

Asha Ram and anr. Vs. State of U.P.

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Court : Allahabad

Decided On : Mar-19-2004

Reported in : 2004CriLJ4470

Judge : Vishnu Sahai and ;G.K. Gupta, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 300

Appeal No. : Criminal Appeal Nos. 54 and 187 of 2002

Appellant : Asha Ram and anr.

Respondent : State of U.P.

Advocate for Def. : B.K. Nigam, Addl. Public Prosecutor

Disposition : Appeal allowed

Judgement :

Vishnu Sahai, J.

1. Six persons, namely, Asha Ram, Magan, Chandrika, Ram Chhattar, Shiv alias Shiv Prasad and Ghan Shyam were tried by the IInd Additional Sessions Judge, Bahraich in Sessions Trial No. 70 of 1997 for offences punishable under Sections 147, 148, 302/149 and 201 of the Indian Penal Code. Vide judgment and order dated 15-12-2001, the learned Judge acquitted Magan, Ram Chhattar, Shiv alias

Shiv Prasad and Ghan Shyam on all the counts but convicted and sentenced Asha Ram and Chandrika in the manner stated hereinafter :--

(i) Under Section 147, I.P.C. to undergo six months' R.I.

(ii) Under Section 148, I.P.C. to undergo one year's R.I.; and

(iii) Under Sections 302/149, I.P.C. to undergo imprisonment for life and to pay a fine of Rs. 200/- each, in default to undergo 10 days' simple imprisonment.

The learned Judge directed the sentences of Asha Ram and Chandrika on all the counts to run concurrently.

2. Aggrieved by their convictions and sentences Asha Ram and Chandrika preferred in this Court Criminal Appeal No. 54 of 2002 and Chandrika Criminal Appeal No. 187 of 2002. As a matter of fact Cri. Appeal No. 187 of 2002 should not have been entertained by this Court because Chandrika, the sole appellant in it was also the appellant in Cri. Appeal No. 54 of 2002. It was entertained because the concerned clerk of the criminal section failed to make an endorsement on it that Chandrika's appeal (Cri. Appeal No. 54 of 2002) had already been passed.

3. Since both these appeals arise out of a common factual matrix and impugned judgment, we are disposing them of by a common judgment.

4. Shortly stated the prosecution case runs as under :--

The informant Jamidar (P.W. 1) is the son of the deceased Hira Lal and the real brother of deceased-Talukdar and Faujdar. At the time of the incident the informant, the three deceased persons, Ramanand (P.W. 2), Urmila (P.W. 3) and appellants-Asha Ram and Chandrika were living in village Gadariyan Purwa, hamlet of Rakhauna within the limits of Police Station Khairighat in district Bahraich.

Appellants-Asha Ram and Chandrika and the acquitted accused-Magan, Ram Chhattar alias Lallu, Shiv alias Shiv Prasad and Ghan Shyam are interconnected and inter-related. Appellant-Chandrika and acquitted accused-Magan are the nephews of appellant-Asha Ram and Ram Chhattar is brother in law (wife's

brother) of appellant-Asha Ram. Shiva alias Shiv Prasad and Ghan Shyam are the associates of the remaining appellants.

Prior to the incident enmity was subsisting between appellant Asha Ram on one hand and the three deceased persons on the other. At the time of the incident a dispute arising out of a grove was subsisting between appellant-Asha Ram and deceased-Hira Lal. Deceased-Faujdar had illicit relations with the wife of one Pahalwan of village Barhi. On account of it appellant-Asha Ram and others had ex-communicated the informant and others.

On 18-9-1996 at about 8 p.m. appellant's-Asha Ram and Chandrika along with acquitted accused-Magan, Ram Chhattar and Ghan Shyam came to the house of Faujdar and Talukdar (deceased) who lived in separate houses in the immediate proximity of the informants house and took them to consume liquor. All of them consumed liquor at the house of appellant-Asha Ram. On the said date at about 8-9- p.m. Faujdar came to his house, accompanied by appellants-Asha Ram and Chandrika and acquitted accused-Ghan Shyam, Magan, and Ram Chhattar and in the presence of his neighbour Ramanand asked his daughter Urmila (P.W. 3) to give him mustard oil in a bottle which was required for cooking fish at the house of Ram Chhattar. Faujdar told Urmila that she should eat and sleep and he would be eating at Ram Chhattar's place. Thereafter Faujdar and others went away.

