

imamuddln Vs. State of U.P.

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Court : Allahabad

Decided On : May-22-2009

Reported in : 2009CriLJ4477

Judge : Poonam Srivastava and ;Rajesh Chandra, JJ.

Appellant : imamuddin

Respondent : State of U.P.

Disposition : Appeal allowed

Judgement :

Rajesh Chandra, J.

1. This 'appeal has been filed by accused appellant Imamuddin against the Judgement and order dated 26-9-2005 passed by Additional Sessions Judge Court No. 3, Azamgarh, in Sessions Trial No. 187 of 1999 convicting him for the offence under Section 302, IPC and sentencing him to imprisonment for life and a fine of Rs. 5000/- with default clause. The appellant has further been convicted for the offence under Section 25 of the Arms Act and sentenced to undergo imprisonment of two years and with fine of Rs. 1000/- with default clause. The sentences were ordered to run concurrently.

2. The background facts are that one Zaheer Ahmad resident of Police Station Devgaon, District Azamgarh submitted a written report (Ext. Kal) at Police Station, Devgaon on 13-11-1997 at 5.05 p.m. and alleged that his brother Nabi Sarvar alias Khaddar was doing some job with Rais son of Idris resident of Jehatmandpur Police Station, Devgaon, district Azamgarh but he left the job about three months back. It was further mentioned that in the last month 'Hawala' money belonging to Rais was seized by Varanasi Police. Rais suspected that Nabi Sarvar was behind this police action and as such 'nurtured ill will against Nabi Sarvar and had also threatened him of his life.

3. According to the complainant Zaheer Ahmad, on 13-11-1997, he along with his brother Nabi Sarvar was coming on the scooter from Devgaon and was going towards his home. When at about 4 p.m. they reached within the vicinity of village Chandapur accused Imamuddin resident of Kundanpur, accused Nasruddin resident of village Dauna and one more associate came from behind on a motorcycle and after coming ahead of the scooter stopped their motorcycles. The complainant in order to avoid accident turned towards left side and went into a ditch having water. The accused Nasruddin and two others dragged Nabi Sarvar from the ditch, brought him on the side of the road and then accused Imamuddin and Nasruddin opened fire upon Nabi Sarvar with their pistols. Nabi Sarvar fell down and succumbed to the injuries on the spot. It was also mentioned in the FIR that this murder was committed, at the instance of Rais. ...

4. On the basis of the written report a chick report Ext. Ka 10 was prepared at the police station and the case was entered into General Diary (Ext. Ka 11). The investigation was taken up by Ram Chandra Bharati (PW-7) Station Officer, Devgaon. fey the time he reached the spot, the inquest over the dead body of Rais had already been conducted by Sub-Inspector, Chakrapanidutt Misra and he had prepared the inquest report Ext. Ka 12. Mr Misra had also prepared the sketch of dead body, police form No. 13, letter for the Reserve Police Inspector, Police Lines, Azamgarh and letter to Chief Medical Officer Azamgarh, Police Form No. 33 respectively (Ext. Ka 13 to Ext. Ka 17). Mr Misra had also collected a sandal allegedly belonging to one of the accused, a scooter belonging to deceased Nabi Sarvar, one chappal belonging to deceased Nabi Sarvar as well as plain and blood

stained earth under memos Ext. Ka 19 to Ext. Ka 22. The Station Officer, Mr Bharati prepared the site plan (Ext. Kal 8) of the place of occurrence and recorded the statement of the complainant Zaheer Ahmad as well as the statement of Sarfaraj and Ors.. On 26-11-1997 Mr Bharati was transferred from the police station and thereafter the investigation was taken over by Deputy Superintendent of Police Abdul Samad (PW4). He again recorded the statement of the complainant Rais Ahmad and Sarfaraj Ahmad. However, he was also transferred in the month of May, 1998. After his transfer the investigation was taken up by the Circle Officer, Pradyumn Singh (PW6), Mr Singh had taken the accused Imamuddin on police remand and thereafter 'Katta' was recovered at the instance of accused Imamuddin & memo Ext. Ka3 was prepared in this regard.

