

State of U.P. Vs. Avinash

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Court : Allahabad

Decided On : Jul-26-1996

Reported in : 1997CriLJ966

Judge : N.L. Ganguly and ; B.K. Sharma, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 302 and 304; Code of Criminal Procedure (CrPC) - Sections 82, 83, and 161

Appeal No. : Government Appeal Nos. 915 and 1601 of 1980

Appellant : State of U.P.

Respondent : Avinash

Advocate for Def. : Y.S. Tyagi, Adv.

Advocate for Pet/Ap. : A.G.A.

Disposition : Appeal dismissed

Judgement :

B.K. Sharma, J.

1. Avinash accused was tried by Sri. S. K. Sexena, the then VIIth Addl. Sessions Judge, Meerut for the offence under Section 302, I.P.C. By his judgment and order dated 22-4-1980 at the trial the VIIth Addl. Sessions Judge, Meerut held him guilty

only of the offence under Section 304, I.P.C. and accordingly convicted him of this offence and sentenced him to undergo R.I. for 10 years and also a fine of Rs. 10,000/- and in case of default to suffer further R.I. for a period of one year.

2. Being aggrieved by the said judgment and order Avinash accused has preferred Criminal Appeal No. 915 of 1980 seeking his acquittal under Section 304, I.P.C. On the other hand the State Government preferred Government Appeal No. 1601 of 1980 praying for conviction and sentence of the accused for the offence under Section 302, I.P.C.

3. Both appeals have been consolidated and heard together and both appeals are being disposed of by this common judgment. The original judgment shall be kept on record of Government Appeal No. 1601 of 1980.

4. Heard learned counsel for the parties and perused the record.

5. The prosecution story was that deceased Kunwar Pal Singh and the witnesses Yash Pal Singh and Ved Bir Singh were living together in a room in Mohalla Nagla Battu in the city of Meerut, that on the day of occurrence in the noon there was some quarrel between the deceased and two boys, namely, Sukhbir and Tejbir, that the accused Avinash was also accompanying Sukhbir and Tejbir in that incident, that the present occurrence took place on 1-12-1978, that on that day the deceased and his companions Yash Pal Singh and Ved Bir went together to see the picture in Evej Talkies, Meerut in the show running from 6 to 9 p.m. taking their seats in the second class, after purchasing tickets, that on the seat behind the seat of Kunwar Pal deceased this accused was sitting, that during the show the accused knocked the deceased many times with his leg, that the deceased informed his companions that the boy sitting behind him was one of the persons who was with Sukhbir and Tejbir in Meerut College at the time of a quarrel there, that after the show was over the deceased and his companions came out of the cinema hall and the accused met them on the gate and had a talk with the deceased, that during the conversation the deceased and the accused went to the other side of the road, that one Sudesh met the witnesses Yash Pal Singh and Vedbir and they followed the deceased and, the accused, that there was electric light of electric rod on the road, that after some time, all of a sudden, the accused

took out a knife and gave a knife blow on the deceased's chest and fled towards the excise godowns, that the deceased made a cry and ran after the accused but after some distance the deceased fell on the ground, that the accused managed to escape, that the companions Yash Pal Singh and Vedbir took the deceased to P. L. Sharma Hospital, Meerut in a rickshaw where he was hospitalised and where he died at about 10 p.m., that leaving the dead body of the deceased in the hospital Shri Ved Bir Singh companion went to police station Kotwali where he lodged the written F.I.R.(Ext.ka-5)on 1-12-78 at 11.15 p.m. and on its basis the chick report was prepared. Accused Avinash was not nominated in the F.I.R. During investigation his name was disclosed by Chatar Singh (PW

3) who gave an eye-witness account to the Investigating Officer Sri V.S. Vishnoi (PW 10), on 2-12-1978. The Investigating Officer could not arrest accused Avinash and claimed to have given a report under Section 82/83, Cr.P.C. It was claimed that he did not get the warrant till 9-2-79 and that thereafter the Investigation of the case was entrusted to C.I.D. C.B., Meerut. The second Investigating Officer Sri Badan Singh (PW

