

(2009) 07 AHC CK 0315

In the Allahabad High Court

Case No : Criminal A. No. 1809 of 2007 and Ref. No. 11 of 2007

Pradeep and Another

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 17-07-2009

Acts Referred:

Arms Act, 1959 — Section 25
Criminal Procedure Code, 1973 (CrPC) — Section 311, 392
Evidence Act, 1872 — Section 27, 6
Penal Code, 1860 (IPC) — Section 302, 34

Citation : (2010) 1 ACR 313

Hon'ble Judges : Imtiyaz Murtaza, J

Bench : Single Bench

Advocate : P.N. Mishra and Apul Mishra, for the Appellant; K.N. Bajpai, A.G.A., for the Respondent

Final Decision : Dismissed

Judgement

Imtiyaz Murtaza, J.—Present appeal has come up before me vide order dated 23.2.2009, passed by Hon. C.J. upon a reference being made u/s 392, Code of Criminal Procedure. It would appear that the aforesaid appeal was heard by the Division Bench consisting of Hon. S.S. Kulshrestha and Hon. B.A. Zaidi, JJ. and the judgment was reserved on 6.5.2008. Subsequently, on account of Hon. Judges being divided in opinion, both the Hon. Judges wrote their separate judgments in the appeal which are placed before me for my opinion u/s 392, Code of Criminal Procedure.

2. The aforesaid appeal was preferred against the judgment and order dated 24.2.2007 rendered by Sri. Ashok Pathak, Addl. Sessions Judge, Muzaffarnagar in S.T. No. 886 of 2006, whereby Appellants Pradeep and Saranvir were convicted u/s 302, I.P.C. and were awarded the death penalties.

3. Upon the matter being referred to me for opinion u/s 392, Code of Criminal Procedure. I have heard Sri. P.N. Mishra learned senior counsel appearing for the

accused-Appellant and also learned Government Advocate for the State at prolix length and have also been taken through the entire record including judgment rendered by both the Hon. Judges.

4. In order to appreciate the view points in both the judgments, it would be useful to set out abridged version of the prosecution case. The occurrence is stated to have occurred on 7.7.2006 in the Court premises. The author of the F.I.R. is constable Raj Pal Singh who had been deployed from Police Lines, Muzaffarnagar for duty of escorting the under-trials from lock up to the Court and vice versa. It is alleged that on the day of occurrence, he alongwith A.P. Vijendra Singh was escorting accused persons Jaivir, Pappu, Mahboob, Dinesh from F.T.C. Court to lock up situated in the Court premises. On way to lock up, it is alleged, the constables heard the pattering and when they swivelled their heads to see as to what was the matter, they saw that accused Sharanvir son of Tikam Gurjar was wielding country made pistol and targeting under trial Dinesh, he opened fire which hit Dinesh and he staggered down on the ground. Before he could load the country made pistol, the accompanying constable Vijendra Singh swung into action and one of the accused namely Pradeep was pinned down and he was overcome and was taken into custody alongwith country made pistol and live cartridge. The other accused person namely Sharanvir managed to escape. In the meanwhile, police force of Civil Lines, Police Lines descended at the scene of occurrence. He guided the reinforcement towards the side where Sharanvir had escaped. The injured under-trial was removed to hospital. It is further alleged that the apprehended accused-Pradeep was entrusted to the custody at P.A.C. camp and the other under-trials which he was escorting was taken to lock-up. It is further alleged that when the injured Dinesh was brought to hospital by S.I. Devendra Singh Bisht he was declared "brought dead." Upon written report, the case was registered at Case Crime No. 694 of 2006, u/s 302, I.P.C. against accused Sharanvir and Pradeep accused while another case was registered at Case Crime No. 695 of 2006 u/s 25, Arms Act.