5. Mr Singh had sent the plain and blood stained earth, one Paljama, one Kurta, one Baniyan, one underwear and one bullet which was recovered from the deadbody at the time of postmortem for chemical examination. He had also sent the 'katta' which was recovered at the instance of accused Imamuddin for examination by ballistic expert.

6. Before proceeding further it is proper to mention the antemortem injuries found on the dead body of Nabi Sarvar.

1. 'Fire arm wound of entry 4.00 cm x 1.00 cm x cranial cavity deep on right side fronto temporal region elliptical in shape, inverted margin, edges-blackened.

2. Fire arm wound of exit 2.00 cm x 1.5 cm x cranial cavity deep through and through on left side skull, 7 cm, above and lateral to left ear. Margin-everted, communicating to injury No. 1.

3. Fire arm wound of entry 1.00. cm x 1.00 cm x chest cavity deep on left side upper part of chest 7.00 cm, above left nipple, at 2 o' clock position. Margin-inverted edge-blackened. Direction downward laterally. On internal examination:Right frontal and temporal bones, were found fractured, left parietal bone was also fractured,, left and right lungs were punctured, one metallic bullet was found in the thoracic cavity.

In the opinion of the doctor, death was caused due to shock and haemorrhage as a result of antemortem injuries. Death had taken place within one day.

7. The learned Counsel for the appellant argued that the trial court has committed illegality in finding the appellant guilty for the murder of Nabi Sarvar. When the evidence of PW 1 Zahir Ahmad and PW 2 Rais was disbelieved in respect of accused Nasruddin, it ought not to have been accepted in respect of Imamuddin. He further argued that the learned trial court has laid emphasis upon the fact that a country made pistol was recovered at the instance of Imamuddin and as per the ballistic expert report the same was found to have been used in the commission of the crime. He argued that the prosecution has failed to prove that the alleged recovery of fire arm was pursuant to any disclosure statement of Imamuddin and that the recovery itself was doubtful as the independent witnesses of recovery namely, Mushtak Ahmad and Akik Ahmad, were not examined in the court. Moreover, the alleged recovery was made from an open place which was accessible to each and everyone. He further argued that the bullet, which was recovered from the dead body at the time of post mortem, was sent to the Superintendent of Police, Azamgarh in a sealed cover and the prosecution has failed to lead any link evidence that it was the same bullet which was sent for examination by ballistic expert.

8. The learned A.G.A. on the other hand argued that the maxim falsus in uno falsus in omnibus, is not applicable in India, hence if the testimony of PW 1 Zahir Ahmad and PW2 Rais was not found reliable in respect of accused Nasruddin, it does not mean that the same cannot be relied upon in regard to accused Imamuddin. It was also argued that even if the country, made pistol was not recovered pursuant to any disclosure statement of accused Imamuddin the recovery was made at the instance of accused Imamuddin which fact goes to show that it was within the knowledge of Imamuddin that a country made pistol is lying hidden beneath the earth. The bullet recovered from the dead body of Nabi and the aforesaid country made pistol were sent for the opinion of ballistic expert who opined that the bullet found in the dead body had been fired from the same pistol. It clearly establishes that the accused appellant 'Imamuddin by opening fire from the pistol, which he got recovered, caused death of Imamuddin.

9. We have considered the submissions made by the learned Counsel for the appellant as well as the A.G.A. The learned trial court has come to the conclusion that the accused Rais had not conspired for the murder of Nabi Sarvar and as such acquitted him of the charges under Section 120B and 302 IPC. The learned trial court further found that the co-accused Nasruddin was not in India on the date of occurrence and in fact had gone to another country namely, Brunei. He was also acquitted of the charges Under Sections 120B & 302 IPC. Learned A.G.A. conceded that no Government appeal has been filed against that finding of the trial court. Thus this much part of the trial court's judgment has become final.

