

Gafoor Shah, Vs. State

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Court : Allahabad

Decided On : Apr-01-2005

Reported in : 2005CriLJ3492

Judge : Imtiyaz Murtaza and ;R.P. Yadav, JJ.

Acts : Indian Penal Code (IPC) - Sections 147, 148, 149, 302, 307, 379, 396, 420, 429, 465, 467, 468, 471 and 486; Code of Criminal Procedure (CrPC) - Sections 386

Appeal No. : Criminal Appeal No. 2679 of 1981

Appellant : Gafoor Shah, ;kalloo Shah, ;godam Shah Sons of Asharfi and Mehtab Shah S/O Garib Shah

Respondent : State

Advocate for Def. : Arun Kumar Shukla, Adv. and ;A.G.A.

Advocate for Pet/Ap. : P.N. Misra and ;Apul Misra, Advs.

Judgement :

R.P. Yadav, J.

1. This Criminal Appeal by appellants Gafoor Shah, Kalloo Shah, Godam Shah and Mehtab Shall has been preferred against the judgment and order dated

21st October, 1981 passed by IV Additional District & Sessions Judge, Budaun in S.T. No. 230 of 1978 convicting the appellants under Section 396 I.P.C. and sentencing each of them to undergo imprisonment for life.

2. The appellant Mehtab Shah died during the pendency of the appeal and his appeal has abated.

3. Complainant Suraj Pal (P.W.I) s/o Shri Ram Charan (deceased) who is a Harijan by caste is resident of village Beoli which lies within the circle of P.S. Wazeerganj of District Budaun at a distance of 3 kms, from police station. Smt. Shyama is his mother, whereas Sukhe (P.W. 2) is the father of Smt. Shyama and NANA of complainant Surajpal (P.W. 1). Smt. Suraj Wati (P.W. 3) and Km. Anita who are injured are sisters and Suraj Prakash (P.W. 1), is the brother of the complainant. Chandra Pal is his maternal uncle. The appellant Gafoor Shah, Kalloo Shah and Godam Shah are real brothers and are residents of the same village Beoli. The complainant as well as the appellants are said to be neighbours with only one house of Sri. Bhullan intervening between the houses of complainant and appellants.

4. It is alleged by the prosecution that the appellant Gafoor Shah had developed illicit relationship with Smt. Shyama, the mother of the complainant Suraj Pal (P.W. 1). When this illicit relationship came to be known to the family members, they strongly objected to it. They clandestine activities and continued to meet Smt. Shyama. Some altercation had also taken place between the appellant Gafoor Shah and Sri Ram Charan-his father, where after appellant Gafoor Shah had killed a pig of the complainant. Report of the same was lodged by Sukhey Nana of the complainant at the police station and appellant Gafoor Shah was prosecuted (and convicted in that case under Section 429 I.P.C after this occurrence) However, since lodging of the report, the enmity between them was intensified, It is said that Gafoor Shah's covert meeting with his mother did not come to an end. Three days before the incident in question, his father Ram Charan and Nana Sukhey had scolded his mother. It was taken ill by Gafoor Shah-appellant. In this very connection Shri Chandra Pal, maternal uncle of the complainant had thrashed also the appellant Gafoor Shah with lathi, whereupon, he had threatened to see them

very soon.