5. In the case prosecution examined in all 7 witnesses out of which P.W. 1 Constable Raj Pal Singh, P.W. 2 Vijendra Singh are police constables who at the relevant time were deployed for duty at the lock-up situated in the civil courts campus to escort under-trials including the deceased from lock-up to the Courts and vice versa. P.W. 3 is Satya Prakash Sharma. At the relevant time, he was posted as Tahsildar Sadar and on the day of occurrence, upon being directed by City Magistrate, he was assigned the work of preparing inquest. P.W. 4 is S.I. Rakesh Kumar who investigated the case. P.W. 5 is Dr. Rajesh Singh who conducted autopsy on the dead body. P.W. 7 is constable Tej Pal who was posted at the relevant time as constable Moharrir at Civil Lines, Police Station and prepared the chik report.

6. The autopsy was conducted by Dr. Rajesh Singh who found the following injuries on the person of the deceased Dinesh:

(1) Size 2.5 cm. x 1.5 cm. x chest cavity deep at back side of chest Rt. side 8

cm. from Rt. scapula region lower angle .05 cm. from Rt. side midline. Margins are inverted, wound is circular. Edges are contused. Blackening present in direction of wound underlying 5, 4, 6th rib is fractured. The Rt. lung is ruptured (lacerated). One plastic wad recovered from the wound. Metallic pellets No. eleven (11) are recovered from the wound.

(2) Multiple Pallet lying in an area of 34 cm. x 10 cm. on inner aspect of right thigh and leg. Size 0.5 mm. x 0.5 mm. Black and Bluish in colour. Pellet metallic one received from the 2 sites of pellet injury. These are surgical and muscle deep.

(3) Abrasion size 0.3 cm. x 0.1 cm. on left knee.

It was also opined by the Doctor that the death of the deceased might have been caused on account of fire arm injury on vital part.

7. I have traversed upon both the judgments. From a scrutiny of judgment rendered by his Lordship (Hon. S.S. Kulshrestha, J.), it transpires that the learned Judge relied upon the deposition of the two ocular witnesses namely Raj Pal Singh P.W. 1 and Vijendra Singh P.W. 2. These two witnesses are police constables and at the time of occurrence they were escorting the under-trials including the deceased from the Fast Track Court to the lock up situated in the Court campus. The learned Judge dealt with the deposition of both the witnesses at prolix length and relied upon their testimonies as being natural witnesses being on duty. It is further observed that the witnesses had not made any exaggeration to establish the prosecution case. It is further observed that the witnesses had given the account of the incident and stated that they had seen both the accused persons opening fire. The learned Judge further observed that accused Sri. Pradeep was caught hold by them and the other accused namely Sharan Veer ran away from that place. Lastly, it was observed that both the witnesses namely Raj Pal Singh P.W. 1 and Vijendra Singh P.W. 2 were on duty and the deceased was shot dead when he was in their custody. In the light of the above discussion, the learned Judge converged to the conclusion that the witnesses cannot be excoriated as interested witnesses for furthering the prosecution version. The learned Judge also repelled the arguments that name of Sharan Veer Singh accused was interpolated under some pressure attended with further submission that he was not arrested on the spot and was not involved in the commission of the offence citing the instance that application for identification parade was rejected by the trial court seeing resistance from the side of the prosecution. The learned Counsel to prop up submission, also relied upon various decision including State of U.P. v. Shree Krishan 2005 (1) CAR 109 (SC) : 2005 (1) ACR 422 (SC) and Jadunath Singh and Another Vs. The State of U.P., The quintessence of both the aforesaid decision is that absence of test identification parade in all cases is not fatal. In connection with above submission, the learned Judge also relied upon decision of the Apex Court in Cr. Appeal No. 92 of 1956, Prakash Chand Sogani v. State of Rajasthan, decided on January 15, 1957. Ultimately the learned Judge observed that such not arranging of identification parade would not in the given circumstances of the case affect