At about 11 p.m. Talukdar came back to his house.

On the night of 18/19-9-1996 the informant Jamidar slept at his door along with his brother-in-law Deba (P.W. 5) Chandrika (P.W. 4) another brother-in-law of the informant slept at the door in front of the house of Talukdar. A dhebri was burning there. The informant had a torch. Hira Lal, the father of the informant was sleeping in his house, inside the compound. At about 2 a.m., on account of some sound, the informant woke up, flashed his torch and saw appellants-Asha Ram and Chandrika armed with bankas and acquitted accused-Magan, Ram Chhattar and Ghan Shyam with lathies assaulting his father Hira Lal. Thereafter the appellants and others went to the house of Talukdar and committed his murder. While it was being committed acquitted accused-Shiv alias Shiv Prasad was standing there, armed with a country made pistol, and threatening the witnesses that if they came

near they would be killed. Hearing the cries of informant and others a number of persons from the village came. In the meantime the appellants and acquitted accused ran away. Thereafter the informant and others started searching Faujdar and found his corpse in the field of Ramwati near the chak road. His neck was totally detached from trunk and penis was also cut.

Thereafter, informant got the FIR scribed at his house by Hanuman Prasad Pandey, who after scribing it read it over to him. He thereafter affixed his thumb impression on it. He then proceeded to Police Station Khairighat and lodged it.

5. The evidence of Deena Nath Yadav (P.W. 10) shows that on 19-9-1996 he was posted as Head Moharrir at Police Station Khari-ghat and on the said date, at 4 a.m. Jamidar came and filed his written FIR on the basis of which he prepared the chik FIR (Ext. Ka.13).

A perusal of the chik FIR shows that the distance between the place of incident and Police Station Khairighat was 1 kilometer. It is significant to mention that a perusal of the chik FIR also shows that on its basis a case under Sections 147, 148, 302/149, I.P.C. was registered against appellants-Asha Ram and Chandrika and acquitted accused-Magan, Ram Chhattar, Shiv alias Shiv Prasad and Ghan Shyam.

6. The evidence of SI Prabhakar Mishra (P.W. 9), in short, shows as under :--

On 19-9-1996 at 4 p.m., in his presence, Jamidar lodged the FIR at Police Station Khairighat, on the basis of which an offence punishable under Sections 147, 148 and 302/ 149, I.P.C. was registered. He immediately commenced the investigation and proceeded to the place of incident where he recorded the statements of the informant, Smt. Urmila Devi and Smt. Ramawati (wife of Talukdar. On his direction R. S. Utam performed inquest on the dead bodies of Faujdar, Talukdar and Hira Lal. He thereafter inspected the place of incident and prepared the site plan. From the place of incident he seized plain and blood stained earth in three containers under a recovery memo. He also seized the torch of the informant and two dhebries under a recovery memo. On 20-9-1996 he searched for the accused persons. On 21-9-1996 he arrested appellant-Chandrika and acquitted accused-

Ram Chhattar and Ghan Shyam. On their pointing out he seized the weapons of assault, namely, Gandasa and banka. He also seized the lungi and kurta of appellant-Chandrika which were stained with blood. The said seizures were made under recovery memos, on 21-9-1996. On the said date he submitted a report for initiating action under Section 82/ 83, Cr. P.C. against appellant-Asha Ram. On 26-9-1996 Asha Ram, Magan and Shiv alias Shiv Prasad surrendered in the Court. On 5-11-1996, after obtaining orders from the Court, he recorded the statements.