5. The occurrence in question is said to have taken place in the midnight of 14/15, January of 1977 when complainant Suraj Pal, his father Ram Charan, sister Suraj Wati -P.W. 2 Km. Anitha and his mother Smt. Shyama were sleeping in their house. A lamp was allegedly burning inside the house. Their house being thatched one a Tatia was there on the door of the house. At about midnight, there was some whispering from outside asking to open the Tatia whereupon, the complainant and his father Ram Charan made an enquiry as to who was there. But his mother Smt. Shyama told that it may be Chandra Pal having come to take beedi. In the meantime, appellant Gafoor Shah and his uncle Mehtab (deceased) aimed with guns and his two other brothers armed with country made pistols along with three other miscreants (who were not known by name) pulled off the Tatia and forced their entry in the house. When the complainant and his father asked appellant Gafoor Shah to stay away, he fired a shot with his gun at Ram Charan telling that he had been humiliating him and he will finish his story for ever. The complainant took a lathi and wanted to ply the same. But appellant Mehtab(deceased) fired with his gun at him. His father wanted to pick-up an axe to save himself but one of the miscreants having lathi, snatched the axe and gave a blow on the leg of his father with the result his leg was chopped off. His mother having got an opportunity ran out of the house and raised shouts. The appellants fired at the complainant, his brother and sisters who all sustained fire-arm injuries. On the hue and cries raised by them, his Nana Sri Sukhe-P.W. 2, Sri Mallan-P.W. 5, Sri Munshi-P.W. 4, Dharam Pal, Ram Pal, his maternal uncle Chandra Pal and others reached there. Shri Chandra Pal set fire to a stack of 'Sarkanda' lying in front of the house and challenged the miscreants, whereupon, the miscreants seeing the villagers assembling there, ran away, but while going away, they fired at the villagers also, causing injuries to Shri Sukhe-P.W. 2. Appellant Gafoor Shah is said to have taken away a box of the complainant which contained cash, ornaments and clothes.

6. It is alleged that the appellants were recognized in the light of the lamp, torches and burning 'Sarkanda'.

7. The complainant and his other family members could not go the police station in the night due to fear. In the early morning, some cart was arranged, whereupon, all the injured and the complainant went to the police station Wazeerganj, where complainant Surajpai, P.W.1 lodged an oral report (Ext. Ka.1) on his dictation, which was reduced to writing by Head Constable Khem Singh (P.W.7) who registered a case under Section 396 I.P.C. Investigation was entrusted to S.O. Shri Raghubeer Singh Malik P.W.9 S.O. who was then present at the Police Station.

8. Reference letters for medical were prepared by Head Constable Khem Singh and the injured persons were sent to Primary Health Centre Saidpur, where Dr. Sakhir Hussain-P.W.1, medically examined Km. Anita, daughter of Ram Charan, Sukhe-P.W.2, Suraj Pal-P.W.1 Km. Suraj Wati -P.W.3 and Suraj Prakash between 12.45 noon to 1.45 p.m. and noted the following injuries on their person.:-

Km. Anita -- aged about 8 years:-

(1) Swelling 3 cm x 3 cm on the right upper eye lid. Bluish in colour, unable to open the eye. Clotted blood present between both the eye lids. Kept under observation.

(2) Circular lacerated wound 1/5 cm x 1/5 cm x 1/5 cm x 1/4 cm on right side forehead 4 cm above right eye brow. Clotted blood present.

Sukhey -- aged about 60 years.:-

(1) Multiple circular lacerated wound in an area of 34 cm x 25 cm on the outer surface of right thigh, each measures 1/2 cm x 1/2 cm. Depth of some wounds not traceable. Kept under observation. Advised X-ray. Clotted blood present.

(2) Multiple Swellings in an area on 2 Cm x 12 cm on inner surface of right thigh. Each measures 2 cm x 2 cm Red in colour. On Palpat in the feeling of hardness. Kept under observation. Advised X-ray. Clotted blood present.

(3) Multiple lacerated circular wounds in an area of 25 cm x 25 cm x 1.8 cm on the back of left knee and lower part of left thigh. Clotted blood present. Kept under

observation.

Suraj Pal -- aged about 17 years :-

1) Lacerated wound 14 cm x 12 cm x bone deep on back of right fore arms and right elbow Margins of wounds charred off. Blackening present. Kept under observation. Clotted blood present. Km Suraj Wati -- aged about 15 years :-

1) Two circular lacerated wounds on right shoulder. Each measuring 1/4 cm x 1/4 cm x 1/4 cm clotted blood present.

2) Circular lacerated wound 1/4 cm x 1/4 cm x 1/4 cm on right upper arm upper part clotted blood present.

3) Multiple lacerated wound 8 cm x 4 cm on front of neck each measuring 1/4 cm x 1/4 cm x 1/4 cm.