the prosecution case. In connection with the argument that the witnesses had not occasion to have known the accused Sharan Veer Singh and for that reason the identification was claimed. The learned Judge referred to the deposition of witnesses in which it is clearly stated that Sharan Veer Singh was a hardened criminal facing as many as 18 cases and he used to be brought to lock up for being produced in the Court every now and then. It has also come in the evidence that since the witness was on lock up duty he came to know about the criminal antecedents of the accused. The learned Judge referring to the testimony of the witnesses observed that since the witness is in the police force and when a person having long criminal history and often visits lock ups due to his criminal cases, there is no reason to disbelieve the testimony of Sri. Raj Pal Singh P.W. 1 that he was well acquainted with the accused Sharan Veer Singh. The learned Judge also repelled the argument that evidence with regard to the recovery of the weapons and the cartridges and sending them to the Ballistic Experts in a sealed wrap has not been proved by the prosecution observing that there is no evidence to show that nobody was permitted to tamper with the seal. The learned Judge also observed that the fact remains that the Ballistic Expert found empty cartridges to have been shot from these recovered weapons. Attended with the finding that there is no cross-examination from the side of the accused to challenge the acceptability of the report of the Ballistic Experts. The learned Judge also repelled the arguments that it was a case of culpable homicide not amounting to murder and that the accused-Appellants cannot be convicted u/s 302, I.P.C. The learned Counsel also canvassed the point that the assailants had no intention to cause death. In connection with the argument the learned Judge observed that the intention of the assailants may well be inferred as the second fire was also made in that commotion and if the second fire missed the target or did not cause hurt at the vital part, it would not be construed that the assailants had no intention to cause death of the deceased. In ultimate analysis, the learned single Judge affirmed the conviction of both the accused but commuted the death penalty to imprisonment for life in so far as Appellant Sharan Veer Singh is concerned.

8. I have also scanned the judgment rendered by Hon. Mr. Justice B.A. Zaidi, J. The learned Judge observed in his judgment that the two eye-witnesses are police constables. The incident occurred at 10 O'clock in the day inside the civil court compound teeming with lawyers and litigants and there was apparently no dearth of witnesses who had seen the occurrence. Then the learned Judge posed the question why has no public witness been produced. The learned Judge further observed that it may be said that public witnesses were not willing to depose but then an effort should have been made and the Court should have been told that despite efforts no lawyer or litigant or other public witness was willing to come forward as a witness. There is not a word in the charge-sheet that any public witness was contacted or efforts were made to procure their testimony and there is nothing in the statement of Investigating Officer in the Court about the same. The learned Judge further observed that even if people

did not see the actual firing from pistol a large number of people would have naturally collected at the spot after the incident and P.W. 2 has admitted this fact in his statement in Court. Those witnesses, it is further observed could depose that they saw the deceased bleeding in an injured condition and that the accused Pradeep was being held as culprits by the police men. This evidence it is also observed, could have been admissible as evidence of res gestae u/s 6 of the Evidence Act. The learned Judge also observed that there is no indication from the side of the prosecution that any effort was made to procure the testimony of any such witnesses. In Para 11, the learned Judge observed that there is strange that when such an incident takes place where there are hundreds of people assembled not a single public witness has been produced and nothing has been shown that any effort was made in this direction. This is a very disquieting feature which leaves the mind very dissatisfied. In Para 12 it is observed that leaving aside other witnesses, there were three prisoners who were being carried to lock up alongwith the deceased when the incident occurred. They are natural witnesses of the occurrence and their presence is beyond doubt. They have also not been examined and the prosecution has not given any reason good bad or in different as to why they were not examined. In Para 15 the learned Judge observed that Judge has also not played his part in the case and has been a passive observer of the evidence. The role of a Judge in a criminal trial is not that of a referee blowing a whistle only when there is foul. He has to be an active participant in the proceedings because the desideratum is the discovery of truth. If the prosecution fails to produce witnesses the Judge has the authority to summon them and that is what Section 311, Code of Criminal Procedure : is all about. Ultimately the learned Judge relied upon decision of the Apex Court in Zahira Habibulla H. Sheikh and Another Vs. State of Gujarat and Others, , the learned Judge observed that we have naturally refrained from making any comments on the evidence in the case, because in the circumstances the only appropriate course to secure the ends of justice would be to remand the case for retrial so that other witnesses may be summoned and examined.

9. It would thus, transpire that the learned Judge laying emphasis on decision of Zahira Sheikh, directed remand of the case for retrial so that other witnesses may be summoned and examined.