5) C.B. C.I.D. Meerut also made a search of the accused but could not find him, and could not arrest him. Ultimately the accused Avinash surrendered in Court on 14-5-1979. He was put up for identification on 15-6-1979. Sri Sita Ram, Executive Magistrate (PW

4) got the identification proceedings conducted and Yash Pal Singh (PW

1) and Vedbir Singh (PW

2) correctly identified the accused Avinash in the identification proceedings. The identification memo is Ex. ka

2. At the trial both these witnesses correctly identified the accused and Chatar Singh (PW

3) gave ocular evidence against the accused naming him. The learned Sessions Judge accepted the prosecution evidence with the only difference that he considered that the evidence constituted only an offence under Section 304, I.P.C.

against the accused and observed that though the blow with a knife may not be caused with an intention to commit the murder of Kunwar Pal Singh deceased, but at least this accused had full knowledge that he is causing such a bodily injury which was likely to cause the death of Kunwar Pal and that ultimately Kunwar Pal died of this injury.

6. We have heard learned counsel for the parties and perused the record. It is not controversy that deceased Kunwar Pal was inflicted a sharp weapon injury on his body on 1 -12-78 in the night, due to which he later on died in P. L. Sharma Hospital, Meerut the same day. The injury was a punctured wound 2 cm. x 1 cm. chest cavity deep on the left side of front of chest. Pericardium and the heart were punctured. The injury was sufficient to cause death in the ordinary course of nature.

7. The F.I.R. of this case has been lodged at 11.15 p.m. at police station Kotwali, district Meerut by Vedbir Singh (PW 2). Witness Yash Pal Singh has been named in the F.I.R. In the F.I.R. it is claimed that informant Vedbir Singh and Yash Pal Singh both who accompanied the deceased in the Cinema Hall itself and Sudesh, who met them in front of the Cinema Hall after the show was over and before the occurrence took place took the deceased to the Hospital in rickshaw. In the F.I.R. it is also stated that the occurrence took place at 9.15 p.m. and that the deceased died in the Hospital the same day at 10 p.m.

8. The prosecution has examined Vedbir Singh informant (PW. 2) and Yash Pal Singh (PW 1), at the trial. Both of them testified to the prosecution story. Both correctly identified accused Avinash at the identification proceedings and also at the time of the statement at the trial.

9. The defence disputes the presence of the said both witnesses at the spot at the time of occurrence. There are circumstances also which lend support to the defence plea.

The case has been initially investigated by Sri. Badan Singh (PW 15) and thereafter the investigation of the case was entrusted to C.B. C.I.D., Meerut. The medical examination report in respect of the injured at the time of admission in P.

L. Sharma Hospital, Meerut has been withheld by the prosecution. The prosecution has also withheld the bed head ticket of the deceased. The prosecution also did not disclose whether the deceased had made any dying declaration in the Hospital before his death.

10. The crucial question for consideration becomes as to who took the injured to the Hospital and who had got him hospitalised there. The suppression of the said documents by the prosecution throws a great shadow of doubt over its case.

11. The defence has brought on record a copy of the G.D. Entry No. 39 of 22.05 hrs. dated 1-12-1978 of Police Station Railway Road Meerut. It was Ext. Kha-I. This G. D. entry was in respect of the memo sent by Male Emergency Ward of P. L. Sharma Hospital Meerut to the police station which contained the information that one patient Kunwar Pal has been brought in the Hospital on 1 -12-1978 at 9.45 p.m. having been accidentally injured by knife (CHAKU KE LAGNE SE DURGHATNAGRAST HOKAR ASPATAL MEN LA YE GA YE). It is significant to note that it does not indicate as to who brought the injured to the Hospital. Apparently, it indicates that some unconcerned person found the deceased in an injured condition and brought him to the Hospital. It may be mentioned here that in the Hospital there is maintained an Accidental Injury Register and a Medico Legal Register is also maintained there. The Medico Legal Register is different from the Accidental Injury Register. It seems that the injury report and the bed head ticket have been -withheld by the prosecution from the Court be-cause the same did not contain the names of informant Vedbir Singh (PW-2) and of Yashpal Singh (PW-1) as also of Sudesh as claimed by the prosecution but it contained the name of some other person and the production of these documents would have belied the prosecution story that these two persons, namely Vedbir Singh and Yash Pal Singh accompanied the deceased from the beginning and Sudesh joined these two persons outside the cinemahall before the occurrence.