10. Now we proceed to discuss the evidence of alleged eyewitness PW 1 Zahir Ahmad and PW 2 Rais. We will also discuss as to whether their evidence if disbelieved with respect to accused Nasruddin can be believed with regard to accused Imamuddin.

11. The case of the prosecution is that PW 1 Zahir Ahmad was driving the scooter whereas the deceased Nabi Sarvar was on the pillion seat. Thus, PW1 Zahir Ahmad was the main eyewitness of the incident. Further case of the prosecution is that, at the time of incident PW 2 Rais and one Shyam Narayan Vishwakarma had also reached there and had witnessed the occurrence. Eyewitness Vishwakarma has not been examined in the court. The other witness Rais has been examined as PW 2.

12. There is no denial to this fact that the deceased Nabi Sarvar and the informant Zahir Ahmad are real brothers PW 2 Rais has admitted that he is their sister's son (bhanja). According to Rais he on 13-11-97 had gone to village Jehatmandpur to meet his 'Khala' and after meeting her when he was going to Devgaon to meet his 'Khalu' he reached the spot and witnessed the occurrence. He has stated that Nabi Sarvar and Zahir were going on the scooter, accused Imamuddin and Nasruddin and one more came from behind on a motorcycle and by bringing the motorcycle ahead of the scooter stopped the same, in order to avoid accident, Zahir Ahmad took his scooter to the left hand side and went into a ditch. Accused Imamuddin, Nasruddin and their fellow man then dragged Nabi Sarvar from the ditch and the accused Nasruddin and Imamuddin opened fire on Nabi Sarvar and

he received injuries on his head and chest. Nabi Sarvar died at the spot. He raised alarm and tried to catch hold of the accused but they threatened of his life and flew from the spot on the motorcycle. In cross examination he has stated that he reached Jahatmandpur at about 3 p.m. and met his 'Khala' and remained there for about 30-35 minutes. Thereafter he started for Devegaon as he had to meet his 'Khalu' but before he could reach Devegaon he saw the occurrence near village Chandapur.

13. The learned trial court after discussing the evidence of PW 2 Rais has come to the conclusion, though it has not been mentioned in very many clear words, that Rais was not present at the spot.

14. We have gone through the evidence of the PW 2 Rais and we are of firm opinion that he was not present at the place of incident. First of all it is important to notice that in the first information report the name of PW 2 Rais has not been mentioned as a witness. This Rais is the son of complainant's sister and as such a very close relative of the complainant Zahir Ahmad. If he had been present at the spot, there was no reason for Zahir Ahmad not to give his name in the first information report. This fact shows that the name of Rais has been added as a witness at a later stage. During his statement Rais has admitted that he had reached the spot just by chance and had seen the entire incident. However, he admits that he remained at the spot only for three minutes but did not have any conversation with Zahir Ahmad either at the place of incident or thereafter till his statement in court. He also did not disclose anything to the police of his own. What he said is that the other witness Shyam Narayan Vishwakarma, is not examined in this case, had told the police that he (Rais) was also present at the spot and it was thereafter that his name came to light as a witness. He further says that it was Shyam Narayan Vishwakarma who told him that he (Rais) has been named as a witness in the case. His admission is that after the incident he did not go to the police station nor told anybody about this incident. From these facts it is clear that the conduct of witness Rais has altogether been unnatural.

