

Akbar and anr. Vs. State

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Court : Delhi

Decided On : May-29-2009

Reported in : 2009CriLJ4199

Judge : Pradeep Nandrajog and; Aruna Suresh, JJ.

Acts : Code of Criminal Procedure (CrPC) - Sections 157, 161 and 313; Indian Penal Code (IPC) - Sections 34 and 302

Appeal No. : Cri. Appeal No. 327/2007

Appellant : Akbar and anr.

Respondent : State

Advocate for Def. : Richa Kapoor, Adv.

Advocate for Pet/Ap. : K.K.Sud, Sr. Adv.; Alok Rai; Atul Sahi and; F. Haq, Adv

Disposition : Appeal dismissed

Judgement :

Pradeep Nandrajog, J.

1. Vide impugned judgment and order dated 30.04.2007, the appellants, Abdul Hamid @ Millu, Akbar, Afsar @ Umar Daraj and Arasleen @ Mursaleen @ Sanno have been convicted for the offence of having murdered Mohd. Kazim @ Babbu

Pehelwan (hereinafter referred to as the 'Deceased'), for which offence they have been sentenced to undergo imprisonment for life and pay a fine in sum of Rs. 5,000/- each; in default to undergo rigorous imprisonment for one year.

2. Case of the prosecution was that in the night of 03.02.2001 the appellants went to the house of the deceased and that a dispute arose between appellant Arasleen and the deceased over a sum of money. Thereafter all the appellants fired shots at the deceased from their respective pistols and fled from the place of the incident after causing the death of the deceased. The wife and sons of the deceased namely, Haseen Bano PW-1, Safdar PW-2 and Akbar PW-3, had witnessed the incident.

3. Needless to state the case of the prosecution hinged upon the veracity and credibility of the testimony of Haseen Bano PW-1, Safdar PW-2 and Akbar PW-3.

4. Criminal law was set into motion when at around 11.20 P.M. on 03.02.01, DD Entry No. 28A, Ex.PW-6/A, was recorded by HC Umesh Singh PW-6, to the effect that a wireless information has been received informing that two persons named Akbar and Afsar have shot a person near a transformer situated near Brahmpur Pulia.

5. On receiving a copy of the afore-noted DD Entry, SI Jagbir Singh PW-12, accompanied with Const. Shokeender PW-5 and Const. Billu Singh PW-7, went to the electric transformer situated near Brahmpur Pulia and on learning that an incident of murder had taken place at a nearby slum-dwelling bearing Municipal No. B-16/K-3332, K-Block, Ganda Nala, Seelam Pur proceeded to the said dwelling where they learnt that the deceased has been removed to GTB hospital.

6. Leaving Const.Shokeender PW-5, at the place of occurrence, SI Jagbir Singh PW-12 and Const.Billu Singh PW-7, proceeded to GTB hospital where they were informed that the deceased has been declared brought dead as noted in the MLC Ex.PW-4/A of the deceased. We note that on the MLC Ex.PW-4/A of the deceased, following was recorded:

Name and address of relative or friend brought by: wife..

Alleged H/o gunshot

Patient brought to hospital at 11.30 P.M.

7. After obtaining the MLC Ex.PW-4/A of the deceased, SI Jagbir Singh and Const. Billu Singh returned to the place of occurrence where they met Haseena Bano PW-1, the wife of the deceased, who claimed to have witnessed the incident. SI Jagbir Singh recorded the statement Ex.PW-1/A of Haseen Bano and made an endorsement Ex.PW-12/A thereon, and at around 1.30 A.M. forwarded the same through Const. Billu Singh PW-7, for registration of an FIR. Const. Billu Singh took Ex.PW-12/A to the police station and handed over the same to HC Ram Singh PW-8, who recorded the FIR No. 50/2001, Ex.PW-8/A, at 1.40 A.M. on 04.02.01. HC Ram Singh contemporaneously prepared DD Entry No. 30A Ex.PW-6/DA, recording the registration of the FIR Ex.PW-8/A.

8. In her statement Ex.PW-1/A, Haseen Bano stated that she resides in a slum-dwelling bearing Municipal No. B-16/K-3332, K-Block, Ganda Nala, Seelam Pur with her family. Her husband had a factory, where bangles were manufactured, but at present is running a dairy on account of the said factory being sealed. Tonight, at around 10.30 P.M. she along with her husband and children was present in her house when Sanno Pehelwan along with his nephews Akbar and Afsar s/o Allah Pehelwan and one Abdul @ Millu who was their friend had come there. That two of her children; namely, Safdar and Akbar were awake at the time of the arrival of said persons in their house. The aforesaid persons who reside in New Seelampur used to keep meeting her husband and that she is well acquainted with them as they are her distant relatives. On the arrival of the said persons, she got up from takhat (cot) and was standing when Sanno asked her husband to return the money borrowed by him on which her husband replied that he did not owe any money to him. Thereupon a quarrel ensued between her husband and Sanno and suddenly Sanno took out a pistol. On seeing this, Akbar, Safdar and Millu also took out pistols hidden in their clothes. On seeing pistol in their hands, she got scared; fell on the feet of Sanno and pleaded with him to forgive the deceased, but all the four aforesaid persons fired shots at her husband. The bullets fired by them hit the chest, left abdomen and the ribs of the deceased. When she and her two

