInd Additional Sessions Judge, Saharanpur, convicting the appellant Kundan Singh Rawat to undergo imprisonment for life u/s 302 IPC and two years R.I. u/s 148 IPC. The appellants Smt. Sundra Devi alias Neelam, and Narendra Singh alias Teetu were sentenced to imprisonment for life u/s 302 IPC read with Section 149 IPC and one year R.I. u/s 147 IPC. The sentences to all the appellants were to run concurrently.

FACTS

2. The prosecution case was that the informant Shiv Shankar and his wife Smt. Kheemu alias Parvati (the deceased) and the appellant Kundan Singh used to reside as tenants in the same house No. 22/92, Gandhi Road, at Kasba Kankhal. Kundan Singh wanted the informant and his wife to vacate the premises and there had been exchange of hot words between the parties on that account on several occasions. A settlement had been reached that on 24.6.1987 the

informant Shiv Shankar would vacate the house. On 24.6.1987, the date of incident, at about 2 p.m. in the afternoon, Shiv Shankar and his wife Kheemu alias Parvati were sleeping in their room. At that time, the appellant Kundan Singh armed with an axe, his wife co-appellant Neelam, his son Narendra alias Teetu, and Dev Kumar and Ramesh Chanda (the latter two accused who have been acquitted by the trial court) arrived at his room hurling abuses. They said that the informant was not interested in vacating the house and they would deal with him on that date. Saying that appellant Neelam and Narendra caught hold of Kheemu alias Parvati and Kundan Singh started assaulting her with an axe. The other two accused Ramesh and Dev Kumar caught hold of informant Shiv Shankar. The blows of Kundan Singh struck on the neck of Smt. Kheemu, who died on the spot. The cries raised by Shiv Shankar, attracted a number of persons from the neighborhood. Thereupon, the five accused ran away from the spot carrying their axe. The informant Shiv Shankar lodged a written report of this incident on 24.6.1987 at 2.40 p.m. at P.S. Kankhal, district Saharanpur. On that basis, a chik report (Ext. Ka-1) was recorded by Madan Pal Singh, Head Moharrir, who also registered the case in the G.D. at report No. 28 (Ext. Ka-2).

3. Investigation of this case was taken up by S.I. Ajay Kumar (P.W.6), who was the S.O. of P.S. Kankhal. The F.I.R. was registered in his presence. He immediately proceeded to the spot along with S.I. R.K. Singh and recorded the statement of the complainant P.W.1 Shiv Shankar Mahadev. Under his supervision, S.I. R.K. Singh prepared the inquest report (Ext. Ka-3) of the dead body of Smt. Kheemu and other necessary documents such as photo lash (Ext. Ka-4), Challan lash (Ext. Ka-5) and letter for C.M.O. Saharanpur for postmortem (Ext. Ka-6). He also sealed the dead body and handed it over to Constable Rajveer Singh and Constable Virendra Singh (P.W.7) for taking it for postmortem examination. Postmortem examination was conducted on the dead body of Smt. Kheemu alias Parvati by Dr. A.K. Jain at H.M.G. Hospital, Hardwar on 25.6.1987 at 1.45 p.m. Dr. Jain found the following ante mortem injuries on the dead body of the deceased:

1. Incised wound with clean divided margin 8 cm x 4 cm x mouth cavity deep with fracture of maxilla (left) and mandible (left) extending from left lobule of ear to 1 cm above left lateral angle of mouth, tailing upward oblique in direction.
2. Incised wound 3 cm x 1 cm x bone deep left side cheek, 1 cm below injury No. 1, communitied fracture, left maxilla and mandible transverse in direction, tailing outward.
3. Incised wound left side chin, 5 cm x 3 cm x bone deep transverse in direction tailing outward.
4. Incised wound 2 cm x 1 cm x bone deep left side back 3 cm below left ear, transverse in direction tailing outward.
5. Incised wound 3 cm x 1 cm x muscle deep, transverse in direction, tailing medially.

On internal examination, 4 oz. of semi digested food was found in the stomach while digested food with gases were found in small intestine and faecal matter was found in large intestine. The gall bladder was found half full.

4. The cause of death was shock and haemorrhage due to ante-mortem injuries.

5. The appellant Kundan Singh Rawat was charged under Sections 148 and 302 IPC, while the remaining four accused, Smt. Neelam alias Sundra Devi, Narendra alias Teetu, Dev Kumar and Ramesh Chand were charged under Sections 147 and 302 read with Section 149 IPC. All the accused pleaded not guilty to the charges. The prosecution has examined seven witnesses. Five witnesses P.W.1 Shiv Shankar Mahadev, P.W.2 Jai Shanker, P.W. 3 Maya Ram and P.W.4 Babu Lal, P.W.5 Diwan Singh were eyewitnesses and witnesses of fact. P.W.6 S.I. Ajay Kumar, was the Investigating Officer, P.W.7 Constable Virendra Singh was a formal witness who carried the dead body.

6. P.W.1 Shiv Shankar Mahadev is the informant and principal witness in this case. He deposed that he was living as a tenant along with his wife in the house where the incident took place, from about four or five months prior to the incident. Appellant Kundan Singh also resided in a portion of that house with his wife Sundra and two sons, one of whom was the appellant Narendra Singh. There were six other tenants in that house. On the date of incident at about 2 p.m. he was lying on a cot. His wife Kheemu alias Parvati was sitting on an adjoining cot. At that time Kundan Singh's wife, appellant Sundra Devi, arrived there and caught hold of his wife Parvati's hair. Then the two pushed and exchanged fist blows with each other. Three persons, one of whom was the appellant Narendra and two others, who were standing outside the courtroom, were present. When the two men, who were standing outside the courtroom, were summoned, one of the persons turned out to be one Sanjay Kumar, who was not an accused in this case. The three persons caught hold of Shiv Shankar. At that time, the appellant Kundan arrived in the room. He gave three or four blows on the head of Smt. Parvati with an axe. Then, the assailants ran away. Kundan approached the Magistrate Negi after the incident, whereas the informant went to the police station. His wife had died. He went to the police and narrated the entire incident. The police inspected the spot and went away. Then a talk took place with the Inspectors at the police station. Only after arrival of the Deputy Superintendent of Police was his report taken down. He could not see, who wrote his report. A person was writing his report and tearing it. They made him wait at the police station till 12 at night. They got his thumb impression affixed on the report. An entirely wrong report was taken down. The Government counsel had read out the report to him thrice outside. This report was wrong. The correct report, was present with him, and he was filing the same. He admits to having affixed his thumb mark on the report, which was written by the police, but it was not read out to him. The report, which he was presenting, contained the correct facts. He did not mention the name of Amrish. This report was marked (Ext. 1). Kundan's son had run away with Rs. 1500/-

which belonged to him. The house where they resided belonged to Roop Kishore Baniya. Kundan wanted them to vacate the house. Amrish neta had said that he would come on 24th at 10 a.m. and take the informant Shiv Shankar Baba to Allahabad and get the house vacated and sealed by the administration. Kundan was inimical to the informant. Kundan had earlier sold a child and thereafter he had sold a woman and given poison to another woman. Kundan used to accuse them of defaming him and hence he wanted them to vacate the house. The incident took place on 24th as Amrish neta had not come by 10 a.m., hence the informant had promised that they would vacate the house by 4 p.m., but the assailants came at 2 p.m. and committed this crime. There were only some pahari persons, who resided at the place of incident, but the informant did not recognize them. A tape recorder was even switched on, so that voices could be muffled. He had seen Kundan striking the deceased with an axe with his own eyes. At that point the learned trial judge observed that the witness became emotional and began weeping.

