

(2015) 10 AHC CK 0096
In the Allahabad High Court
Case No : Capital Cases No. 891 of 2010

Raju Maurya and Others

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 01-10-2015

Acts Referred:

Arms Act, 1959 — Section 25
Criminal Procedure Code, 1973 (CrPC) — Section 173(2), 366, 428
Evidence Act, 1872 — Section 27
Penal Code, 1860 (IPC) — Section 302, 307, 34, 504, 506

Citation : (2015) 10 AHC CK 0096

Hon'ble Judges : Surendra Vikram Singh Rathore and Raghvendra Kumar, JJ.

Bench : Division Bench

Advocate : A. Kumar Srivastava, Dileep Kumar, Rajeev Gupta and Upendra Kumar Mishra, for the Appellant; Amit Mishra and Jag Narain, for the Respondent

Judgement

Raghvendra Kumar, J.—Heard Sri Dileep Kumar, learned Senior Counsel for the accused-appellants, Sri Akhilesh Singh learned G. A., Sri Narendra Kumar Singh, learned A. G. A. for the State of U. P. as well as Sri Amit Mishra, learned counsel for the complainant and perused the record.

2. The instant capital case appeal is directed against the judgment and order dated 3.2.2010 passed by Additional Sessions Judge, Court No. 2, Bareilly in Sessions Trial No. 943 of 2008 (State v. Raju Maurya @ Rajiv & Anr) arising out of Case Crime No. 1423 of 2007, registered u/s. 302 /34 , 504 , 506 IPC at P.S. Subhash Nagar, District-Bareilly whereby the accused-appellants Raju Maurya @ Rajiv and Sanjay Maurya @ Rajiv have been convicted for the offence u/s. 302 /34 IPC and have been awarded death sentence (to be hanged till death). Both the accused-appellants were also convicted for the offences u/s. 504 & 506 IPC, but no sentence was awarded as they were awarded death sentence for the offence u/s. 302 /34 IPC as mentioned above. In Sessions Trial No. 944 of 2008 (State v. Raju Maurya @ Rajiv & Anr) arising out of Case Crime No. 1486 of 2007, registered u/s. 25 of Arms Act at P.S. Subhash Nagar, District-Bareilly, vide

common judgment dated 3.2.2010, the trial Court had convicted the accused-appellants Raju Maurya @ Rajiv and Sanjay Maurya @ Rajiv for the offence u/s.25 of Arms Act, but no sentence was awarded since, the above named accused-appellants were awarded death sentence for the offence u/s. 302 /34 IPC in Sessions Trial No. 943 of 2008.

3. A reference has been moved by the learned trial Court to this Court under Section 366 Cr. P. C. for confirmation of the death sentence.

4. The appeal as well as the reference, both are directed against the common judgment and order dated 3.2.2010 passed in Sessions Trial No. 943 of 2008 arising out of Case Crime No. 1423 of 2007, registered u/s. 302 /34 , 504 , 506 IPC at P.S. Subhash Nagar, District-Bareilly and Sessions Trial No. 944 of 2008 arising out of Case Crime No. 1486 of 2007, registered u/s. 25 of Arms Act at P.S. Subhash Nagar, District-Bareilly, hence, are being disposed of by a common judgment.

5. The factual matrix of the case is as follows:--

"The FIR of this case was lodged at P.S. Subhash Nagar by informant-complainant Damodar Swaroop, son of Late Puran Prasad, R/o- Mohalla. Nekpur, Galla Mandi, Bareilly, the father of deceased on 10.10.2007 at 19.10 hours with respect to an incident that took place on 10.10.2007 at 5.00 pm, against accused Raju Maurya and accused Sanjay @ Rajiv. The FIR was initially registered at Case Crime No. 1423 of 2007 u/s. 307 , 504 , 506 IPC. According to FIR, son of informant namely, Akhilesh Kumar (deceased) was doing business of providing dish-cable connection to people. Accused-appellant Raju Maurya s/o Late Nathulal Maurya illegally obtained the cable connection from the dish-cable for which Akhilesh (deceased) lodged a complaint with the family members of accused-appellant Raju Maurya, but he neither removed the illegal connection nor, paid the rent for cable connection. On 10.10.2007, Akhilesh (informant's son) along with his friend Amit Yadav (deceased) s/o Sheeshpal Yadav, r/o Nekpur, Galla Mandi, went to the house of Raju Maurya for demanding the rent of dish connection. As Akhilesh (deceased) demanded the rent, accused-appellant Raju Maurya got furious and he came out of his house along with his nephew (bhanja) Sanjay Maurya @ Rajiv and started abusing him and with an intention to kill fired two shots. Informant's son sustained injuries on his head and another bullet hit on the abdomen of his friend Amit Yadav (deceased) who happens to be the son of Sheeshpal, scribe of the FIR. Informant's son and his friend Amit, both in the injured condition rushed towards their houses. Both the injured persons were chased by accused-appellants Raju Maurya and Sanjay @ Rajiv. The accused-appellants continued to fire while chasing. Because of such firing the people of the vicinity were terrified and confined themselves inside their houses. They also closed the doors and windows of their houses. There was chaos at the place. Akhilesh and his friend Amit were somehow rescued by witnesses Ritesh Kumar s/o Rajendra Singh, r/o Puranaganj, Pilibhit and Hitesh Rathore s/o Late Ashok Kumar, r/o Nekpur, Galla Mandi (both eye witnesses

named in the FIR). The written report was scribed by Sheeshpal Yadav s/o Late Brajlal Maurya, R/o Nekpur, Galla Mandi, P.S. Subhash Nagar, District-Bareilly, who is the father of deceased Amit Yadav. Both the injured persons, were taken to the hospital. After registration of the case, the investigation proceeded."

6. The deceased Akhilesh had undergone treatment at Ganga Charan Hospital and the deceased Amit Yadav had undergone preliminary treatment at Siddhi Vinayak Hospital. Akhilesh died on 17.10.2007 at Ruhailkhand Medical College and Amit Yadav died on 21.10.2007 at City Hospital, Delhi. The Investigating Officer prepared the site plan and recorded the statement of the witnesses. Formal documentation was done during the course of investigation. The investigation culminated into filing of police report under Section 173 (2) Cr. P. C. in the shape of charge sheet.