children Akbar and Safdar shouted for help the said four persons ran away. She sent her son Akbar to call the police and removed her husband who was profusely bleeding to GTB hospital in a TSR with the help of her son Safdar where he was declared as brought dead. Sanno Pehelwan, Akbar, Afsar and Millo had acted in concert with each other and murdered her husband. She and her two sons namely, Safdar and Akbar, have witnessed the incident in question.

9. At the spot SI Jagveer Singh PW-12, prepared the rough site plan, Ex.PW-12/B of the place of the offence; recording therein, at point 'A' the spot where the takhat (cot) on which the deceased was murdered was lying. On thorough search of the place of occurrence, two cartridge cases of 12 bore and 315 bore respectively and one bullet of 315 bore were found which were seized vide memo Ex.PW-2/A. SI Jagveer Singh lifted blood found at the place of occurrence which was seized vide memo Ex.PW-1/C. The blanket stained with blood found at the place of occurrence was seized vide memo Ex.PW-1/B. Const.Padam (photographer) PW-9, reached the place of occurrence on being summoned. 4 photographs, Ex.PW-9/A to Ex.PW-9/D; negatives whereof are Ex PW-9/E to Ex.PW-9/H were taken.

10. The statements of the sons of the deceased namely Safdar PW-2 and Akbar PW-3, who also claimed to have witnessed the incident were recorded under Section 161 Cr.P.C. wherein they also indicted the appellants as the assailants of the deceased.

11. Since the deceased was brought dead at the hospital, his body was sent to the mortuary of GTB Hospital, where Dr. K.K. Banerjee PW-18, conducted the post-mortem at about 11.05 A.M. on 04.02.2001 and gave his report Ex.PW18/A, which records the following external ante-mortem injuries:

Antemortem Injuries

(i) Firearm Entry wound 3 cm x 2 cm x cavity deep with irregular margins and blackening around the wound obliquely placed on left side of upper part of chest 4.5 cm medial to above at straight line drawn medially from left nipple and 4.5 cm away from mid-line directed inwards and medially from left to side of chest cavity. On exploring the wound it had caused a wide fracture of the 1st rib in the left

parasternal area 3.5 x 3 cm, a big laceration of the left anterosuperior surface of the heart, aortic arch and upper lobe of left lung.

(ii) Firearm Entry wound 1 cm x 0.8 cm, oval shaped surrounded by tattooing over an area of 9 cm x 9.2 cm on left side of abdomen 5 cm away from mid-line, 15 cm above the middle of left inguinal line entering the abdominal cavity directed from left to right obliquely from above downwards.

(iii) Firearm Exit wound 1 cm x 1.2 cm on right posterior axillary line 10 cm above right iliac crest irregular margins. On exploring the wound it was found connecting injury No. 2 and caused perforation of the ileum.

12. He opined that the cause of the death of the deceased was shock as a result of ante-mortem injuries to the internal organs produced by the projectile of a firearm from a closed range. That the injuries Nos. (ii) and (iii) were caused by two different weapons and were sufficient to cause death in the ordinary course of nature.

13. After the post-mortem, the doctor handed over the clothes and blood sample of the deceased on a gauze, a blanket found wrapped on the body of the deceased, three wads and 90 pellets recovered from the body of the deceased to HC Om Pal Singh PW-11, who in turn handed over the same to HC Bhoop Singh PW-10, as recorded in the memo Ex.PW-10/A.

14. Since the three eye-witnesses; namely, Haseen Bano PW-1, Safdar PW-2 and Akbar PW-3, had indicted the appellants of having murdered the deceased, the police set out to apprehend them. Appellants Abdul Hamid and Akbar were apprehended by Inspector Rajender Gautam PW-18, SI Jagveer Singh PW-12 and Const. Billu Singh PW-7 on 08.02.01 from a flyover at ISBT. Thereafter appellants Afsar and Arsaleen were apprehended on 09.02.01 and 14.02.01 respectively.

15. The appellants were interrogated and their confessional statements were recorded. We need not note the contents of confessional statements inasmuch as the same are completely inadmissible in evidence as they admit of guilt. We note that no recovery were effected nor was a fact discovered by the police pursuant to

the said statements made by the appellants.

