

Suman and ors. Vs. State of U.P.

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Court : Allahabad

Decided On : May-27-1999

Reported in : 2000CriLJ528

Judge : S.K. Phaujdar and ;J.C. Misra, JJ.

Acts : Arms Act - Sections 25(1B); ;Evidence Act - Sections 25, 27 and 134;
[Indian Penal Code \(IPC\), 1860](#) - Sections 148, 149 and 302; Code of Criminal
Procedure (CrPC) - Sections 313

Appeal No. : Cril. Appeals Nos. 931 and 1041 and Death Ref. No. 8 of 1998

Appellant : Suman and ors.

Respondent : State of U.P.

Advocate for Def. : A.G.A.

Advocate for Pet/Ap. : P.N. Misra, ;G.S. Chaturvedi and ;Veer Singh, Advs.

Disposition : Appeal allowed

Judgement :

J.C. Misra, J.

1. The Illrd Addl. Sessions Judge, Binjore, had tried the following six cases together :--

(a) S. T. No. 370 of 1995, in which all the present appellants in the above two appeals stood charged under Sections 148 and 302/ 149, IPC relating to case Crime No. 145 of 1995, PS Himpur:

(b) S. T. No. 375 of 1995, in which appellant Vinay Kumar alias Binnu stood charged under Section 25(1-B)(b) of Arms Act. This related to case Crime No. 158 of 1995, PS Himpur;

(c) S. T. No. 376 of 1995, in which appellant Yogendra stood charged Under Section 25(1-B)(a) of the Arms Act. This related to case Crime No. 154 of 1995;

(d) S. T. No. 377 of 1995, in which appellant Nagendra stood charged Under Section 25(1-B)(a) of the Arms Act. This related to case Crime No. 155 of 1995;

(e) S. T. 38 of 1995, in which appellant Suman was charged under Section 25(1-B)(a) of the Arms Act in case Crime NO. 156 of 1995; and

(g) S. T. No. 379 of 1995, in which appellant Arvind was charged under Section 25(1-B)(a) of the Arms Act in case a Crime No. 157 of 1995.

2. A common judgment in these consolidated trials was pronounced on 22-5-1998 whereby the appellants Suman, Yogendra, Nagendra, Sattey were convicted Under Section 302/149, IPC and were sentenced to death. For these sentences only, the reference has been made. The appellants. Arvind and Vinay alias Binnu also stood convicted for the offence Under Section 302/149, IPC but they were sentenced only to life imprisonment. All the appellants were again convicted for the offence under Section 148, IPC and each was sentenced to RI for 3 years. For their conviction for the offence under the Arms Act, four appellants Suman, Yogendra, Nagendra and Arvind were sentenced to RI for 7 years while for the conviction under the Arms Act, Vinay alias Binnu was sentenced to RI for 3 years The trial judge directed that all the sentences of imprisonment were to run concurrently.

3. In the appeal the judgment of trial Court was challenged on the ground that conviction had been made on the basis of deposition of a sole eye-witness who happened to be also a mere chance witness, highly interested in the prosecution

and equally inimical to the accused persons. It was further stated that the time of FIR itself was doubtful as there had been a radio telegraphic message concerning the instant murders wherein no particular accused was named. The learned advocates highlighted this aspect to say that not only the FIR was doubted, but also the whole prosecution story would lose the foothold if this radio telegraphic message was to be accepted. On the question of recovery of the killer weapons, it was stated that although the ballistic expert was examined, the link evidence was absolutely lacking. In relation to the sole eye-witness, it was contended that her own evidence suffers from intrinsic improbabilities and there was crucial deviation from the FIR story by her while deposing in Court.

4. To appreciate the arguments advanced on behalf of the appellants, it is necessary to go through the factual background of the case.

5. The case Crime No. 145 of 1995 was initiated when an FIR was lodged by Km. Siddhi Datri (sister of the two deceased) at Himpur police station on 4-7-95 at about 6.15 p.m. for an incident that had taken place at about 4 p.m. in the outskirts of village Sisauna on the same day. The village was about 6 kms. from the police station. In addition to the present six appellants, one Bholey son of the appellant Nagendra, was also named in the FIR, but he could not be apprehended during investigation and, accordingly, only the present six appellants had stood the trial. According to the FIR, Siddha Prakash and Madan Prakash, two brothers of the complainant, had gone to their fields to fetch fodder. She had also accompanied her brothers to the field. While coming back the brothers were carrying the loads of fodder on their heads and the sister was following them. It was about 4 p.m. then. When they reached near the field of Yogendra, all the present appellants and Bholey waylaid them, and announced that they must not be spared as they (the accused) had got a chance to avenge the murder of their brother, Kittan. Amongst the appellants, Suman and Yogendra held guns, Nagendra and Sattey had tamachas with them. The absconder Bholey and the appellant Binnu held pharsas while Arvind had a tamancha with him. They pounced upon Siddha Prakash and Madan Prakash, opened fire on them and also assaulted by pharas, and killed both of them at the spot. The complainant, Siddhi Dari, who was closely following his brothers raised an alarm. The passers-by as well as the neighbouring