7. After completion of the investigation the appellants and the acquitted accused were charge-sheeted.

8. Going backwards, the autopsies on the dead bodies of Talukdar, Hira Lal and Faujdar were conducted on 20-9-1996 at 2.05 p.m. 2.45 p.m. and 3.30 p.m. respectively by Dr. S. K. Verma (P.W. 6), who found on their person ante-mortem injuries, enumerated hereinafter :--

Talukdar :--

'Oesophagus, trachea nearly all structures are clean cut and very well visualized from outside. One incised large wound 2.5 cm. below lower of right mid mandible circumference from right to left going to back up to 7 cm. below the occipital posteriorly scalp contused subcalvion arteries and left side back (sic) nerves. Spine nerves, thyroid and parathyroid gland, trachea, oesophagus, nearly all structures are clean cut, measuring within an area of 16 cm. x 6 cm. x bone deep up to right side skin flap transversely situated in front live neck head is hanging through skin and s/c tissue right side neck with skin flap, c.3 cervical vertebrae is clean cut along spinal cord thyroid bone and surrounding membrane around spinal cord.' Heera Lal

'1. A clean cut incised wound 3 cms. below lobule of right ear measuring 7 cms. x 2.5 cms. x bone deep connecting to injury. On right side of neck structures (sic) clean cut contused artery, vertebrae, arteries (sic) oesophagus, cartoid larynx etc.

2. A clean cut incised wound just laterally to larynx in front of neck 1 cm. below injury No. (1) (sic) connecting to injury No. (1) measuring 13 cm. x 7 cm. x bone deep cervical 4 vertebrae along with (sic) clean (sic) right and carotid vessels vertebrae artery (sic) on no oesophagus, trachea muscles in front side of right of neck a clean cut along thyroid and parathyroid gland and vessel right side neck deep up posteriorely posterior aspect of skin (sic) situated 7 cm. below the occiput still bleeding.

3. A clean cut incised wound around top right shoulder. It is measuring 4 cm. x 2 cm. x bone deep, (sic) right collar bone cut through.

4. A clean cut incised wound over to anterior surface of the left wrist joint measuring 6 cm. x 3 cm. x bone deep hanging skin tag on dorsum of wrist with clean cut parietal (sic) t all flexor muscles (sic) and exterior (sic) and Flexor (sic) is above clean cut along with (sic) and (sic) Nerves (sic) hand.

5. An incised wound with clean cut margins over the posterior surface of left hand 1.3 promixity to injury No. (4) measuring 5 cms. x 1 cms. muscle and deep oozing (sic) serum.

6. A clean cut incised wound proximal to posterior aspect of left ring fingers measuring 2 cms. 1 cms. x bone deep.

7. A clean cut incised wound posterior aspect left middle finger proximal phalanx posterior aspect proximal and (sic) phalanx and fracture middle finger with proximal phalanx missing measuring 5 cms. x 2 cms. x bone deep dorsum of it muscles are clean cut, oozing bleeding (sic) seen.'

Faujdar

'1. Neck is totally detached from trunk through clean cut incised wound. The circumference at neck is 38 cm. and at the very head from trunk is 42 cms., 3 cm. below occipital posterior, neck is clean cut from head at the lower of cervical C1 and C 2 vertebrae. All neck structures skin s/c tissues arteries carotids vertebrae sub-clavion (sic) oesophagus, trachea (sic) nerves, spinal nerves spinal cord and its membrances. Arteries posterior lateral neck muscles all are clean cut. The

wound is situated above thyroid and parathyroid glands oozing blood shell (illegible) sternum clavicles mastoid (sic) muscles and other muscles of neck are also clean cut along with vessels, blood vessels nerves, vein, arteries and membrane, trachea and (sic) and oesophagus etc. neck and not head tallied cut and matched with cut are area before writing...

2. Penis is anteriorly having clean cut wound over it measuring with an area of 6 cm. x 2 cm. x muscle deep cut urethra hanging posterior tag of skin of Penile area, which is 2 cm. down wounds to pubis (sic).'

The cause of death spelt out in the autopsy reports of the deceased persons was shock and haemorrhage as a result of ante-mortem injuries which they had suffered.

It is significant to mention that in his deposition in the trial Court Dr. S. K. Verma (P.W. 6) has reiterated the said cause of death and also stated therein that the ante-mortem injuries suffered by the three deceased persons could be attributable to a heavy sharp cutting weapon like gandasa and banka.

9. The case was committed to the Court of Session in the usual manner where the appellants and the acquitted accused were charged on counts mentioned in paragraph 1. They pleaded not guilty to the charges and claimed to be tried. Their defence was of denial.