16. On 20.04.01 SI Mahesh Kumar, a draftsman, was taken to the place of occurrence by Inspector Rajender Gautam PW-19, where at the instance of Safdar he prepared the site plan to scale Ex.PW-13/A; recording therein, points 'A' to 'F', the spots where the takhat on which the deceased was murdered was lying, the two shells and bullets were found, the spots wherefrom Safdar and Haseena witnessed the incident and blood was lying, respectively.

17. The seized materials; viz. the blood sample and clothes of the deceased, the blanket seized from the place of occurrence and the blanket found wrapped on the body of the deceased at the time of post-mortem were sent to a serologist for a serological test. Vide FSL reports Ex.PW-19/D and Ex.PW-19/E it was opined that the blood group of the deceased was 'A'; that the blood lifted from the place of occurrence was human blood of group 'A'; that human blood of group 'A' was found on the clothes of the deceased and the afore-noted two blankets.

18. The two cartridge cases and one bullet found at the place of occurrence, three wads and 90 pellets recovered from the body of the deceased and the clothes of the deceased were sent to a ballistic expert for his opinion. Vide report Ex.PW-19/C, the ballistic expert opined that the said two cartridges cases are fired empty cartridge cases; that the bullet found at the place of occurrence corresponds to the bullet of 315 cartridge; that the wads recovered from the body of the deceased are air cushion wad, under shot wad and over powder wad of 12 bore cartridge; that the pellets, 88 in number, correspond to shots of a 12 bore cartridge; that four holes were found present on the shirt of the deceased, three in front and one in back and that the three out of the said four holes viz, two in front and one in back, were caused by the bullets.

19. Needless to state, the appellants were sent for trial. Charges were framed against them for having committing the offence punishable under Sections 302/34 IPC.

20. At the trial, HC Umesh Singh PW-6, deposed that DD Entry No. 28A, Ex.PW-6/A, was recorded by him. HC Ram Singh PW-8, deposed that the FIR Ex.PW-8/A

and DD Entry No. 30A Ex.PW-6/DA were recorded by him. Const.Om Pal Singh PW-11, deposed having handed over the clothes and blood sample of the deceased, the blanket found wrapped on the body of the deceased and the wads and pellets recovered from the body of the deceased to HC Bhoop Singh PW-10, vide memo Ex.PW-10/A. SI Mahesh Kumar PW-13, deposed that the site plan to scale Ex.PW-13/A was prepared by him. Dr. K.K. Banerjee PW-18, deposed that he conducted the post-mortem of the deceased and the post-mortem report Ex.PW-18/A was prepared by him. Const.Padam PW-9, deposed that the photographs, Ex.PW-9/A to Ex.PW-9/D; negatives whereof are Ex PW-9/E to Ex.PW-9/H were taken and developed by him. Mohd.Hashim PW-15 and Abdul Kalam PW-16, the brothers of the deceased, deposed that they had identified the body of the deceased.

21. Ignoring the testimony of few formal police witnesses who deposed to the receipt of various articles in the malkhana and further movement thereof to FSL, we note the testimonies of such witnesses, in respect whereof, submissions were made during the arguments of the appeals on the issue, whether Haseen Bano PW-1, Safdar PW-2 and Akbar PW-3, were at all eye-witnesses.

22. Haseena Bano PW-1, the wife of the deceased, deposed on the lines of her statement Ex.PW-1/A.

23. Safdar PW-2, the son of the deceased, deposed that on 03.02.01 the appellants who were quite familiar to him had come to his house and that he, his parents and his younger brother were awake at that time. That appellant Sanno asked his father to return the money borrowed by him to which the deceased replied that he did not owe any money to him whereupon an altercation took place between them. Suddenly the appellant Sanno took out a pistol hidden in his clothes. On seeing this, Akbar, Safdar and Millu also took out pistols hidden in their clothes. On seeing pistol in their hands, his mother got scared; fell on the feet of Sanno and pleaded with him to forgive the deceased. Thereafter appellant Afsar followed by appellant Akbar fired shots at the deceased whereupon he, his mother and brother surrounded the deceased. Thereafter appellants Sanno and Millu fired shots at the deceased and then all the appellants fled from their house after firing

shots in the air. He and his mother removed the deceased to GTB Hospital in a tempo where the doctor declared him as brought dead. On their return from the hospital they found that two police officials were present at their residence. Two cartridge cases and one bullet was recovered by the police from their house.