15. It is also important to notice that according to PW 2 Rais he after the incident met his 'Khalu' in village Devgaon at about 4.30 p.m. but at the same time he says

that he did not have any conversation with his 'Khalu'. This is highly improbable. When Rais had gone to meet his 'Khalu' because Rais was leaving for Bombay then it is quite unnatural that even after meeting his 'Khalu' he did not have any conversation with him. Thus, the presence of Rais at the spot is highly improbable and extremely doubtful. It is not expected from such a close relative of the deceased (being son of deceased's sister) that he will just witness the murder of his maternal uncle and will neither go to the police station nor will tell the incident to anybody nor will have any conversation with his another maternal uncle, that is the complainant Zahir Ahmad, who was present at the spot and further that even after meeting his 'Khalu' he will not have any conversation with him although he had purposely gone to meet him. Thus, we come to the conclusion that PW 2 Rais was not present at the spot and he is a procured witness,

16. Now remains the testimony of PW 1 Zahir Ahmad. Zahir Ahmad has stated that accused Imamuddin, Nasruddin and one of their associate had dragged Nabi Sarvar from the ditch and thereafter Imamuddin and Nasruddin had opened fire with their respective pistols. In cross examination also he confirmed that first of all Nasru (Nasruddin) had fired upon the head of Nabi and thereafter the accused Imamuddin had fired upon the left side of the chest. In the post mortem one fire arm wound of entry was found on right side front of temporal region and a corresponding fire arm wound of exit through and through was found on left side skull. One fire arm wound of entry was found on the left side upper part of chest. It appears there from that two fires were opened upon Nabi, one upon the head and the other on the chest. It is the categorical statement of Zahir Ahmad that one fire at the head was made by Nasruddin and the other by Imamuddin over the chest. If Nasruddin was not present at the spot and was out of country then the question of Nasruddin opening fire does not arise. The question then arises as to who had opened the second fire. It is not the case of prosecution that both the fires were made by Imamuddin or one fire was made by Imamuddin and other by their third unknown associate. If that is so, presence of PW 1 Zahir Ahmad at the place of occurrence also becomes highly doubtful. Prosecution has failed to explain that if Nasruddin had not fired on Nabi then who inflicted firearm injury over the head.

17. Learned A.G.A. by referring the judgment of Hon'ble the Supreme Court in Kalegura Padma Rao and Anr. v. State of Andhra Pradesh : (2008) 2 Supreme Court Cases (Cri) 197 : AIR 2007 SC 1299 and Gubbala Venugopaldaswamy and Ors. v. State of A.P. 2004 Scc (Cri) 1764 : AIR 2004 SC 2477 argued that the maxim falsus in uno falsus in omnibus is not applicable in India and even if the testimony of a witness is not believed in respect of one accused, it can be relied upon with regard to another accused and the other accused may be convicted upon his testimony.

18. In this connection the judgment of Hon'ble Supreme Court in the case of Jakky v. State of Punjab : (2007) 9 SCC 589 : AIR 2007 SC (Supp.) 663, may be referred wherein the following observations have been made.

The maxim falsus in uno, falsus in omnibus has not received general acceptance nor has this maxim come to occupy the status of rule of law. It is merely a rule of caution. All that it amounts to is, that in such cases testimony may be disregarded and not that it must be (discarded). The doctrine merely involves the question of weight of evidence which a court may apply in a given set of circumstances, but it is not what may be called 'a mandatory rule of evidence.'

19. The Hon'ble Supreme Court in the above noted judgment has referred the following two Judgments of the Apex Court.

1. Zwinglee Ariel v. State of M.P. : AIR 1954 Supreme Court 15.

2. Balaka Singh v. State of Punjab : AIR 1975 Supreme Court, 1962.

While referring aforesaid judgments the Apex Court observed as under:

An attempt has to be made to, as noted above, in terms of felicitous metaphor, separate the grain from the chaff, truth from falsehood. Where it is not feasible to separate the truth from falsehood, because the grain and the chaff are inextricably mixed up, and in the process of separation, an absolutely new case has to be reconstructed by divorcing essential details presented by the prosecution completely from the context and the background against which they are made, the only available course to be made is to discard the evidence in toto. As observed

by this Court in *State of Rajasthan v. Kalki* : AIR 1981 SC 1390 normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence and those are always there, however honest and truthful a witness may be. Material discrepancies are those which are not normal and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorised. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so.