7. P.W.2 Jai Shankar deposed that he did not know Shiv Shankar from before. He also claimed not to know his wife Parvati. Kundan Singh was his neighbour. He knew his wife and his son Narendra. His house was adjoining Kundan's house. He did not know Dev Kumar and Ramesh Chand. He had a shop dealing in iron wares. He had not seen any murder in the house, where Kundan Singh resided on 24.6.1987 at 2 p.m., nor had he heard about it. He was declared hostile. He denied having given any 161 Cr. P. C. statement to the I.O., or that any such statement was read out to him and he could not give any explanation as to how the same came in existence. At about 5.30 p.m. a truck carrying cement had arrived at Kundan's house, which was being unloaded by Kundan. Kundan had calmly entered his house and he was not arrested by the police. He denied going to the place of incident even at that time.

8. P.W. 3 Maya Ram deposed that he resided in the house of Gangeshwar Amrit Kutir, which was adjoining Kundan's house. The name of one of Kundan's sons was Babloo. Kundan, his wife Sundari and his eldest son Narendra were present in Court. He did not know Dev Kumar and Ramesh Chand from before. He did not know how many tenants lived in the house at the time of incident. The informant Shiv Shankar Mahadev was also residing in that house along with his wife, but he denied knowing them. They were residing in the house from 3 or 4 months earlier. He did not know whether there was any quarrel of Kundan Singh with these persons. He admits that the incident in which the informant's wife was murdered had taken place 7 or 8 months earlier. But he did not know when the murder took place, nor did he know who committed the murder. At that stage, the witness was declared hostile. He denied having given any statement to the police. The police only asked him his name and parentage. He denied having given the 161 Cr. P. C. statement which was read out to him and admitted having known Kundan Singh for several years. He denied that he was concealing the truth because of his closeness to Kundan.

9. P.W. 4 Babu Lal is the son of informant Shiv Shankar Mahadev and the deceased Parvati. His parents were residing in the house where the incident took place from six months earlier. Kundan and his family were also residing in that house. His house was 3 miles from the house, where the incident took place. Some dispute was going on between his father and Kundan Singh and others. He, however, denied having seen the incident. When he reached the place of incident, the dead body had been sealed and he denied being present at the time of incident. This witness was also declared hostile. He denied having given the 161 Cr. P. C. statement to the police, which was read out to him. He could not give any reason as to how such a statement was recorded by the police. He denied having colluded with the accused.

10. P.W. 5 Diwan Singh simply mentioned that he did not know any of the parties. He claims to be staying at the college. At Kankhal Road Gandhi Road the I.O. had sealed some items and got his signature appended on the same. He did not know what was contained in that bundle. He was only made to sign on one paper. Another acquaintance Sudhir Gupta, who was standing there, also affixed his signature to the bundle. They were told that inquest was being done. This witness was also declared hostile. He could read Hindi. He admitted his signature on the documents (Ext. Ka-2, 3, 4 and 5). His signature was taken at that place where the sealed bundle was lying. He had not enquired as to why his signature was taken. No axe was recovered in his presence by the I.O. He had not read the facts. He did not know that it was written in the recovery memo that the axe had been recovered in his presence. No statement u/s 161 Cr. P. C. was recorded by the I.O. He was not even interrogated when his signature was taken. He denied having colluded with the accused or giving a false statement.

11. We had earlier heard the appellant's learned Counsel and learned AGA and reserved the judgment. As some doubts arose when we were writing the judgment, we again posted the case for further hearing and have heard the appeal on two days and reserved our judgment on 26.4.2006.

CONTENTIONS OF COUNSEL

12. It has been argued by Sri G.C. Saxena on behalf of the appellant that:

1(a) - the time of lodging of the FIR is doubtful. Whereas the chik report shows that the FIR was lodged on 24.6.1987 at 2.40 pm, yet the -informant, PW 1, Shiv Shanker Mahadeo has stated in his evidence that the report was lodged at 12 mid-night;

(b)- scribe of the report has not been produced;

(c)- according to the chik FIR, the copy of the report was prepared by Head Moharrir Harpal Singh, but the investigating officer, PW 6, SO, Ajai Kumar, has stated that the chik FIR was prepared by HM Madan Lal;

(d)- the informant questioned the validity of the report that was being shown to him by the public prosecutor and has himself filed the copy of the report and that

the chik report was not proved by the prosecution.

On the basis of these points it is suggested that if the time of the FIR is disputed, then the whole substratum of the prosecution case collapses. In support of these contentions, the learned Counsel for the appellant has placed reliance on the cases of Marudanal Augusti v. State of Kerala 1980 SCC (Cri) 985, Bijendra and Ors. v. State (30) 1993 ACC 470, Mehraj Singh v. State of U.P. 1994 SCC(Cri) 1390, Arjun Marik and Ors. v. State of Bihar 1994 CAR 175, Bandhu @ Bandhu Harijan v. State 1997 JIC 206 (All)(LB), Rang Bahadur Singh and Ors. v. State of U.P. 2000 CAR 597 and State of U.P. v. Sripal and Anr. 2006 UP Cr.R 376.

(2) There was confusion about the name of the co-appellant, wife of the appellant Kundan because in the report her name is mentioned as Neelam whereas in evidence her name is actually Sundara and this was another reason for doubting the reliability of the report.

(3) As it was the prosecution case itself that the informant Shiv Shanker had agreed to vacate the house on the same date in the evening, there was little motive for the appellants and the acquitted accused to have committed this crime.

(4) No blood-stained earth was taken from the spot.

(5) As the injuries were all on the left side, they suggested that the deceased was assaulted when she was sleeping and the nature of injuries was inconsistent with the manner of assault as described in the prosecution case.

(6) Two of the accused, Dev Kumar and Ramesh Chandra have been acquitted by the trial court. In view of the fact that the informant, PW 1, had not identified them and in their place he had identified one unconnected outsider Sanjai, it is argued that no reliance could be placed on his testimony. All the witnesses of fact, except PW 1, the informant Shiv Shanker Mahadeo, have turned hostile and reliance could not be placed on his solitary testimony to convict the appellants.

(7) The appellant Kundan has pleaded an alibi that he had gone to Saharanpur on the date of incident and he got the bank draft made on that date and when he reached his house, his wife told him that there was murder in the house and he had been falsely implicated.

13. Learned AGA, on the other hand, contended that this murder had taken place in broad-day light. The time and place of incident was not disputed. The FIR was lodged immediately after the incident. This averment is supported by the fact that the inquest papers contained the crime number etc. It was only on account of some confusion that the informant had stated at one point that he was detained in the police station upto 12 in the midnight and that the report was written at that time after it had been torn up on several earlier occasions. Learned AGA further points out that the nature of injuries on the deceased was wholly consistent with the manner of assault as described by the prosecution. The alibi set up by the appellant has not been established. The informant

appears to have been treated in a harsh and hostile manner not only by the investigating officer but also by the public prosecutor and that the prosecution has fully succeeded in establishing its case against the appellants.

ANALYSIS OF ARGUMENTS

Whether the report was ante-timed?

14. So far as the principal contention of the appellants about the FIR not having been written at the time alleged (i.e. at 2.40 pm) but having been lodged at midnight on 24/25.6.1987 and that the RR had been ante-timed, is concerned, it may be noted that the informant, PW 1, had stated that immediately after the incident in which his wife was given three or four axe blows by the appellant Kundan, Kundan had run to Magistrate Negi whereas he immediately left for the police station. If he had arrived at the police station immediately thereafter, which would be his conduct in these circumstances, there was little reason for the informant not to have handed in his FIR. However, it appears that in this case a lot of pressure was brought to bear upon the police personnel who also do not appear to be fully supportive of the informant. It is possible that they had kept the informant waiting there, perhaps with the object of giving him protection as the trial judge has suggested, or for questioning him about the manner of incident, as his wife had lost her life in their house, although that line may not have been seriously pursued as the informant was 73 years in age, whereas his wife, the deceased was 60 years old. Significantly the appellants have not even been able to muster the courage to even make this far fetched suggestion to any witness, that the old informant had murdered his wife. There seems greater weight in the suggestion of the informant Shiv Shanker Mahadeo that there was interference with the investigation because of the partiality of Magistrate Negi to the appellant Kundan, and that his report was scribed only on the intervention of the Dy. S.P. With the countervailing pressures that were being exerted in this case, it was entirely possible as was suggested by the informant that the report was being written out, torn up, and then written out again.