During trial in all the prosecution examined 11 witnesses. Four of them, namely, the informant Jamidar (P.W. 1), Chandrika (P.W. 4). Debu (P.W. 5) and Kallu (P.W. 8) were examined as eye-witnesses. Excepting Jamidar (P.W. 1) the other three turned hostile and when confronted with those portions of their statements under Section 161, Cr. P.C. wherein they had given ocular account denied having made them. The informant Jamidar, however, stood firm as a rock of Gibraltar.

The learned trial Judge believed the evidence of Jamidar as also that of Ramanand (P.W. 2) and Urmila (P.W. 3) and the recoveries effected on the composite pointing out of appellant-Chandrika and acquitted accused-Ram Chhattar and Ghanshyam the last mentioned against appellant-Chandrika, and

convicted and sentenced them in the manner stated in paragraph 1. He, however, acquitted the remaining four accused, namely, Magan, Ram Chhattar, Shiv alias Shiv Prasad and Ghan Shyam. It is pertinent to mention that the State of U.P. has not impugned their acquittal by preferring an appeal under Section 378(1), Cr. P.C.

10. As mentioned earlier, aggrieved by their convictions and sentences Asha Ram and Chandrika preferred Criminal Appeal No. 54 of 2002 in this court and Chandrika also preferred another appeal i.e. Cri. Appeal No. 187 of 2002 and since these appeals arise out of a common factual matrix and impugned judgment, we are disposing them of by one judgment.

11. It is a matter of profound regret that although the appellants are languishing in jail from 19-9-1996, learned counsel for the appellants are not present in the Court. Since the appellants have been in jail for over seven and a half years we did not think it expedient to adjourn these appeals and instead thought that the more equitable and proper course was to dispose them off on merits with the assistance of the learned Additional Public Prosecutor, Mr. B.K. Nigam. That we can do so is clear from the ratio laid down by the Supreme Court in paragraph 15 of the oft-quoted case of Bani Singh v. State of U.P., AIR 1996 SC 2439 : (1996 Cri LJ 3491 : 1996 All LJ 1399).

12. We have gone through the depositions of the prosecution witnesses; the material exhibits tendered and proved by the prosecution; the statements of the appellants recorded under Section 313, Cr. P.C; and the impugned judgment and are of the judgment that these appeals deserve to be allowed, inasmuch as this is a case wherein benefit of doubt should be extended to the appellants.

13. It would become manifest from the above that the learned trial Judge has based the conviction of the appellants on the ocular account furnished by Jamidar (P.W. 1) coupled with the evidence of Ramanand (P.W. 2) and Urmila (P.W. 3) and that of appellant-Chandrika on the recoveries effected on the joint pointing out of Chandrika, Ram Chhattar and Ghanshyam.

14. After the utmost circumspection, we are of the judgment that it would be unsafe to accept the evidence of Jamidar and once that is done the conviction of

appellants cannot be sustained on the evidence of Ramanand (P.W. 2) and Urmila (P.W. 3) and the recovery, on the composite pointing out of appellant-Chandrika and acquitted accused-Ram Chhattar and Ghan Shyam.

15. We would first like to deal with the evidence of Jamidar (P.W. 1). Since in paragraph 4 we have set out the prosecution story primarily on the basis of the recitals contained in his examination-in-chief, we do not want to burden our judgment by reiterating the details. In short, his evidence shows :--

Appellants and the acquitted accused are interconnected and interrelated (we have set out the manner in paragraph 4). There was enmity between appellant-Asha Ram and others on one hand and the deceased-Hira Lal, and Talukdar on the other (in paragraph 4 we have furnished in respect of it). On the night of 18/19-9-1996, at about 8 p.m., the appellants along with acquitted accused came to the houses of Talukdar and Faujdar, who lived in his immediate vicinity and took them to consume liquor. At about 8-9 p.m. Faujdar came along with Asha Ram and others and in the presence of Ramanand told his daughter Urmila (P.W. 3) to give them mustard oil for cooking fish. He also told her that fish would be cooked at the house of acquitted accused-Ram Chhattar and he would eat there and she should eat and sleep. At about 11 p.m. deceased-Talukdar came back to his house.