20. In the above noted *Balaka Singh's case Balaka Singh v. State of Panjab* : AIR 1975 SC 1962 nine accused were tried, and the witnesses stated in complete unanimity that all the nine accused-persons had taken part in the commission of the crime. All the nine accused were convicted by the Trial Court. In appeal before the High Court four accused were acquitted while five were convicted on the same evidence. In this background. Hon'ble Apex Court observed as under:

It is true that there are as many as eight witnesses who are alleged to have seen the occurrence and they have given a parrot-like version of the entire case regarding the assault on the deceased by the various accused persons. All these witnesses have with one voice and with complete unanimity implicated even the four accused persons acquitted by the High Court equally with the appellants making absolutely no distinction between one and the other. A perusal of the evidence of the prosecution witnesses would show that the prosecution case against the appellants and the four accused is so inextricably mixed up that it is not possible to sever one from the other. It is true that as laid down by this Court in *Zwinglee Ariel v. State of Madhya Pradesh* : AIR 1954 SC 15 : 1954 Cri LJ 230 and other cases which have followed that case, the Court must make an attempt to separate grain from the chaff, the truth from the falsehood, yet this could only be the possible when the truth is separable from the falsehood. Where the grain cannot be separated from the chaff because the grain and the chaff are so inextricably mixed up that in the process of separation the Court would have to reconstruct an absolutely new case for the prosecution by divorcing the essential details presented by the prosecution completely from the context and the background against which they are made, then this principle will not apply. We are

satisfied that in the facts of the present case, having regard to the partisan and interested evidence of the prosecution witnesses who can implicate the appellants and the four accused equally with regard to the assault on the deceased it is not possible to reject the prosecution case with respect to the four accused and accept it with respect to the other five appellants. If all the witnesses could in one breath implicate the four accused who appear to be innocent, then one cannot vouchsafe for the fact that even the acts attributed to Balaka Singh, Joginder Singh, Pritam Singh, Darbara Singh and Jarnail Singh may have been conveniently made to suit the needs of the prosecution case having regard to the animus which the witnesses as also Banta Singh bore against the appellants.

21. In view of the above judgments of the Apex Court it has to be seen as to whether the discrepancy with regard to the fact as to who had opened second fire upon Nabi Sarvar is a normal discrepancy or material one. At the same time it has also to be seen as to whether the falsehood can be separated from the truth or not. If the grain and chaff are so inextricably mixed up that any attempt to separate them will make out a new case then the evidence of PW 1 Zahir Ahmad cannot be believed. As we have observed in the earlier part of the judgment according to Zahir Ahmad first fire was made by Nasruddin upon the head of Nabi whereas the other fire was opened by Imamuddin which struck to his left side of the chest. It has already been concluded by the trial court that Nasruddin was not present in India on the date of occurrence. It is thus clear that accused Nasruddin has wrongly been implicated in this case and this implication is not due to any error of observation or error of memory due to lapse of time. It is a statement in unequivocal terms and this discrepancy cannot be termed as a normal discrepancy. It has to be regarded as a material discrepancy and Corrodes the credibility of evidence of Zahir Ahmad. It is also apparent that the grain can not be separated from chaff, or the truth from falsehood because the grain and chaff are so inextricably mixed up that any attempt to separate them will make out a new case. If we believe the statement of Zahir Ahmad that Nasruddih and Imamuddin both opened fire upon Nabi Sarvar and at the same time it established that co-accused Nasruddin was not-present at the spot then this anomaly can be sorted out only by bringing a third case that apart from Imamuddtn some third person had opened second fire upon Nabi Sarvar.

22. At this juncture a judgment of Hon'ble Supreme Court Joseph v. State of Kerala : 2003 Supreme Court cases (Cri) 356 : AIR 2003 SC 507 may be referred wherein the following observations have been made.