10. In Para 9 of its dissenting judgment, His Lordship (Hon. B.A. Zaidi), observed that: "there are two eye-witnesses of the occurrence and both are police constables. The incident occurred at 10 O'clock in the day inside the civil court compound, teeming with lawyers and litigants. There was apparently, therefore no dearth of witnesses who had seen the occurrence. Why then has no public witness been produced. It may be said that public willing were not willing to depose but then an effort should have been made and the Court should have been told that despite efforts no lawyer or litigant or other public witness was willing to come forward as a witness." It is in the perspective of above observation that the learned single Judge preferred to dissent and rendered separate judgment directing to remand the case for retrial. The learned Judge

ostensibly disinclined to evaluate the evidence by reason of witnesses being police personnel and stressed the point that the prosecution did not endeavour to secure evidence of independent public witnesses who must have assembled and witnessed the occurrence.

11. In the above perspective, in order to appreciate the rival view contained in the judgments under scrutiny, I have independently scrutinised the oral and documentary evidence appearing on record.

12. The focus rests upon the testimonies of the two ocular witnesses who happen to be the police personnel and in my opinion, the fate of the case hinges upon their testimonies and therefore, to begin with, I embark upon appreciation of their evidence. P.W. 1 Raj Pal Singh and P.W. 2 Vijendra Singh were deployed for lock up duty in the lock- up situated within the precincts of civil court campus and their duty was to escort the under-trials from lock-up to the Courts. On the day of occurrence at about 12.50 p.m. he with constable Vijendra Singh had escorted four under-trials including Dinesh (deceased) for being produced before the Fast Track Court No. 2. When they were all on way back to lock-up, the witness heard the pattering sound of foot stems from behind upon which he swivelled his head to look back, he saw accused Sharan Veer and Pradeep carrying with them country made pistol who fired targeting Dinesh. As a result of fire arm injury, Dinesh staggered down on the ground. It is further stated that the accused persons attempted to reload but in the meantime P.W. 2 swung into action and accused-Pradeep was pinned down. The second assailants Sharan Veer managed to escape from that place. It is further deposed that search of accused Pradeep yielded one country made pistol 12 bore, two live cartridges and empty cartridge. Thereafter, the apprehended assailant was entrusted to the custody of P.A.C. personnels and the witness escorted other under-trials to the lock-up. The injured under-trial Dinesh was rushed for medical help where he was declared dead by the Doctor. The witness also proved report Ka-1 which was lodged by him at the police station. The witness also deposed that the recovery memo of country made pistol and cartridges (Ex. Ka-2) was also drawn by him. The witness further deposed that accused Sharan Veer Singh was known to him from before as he was facing several trials at the relevant time and when he was on the lock-up duty, many a times he escorted him to Court. The other material Exhibits were also proved by the witness.

13. The deposition of P.W. 2 Vijendra Singh is also on the same lines. He is the witness who swung into action and caught hold of the assailants Pradeep. He deposed that he heard that someone was lurking behind and when he swivelled his head back, he saw the accused persons armed with country made pistol and they shot fire at the under-trial. He deposed that accused Pradeep was caught hold at the spot and search of his body yielded one country made pistol 12 bore, one empty cartridge and two live cartridges. As regards Sharan Veer Singh it was deposed that the said accused managed to escape.

14. In so far as testimonies of the witnesses aforesaid are concerned, their

depositions do not leave any room for doubt about their presence at the scene of occurrence or at the relevant time, their escorting of under-trials after their production in Court No. 2. It has not been disputed that they were deployed on duty from Police Lines for lock-up duty. Indeed, it was part of their duties to escort the under-trials from lock-up to Court and vice versa. Merely because they are police personnels, their testimonies cannot be thrown above board. The learned single Judge (Hon. S.S. Kulshrestha, J.) in his judgment rightly believed their testimonies as being cogent and credible and inspires confidence. I fully concur with the finding of the learned Judge that the prosecution version is amply corroborated by the medical evidence and there appears to be no reason to jettison the evidence of these two ocular witnesses. The learned Judge also rightly held that both the witnesses are not the partisan witnesses. The learned Judge also adjudged them as independent witnesses.