cultivators also raised alarm and the miscreants fled towards village Pilana through the fields only. The complainant claimed in the FIR that the occurrence was seen by her as also by the passers-by and also by the neighbouring cultivators. The report was scribed by one Anuj Tyagi and was made over to the police station, as already stated, at about 6.15 p.m. Subsequently, on 19-7-95, after the arrest of Yogendra and Nagendra in connection with the aforesaid case Crime No. 145 of 1995, certain recovery was made pursuant to their statement made before the police. The materials received were a gun and a tamancha which were allegedly used in the killing Siddha Prakash and Madan Prakash. For these recoveries, two case crime Nos. 154 of 1995 and 155 of 1995 were recorded against. Yogendra and Nagendra, respectively, for illicit possession and use of fire-arms.

6. Again on 21-7-1995 after the arrest of Suman, Arvind and Vinay, a single barrel gun, a tamanchas and one pharsa were recovered pursuant to statements made by them to the police and it was stated that these weapons were used in the murder of Siddha Prakash and Madan Prakash in the aforesaid case. For these recoveries, case Crime Nos. 156, 157 and 158, all of 1995, were registered against Suman, Arvind and Vinay, respectively, for illicit possession and use of arms.

7. During investigation the police also seized from the spot two pieces of 'chaap', (wooden butt) of single barrel guns. Bloodstained earth and standard earth were also seized from the place of occurrence. The police also seized from that place, fired cartridges of 315 bore and 12 bore. There was seizure of two bundles of harvested fodder also from the spot.

8. Post mortem examination on the dead-body of Siddha Prakash was conducted on 5-7-95 at about 3.15 p.m. and according to the doctor, death had been caused about one day prior to such examination. It was the dead-body of a male of average built aged about 35 years. There were five fire-arm wounds of entry and four incised wounds, the right parietal and temporal bones were found fractured as also the right mandible and maxilla. The brain membrane was lacerated. The stomach contained 200 Ml. of semi-digested food. According to the autopsy

surgeon, death was caused due to shock and haemorrhage as a result of the antemortem injuries. The doctor recovered two metallic bullets and 12 pellets and 3 pieces of wads from the dead-body and the same along with wearing apparel of the deceased were sent back to the police in a sealed cover. The postmortem examination on the dead-body of Madan Prakash was conducted at about 2 p.m. on 5-7-95 and the doctor found that death had occurred within one day from the time of examination. It was an average built body of a male aged about 30 years. There were six fire-arm wounds of entry on the person of the dead-body and two lacerated wounds on the forehead and fingers. The sixth rib on the left side below the nipple was found fractured, the pleura were lacerated and both the lungs were ruptured and were almost a pulp of flesh and blood. The heart was also ruptured to such a degree that it was not identifiable. The stomach contained semi-digested food materials. The doctor recovered 45 pellets and 3 wads from the dead-body and made them over to the police along with the wearing apparel of the deceased. Death was due to shock and haemorrhage resulting from the ante-mortem fire-arm injuries.

9. The wads and pellets, blood-stained earth and plain earth collected from near the two dead-bodies, wearing apparels were all sent for chemical examination. The pharsa that was recovered was also sent for chemical examination. No blood was detected on the pharsa, as per report. Human blood was detected on the wads, pellets, blood-stained earth and the wearing apparels, the blood group could not be identified due to disintegration. The fire-arms that were recovered were also sent for expert examination and according to the ballistic experts, the fired cartridge that was marked EC-1 by him could not be stated to have been fired from the 12 bore SBBL gun for lack of details, but the expert was sure that it was not fired from the 12 bore tamancha which was marked by him as 1/ 95 or the SBBL gun that was marked by him as 2/95. For the fired cartridge, EC-2, similar opinion was given. No opinion was given with regard to fired cartridge, EC-3 or EC-4. But the expert was sure that the fired cartridge EC-6 had been fired from the tamancha marked 4/95.

