

(2019) 09 RAJ CK 0142

In the Rajasthan High Court

Case No : Criminal Appeal No. 1233 Of 2016, ?34 Of 2017

Sabir Ahmed And Ors

APPELLANT

Vs

State Of Rajasthan And Ors

RESPONDENT

Date of Decision : 16-09-2019

Acts Referred:

Indian Penal Code, 1860 — Section 147, 148, 149, 302, 341, 379
Code Of Criminal Procedure, 1973 — Section 161, 313, 374(2), 437A
Evidence Act, 1872 — Section 27

Citation : (2019) 09 RAJ CK 0142

Hon'ble Judges : Sandeep Mehta, J;Abhay Chaturvedi, J

Bench : Division Bench

Advocate : Pradeep Shah, Mohd. Rashi, Anil Joshi, J.S. Choudhary, Amardeep Lamba, Tarun Dhaka

Final Decision : Allowed

Judgement

Sandeep Mehta, J

1. The appellants herein have been convicted and sentenced as below vide the judgment dated 11.11.2016 passed by the learned Additional Sessions Judge, Phalodi, District Jodhpur in Sessions Case No.17/2012 :

Names of the appellants

Offence for which convicted

Sentence awarded

(1) Sabir Ahmed

(2) Nawab

(3) Saleem

(4) Bashir

(5) Ali

(6) Abdul Gaffar

Section 148 IPC

Rigorous imprisonment of two years alongwith a fine of Rs.2000 and in default of payment of fine, additional simple imprisonment of three months

Section 341 IPC

Fine of Rs.500/- and in default of payment of fine, additional simple imprisonment of seven days

Section 302/149 IPC

Imprisonment for life alongwith a fine of Rs.50,000/- and in default of payment of fine, additional simple imprisonment of two years

All the substantive sentences were ordered to run concurrently.

2. Being aggrieved of their conviction and the sentences awarded to them, the appellants Sabir Ahmed, Nawab, Saleem, Bashir, Ali and Abdul Gaffar have preferred these two appeals under Section 374 (2) CrPC. As the appeals arise out of a single judgment, they are being heard and decided together.

3. Brief facts relevant and essential for disposal of the appeal are noted herein below.

The complainant Samasdeen (P.W.5) lodged a typed report (Ex.P/1) to the SHO, Police Station Jamba at the Government Hospital, Phalodi on 21.06.2012 at 05.00 p.m. alleging inter alia that his father Aamdeen S/o Somraj Khan was proceeding towards his village at about 02.30 p.m. after collecting a sum of Rs.6,12,000/- from Haneef S/o Haji Deenu Khan. The accused Khair Mohammed, Bashir, Sabir, Saleem, Nawab, Kayam Khan, Gaffar, Bachu Khan and Ali Khan came across in a Bolero car driven by Imamdeen and waylaid Aamdeen. They were armed with swords, axes, Dhariyas and guns. They came with the common intention of killing Aamdeen and acting in furtherance thereof, they assaulted and injured him severely. One Babu Kumhar called Yaru, the brother of the complainant, and told them of the incident, upon which, he and Yaru accompanied Khairdeen S/o Kadar Khan rushed to the place of incident and raised a hue and cry. On hearing the commotion, the accused persons snatched the money from Aamdeen's pocket and escaped from the scene of occurrence in their Bolero vehicle. The complainant, Yaru and Khairdeen brought Aamdeen to the Government Hospital, Phalodi, where, after primary treatment, the doctor declared him dead. Upon this information, an FIR No.23/2012 (Ex.D/6) was registered at the Police Station Jamba for the offences under Sections 147, 148, 149, 302, 341 and 379 IPC.

4. The investigation was undertaken by Amarchand (P.W.16), SHO, Police Station Phalodi, who conducted the relevant steps of investigation; viz. Spot inspection

got the dead body subjected to postmortem, arrested the accused, effected recoveries etc. and thereafter, proceeded to file an incomplete charge-sheet against six of the ten accused named in the FIR, viz. (1) Sabir Ahmed (2) Nawab (3) Saleem (4) Bashir (5) Ali and (6) Abdul Gaffar, for the above offences in the court of the Magistrate concerned. Investigation was kept pending qua Khair Mohammed, Kayam Khan, Bachu Khan, Imamdeen and Anwar Khan. Upon culmination of the investigation, Khair Mohammed, Kayam Khan, Bachu Khan and Imamdeen, though named in the FIR, were not found involved in the offences, whereas a supplementary charge-sheet was filed against Anwar Khan, who was not named in the FIR. Since the offence under Section 302 IPC was Sessions triable, the case was committed to the court of the Additional Sessions Judge, Phalodi for trial.