12. On this point it will be useful to place some further material on record before coming to the second G.D. Entry of the police station informing about the death of the deceased. In the F.I.R. it has been stated that informant Vedbir Singh, Yash Pal Singh and Sudesh, all the three took the injured to the police station in a

rickshaw and all the three along with the injured went in one rickshaw. At the trial Yash Pal Singh (PW 1) claimed in para 3 of his evidence that he and Vedbir Singh picked the injured and took him to P. L. Sharma Hospital, Meerut and got him admitted in the Emergency Ward. In his cross-examination by defence in para 6 he stated that he and Vedbir Singh took the injured with them to the Hospital and added 'HAMARE SATH US SAMAI KOI NAHIN THA.' He was confronted with the statement given by him to C.I.D. Inspector under Section 161, Cr.P.C. Thereupon he resiled from the same and stated that he did not tell the C.I.D. Inspector that Sudesh was also with him. He claimed that Sudesh had come to the Hospital later on (MAINE C.I.D. INSPECTOR SE NAHIN KAHA THA KI SUDESH BHI MERE SATH THA. WAH BAD MEN ASPATAL AA GAYA THA), and that he could not tell, how C.I.D. Inspector recorded that 'MAIN VEDBIR WA SUDESH KUNWAR PAL KO RIKSHAW MEN RAKHKAR PYARE LAL SHARMA ASPATALPAHUNCHE' Wedbirin-formant (PW 2) made a different statement. He stated that he, Yash Pal and Sudesh picked the injured and took him to P. L. Sharma Hospital and got him admitted there. This is in line with the contents of the F.I.R. but is in conflict with the evidence given by Yash Pal (PW 1) at the trial. He stated in para 15 that when the injured was taken in rikshaw he witness Yash Pal and the injured were in one rickshaw and Sudesh was in another rickshaw. He further stated that Yash Pal (PW 1) knew that Sudesh is in another rickshaw. This statement has obviously been given by this witness to reconcile the statement of Yash Pal (PW 1).

13. Here it may also be mentioned that Yash Pal Singh (PW 1) stated in his cross-examination in para 10 of his evidence, 'HAMNE KHUD KAHAKAR ASPATAL MEN APNI AAMAD DARZ NAHIN KARAI. DOCTOR NE MERE SE WA VEDBIR SE NAAM, PATA KUCHH NAHIN PUCHHA'. These replies are calculated to contain an explanation for the non-mention of his name in the Hospital records as one of these accompanying injured Kunwar Pal to the Hospital. Vedbir (PW 2) stated in para 15 of his evidence, 'MAINE APANA NAAM DOCTOR KO BATAYA THA YA NAHIN YAH MUJHE DHYAN NAHIN.' This is in tune, with the above noted reply of Yash Pal Singh (PW 1) on the same subject.

14. It may be relevant to mention as here that the defence got proved G. D. Entry No. 40 of 22.40 hrs. of the police station Railway Road Meerut which was about

the death memo sent by the doctor of the Hospital to the Station Officer of the police station informing about the death of Kunwar Pal deceased, which is Ext. Kha-2. What it says and what it does not say both are material. It says, 'AAPKO SUCHIT KIYA JATA HAIKI KUNWAR PAL SINGH UMXR '26 SAL, PUTRA SRI RAM SINGH, R/O NIWASI DAURALA JO KI JAIPAL SINGH PUTRA SRI MEHRA SINGH DWARA LAYA GAYA THA JISKI AAJIS SAMAI RAAT EMERGENCY WARD MEN MRITYU HO GAYEE HAI. SD. AIATHIT10.30 P.M.' There is no question of the doctor substituting the name of Jaipal Singh instead of informant Vedbir Singh and his companions Yash Pal Singh and Sudesh. The evasive replies of informant Vedbir Singh (PW 2), Yash Pal Singh (PW 1) on this subject may be seen in its light. It shows that none of these two witnesses were at or near the scene of occurrence at the time when the occurrence took place or even upto the time when the injured was picked up from the spot and taken to P. L. Sharma Hospital Meerut, and that it was a third person Jaipal Singh, s/o Sri Mehra Singh, who alone had taken the injured to the Hospital.