4) Multiple circular lacerated wound in an area of 7 cm x 7 cm on right side of forehead just above right eye brow each measuring 1/4 cm x 1/4 cm x 1/4 cm clotted blood present.

5) Circular lacerated wound 1/4 cm x 1/4 cm x 8 cm deep on right ear pinna interior surface.

6) Multiple circular lacerated wound in an area of 10 cm x 6 cm on front side of cheek and chin each 1/4 x 1/4 x 1/4 clotted blood present.

Suraj Prakash -- aged about 10 years :-

An old scar 2 cm x 1 1/2 cm in outer surface of right ambler region.

Circular lacerated wound 1/4 cm x 1/4 cm x 1/4 cm on left side of forehead just about outer end of lt. eye brow. Clotted blood present.

9. Duration of the aforesaid injuries in the opinion of the doctor was about half day. The injuries were caused by some fire arm. Some of the injuries were kept under observation and others were found to be simple.

10. Shri R.B.S. Malik-P.W.9 Station officer, in whose presence the case was registered, interrogated the complainant Suraj Pal-P.W.1, P.W;-2 Sukhe, Suraj Prakash and Km. Anitha and Suraj Wati-P.W.3 at the police station and, thereafter, left for the spot. On reaching there, he held inquest on the dead body of Sri Ram Charan and prepared inquest report (Exht.Ka 14) He also prepared other relevant papers Ext.Ka.-15 to 18 and sent the dead body in sealed cover for post mortem.

11. Post-mortem on his dead body was conducted by Dr S.C. Naugaria- P.W.-6 who was then posted as Medical Officer, District Hospital, Budaun. The deceased was aged about 45 years and the following ante-mortem injuries were found on his person.:-

(1) Lacerated wound square size 8 cm x 7 cm x 4 x 3.5 cm x muscle deep over right front chest in-in pacavicular region 2 cm above right nipple.

Surrounding towards 6 wounds (Gun shot wounds of entrance of size 0.25 cm x 0.25 cm present with blackening of surrounding skin.

One guttar, one cock piece was found and 5 pallets also found.

(2) Lacerated wound of square shape of 8 cm x 7 cm x 35 cm 4 cm. over medial side of lower 1/3rd of right thigh (just above x bone deep) above knee with fracture of femur bone under-neath.

(3) Incised wound 7 cm x 1 cm x bone deep on lateral side of lower 1/3rd of right thigh.

(4) Incised wound 12 cm x 4 cm x muscle deep 2 cm below injury No.3.

(5) Four wounds of entrance (gun shot) of size (0.25 cm x 0.23 cm) on upper 1/3rd of right thigh on anteromedial aspect. 2 pallets found.

(6) Incised wound 2.5 cm x 1 cm x muscle deep over Lateral side of left fore arm just above the wrist.

(7) Four gun shot wounds of entrance of size 0.25 cm x 0.25 cm, 3 cm. above injury No. 6. Two pallets found. According to the opinion of Dr. Naigraiya -- P.W.6, his death might have taken place in the night of 14/15.1.1977 around midnight. He also stated that ante-mortem injuries found on the body might have been caused by axe and fire arm which were sufficient in the ordinary course of nature to cause death.

12. After sending the dead body Sri Malik-P.W.9 inspected the spot, prepared site plan-Ext. Ka-19. He took in his custody the burnt ashes, piece of blanket, whereon deceased has been lying in that night, plain earth, blood stained earth, and kulari Ext.Ka-9, prepared memos Ext. Ka-20 to 24. He also inspected the torches of the witnesses in the light of which, they stated to have seen the occurrence. He prepared their memo Ext. Ka-25. The two other accused Baldeo, and Shammoo who were arrested as suspected accused and after test identification, they were also charge sheeted alongwith appellants for facing trial.

13. Appellants pleaded not guilty and attributed their false implication due to enmity.

14. To substantiate the charge, prosecution examined complainant Suraj Pal-P.W.1, Sukhe-P.W.2, Smt. Suraj Wati- P W.3, Munshi-P.W.4, Mallan-P.W.-5, Dr. S.C. Naugraiya -P.W-6, Khem Singh-P.W.7, Dr. Sabir Hussain- P.W.8 and Shri R.B.S.Malik S.I. -P.W.-9.