7. To substantiate the charges levelled against the accused-appellants, the prosecution has examined PW-1, Damodar Swaroop, informant, who has supported the prosecution case and has proved the execution of written report (Ext Ka.1). He has further stated that Akhilesh and Amit (both deceased) died in the hospital because of injuries sustained by them. PW-2, Hitesh Kumar (named in FIR as an eye witness) has also supported the prosecution case. Both these witnesses have claimed themselves to be the eyewitnesses of the incident. PW-3, Dr. Rakesh Dubey has conducted autopsy on the corpus of deceased Akhilesh on 18.10.2007 and has proved the execution of autopsy report. His testimony is confined to the factum of post mortem examination. He has noted following ante mortem injuries on the body of Akhilesh in autopsy report (Ext Ka.2):--

"(i) Stitched wound in "C" shape on the head right side, 31 cm size with open cut, 24 stitches present.

(ii) Stitched wound 1 cm in size, 3 cm behind the right ear, single stitch present.

(iii) Stitched wound 7 cm in size. Just lateral to right eye, 2.5 cm anterior to right ear with 5 stitches.

(iv) Contusion 7 cm x 5 cm, 3cm below right ear on the neck

(v) Three abrasions in front of right shoulder 0.2 cm x 0.2 cm all 2cm apart in "... " shape

(vi) Contusion 6 cm x 8 cm at the back of shoulder right"

8. PW-4, Rahat Ali Khan has proved the execution of chik FIR and the relevant entry in the G. D. (General Diary).

9. PW-5, Dr. Satish Kumar, Neuro Surgeon of Ganga Charan Hospital has stated that on 10.10.2007 deceased Akhilesh Kumar was hospitalized and as per his statement he has noted lacerated wound 4 cm x 5 cm on the right side of his face. Marks of entry wound of different pellets on right side of face, neck and head. He has also noted the factum of bleeding from the face.

10. He has further stated that Computerized Tomography (C. T.) Scan was conducted by Dr. Sumit Tandon. He stated that there was acute subdural haematoma (clotting of blood between the surface of brain and it's tough outer covering) on the right temporal parietal region due to which there was extreme pressure on the brain. Foreign bodies were found on the face, neck, head and right eye, causing damage to the right eye. There was swelling inside the brain. He has proved the execution of clinic chart, operative notes, admission notice, injury reports and further stated that the injuries could be caused by country made pistol or gun (fire arm weapon). Injuries were on vital parts of the body and were fatal.

11. PW-6, Dr. Deepak Kudasiya of Siddhi Vinayak Hospital has stated that deceased Amit Yadav was hospitalized at Siddhi Vinayak Hospital. In his statement he has noted following injuries:--

He has proved the execution of the injury report of deceased Amit Yadav. The injuries were caused by fire arm for instance, country made pistol or gun. The injuries could have been caused on 10.10.2007 at 5 pm. Testimony of this witness is confined to medical examination of deceased Amit Yadav.

12. PW 7, Dr. Sumit Tandon, Radiologist has stated that on reference of Dr. V.B. Singh. He has conducted the C.T. Scan Examination of deceased Akhilesh and noted the presence of metallic particles on face, neck, head etc and also in the right eye. The right eye was damaged. There was haematoma beneath the membrane of brain. The brain had swelling. Air pockets were present in the head. He has proved the execution of C.T. Scan Report. His testimony is confined to the C.T. Scan Report.

13. PW-8, Constable Jaiveer Singh has proved the execution of chik FIR of the case registered against accused Raju Maurya and Sanjay @ Rajiv Maurya for the offence u/s. 25 of Arms Act and the relevant entry in the G.D. He is a formal witness. PW-9, Munendra Pal Singh is the witness of recovery of weapon of assault. According to him, one country made pistol was recovered on the pointing out of accused Raju Maurya from the place below the chimney of a brick kiln and another country made pistol was recovered below the next furnace from another portion of the brick kiln on the pointing out of accused Sanjay @ Rajiv Maurya. He has proved the recovery of weapon of assault.

14. PW-10, Ganga Sahay Satsangi was the first Investigating Officer of Case Crime No. 1423 of 2007 registered u/s. 307 , 504 , 506 IPC and prepared the site plan at the pointing out of PW-1 and also recovered empty cartridges as well as shoes and chappals, which were abandoned by the people present on the spot. He has proved site plan, recovery memos of empty cartridges, shoes and chappals respectively and has also proved the material exhibits. He has further stated that on 17.10.2007 the information of death of Akhilesh was received, which was entered in the G.D. He further stated that inquest of deceased was prepared on 18.10.2007 and he also stated to have prepared the relevant

documents for the purposes of post mortem examination. He has also proved the entry of G.D. Entry No. 45 of 17.10.2007. He has also proved the G.D. Entry No. 50 and after conversion of the offence u/s. 302 IPC, the investigation was transferred to S.I. Kiran Pal Singh.

15. PW-11, S.I. Kiran Pal Singh has conducted the remaining part of the investigation and took the police custody remand and thereafter recovered the weapon of assault and filed charge sheet u/s. 302 , 504 , 506 IPC.

16. PW-12, Dr. Ankita Dey, Senior Resident of Maulan Abdul Kalam Azad Medical College, New Delhi has conducted the post mortem examination of deceased Amit Yadav, which was conducted on 22.10.2007 at 2.30 pm. The deceased died on 21.10.2007 at 1.40 pm. The doctor has noted the following ante mortem injuries, which have been deposed in her statement:--

"(i) Sign of Abrasion (old) present on the chest in between the nipples 7.5 cm x 4.5 cm.

(ii) Old abrasion, contusion 4 cm x 2 cm on front left side of the chest. 2 cm above the left nipple.

(iii) 4 cm wound of entry of bullet on left side of stomach, which was infected. Pus was present.

(iv) Stitched incised wound of 23 cm on abdomen, right to left side adjacent to injury No. (iii)

(v) Surgical stitched wound 25 cm on stomach, 3 cm below the xiphisternum

(vi) Wound of exit, which was half filled and margins were turned outwards on right side of the back 13 cm away from the midline. She has noted infection."

The original texture was examined and greenish yellow pus was there. Spinal cord was fractured and dislocated. There was dislocation from T 12 to L 1. Pus was present in the brain, which was congested. Cause of death has been assigned as ante mortem fire arm injuries. She has proved the post mortem report (Ext Ka.28).