15. Here it may be mentioned; that if; is not the case of Yash Pal Singh (PW 1) or of Vedbir Singh informant (PW 2) that Jaipal Singh, s/o Sri Mehra Singh was also accompanying them.

16. On the point a subject of death it comes out from G. D. Entry No. 40 that the death of Kunwar Pal injured took place in P. L. Sharma Hospital at 10.30 p.m. on the date. This is in conflict with 10 p.m. the timing of death of the deceased in the Hospital as given in the F.I.R. lodged by Vedbir Singh informant (PW 2) and in the evidence given by Yash Pal Singh (PW 1) in para 3 of his evidence and in the evidence given by Vedbir Singh informant (PW 2) in para 3 of his evidence.' This discrepancy goes to show that they had not only not seen the occurrence but have also not accompanied the injured to the Hospital and were' even not present in the Hospital upto the time of his death and that in the F.I.R. the time of death was mentioned on the basis of nothing but hearsay. It may be mentioned here that Chatar Singh (PW 3) stated that he know the deceased and also knew Yash Pal Singh (PW 1). The informant Vedbir Singh (PW 2) was real brother of the deceased. So in the ordinary course he would be expected to know him also from before. However, there is not a word in the testimony of Chatar Singh (PW 3) to

the effect that he saw Yash Pal Singh (PW 1) and Vedbir Singh (PW 2) with the deceased inside the cinema hall during the show or outside it after the show was over what to say. of claiming that these two were accompanying the deceased at the time of the occurrence at the, road and saw the stabbing and took the injured-deceased in a rickshaw to the hospital.

17. Here the timing of lodging of the F.I.R. also becomes very important. As per prosecution case, the F.I.R. was lodged at 11.15 p.m. The distance of the scene of occurrence from the police station is 1 mile as given in the chick report prepared by the Constable on the basis of the written F.I.R. lodged by Vedbir Singh (PW 2). The informant did not claim to have gone from the scene of occurrence to the police station. It has been said that the victim was in a precarious condition and so the witnesses first took him to the Hospital and got him admitted in the Emergency Ward with a view to save his life. But this plea fails because neither Yash Pal Singh (PW 1), nor Vedbir Singh (PW 2) were present at or near the scene of occurrence and that they were not present even at the time of death of the deceased in the Hospital as we have already noted earlier. It may be that nobody was named in the F.I.R. lodged at the police station by the informant Vedbir Singh but keeping in mind the facts noted above no implicit reliance can be placed on the version of occurrence as given in the F.I.R. which was obviously a concoction which must have been based on hear-say.

18. It is significant to note that it has been claimed in the F.I.R. and also in the evidence of the prosecution witnesses at the trial that after coming out from the cinema show the assailant joined the deceased and while both of them were conversing with each other they both, i.e. the deceased sod the assailant, crossed the road and went to other side of the road in front of the cinema hall. In the F.I.R. it was stated that Sudesh met the informant Vedbir Singh and witness Yash Pal Singh and then these three proceeded behind i.e. towards the deceased. According to the prosecution witnesses the assailant had teased the deceased from behind in the picture hall by kicking to which the deceased had objected. According to informant Vedbir Singh (PW 2) kicking was made several times by the assailant. If that was a correct statement of fact then there would be no occasion for the deceased joining the assailant at the gate of the cinema hall and

going with him to the other side of the road leaving the informant and Yash Pal Singh witness behind. So obviously, all these were concocted facts. The incident of teasing inside the picture hall appears to have been introduced in the F.I.R. and the prosecution evidence given by Vedbir Singh informant (PW 2) and Yash Pal Singh (PW 1) to show adequate opportunity for both of them to see and identify the assailant. The conversation between the deceased and the two witnesses disclosed in the F.I.R. that he had seen the assailant in the noon in the company of Sudhir and Tejvir with whom an altercation had taken place in the College was also intended to serve the same purpose. However, this makes it even more improbable that after the show was over the deceased will join the assailant in the manner as claimed by the prosecution.