24. Mohd. Akbar PW-3, the son of the deceased, deposed that on 03.02.01 at around 10.30 P.M. the appellants had come to his house and that he, his parents and siblings were present therein at that time. Appellant Sanno asked his father to return the money borrowed by him to which the deceased replied that he did not owe any money to him, whereupon an altercation took place between them. Suddenly the appellant Sanno took a pistol hidden in his clothes. On seeing this, Akbar, Safdar and Millu also took out pistol hidden in their clothes. On seeing pistols in their hands, his mother got scared; fell on the feet of Sanno and pleaded with him to forgive the deceased. Thereafter appellant Afsar fired a shot at the deceased which hit him on the chest and he fell on the ground. Thereafter appellant Akbar fired a shot at the deceased which hit him on the back side of his stomach. Thereafter appellants Sanno and Millu fired shots at the deceased and then the appellants fled from their house. His mother and brother Akbar removed the deceased to the hospital in a TSR. Two cartridge cases and one bullet was recovered by the police from their house.

25. In their examination under Section 313 Cr.P.C., the appellants pleaded innocence and false implication. They stated that the deceased used to indulge in gambling and was murdered by some unidentified persons in connection with the same. The deceased was murdered near an electric transformer situated near Brahmpur Pulia and that his body was subsequently shifted by his family to his residence in order to contrive evidence against the appellants. That the family of the deceased was inimical towards appellant Akbar and Mursaleen on account of the fact that the brother of the wife of the deceased was engaged to a relative of said appellants, which engagement was broken by the family of the said appellants. Due to this the family of the deceased bore a grudge against appellants Afsar and Abdul Hamid inasmuch they had supported the appellants Akbar and Mursaleen in the dispute arising out of the said broken engagement. Additionally, appellant Afsar pleaded the defence of alibi to improbabilize his

physical presence at the place of occurrence at the alleged time of occurrence. He stated that he was attending the marriage of the daughter one Satbir Singh, a friend of his father, at the alleged time of the crime.

26. In defence, the appellants examined five witnesses namely, Rukhsana, Allo, Satbir Singh, Jakir and Sayeeda Parveen as DW-1, DW-2, DW-3, DW-4 and DW-5 respectively.

27. Rukhsana DW-1, a neighbour of the deceased, deposed that the deceased used to indulge in gambling in his lifetime. That 6-7 years ago at around 10-10.20 P.M. she was present in her residence when she heard noises coming from the neighbourhood whereupon she went out and found that the deceased was lying murdered under an electric transformer situated near pulia. That 2-3 persons brought the deceased to his residence wherein no family member of the deceased was found present. The deceased was laid down on the floor of his residence and was covered by a blanket. Someone from the crowd informed the wife of the deceased who was present at the residence of her brother. That she had appraised the police about the said incident.

28. Jakir DW-4, a neighbour of the deceased, deposed that the deceased used to indulge in gambling in his lifetime. That about 6-6 1/2 years ago he had seen that the deceased was lying near an electric transformer situated near the pulia of his colony and that 15-20 persons were standing near the deceased. That someone from the crowd went to the house of the deceased but the same was found to be locked. That thereafter some persons from the crowd removed the deceased to GTB hospital.

29. Sayda Parveen DW-5, a neighbour of the appellant Mursaleen, deposed that a dispute had arisen between the families of the wife of the deceased and appellant Mursaleen in connection with the engagement of the brother of the wife of the deceased with a relative of appellant Mursaleen. That the family of the wife of the deceased had given threats to appellant Mursaleen and also to his family members and friends.

30. Also DW-2, the father of appellant Afsar, deposed that the family of the deceased was inimically deposed towards his family as he had supported appellant Mursaleen in the dispute which had arisen between the families of the wife of the deceased and appellant Mursaleen in connection with the engagement of the brother of the wife of the deceased with a relative of appellant Mursaleen. That on 03.02.01 appellant Afsar had gone to village Kiradi near Punjabi Bagh to attend a marriage and returned home next day at around 4 A.M.

31. Satbir Singh DW-3, a friend of the father of appellant Afsar, deposed that the marriage of his daughter was solemnized on 03.02.01 and that appellant Afsar had attended the said marriage. That appellant Afsar handed him a gift at around 7.30 P.M. and that he had last seen him at venue between 12.30 A.M. to 1.00 A.M.

32. Believing the testimony of Haseen Bano PW-1, Safdar PW-2 and Akbar PW-3, to be creditworthy; holding that the witnesses examined by the defence particularly Rukhsana DW-1 and Jakir DW-4, do not inspire any confidence for the reason there is a material contradiction between their versions inasmuch as Rukhsana had deposed that the deceased was removed to his house from the electric transformer whereas Jakir deposed that he was removed to the hospital; that appellant Afsar has not been able to prove his defence of alibi for the reason the credentials of Satbir Singh DW-3, are doubtful, inasmuch as he has not been able to show any evidence to establish that appellant Afsar had attended the marriage of his daughter on 03.02.01, the learned Trial Judge has convicted the appellants.