17. PW-13 S.I. Daya Ram Singh has conducted the investigation of the case registered against the appellants u/s. 25 of Arms Act and has proved the said part of the prosecution case.

18. PW-14, S.I. Dinesh Kumar of P.S. Palam, New Delhi has conducted the inquest of the body of deceased Amit Yadav and prepared the necessary documents for post mortem examination.

19. PW-15, Dr. Amitab Yadav has stated that on 14.10.2007 he was a Consultant in City Hospital. On that day Amit Yadav was hospitalized in I. C.U. His treatment continued till 21.10.2007 and on 21.10.2007 he expired during course of his treatment. He noticed perforation in the small intestine and faecal matter was found in the stomach. The intestines were cut repaired and connected. A pipe

was also connected. The injured was referred from Siddhi Vinayak Hospital, Bareilly. He died as a consequence of fire arm injuries. He has proved the case summary of treatment.

20. Defence of the appellants was of their false implication due to Mohalla partybandi.

21. No evidence has been led on behalf of appellants in their defence before trial Court.

22. After appreciating the evidence on record, the learned trial Court convicted the accused-appellants, hence, this appeal.

23. The learned counsel for the appellants has assailed the authenticity of the FIR on the ground that it is ante timed. No such incident has taken place on the date, time and place as alleged in the FIR. It is concocted as well as delayed one. The FIR has not been scribed by Sheeshpal, at the time and place as stated by informant Damodar Swaroop. After sustaining the injuries by the injured persons Akhilesh and Amit, it was not possible for them to move or rush towards their houses, as such, the authenticity of FIR is shrouded with suspicion. The presence of Sheeshpal at the police station at the time of lodging of FIR is belied by the statement of PW-1, Damodar Swaroop. Both the witnesses of fact were not present at the time of occurrence, hence, the origin of FIR becomes suspicious. PW-2, Hitesh Kumar is a chance witness. The presence of PW-1 is also not established from any of the medical document executed during the course of treatment at hospitals as he has nowhere signed any such document nor, his name is mentioned as care taker. It has further been contended that Ritesh and Sheeshpal have not been examined and have been withheld by the prosecution, which gives rise to an adverse inference against the prosecution. After sustaining gun shot injuries, moving of 153 paces by Akhilesh, as stated by PW-1 and also noted in site plan raises finger upon the authenticity of the contents of FIR and also belies the presence of PW-1. Documentary medical evidence has been withheld by the prosecution. It also goes against the prosecution. The recovery of weapon of assault has also been challenged on the ground of being false. No blood has been found at any point through which the injured Akhilesh allegedly moved 153 paces towards his house. It has also been submitted that one Sudhir has been named in the medical documents as brother of deceased Akhilesh. It has also been submitted by the counsel for defence that the conversation mentioned in the FIR, could not be over heard by the alleged eye witnesses from the place from where they witnessed the incident. It is submitted that in view of these glaring infirmities the conviction of the appellants cannot be sustained.

24. Per contra, learned G. A. has submitted that the purpose and value of the FIR is limited just to bring the State machinery into motion after registration of the crime. No specific format has been provided for lodging the FIR. In a typical mental trauma and psychological condition the FIR was lodged with the police promptly without any unreasonable delay. The FIR is not supposed to be an

encyclopaedia of entire prosecution case containing all the minute details. The FIR of this case is neither an after thought nor, ante timed. It has further been submitted that after getting the information of such heinous incident, the relatives, well wishers do rush up to the hospital and mere mentioning of the name of one Sudhir in the medical papers, could not create any doubt about presence of PW-1, Damodar Swaroop (informant-complainant). Learned G. A. has submitted that recovery of weapon of assault has been made on the pointing out of appellants is admissible u/s. 27 of Evidence Act. The learned Court has rightly appreciated the evidence available on record and rightly recorded findings of conviction.

25. How the appellate jurisdiction is to be exercised by the High Court while adjudicating the criminal appeals, it has time and again been highlighted by the Hon'ble Apex Court. [Padam Singh Vs. State of U.P., ; Rama and Others Vs. State of Rajasthan, ; Majjal Vs. State of Haryana, ; Kamlesh Prabhudas Tanna and Another Vs. State of Gujarat, .]

26. From the above case laws the legal position so crystallizes that the High Court is expected to critically appraise the evidence available on record on the basis of which the findings of conviction has been recorded by the learned trial Court. At the same time, the High court is not expected to be influenced by the findings of conviction recorded by the learned Court below bearing in mind the basic principle of criminal jurisprudence that the accused is innocent unless otherwise established in accordance with law.

27. PW-1, Damodar Swaroop has categorically stated that his deceased son Akhilesh was doing the business of cable-dish T.V. The accused Raju Maurya took the illegal cable connection for which a complaint was made by Akhilesh to the family members of the accused-appellant. This motive has been averred in the FIR and finds support from the testimony of PW-1. It is a case of direct evidence. The legal position on this score is crystal clear that in cases of direct evidence, motive becomes insignificant. So, the case of prosecution is to be scrutinized on the basis of materials available on record.

28. It has been stated by the witness PW-1 that the FIR was scribed by Sheeshpal at Ganga Charan Hospital. He has specifically stated that he went to lodge FIR along with brother-in-law of the deceased Akhilesh. It has been assailed on the ground that the testimony of PW-4 speaks about the presence of Sheeshpal at the police station. It has further been stated that it was not possible for Sheeshpal to leave his son and to go to Ganga Charan Hospital to scribe the FIR. Further it has been submitted that the FIR has been lodged with delay. The factum of lodging of the FIR has been proved by a public servant PW-4 Head Constable Rahat Ali Khan. It clearly establishes that the FIR was lodged with the police. So far as the going up to police station for lodging the FIR is concerned, even if for argument sake the discrepancy is presumed, it would not amount to denial of factum of lodging of the FIR. The presence of Sheeshpal at the police station finds mention in the relevant G.D. It is the established