15. The accused led no oral defence. They filed one document marked Ext. Kha 1, which is the copy of judgment of appeal dated 1.8.1979 setting aside the conviction of appellant Gafoor Shah dated 30.5.1979 recorded by the learned Magistrate under Section 429 I.P.C for having killed the pig of complainant.

16. Out of the aforesaid nine witnesses, P.W.-6 to 9 are almost formal witnesses. P.W.-4 Munshi and P.W.-5 Mallan who were examined as witnesses of fact, turned hostile and did not support the prosecution case so far as participation of the appellants and the other accused in the incident in question was concerned. The main stay of the prosecution was on the evidence of Suraj Pal - P.W.1 Sukhe-P.W.2, Smt, Suraj Wati P.W.3 who were injured witnesses. The learned Additional

Sessions Judge believed their testimony and held the appellants guilty of the offence under Section 396 I.P.C, and convicted and sentenced them to imprisonment for life. However, he acquitted the other two accused Shammoo and Baldeo, against whom prosecution case rested on test identification only.

17. The appellants challenge their conviction and sentence through this appeal.

18. Learned counsel for the appellants, without challenging the factum of the incident, has submitted that it seems to be a case of typical dacoity where the appellants have been implicated falsely due to prior enmity. It is also submitted by him that the appellants were neighbours of the complainant and well known to the witnesses, so, it was not possible for them to have participated in any such occurrence without having covered their faces or taken any precaution to conceal their identity. It has also been submitted that all the witnesses examined by the prosecution were partisan and interested witnesses and no independent person of village has come forward to support the prosecution case and that there is no recovery of any looted article from the possession of the appellants. It has also been contended by the learned counsel that there is material contradiction in the statement of the witnesses on the point of lodging of the F.I.R., time about going to the police station and for medical examination and the contradiction being on material points are sufficient to dismantle the very foundation of the prosecution case. Question of light was also raised.

19. Before proceeding to examine the contention of the learned counsel on merits, let us examine as to what is the substratum of the prosecution version and what offence does it prima facie make out. In Nutshell the version given in the F.I.R. is that appellant Gafor Shah was inimical and annoyed with the complainant and his father on account of their being hurdle in the way of his carrying on illicit relationship with Smt. Shyama, the mother of the complainant and also because his maternal uncle Chandrapal had beaten him shortly before this occurrence and whereupon he had extended threats to the family of the complainant. On the eventful day, in the midnight, the appellants along with three others raided the house of the complainant when they were asleep. Appellant Gafoor Shah is said to have asked from outside to open the Tatia of the house, whereupon, the

complainant and his father made enquiry. But before giving reply, he pulled off the Tatia and all the appellants along with three others forcibly entered the house. Appellant Gafoor Shah fired on Shri Ram Charan, father of the complainant with his gun and while doing so, he told them that he has been humiliating him and, therefore, his is finishing his story for ever. It is also in the F.I.R. that thereafter, appellant Mehtab Shah fired at the complainant and the other miscreant cut off the leg of his father with an axe. The appellants fired at other family members also, who sustained injuries. Besides the murder of Shri Ram Charan, other five person of his family, including the complainant Suraj Pal, his two sisters Km. Anitha and Smt. Suraj Wati, his brother Suraj Prakash and Nana Sukhe sustained fire arm injuries. It is also the prosecution version that while going away, appellant Gafoor Shah took away the box of the complainant which contained cash, ornaments and clothes.