15. A stronger reason for showing that the informant's alleged statement that the report was written out at mid night, is the result of some confusion is the circumstance that the appellant Kundan has himself admitted in his Section 313 Cr.P.C. statement that when he returned to his house (after leaving Saharanpur at 3 p.m. after getting a draft made and deposited there) his wife told him about Smt. Parvati's murder there and that they had been nominated in that case, and that the police picked him up at 7 p.m. in this connection. This would be inconsistent with the contention of learned Counsel for the defence that the FIR was lodged at mid-night.

Defects in investigation and collusion of Public prosecutor with accused no reason to throw out prosecution case:

16. It is well settled that simply because the investigating agency has not acted in a completely fair manner provides no reason for rejecting the prosecution case

as a whole, if the account given by the principle eye witness, in this case the informant may be considered natural in the circumstances and there is little reason to doubt its intrinsic credibility, and where no reason is suggested why the witness would nominate the particular accused leaving out the real culprits. However the Court is required to act with care and circumspection for reaching a finding of guilt in these circumstances. The conspectus of authorities on the point, that an acquittal should not be recorded if the investigation is designedly defective have been considered recently in the Apex Court decision in *Dhanaj Singh @ Shera and Others Vs. State of Punjab*, of the aforesaid law report at page 1922 are reproduced herein below:

4. In reply, learned Counsel for the State submitted that faulty investigation cannot be a ground to affect the credibility of the eyewitnesses. It is a fairly settled position in law that when witnesses are branded as partisan or inimical, their evidence has to be analysed with care and scrutiny. That has been done in the present case and both the trial Court and the High Court have found the evidence to be credible. Even if the investigation was faulty, both the trial Court and the High Court have acted only in the permissible way i.e. to weigh the evidence carefully and come to an independent conclusion. As rightly noted by the High Court, the investigation seems to be slipshod. The highly improbable stand that the complainant and his relatives killed the deceased who was their close relative can hardly be accepted with even a pinch of salt. Though the deceased and the complainant had criminal track records that per se will not affect the evidence of witnesses if it is otherwise credible and cogent. Both the trial Court and the High Court after analysing the evidence found it to be credible, cogent and trustworthy. The plea that the primary duty to investigate the evidence is that of the police and when the police has given clean chit, that should prima facie be accepted is clearly without substance.

5. In the case of a 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; to do so would be tantamount to playing into the hands of the Investigating Officer if the investigation is designedly defective. (See *Karnel Singh Vs. State of M.P.*,

6. In *Paras Yadav and others Vs. The State of Bihar*, it was held that if the lapse or omission is committed by the investigating agency or because of negligence the prosecution evidence is required to be examined de hors such omissions to find out whether the said evidence is reliable or not. The contaminated conduct of officials should not stand on the way of evaluating the evidence by the Courts; otherwise the designed mischief would be perpetuated and justice would be denied to the complainant party.

7. As was observed in *Ram Bihari Yadav Vs. State of Bihar and Others*, if primacy is given to such designed or negligent investigation, to the omission or lapses by perfunctory investigation or omissions, the faith and confidence of the people would be shaken not only in the law enforcing agency but also in the

administration of justice. The view was again reiterated in Amar Singh Vs. Balwinder Singh and Others, As noted in Amar Singh's case (supra) it would have been certainly better if the fire-arms were sent to the Forensic Test Laboratory for comparison. But the report of the Ballistic Expert would be in the nature of an expert opinion without any conclusiveness attached to it. When the direct testimony of the eye-witnesses corroborated by the medical evidence fully establishes the prosecution version failure or omission or negligence on part of the IO cannot affect credibility of the prosecution version.

(Emphasis added)

17. In this case the extent of unfair treatment to the informant was so great that even the public prosecutor does not appear to have supported the informant fully. In this connection the witness has deposed that the Government Pleader read out the report to him thrice. That report was incorrect. Then he produced the correct copy which was a Photostat of the chik report that had been written by the appellants and it was marked as Ext. 1. Amrish was not an accused in his report. This Amrish appears to have been his solitary supporter and it could not be ruled out in the circumstances that by exercising their influence the appellants were trying to exonerate themselves and to implicate Amrish in their place, to which suggestion the informant, whose wife had been murdered in his presence, was not at all agreeable. If even the public prosecutor was not fully supportive of this witness, in such circumstances, it can be assumed that the appellants do not appear to have been favorable to this appellant, perhaps because he was a person from the "plains" whereas the appellants, the police agency and the public prosecutor etc. may have been "paharis". This aspect has been noted by the trial judge in his judgement as this witness has stated at one point in his evidence that all the persons at the post were "paharis" and he did not recognize them. It is noteworthy that the informant is an outsider and he had started living in that house only from 4 or 5 months prior to this incident. The trial judge who had observed the demeanour of this witness and had noted that in response to the question as to whether he had seen Kundan assaulting his wife, he had replied that he had seen Kundan assaulting his wife with an axe with his own eyes and at that point this witness had become emotional and had started to weep. The trial judge has poignantly observed in paragraph 13 of his judgement as follows:

The complainant is about 73 years of age and I do not think that at the fag end of his life; he would act as a puppet in the hands of others, to falsely implicate the accused. There is no denial of the fact that his wife was done to death in his presence in a brutal manner, I also noted the demeanour of this witness at the time of the evidence in this Court and found that he had become emotional again and again and also wept bitterly in the court. After all, the lady was his only companion in his old-age. I have perused his statement with great care and find absolutely nothing in it to disbelieve him. This witness proved the photostat copy of the report as Ext. I. In fact, this photostat copy (Ext.I) is the copy of the

original chik FIR recorded at the police station.

18. In these circumstances no advantage can accrue to the defence only because the informant could not give the name of the scribe or because the scribe was not examined.

19. So far as the suggestion that the name of the writer of the chik RR has been shown as Harpal in the chik report whereas it was Madan Lal, according to the statement of the investigating officer, PW 6, Ajai Kumar. There appears to be some typographical error in writing the name Harpal, as the investigating officer was not questioned about any such discrepancy.

20. So far as the contention about the informant repudiating the official chik FIR and producing another copy himself is concerned, it may be mentioned that an attempt was being made by the prosecution agencies, which included both the I.O., and even the Public Prosecutor to completely confuse and befuddle this old man, for some ulterior reasons. This is apparent from the circumstances that initially the police were indulging in deliberate procrastination in taking down the report, and hence kept the informant detained in the police station for a long time. Perhaps Magistrate Negi was siding with the pahari, the appellant Kundan, and only on arrival of the Dy.S.P. it appears that the report was written as per the direction of the informant. Later we find that the investigating and prosecuting agencies have not even cared to bring the chemical examiner's report on record. (However as observed by the trial judge that even without the chemical examiner's report and with the witness of recovery PW 5 Diwan Singh having turned hostile and not supporting the recovery, there was other material on record which was sufficient for recording the conviction of the appellant). Then the effort of the P.P. to show a wrong report to this unfortunate witness, which tried to nominate his supporter, but only after the repeated protests by this witness, could he file his own photo-copy of the chik report. The collusion of the Public Prosecutor, and hostility to the informant is apparent from the fact that although the original chik report is present on the file, but the P.P. has not chosen to prove it. In such circumstances the defence can possibly obtain no benefit from the admitted protests by this witness that the report that the P.P. was showing to him, was not the authentic report dictated by him, and that his own copy of the report which he was filing as Ext. 1 contained the the real version.