5. The accused were charged for the above offences, to which, they pleaded not guilty and claimed trial. The prosecution examined as many as 16 witnesses and exhibited 44 documents to prove its case. Upon being questioned under Section 313 CrPC and when confronted with the prosecution allegations, the accused denied the same and exhibited 63 documents in defence, but did not lead any oral evidence. After hearing the arguments advanced by the learned Public Prosecutor and the defence counsel and upon appreciating and evaluating the evidence available on record, the learned trial Judge proceeded to acquit the accused Anwar Khan of all the charges. However, the appellants herein were convicted and sentenced as above. Hence, these appeals.

6. Mr. Pradeep Shah, learned counsel representing the appellants, vehemently and fervently urged that the entire prosecution case is false and fabricated. The evidence of the star prosecution witness Baburam (P.W.2) is not reliable and worthy of credence. He submitted that if the evidence of Haneef (P.W.1), who went to the Police Station Jamba and brought the police at the spot is appreciated, manifestly, he was the first person, who reached near the victim and the other witnesses, viz. Baburam, Yar Mohammed (P.W.3), Khairdeen (P.W.4), Samasdeen (P.W.5) reached at the spot much later and they could not have seen the assault happening with their own eyes. He further contended that the conduct of the star prosecution witness Baburam is highly unnatural and suspicious. He drew the court's attention to the postmortem report (Ex.P/19) and pointed out that a total of eight injuries were found on the body of the deceased. As many as 10 assailants were named in the FIR and thus, the entire assault would have taken only a few moments and it is impossible to believe that the accused would still be waiting for arrival of the witnesses and would not make good their escape immediately after attaining the alleged motive of the assault, i.e. to loot the money from the deceased. He further submitted that even the trial court did not place implicit reliance on the evidence of the witnesses other than Baburam. As many as 4 out of 10 persons named in the FIR and the statement of Baburam were not found involved in the case and were exonerated by the Investigating Officer. No steps were taken to prosecute these accused. Out of the 7 charge-sheeted persons, accused Anwar Khan has been acquitted by

the trial court. He contended that as the evidence of Baburam is also unreliable, manifestly, conviction of the appellants by holding them responsible for the charges is absolutely unjustified. Mr. Shah further urged that the fact that Samasdeen and Yaru gave a cooked up version of the incident in their testimony can very well be assessed from the contents of the FIR (Ex.D/6), wherein a clear allegation has been set up that the accused assaulted the deceased with firearms amongst other weapons. He submitted that not a single injury by a firearm was noticed on the body of the deceased when it was subjected to postmortem. He further urged that the prosecution theory that the accused appellants looted amount to the tune of Rs.6,12,000/- from the deceased is totally cooked up because no substantive evidence was provided either during investigation or at the trial so as to establish or corroborate the fact that the deceased was carrying such a huge stash of money or the source thereof. Mr. Shah further submitted that the statement of Baburam under Section 161 CrPC was recorded by the Investigating Officer as late as on 08.07.2012. The rank silence of the witness for this long duration and this failure to divulge about the incident despite claiming to be an eye-witness makes his testimony doubtful. Learned defence counsel further pointed out that the witness Baburam attributed specific weapons to a few of the accused. He was confronted with his police statement (Ex.D/4), wherein no specific weapon has been assigned to any of the accused. He feigned ignorance as to the reason of this discrepancy/omission. As per the learned defence counsel, material improvements made by the witness regarding the weapons held and the role played by the accused completely demolishes his evidentiary worth. He further contended that the recoveries of weapons effected at the instance of the accused are fabricated and concocted because all were effected after a significant delay and from open places, accessible to all and sundry. He further pointed out that Baburam categorically stated in his evidence that he did not see any money with Aamdeen. Thus, as per Mr. Shah, the theory portrayed in the FIR by the witnesses related to Aamdeen that the incident was perpetrated with the intention of looting the money carried by the deceased is falsified. He, thus, implored the court to accept the appeal; set aside the impugned judgment and acquit the appellants of the charges.

7. Per contra, learned Public Prosecutor and Mr. J.S. Choudhary, learned Senior Advocate, representing the complainant, vehemently and fervently urged that Baburam had no animosity whatsoever with the accused appellants so that he could be persuaded to falsely implicate them for the murder of Aamdeen. He contended that the witness gave a truthful deposition by specifically assigning weapons to Saleem (axe), Sabir (Farsi), Nawab (Farsi), Bashir (Farsi) and stated that the other accused were having lathis in their hands. Upon seeing the ghastly assault, the witness, who was all alone and outnumbered, acted in an absolutely natural fashion, hid himself and called Yaru, son of Aamdeen, and informed him that his father was being assaulted. The witness clearly stated that as soon as Yaru, Samasdeen and Khairdeen reached the place of incident on a motorcycle, the accused escaped in their vehicle. They particularly drew the court's attention

to the cross-examination conducted from the witness Baburam, wherein it was elicited that the place of incident is at a distance of only one km. from his shop. Thus, as per the learned Public Prosecutor and the complainant's counsel, the statement made by the witness that he followed Aamdeen and saw the accused assaulting him with his very own eyes is absolutely natural and the trial court was perfectly justified in placing implicit reliance on his testimony and convicting the accused appellants as above. They implored the court to reject the appeal and affirm the impugned judgment.