20. A glance at the aforesaid averments made in the F.I.R shows that, in fact, allegations made in the F.I.R disclosed an offence of murder, attempt to commit murder and theft punishable under Section 302, 307 & 379 I.P.C. Since the total number of miscreants was alleged to be seven, it was also a case of unlawful assembly punishable under Section 147 I.P.C. Against Gafoor Shah-the appellant, the case was of murder and theft punishable under Section 302 & 379 I.P.C., whereas against other accused, it was a case of murder committed in prosecution of the common object of the unlawful assembly of which they were members. So appellant

21. Gafoor Shah ought to have been charged under Section 302 I.P.C, (Simplicitor) and Section 379 I.P.C. also, whereas, the other appellants ought to have been charged under Section 302 I.P.C. read with Section 149 I.P.C. All the accused should have been further charged under Section 307 read with Section 149 I.P.C. for having attempted to commit murder of the complainant Suraj Pal, Suraj Prakash, Km. Anitha, Smt. Surajwati-P.W.3 and Shri Sukhe-P.W.2. Those armed with deadly weapons ought to have been charged under Section 148 of the I.P.C. No averment was made in the F.I.R. that the miscreants including the appellants entered the house with an intention to commit dacoity and while conjointly committing dacoity, murder of Ram Charan was committed and hurt was

caused by any of those miscreants during the course of commission of dacoity. We are surprised that when the allegation in the F.I.R. were so clear, how the case could be registered under Section 396 I.P.C. But it is more surprising that the learned Sessions Judge, without examining the contents of the F.I.R., the case diary and the prosecutions evidence referred therein, framed the charge under Section 396 I P.C and proceeded to try the appellants along with other acquitted accused for the aforesaid offence punishable under Section 396 I.P.C. The appellants have thus been tried for an offence which was not at all made-out even for the purpose of framing the charge on the basis of the material available in the case dairy and the version given by the witnesses. In reality, it was therefore not a case of dacoity, it was a case of murder, attempt to murder and theft. If the trial is for a wrong offence, what course should be adopted is the next question that needs to be considered. Under Section 386 of the Code of Criminal Procedure, this Court while disposing the appeal from conviction has powers to direct re-trial of the accused also if the circumstances so justify. But the order of re-trial of a criminal case is made very sparingly and in exceptional cases and not unless the court is satisfied that the court trying the proceedings had no jurisdiction to try or the trial was vitiated by serious irregularities or on account of misconception of nature of proceedings and on that account in substance, there is no real trial or that the prosecutor or the accused was, for reasons over which he had no control prevented from leading or tendering evidence material to charge and the Court considers that it would be appropriate and in the interest of justice having regard to the circumstances of the case that the accused be put on trial again.

22. In the case of *Rajeswar Prasad Misra v.. State of West Bengal and another* (AIR 1965 Supreme Court 1887) it is held that :-

'But the Code contemplates that a retrial may be ordered after setting aside the, conviction or acquittal (as the case may be) if the trial already held is found to be unsatisfactory or leads to a failure of justice. In the same way, the Code gives a power to the appellate Court to take additional evidence, which for reasons to be recorded, it considers necessary. The code thus gives power to the appellate Court to order one or the other, as the circumstances may require, having a wide discretion to it to deal appropriately with different cases. The two cases of this

Court deal with situations in which a retrial was considered necessary by the appellate court. In the case of Abinash Chandra Bose, AIR 1963 SC 316, this Court held that the order for re-trial was not justified. In Ukha Kolhe's case, AIR 1963 SC 1531 too the order for retrial was considered unnecessary because end could have been achieved equally well by taking additional evidence. This Court mentioned by way of illustration, some of the circumstances which frequently occur and in which retrial may properly be ordered. It is not to be imagined that the list there given was exhaustive or that this Court was making a clean cut between those cases where retrial rather than taking of additional evidence was the proper course. It is easy to contemplate other circumstances when retrial may be necessary, as for example where a conviction or an acquittal was obtained by fraud or a trial for a wrong offence was held or abettors were tried as principal offenders and vice versa. Many other instances can be imagined. The Legislature has not chosen to indicate the limits of the power and this Court must not be understood to have laid them down. The cases may arise where either of the two courses may appear equally appropriate. Since a wide discretion is conferred on appellate Courts, the limits of that Courts' jurisdiction must obviously be dictated by the exigency of the situation and fair play and good sense appear to be the only safe guides. There is, no doubt, some analogy between the power to order a retrial and the power to take additional evidence. The former is an extreme step appropriately taken if additional evidence will not suffice. Both actions subsume failure of justice as a condition precedent. There the resemblance ends and it is hardly proper to construe one section with the aid of observations made by this Court in the interpretation of the other section. '