CASES CITED BY APPELLANT'S COUNSEL

DISTINGUISHABLE

21. The cases cited by the learned Counsel for the appellants are distinguishable and they need to be confined to the own facts. So far as the case of Marudanal Augusti v. State of Kerala 1980 SCC (Cri) 985, is concerned, it was a case in which the High Court has set aside the order of acquittal passed by the Sessions Judge. There were other features in that case about the manner in which the F.I.R. was lodged. The delay in dispatch of the F.I.R. and the delay on the part of P.W.1 in getting the injuries examined by the doctor, which had resulted in the

acquittal by the Sessions Court. The High Court, according to the Supreme Court, had overlooked these features and " in reversing the judgment of acquittal, the Appellate Court has also to keep in mind a very vital consideration, namely, as to whether or not the view taken by the Sessions Judge could be reasonably possible." According to the Apex Court, the view taken by the Sessions Judge was reasonably possible.

22. *Bijendra and Ors. v. State*: (30)1993 ACC 470 , was a case where the inquest did not mention the weapon used. There was discrepancy in the distance of the police station from the place of occurrence in the F.I.R. and inquest report. We find no such discrepancy in the present case. It is clearly mentioned that the injury had been caused by an axe and the distance was 1 km as it is the same as the distance mentioned in the chik F.I.R. Moreover, the crime number and the other sections are clearly mentioned in the inquest report and the copy of the chik report and other documents are the annexures to the inquest report, which was prepared on 24.6.1987 at 5 P.M. There is no suggestion either to the I.O., P.W.6 Ajai Kumar or other witnesses about there being any discrepancy between the inquest report and the chik report. There is no suggestion even that inquest report was earlier prepared and then ante-timed and then entry made on the basis of ante-timed report. Moreover, it has been observed in paragraph 8 of *Khujji alias Surendra Tiwari Vs. State of Madhya Pradesh*,

8. It was faintly submitted by counsel for the appellant that the evidence of eye witnesses could not be relied upon as their names did not figure in the inquest report prepared at the earliest point of time. We see no force in this submission in view of the dear pronouncement of this Court in *Pedda Narayana and Others Vs. State of Andhra Pradesh*, Referring to Section 174 of the Code of Criminal Procedure this Court observed at page 89 (of Supp SCR): (at p. 1256 of AIR) as under:

A perusal of this provision would clearly show that the object of the proceedings u/s 174 is merely to ascertain whether a person has died under suspicious circumstances or an unnatural death and if so what is the apparent cause of the death. The question regarding the details as to how the deceased was assaulted or who assaulted him or under what circumstances he was assaulted appears to us to be foreign to the ambit and scope of the proceedings under 5. 174. In these circumstances, therefore, neither in practice nor in law was it necessary for the police to have mentioned these details in the inquest report.

(Emphasis added)

We respectfully agree and see no merit in this submission made by the counsel for the appellant.

23. Likewise *Mehraj Singh v. State of U.P.* 1994 SCC (Cri) 1390, also refers to some discrepancy between the F.I.R. and inquest report for reaching a conclusion that the F.I.R. contained embellishments and was a creature of after thought. The allegations in *Mehraj Singh's* case of the special report reaching the local

Magistrate late and the other external checks namely the simultaneous sending of the copy of the F.I.R. along with the dead body and its reference in the inquest report are not found in the present case. There is also no suggestion of any such discrepancy to the Investigating Officer or to any other witness in the present case.

24. Moreover, there appears to have been some departure from the decision from Mehraj Singh's case in subsequent decisions of the Apex Court. In *Rajesh @ Raju Chandulal Gandhi and Another Vs. State of Gujarat*, it has been noted at paragraph 13 as follows; -

Relying upon the judgment of *Meharaj Singh (L/Nk.) v. State of U.P.* 1994 (5) SCC 189, the learned Counsel appearing for the appellants has submitted that FIR in a criminal case is a vital and valuable piece of evidence for the purpose of appreciating the evidence led in the trial. The object of insisting upon prompt lodging of the FIR is to obtain information regarding the circumstances in which the crime was committed including the names of actual culprits and the part played by them, the weapon of offence used as also the names of the witnesses. One of the external checks which the Courts generally look for is the sending of the copy of the FIR along with the dead body and its reference in the inquest report. The absence of details in the inquest report may be indicative of the fact that the prosecution story was still in embryo and had not given any shape and that the FIR came to be recorded later on after due deliberations and consultation and was then ante-timed to give it a colour of prompt lodged FIR. The reliance of learned Counsel for the appellant on *Meharaj Singh's* case is of no help to him in the instant case inasmuch as all requisite details are mentioned in Panchanama Exhibit P-32. Mere omission to mention the number of the FIR and the name of the complainant in Exh. P-37 has not persuaded us to hold that the FIR was ante-timed in view of the peculiar facts and circumstances of the case as noticed by the trial Court, the High Court and by us hereinabove.

(Emphasis added)

25. In *Amar Singh Vs. Balwinder Singh and Others*, it has been mentioned in paragraph 10 that simply because of delay in the RR, the prosecution case need not be thrown out, and the prosecution evidence has to be adjudged on merit. The relevant passage at page 1171 reads as follows:

There is no hard and fast rule that any delay in lodging the FIR would automatically render the prosecution case doubtful. It necessarily depends upon facts and circumstances of each case whether there has been any such delay in lodging the FIR which may cast doubt about the veracity of the prosecution case and for this a host of circumstances like the condition of the first informant, the nature of injuries sustained, the number of victims, the efforts made to provide medical aid to them, the distance of the hospital and the police station, etc. have to be taken into consideration. There is no mathematical formula by which an inference may be drawn either way merely on account of delay in lodging of the

FIR. In this connection it will be useful to take note of the following observation made by this Court in Tara Singh and others Vs. The State of Punjab,

The delay in giving the FIR by itself cannot be a ground to doubt the prosecution case. Knowing the Indian conditions as they are, one cannot expect these villagers to rush to the police station immediately after the occurrence. Human nature as it is, the kith and kin who have witnessed the occurrence cannot be expected to act mechanically with all the promptitude in giving the report to the police. At times being grief-stricken because of the calamity it may not immediately occur to them that they should give a report. After all it is but natural in these circumstances for them to take some time to go the police station for giving the report. Of course, in cases arising out of acute factions there is a tendency to implicate persons belonging to the opposite faction falsely. In order to avert the danger of convicting such innocent persons the Courts should be cautious to scrutinise the evidence of such interested witnesses with greater care and caution and separate grain from the chaff after subjecting the evidence to a closer scrutiny and in doing so the contents of the FIR also will have to be scrutinised carefully. However, unless there are indications of fabrication, the Court cannot reject the prosecution version as given in the FIR and later substantiated by the evidence merely on the ground of delay. These are all matters for appreciation and much depends on the facts and circumstances of each case.

(Emphasis added)

26. Arjun Marik and Ors. v. State of Bihar 1994 CAR 175 was a case where the report had been forwarded to the Magistrate with delay as mentioned above. There is no such suggestion, nor was any question put to the I.O. about forwarding of the report with delay. Moreover, there was only circumstantial evidence of "last seen," in Arjun Marik which was held to be insufficient to complete the chain of circumstances against the accused. In these circumstances the Apex Court was of the opinion that inherent improbabilities and infirmities were rightly ignored by the courts below.

27. Bandhu alias Bandhu Harijan v. State 1997 JIC 206 (All) LB was a case where there were discrepancies in the challan lash and inquest report and where copies of the F.I.R. were not sent to the doctor along with other papers and the witnesses claimed to have left the police station and returned. All these circumstances were taken to suggest that the F.I.R. was ante-timed. But there is no such controversy in the present case.