8. We have given our thoughtful consideration to the submissions advanced at Bar; have minutely re-appreciated the evidence available on record and perused the impugned judgment.

9. Learned trial court, after discussing the evidence, concluded in the impugned judgment that the most reliable of evidence available to the prosecution for fixing the responsibility of the accused was the testimony of Baburam (P.W.2).

10. The first informant Samasdeen (P.W.5), son of the deceased Aamdeen, alleged in the FIR (Ex.D/6) that they were informed about the incident by Baburam. It is clearly set out in the FIR that when Samasdeen, Khairdeen and Yaru Khan reached the place of incident and raised a hue and cry, the 10 assailants took out the money from the pocket of Aamdeen and escaped from the place of occurrence in their Bolero vehicle. The number of accused named in the FIR is 10. The Investigating Officer filed charge-sheet only against 6 persons, whereas, 4 were exonerated. The role assigned to all the 10 assailants in the impugned FIR is identical. It is mentioned in the FIR that all the accused were armed with firearms, sharp weapons and lathis. As per the postmortem report (Ex.P/19), a total of 8 injuries were noticed by Doctor Dr. Bhanwar Doyal (P.W.13) while carrying out autopsy upon the body of the deceased. None of these injuries was caused by a firearm. A bare perusal of the postmortem report (Ex.P/19) and the investigational statement (Ex.D/4) of Baburam (P.W.1) makes it clear that none of the accused was armed with a gun at the time of the incident. Manifestly, thus, the FIR, apart from being exaggerated regarding the number of accused, also appears to be containing concocted allegations regarding the weapons allegedly used by the assailants.

11. It may be stated here that initially six accused, i.e. the appellants herein, were charge-sheeted by the police and their trial was commenced. Four persons named in the FIR, viz. Khair Mohammed, Kayam Khan, Bachu Khan and Imamdeen, were left off. Later on, a subsequent charge-sheet came to be filed against accused Anwar Khan and his case was consolidated with that of the previously charge-sheeted accused and thus, the statements of Baburam were recorded twice. The subsequent statement of Baburam, examined as P.W.2, was recorded in presence of all the seven accused and thus, the same shall be discussed when the evidence is appreciated.

12. Haneef (P.W.1) stated on oath that he called Aamdeen on the day of the

incident at about 9 a.m. and asked him to collect the money, which he owed to Aamdeen towards 85 goats purchased by him. Aamdeen called him at Ali's house. The witness carried a sum of Rs.3,12,000/- and went to Ali's house. He took a sum of Rs.3,00,000/- from Ali. He further stated that he gave the total amount of Rs.6,12,000/- to Aamdeen at Ali's house. Aamdeen put the money in a cloth sachet and tied the same to his waist. Thereafter, they went to the house of Mehardeen for enjoying a feast. After the feast, the witness offered Aamdeen that he would drop him off at his house. Aamdeen refused and told that he had to charge his phone at Babu's shop. Therefore, the witness took and dropped Aamdeen off at Babu's shop and went back to his house. In the afternoon, at about 02.30 p.m., the witness received a call from Babu, who told him that he was standing near the house of Jogis and that Aamdeen was being assaulted by Bashir, Sabir and Imamdeen and asked the witness to rush to the place of incident. On receiving this information, Haneef rushed to the place of incident on his motorcycle, but by that time, the assailants had escaped. Samasdeen, Yaru, Khairdeen and Babu were standing there. Aamdeen was lying down with his hands and legs broken. Aamdeen requested Haneef to give him water. However, the witness did not give water to Aamdeen and instead, immediately went to the Police Station Jamba and returned back with the police officers. Then they took Aamdeen to Phalodi Hospital in a Bolero vehicle and after getting him admitted, the witness rushed to his house. The witness made a conjecture that Aamdeen had been beaten by Bashir, Saleem, Imamdeen, Kayamdeen, Khairdeen, Bachu. In his cross-examination, the witness was confronted with his previous police statement (Ex.D/1) regarding the omissions and contradictions appearing in his testimony. The evidence of this witness is only relevant to the extent, he claims to have given a sum of Rs.6,12,000/- to Aamdeen; the fact that he dropped Aamdeen off at the shop of Baburam and that he reported the matter to the police. In his cross-examination, the witness admitted that upon reaching the police station, he only told that a quarrel had taken place at the Village Naneu and that Aamdeen was lying in injured condition. He did not divulge the names of the assailants to the police because they did not ask him. The most significant fact apparent from the evidence of this witness is that his police statement was recorded by the Investigating Officer as late as on 08.07.2012, i.e. after more than 15 days of the incident. In this statement (Ex.D/1), with which, the witness was confronted, there is complete omission of the names of the assailants. The witness claimed that he gave a sum of Rs.6,12,000/- to the deceased Aamdeen at the house of Ali, who was examined as P.W.6 and he corroborated the statement of Haneef (P.W.1). In his examination-in-chief, Ali deposed that he and Haneef gave a total of Rs.6,12,000/- to Aamdeen at his room in his house for the 85 goats bought from him. Thus, it is clearly and unequivocally inferable from the over all appreciation of the statement of Haneef (P.W.1) that neither Baburam told him about the names of the assailants nor did he see any of the assailants upon reaching at the place of incident.