10. The two recovered butts were also compared with the recovered fire-arms and the butt that was marked C-2 tallied with the SBBL gun, marked 2/95.

11. At the trial, the alleged confession of Yogendra and Nagendra made before the police and which was recorded in writing was also proved and marked exhibit. A reading of the statement indicates that it was a joint one made by Yougendra and Nagendra. Similarly, a joint statement allegedly confessing their involvement in the murder as made by Suman, Arvind and Vinay was also proved and marked exhibit. These were brought on record, presumably under Section 27 of the Indian Evidence Act as there had been alleged recovery pursuant to these statements. The legality of the joint statements or admissibility of these statements against any one of the maker would be seen in the subsequent paragraphs of this judgment.

12. The prosecution had examined 10 witnesses. PW 1 was Km. Siddhi Datri, the complainant. PW 2 was Dr. V. K. Misra who held the post-mortem examination on the two dead bodies. P.W. 3 was a head constable, Satyaveer Singh, who had received the FIR and drawn up the chik and general diary. PW 4 was Sub - Inspector Phool Singh, who held inquest on the dead-bodies, sent them for post-mortem examination and had conducted investigation. PW 5 was Smt. Deepa Tyagi, a sister of Siddhi Datri who claimed to have come to the spot on hue and cry and had seen the appellants running away PW 6, Rajendra Singh, who had taken over charge of investigation from Phool Singh and had conducted further investigation. PW 7 was constable Devendra Singh who had taken the dead-bodies for postmortem examination. PW 8 was Ram Sharan Lal Sharma, who had also conducted a part of the investigation. PW9, Mohd. Islam, was also another investigating officer while R. C. Rawat (PW 10) was the scientific officer who had examined the fire-arms.

13. In their examination under Section 313, Cr.P.C. the appellants simply denied the allegations that had come up against them in evidence. No definite or specific defence was taken up except that of false implication.

14. Three defence witnesses were examined. DW 1 was Markhoo Singh, the postmaster of Sisauna branch post-office and, according to him, last ever telephone call was made from the public booth in his post-office in May, 1989. DW 2 Vinod Kumar Singhal was the manager of Oriental Bank of Commerce at Sisauna. He had stated that he was working there since 1997 and there was no

telephone line in his bank. DW 3 was Nathu Singh, a constable attached to the police radio station, Bijnore Police Lines. He proved the log book and the contents of radio telegraphic message which the defence relied on to challenge the credibility of the FIR story.

15. In support of their contentions, as indicated in the earlier paragraphs, the learned counsel relied on certain case-laws. Reference was made to the decision of the Supreme Court in AIR 1994 SC 1250 : 1994 Cri LJ 2252. It was also a case of murder. The eye-witness was inimical towards the accused and was also an interested one. His version was highly doubtful as it was not corroborated by the medical evidence. He was also a chance witness. The Court held that conviction could not be based on his testimony. The relevant paragraphs indicate that there was an admitted enmity between the two rival factions. The witness belonged to one and the accused to another. The Court also held that the witness who was relied upon was merely a chance witness as he had gone away from his house to the particular field to attend the call of nature. The Court observed that it was necessary to have a closer scrutiny of his evidence. We are, thus, required to see if at all Siddha Datri would fall within the category of chance witness and inimical witness and if at all she answers both these questions affirmatively, we should be scrutinising to accept her statement.

16. Reliance was also placed on another decision of the Supreme Court reported in AIR 1976 SC 383 : 1976 Cri LJ 331. It was also a case of murder and conviction was based on the testimony of a sole witness who had lodged the FIR in which only one accused was named as an assailant, but the medical evidence suggested assault by more than one assailant. There was a change in the FIR version by the witness while deposing in Court. There was absence of other important link evidence. As such, the conviction and sentence were set aside. The Court observed: 'Where an accused is going to lose his life in a serious charge of murder, it is only necessary that the Court should be circumspect and closely scrutinises the evidence to come to an unhesitating conclusion that the eye-witness on whose testimony the conviction is based is absolutely reliable. Where the sole witness on whose testimony the conviction was based at most give the FIR and there were serious departures in his evidence from the versions given in

the FIR and the evidence was contradicted by medical evidence, held on facts that the High Court failed to consider the intrinsic quality of evidence of a witness. It failed to notice certain particular facts which would definitely weigh with the Court while appreciating the ocular testimony. The witness was unreliable and his testimony instead of being corroborated, was contradicted by the FIR.' The Supreme Court had set aside the conviction. Here again the principle laid down by the Supreme Court was of general application, no doubt, but it would be tested against the facts and circumstances of each case.