proposition of law that the documentary evidence prevails upon oral testimony and gets primacy. This possibility cannot be ruled out that brother-in-law of deceased Akhilesh did not enter the campus of the police station whereby his presence might have not been noted in the G.D. Scribing the FIR by Sheeshpal, as alleged by PW-1 at Ganga Charan Hospital, does not appear to be a fact, which cannot be believed. It is a common psychology or tendency when anyone becomes affected of any offence, the close relatives want to ensure that the real culprit may not go scot free. As such, they have the tendency of informing the police about the commission of a crime so that necessary prompt action may be taken by police against the assailants. Pursuant to the aforesaid psychology, this possibility cannot be ruled out that Sheeshpal, father of Amit (victim of crime) had scribed the FIR and visited the police station, so that action may be taken by the police against the assailants and more so, he had no involvement in the treatment of Amit, since, it was being done by the doctors of Siddhi Vinayak Hospital. The submission of the counsel for the appellants in this regard do not impress us. There is yet another aspect which compels us to ignore such minor discrepancies. We cannot ignore the mental condition of PW-1 and also of Sheeshpal that their sons were struggling for life. In such condition entire concentration of these two persons must have been conscious to make best effort to save their lives. Since registration of the case was also an important aspect so as to ventilate the grievances against accused-appellants, as such the witnesses might not have attributed much importance to such petty happenings or facts which were put during cross-examination.

29. So far as the aspect of delay is concerned, the incident is alleged to have taken place on 10.10.2007 at 5 pm. The FIR has been lodged at 19.10 hours. In the incident it is alleged that injured Akhilesh and Amit, both have sustained serious fire arm injuries, therefore, the injured were taken to the hospital for providing immediate medical assistance. It has come in evidence that Amit was taken to Siddhi Vinayak Hospital for the purposes of treatment on a motorcycle and Akhilesh was taken to the Siddhi Vinayak Hospital on a rickshaw whereafter, he was taken to the Ganga Charan Hospital. It can safely be inferred from the evidence that after the commencement of treatment the role of attendants do not remain so material and Sheeshpal might have managed to come to Ganga Charan Hospital for the purposes of inscribing the FIR and thereafter, the FIR was lodged. This does not appear to be unnatural conduct and the FIR was, therefore, lodged after initiation of the medical procedure. As such, the delay, if any, in lodging the FIR even if presumed for argument sake, stands fully explained. The FIR has been lodged after the incident in the circumstances as disclosed above, it cannot be held to be ante timed. It was most natural conduct of the informant to make effort to save the life of their sons, because nothing is more important than the human life.

30. Much emphasis has been laid to the fact contained in the FIR that when the rent of dish connection was demanded, accused Raju Maurya became awfully annoyed and started abusing and thereafter fired shots. Further submission has

been made to the effect that the place from where the incident is alleged to have been witnessed by Damodar Swaroop he was not in a position to hear the above averments contained in the FIR. This fact can be appreciated from the averments of the FIR that the protest or complaint about the illegal dish connection was earlier made with the family members of the accused-appellant Raju Maurya. So, the grievances against Raju Maurya must be in the mind of the complainant-informant Damodar Swaroop, being the father. Even if, the fact of over hearing of the above conversation is denied even then, it does not go to the root of the prosecution case and it would not be fatal for the prosecution as the same only relates to motive. The challenge to FIR has been made on the ground that in the medical documents the name of Damodar Swaroop (PW-1) does not find place. This fact situation cannot be denied that the procedure of medico legal examination is entirely defined and the doctors working in the government hospitals are fully acclimatized to the procedure whereas the situation in private hospitals is not so. Nowhere by way of suggestion it has been disputed on behalf of accused-appellants that no treatment of Akhilesh was conducted at Ganga Charan Hospital. As such, mere omission of the name of Damodar Swaroop (PW-1) in the medical documents executed by doctors, would have no adverse bearing on the FIR and would not amount to denial of presence of PW-1 at the place of occurrence and hospital. This fact situation also cannot be denied that in such type of incident, the near relatives, well wishers always accompany the victim up to the hospital and they actively help the victim family. We also cannot ignore the disturbed mental state of the complainant and if in that background any other person has completed such formalities of the hospital then the same cannot be a ground to hold that PW-1 was not present. If the name of anyone else finds place it would not automatically rule out the presence of PW-1 Damodar Swaroop.

31. The importance of the FIR as time and again been considered by the Hon''ble Apex Court and guidelines have been issued from time to time. Hon''ble the Apex Court has laid down the following proposition recently in the case of Jai Prakash Singh Vs. State of Bihar and Another etc., . The relevant paragraph 12 is being reproduced herein below:--

"The FIR in criminal case is a vital and valuable piece of evidence though may not be substantive piece of evidence. The object of insisting upon prompt lodging of the FIR in respect of the commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of actual culprits and the part played by them as well as the names of eye- witnesses present at the scene of occurrence. If there is a delay in lodging the FIR, it loses the advantage of spontaneity, danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of large number of consultations/deliberations. Undoubtedly, the promptness in lodging the FIR is an assurance regarding truth of the informant's version. A promptly lodged FIR reflects the first hand account of what has actually happened, and who was responsible for the offence in question."

32. It is settled law that even if delay in lodging the FIR cannot be explained satisfactorily, it is by itself not fatal to the case of prosecution.

33. The Hon"ble Apex Court in the case of State of Haryana v. Gyan Chandra reported in J. T. 2001 (5) SC 1691 has been pleased to observe that :

"Delay has the effect of putting the Court on its card to search that if any explanation has been offered for the delay, and if offered, whether it is satisfactory or not? If the prosecution fails to satisfactorily explain the delay, the delay would be fatal to prosecution. However, if the delay is explained to the satisfaction of the Court, the delay cannot itself be the ground for disbelieving and discarding the entire prosecution case."

34. In Ramdas and Others Vs. State of Maharashtra, the Hon"ble Apex Court was pleased to observe that mere delay in lodging the first information report is not necessarily fatal to the prosecution. However, the fact that the report was lodged belatedly, is a relevant fact of which the Court must take notice. This fact has to be considered in the light of other facts and circumstances of the case.

35. From the above propositions of law, it can safely be discerned that the FIR is a basic document by its registration the State machinery, vested with the power of investigation, is put to action. The details regarding date, time, place and manner of occurrence and by whom the offence has been committed and the weapon used in commission of crime is mentioned in the FIR. It simply facilitates the investigating agencies to investigate the crime expeditiously, so as to reach to correct conclusion after investigation. Even if, there is delay in the FIR it is not fatal, if the delay in lodging the FIR has been satisfactorily explained and if it is found satisfactory by the Court, it will have not adverse bearing on the prosecution version. It is also settled that the FIR is not supposed to be an encyclopaedia. Mere omission would not totally destroy the FIR.