13. The most important prosecution witness Baburam (P.W.2) stated in his

examination-in-chief that Haneef dropped off Aamdeen at his shop at about 12 o'clock. Aamdeen engaged in a conversation with the witness and put his mobile phone to charge in the shop. While they were talking, the witness received a call from a tractor operator that he should come for collecting gravel. On this, Baburam told Aamdeen that he was going to collect gravel. Aamdeen offered that he would also accompany him. Thereupon, the witness as well as Aamdeen started towards "Naiyon Ki Dhani" on foot. The witness started collecting gravel from the fields. Aamdeen left him behind and proceeded ahead. A little later, while the witness was collecting the gravel, he heard the shouts "Mare Re Mare Re", on which, he got up and looked up towards the direction, from where the cries were coming. He saw a Bolero vehicle standing there. He went towards the place and saw 12 persons, namely, Sabir, Saleem, Bashir, Nawab, Ali, Kayam, Bachu Khan, Khaire Khan, Gaffar, Imamdeen and Anwar assaulting Aamdeen. Saleem was having an axe, Bashir, Sabir and Nawab were having Farsis, whereas all the other assailants were armed with lathis. He claims to have seen the incident from a distance of 20 Pawandas (1 Pawanda = 5 steps). Immediately on seeing the assault, he called Yaru Khan, Haneef, Samasdeen and Khaire Khan and gave them this information. He claimed that he made the calls after hiding himself behind bushes fearing that if discovered, the assailants might turn on him and kill him as well. He asked these persons to rush to the place of Incident. Samasdeen, Khair Mohd. and Yaru arrived at the spot and on seeing them, the accused escaped in their vehicle. The witness further stated that the accused managed to escape in their vehicle, while Samasdeen, Yaru Khan and Khaire Khan were at a distance of about 20-25 pawandas. Thereafter, Haneef came there. Samasdeen asked him to go to Jamba. Haneef went to the Jamba Police Station; informed and brought the police to the place of incident. The police officers made enquiries, on which, the witness told them about the incident and disclosed the names of the assailants. Thereafter, the police officers went to Phalodi in the Bolero vehicle. Aamdeen was taken to the Phalodi Hospital by Yaru, Samasdeen, Khaire Khan, Hasam, Maula Bux etc. Extensive cross-examination was conducted from the witness. He stated that Haneef dropped Aamdeen at his shop at about 12 o'clock. He kept sitting there till 2 o'clock. Upon a pertinent question, the witness stated that the accused came to the place of incident, got down from their vehicle, assaulted Aamdeen and then went away in the same vehicle and the entire sequence of events was over within 5 minutes. The witness did not attribute any specific injury caused to Aamdeen to anyone in particular. He was confronted with his police statement (Ex.D/4), in which, there is an omission regarding the fact that the accused were holding lathis and Farsis and regarding the names of the accused Saleem and Anwar. Upon being confronted with the previous statement Ex.D/4, he admitted that he did not tell the police that he called Samasdeen and Khaire Khan by phone and told them of the incident. Omission was also elicited regarding the fact that Samasdeen, Khaire Khan and Yaru Khan arrived at the place of incident and "on seeing them, the accused made good their escape". It is noteworthy that it is categorically mentioned in the statement Ex.D/4 that the assailants went away in their Bolero

after beating Aamdeen and that his family members reached the place of occurrence thereafter. It is further relevant to mention here that the police statement of this witness (Ex.D/4) was recorded on 08.07.2012, i.e. after nearly 16 days of the incident. The witness was questioned regarding this delay and he denied the suggestion that the police continued to call him for giving the statement and he avoided their summons. Suggestion were given to him that Yaru and Samasdeen had introduced his name in the FIR on the ground that he was on close terms with them that he had been pressurized to give statement in tune with the allegations set out in the FIR. The witness denied these suggestions and stated that the police did not call him to give the statement and that is why, the delay was caused.