17. The third decision also stand reported in AIR 1976 SC 2032 : 1976 Cri LJ 1568. Reference was made to paragraph 10 of the judgment dealing with appreciation of evidence of a chance witness. It was observed that if by coincidence or chance, 'a person happens to be at the place of occurrence at the time of its taking place, it is equally a chance witness and if such a person happened to be a relative or friend of the victim or inimically disposed towards the accused, his being a chance witness is viewed with suspicion. Such a piece of evidence is not necessarily incredible or unbelievable but it requires cautious and close scrutiny.' In fact, the legal dictum is contained in the last line of the quoted observation. This Court is not to reject the testimony of a witness merely for his or her being a chance witness or being friendly to the deceased or inimical to the accused. The Court is required to be cautious and to scrutinise such evidence very closely.

18. The case-law reported in 1989 SCC (Cri) 585 : AIR 1989 SC 1519 : 1989 Cri LJ 1485 also dealt with the question of appreciation of evidence in a criminal trial. Here was a witness who was the brother of the deceased and he had claimed to have seen the incident while coming back from a shop after closing it 3 hours earlier than usual. The witness did not advance any reason for his so doing. The shop was situated about three and a half miles from the place of occurrence. He did not come to the rescue of his brother. The Court held that his presence at the scene was doubtful.

19. In the instant case, we are to see if the claim of Siddhi Datri that she was present at the spot was a natural one or if her evidence also suffers from the same

defect as was observed by the Supreme Court in the last mentioned case.

20. The defence also relied on another decision reported in AIR 1976 SC 560 : 1976 Cri LJ 496. Here was also a case of conviction on the testimony of a single witness in a murder case. The Court had observed that under the Evidence Act no particular number of witness was required for proving any fact. It was a sound and well established rule of law that quality and not quantity of evidence did really matter. The Court had to consider in each case whether it could be reasonably satisfied to act even upon the testimony of a single witness for the purpose of convicting the person. But a note of caution was also uttered in this decision and it was observed that if a witness who was the only eye-witness against the accused to prove a serious charge of murder who modulate his evidence to suit a particular prosecution theory for a deliberate purpose of securing a conviction, such witness cannot be considered as a reliable person and no conviction can be based on his sole testimony.

21. Thus the law is clear. Section 134 of the Evidence Act and the pronouncement of the Supreme Court make it clear that even a single witness could be believed to sustain the conviction but if at all the witness is inimical to the accused or interested in prosecution or is a chance witness, the Court must be very cautious to accept his evidence and must scrutinise it thoroughly before such acceptance. This would be our guideline in the instant case for acting or non-acting upon the statement of Siddhi Datri and the other statements would be seen and analysed to see if they lend support to the story made out by Siddhi Datri.

22. Siddhi Datri was examined as PW 1 on 14-10-96. She had given the inter se relationship between different accused persons including the absconder Bholey and she had also stated how accused Binnu and Arvind were interested in those accused persons as their close friends. She had stated about the murder of her brother, Ravi Prakash, long prior to the present incident by these very accused persons. Materials have come on record to show that the trial ended in acquittal of the accused persons. One Kittan (sometimes spelt as Fittan also) was a brother of Suman and was also an accused in that case. This Kittan was done to death in 1993 and the present two deceased. Siddh Prakash and Madan Prakash, were

named in that case as assailants and they were standing trial for that alleged murder. The present accused-appellant, Arvind, was a witness in that trial and the FIR was scribed by Vinay alias Binnu. Evidence in the trial against Siddh Prakash and Madan Prakash was completed and the matter was fixed on 11-7-95. The two accused persons in that case were attending the Court under police escort arrangements whereof were being made by this witness, Siddhi Datri, who was otherwise engaged in an employment away from the village. She supported her FIR story about going to the field with her brothers for fetching fodder and about the attack on them while coming back. She described that Suman and Yogendra had guns, Nagendra, Arvind and Satty had tamancha while Bholey and Binnu had pharsa. All had shouted that these two persons be killed ('Inhen Jaan Se Maar Do'). They wanted to avenge the murder of Fittan. They opened fire and her brothers received injuries and tried to run away. They were chased. Madan fell down near the ridge (Mend). Siddha Prakash could proceed 8 to 10 steps towards the east and fell down (sic). He was surrounded and was assaulted again by pharsa and gunshot. The assailants fled towards the east. On hue and cry, her mother and sister, Deepa Tyagi, reached the spot. The people who had assembled were kept near the dead-bodies while Siddhi Datri came home and got a report written by her relation Anuj Tyagi. She read it and put her signature thereon and she proved this report as Ext. Ka-1. Thereafter she left for the police station with the chowkidar and made over the report. The place where her brothers had fallen down got soaked with blood.