15. In *State of Gujarat Vs. Anirudh singhh and another*, the Apex Court was seized of somewhat similar controversy. It was a case of murder of member of Legislative Assembly. The M.L.A. happened to be present at the flag hoisting ceremony and at that time, the accused fired at the M.L.A. The P.W. 2, P.W. 58 and P.W. 46 were police officers and they happened to be present at the scene by virtue of their duty. The Apex Court in ultimate analysis converged to the view that merely because they were police officers, their evidence cannot and must not be rejected out-rightly as unreliable or unworthy of acceptance. It requires to be subjected to careful evaluation like any other witness of occurrence.

16. In *Karamjit Singh Vs. State (Delhi Administration)*, , the Apex Court held the view that: "the testimony of police personnel should be treated in the same manner as testimony of any other witness and there is no principle of law that without corroboration by independent witnesses their testimony cannot be relied upon. The presumption that a person acts honestly applies as much in favour of a police personnel as of other persons and it is not a proper judicial approach to distrust and suspect them without good grounds. It will all depend upon the facts and circumstances of each case and no principle of general application can be laid down.

17. In *Kalpnath Rai Vs. State (through CBI)*, , the Apex Court held the view as under:

There can be no legal proposition that evidence of police officers, unless supported by independent witnesses, is unworthy of acceptance. Non-examination of independent witness or even presence of such witness during police raid would cast an added duty on the Court to adopt greater care while scrutinising the evidence of the police officers. If the evidence of the police officer is found acceptable it would be an erroneous proposition that the Court must reject the prosecution version solely on the ground that no independent witness was examined. In *Pradeep Narayan Madgaonkar*, to which one of us (Mukherjee, J.), was a party, the aforesaid position has been stated in unambiguous terms, the relevant portion of which is extracted below: Pradeep

Narayan Madgonkar etc. etc. Vs. State of Maharashtra,

Indeed, the evidence of the official (police) witnesses cannot be discarded merely on the ground that they belong to the police force and are, either interested in the investigating or the prosecuting agency but prudence dictates that their evidence needs to be subjected to strict scrutiny and as far as possible corroboration of their evidence in material particulars should be sought. Their desire to see the success of the case based on their investigation, requires greater care to appreciate their testimony.

18. In *State Government of N.C.T. of Delhi v. Sunil* (2001) 1 SCC 652 : 2001 (1) ACR 170 (SC), the Apex Court held the view as under:

We feel that it is an archaic notion that actions of the police officer should be approached with initial distrust. We are aware that such a notion was lavishly entertained during the British period and policemen also knew about it. Its hangover persisted during post-independent years but it is time now to start placing at least initial trust on the actions and the documents made by the police. At any rate, the Court cannot start with the presumption that the police records are untrustworthy. As a proposition of law the presumption should be the other way around. That official acts of the police have been regularly performed is a wise principle of presumption and recognised even by the Legislature. Hence, when a police officer gives evidence in Court that a certain article was recovered by him on the strength of the statement made by the accused it is open to the Court to believe the version to be correct if it is not otherwise shown to be unreliable. It is for the accused, through cross-examination of witnesses or through any other materials, to show that the evidence of the police officer is either unreliable or at least unsafe to be acted upon in a particular case. If the Court has any good reason to suspect the truthfulness of such records of the police the Court could certainly take into account the fact that no other independent person was present at the time of recovery. But it is not a legally approvable procedure to presume the police action as unreliable to start with, nor to jettison such action merely for the reason that police did not collect signatures of independent persons in the documents made contemporaneous with such actions.

22. In this case, the mere absence of independent witness when P.W. 17 recorded the statement of A-2 Ramesh and the knickers were recovered pursuant to the said statement, is not a sufficient ground to discard the evidence u/s 27 of the Evidence Act.