In further cross-examination, the witness stated that the police came to the place of incident about half an hour after the assault. He was present when the police arrived. Right at that point of time, he disclosed names of the accused and the weapons held by them to the police officers. The police took Aamdeen to the hospital, but he did not accompany them. The family members of Aamdeen did not talk to the police regarding the incident in his presence. After Aamdeen had been taken to the hospital, he went back to his house. The police came back in the evening, but did not call him. The houses of Samasdeen, Khair Mohd. and Yaru Khan are located at a distance of 1 km. from the place of incident and the route between the two places is an uneven pathway. The witness denied numerous portions of his police statement (Ex.D/4).

14. A few significant facts are discernible upon a careful overall evaluation of the statements of the witnesses referred to supra :

? Haneef stated that he dropped Aamdeen at the shop of Baburam 12 o'clock. The incident took place at about 02.30 p.m. in the afternoon of 21.06.2012.

? The police statements of Haneef and Baburam were recorded on 08.07.2012.

? Neither Haneef and Baburam nor Yar Mohd. (P.W.3), Khairdeen (P.W.4) and Samasdeen (P.W.5), the complainant, made any effort whatsoever to take Aamdeen to hospital for treatment even though he was still alive when the witnesses claimed to have reached at the place of incident. Rather, the witnesses, even did not give water to Aamdeen despite his fervent pleas.

? Haneef went to the Police Station Jamba and informed the police, however, in the information so given by Haneef at the police station, which was entered in the Roznamcha entry Ex.P/27, there is no reference of the names of the assailants, even though Haneef had been allegedly apprised of the details of the incident by Baburam, Samasdeen, Khairdeen and Yaru Khan.

? Baburam (P.W.2) did not state in his evidence that he saw the accused removing money from the person of Aamdeen.

15. The witnesses Yar Mohd. (P.W.3), Khairdeen (P.W.4) and Samasdeen (P.W.5) have given evidence on almost identical lines. They claimed that on receiving the

call of Baburam that the assailants were beating Aamdeen, all of them went to the place of incident on motorcycle. The witnesses claimed that the 10 assailants named in the FIR and Anwar were indiscriminately belabouring Aamdeen with axes, dhariyas and lathis and on sensing their presence, they escaped in the Bolero. The witnesses called Hasam, who came there with a vehicle. In between, Haneef came and acting on his own volition, he went to report the matter at the Police Station Jamba. The witnesses claimed that then, they boarded Aamdeen on to the vehicle brought by Hasam and took him to the hospital. The police vehicle also accompanied them.

16. None of these three witnesses attributed any particular weapon or blow to any of the 11 accused. Upon a comparative analysis of the statement of these three witnesses, viz. Yar Mohammed (P.W.3), Khairdeen (P.W.4), Samasdeen (P.W.5) with the evidence of Haneef (P.W.1) and Baburam (P.W.2), we are duly satisfied that the possibility of these witnesses reaching at the place of incident while the assault upon Aamdeen was still in progress or that the accused were present there and could be identified by these three witnesses is unlikely. As per the postmortem report (Ex.P/19) and the statement of the Medical Jurist Dr. Bhanwar Doyal (P.W.13), a total of 8 injuries were noticed on the body of the deceased. Since the number of accused arraigned in the FIR and the evidence of these so called eye-witnesses is 10/11, the possibility of the assault having lasted for more than 1 to 2 minutes is unlikely. Baburam claimed that after the incident was over, he hid himself behind a shrub and individually called all the three witnesses referred to supra. Thus, during the time which would have been spent while Baburam was putting the calls to the witnesses and the time taken for them to reach the place of incident, the accused would definitely have escaped from the scene of occurrence. Baburam stated in his evidence that soon after Yar Mohammed (P.W.3), Khairdeen (P.W.4), Samasdeen (P.W.5) arrived at the spot, Haneef also reached there and that Samasdeen sent him to Jamba Police Station. In view of the above facts, there is a strong possibility that Baburam must have run away from the place of the incident and would have gone back to his shop in order to escape harm at the hands of the assailants and that he must have called the family members of Aamdeen from his shop.

17. The three witnesses referred to supra and Haneef must have reached the place of incident sometime later and there, they saw Aamdeen lying at the spot in a badly injured condition, whereafter, Haneef was sent to report the matter to the police. The fact that Haneef did not disclose names of the accused to the police creates strong doubt in the mind of the court that none of these witnesses were aware as to who had assaulted the deceased by that time. They must have consulted Baburam later on and then, the matter was reported to the police. The fact that Baburam, despite being on good terms with Aamdeen, did not accompany him to the hospital lends force to the conclusion drawn by us that he must have run away from the spot after seeing the assault happening and thus, his evidence too would have to be viewed with circumspection.