23. Her cross examination indicates that the place of occurrence was 500-600 yards away from the village. She claimed that the villagers had seen the miscreants running away. She accepted that when the report was being written, her mother and sister were near the dead-body but in the report she did not indicate that these two persons had seen the incident nor did she say in her statement before the police that her mother and sister were kept in watch of the dead-body or that they had seen the incident. The investigation Officer reached the spot in the night itself and stayed there overnight and the sister of the informant and the mother stayed at the place of occurrence till the dead-bodies were there. The investigating officer, however, did not examine these two ladies then. She explained that they were under such a condition that no interrogation

was possible. She accepted that during those days she was working in the PHC, Rehra at Sinthala. This place was about 90 km. away from the village of occurrence and the distance could be covered in one and a half hours. She had attended her duty till 3-7-95 and had taken leave for 4-7-95. She had submitted the leave application in the morning of 4-7-95. She denied the suggestion that she was at the PHC till about 8 p.m. at Sithala. She also denied that she came to the village only on the information of murder of her brothers. Her brothers had with them sickles for harvest of fodder (Daranti). When the incident had taken place the sickles were tied up with the bundles of fodder. The investigating officer had looked to both the bundles. No seizure list for these sickles is there on record. Siddhi Datri admitted that she did not take part in harvest of fodder and she had no sickle with her. When her brothers were attacked, she was at a distance of 25-30 steps from them. The whole episode took place within a period of 2 to 3 minutes. She was not attacked in any manner by the miscreants.

24. Her cross-examination, made on behalf of Arvind indicates that she did not narrate in her FIR about fired cartiges, blood, or the butt of any gun lying on the spot nor did she made any such statement before the police. She was present when inquest was done. Thereafter the dead-bodies were removed to the police station. Dinesh, a witness to the inquest, was a son of her sister, Saroj, and Dinesh lived in Saharanpur. Anuj had telephoned Dinesh at Saharanpur and on such information Dinesh had come. Anuj was none but the son-in-law of Saroj. He was in the village on that date although ordinarily he was residing in Saharanpur. The telephone call was made from the village itself after Siddhi Datri had left for the police station. She stated that she had gone to the police station on foot with the chowkidar. The chowkidar, however, was not examined in the trial Court. Anuj had met the police officers during investigation. This Anuj was also not examined in Court. She denied a further suggestion that the chowkidar had gone to the police station alone at about 7.30 p.m. and stated about the murder of these two persons by unknown miscreants. It was suggested to her that only thereafter the I/O had come and the FIR was concocted.

25. In a third set of cross-examinations made on behalf of Binnu and Nagendra, Siddhi Datri had admitted that she did not indicate in the report that Binnu was a

friend of the accused persons. It appears that she did not state this fact even before the police. Binnu was not a witness in the case of murder of Fittan, but he was the scribe of the FIT. His elder brother, however, was a witness in that murder case. She stated that Madan was not hit by pharsa but in the FIR a joint description was given for the assailants of both the brothers. She did not speak to the I/O about having taken leave for 4-7-95. She made a very crucial admission in paragraph 127 of her cross-examination to the effect that she was a graduate and she was lying ill on the date of occurrence and was feeling very weak. After this ghastly incident, she was not in a position to write out anything. Her hands were trembling.

26. PW 3, constable Satyaveer Singh, had received the FIR at the police station and a chik was drawn up and a GD entry No. 27 was made. The GD was proved as Ext. Ka-5. He claimed that special report was made on that very date and was sent to the senior officers through constable Sohan Lal and this fact stood indicated in GD entry No. 31 of that date at 7 p.m. This GD was also marked as Ext. Ka-6. He took about half hour to complete the writing. This witness admitted that there was a radio transmission set in the police station and every dangerous crime had been informed to the senior officers through RT message but no register was kept for such RT message. Only a separate GD was entered. The entry in the GD would only be connected through RT message to the DCRS. He, however, denied the suggestion that the chowkidar had come at about 7 p.m. at the police station and informed about the murder of Madan Prakash and Siddh Prakash by some unknown persons. He denied the suggestion that the report or the GDs were ante-timed.