Discrepancies have to be put

28. Moreover, the observations in paragraph No. 13 of the aforesaid decision of this Court that the discrepancy occurring in the document need not be put to the Investigating Officer appears to be per incuriam. In this connection it has clearly been held in State of Uttar Pradesh Vs. Nahar Singh (Dead) and Others, that without questioning a witness specifically about an omission or a contradiction or

a discrepancy in his testimony the accused cannot take any advantage of such a contradiction. The following passage from paragraphs 13 and 14 of State of Uttar Pradesh Vs. Nahar Singh (Dead) and Others, may be usefully perused:

13. It may be noted here that that part of the statement of PW1 was not cross-examined by the accused. In the absence of cross-examination on the explanation of delay, the evidence of PW 1 remained unchallenged and ought to have been believed by the High Court. Section 138 of the Evidence Act confers a valuable right of cross-examining the witness tendered in evidence by the opposite party. The scope of that provision is enlarged by Section 146 of the Evidence Act by allowing a witness to be questioned:

(1) to test his veracity,

(2) to discover who he is and what is his position in life, or

(3) to shake his credit by injuring his character, although the answer to such questions might tend directly or indirectly to incriminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture.

14. The oft-quoted observation of Lord Herschell, L.C. in *Browne v. Dunn* (1893) 6 Rep 67, dearly elucidates the principle underlying those provisions. It reads thus:

I cannot help saying, that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which, it is suggested, indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness, you are bound, whilst he is in the box, to give an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but it is essential to fair play and fair dealing with witnesses.

(Emphasis added)

29. *Rang Bahadur Singh v. State of U.P.* 2000 CAR 597 was a case of night time murder, where there was not sufficient light to identify the appellants. There was enmity, the witnesses also belonged to the village, but they did not try to cover their faces. In this totality of circumstances, it was held that the F.I.R. could have been prompted by the police. In the present case we find that the prosecution and police if at all, appears to be more keen to help the accused, and they are in fact engaged in confusing the hapless informant. Moreover, the present case is a case of daylight incident where the 60 years old wife of the informant had been

murdered in his house after a quarrel with the appellants.

30. State of U.P. v. Sripal and Anr. 2006 UP Cr. Rul 376, was a case where there was inconsistency in the eyewitness account as some of the eye witnesses were saying that the two accused respondents had muffled up their faces, whereas the others were saying that they had come to commit the crime with their faces open and the Court had held that the F.I.R. was prepared under the supervision of the local police, who may have been instrumental in implicating the accused in the case of dacoity with murder. The facts of the present case are entirely distinguishable from the authorities cited by the learned Counsel for the appellant, which for the reasons stated above need to be confined to their own facts.

31. Moreover the law relating to FIRs is very clear that the said reports are meant only for setting the investigation process in motion. They can only be used for corroborating the version given by the informant in court and only because the prosecution succeeds in causing some confusion about the time or manner of existence of the report that could provide no good reason to question the reliability or validity of the eye-witness account given by the witness, if it cannot be assailed on any other ground.

32. It has been held in Sheikh Hasib alias Tabarak Vs. The State of Bihar, "The principal object of the first information report from the point of view of the information is to set the criminal law in motion and from the point of view of the investigating authorities is to obtain information about the alleged criminal activity so as to be able to take suitable steps for tracing and bringing to book the guilty party. The first information report, we may point out, does not constitute substantive evidence though its importance as conveying the earliest information regarding the occurrence cannot be doubted. It can, however, only be used as a previous statement for the purpose of either corroborating its make u/s 157 of the Indian Evidence Act or for contradicting him u/s 145 of that Act. It cannot be used for the purpose of corroborating or contradicting other witnesses.

(Emphasis added)

33. In Rajesh @ Raju Chandulal Gandhi and Another Vs. State of Gujarat, it has been clarified that if eye witness account is intrinsically reliable, there is no ground to discard the prosecution case on account of some minor irregularities in the recording of the FIR. Paragraph 10 of the law report reads as follows:

On this aspect the High Court held that merely, "on account of some irregularities in mentioning the names or noting the timing during the course of investigation by the prosecution or some discrepancies and contradictions, which are at the micro-level could not be said to be sufficient and efficient to discard and dislodge the otherwise weighty and very important, serious and sound testimony of eye-witness, PW-1, Rakesh, one of the close relatives of the deceased, whose presence, we have found, quite natural and whose evidence is, also, found to be quite reliable and dependable and, rightly, accepted by the trial Court. After

going through the testimony of the prosecution witnesses particularly those of PWs-1 and 14, perusing the record including FIR No. 49/93, Exhibits 37 and Exhibit 32, we are of the opinion that the plea of ante-timing of the FIR is the figment of imagination of the defence and not a reality, Assuming that the FIR number and the name of the complainant was known at the time of recording of panchanama (Exh. P-37) and it was not mentioned therein, such circumstance would not probabilise the defence version that the FIR had been ante-timed, in view of the cogent, reliable and confidence inspiring testimony of Rakesh (PW-1), Satish (PW-12) and Umaben (PW-10).

(Emphasis added)

Confusion about name of appellant Sundara

34. So far as the argument about the confusion about the name of the co-accused, being shown as Neelam in the F.I.R. when Sundara was her actual name. It may be noted that from the kind of pressure and opposition that the informant was being made to undergo when he was trying to lodge the report of the murder of his wife before his own eyes, if he became bewildered and described the co-accused as Neelam and not Sundari, that could only be said to the result of confusion, old age and hostile treatment that the informant was receiving at the hands of the police and that could be no reason for throwing overboard the entire first information report and prosecution case. The informant was clearly referring to the wife of the appellant Kundan as the co-accused, who had caught hold of his wife, the deceased Smt. Kheemu alias Parvati and too much cannot be made of this minor discrepancy.

Motive sufficient

35. There is no merit also in the argument of the learned Counsel for the appellants that as Shiv Shanker informant was to vacate the house on the same day, there was little motive for the appellants to have committed this crime. We do not know how the mind of a criminal works and it is quite possible if they were determined to ensure that the deceased and her husband vacated his portion of the house and had got the impression that perhaps they were dilly dallying and were trying to put off their departure, by taking the plea that they were waiting for Amrish neta to arrive. It cannot be ruled out that in those circumstances if the appellants got extremely angry and assaulted the deceased in the manner with the axe, which caused her death, it could be argued that there was no immediate motive for the crime. It is apparent that the terms between the informant and the appellants were not good as the appellants may have felt that the informant was trying to defame him by saying that appellant Kundan had sold one child and one woman earlier and thereafter killed another woman by giving her poison, and the informant and the deceased were not even serious about vacating the house.

Taking blood stained earth not necessary

36. There is also little substance in the argument that no blood stained earth was taken from the spot or that the injuries were not consistent with the eye witness account. As the informant's version was that the deceased was assaulted while she was lying on the bed and even the mattress had been soaked with blood which was taken in possession by the police, and in fact taking in possession blood stained (sic) from the spot would have been anomalous in the circumstances.

Injuries on deceased corroborate prosecution version

37. Similarly, the presence of injuries on one side (left side on the head and neck region and not on both sides) is also easily explainable on the prosecution case. If the deceased who was caught hold of by one accused and was then assaulted with an axe, and who may have collapsed on the bed after receiving the first grievous injury on the left side, where after she could have received the other injuries on the same side. There is thus no substance in the argument of the learned Counsel for the appellants as to why there were no injuries on both sides of the head of the deceased.

38. In this connection it has been stated in *State of Madhya Pradesh Vs. Dharkole @ Govind Singh and Others*, that there can be no mathematical basis for evaluating the reliability of the prosecution case when tested on the anvil of medical evidence which ultimately must rest of the trained intuitions of the judge, and an "uninformed legitimization of trivialities would make a mockery of the criminal justice system" Paragraph 12 of the law report reads:

12. The concepts of probability, and the degrees of It, cannot obviously be expressed In terms of units to be mathematically enumerated as to how many of such units constitute proof beyond reasonable doubt. There is an unmistakable subjective element in the evaluation of the degrees of probability and the quantum of proof, Forensic probability must, in the last analysis, rest on a robust common sense and, ultimately, on the trained intuitions of the judge. While the protection given by the criminal process to the accused persons Is not to be eroded, at the same time, uninformed legitimization of trivialities would make a mockery of administration of criminal justice. This position was illuminatingly stated by Venkatachaliah, 3. (as His Lordships then was) in *State of U.P. Vs. Krishna Gopal and Another*,

On that score also the High Court's conclusion that the medical evidence varied with the ocular evidence suffers from vulnerability.