18. As per the evidence of Dr. Bhanwar Doyal (P.W.13), he noticed the following injuries on the body of deceased Aamdeen :-

1. Triangular wound 2.5 cm. x 1.5 cm. x bone deep on the frontal area of head, which was allegedly caused by a blunt weapon.
2. Abrasion 2.5 cm. x 2 cm on the front of the head, caused by a blunt weapon.
3. Perforated wound 0.5 cm. x 0.5 cm bone deep on the left arm with a fracture of the underlying bone. This wound too was caused by a blunt weapon.
4. Incised wound admeasuring 7 cm. x 1.5 cm. x 4 cm on the left forearm on the posterior region with fracture of both the underlying bones. The injury was caused by a heavy cutting weapon.
5. Incised wound 8 cm. X 1.5 cm. x 3.5 cm. on the front side of right knee with fracture of patella bone and dislocation of the knee joint. This wound too was caused by a heavy cutting weapon.
6. Incised wound admeasuring 8 cm. X 2 cm. x 5 cm. on the lower part of the right leg on the interior region, which was caused by a heavy cutting weapon. The underlying bones were fractured. The wound was so deep that the leg was almost severed and just joined by a small area of skin.
7. Incised wound 8 cm. X 2 cm. x 5 cm. on upper and posterior region of right leg with fracture of both bones. This injury was caused by a heavy cutting weapon.
8. Perforated wound 0.5 cm. x 0.5 cm. bone deep on the right leg middle part on front side with fracture of both the underlying bones. This injury too was caused by a blunt weapon.

Upon opening the body, the scalp, skull, vertebra, thorax wall, ribs, cartilages, pleura, carina of trachea, Pericardium, abdominal wall and internal and external organs were all found to be healthy. The doctor also stated that Aamdeen was admitted at the hospital in a severely injured condition at 03.50 p.m. and he passed away a little later. The cause of death was opined to be hemorrhagic shock caused by extensive injuries.

19. The investigation of the case was conducted by Amarchand (P.W.16), who stated that he was posted as the SHO, Police Station Jamba on 21.06.2012. On that day, he received a typed report submitted by Samasdeen in the mortuary room of Phalodi hospital. The report was forwarded to the police station for registering the FIR. Much before this report was submitted, Haneef had come to the police station and reported that an incident had occurred in the Village Naneu, in which Aamdeen had been injured and was lying on the road. Upon receiving this information, the witness alongwith other police personnel went to the place of incident in the Government jeep after making an entry in the Roznamcha, which was proved as Ex.P/27. Aamdeen was lifted from the spot and was brought to the Phalodi Hospital, where he expired while undergoing

treatment. Amarchand thereafter conducted investigation; prepared the relevant documents viz. site inspection plan, Panchnama Lash, Fard Supurdgi Lash; got the dead body subjected to postmortem; collected the blood stained and control samples; recorded the statements of the witnesses and arrested the accused. He proved the informations given by the accused and the recoveries made in furtherance thereof in the following manner :-

"जैर हिरासत मुलजिम साबिर, नवाब, सलीम की धारा 27 की ईत्तलाओं क्रमशः Exp-29, Exp-30, Exp-31, Exp-32 है, जिन पर A से B मेरे C से D मुलजिम के हस्ताक्षर है। जैर हिरासत मुलजिम साबिर के विरुद्ध दर्ज प्रकरणों की सुची Exp-33 है जिस पर A से B मेरे हस्ताक्षर है। मृतक आमदीन की लाश के फोटोग्राफ्स Exp-34 से लगायात Exp-41 है जिन पर A से B मेरे हस्ताक्षर है। दौराने अनुसंधान मुलजिम साबिर, नवाब, सलीम ने मौका तस्दीक करवाया था जिसकी फर्द Exp-8 बनाई थी जिस पर E से F मेरे A से B, C से D मौतबिरान के G से H मुलजिम के हस्ताक्षर है। इसी प्रकार मुलजिम साबिर की ईतला अनुसार एक बोलेरो कार नं. RJ-21-UA 1950 जरिये फर्द Exp-09 के कब्जा पुलिस ली थी जिसका E से F मेरे A से B, C से D मौतबिरान के व G से H मुलजिम के हस्ताक्षर है। बरामदगी स्थल का नजरी नक्शा Exp-10 है जिस पर E से F मेरे A से B, C से D मौतबिरान के G से H मुलजिम के हस्ताक्षर है। इसी प्रकार जैर हिरासत मुलजिम नवाब से दो बास की लाठियां जरिये फर्द Exp-11 के कब्जा पुलिस ली थी जिसका E से F मेरे A से B, C से D मौतबिरान के G से H मुलजिम के हस्ताक्षर है। बरामदगी स्थल का नजरी नक्शा Exp-12 है जिसका E से F मेरे A से B, C से D मौतबिरान के G से H मुलजिम के हस्ताक्षर है। इसी प्रकार मुलजिम नवाब से एक फरी (धारिया) जरिये फर्द Exp-21 के बरामद किया था जिस पर E से F मेरे, A से B, C से D मौतबिरान के G से H मुलजिम के हस्ताक्षर है। बरामदगी स्थल का नजरी नक्शा Exp-22 है जिस पर E से F मेरे A से B, C से D मौतबिरान के G से H मुलजिम के हस्ताक्षर है। इसी प्रकार मुलजिम सलीम से एक लोहे की कुल्हाड़ी जरिये फर्द Exp-23 के बरामद की थी जिस पर E से F मेरे A से B, C से D, मौतबिरान के G से H मुलजिम के हस्ताक्षर है। बरामदगी स्थल का नजरी नक्शा Exp-24 है जिसका E से F मेरे A से B, C से D मौतबिरान के G से H मुलजिम के हस्ताक्षर है। पर्चा चाक F.I.R. Exp-.06 है जिसका HC प्रेमसिंह के A से B हस्ताक्षर है।"