36. PW-1, Damodar Swaroop is the father of injured Akhilesh. His evidence has also been assailed on the ground that he is a related witness. As such, he is closely related to the victim. The law for appreciation of a related witness is ample clear. Hon"ble the Apex Court has time and again considered the question of appreciation of evidence of related witness or interested witness and has been pleased to issue guidelines in this regard in the cases of Shiv Ram and Another Vs. State of U.P., , Kuria and Another Vs. State of Rajasthan, . In a recent judgment in the case of Gurjit Singh and Others Vs. State of Haryana Hon"ble the Apex Court has observed that statement of a relative cannot be discarded on the ground that he is a relative. Apart from it, Hon"ble the Apex Court in the case of Veer Singh and Others Vs. State of U.P., has observed that court can and may act on the single testimony. Legal system has laid emphasis on value, weight and quality of evidence rather than the quantity.

37. In view of the propositions it is now settled in law that the testimony of a related witness cannot be discarded merely on the ground of relationship. But, in such circumstance an onerous duty is cast upon the Courts to scrutinize the

testimony as a whole critically with utmost care and caution.

38. Further submission of the counsel for the appellants is whether after sustaining the injuries on the head by Akhilesh and after having the abdominal injuries by Amit, it was not possible for them to rush towards their houses. It is a common human psychology and tendency as well as the fear of death, the victim always tries to save his life by taking shelter at a safe place. No such question has been put to the medical witnesses whether the running of the victims Akhilesh and Amit was possible after sustaining fire arm injuries on vital parts. No such question has been put, which can raise suspicion about the rushing of victims towards their houses. It has been stated that Amit could hardly go 4 or 5 paces whereas Akhilesh rushed to approximately 153 paces. In absence of any specific suggestion to doctor, the possibility of moving certain paces by way of reflex action, cannot be ruled out. As such, on this score the case of prosecution cannot be doubted.

39. The next submission on behalf of appellants is about the presence of PW-1 Damodar Swaroop at the place of occurrence on the ground that he has seen the incident, does not find mention in the FIR. It is settled proposition of law that a FIR is not required to be an encyclopaedia. Even if, the omission of his specific mention of presence in the FIR, would not have adverse bearing on the prosecution case. It is the settled proposition of law that FIR is a vital and important document, but it is not a substantive piece of evidence. The law is settled on the point that the averments of the FIR are always tested on the anvil of testimonies of witnesses of fact. More so, it is also settled that any document in a case is always read in its entirety and the document is not interpreted in parts so as to draw a particular inference suited to a particular side. Here it is pertinent to mention that the complainant in the FIR had nowhere mentioned that the incident was told to him by someone else. He has given all the details of the incident in his FIR and has supported the same during trial. So, it would not be a ground to hold that he was not present on the place of occurrence as he himself has seen the incident and narrated the FIR.

40. It has been contended on behalf of appellants that two fire shots are alleged to have been discharged, but the FIR does not reveal as to whether the accused-appellants have discharged one shot each. This further questions the presence of PW-1 at the place of occurrence. The legal proposition in this regard is crystal clear and it is well settled in law that each and every minute details if omitted to have been mentioned, would have no adverse bearing on FIR, since, the FIR is not supposed to be an encyclopaedia of the events. The purpose and value of FIR has already been discussed in detail.

41. It has further been stated that PW-1 Damodar Swaroop per chance reached to the place of occurrence. PW-2 Hitesh even if, taken to be an eye witness is a chance witness. The matter of consideration of testimony of a chance witness has time and again been considered by the Hon''ble Apex Court. In the case of Vikram Singh and Others Vs. State of Punjab, , Hon''ble the Apex Court has

cited paragraph 3 of its earlier pronouncement in the case of Rana Partap and Others Vs. State of Haryana, which reads as under:--

"There were three eye witnesses. One was the brother of the deceased and the other two were a milk vendor of a neighbouring village, who was carrying milk to the dairy and a vegetable and fruit hawker, who was pushing his laden cart along the road. The learned Sessions Judge and the learned Counsel described both the independent witnesses as chance witnesses implying thereby that their evidence was suspicious and their presence at the scene doubtful. We do not understand the expression "chance witnesses". Murders are not committed with previous notice to witnesses; soliciting their presence. If murder is committed in a dwelling house, the inmates of the house are natural witnesses. If a murder is committed in a brothel, prostitutes and paramours are natural witnesses. If murder is committed in a street, only passersby will be witnesses. Their evidence cannot be brushed aside or viewed with suspicion on the ground that they are mere "chance witnesses". The expression "chance witness" is borrowed from countries where every man's home is considered his castle and every one must have an explanation for his presence elsewhere or in another man's castle. It is a most unsuitable expression in a country whose people are less formal and more casual. To discard the evidence of street hawkers and street vendors on the ground that they are "chance witnesses" even where murder is committed in a street is to abandon good sense and take too shallow a view of the evidence."

42. Reference may also be made to the pronouncement of Hon'ble Apex Court in the case of Thangaiya Vs. State of Tamil Nadu, and the Hon'ble Apex Court has observed in para 8 which is reproduced as under:--

"Coming to the plea of the accused that PW-3 was "chance witness" who has not explained how he happened to be at the alleged place of occurrence, it has to be noted that the said witness was an independent witness. There was not even a suggestion to the witness that he had any animosity towards the accused. In a murder trial by describing the independent witnesses as "chance witnesses" it cannot be implied thereby that their evidence is suspicious and their presence at the scene doubtful. Murders are not committed with previous notice to witnesses; soliciting their presence. If murder is committed in a dwelling house, the inmates of the house are natural witnesses. If murder is committed in a street, only passersby will be witnesses. Their evidence cannot be brushed aside or viewed with suspicion on the ground that they are mere "chance witnesses". The expression "chance witness" is borrowed from countries where every man's home is considered his castle and everyone must have an explanation for his presence elsewhere or in another man's castle. It is quite unsuitable an expression in a country where people are less formal and more casual, at any rate in the matter explaining their presence."