19. If we take that the assailant and the deceased met each other at the gate of the cinema after the show was over and talking with each other went to the other side of the road, it will indicate that they were not only known to each other but were also on good terms with each other and in the ordinary course they were going together on the road. If this were so, then without any rhyme and reason it could not be that one of the two would become assailant and would give a knife blow to the other of them. In this context we are not referring to the accused Avinash as such but referring to the assailant who according to the prosecution was unknown to these two witnesses. It was not the prosecution case that after their joining each other all of a sudden a quarrel started between the two and hot words were exchanged in the course of which one of them took out a knife and assaulted and injured the other. So, in any case, the prosecution story gets discredited.

20. If the allegation of teasing by the assailant inside the picture hall goes off then the link of proof provided in the F.I.R. that the deceased had stated that he had seen the assailant the same day in the company of Sudhir and Tejvir of Madhi with whom an altercation had taken place in the College also fails. The defence plea was that the assailant was identified at the identification proceedings and at the trial by informant Vedvir Singh (PW 2) and Yash Pal Singh (PW 1) because a quarrel had taken place in the morning in which Avinash accused had beaten Yash Pal Singh (PW 1). There was also a suggestion made to Vedbir Singh (PW

2) from the side of the defence that on the date of occurrence in the morning a quarrel and Marpeet had taken place in the election of the Students Union in which Omendar and Devendar had intervened and got his hands joined with assailant Avinash and that his name Avinash had also been disclosed at that time. He was also suggested that he identified Avinash assailant at the instance of Chatar Singh (PW 3) taking him to be the murderer of the deceased. In the state of circumstances disclosed above, the defence plea is quite plausible. It may be mentioned here that in the F.I.R. the informant claimed only that the deceased said about the assailant that he had seen this person in the company of Sudhir and Tejvir. But there was no mention the F.I.R. of any statement by Yash Pal Singh (PW 1) in the cinema hall to the same effect i.e. he is the same boy who was involved in that quarrel which had taken place in the college. At the trial also Yash Pal (PW 1) did not say so. The informant Vedvir Singh (PW 2) also did not say at the trial that Yash Pal Singh (PW 1) had told him that he also had seen the same assailant participating in the quarrel that took place in the day in the College. In the circumstances of this case as mentioned above, this mention of the incident of the College does not go to link the present accused with the occurrence. Since the informant Vedvir Singh (PW 2) and Yash Pal Singh (PW 1) were not actually eyewitnesses of the present occurrence as held by us above consequently the description of the assailant that has been given in the F.I.R. could only be based on suspicion and the murder occurrence too would have been linked with the day incident of the College only out of suspicion as claimed by the accused.

21. It may be mentioned here that in the F.I.R. there was an allegation that Sudhir and Tejvir (of the morning incident mentioned in the F.I.R.) came behind and went away towards N. A.S. College when they informant Vedvir Singh (PW 2) and Yash Pal Singh (PW 1) were sitting with the deceased Kunwar Pal in a rickshaw. Such an allegation was also made by Vedvir Singh (PW 2) in his evidence at the trial in para 4. However, such a statement was not made by Yash Pal Singh (PW 1) at the trial. Obviously, this mention was a concoction that has been made to serve as a link. We have already found that none of these two witnesses were anywhere at or near the scene of occurrence when the occurrence took place.