20. In cross-examination, the witness stated that when he reached at the place of incident alongwith the police party upon receiving the information of Haneef, only Aamdeen was lying unconscious at the spot in injured condition and a person named Iliyas was standing besides him.

21. Aamdeen was taken to the hospital in the police vehicle. From the said fact as elicited in the statement of the Investigating Officer, our conclusion that Yar Mohammed (P.W.3), Khairdeen (P.W.4), Samasdeen (P.W.5) were not present at the spot and they did not see the incident with their own eyes and that Baburam must have run away from the place of incident on seeing the accused assaulting the deceased is fortified. In view of above, the evidence of Illiyas would become really important and his non-examination would persuade us to draw adverse inference against the prosecution. The Farsi, Dhariya and the axe allegedly recovered at the instance of the accused alongwith the apparels of the deceased were forwarded to the FSL, from where, a report Ex.P/43 was received. As per the said report, these articles tested positive for presence of 'B' group blood. However from a bare perusal of the above quoted portion of the examination-in-chief of the Investigating Officer, it is clear that he did not prove the informations of the accused in an appropriate legal manner mandated by law so as to make the same in admissible in evidence. This court in the case of Daau Ram Vs. State

of Rajasthan [D.B. Criminal Appeal No.87/2019] decided on 27.05.2019 has held affirmatively held that for an information under Section 27 of the Evidence Act to be admitted in evidence, the police officer concerned must depose the contents thereof verbatim during his sworn testimony. A casual statement that the accused gave the information, which was being marked as an exhibit, would not amount to a proper legal proof of the information. Apparently, the Investigating Officer would have recorded the informations during interrogation of the accused and thus, he would be the prime witness to prove the same. He would, thus, be required to narrate verbatim or at least in substance the contents thereof, only whereafter, such informations could be treated as having been proved as per law. If the Investigating Officer fails during his testimony to elaborate the details of the information given to him by the accused under Section 27 of the Evidence Act, a formal marking of the document as an exhibit during the trial would not fulfill the requirement of law and the information would have to be treated as not proved. As observed above, the Investigating Officer made a simple formality of putting exhibits on the informations under Section 27 of the Evidence Act in his evidence without deposing the words spoken to him by the accused and thus, these informations and the recoveries made in furtherance thereof are rendered inadmissible in evidence.

22. As a consequence, we are of the view that the evidence of the sole eye-witness Baburam (P.W.2) is the only material available to the prosecution, on the basis whereof, the prosecution case can be evaluated. Baburam named 9 persons as the assailants in his statement under Section 161 CrPC (Ex.D/4) and stated in an omnibus manner that all rained indiscriminate blows on the person of Aamdeen. However, upon being examined on oath, Baburam (P.W.2) made wholesome improvement from his previous statement and named 11 persons as the assailants of Aamdeen by adding the names of Saleem and Anwar as the assailants. He made a further improvement from his police statement in his sworn testimony and alleged that Saleem was having an axe, whereas Sabir, Nawab, Bashir were having Farsis and the others were having lathis in their hands. In the police statement, none of the accused named by the witnesses was attributed any particular weapon and the allegations were totally omnibus in nature. Thus, there exist serious discrepancies and contradictions in the evidence of Baburam vis-a-vis his investigational statement and he has made significant improvements in the number of accused and the weapons ascribed to them. Manifestly, the witness saw the incident from some distance, called and told about the same to Yar Mohammed, Khaire Khan, Samasdeen and Haneef and thereafter, he went back to his shop. Admittedly, the 161 CrPC statement (Ex.D/4) of this witness was recorded on 08.07.2012. The witness explained that the police did not call him to give the statement during this period. For verifying this fact, we perused the case diary and found that the Investigating Officer never summoned the witness for recording his statement upto 08.07.2012. Thus, the credibility of the evidence of this witness cannot be doubted simply because his statement under Section 161 CrPC was recorded after some delay.