27. PW 4, SI Phool Singh claimed to have held the inquest on 4-7-95 itself but the dead-bodies of Madan Prakash and Siddh Prakash and to have sent the bodies for postmortem examination. The papers in this respect indicate that the dead-bodies were sent at about 11 p.m. on 4-7-95 itself. The constables reached the headquarters that (sic) the dead bodies at 11 a.m. on the next day. The place of occurrence was 30 km. from the headquarters. The evidence of the constable, Devendra Singh, PW 7, does not disclose what was the means of conveyance for carrying these two dead-bodies to the headquarters and hospital and carrying

them back to the police station. It is, however, slated in cross-examination that they had started at about 12 in the night. The constable claimed to have reached back the police station at about 9 p.m. after the postmortem examination. The post-mortem was done according to the reports and the doctor had done it at 3.15 p.m. and from these data, it could be found that the journey between the hospital and the police station was about 6 hours as they came back to the police station at 9 p.m. In that situation, they should have reached the headquarters and the hospital by 6 a.m. in the morning of 5-7-95. This fact is certainly of relevance as they reached the hospital with papers at about 11 a.m. and it is the defence case that the FIR was lodged early in the morning.

28. PW 5, Deepa Tyagi, stated about the background of rivalry between the two families and of her two incidences of murder on both sides. According to her, Madan Prakash and Siddh Prakash were facing a trial in the murder of Fittan, brother of Suman, and these two brothers had been attending the Court under police escort Siddhi Datri used to make arrangement for this police escort and for that purpose she had come to the village on that date and had reached in the morning itself. This witness claimed to have heard the sound of gun-fire as also the hue and cry which came from the side of their fields. She rushed towards that place and she claimed that she had seen the present appellants there and she described how variously they were armed. She did not claim to have seen any part of the incident. The villagers had also assembled and then the miscreants fled towards the village Pilana. When this witness reached the spot, Siddhi Datri as also her mother were there and raising alarm. After the departure of the miscreants this witness went near the dead-bodies and found bleeding injuries on their persons. Siddhi Datri consoled them and kept them near the dead bodies. Coming back home she took the chowkidar with her and went to the police station to make a report. According to her, the mother had lost mental balance when her brother Ravi Prakash was murdered on an earlier occasion. This witness was an MA. She was married in 1994. She never did any pairvi (taking steps) in the murder trial of her brothers. It was being done by Siddhi Datri alone. She was there at the spot during arrival of police, who came at about 8.30 or 9 p.m. She claimed to have answered the interrogation by police at the spot itself but, according to the statement of the investigating officer, she was examined after six

days on 10th July, 1995. The witness claimed that not only at the spot but the police interrogated her on the second day, third day and fourth day. For all these days she was staying in village Sisauna itself. She was alone in the house when she had heard the gun-fire and from the sound itself she apprehended that something must have happened with her brothers and she started running towards the field raising hue and cry. Other persons were also attracted on her cry and went with her when she had seen the miscreants running away with their weapons through the fields only. But she claimed that they were only 5 to 6 steps away from her. Information of this incident was given by her on telephone to her relatives who started arriving on such information. They reached from Saharanpur that night itself. Telephone was made from the bank situated in the village. Telephone was made not by herself but by Anuj. According to this witness, Siddhi Datri had come in the morning itself on 4-7-95 and the purpose of her visit was to make arrangement for police guards for 11-7-95, the date fixed for the trial of Siddh Prakash and Madan Prakash. She further stated that Siddhi Datri could not go for making such arrangement on that day as there was some urgent business. She claimed to have shown to the investigating officer the place from where she had seen the miscreants running away. The evidence of investigating officer, however, does not support this assertion.

29. We may now come to the questions of despatch of the RT message as also the question of alleged recovery on the alleged statements made by different accused persons in group.

30. DW 3, Nathu Singh, was posted at the police radio station at Police Lines. Bijnor from 3-7-95 to 9-7-95 at the District Control Room. This control room was connected with all the police stations of the district and it received radio messages from all such police stations concerning any serious offence. On receipt of such information, an entry was used to be made in the log book which was maintained according to the rules. He produced the log book for the date 4-7-95 and explained that every police station had a definite code number and the police station concerned in this case had the code number F-22. On 4-7-96 at about 7 p.m. a radio message came from F-22 and the entry of the message was made in the log book which indicated that chowkidar of Sisauna had come to the police station and

informed that somebody had shot dead Madan Prakash and Siddh Prakash and the Station Officer had left for the spot with force. This message was transmitted to the residences of the Superintendent of Police and Addl. Superintendent of Police as also to the C.O., Chandpur. This log book was proved as defence Ext. Kha-1. His cross-examination indicates that he could not fix the identity of the person who was speaking from the other end. He further admitted that if the caller disclosed his identity as calling from F-22, he would take it that he was calling from that station only. His further cross-examination indicates that on 4-7-95 itself at 6.40 p.m. a message came from F-3 but the details of the message were not recorded.