On the said night while he (informant) was sleeping at his door, Chandrika (P.W. 4) was sleeping at the door of Talukdar; and Hira Lal was sleeping in the courtyard of his house, appellants-Chandrika and Asha Ram armed with bankas and acquitted accused-Magan, Ram Chhattar and Ghan Shyam armed with lathies came. On hearing some sound he woke up and flashed his torch. In the light of which he saw the aforesaid five persons belabouring his father. Hira Lal with bankas and lathies. Thereafter the appellants belaboured his brother Talukdar. At that time, acquitted accused-Shiv alias Shiv Prasad was standing with a pistol in his hand and was threatening the witnesses' that if they came near they would be killed. Hearing the cries a number of persons from village came. In the meantime the appellants ran away. Thereafter he and others started searching for Faujdar and found his corpse in the field of Ramwati, on the chak road. Then he came back to his house along with the corpse of Faujdar and got the FIR scribed by

Hanuman Prasad Pandey, who after scribing it read it over to him. He thereafter affixed his thumb impression on it and lodged it at Police Station Khairighat, district Bahraich.

16. We have gone through the statement of Jamidar and in our view it would be extremely unsafe to accept it for the reasons enumerated in paragraphs 17 to 22.

17. In his examination-in-chief he categorically stated that both the appellants i.e. Asha Ram and Chandrika with bankas and the three acquitted accused persons, namely, Magan, Ram Chhattar and Ghan Shyam with lathies assaulted his father Hira Lal. This, however, is per se belied by the nature of the ante-mortem injuries found on the person of Hira Lal by the autopsy surgeon Dr. S. K. Verma (P.W. 6) which we have reproduced in entirety in paragraph 8. Their perusal would show that Hira Lal only sustained seven clean cut incised wounds and did not sustain any lacerated wound contusion, abraded contusion or even an abrasion. In other words, the autopsy report makes it manifest that Jamidar has falsely implicated Magan, Ram Chhattar and Ghan Shyam. In our judgment if he could falsely implicate the aforesaid three persons, there is no assurance that he did not falsely implicate the appellants.

18. It is true that the principle 'falsus uno, falsus omnibus' is not applied by Courts while adjudicating upon the credibility of a witness but we wish to make it clear that it is only done in those cases where the grain in the evidence of a witness can be separated from chaff and where it cannot be, as is the case here, and a major part of the evidence of a witness is false, the Court would have no compunction in rejecting the testimony of the witness in entirety. (See para 8 of AIR 1975 SC 1962, Balaka Singh v. State of Punjab).

19. The statement of Jamidar that the FIR was lodged by him at 4 a.m. on 19-9-1996, which is corroborated by the evidence of Head Moharrir Deena Nath Yadav (P.W. 10) who registered the case on the basis of the FIR and that of the Investigating Officer S.I. Prabhakar Mishra (P.W. 9) is unworthy of belief and circumstances clearly show that the FIR was lodged after 4 a.m. it is pertinent to mention that in his FIR the informant has categorically stated that the corpse of his brother Faujdar with head practically severed from trunk and penis cut was lying

near the field of Nankau Behna. However, the admissions made by him and Smt. Urmila in their cross-examination make it manifest that the corpse of Faujdar was discovered after dawn. In his cross-examination the informant stated that he and others found the corpse of Faujdar in day light. Smt. Urmila stated therein that they found the corpse of Faujdar when the crows started crowing. She further stated therein that they started crowing at about 7 a.m. Since the corpse of Faujdar was discovered at about 7 a.m. and in the FIR there is a mention of the fact that the corpse of Faujdar had been discovered. It is obvious that the FIR was lodged after 7 a.m. on 19-9-1996 and not at 4 a.m. on the said date. In our view, this delay in the lodging of the FIR although Police Station Khairighat, where the FIR was lodged, was situated only one kilometer from the place of incident shows that the informant did not see the incident and utilized time in concocting a case.