23. Nevertheless, the fact remains that 10 accused were named in the FIR lodged on the basis of the information supplied by the witness Baburam to the informant. The Investigating Officer exonerated the accused Khair Mohammed, Kayam Khan, Bachu Khan and Imamdeen and did not file charge-sheet against them. The trial court appreciated the evidence and acquitted the accused Anwar of the charges even though the evidence against him is the same as that exists against the accused appellants. True it is that in the Indian scenario, the principle of "Falsus in uno falsus in omnibus" does not apply, but when there is no material with the court to separate the chaff from the grain, then the benefit of doubt has to be extended to the accused.

24. On a comparative analysis of the police statement of Baburam (Ex.D/4), with which he was confronted while deposing on oath before the court, it comes out that Baburam named 11 persons as assailants in his sworn testimony, whereas only 9 persons were named by him as accused in his 161 CrPC statement (Ex.D/4), wherein the names of Saleem and Anwar were omitted.

25. As per the evidence of the Investigating Officer Amarchand (P.W.16), when he reached the spot, the injured was lying on the road and only one Illiyas was standing nearby. This candid admission appearing in the statement of the Investigating Officer, apparently, the claim of the first informant Samasdeen (P.W.5), Yaru (P.W.3), Khairdeen (P.W.4) and Baburam (P.W.2) that they were all standing besides Aamdeen when then police arrived at the spot is falsified. The admission as appearing in the statement of Haneef that Aamdeen asked for water, yet nobody offered him the same also fortifies our conclusion that no one must have been present near Aamdeen when he was assaulted. Thus, the claim of the first informant Samasdeen (P.W.5), Yaru (P.W.3) and Khairdeen (P.W.4) that they also saw a part of the incident happening with their own eyes is totally falsified by this material fact elicited in the cross-examination of the Investigating Officer. If at all the prosecution was intending to bring out the truth of the matter, then the said Illiyas should have been examined in evidence.

26. The motive attributed to the appellants is of looting the money allegedly available on the person the deceased Aamdeen. However, as stated above, the sole prosecution eye-witness Baburam (P.W.2), whose testimony has been held to be partially reliable did not allege in his evidence that he saw any of the accused removing the money from the person of Aamdeen. Furthermore, no recovery of money was effected by the Investigating Officer from any of the accused during investigation. Thus, the theory of motive is also not established by any cogent evidence.

27. In view of these grave discrepancies, improvements and contradictions apparent in the testimony of Baburam (P.W.2), manifestly, he cannot be termed to be a witness of sterling worth and can only be considered to be a partially reliable witness. Law is well-settled that conviction cannot be founded on the evidence of such witness without thorough corroboration. As we have already discussed above, the prosecution does not have available to it any corroborative

piece of evidence so as to substantiate the faltering testimony of Baburam because we have already discarded the evidence of recovery of weapons and the evidence of the other so-called eye-witnesses.

28. After discussing the evidence of Baburam in detail, we are unable to find any distinguishing feature amongst the cases of the acquitted accused Anwar Khan; Khair Mohammed, Kayam Khan, Bachu Khan and Imamdeen, who were exonerated by the police and the accused appellants herein. Thus, there remains no option with the court, but to acquit the accused appellants of all the charges by giving them the benefit of doubt.

29. As a result of the above discussion, the appeals are allowed and the impugned judgment dated 11.11.2016 passed by the learned Additional Sessions Judge, Phalodi, District Jodhpur in Sessions Case No.17/2012 is quashed and set aside. The appellants are acquitted of all the charges. The appellants (1) Ali S/o Bachu Khan and (2) Abdul Gaffar S/o Khair Mohd. are on bail. They need not surrender. Their bail bonds shall stand discharged. The other appellants, namely, (1) Sabir Ahmed S/o Bachu Khan, (2) Saleem S/o Bachu Khan, (3) Nawab S/o Kayamdeen and (4) Bashir S/o Bachu Khan are in custody. They shall be released forthwith, if not wanted in any other case.

30. However, keeping in view the provisions of Section 437-A CrPC, the acquitted accused appellants are directed to furnish a personal bond in the sum of Rs.40,000/- and a surety bond in the like amount before the learned trial court, which shall be effective for a period of six months to the effect that in the event of filing of a Special Leave Petition against the present judgment on receipt of notice thereof, the appellants shall appear before the Supreme Court.