19. Sri. P.N. Mishra learned Counsel argued before me that there was suppression of genesis of the dispute and the Appellants have not been attributed any motive. This argument was pressed into service before the Division Bench aforesaid and the said argument has been dealt with at prolix length in the judgment of his Lordship (Hon. S.S. Kulshrestha). In connection with this argument, the learned Judge (Hon. S.S. Kulshrestha) observed that

suffice it to mention that motive is not always capable of precise proof, if proved, may only lend additional support to strengthen the probability of commission of the offence by the person accused but absence of motive does not ipso facto warrant an acquittal. Reliance was also placed in the case of *Sardul Singh v. State of Haryana* (2002) 8 SCC 72 : 2003 (1) ACR 768 (SC). The learned Judge also observed that further there is direct evidence on record showing the complicity of the accused-Appellants and on non-referring of the motive would have no significance. Nothing has been pressed into service to differ from the view articulated by the learned Judge. Besides the case cited in the judgment, I feel called to refer to the observation of the Apex Court in *State of Gujarat v. Anirudh Singh and Anr.* (supra). It was argued in that case that the accused of that case had no motive and prosecution failed to prove it. The Apex Court observed that motive gets locked upon into mind of the makers and it is difficult to fathom it. The Apex Court further observed that if motive is proved that would supply a chain of links but absence thereof is not a ground to reject.

20. The next contentious point propounded in the judgment by his Lordship (Hon. B.A. Zaidi, J.) is that the prosecution did not strive to produce independent witnesses. In number of decisions including decision in *Appabhai and Another Vs. State of Gujarat*, , the consistent view of the Apex Court has been that failure of prosecution to examine independent witness does not make out a case to throw out the prosecution case. In taking that view, the Apex Court alluded that: "Civilized people are generally insensitive when a crime is committed even in their presence. They withdraw both from the victim and the vigilante. They keep themselves away from the Court unless it is inevitable. They think that crime like civil dispute is between two individuals or parties and they should not involve themselves. This kind of apathy of the general public is indeed unfortunate but it is there everywhere whether in village life, town or cities. One cannot ignore this handicap with which the investigating agency has to discharge its duties. The Court, therefore, instead of doubting the prosecution case for want of independent witness must consider the spectrum or the prosecution version and then search for the nugget of truth with due regard to probability if any suggested by the accused."

21. Similar is the situation obtaining in the present case. When the assailants struck, there must have been assemblage of people but the probability cannot be discounted that soon after the occurrence, the people must have dispersed. The assemblage in the Court campus is mostly composed of clients and lawyers and with worries haunting their minds about their own cases, they cannot be expected to come forward and offer to be cited as witness of the occurrence. In this situation, it is not difficult to visualise how the prosecution could manage to secure independent evidence.

22. Similarly, in *Birendra Rai and Others Vs. State of Bihar*, the quintessence of what has been held by the Apex Court is that the prosecution case cannot be rejected merely on account of failure to examine all witnesses who may have

witnessed the occurrence.

23. Likewise in *Ashok Kumar Chaudhary and Others Vs. State of Bihar*, , the Apex Court quintessentially held that non-examination of public witness by itself does not give rise to adverse inference against prosecution. Para 7 of the said decision being germane is excerpted below:

7. We are not impressed with the argument. Though it is true that the incident having taken place near the market around 6 p.m. on 17th July, 1988, the prosecution should have attempted to secure public witnesses who had witnessed the incident, but at the same time one cannot lose sight of the ground realities that the members of the public are generally insensitive and reluctant to come forward to report and depose about the crime even though it is committed in their presence. In our opinion, even otherwise it will be erroneous to lay down as a rule of universal application that non-examination of a public witness by itself gives rise to an adverse inference against the prosecution or that the testimony of a relative of the victim, which is otherwise creditworthy, cannot be relied upon unless corroborated by public witnesses. Insofar as the question of creditworthiness of the evidence of relatives of the victim is concerned, it is well-settled that though the Court has to scrutinize such evidence with greater care and caution but such evidence cannot be discarded on the sole ground of their interest in the prosecution. The relationship per se does not affect the credibility of a witness. Merely because a witness happens to be a relative of the victim of the crime, he/she cannot be characterized as an "interested" witness. It is trite that the term "interested" postulates that the person concerned has some direct or indirect interest in seeing that the accused is somehow or the other convicted either because he had some animus with the accused or for some other oblique motive.