31. This statement of DW 3 may be compared with the statements of the police witnesses. It is not disputed that information of every serious offence is sent by radio message to the control room for information of the senior officers and it is also not disputed that such a message was really sent. If at all this defence exhibit was a fake call, there must have been an entry regarding the actual call that was made from P.S. Himpur (P 22). But the log book of the control room covering the relevant date did not contain any such message. A doubt, therefore, creeps in on the question of the text of the message that the prosecution claimed to have sent. Had it been a message on the basis of information from Siddhi Datri, the name of the chowkidar would not have been mentioned. Had there been the names of the assailants in the message, the log book would not have been indicated 'Kisi Ne Maar Diya' ('somebody had murdered'). The learned trial judge had met this point with an observation that the message could have been sent from elsewhere at the instance of the accused persons and the code number of Himpur was used. But the absence of the real message which must have been sent, according to the prosecution version, deepens the doubt about the text of the message and the defence document, therefore, may not be thrown away as a bogus or fake one. It was for the prosecution to explain this situation as the message (kha-1) was brought on record not at the defence stage only but earlier at the stage of bail during investigation.

32. The statements of different accused persons allegedly made before the police had been proved by the prosecution. One such statement is Ext. Ka-23. This statement was allegedly made on 18-7-1995 by accused, Yogendra and

Nagendra, to the investigation officer while they were in custody. This exhibit indicates that they were interrogated after taking them out of the male lock up in the police station and both had confessed and stated that to avenge the murder of their brother Fittan, they had murdered Siddh Prakash and Madan Prakash, along with the accused persons while these two persons were coming back after fetching fodder. They had confessed to have carried 12 bore gun and 315 bore tamancha and they had concealed these weapons covered by old clothes near the railway track in village Pilana. They stated that they could locate the place for the recovery of the weapons.

33. Similarly, there is an alleged confession made to the police on 21-7-1995 as is indicated in Ext. Ka-26. This alleged statement was made by accused persons Suman, Arvind and Vinay Kumar alias Binnu who were also taken out of the male lock-up for interrogation. The accused persons confessed their guilt and stated that the murder of Siddhi Prakash and Madan Prakash was committed by way of revenge and other accused persons also took part in the murder. They had further confessed that Suman had concealed his gun in the mango orchard of Rama Autar. Arvind had concealed his tamancha in a sugar-cane field and Binnu had concealed the pharsa also in a sugarcane field. All claimed to be able to lead the police party to those places for recovery.

34. The seizure memos proved as Exts. Ka-24 and 25, Ka-24 relates to a seizure dated 19-7-1995 made on the alleged pointing out by Yogendra and Nagendra. It is stated that both were handcuffed and were taken to village Pilana near tank by the railway track. On the asking of the accused persons (in plural), the jeep was stopped, the villagers were requested to accompany the police party but they refused. The police party searched each other to ensure that none was carrying any incriminating article and then the accused persons led them near a ditch and the two accused persons separately took out two bundles wrapped with clothes. They had stated that those were the gun and tamancha which were used in the murder of Siddh Prakash and Mandan Prakash. It was allegedly stated by the accused persons that the butt of the gun had fallen down at the spot and separated portions were packed separately and concealed. The gun was allegedly recovered on the pointing out of Yogendra and the tamancha on the pointing out of

Nagendra.

35. Ext. Ka-25 indicates that Suman, Arvind and Binnu were taken out of the male lock-up on 21-7-1995 and were taken to the places in terms of their alleged confession. They reached the mango orchard and the villagers were requested to be witness to the search but not agreed. The police party gave search to each other to ensure that none carried any incriminating article and thereafter recovery was made. Suman took out an SBBL gun of 12 bore and stated that with that gun he had killed Siddh Prakash and Madan Prakash. Arvind took out a country-made tamancha from the sugar-cane field and the third took out a pharsa and both had confessed that these were used in the killing of Siddh Prakash and Madan Prakash.

36. From the recovery memos, it is found that certain statements were allegedly made after the recovery connecting the weapons with the murder. Those statements were in the nature of confession made to police and were not to be read as evidence Under Section 25 of the Indian Evidence Act, and as no further discovery was made pursuant to such statements, the same may not be read as evidence even with the help of Section 27 of the Evidence Act. So far the initial confessions are concerned, the concerned exhibits indicate that those were made jointly by different group of accused persons without any indication as to what part of the confession could be fixed with any particular accused. A joint statement whether confession or otherwise may not be attributed to either of the makers thereof and, as such, those were no statements attributable to any particular accused and, as such, any recovery made pursuant to such alleged confessions, could not be covered by Section 27 of the Evidence Act.