20. We are not oblivious of the fact that Head Moharrir Deena Nath Yadav P.W. 10, who registered the case on the basis of the FIR, in his cross-examination stated that the special report was sent the same morning at about 5.30 a.m. We are aware that along with the special report a copy of the FIR is sent, but since he has also stated in his cross-examination that he is deposing about the time of sending of the special report from his memory and the GD of the Police Station is not before him, in our judgment it would be dangerous to trust his memory, in preference to the admissions made by Jamidar and Urmila in their cross-examination which clearly make it manifest that the FIR was lodged after 7 a.m.

21. In our judgment when the aforesaid two infirmities in the statement of Jamidar are evaluated in the background of the fact that he is the real brother of the deceased-Talukdar and Faujdar and the son of the deceased-Hira Lal and is inimical to the appellants, it becomes extremely unsafe to accept his testimony.

22. For the aforesaid reasons we do not feel it prudent to place reliance on the testimony of Jamidar (P.W. 1).

23. We now take up the evidence of Ramanand (P.W. 2) and Urmila (P.W. 3). In our judgment their evidence hardly bolsters the prosecution case. The evidence of Ramanand and Urmila shows :--

On the date of incident, at about 8-9 p.m., appellants-Asha Ram and Chandrika, along with Faujdar and the acquitted accused-Ghan Shyam, Magan and Ram Chhattar came to Faujdar's house. Faujdar asked Urmila to give him mustard oil which was required for cooking fish at the house of Ram Chhattar. He told her that he would eat at Ram Chhattar's house and she should eat and sleep. Thereafter Faujdar went away with them.

It is true that in her cross-examination Urmila stated that after some time when she and her mother went to answer the call of nature, she found her father Faujdar going in the company of Asha Ram and acquitted accused-Shiv in the direction of Bahera. However, we are loath to believe this statement of hers because she did not state this fact in her statement under Section 161, Cr. P.C. and when cross-examined she stated that she had told the Investigating Officer and it was his fault if he had not written it. We make no bones in observing that we are not inclined to believe her and would rather believe the Investigating Officer SI Prabhakar Misra, who in his cross-examination clearly stated that Urmila did not mention this fact to him, because whereas she is an extremely interested witness, being the daughter of deceased-Faujdar, SI Misra appears to be an independent witness for nothing has been scored out from his cross-examination which would show that he had either a soft corner for the accused or was antagonistic towards her.

24. For the aforesaid reasons, we are not inclined to believe Urmila when she states, that after she had given mustard oil to her father she saw him going in the company of appellant-Asha Ram and acquitted Shiv in the direction of village Bahera.

25. In our judgment, merely because Ramanand P.W. 2 and Urmila P.W. 3 depose that on the night of incident at about 8-9 p.m. Faujdar came along with the appellant to his house; asked the latter (Urmila) to give mustard oil, which she gave; and thereafter Faujdar left with the appellants, would not simpliciter warrant the inference that the appellants committed the murder of Faujdar. At the highest it may create a strong suspicion against the appellants or may show that the prosecution case that the appellants murdered the said deceased may be true, but to borrow the words of Gajendragadkar, J., as he then was, in the oft-quoted case

of Sarwan Singh Rattan Singh v. State of Punjab, AIR 1957 SC 637 'but suspicions, however, strong, cannot take the place of proof' (see para 9). We wish to emphasise that no conviction can take place merely because the prosecution case may be true. Repelling a similar argument in AIR 1957 SC 637 : (1957 Cri 1014) (supra), in para 11, Gajendragadkar, J. observed 'it may be as Mr. Gopal Singh strenuously urged before us that there is an element of truth in the prosecution story against both the appellants. Mr. Gopal Singh contended that considered as a whole, the prosecution story may be true; but between 'may be true' and 'must be true' there is inevitably a long distance to travel and the whole of this distance must be covered by legal, reliable and unimpeachable evidence.'