(Emphasis added)

Acquittal of co-accused no ground to discard whole prosecution case

39. The acquittal of co-accused Dev Kumar, Ramesh Chandra by the Trial Court as informant P.W.1 had failed to identify them and that he had in fact identified one outsider Sanjai as pointed out above was also no ground for discarding the entire prosecution case. As noted above the informant was under extreme

pressure as he felt that the police officer, who was investigating the case and even the public prosecutor were completely hostile to him and were not at all supportive of him. Moreover, as Dev Kumar and Ramesh Chandra were outsiders the informant could have got confused about their identities and simply because they have been acquitted is no ground for rejecting the entire testimony of the informant. So far as the appellant Kundan is concerned, he was the principal accused in this case, as he had given the axe blow to the deceased. There could be no confusion in fixing the identity of the appellant Kundan.

40. Moreover the maxim *falsus in uno, falsus in omnibus* has no application in India, and unless the wheat and the chaff are so inextricably mixed up that it would require constructing a third case, even if some of the accused have been acquitted but if the prosecution version about the place and manner of incident can be believed as a whole and there is no reason to doubt the presence or identity of a particular accused, simply because all the accused have not been convicted on the evidence of the witness, there is no reason for disbelieving the key witness in toto and for discarding the entire prosecution case. After noting the conspectus of authorities on the point, it has felicitously been observed in *Sucha Singh and Another Vs. State of Punjab*,

18. To the same effect is the decision in *The State of Punjab Vs. Jagir Singh, Baljit Singh and Karam Singh*, and *Lehna Vs. State of Haryana*, Stress was laid by the accused-appellants on the non-acceptance of evidence tendered by some witnesses to contend about desirability to throw out entire prosecution case. In essence prayer is to apply the principle of "*falsus in uno falsus in omnibus*" (false in one thing, false in everything). This plea is clearly untenable. Even if major portion of evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, notwithstanding acquittal of number of other co-accused persons, his conviction can be maintained. It is the duty of Court to separate grain from chaff. Where chaff can be separated from grain, it would be open to the Court to convict an accused notwithstanding the fact that evidence has been found to be deficient to prove guilt of other accused persons. Falsity of particular material witness or material particular would not ruin it from the beginning to end. The maxim "*falsus in uno falsus in omnibus*" has no application in India and the witnesses cannot be branded as liar, The maxim "*falsus in uno falsus in omnibus*" has not received general acceptance nor has this maxim come to occupy the status of rule of law. It is merely a rule of caution. All that it amounts to, is that in such cases testimony may be disregarded, and not that it must be disregarded. The doctrine merely involves the question of weight of evidence which a Court may apply in a given set of circumstances, but it is not what may be called "a mandatory rule of evidence." (See *Nisar Ali Vs. The State of Uttar Pradesh*, . Merely because some of the accused persons have been acquitted, though evidence against all of them, so far as direct testimony went, was the same does not lead as a necessary corollary that those who have been convicted must also be acquitted. It is always open to a Court to differentiate accused who had been acquitted from those who were convicted. (See *Gurcharan Singh and*

Another Vs. State of Punjab, The doctrine is a dangerous one specially in India for if a whole body of the testimony were to be rejected, because witness was evidently speaking an untruth in some aspect, It Is to be feared that administration of criminal justice would come to a dead stop. Witnesses just cannot help in giving embroidery to a story, however, true in the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of acceptance, and merely because in some respects the Court considers the same to be insufficient for placing reliance on the testimony of a witness, it does not necessarily follow as a matter of law that it must be disregarded in all respects as well. The evidence has to be sifted with care. The aforesaid dictum is not a sound rule for the reason that one hardly comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggeration, embroideries or embellishment (See Sohrab s/o Sohrab and Another Vs. The State of Madhya Pradesh, and Ugar Ahir and Others Vs. The State of Bihar, An attempt has to be made to, as noted above, in terms of felicitous metaphor, separate grain from the chaff, truth from falsehood. Where it is not feasible to separate truth from falsehood, because grain and chaff are inextricably mixed up, and in the process of separation an absolutely new case has to be reconstructed by divorcing essential details presented by the prosecution completely from the context and the background against which they are made, the only available course to be made is to discard the evidence in toto. (See Zwinglee Ariel Vs. State of Madhya Pradesh, and Balaka Singh and Others Vs. The State of Punjab, As observed by this Court in State of Rajasthan Vs. Smt. Kalki and Another, normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not normal, and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorised. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so. These aspects were highlighted recently in Krishna Mochi and Others Vs. State of Bihar, Accusations have been clearly established against accused-appellants in the case at hand. The Courts below have categorically indicated the distinguishing features in evidence so far as acquitted and convicted accused are concerned.

(Emphasis added)

Hostility of some witnesses - impact

41. Likewise the fact that if for some reason the other witnesses have turned hostile and are not interested in supporting the prosecution case is no reason to discard the testimony of the Informant Shiv ghankar, P.W. 1. if It has stood the test of cross-examination and on close scrutiny can be relied upon, at least for arriving at the inference of the complicity of the appellant Kundan. The incident has taken place in broad day light in the room of the informant where he was

present with his wife, the deceased Smt. Kheemu @ Parvati when the accused arrived there and indulged in the crime. As shown above the medical evidence supports the prosecution case, and that it is wrong to contend that there was want of motive for the offence. Moreover there is absolutely no reason for the informant to spare the real assailant and to wrongly nominate the appellant, if he had nothing to do with the crime.

42. So far as the witness P.W. 2 Jai Shankar is concerned, although he admits that his house was adjoining the house of appellant Kundan Singh and that he knew Kundan Singh. his wife and his son Narendra. He, however, denies knowing the informant or his wife Parvati and denies that any murder had taken place at 2 p.m. on 24.6.1987 or that his statement u/s 161 Cr. P. C. was recorded by the Investigating Officer. He was declared hostile. However in his cross-examination he has admitted that a murder had taken place at the alleged time in the house of incident, which is apparent from the fact that when someone climbed his roof, he saw a crowd gathered at the door of appellant Kundan's house, and the police was present there. From the crowd he learned that the old lady had been murdered. Obviously this witness is not prepared to speak the whole truth because of his being a neighbour of appellant Kundan Singh, who dealt in building material (iron ware), whereas Kundan dealt in cement.

43. Likewise P.W.3 Maya Ram also admits that the house where he resides, "Amrit Kutir," is adjoining the house of appellant Kundan Singh. He claims to know Kundan Singh and his son Narendra, though he denies knowing Dev Kumar and Ramesh Chandra (the acquitted accused). He denies knowledge of the number of tenants who were living in the house at the time of incident, but admits that the informant was living there with his wife, the deceased, but he did not know them. They had started living there from 3 or 4 months earlier, He does not know if there was any conflict between Kundan Singh and the informant and his wife. He states that the incident took place in the place alleged 7 or 8 months earlier, in which the informant's wife was murdered, but he does not know at what time, the incident took place or who committed the murder and he denies his 161 Cr. P. C. statement to the police. It is obvious that this witness is also not interested in coming forward with the complete truth because of his admitted old association with Kundan. However, from his statement at least this much is apparent that the informant and his wife were living in that house where the informant's wife was murdered. Likewise P.W.4 Babu Lal, who is the own son of the informant Shiv Shankar and his wife Parvati, the deceased, admits that the incident had taken place 10 months prior to his evidence in Court and that his father was staying in the house of incident from 6 months before the incident. Kundan Singh and his family were also staying there. He admits that there was a dispute between his father and Kundan Singh, because Kundan wanted his father to vacate the house. He was not an eyewitness of the incident and when he reached the house, from his house which was 3 miles away, the body had been sealed, He denies his 161 Cr. P. C. statement to the police.