32. At the hearing of the appeals, learned Counsel for the appellants advanced submissions on following 8 counts:

I That the FIR registered in the present case was ante-timed.

II That the witnesses namely, Haseena Bano PW-1, Safdar PW-2 and Akbar PW-3, are 'wholly unreliable? witnesses.

III That there is variance between medical and ocular evidence.

IV That the conduct of the so-called eye-witnesses after the incident is most unnatural.

V That the case set up by the prosecution is improbable.

VI That the prosecution failed to prove the genesis of the occurrence.

VIII That there are suspicious circumstances in the case of the prosecution.

VIII That the investigation conducted in the present case is most perfunctory.

Fir Being Ante-Timed

33. The first submission advanced by the learned Counsel for the appellants was that the FIR Ex.PW-8/A registered in the present case was ante-timed which leads to a strong presumption that the police had gained time to contrive evidence against the appellants. According to the counsel, the circumstances which indicated that the FIR was ante-timed are that: (i) no evidence has been adduced by the prosecution to prove that the requirement of sending the copy of the FIR to the Magistrate soon after the occurrence prescribed under Section 157 Cr.P.C. was complied with. Particular emphasis was laid on the fact that the police official who had allegedly delivered copy of the FIR to the Magistrate has not been examined by the prosecution; (ii) there is a serious contradiction in the evidence on record regarding the delivery of the FIR to the Magistrate inasmuch as FIR Ex.PW-8/A records that the same was delivered through Const. Ranveer Singh whereas HC Bhoop Singh PW-8, who is the scribe of the FIR, deposed that the same was delivered through Const. Harbeer Singh; (iii) DD Entry No. 30A Ex.PW-6/DA, records that the FIR in question is 'being recorded' at 1.40 A.M. on 04.02.01 which is contrary to the recording contained in the FIR that the same was recorded at 1.40 A.M. on 04.02.01 and (iv) the fact that DD Entry No. 30A Ex.PW-6/DA, was got proved by the defence and not by prosecution indicates that the prosecution had attempted to conceal the said document.

34. It is no doubt true that the compliance with the provisions of Section 157 Cr.P.C. is required to be proved by the prosecution. However, the question which arises for consideration is whether the failure of the prosecution in proving the said requirement necessarily leads to an inference that the FIR has not been lodged at the stated time or that the investigation is not fair and forthright.

35. A similar contention advanced before Madhya Pradesh High Court in the decision reported as Naniya @ Nannuram and Ors v. State of M.P. (1995) MPLJ was repelled by the Court in the following terms:

Though, it is the requirement of law that the report of the offence, if any, be immediately sent to the Magistrate having jurisdiction, but any irregularity in that will not be sufficient to throw the case of the prosecution over board. What is required is that the evidence should be closely scrutinized and the possibility as to whether FIR has been antedated should also be examined.

36. In the decision reported as Poor Singh v. State of MP 2004 Cri LJ 3810 a contention was advanced before the Madhya Pradesh High Court that no proof was adduced by the prosecution pertaining to compliance with the provisions of Section 157 of Code of Criminal Procedure regarding sending of copy of the First Information Report to the Magistrate concerned, therefore, the accused persons could have not been convicted. The court noted that no question was put to the Investigating Officer, who was the scribe of the FIR, regarding the dispatch of the copy of the FIR to the Magistrate and that no suggestion was given to the said witness to the effect that copy of the FIR was not sent or that it was dispatched late, which if given, would have given an opportunity to the witness to afford some explanation or to show as to when the FIR, was sent to and received by the Magistrate. In view of the afore-noted circumstances, it was held by the court that it cannot be said that the copy of the FIR was not sent to the Magistrate promptly. It was further held that mere non-compliance with the provisions of Section 157 Cr.P.C. is by itself no ground to throw out the case of the prosecution.

37. In the decision reported as State of MP v. Pattu , the only evidence regarding the dispatch of the copy of the FIR to the Magistrate was the testimony of the police official who had registered the FIR that he had sent the copy of the FIR to the Magistrate through a special messenger. The special messenger who had delivered the copy of the FIR to the Magistrate was not examined by the prosecution. It was held by Madhya Pradesh High Court that the deposition of the author of the FIR regarding the delivery of a copy of the FIR to the Magistrate is sufficient to prove compliance with the provisions of Section 157 Cr.P.C. It was yet

again held by the Court that mere non-compliance of Section 157 Cr.P.C. shall not itself lead to throwing out of the case of the prosecution.

38. In the instant case, HC Ram Singh PW-8, has categorically deposed that he had dispatched the FIR Ex.PW-8/A after its registration to the Magistrate and senior police officials through a special messenger. It is relevant to note that neither any question was put nor any suggestion was given to the witness in his cross-examination regarding the dispatch of the FIR.