23. When there is a sole witness to the incident his evidence has to be accepted with an amount of caution and after testing it on the touchstone of the evidence tendered by other witness or evidence as recorded. Section 134 of the Indian Evidence Act provides that no particular number of witnesses shall in any case be required for the proof of any fact and, therefore, it is permissible for a court to record and sustain a conviction on the evidence of a solitary eyewitness. But, at the same time, such a course can be adopted only if the evidence tendered by such witness is cogent, reliable and in tune with probabilities and inspires implicit confidence. By this standard, when the prosecution case rests mainly on the sole testimony of an eyewitness, it should be wholly reliable.

24. As we have already held, the testimony of PW 1 Zahir Ahmad has been falsified in respect of accused Nasruddin and as such he cannot be termed as a wholly reliable witness.

25. The learned trial court in reaching the conclusion that accused Imamuddin committed murder of Nabi Sarvar not only relied upon the statement of Zahir Ahmad but also heavily placed reliance over the recovery of the pistol at the instance of accused Imamuddin Trial court also found that the bullet which was recovered from the dead body of Nabi Sarvar as well as the recovered pistol were sent for ballistic expert examination, who after examination found that the bullet was fired from the same pistol. The contention of the prosecution is that this evidence weighs heavily against the accused Imamuddin and proves his guilt beyond any doubt. The defence on the other hand argued that the alleged recovery of the revolver at the instance of accused Imamuddin is of no consequence. His contention is that the recovery was not made pursuant to any disclosure statements.

26. We have considered the respective arguments Hon'ble Supreme court in Amitsingh Bhikamsingh Thakur v. State of Maharastra : 2007 Cr. LJ page 1168 : AIR 2007 SC 676 has explained the various requirements of Section 27 of the

Evidence Act which are as under:

The various requirements of the section can be summed up as follows:

(1) The fact of which evidence is sought to be given must be relevant to the issue. It must be born in mind that the provision has nothing to do with question of relevancy. The relevancy of the fact discovered must be established according to the prescriptions relating to relevancy of other evidence connecting it with the crime in order to make the fact discovered admissible.

(2) The fact must have been discovered.

(3) The discovery must have been in consequence of some information received from the accused and not by the accused's own act.

(4) The person giving the information must be accused of any offence.

(5) He must be in the custody of a police officer.

(6) The discovery of a fact in consequence of information received from an accused in custody must be deposed to.

(7) Thereupon only that portion of the information which relates distinctly or strictly to the fact discovered can be proved. The rest is inadmissible.

27. It is clear from the above that apart from other ingredients the prosecution has to prove that the discovery was made in consequence of some information received from the accused and it was not the recovery by the accused's own act. It is further required that the discovery of a fact in consequence of information must be deposed to. In the present case the investigating officer Pradyumna Singh (PW-6) has nowhere stated that after taking police remand of accused Imamuddin under the orders of a Magistrate, the accused Imamuddin made any disclosure statement. What PW 6 says is that the prayer for police remand on accused Imamuddin was accepted by the Chief Judicial Magistrate and at the instance of the accused a pistol of 303 Bore which was used in the commission of crime was recovered and that the accused himself had procured the pistol after digging the earth from the place which was about 100 meters from the house of accused

Imamuddin. Thereafter a memo Ext. 3 was prepared. The learned A.G.A. argued that in the recovery memo it has specifically been mentioned that before the recovery of pistol the accused Imamuddin in the presence of witnesses Mushtak Ahmad and Akik Ahmad had stated that the pistol with which he had opened fire upon Nabi Sarvar and about which he has already told he had concealed the same beneath the earth and is now giving to the investigating officer. Thereafter digging the earth took out a pistol and gave it to the investigating officer. The learned A.G.A. wants that this statement recorded in the recovery memo may be believed although the same has not been repeated in the statement of the investigating officer Pradyumna Singh. We feel that the argument is misplaced statement as recorded in the recovery memo cannot be taken into consideration until unless the same would have been deposed to by investigating officer in his statement on oath. Since the recovery of the pistol has not been made pursuant to any disclosure statement the same cannot be relied upon.