44. It is also significant that in his examination u/s 313 Cr.P.C. in reply to question No. 15 as to whether he has anything more to say, the appellant Kundan Singh states that the informant Shiv Shankar was with him till 9 a.m. on the date of incident. Thereafter he had gone to Shaharanpur, where he got a bank draft made, which he deposited in the State Bank at 1.45 p.m. for placing an order for cement, At 3 p.m. he left that place. When he reached home, his wife told him that a murder had taken place in the house and that they had been implicated. His wife and children had been taken away by the police, but they were later let off. He asked the police to investigate the matter and he even showed them his ticket. The police took him away at about 7 p.m. At least this much is apparent from his statement that the appellant admits that the deceased had been murdered in the house where he also resided with his family on the date of incident but he denies his presence at the time of Incident and attempts to set up alibi that he had gone to Shaharanpur for getting a bank draft made and deposited for his cement business. Therefore, from a perusal of the evidence of the witnesses and from examination of the 313 Cr. P. C. statement of the appellant Kundan Singh, we feel that there is adequate corroboration of the time and place of incident of the fact that the deceased Smt. Parvati was murdered in the house where the informant was residing and that the appellants also used to reside in the same house. The murder took place in the day time, However, it appears that for some reason such as the fact that the informant had begun to reside in that house from only about 3 or 4 back, or because the appellants and the witnesses were all paharis and neighbours of the appellants with whom they must have had an old association, the witnesses were not prepared to speak out the whole truth and were resiling from their statements given to the police u/s 161 Cr. P. C. The law on treatment of hostile witnesses is clear that even where a witness is declared hostile his entire statement need not be excluded from consideration and it is open to the court to accept that part of his testimony which it finds creditworthy. Thus in *Gura Singh v. State of Rajasthan* AIR 2001 SC 330 it has been observed in paragraph 11:

11. There appears to be misconception regarding the effect on the testimony of a witness declared hostile. It is a misconceived notion that merely because a witness is declared hostile his entire evidence should be excluded or rendered unworthy of consideration. This Court in *Bhagwan Singh Vs. The State of Haryana*, held that merely because the Court gave permission to the Public Prosecutor to cross-examine his own witness describing him as hostile witness does not completely efface his evidence. The evidence remains admissible in the trial and there is no legal bar to base conviction upon the testimony of such witness. In *Shri Rabindra Kumar Dey Vs. State of Orissa*, It was observed that by giving permission to cross-examine nothing adverse to the credit of the witness is decided and the witness does not become unreliable only by his declaration as hostile. Merely on this ground his whole testimony cannot be excluded from consideration. In a criminal trial where a prosecution witness is cross-examined and contradicted with the leave of the Court by the party calling him for evidence

cannot, as a matter of general rule, be treated as washed off the record altogether. It is for the Court of fact to consider in each case whether as a result of such cross-examination and contradiction the witness stands discredited or can still be believed In regard to any part of his testimony. In appropriate cases the Court can rely upon the part of testimony of such witness if that part of the deposition is found to be creditworthy.

(Emphasis added)

Majesty of Justice to be upheld

45. In such circumstances, when the witnesses are not Prepared to come out with the entire truth and are turning hostile and the police agency and the public prosecutor also do not appear to be completely independent and supportive of the prosecution case, the onus of the Court is even heavier, and if the court is to maintain public confidence in the administration of justice and to vindicate and uphold the "majesty of the law" it is important that it does not meekly surrender before a wily accused and allow the criminal justice System to be derailed because the accused succeeds in winning over some of the witnesses inducing them to turn hostile, or wins over the police or even the public prosecutor to his side.

46. The Apex Court in *Zahira Habibullah H. Sheikh v. State of Gujarat* AIR 2004 SC 3114 it has taken note of this problem and sagely tendered the following advice in paragraphs 58 and 59:

58. The Courts at the expense of repetition we may state, exist for doing justice to the persons who are affected. The Trial/First Appellate Courts cannot get swayed by abstract technicalities and close their eyes to factors which need to be positively probed and noticed. The Court is not merely to act as a tape recorder recording evidence, overlooking the object of trial i.e. to get at the truth. It cannot be oblivious to the active role to be played for which there is not only ample scope, but sufficient powers conferred under the Code. It has a greater duty and responsibility i.e. to render justice, in a case where the role of prosecuting agency itself is put in issue and Is said to be hand In glove with the accused, parading a mock fight and making a mockery of the criminal justice administration Itself.

59. As pithily stated in *Jennison v. Backer* 1972 (1) All ER 1006 , "The law should not be seen to sit limply, while those who defy it go free and, those who seek its protection lose hope". Courts have to ensure that accused persons are punished and that the might or authority of the State are not used to shield themselves or their men. It should be ensured that they do not wield such powers which under the Constitution has to be held only In trust for the public and society at large. If deficiency in investigation or prosecution is visible or can be perceived by lifting the veil trying to hide the realities or covering the obvious deficiencies. Courts have to deal with the same with an iron hand appropriately within the framework of law. It is as much the duty of the prosecutor as of the Court to ensure that full

and material facts are brought on record so that there might not be miscarriage of justice. (See Smt. Shakila Abdul Gafar Khan Vs. Vasant Raghunath Dhoble and Another,

(Emphasis added)

47. The Court will have to scrutinize the evidence carefully to ferret out fact from fiction, to separate the wheat from the chaff. In this regard, we have already shown above as to the great difficulty that the informant faced for lodging an F.I.R. with the police, and the suspicious role played by Magistrate Negi, the circumstance of the public prosecutor seeking to confuse the informant by reading out reports, which were not the correct report given by the informant, and hence the informant himself filed the correct copy in Court thereafter. Another suspicious circumstance in this regard was the examination of the witnesses as prosecution witnesses, even though, admittedly, as is evident from the affidavits of these witnesses discounting the prosecution case, which are on record, that it was known to the prosecution agency that they had even turned hostile earlier. They appear to have been examined by the public prosecutor only to weaken the prosecution case. Such a practice has been severely deprecated in Zahira Sheikh's case (supra) (paragraph 75)

75. A somewhat an unusual mode in contrast to the lapse committed by non-examining victims and injured witnesses adopted by the investigating agency and the prosecutor was examination of six relatives of accused persons. They have expectedly given a clean chit to the accused and labeled them as saviors. This unusual procedure was highlighted before the High Court. But the same was not considered relevant as there is no legal bar. When we asked Mr. Rohtagi, learned Counsel for the State of Gujarat as to whether this does not reflect badly on the conduct of investigating agency and the prosecutor, he submitted that this was done to show the manner in which the incident had happened. This is a strange answer. Witnesses are examined by prosecution to show primarily who is the accused. In this case it was nobody's stand that the incident did not take place. That the conduct of investigating agency and the prosecutor was not bona fide, is apparent and patent.

(Emphasis added)

48. Again in Banti @ Guddu Vs. State of Madhya Pradesh, it has been stated in paragraph 14 that the prosecution is not required to produce witnesses about whom they have advance information that they would not support the prosecution case. Paragraph 14 reads as under:

14. The situation in a case where the prosecution cited two categories of witnesses to the occurrence, one consisting of persons closely related to the victim and the other consisting of witnesses who have no such relation, the Public Prosecutor's duty to the Court may require him to produce witnesses from the later category, also subject to his discretion to limit to one or two among them. But if the Public Prosecutor got reliable information that any one among

that category would not support the prosecution version he is free to state in court about that fact and skip the witness from being examined as a prosecution witness. It is open to the defence to cite him and examine him as a defence witness. The decision in this regard has to be taken by the Public Prosecutor in a fair manner. He can interview the witness beforehand to enable him to know well in advance the stand which that particular person would be adopting when examined as a witness in Court.