43. In view of the propositions laid above, it can be deciphered that the testimony of any witness is required to be appraised by the Court critically and carefully and if the testimony is found to be credible, reliable in its entirety, there

is no legal impediment in placing the reliance.

44. It has further been submitted by the learned counsel for the appellants that the witness Ritesh, who is alleged to be the eye witness has not been examined. The prosecution has purposefully withheld this witness. This aspect would be taken against the prosecution. The law on the point is ample clear. It is the quality of evidence that matters and not the quantity of evidence for proving facts of the case. The names of Ritesh and Hitesh finds mention in the FIR. It has been averred in the FIR that Ritesh Kumar and Hitesh Rathore somehow or the other saved Akhilesh and Amit. In the perspective in which the names of Hitesh and Ritesh finds place in the FIR leads to the only conclusion that they have seen the incident.

45. Now the testimony of PW-1 & PW-2 independently and inter se is to be appreciated critically with respect to the incident keeping in view the law referred above.

46. Before appreciation of evidence of witnesses of fact it would be appropriate to discuss the places mentioned in the site plan (Ext Ka.13). "AA" is the place where the injured persons (subsequently deceased) sustained the injuries. "EE" is the place from where accused persons fired shots. The distance between "AA" and "EE" is approximately 4 paces. "B" is the place where the injured-deceased Akhilesh fell down. "D" is the place from where the witnesses including PW-1 and PW-2 witnessed the incident. The distance between "A" to "D" is 23 paces and "A" to "B" is 153 paces. The I. O. has shown the directions in which the accused persons chased the injured victims and further shown the directions of PW-1 and PW-2 following the accused persons/injured.

47. PW-1, Damodar Swaroop has categorically stated that Raju Maurya and Sanjay @ Rajiv came out of the house abusing Akhilesh. Both were equipped with country made fire arms. Both have fired shots from their respective weapons. One bullet hit on the head of Akhilesh and one bullet hit on the abdomen of Amit. Amit after sustaining the injury fell down after moving 4-5 paces. Akhilesh and Amit were chased by accused-appellants Raju Maurya and Sanjay @ Rajiv. Subsequently, Akhilesh died at Ruhilkhand Hospital and Amit died in a hospital at Delhi. This witness has categorically mentioned that as soon as his son went out along with his friend Amit, he also came out of his house (i.e. just after a minute) on the pretext of purchasing vegetables, but he specifically clarified in his cross-examination that he did not go to purchase vegetables, since, in the meantime the incident took place. He was accompanied by Ritesh, but as he reached near the turning of the lane, Hitesh also met him. The I. O. has shown two exit points, one in the north-south lane and other in the east-west direction. This fact has been verified by PW-1 by way of his cross-examination. In his cross-examination, PW-1 has reiterated the factum of witnessing the incident. This witness reiterated about the presence of Ritesh and Hitesh on the place of occurrence. PW-1 has further stated that Amit was taken to the hospital by his father on a motorcycle. One person was sitting behind Amit

and he was catching hold of Amit while he was being taken to the hospital. Akhilesh was taken to the hospital on a rickshaw accompanied by Anil Kumar, another son of PW-1. He has stated about the hospitalization of his son at Ganga Charan Hospital. PW-1 has stated in his cross-examination that initially he took his son to Siddhi Vinayak Hospital. All the doctors were busy with the operation of injured Amit, therefore, he had taken his son to Ganga Charan Hospital. No treatment was provided to his son at Siddhi Vinayak Hospital. PW-1 further clarified that after getting his son hospitalized, he went to his home and then to the police station for lodging the FIR. He has further reiterated the factum of preparation of FIR at Ganga Charan Hospital. PW-1 has been put to a lengthy cross-examination. In his examination-in-chief as well as in his cross-examination, he has reiterated the date, time, place and manner as well as by whom the offence was committed and, the weapon used in the commission of crime, as stated in the FIR. One suggestion was given to the witness PW-1 that

This suggestion goes to indicate that the accused-appellants do concede the presence of PW-1. PW-1 has taken a stand that he came out on the pretext of purchasing vegetables, but he could not go to purchase vegetables, since, in the meantime the incident took place. The suggestion advanced on behalf of accused-appellants fortifies the presence of PW-1 at the place of occurrence as stated. PW-1 has maintained consistency in his examination-in-chief and cross-examination with the FIR version.

48. Keeping in mind the facts of the case it is clear that two persons received fatal injuries. They were taken to hospital. One was operated and after some gap other was referred to Delhi. So, in this background several things must have taken place in quick succession. The family members must have made arrangement of money for the best treatment of their son. So, their concentration must have been only to save the life of their patient. Questions, which are put to witnesses regarding the facts which in that mental condition might not have been noticed by the witnesses are replied on imagination as the witnesses fear that if they do not reply the questions, their evidence may not be relied upon. The evidence of PW-1 was recorded more than a year after the occurrence on 26.2.2009.

49. PW-1 has categorically stated through his on oath statement in the Court that accused-appellants were equipped with country made fire arms and they discharged one fire shot each. The position of two fire shots as mentioned in the FIR stands clarified in view of oral testimony of PW-1. Even after a lengthy examination, nothing could be elicited on behalf of the accused-appellants, which may be termed as material contradiction and which may raise question mark on the veracity of the statement of PW-1.

50. PW-2, Hitesh Kumar Rathore is also alleged to be an eye witness. He has categorically stated that on 10.10.2007 at about 5 pm when he reached on the turning of the lane, he saw Raju Maurya and Sanjay equipped with country made fire arms and they fired one shot each upon Akhilesh and Amit, whereby they

sustained injuries. He further reiterated the factum of accused-appellants chasing the injured persons. He further stated that Akhilesh and Amit were respectively taken to the hospitals by their parents in injured condition. He has fairly conceded that Damodar Swaroop (PW-1) belongs to his community or caste. This witness has stated his acquaintance with the accused-appellants prior to the date of incident. He has fairly conceded that his father had already expired. He has denied the factum of being the partner of deceased Akhilesh in his dish-cable business. He has denied the suggestion questioning the presence of Ritesh and PW-1 on the place of occurrence. He has further denied that PW-1 and Ritesh were not the eye witnesses. He has also been put to a lengthy cross-examination. During course of cross-examination he has reiterated that in his presence of Amit and Akhilesh, both have sustained fire arm injuries. This witness has also been put to a lengthy cross-examination, but nothing could be elicited from him, which may be considered as material contradiction and which may have bearing on the veracity and authenticity of his testimony.