37. The conduct, however, of the accused persons could be of some relevance as they had allegedly picked up the weapons from concealment. On this point, we have before us only the evidence of the police personnel as in the facts and circumstances of the recovery, no public witness is there. No doubt, a police witness is not to be disbelieved simply for absence of public witnesses, but the over-zealousness on the part of the police to record a joint confession to entrap every single accused before us on record makes it unacceptable without

independent corroboration.

38. We may be back to the statement of Siddhi Datri. The defence questions the probability of her presence at the spot. She was not to help her brothers and there was no reason, as stated by the defence, for her to accompany the brothers in a formal job of collection of fodder. This may be repelled with the possibility that she was a sister staying outside the village and normally she would like to spend as much time as possible with her brothers and collection of fodder was not such a serious job which would stop the brothers from having a chat with the sister while working. This explanation gets a jolt from the very admission of Siddhi Datri that she was ailing on that date and was feeling very weak. Even if we believe the story that she had come to the village for arranging the police escorts for her brothers for the next week, this admission certainly suggests that she would not, in the normal course, go with her brothers to the fields. Her visit to the village was for arranging the police guards but, admittedly, it was not done on that day. She had advanced a reason that she was busy in some urgent work but the real reason appears to be that she was ailing and was feeling weak. A doubt, therefore, comes on the way of accepting the claim that Siddhi Datri was present at the spot when killing was done. This doubt gets reinforced from certain relevant admissions and certain statements in the FIR. The FIR does not speak of the presence of Deepa or her mother and she did not speak of their presence in her statement to police, but in her statement in Court she had claimed that Deepa and their mother also reached the spot almost immediately after the incident. She had further stated that Deepa was near the dead-body till the arrival of the investigating officer.

39. This claim may be judged against the statement of Deepa. She was in her house. It was at least 600 yards away from the place of occurrence. On hearing gunfire, she felt some danger to her brothers and started running towards the field all the way making hue and cry which attracted other persons who also accompanied her. These other persons have not been examined. Deepa claimed to have seen the accused running away while they were 5 to 6 steps away from her. The incident had taken place for a very short while, about 2 to 3 minutes as admitted by Siddhi Datri. The accused persons, if the prosecution story be believed, had completed their mission and were running away. Deepa could not

have sprinted a distance of 600 yards to see the accused persons still at the spot only 5 steps away from her. The claim of Deepa to have seen the accused persons with weapons must be disbelieved, and, more so when her name was not indicated in the FIR.

40. While discussing the statement of the constable who took the dead-bodies for the post-mortem examination, we had indicated that they could cover the distance from the hospital back to the police station within 6 hours. They must have taken the same time while going to the hospital. They reached at 11 a.m. which suggests that they had started early in the morning. It again indicates that they could not have started at 12 in the night and the story of inquest being done in the night is also doubtful. Together with all these aspects, we have the radio message where the assailants were indicated as 'somebody' and the prosecution could not bring on record the real, if any, radio message sent from the police station. The defence suggestion that after the murder of the two brothers by unknown persons, Siddhi Datri was informed and then he went to the police station to implicate the known enemies and their associates would not, therefore, be dubbed as a bogus one. About the telephone call, two witnesses were examined by defence to say that there was no telephone facility available or used at the relevant time. This is not of much consequence as the person who had allegedly telephoned (Anuj) had not been examined nor was the chowkidar examined who could have explained if he had given any information at the police station about the murder by unknown persons.

41. In Siddhi Datri, we have a chance witness as she was not normally expected in the village and, admittedly, at the spot. She was also an interested witness as her brothers were killed and she was also inimical to the accused persons because of the old cases. The statement of Siddhi Datri was, therefore, required to be scrutinised very thoroughly before acceptance and the intrinsic defects as, points out above in the statement of Siddhi Datri as also in the whole prosecution case, compel us not to accept the version of this single witness.

42. For all these reasons, we may not rule out the defence story that the accused persons were falsely implicated due to prior enmity.

43. In the result, both the appeals stand allowed and the order of conviction and sentence is set aside. All the appellants are acquitted of the charges brought against them. The reference is also answered accordingly. The appellants, if in custody, must be released forthwith if not required to be detained in any other case.

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