39. In view of the afore-noted facts and judicial decisions noted herein above, we find no merit in the submission of the counsel predicated upon Section 157 Cr.P.C.

40. Insofar as the discrepancy between the recording contained in FIR Ex.PW-8/A and the testimony of HC Ram Singh PW-8, regarding the delivery of the FIR to the Magistrate is concerned, it be noted here that HC Ram Singh was examined on 24.02.06 i.e. five years after scribing the FIR. Human memory is not infallible. It is too much to expect that the witness would correctly remember the name of the police officer who had delivered the FIR scribed by him after five years of scribing the FIR particularly when he has been scribing and dispatching dozens of FIR in a month.

41. It was pointed out by the learned counsel, pertaining to DD Entry No. 30A, Ex.PW-6/D, that the said DD Entry records that FIR No. 50/2001 is 'being recorded' at 1.40 A.M. on 04.02.01, meaning thereby, that the said FIR was in the process of being recorded at 1.40 A.M., which is manifestly contrary to the recording contained in the said FIR that it was recorded at 1.40 A.M. on 04.02.01. Elaborating this contention learned Counsel contended that the fact that the prosecution had attempted to suppress the said DD Entry by not proving the same reinforces the stand of the appellants that the FIR Ex.PW-8/A was not recorded at 1.40 A.M. as alleged by the prosecution.

42. Nothing much turns on the fact whether the FIR Ex.PW-8/A was 'being recorded' or 'recorded' at 1.40 A.M. on 04.02.01. If the argument of the counsel that the FIR was being recorded at 1.40 A.M. is accepted, then it can safely be taken the registration of the FIR would have been completed by 1.55 A.M. This

difference of fifteen minutes in the stated and actual time of the registration of the FIR as brought out by the counsel is of no consequence inasmuch as police would have taken mere fifteen minutes to contrive evidence against the appellants. It is apparent that the scribe of the FIR Ex.PW-8/A, has recorded the time at which he started the registration of the FIR, as the time of its registration. The argument is nothing more than quibbling with words and expressions.

43. Insofar as the contention that the prosecution had attempted to conceal the DD Entry No. 30A Ex.PW-6/DA, as it has not proved the same is concerned, suffice would it be to state that the omission by the prosecution to prove the said document is of no consequence inasmuch as prosecution did not prove the said document as nothing much turned on the said document, for the reason, it merely pertained to the registration of the FIR Ex.PW-8/A.

Eye-Witnesses Being 'Wholly Unreliable? Witnesses

44. Under this head, learned Counsel for the appellants contended that the so-called eye-witnesses are 'wholly unreliable' witnesses for the reason their evidence is full of serious contradictions. The contradictions pointed out by the learned Counsel can be broadly classified into three categories namely, (i) inter-se contradictions between the testimony of the said witnesses; (ii) contradictions between the statements of the witnesses recorded under Section 161 Cr.P.C. and their testimony in Court and (iii) contradictions between the testimony of the said witness and other evidence on record.

45. Under the first category, the contradictions pointed out by the learned Counsel were: (i) Haseen Bano PW-1, deposed that all the four appellants had at once fired shots at the deceased from their respective pistols, whereas Safdar PW-2 and Akbar PW-3, deposed that appellant Afsar followed by appellants Akbar, Sanno and Millu had fired shots at the deceased; (ii) Haseena Bano deposed that she had sent Akbar to the police station after the incident to inform the police, but neither Safdar nor Akbar deposed about the fact that Akbar had gone to the police station after the incident and (iii) Haseena Bano deposed that she and her son Safdar had removed the deceased to the hospital in a TSR whereas Safdar deposed that they had removed the deceased to the hospital in a tempo.

46. Under the second category, the contradictions pointed out by the learned Counsel were: - (i) Safdar stated in his statement under Section 161 Cr.P.C. that the shots fired by appellants Sanno and Millu had hit the wall whereas he pleaded ignorance about the said fact in his testimony; (ii) Akbar stated in his statement under Section 161 Cr.P.C. that he, his mother and Safdar had embraced the deceased before firing of shots by appellants Sanno and Millu whereas he deposed in Court that they had come near to the deceased but had not embraced him; (iii) Haseena Bano stated in her statement Ex.PW-1/A that the appellants were her distant relatives whereas she deposed in her examination-in-chief that she was related to the appellants as she and the appellants belonged to the same community and (v) Haseena Bano stated in her testimony that the deceased removed the quilt from his body when the appellants arrived at their residence whereas no such factum was stated by her in her statement Ex.PW-1/A.