51. The examination-in-chief and cross-examination of PW-1 and PW-2 are inter se consistent and coherent. There is consistency and coherence in over all testimonies of PW-1 & PW-2 on material points. Nothing could be elicited from PW-1 and PW-2 by way of cross-examination, which may raise doubt about their presence at the place of occurrence. The testimony of PW-1 taken in its entirety has complete coherence with the FIR version as well.

52. Learned counsel for the appellants has drawn our attention towards some contradictions with respect to direction of faces of injured-deceased and directions of faces of accused-appellants and the angle of fire. But, it does not have any importance in view of the facts and circumstances of the case. The reason is quite obvious. The son of PW-1 and his friend, both have sustained bullet injuries. This fact situation cannot be denied that PW-1 might have not concentrated himself in seeing the directions of victim and appellants instead of that he must have concentrated towards rescuing the victims and providing them the medical assistance promptly to save their lives. In the event of commission of such heinous offence, the psychology of the persons, that too of a person closely associated with the victims, cannot remain unaffected. While appreciating his evidence this aspect also cannot be ignored.

53. Much emphasis has been laid on the fact that victim Akhilesh was taken to Ganga Charan Hospital on medical ambulance for his C.T. Scan. From the evidence it is established that C.T. Scan of Akhilesh was conducted at Ganga Charan Hospital on the reference of one Dr. Brijeshwar Singh. The testimony of PW-5, Dr. Satish Kumar reveals that injured approached him along with the C.T. Scan report. From the evidence available on record in this regard it is clearly established that the C.T. Scan of injured Akhilesh was conducted. Thus, the factum of C.T. Scan is established from the evidence on record. Whether he was taken on an ambulance or otherwise, this would not belie the factum of C.T. Scan. These are such minor things that no one, in such circumstance take note

of it. As such, the argument in this respect has no force.

54. The testimony of PW-2 has also been assailed on the ground that his statement was recorded by the I.O. after lapse of 2 and 1/2 months, which is a long gap. It has time and again been reiterated that any laches on the part of the I. O. would not be interpreted in favour of the prosecution or defence rather, the Court would be under an obligation to assess the prosecution case in its entirety without extending any undue advantage of deliberate laches of the I. O.

55. It has further been submitted on behalf of defence that it was not possible for the victim Akhilesh to cover a distance of 153 paces towards his house after sustaining the fire arm injuries on his head. In the like manner, it was not possible for Amit also to move even a shorter distance as has been alleged. It is noteworthy that no suggestion has been given on behalf of accused-appellants to any of the doctor as to whether after sustaining the injuries in the nature as alleged to have been sustained by Akhilesh and Amit, they could have moved the distance as alleged by the prosecution.

56. Per contra, learned G. A. has stated that it is because of reflex action and when there is a sense of insecurity to life, the distance could be travelled by the victims, as has been alleged by the prosecution in the instant case. More so, it has been emphasized by the learned G. A. that in case of any contradiction it is the ocular evidence, which shall prevail upon the medical evidence. This fact cannot be denied that in danger to life and in view of reflex action as well as in absence of any suggestion to the doctors examined during the course of trial, the factum of movement by victims as alleged by the prosecution, cannot be said to of such a nature as to discard the otherwise reliable evidence of PW-1 & PW-2.

57. The attention of the Court has been drawn to the fact that the name of one Sudhir finds place in the medical papers as the person who got the injured Akhilesh admitted in the hospital. While appreciating the evidence Court must bear in mind the ground realities. This ground reality cannot be overlooked that in the event of any serious incident, the relatives, friends and well wishers of the victim usually come to the extend help. Even if, for argument sake it is conceded that Sudhir is not the brother of deceased even then if his name has been written by the doctor as brother, it will not belie the prosecution case. More so, Ext Ka. 7 makes an endorsement that history given by his brother Sudhir Kumar, but, at the same time on the back side of the document it has been mentioned that the condition of poor progress is explained to relative Anil Kumar, brother of injured. This leads to the conclusion that either Sudhir Kumar and Anil Kumar, both were present or, the name of Sudhir Kumar might have been wrongly mentioned in the place of Anil Kumar. On the basis of this document it cannot be inferred that Anil Kumar was not present there. More so, the presence of Anil Kumar has been specifically averred by PW-1. As such, the presence of Anil Kumar cannot be denied.

58. It has also been emphasized on behalf of accused-appellants that it seems

unnatural that being the father, Damodar Swaroop (PW-1) did not try to rescue the victims i.e. his son and son's friend. From perusal of the entire testimonies of PW-1 & PW-2 and the initial document i.e. FIR it is clearly established that after discharging fire shots upon the victims, the accused persons chased the victims. In such a situation if one could not muster courage, it does not mean that mere on this score presence of PW-1 could be denied. The presence of PW-1 has also been assailed on the ground that no medical document mentions about his presence and some of the medical documents have not been produced. If any document or evidence has been withheld, then the accused must show that it has prejudiced him in his defence. No such prejudice could be brought to our notice during arguments. Apart from it the accused was at liberty to summon such papers that could have supported his claim of innocence. In the instant case, the crucial question is to ensure as to whether the offence of broad daylight double murder by fire arm as alleged, is established from the evidence available on record or not?

59. Place of occurrence has also been challenged on the ground that no blood was recovered by the I. O. from the place of occurrence. Evidence and perusal of site plan shows that occurrence took place in an inhabited area. In the facts of the case the injured were immediately taken to hospital. So, even if some blood might have fallen on the place of occurrence, the possibility of its having been vanished by movement of public cannot be ruled out. Purpose of taking blood sample is to establish the place of occurrence. But its contrary is not true. It cannot be said that where blood has not been recovered then it will lead to the only conclusion that incident has not taken place at the alleged place. It is always the substantive evidence of witness that prevails. When place of occurrence is established by ocular testimony of PW-1 & PW-2 then the same cannot be doubted on this score. Apart from it, it is nowhere the case of the defence that occurrence has taken place at some other place. No such suggestion has been given to any witness.