22. In the F.I.R. it has been stated that informant Vedvir Singh (PW 2) and Yash Pal Singh (PW 1) were sitting in the cinema hall having ticket of Rs. 3.25 each. It has been stated by Yash Pal Singh (PW 1) in his cross-examination that he had taken tickets of Rs. 3.25 each. He denied having told the first I.O. Virendra Pal Singh (PW 10) that tickets of Rs. 3.75 each were taken. He could not give any explanation why it was so recorded. This I.O. said that Yash Pal Singh (PW 1) had told him that the cinema ticket was of Rs. 3.75 (each). Informant Vedvir Singh (PW 2) stated in para 7 of his evidence at the trial that he had taken ticket of Rs. 3.25 each and had told this to the first I.O. However, he could not give any explanation that in his statement recorded by the said I.O. it was written that he gave the fare of tickets as Rs. 3.75 each. The said I.O. contradicted him on this point in para 11 of his evidence. This discrepancy assumes significance in view of the earlier noted circumstances. It becomes one more circumstance to show that none of them had gone to see the show on the said date and had given the amount of ticket charge on the basis of conjecture.

23. Here it is unnecessary to dilate on the point of delay in lodging of the F.I.R. in view of the fact that these two witnesses were not present at the time of occurrence and they were not even present at the time of death of the deceased in the Hospital. It may also be mentioned here that Yash Pal Singh (PW 1) has stated in his cross-examination in para 9 of his evidence, 'DAS BAJE SE SAWA GYARAH BAJE TAK VEDVIR NE REPORT LIKHI. MAI ISKE SATH THA...' The defence suggestion to Vedvir Singh (PW 2) in his cross-examination was that after the occurrence Yash Pal Singh had gone to the village to lake him. This suggestion is quite plausible.

24. The identification of the accused made by informant Vedvir Singh (PW 2) and Yash Pal Singh (PW 1) at the identification parade and at the trial becomes useless in view of the fact that their presence on the scene of occurrence has been falsified. However, even then the other criticism of the identification aspect may be placed on record. As per prosecution case the name of accused Avinash came to light on 2-12-1978 i.e. on the date following the date of occurrence. But no serious effort was made by the regular police or the C.B.C.I.D. to arrest the accused even though he was resident of the same district. As noted earlier, he has surrendered

on 14-5-1979 and identification proceedings were held on 17-6-1979. The accused claimed at the time of identification proceedings that the witnesses knew him from before and that they had obtained his photographs from the College. Then during this period the accused Avinash was allowed to remain at large and so in any case the witnesses got an opportunity of familiarising themselves with his features and this itself made the identification evidence fit to be discarded. The following observations made in the authority, *Nathwa v. State* AIR 1951 All 452 at page 455 are worth mention in this regard :

It appears to me that there is a considerable-force in the suggestion made on behalf of the appellant the Circle Inspector deliberately left Kripal at liberty allowing him to live peacefully in his village with the object that this interval of about two months might be utilised by his prosecution witnesses to see him in his village and mark him carefully so as to be able to recognise him at the time of the identification proceedings subsequently.

25. Then in the F.I.R. the following Hulia of the assailants has been given, 'EK LARKA PATLA LAMBA SA GENUNWA RANG KA MOTI MOTI ANKHO KA KOI 24-25 SAL KA HOGA'. There is also mention of his age (here it is immaterial). No other identifying features have been mentioned in the F. I. R. On the other hand, in the memo of identification proceedings (Ext. Ka-2) dated 15-6-1979, the following specific features of the accused Avinash have been recorded :

(1) THODIKE NEECHE DAAG, (2) DAYEN GALL PAR MASSA, (3) DAYEE BHAUN KE KONE PAR DAAG CUT, (4) DAYEEN KANPATI PAR DO TIL WA DAAG FUDYA, (5) DAYEEN MOOCHH KE OOPAR TIL, (6) DAYEN JABRE PAR TIL, AND (7) DONON BHAUN MILIHUYEE. The height and the body-built of the accused have not been mentioned in the said identification memo. In examination-in-chief Yash Pal Singh (PW 1) has not given the Hulia of the assailant. In his cross-examination he gave in para 6 the same features of the assailant as given in the F.I.R. He repeated that he had seen the eyes of the assailant and the same were large (MOTI ANKHON WALA). When he was shown the accused Avinash from a close distance then he stated that his eyes were not BILLORI. He further stated that he did not find any individual features in his eyes which were of normal

type (ABHIYUKTA KI JO ANKHEN MAINE ABHI DEKHIUSKIANKH MEN MUJHE KOI FARK NAHIN DIKHAYEE DIYA. WAH NORMAL HAIN). He further stated, 'MULJIM KA BADAN NAPATLANA CHAURAHAI NORMAL HAI'. He, of course, stated that the colour of the accused was wheatish.