23. In Matukdhari Singh and others v. Janardan Prasad A.I.R. 1966 Supreme Court 356 where the case was punishable under Section 420, 486, 468, 465, 467 and 471 I.P.C. but the Magistrate framed charge under Section 420, 486, 468, 465 and 471 I.P.C. and disposed of the case without framing a charge under Section 467 I.P.C. which was exclusively triable by the Court of Sessions, the Hon'ble Supreme Court upheld the direction for retrial on the ground that there has been no proper trial of the accused.

24. There is another authority of Kerala High Court in Lakshmanan Sundaram v. State of Kerala 1990 Criminal Law Journal 1800 laying down that 'Once the appellate Court comes to the conclusion that justice requires retrial it is for that Court to consider whether it should be a completely de novo trial or continuance or completion of the trial already commenced. Whether direction of the one or the other type should be issued depends on the facts and circumstances of each case, alleged irregularity or illegality committed by the trial Court or the exact reason which prompts the appellate Court to send back the case.'

25. In V. Srinivas Reddy v. State of A.P. (1998) of S.C.C. page 331 the Hon'ble Apex Court held an order of remand/retrial justified where some material evidence was required for effective disposal of controversy raised in the case and to do justice between the parties.

26. Coming to the present case and looking to the sequence of the events narrated by the prosecution and the background in which the murder of Shri Ram Charan was committed and murderous assault was made on the other five, it being a case as already indicated above under Section 147, 302, 307, 149 I.P.C. and a case of theft against one accused appellant Gafoor Shah only, practically there has been no trial because the appellants were not tried for the aforesaid offences and they were tried for the offence of 396 I.P.C. which they were not alleged to have committed. It has, therefore, seriously prejudiced the prosecution as well as accused and we feel that it would be in the interest of justice that the appellants be tried for the offences which they are said to have committed.

27. If we dispose of the appeal on merits, it would amount to a decision without trial and such a heinous crime will go unpunished and in case we confirm the conviction, it will cause more injustice to the appellants, because they will be punished for the offence, which they have not committed. It is a case where no real trial has taken place, so it would be in the interest of justice to remand the matter for retrial and in the circumstances; there is no other alternative available to us.

28. Learned counsel for the appellants has criticized the evidence of prosecution as totally weak, frail and unworthy of credence. Although no appraisal of evidence

is required when the matter is being remanded for retrial, yet with a view to satisfy ourselves that the evidence on record is not absolutely worthless so as not to warrant any chance of conviction, we would like to make cursory reference of the same.

29. To prove the factum of incident as well as the participation of the appellants in the occurrence in question, the prosecution has relied on the evidence of the complainant Suraj Pal (P.W.1), Sri Sukhe P.W.2, Smt. Suraj Wati- P.W.3. All these were injured witnesses. So their presence on the spot was beyond any suspicion. No doubt, the witnesses themselves admit the prior enmity with appellant Gafoor Shah on account of his illicit relationship with Smt. Shyama and killing of the pig in respect of which the appellant Gafoor Shah has already been prosecuted under Section 429 of I.P.C. It is often said that enmity is a double-edged weapon and it cuts both ways. So where there are inimical and partition witnesses, the greater responsibility is cast on the Court to scrutinize and scan evidence of such witnesses with more care and caution, and such evidence could not be rejected merely on the ground of enmity or being partition witnesses. The approach should be to seek corroboration from some other material evidence. In the present case, injuries found on the person of the witnesses and deceased Ram Charan lend corroboration to the prosecution case. Moreover, the injured witnesses would be the last persons to spare the real culprit.