24. In the conspectus of the above decision, it cannot be said that the prosecution case suffers from serious infirmity as no attempt is discernible that the prosecution endeavoured to secure independent witnesses.

25. Reverting to the view taken by Hon. B.A. Zaidi, J., leaning in favour of remand for re-trial, it may usefully be stated that if the evidence leaves the Court in any doubt as to the guilt of the accused, the Court is entitled to a verdict of not guilty. A re-trial may be ordered when the original trial has not been satisfactory for particular reasons. To exemplify if evidence had been wrongly rejected or the Court had refused to hear certain witness who should have been heard but re-trial cannot be ordered on the ground that the prosecution did not produce the proper evidence. In *Ukha Kolhe v. State of Maharashtra* AIR 1963 SC 1531, a Five Judges Bench of Apex Court quintessentially held that an order for re-trial of a criminal case is made in exceptional cases and not unless the appellate court is satisfied that the Court trying the proceeding had no jurisdiction to try it or that the trial was vitiated by serious illegalities or irregularities or on account of misconception of the nature of the proceedings and on that account in substance there had been no real trial

or that the prosecutor leading or tendering evidence material to the charge and in the interest of justice, the appellate court deems it appropriate having regard to the circumstances of the case that the accused should be put on his trial again. In the instant case, the learned Judge differing from the judgment and order of Hon. S. S. Kulshrestha, J. wrote separate judgment and passed the order of remand without quashing the proceeding ostensibly on the ground that the witnesses produced by the prosecution were police personnels. It would suffice to say that the testimony of a witness should be judged on its own merits and the Court should not draw an adverse inference from the reason of his being a Government servant or in the employment of the police. There is no rule of presumption against a police officer that his testimony is to be regarded as of little value. The presumption that a person acts honestly applies as much in favour of a police officer as of other persons and it is not a judicial approach to distrust and suspect him without good grounds therefor. It can only run down the prestige of the police administration. The rule of practice is that when a case hinges on the testimony of police officials alone, it should not be ordinarily accepted without a very careful scrutiny. Having analysed the testimonies and materials on record, it brooks no dispute that the trial court after careful scrutiny of evidence on record, placed credence thereon and in my considered view, the testimonies of police officials in juxtaposition of allied circumstances do inspire confidence.

26. The next argument urged before me relates to sentencing part. It has been urged that in the facts and circumstances, when the crime has been committed with utmost daredevilry besides being diabolical and gruesome, the sentence of death was the appropriate sentence. Learned Judge (Hon. S.S. Kulshrestha, J.) dealt with the argument on the sentencing point. It was argued before the learned Judge that the deceased himself was a criminal and if the guilt is found to have been established, it was the outcome of rivalry between two groups for which the extreme penalty would not be justified. Dealing with the above argument, the learned Judge observed that there is obviously no dispute that the deceased was also involved in criminal cases and such criminal antecedents of the deceased would not warrant extreme penalty to the Appellants and it is in this backdrop that the learned Judge commuted the death sentence to one of imprisonment for life.

27. In connection with this submission, we may usefully advert to the guidelines laid down in stream of decisions commencing from Bachan Singh Vs. State of Punjab, and thereafter reiterated in subsequent decisions namely Machhi Singh and Others Vs. State of Punjab, and Devender Pal Singh Vs. State National Capital Territory of Delhi and Another, The guidelines laid down in Bachan Singh's case (supra) may be culled out as under:

- (i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.
- (ii) Before opting for the death penalty, the circumstances of the offender also

require to be taken into consideration alongwith the circumstances of the crime.