26. We now take up the last leg of the prosecution evidence, namely, recovery of banka and gandasa on the pointing out of appellant-Chandrika and acquitted accused-Ram Chhattar and Ghanshyam and recovery of kurta and lungi of appellant-Chandrika having blood stains. In our view these recoveries also do not advance the prosecution case to the realm of proof beyond all reasonable doubt. As a matter of fact, there is serious lacuna, which renders it unsafe to accept them. In the first place whereas the evidence of SI Prabhakar Mishra (P.W. 9) shows that the recovery of bankas and gandasa was effected at the composite pointing out of Chandrika and acquitted accused-Ram Chhattar and Ghan Shyam but that of public witness of recovery, namely, Devta Deen (P.W. 11) shows that it was effected on the pointing out of appellant-Chandrika. That apart, the evidence of Jamidar (P.W. 1) shows that the deceased was only assaulted by bankas. That being so recovery of gandasa would not constitute incriminating evidence. Further the public witness of recovery Devta Deen is an extremely interested witness inasmuch as in his cross-examination he admitted that the deceased-Hira Lal was his real father-in-law.

27. For the aforesaid reasons, as also bearing in mind the fact that the recovered banka, gandasa, kurta and lungi were not sent by the prosecution to the Chemical Analyst or Serologist, this evidence of recovery would also not go against appellant-Chandrika.

28. We wish to emphasise that in the absence of any cogent explanation forthcoming from the side of the prosecution for sending the weapons of assault having blood stains or clothes of accused having blood stains to the Chemical Analyst and Serologist, there is always a lurking fear in the mind of the Court whether the averment in the recovery memo and that in the evidence of witnesses that there was blood on weapons and clothes may not be true. It should be borne in mind that the report of the Chemical Analyst or Serologist would set the issue whether there was blood and human blood respectively on recovered articles at rest.

29. For the aforesaid reasons, this recovery evidence also does not inspire confidence.

30. We would be failing in our fairness if before proceeding to the operative part of the judgment we do not deal with the principal submission canvassed by Mr. B. K. Nigam, the learned Additional Public Prosecutor. Mr. Nigam urged that it may be that individually; (i) the ocular account furnished by Jamidar P.W. 1; (ii) the evidence of Ramanand P.W. 2 and Urmila P.W.3, who eight hours before the recovery of the corpse of deceased-Faujdar last saw Faujdar in the company of the appellants; and (iii) the evidence of recovery of weapons of assault against appellant-Chandrika, which was effected on the joint pointing out of Chandrika, Ram Chhattar and Ghanshyam, and that of lungi and kurta having blood stains from Chandrika, may not be sufficient to sustain the conviction of the appellants on various counts, but cumulatively would be sufficient.

31. We have examined the aforesaid submission of Mr. Nigam and regret we do not find any merit in it. A perusal of our judgment would show that we have not placed reliance on either the ocular account furnished by Jamidar P.W. 1 or on the recovery effected on the joint pointing out of appellant-Chandrika, and acquitted accused -Ram Chhattar and Ghanshyam and that effected from Chandrika because the evidence comprised of infirm witnesses. In our view, the evidence of an infirm witness cannot lend strength or assurance to the evidence of a credible witness. It is true that we have found the evidence of Ramanand P.W. 2 and Urmila P.W. 3, in whose company the deceased was last seen about eight hours

before the incident, to be credible but it is well settled that no conviction can be recorded/sustained on the solitary circumstance of last seen. As observed by us earlier, this circumstance at the highest may only create a strong suspicion against the appellants or may show that the prosecution case against them is true, but in view of the ratio laid down in para 11 of AIR 1957 SC 637 : (1957 Cri LJ 1014) (supra) a conviction can only be recorded/sustained if the evidence of witnesses shows that the prosecution case must be true; which is not the case here.

32. For the aforesaid reasons, the submission of Mr. Nigam falls.

33. In the result :--

(A) Criminal Appeal No. 54 of 2002 :--

The appeal is allowed. The conviction and sentence of appellants-Asha Ram and Chandrika for offences punishable under Sections 147, I.P.C. 148, I.P.C. and 302 read with Section 149, I.P.C. are set aside. They are acquitted thereunder. In case they have paid fine, it shall be refunded to them. They are in jail and shall be released forthwith unless wanted in some other case. (B) Criminal Appeal No. 187 of 2002 :--

Since appellant-Chandrika is also the appellant in Criminal Appeal No. 54 of 2002, this appeal stands disposed of in terms of our judgment in Criminal Appeal No. 54 of 2002. Office is directed to communicate this judgment to the concerned authorities by 23-3-2004.

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