30. Question of light has also been raised. According to these witnesses, there was burning lamp, torches and 'Sarkanda' which was set on fire by Shri Chandra Pal. Investigating Officer Shri R.B.S. Malik -P.W.9 had found the ashes of burnt 'Sarkanda' on the spot and he has taken the same in custody by preparing memo Exht. Ka-20 thereof. Moreover, the appellants belong to the same village. They were well known to the witnesses. The appellant Gafoor Shah, while opening fire at Sri Ram Charan-deceased had told to finish his story forever. So the witnesses had heard his voice also and when miscreants were able to identify the victims in the light, the victims could have also identified the miscreants in the same light. It was the contention of the appellant's counsel that the appellants also must be attributed the common sense when they were committing the crime in their own village and exercising their common sense, they must have taken some precaution

to conceal their identity by covering their faces. The case of the prosecution could not be rejected for this reason alone when the said argument is judged in the light of the background preceding the incident in question. The appellant Gafoor Shah was not only highly inimical, he was also feeling frustrated due to hurdles created by Shri Ram Charan-P.W.1 (deceased) and Shri Sukhe-P.W.2 in carrying on illicit intimacy with the lady So with a view to establish his supremacy, he alongwith his other family members did commit this crime. Further more, the evidence if found otherwise reliable and trust worthy, it can not be thrown off merely on this ground. It has to be judged in the totality of the circumstances.

31. It was also pointed-out by the learned counsel for the appellants that according to prosecution case, the F.I.R was lodged and, thereafter, investigating officer came to the village. But aforesaid witnesses have stated in their cross examination that the S.O. visited the spot first and then the report was lodged. But when the investigating officer was asked, he clearly stated that he visited the spot only when the F.I.R was registered at the police station. Explanation has also been given by the prosecution for delay in lodging the F.I.R. that on account of fear and dark winter night, they could not muster courage to go to the police station immediately after the occurrence.

32. Some other contradictions in the statement of the witnesses including one on point of time were also attempted to be pointed out, but no such material contradiction has been elicited from the witnesses which may be held to be sufficient for discarding the evidence of the witnesses. It may be added that these witnesses are rustic and illiterate persons and so while judging their evidence, their behavioural pattern and perceptive habits have to be kept in mind as observed by Hon'ble Apex Court in the case of Shivaji v. State of Maharashtra AIR 1973 Supreme Court 2622

'The 'too sophisticated approaches familiar in courts based on unreal assumptions about human conduct cannot obviously be applied to those given to the lethargic ways of our villages. When scanning the evidence of the various witnesses the Court has to inform itself that variances on the fringes, discrepancies in details, contradictions in narrations and embellishments in inessential parts cannot militate

against the veracity of the core of the testimony, provided there is the impress of truth and conformity to probability in the substantial fabric of testimony delivered.'

33. Regarding the estimate of time given by such witnesses, the Hon'ble Court observed 'The sluggish chronometric sense of the country-side community in India is notorious since time is hardly of the essence of their slow life'.

34. Above should be the approach of the Courts while appreciating the evidence of illiterate villagers.

35. We have made reference to the above only with the view to ensure that evidence on record is not such which can lightly be brushed aside. We have not made any critical analysis or scanning of the evidence so that the trial court may remain free to appreciate the evidence in proper and judicious manner.

36. In the result, the conviction of the appellants under Section 396 I.P.C. is liable to be set aside and the matter needs to be remanded for retrial.

37. The conviction and sentences imposed on the appellants under Section 396 I.P.C. are set aside. The matter is remanded to the learned Sessions Judge, Budaun for retrial after framing the charges afresh for the offences in question under appropriate section;. The appellants are on bail and they shall continue to be on bail until further orders of the Trial Judge.

38. It is directed that the evidence on record shall be read as evidence at the trial. However, the prosecution as well as the accused will be at liberty to adduce any further evidence or to further cross examine the witnesses who have already been examined. We make it clear that the learned Sessions Judge while disposing of the trial afresh on merits will not be trammelled by any of the observations made by us in this judgment.

39. Appeal stands disposed of accordingly.

40. Let the record be transmitted down within a week and all efforts should be made by the learned judge conducting the trial to dispose of the trial within three months from today.