(iii) Life imprisonment is the rule and death sentence is an exception. In other words, death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

(iv) A balance-sheet of aggravating and mitigating circumstances has to be drawn up and in doing so, the mitigating circumstances have to be accorded full weightage and just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

28. In *Machhi Singh and Others Vs. State of Punjab*, the Supreme Court expanded the "rarest of rare" formulation beyond the aggravating factors listed in *Bachan Singh* to cases where the "collective conscience" of a community may be shocked. But the Bench in this case underlined that full weightage must be accorded to the mitigating circumstances in a case and a just balance had to be struck between aggravating and mitigating circumstances. It was observed that: "every member of the community is able to live with safety without his or her own life being endangered because of the protective arm of the community and on account of the rule of law enforced by it.... Every member of the community owes a debt to the community for this protection. When ingratitude is shown instead of gratitude by killing, a member of the community which protects the murderer himself from being killed, or when the community feels that for the sake of self-preservation, the killer has to be killed, the community may well withdraw the protection by sanctioning the death penalty. But the community will not do so in every case. It may do so "in rarest of rare cases" when its collective conscience is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty. The community may entertain such a sentiment when the crime is viewed from the platform of the motive for, or the manner of commission of the crime or the anti-social or abhorrent nature of the crime."

29. In *Dalbir Singh and Others Vs. State of Punjab*, , the Apex Court had observed as under:

Counting the casualties is not the main criterion for sentencing to death, nor recklessness in the act of murder. The sole focus on the crime and the total farewell to the criminal and his social personal circumstances mutilate sentencing justice.

30. In *Devender Pal Singh's* case (supra), the Apex Court regard being had to both the cases supra, expanded the formulation for imposing extreme penalty. The guidelines may be abstracted below as under:

(1) When the murder is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community.

(2) When the murder is committed for a motive which evinces total depravity and meanness e.g. Murder by hired assassin for money or reward, or cold blooded murder for gains of a person vis-a-vis whom the murderer is in a dominating position or in a position of trust : or murder is committed in the course for betrayal of the motherland.

(3) When murder of a member of a Scheduled Caste or minority community etc. is committed not for personal reasons but in circumstances which arouse social wrath : or in cases of bride burning or dowry deaths or when murder is committed in order to re-marry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

(4) When the crime is enormous in proportion. For instance when multiple murders, say of all or almost all the members of a family or a large number of persons or a particular caste, community, or locality are committed.

(5) When the victim of murder is an innocent child or a helpless woman or old or infirm person or a person vis-a-vis whom the murderer is in a dominating position, or a public figure generally loved and respected by the community.

31. It would also be useful to refer to a recent decision of the Apex Court in the case of *Desh Raj v. State of Punjab* (2008) 3 SCC 262 : 2008 (1) ACR 144 (SC). While dealing with the facts of the case the Apex Court held that the trial court and the High Court have persuaded themselves to award the death penalty by considering only the aggravating circumstances and to an extent, carried away by the fact that three died and four were injured. The mitigating circumstances have not been given their due importance. On a careful balancing of the aggravating and mitigating circumstances, we find that in spite of the gravity of the crime involving triple murder, the aggravating circumstances noticed and enumerated by the High Court do not outweigh much-less overwhelmingly the mitigating circumstances. This is not that rarest of rare case which invites death penalty.

32. In the above conspectus, I fully concur with the view that the present case does not fall within the category of rarest of the rare cases and the learned Judge while maintaining conviction of the Appellants u/s 302/34, I.P.C. rightly commuted the death sentence to one of imprisonment for life with a fine of Rs. 10,000 and also rightly affirmed the conviction and sentence of the Appellants awarded by the trial court u/s 25, Arms Act with the default stipulations.

33. In the above perspective, I am of the view that the finding recorded by learned single Judge His Lordship (Hon. S.S. Kulshrestha, J.) is based on correct appreciation of the evidence and the prosecution case and his Lordship rightly held that the prosecution version finds corroboration from the two ocular

witnesses whose testimonies besides being cogent and credible, inspires confidence and is also consistent with the medical evidence. The view held by His Lordship (Hon. B.A. Zaidi, J.), that the matter be remanded for re-trial does not appear to be plausible as the evidence of the two witnesses is natural, cogent and convincing and inspires confidence and the same is also consistent with the medical evidence on record.