60. Considering the prosecution version and the evidence in its entirety and more particularly, appreciating the evidences of PW-1 & PW-2, who are the eye witnesses, it is established from the materials available on record that the accused-appellants on the date, time and place of incident discharged fire one shot each at Akhilesh and Amit, which hit them on their head and abdomen respectively. Subsequently, they were taken to the hospital for medical assistance. The identity of the accused-appellants is well established from the testimonies of PW-1 & PW-2. There is complete uniformity, consistency and coherence in the testimonies of PW-1 & PW-2 with respect to date, time, place and manner of assault and the identity of accused-appellants and country made weapon of assault which they used for commission of offence. On the basis of minor variance or contradictions, the testimonies of PW-1 & PW-2 cannot be discarded. Minor contradiction in evidence are bound to occur which goes on to show that the witness has not been tutored. The name of PW-2 finds place in the FIR. It categorically rules out that he was not present on the scene of

occurrence. On critical analysis of evidences of PW-1 & PW-2 in its entirety it goes to establish the commission of offence by the accused-appellants as alleged by the prosecution.

61. So far as the offence u/s. 25 of Arms Act is concerned, this fact has been emphasized before us that the recovery is alleged to have been shown from a place which is accessible by the public at large. It has come in the evidence that the brick kiln was closed and was not operational. Hence, the access of public to the brick kiln does not appeal to reason and more so, the place of recovery is the place below the furnace. The factum of recovery and the place as well as evidence led to prove the recovery has already been considered by the learned trial Court in detail. We do not feel justified in reiterating or repeating the findings recorded by learned Court below in this regard. We upheld the findings of conviction recorded by the learned trial Court against the accused-appellants.

62. In view of the discussions made above, we are of the opinion that the learned trial Court has rightly appreciated the evidence and recorded findings of conviction against the accused-appellants with respect of offence u/s. 302 IPC. The findings of conviction do not warrants any interference.

63. It has always been the philosophy of law to award sentence, which should neither be harsh nor, lenient one. While awarding the sentence the Court is obliged to consider the age, educational background, social background, criminal antecedents and the manner in which the offence was committed and the brutality involved in commission of offence. The sentencing philosophy is with respect to deterrence and reformation. The sentence should be such which should satisfy the ends of justice. Considering the facts and circumstances of the case, we do not find it a case of extreme brutality and it is not a case which may be termed as "rarest of the rare" category. In view of the case of Bachan Singh Vs. State of Punjab, as well as the case of Machhi Singh and Others Vs. State of Punjab, , which still holds good, the aggravating and mitigating or extenuating circumstances of this case, are to be considered before awarding the sentence.

64. In the case of Santosh Kumar Satishbhusan Bariyar Vs. State of Maharashtra, the Hon"ble Apex Court was pleased to observe that the nature, motive, impact of a crime, culpability, quality of evidence, socio-economic circumstances, impossibility of rehabilitation are the factors which are required to be taken into consideration.

65. In Shankar Kisanrao Khade Vs. State of Maharashtra, the Court noticed aggravating circumstances (crime test), mitigating circumstances- (criminal test) and rarest of rare case (R-R test) and made observations in paragraph 52, which is being reproduced herein below:--

"52. Aggravating circumstances as pointed out above, of course, are not exhaustive so also the mitigating circumstances. In my considered view, the tests that we have to apply, while awarding death sentence are crime test, criminal test and the R-R test and not the balancing test. To award death

sentence, the crime test has to be fully satisfied, that is, 100% and criminal test 0%, that is, no mitigating circumstance favouring the accused. If there is any circumstance favouring the accused, like lack of intention to commit the crime, possibility of reformation, young age of the accused, not a menace to the society, no previous track record, etc. the criminal test may favour the accused to avoid the capital punishment. Even if both the tests are satisfied, that is, the aggravating circumstances to the fullest extent and no mitigating circumstances favouring the accused, still we have to apply finally the rarest of the rare case test (R-R test). R-R test depends upon the perception of the society that is society- centric and not Judge-centric, that is, whether the society will approve the awarding of death sentence to certain types of crimes or not. While applying that test, the court has to look into variety of factors like societys abhorrence, extreme indignation and antipathy to certain types of crimes like sexual assault and murder of intellectually challenged minor girls, suffering from physical disability, old and infirm women with those disabilities, etc. Examples are only illustrative and not exhaustive. The courts award death sentence since situation demands so, due to constitutional compulsion, reflected by the will of the people and not the will of the Judges."

66. In view of above cited propositions it can safely be discerned that the award of life imprisonment is a general rule and the death sentence is an exception, which is to be invoked in cases of extreme culpability and which may be termed as rarest of rare case.

67. In view of the aforesaid reasons and discussions, we are of the considered opinion that the findings of conviction recorded by the learned trial Court do not warrant any interference and are correct and substantiated from the evidence available on record. But the quantum of sentence awarded by the learned trial Court requires interference for the simple reason that the case in hand cannot be categorized as "rarest of rare".

68. The findings of conviction of accused-appellants Raju Maurya @ Rajiv and Sanjay Maurya @ Rajiv recorded by the learned trial Court is hereby affirmed. The appeal is partly allowed on the point of sentence only. The reference is, accordingly, dismissed.

69. The accused-appellants namely, Raju Maurya @ Rajiv and Sanjay Maurya @ Rajiv, both are convicted for the offence u/s. 302 read with Section 34 IPC and each are sentenced to imprisonment for life alongwith fine of Rs. 2000/- each with default stipulation of two months imprisonment.

70. The accused-appellants Raju Maurya @ Rajiv and Sanjay Maurya @ Rajiv are convicted u/s. 504 IPC and sentenced to R. I. for six months each.

71. The accused-appellants Raju Maurya @ Rajiv and Sanjay Maurya @ Rajiv are convicted u/s. 506 IPC and sentenced to R. I. for one year each.

72. The accused-appellants Raju Maurya @ Rajiv and Sanjay Maurya @ Rajiv are

convicted u/s. 25 of Arms Act and sentenced to R. I. for two years each. All the sentences shall run concurrently. Accused-appellants shall be entitled for commutation of sentence u/s. 428 Cr. P. C.

73. Let the lower Court's record be sent back to the Court concerned forthwith along with a copy of this judgment and order for immediate compliance.