26. We have noted the description of the assailant as given in the F.I.R. and have discarded the F.I.R. for the reasons noted above. It may not be inappropriate to place on record that witness Chatar Singh (PW 3) stated in para 6 of his evidence at the trial, 'MAINE MARNE WALE KI SHAKLA DEKH LI THI. MARNE WALE KI ANKHEN MOTI NAHIN THI BALKITHEEK THI JAISI SABKI HOTI HAI.' He was shown the accused Avinash at the trial and on seeing this accused he stated in the same para, USKI ANKH MEN KOI KHAS BAAT NAHI HAI.' It may be recalled here that in the F.I.R. the features of the assailant included, 'MOTI MOTI ANKHON KA..' i.e. large eyes. Therefore, if Vedvir Singh informant was an eye-witness in fact and the accused Avinash was the assailant there would have been no discrepancy in the description of the assailant given in the F.I.R. and the actual description of the accused Avinash.

27. Very often features of unknown assailants are not disclosed in the F.I.R. or in the evidence of the prosecution witnesses at the trial and it is to be Judged whether the identification evidence given at the trial is to be believed. But here some Hulia of the assailant has been given in the F.I.R. while the prominent features of the accused as recorded in the identification memo do not find place in the F.I.R. and, in fact, there is discrepancy between the description of the assailant given in the F.I.R. and the actual description of the features of the accused given in the identification memo. This is one more reason to discard the identification evidence of these two witnesses.

28. Now there remain the ocular evidence given by Chatar Singh (PW 3) at the trial. We have already noted earlier that the F.I.R. is a concocted one. Informant Vedvir Singh (PW 2) and Yash Pal Singh (PW 1) are shown as eye-witnesses, while they had not seen the occurrence. They had not even seen the deceased dying in the Hospital. This throws a grave shadow of doubt over the entire prosecution case. The investigation in this case is a tainted one. We have noted

earlier that accused Avinash was never arrested by the police, that as per prosecution case his name came to light on 2-12-1978 i.e. on the date following the date of occurrence and that the Accused has surrendered on 14-5-1979 and no serious effort was made for his arrest in the intervening period. It is also significant to note that Chatar Singh (PW 3) is not named in the F.I.R. as an eye-witness of the occurrence. He claimed that he has been knowing accused Avinash from before. This fact is also not in dispute. We have already noted earlier that Yash Pal Singh (PW 1) and Vedvir Singh informant (PW 2) were not present at the scene of occurrence. So if Chatar Singh had really seen the occurrence as an eye-witness and identified the accused as the assailant, in the ordinary course he was expected to go to the police station and lodge the F.I.R. At any rate he would have contacted Jai Pal Singh, s/o Mehra Singh who was carrying the injured from the spot to the Hospital. But he does not claim having done that also.

29. The facts and the circumstances of this case do not permit us to ignore the F.I.R. and the evidence of Yash Pal Singh (PW 1) and informant Vedvir Singh (PW 2) and place reliance on the testimony of Chatar Singh (PW 3).

30. We have already noted earlier that he had not acted at the spot in the manner he was expected to act regard being to the ordinary course of human Conduct.

31. Chatar Singh (PW 3) stated in para 5 of his evidence that on the date following the date of occurrence he went to police station Kotwali at 12 Noon and some constable/Sub-Inspectors were present there, that the Investigating Officer was not present there, that after it he went to the outpost, where the Investigating Officer was found by him at 2 O'Clock and then the Investigating Officer talked with him and recorded his statement at 2.30 O'Clock. He further claimed that when he went to police station Kotwali he had told the Constable there that Kunwar Pal deceased's murder was done by Avinash, whereupon the Constable told him to go to the outpost and tell this to the Investigating Officer. In the ordinary course the witnesses who are named in the F.I.R. or whose presence at the spot comes to light during investigation are called by the Investigating Officer to the outpost or the police station or to the place where he (the Investigating Officer) is or the Investigating Officer goes to the scene of occurrence or the place where the

witnesses are living and/or are present and records their statements. It will be unusual conduct for a eye-witness not to disclose the name of the assailant at the spot to the public or to the person accompanying the deceased but on the next day of his own to go to the police station and the Investigating Officer to name the assailant and give an eye-witness account of the occurrence.