47. Under the third category, the contradictions pointed out by the learned Counsel were: (i) Haseena Bano deposed that no blanket was wrapped on the body of the deceased at the time of the incident or admission of the deceased in the hospital whereas seizure memo Ex.PW-10/A records that a blanket was found covering the body of the deceased at the time of admission of the deceased in the hospital (ii) Safdar deposed that the police had seized quilts and mattresses from the place of occurrence but there is no memo recording the seizure of the said articles and (iii) Haseena Bano and Safdar deposed that they had met the police at the hospital whereas there is no evidence establishing the said fact.

48. After pointing out the afore-noted contradictions, learned senior counsel drew attention of this Court to the decision of Supreme Court reported as Mahinder Singh v. State of Haryana : 1974 CriLJ742 wherein it was held that there is a limit of illiteracy of a witness which should be considered a factor in his benefit and that it cannot induce a Court to ignore the infirmities in his evidence or to fill in lacuna in the prosecution case. Learned senior counsel contended that in view of the afore-noted observations of Supreme Court, this Court should attach due importance to the contradictions pointed herein above and discard the evidence of the said witnesses.

49. The appreciation of ocular evidence is a Herculean task. There is no fixed or strait-jacket formula for appreciation of ocular evidence. The judicially evolved principles regarding the appreciation of the ocular evidence in a criminal case can be enumerated as under:

I While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the Court to scrutinize the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief.

II If the Court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial Court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details.

III When eye-witness is examined at length it is quite possible for him to make some discrepancies. But courts should bear in mind that it is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the Court is justified in jettisoning his evidence.

IV Minor discrepancies on trivial matters not touching the core of the case, hyper technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole.

V Too serious a view to be adopted on mere variations falling in the narration of an incident (either as between the evidence of two witnesses or as between two statements of the same witness) is an unrealistic approach for judicial scrutiny.

VI By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.

VII Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.

VIII The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind whereas it might go unnoticed on the part of another.

IX By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.

X In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person.

XI Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.

XII A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross examination by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him.

XIII A former statement though seemingly inconsistent with the evidence need not necessarily be sufficient to amount to contradiction. Unless the former statement has the potency to discredit the later statement, even if the later statement is at variance with the former to some extent it would not be helpful to contradict that witness. (These principles have been culled out from the decisions of Supreme Court reported as *Bharwada Bhoginbhai Hirjibhai v. State of Gujarat* : 1983 CriLJ1096 *Leela Ram v. State of Haryana* : 1997 CriLJ3178 and *Tahsildar Singh v. State of UP* : 1959 CriLJ1231).

50. As noted herein above, the first step in appreciating evidence of a witness is to examine his evidence de-hors the discrepancies appearing therein and to see whether the evidence appears to be a truthful account.

51. In the instant case, the incident occurred around 10.30 P.M. on 03.02.01. The statement Ex.PW-1/A of Haseena Bano, which formed the basis of the registration of the FIR Ex.PW-8/A, was recorded at 1.30 A.M. on 04.02.01. The FIR stood registered at around 1.40 A.M. on 04.02.01. It be noted here that Haseena Bano had removed the deceased to the hospital as recorded in the MLC Ex.PW-4/A of the deceased. The statement of Haseena Bano Ex.PW-1/A was recorded at the place of occurrence after she had returned from the hospital. It can reasonably be taken that it must have taken at least 45 minutes for Haseena Bano in removing the deceased to the hospital, getting him admitted there and thereafter to return to the place of the occurrence. In these circumstances, the possibility of Haseena Bano contriving facts and spinning a false story in such less time is remote.

52. There is yet another fact which needs to be noted. The Supreme Court in the decision reported as *Malkiat Singh v. State of Punjab* : [1991]3SCR672 has held that it is settled law that the First Information Report is not substantive evidence. It can be used only to contradict the maker thereof or for corroborating his evidence and also to show that the implication of the accused was not an after-thought. In the instant case, the FIR Ex.PW-8/A, records that Haseena Bano had stated that the bullets fired by the appellants hit the chest, left abdomen and ribs of the deceased. The findings of the doctor who had conducted the post-mortem of the deceased after the registration of the FIR as recorded in the post-mortem report

Ex.PW-18/A are that two bullet entry wounds were found on the left abdomen and the chest of the deceased. Therefore, the FIR Ex.PW-8/A duly corroborates the testimony of Haseena Bano, for the reason, unless Haseena Bano had seen the bullets hitting the deceased; she could not have correctly stated the situs of the injuries suffered by the deceased, prior to the conduct of the post-mortem of the deceased.

53. The MLC Ex.PW-4/A of the deceased corroborates the testimony of Haseena Bano that she had removed the deceased to the hospital, which in turn, establishes her presence at the place of occurrence at the time of the incident.