(Emphasis added)

Rejection of the plea of alibi

49. So far as the plea of alibi raised by the appellant Kundan is concerned, we find that no attempt was made to produce any witness for proving his alibi after his examination u/s 313 Cr. P. C. Moreover, we find that no suggestion was even given to the witnesses that the appellant Kundan Singh was not present at the spot and that he had gone away to Saharanpur for the purpose of getting the bank draft made and deposited and that he came much later after incident. Only one hostile witness, P.W.2 Jai Shankar has sought to suggest in one line in his cross examination that at about 5.30 p.m. when he was sitting at his door, a truck arrived carrying cement in which appellant Kundan was seated and Kundan thereafter calmly entered into the house, without being arrested by the police who were present, It is apparent that this witness has been won over by the informant and is falsely supporting him for ulterior reasons as he was a neighbour and trader in building materials like the appellant Kundan. The other two hostile witnesses P.W. 3 Maya Ram and P.W. 4 Babu Lal, have not said a word about this alibi. Even in the bail application dated 8.4.88 (in respect of the incident dated 24.6.87) preferred by the appellant Kundan Singh before the IInd Additional Sessions Judge, Saharanpur there is no mention about this alibi. The affidavits that have been got filed by the appellant on 16.10.87 including of the P.W.s Jai Shankar, Maya Ram, Diwan Singh. Sudhir Gupta and others only disclose that the witnesses deny their presence during the incident, and can give no reason why the police has given their names in the list of witnesses. They do not say a word about this alibi. It is thus apparent that this alibi which was faintly mentioned in Reply to question No. 15 in his 313 Cr.P.C. statement is a concoction and after thought and no credence can be attached to it.

No exaggerated devotion to the principle of benefit of doubt

50. It would be appropriate to close this discussion with this passage from paragraphs 20, 21 and 22 of Sucha Singh and Another Vs. State of Punjab, which stress the importance of keeping within bounds the principal of benefit of doubt for administering justice according to law;

20. Exaggerated devotion to the rule of benefit of doubt must not nurture fanciful doubts or lingering suspicion and thereby destroy social defence. Justice cannot be made sterile on the plea that It is better to let hundred guilty escape than punish an Innocent Letting guilty escape Is not doing justice according to law.

(See Gurbachan Singh Vs. Satpal Singh and others, Prosecution is not required to meet any and every hypothesis put forward by the accused (See State of U.P. Vs. Ashok Kumar Srivastava, A reasonable doubt is not an imaginary, trivial or merely possible doubt, but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case. If a case is proved perfectly, it is argued that it is artificial; if a case has some flaws inevitable because human beings are prone to err, it is argued that it is too imperfect. One wonders whether in the meticulous hypersensitivity to eliminate a rare innocent from being punished, many guilty persons must be allowed to escape. Proof beyond reasonable doubt is a guideline, not a fetish. (See Inder Singh and Another Vs. The State (Delhi Administration), Vague hunches cannot take place of judicial evaluation. "A Judge does not preside over a criminal trial, merely to see that no innocent man is punished. A Judge also presides to see that a guilty man, does not escape. Both are public duties." (Per Viscount Simon in *Stirland v. Director of Public Prosecution* 1944 AC 315 (PC) quoted in *State of U.P. Vs. Anil Singh*, Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than truth.

21. In matters such as this, it is appropriate to recall the observations of this Court in *Shivaji Sahabrao Bobade and Another Vs. State of Maharashtra*,

...The dangers of exaggerated devotion to the rule of benefit of doubt at the expense of social defence and to the soothing sentiment that all acquittals are always good regardless of justice to the victim and the community, demand special emphasis in the contemporary context of escalating crime and escape. The judicial instrument has a public accountability. The cherished principles or golden thread of proof beyond reasonable doubt which runs through the web of our law should not be stretched morbidly to embrace every hunch, hesitancy and degree of doubt...

...The evil of acquitting a guilty person light heartedly as a learned author *Clanville Williams* in "proof of guilt" has sapiently observed, goes much beyond the simple fact that, just one guilty person has gone unpunished. If unmerited acquittals become general, they tend to lead to a cynical disregard of the law, and this in turn leads to a public demand for harsher legal presumptions against indicated "persons" and more severe punishment of those who are found guilty. Thus too frequent acquittals of the guilty may lead to a ferocious penal law, eventually eroding the judicial protection of the guiltless...

...a miscarriage of justice may arise from the acquittal of the guilty no less than from the conviction of the innocent...

22. The position was again illuminatingly highlighted in *State of U.P. Vs. Krishna Gopal and Another*, Similar view was also expressed in *Gangadhar Behera and Others Vs. State of Orissa*,

(Emphasis added)

CONCLUSIONS:

51. In the light of our observations and conclusions hereinabove, it is our considered view that the prosecution has succeeded in establishing the case against appellant Kundan Singh beyond reasonable doubt, There is little reason to doubt the complicity of appellant Kundan Singh on the basis of the evidence of informant Shiv Shankar Mahadeo, PW 1, who was an old man who resided in the same house with his wife (the deceased), who were being subjected to pressure to vacate the house by the appellant and whose evidence we have scrutinized with the greatest care and circumspection. It was a broad day light incident in the room where they resided, There was no question of any confusion about the Identity of the appellant, No one else could have committed the murder and there was also no reason for the informant to have falsely implicated the appellant exonerating the real assailant, if he was any other. The medical evidence corroborates the version of assault by axe wielded by appellant Kundan, Even the hostile witnesses have admitted more or less that the incident took place In the place and manner alleged in the FIR by the informant, although for ulterior reasons they are not prepared to nominate the appellant.

52. The appellant himself admits that in his 313 Cr.P.C. statement that the deceased was murdered at the house at the time alleged. Although he has weakly sought to raise the plea of alibi which he has not been able to substantiate. The appeal against Kundan therefore fails and it is dismissed.

53. However so far as the appellant Smt. Sundara is concerned, there appears to be some confusion about her name, and it was mentioned as Neelam in the FIR. The post mortem report does not impute any Injury to her, and she was only assigned the role of catching hold. As it was Kundan Singh who was mainly aggrieved because the informant was defaming him, and who must have been pressing for vacation of the house, the appellant Sundara Devi may not have caught hold of the deceased Smt Parvati @ Kheemu. Moreover two accused persons, Dev Kumar and Ramesh Chand who were assigned roles of catching hold of the informant Shiv Shankar, have been acquitted, although they were outsiders. Hence we think that the prosecution has not been able to establish the case against the appellant Sundara, who is therefore being given the benefit of doubt.

54. For the same reason, Narendra @ Teetu, the son of the appellants Kundan and Sundara who has been assigned even a lesser role than Sundara (and similar role as the acquitted accused Dev Kumar and Ramesh Chand of catching hold of Shiv Shankar) is also given the benefit of doubt.

REJECTION OF APPLICATION FOR EXAMINING APPELLANT KUNDAN u/s 315 CR.P.C.

55. Before parting we must mention that a belated application dated 19.7.05 has been moved by the appellant Kundan Singh before this Court seeking to examine himself under 315 Cr.P.C for deposing on oath about his alibi. Significantly the

appellant moved no such application to examine himself under oath u/s 315 Cr.P.C. before the trial court at the appropriate stage after his statement u/s 313 Cr.P.C., nor as we have noted above was any effort made by the appellant to examine any witness before the trial court to prove his alibi. It has wrongly been mentioned in paragraphs 1 and 2 of the affidavit supporting this application u/s 315 Cr.P.C. that the witnesses have filed affidavits supporting the plea of alibi, i.e. of the presence of the appellant Kundan in Saharanpur on the date of incident (24.6.87). The affidavits of Jai Shankar and Diwan Singh dated 16.10.87 annexed as annexures 1 and 2 to this application contain no such averment of the appellant's alibi, The application is accordingly rejected as devoid of merit.

56. In this view of the matter the Criminal Appeal preferred by the appellants Sundara @ Neelam and Narendra @ Teetu is allowed, and their conviction awarded by the trial court is set aside. They are on bail. They need not surrender to their bail and their bail bonds are discharged.

57. The appeal preferred by appellant Kundan Singh is dismissed. He is on bail. His bail bonds stand cancelled. He should be taken into custody forthwith to serve out the sentence awarded to him by the trial court.