28. It is also important to notice that although two independent witnesses namely Mushtak Ahmad and Akik Ahmad were allegedly present at the time of recovery, none of them has been examined. In the absence of any corroboration from independent witnesses it is not safe to rely upon the evidence of the investigating officer who naturally is interested in the success of the case. It is also difficult to believe that the accused Imamuddin after being taken on police remand, without having any conversation with the investigating officer will take them directly to the place where the pistol was allegedly concealed and will hand it over to the investigating officer after digging the earth just to create an evidence against himself. Thus the alleged recovery of pistol is highly doubtful.

29. Moreover, this fact can also not be left off the sight that the alleged recovery of the pistol was made on 5-6-98 whereas the incident had taken place on 13-11-97. Thus the recovery of the pistol has been made say about six months after the occurrence. In this connection a judgment of Hon'ble the Supreme Court in Gopal Sah v. State of Bihar 2009 (64) ACC 997 may be referred. In that case the accused were arrested and on their disclosure statements, blood stained axe and a sickle allegedly used in the murder on 8-9-82 were recovered from the water filled pond, the prosecution had relied upon this recovery but the recovery was

disbelieved by Hon'ble the Supreme Court by observing that the sickle allegedly in the hands of Gopal Sah (accused in that case) had been recovered from a pond three months after the murder hence no evidentiary value whatsoever can be attached to this circumstance as well. In the case at hand the recovery of pistol has been made about six months after the murder of Nabi Sarvar hence cannot be relied upon. More over the recovery is not under Section 27 of the Evidence Act as has been held by us as above.

30. As the recovery of the pistol is highly suspicious and can not be placed reliance the knowledge of the accused Imamuddin as to its concealment beneath the earth also can not be believed.

31. Learned Counsel for the appellant argued that no reliance can be placed upon the report of ballistic expert (Ext Ka 6) to the effect that the bullet (recovered from the dead body of Nabi Sarvar) was fired from the pistol allegedly recovered at the instance of appellant as it is highly doubtful that the bullet remained intact and was not tampered with till its examination by ballistic expert. It is to be noted that as per the post mortem report Ext Ka 2, the metallic bullet found in the dead body of Nabi Sarvar was kept in sealed envelope and was given to the constable who had accompanied the dead body. The prosecution has not led any evidence that after the bullet was received from the doctor where it was kept. If it was kept at the Malkhana of the police station concerned, then no police official, of the Malkhana has been examined to prove that nobody was allowed to tamper with the bullet and it remained in the sealed cover till the same was sent to the scientific laboratory for examination. If the bullet was sent from the Malkhana of the Police Station to the Sadar Malkhana then no one from the Sadar Malkhana has been examined to depose as above. However, from the report of the scientific laboratory (Ex Ka 4) it appears that the bullet alongwith other materials (such as plain and blood stained earth and the clothes of the deceased) was received in the scientific laboratory on 20/8-1998 through special messenger. The post mortem was done on. 14-11-1997 . It is thus clear that the bullet remained at the police station for about nine months and there is no reason as to why the bullet was not sent to the laboratory at an early date.

32. The pistol was allegedly recovered at the instance of the accused on 5-6-1998 . There is no evidence on record to show as to where the pistol was kept after its recovery i.e. either at the police station Malkhana or in the Sadar Malkhana. Again no link evidence has been produced to prove as to when this pistol was sent for ballistic expert examination. The ballistic expert report is (Ext Ka 6) on the record which shows (that the pistol was received for ballistic expert examination on 24-12-1998 from the sero-section of the scientific laboratory Lucknow. However, there is no evidence as to when the pistol was sent from the police station or the Sadar Malkhana to the scientific laboratory. In any case the pistol after its alleged recovery on 5-6-1998 reached the ballistic expert only on 24-12-1998 and no reason for this delay has been given. It is therefore, apparent that the police had in its possession not only the bullet recovered from the dead body but also the pistol which was allegedly recovered at the instance of accused Imamuddin and there was ample opportunity with the Investigating Officer to tamper with the bullet during this period. The inordinate delay in sending the bullet and pistol for scientific and ballistic expert examination creates strong suspicion whether the alleged recovered bullet was sent to the ballistic expert or in its place another bullet fired from the recovered pistol was sent to the ballistic expert for comparison as there was ample opportunity for the police to have done so. In these circumstances the report of the ballistic expert also loses its importance.