32. I.O. Virendra Singh stated in para 7 of his evidence that he had recorded the statement of Chatar Singh on 2-12-1978 in the afternoon at about 2.30 to 4 O'Clock. But he did not claim that this witness himself approached him to give an eye-witness account of the occurrence.

33. The Original Case Diary as it is contains words '2 p.m.' at page 5 on the left side which are apparently in the same pen and ink. He denied that he had written these words in the Case Diary and in support thereof he produced the duplicate carbon copy of the Case Diary, in which these words were not recorded. This denial and this absence, however, cannot be taken as such. In the ordinary course the Case Diary is an official document which was not supposed to go out into the hands of unauthorised persons.

34. The defence Suggestion to witness Chatar Singh (PW 3) was that at the time of infliction of knife injury he (the witness) caught hold of the deceased Kunwar Pal Singh from behind, so that he may not be able to move his hands (in self-defence), that at that time some blood stains had come on the clothes of his body, which he had concealed by the Chadar of the deceased, and that the assailant had gone from Excise Chawple towards N.A.S. College and that he mis-guided the persons who were chasing the assailant towards the Bachcha Park. It was also suggested to him that on that date he was standing outside the cinema hall waiting for Kunwar Pal deceased. This witness denied all these suggestions. In the cross-examination of the Investigating Officer it was suggested in para 11 that on 2-12-1978 he concluded the proceedings after recording the statement of Chatar Singh because of being late night, which he denied. He was further suggested that on the date from 12 Noon upto night when he recorded the statement, he (the Investigating Officer) kept him (Chatar Singh (PW 3) locked in the outpost. He, of course, made a denial of this suggestion also, it is correct that such a suggestion

Was not made to the witness in his cross-examination; Nevertheless, the possibility that Chatar Singh (PW 3) was held on suspicion of his complicity in the crime and was let off when he agreed to become an eye-witness of the occurrence and name the accused Avinash as the culprit cannot be ruled out regard being had to the totality of the facts and circumstances of the case.

35. It is true that the defence suggestion involves the admission of the presence of this witness at the scene of occurrence but it is settled law that any admission of the accused if is to be read or used then it has to be read or used as a whole and it would not be permissible to take one portion of it from here and another portion from there and use it for corroborating the case of the prosecution. It is significant that the accused nowhere admitted his own presence on the scene of occurrence much less his participation in the transaction in which the deceased received knife injury on his body. The defence suggestion was to the effect that witness Chatar Singh was in league with the person who actually inflicted the knife injury on the body of the deceased and assisted him (the assailant). From this suggestion it is not possible for this Court to draw an inference that the accused Avinash was not only himself present on the scene of occurrence but he himself inflicted the knife injury on the body of the deceased which led to his death.

36. In any view of the matter it is a case in which it is impossible to hold him guilty of murder or even to maintain his conviction for the offence under Section 304, I.P.C. or any lesser offence. The accused must get the benefit of doubt and consequently an acquittal.

37. For the foregoing discussion, Government Appeal No. 1601 of 1980, State v. Avinash, is dismissed. Criminal Appeal No. 915 of 1980, Avinash v. State, is allowed. The conviction of accused appellant Avinash for the offence under Section 304, I.P.C. is set aside and he is acquitted of the offence under Section 304, I.P.C. He is on bail. He need not surrender to it. His bail bonds are cancelled and sureties are discharged.

38. Let a copy of this judgment be sent to the learned Sessions Judge concerned within a week from today for information and compliance. The compliance report be submitted to this Court by the learned Sessions Judge concerned within ,a

month from today.

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