33. Apart from above there are other discrepancies in the prosecution evidence which cannot be lost sight of.

34. PW 7 Ramchandra Bharti, one of the investigating officers has stated on oath that by the time he reached the place of occurrence the inquest had already been conducted by SI Chakrapani Datt Mishra and he after preparing the inquest report and allied papers, had sent the dead body for post mortem. This Chakrapani Datt Mishra has not been examined by the prosecution as a witness. He would have been the best person to state as to when the proceeding of inquest were started and when they were completed. He would have stated as to when the dead body of Nabi Sarvar was handed over to two constables Parasnath Bharti and constable Ramnarayan for being taken to mortuary along with the copy of the FIR etc. He would have stated that the inquest report was prepared at the spot and the dead

body was sealed. The prosecution has not examined either constable Parasnath Bharti or constable Ramnarayan to depose that after the dead body was handed over to them, they took it to police station or police line. A perusal of the inquest report Ext. 12 shows that the inquest report was completed on 13-11-97 at 8 p.m. The police form No. 13 (Ext. 14) shows that the dead body of Nabi Sarvar was brought to the police line Azamgarh by the above said two constables namely, Parasnath Bharti and Ramnarayan on 14-11-97 at 9.25 a.m. This document further shows that the distance between police station Devegaon and headquarter is only three kilo meters whereas the distance between the place of incident and the headquarter is 48 kilometers. If constable Parasnath Bharti or constable Ramnarayan had been examined in the court they would have told as to why the dead body did not reach the police line on 13-11-97 itself and why the same was brought at the police line on 14-11-97 at 9.25 a.m. In this connection statement of PW 1 Zahir Ahmad is important. He has stated at page 14 of his statement that the dead body was brought to the police station at 7-8 p.m. He has further stated that at the police station the signatures of Shahid, Mushtak, Surendar Singh, Harivansh Mishra and one other were obtained by the police on a paper. He further stated that the dead body was sealed at the police station but in the second breath he stated that the dead body had been sealed at the spot. Now this is the evidence of the prosecution itself that from the spot the dead body was brought to the police station. A perusal of the inquest report makes it evident that the above named Shahid Mushtak, Surendar Singh and Harivansh Mishra are the 'panch' witnesses of the inquest report. The prosecution has not shown any other paper on which the signatures of these witnesses were taken at the police station. Hence, in the absence of any such document, it may be inferred that panchnama, is the paper on which the signatures of these persons were taken at the police station as stated by PW 1 Zahir Ahmad. It comes out from the above evidence that the dead body from the spot was brought to the police station where inquest report was prepared and the signatures of the 'panch' witnesses were obtained. Anything contrary to above could have been proved by the Sub-inspector Chakrapani Datt Mishra or by the constables Parasnath Bharti and Ramnarayan who have not been examined. In the light of these background facts a suspicion is raised about the genuineness of first information report that the same was lodged at the time when it is being

claimed to have been recorded. The prosecution has not examined even Head Muharrir Surendra Pratap who could have stated that the first information report was written by him on such and such date and at such and such time. Thus, the FIR is also suspicious & appears to have been ante timed.

35. Considering the entire facts and circumstances detailed above, we are of the opinion that learned trial Judge has committed illegality in recording the finding of conviction against the appellant Imamuddin and also in passing the sentence against him.

36. The appeal deserves to be allowed.

37. The appeal is accordingly allowed. The conviction and sentence of the appellant Imamuddin is set aside. He is acquitted of the charges under Section 302 IPC and Section 25 Arms Act. He is in Jail and he be released forthwith if not required in any other case.

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