54. The three eye-witnesses have corroborated each other on material aspects relating to the incident.

55. Therefore, the conclusion which emerges from the first reading of the evidence of the witnesses in question is that they are prima facie truthful witnesses.

56. Next, it needs to be considered, whether the contradictions pointed out by the learned Counsel render the testimony of said witnesses, unworthy of any credit.

57. Before examining the effect of the contradictions pointed out by the learned Counsel qua the credibility of the witnesses, it be noted here, that the witnesses were subjected to a very lengthy cross-examination, evident from the fact that the cross-examination of Haseena Bano, Safdar and Akbar runs into 31, 23 and 13 pages respectively. They were cross-examined by as many as four counsel.

58. The first contradiction which relates to the sequence of firing of shots by the appellants as stated by Haseena Bano on the one hand and Safdar and Akbar on the other hand, shall be dealt by us under the head 'variance between medical and ocular evidence'.

59. The second contradiction that Safdar and Akbar have not deposed a word about the factum of Akbar going to the police station after the incident in their examination-in-chief, is of no consequence, for the reason they have succinctly stated in their cross-examination that Akbar had gone to the police station after the incident. Mere omission on part of the said witnesses to state the said fact in

examination-in-chief is not fatal to the case of the prosecution.

60. The third contradiction which relates to the mode of transport used to remove the deceased to the hospital is no contradiction, because a TSR is also loosely referred to as a tempo. Even otherwise, the discrepancies in the evidence of the prosecution regarding the mode of transportation for removing the deceased to the hospital are minor in nature as held by Supreme Court in a recent decision in Criminal Appeal No. 341 of 2006 Gurunath Donkappal Keri v. State of Karnataka decided on 06.05.2009.

61. The fourth contradiction, which relates to the place, where the shots fired by appellants Sanno and Millu had hit shall be dealt by us under the head 'variance between medical and ocular evidence'.

62. The fifth contradiction relating to whether the witnesses had embraced or surrounded the deceased before the firing of the shot by appellants Sanno and Millu pointed out by learned Counsel is again of no consequence. As already noted hereinabove, only those former statements which have the potential to discredit the later statement of a witness can be used to contradict a witness. The fact that whether the witnesses had embraced or surrounded the deceased before firing of the shots by appellants Sanno and Millu has no material bearing on the guilt/innocence of the appellants. Likewise, the contradictions that whether the deceased were related to each other because of being distant relatives or because of belonging to the same community or that whether the deceased had removed the quilt at the time of arrival of the appellants are of no consequence.

63. The next two contradictions which relate to the seizure of the articles during the investigation are of no consequence for the reason it is settled law that it is not proper to reject the evidence of a witness on the ground of minor variations or infirmities in the matter of trivial details.

64. Insofar as the last contradiction which relates to the removal and admission of the deceased in the hospital by the witnesses Haseena Bano and Safdar is concerned, suffice would it be to state that the deposition of the said witnesses that they had removed the deceased to the hospital, stands corroborated by the

MLC Ex.PW-4/A of the deceased, which records that the wife of the deceased had brought him to the hospital.

Variance Between Medical and Ocular Evidence

65. The next submission advanced by the learned Counsel for the appellants was that the ocular evidence is totally inconsistent with the medical evidence which entitles the appellants to get benefit of doubt. In support of the said contention, learned Counsel placed reliance upon the judgments of Supreme Court reported as *Amar Singh v. State* : 1987 CriLJ706 and *Ram Narain v. State of Punjab* : 1975 CriLJ1500 . The variance pointed out by the learned Counsel for the appellants were: (i) that the so-called eye-witnesses deposed that all the four appellants had fired shots at the deceased whereas post-mortem report Ex.PW-18/A records that only two bullet entry wounds were found on the person of the deceased. Learned senior counsel further pointed out that there is no evidence to show that the remaining shots fired by the appellants had missed the deceased, inasmuch as no fired bullet, bullet mark, bullet hole etc. were found at the place of the occurrence and there are self-contradictions in the testimony of the said witnesses regarding the number of shots fired on the date of the incident; (ii) Akbar PW-3, deposed that a bullet fired by appellant Akbar had hit the back of the stomach of the deceased, whereas no bullet entry wound was found at said place as recorded in the post-mortem report Ex.PW-18/A of the deceased; and (iii) the case of the prosecution was that the appellants had fired at the deceased from a close range which is contradicted from the fact that there was blackening and tattooing around the injuries found on the person of the deceased. According to the learned counsel, blackening/tattooing of a wound is not possible in case of firing from close range when the victim is wearing apparel over the situs of the said wound.

66. It is no doubt true that the evidence on record establishes that only two shots were fired on the date of the incident inasmuch as only two shots had hit the deceased and that there is no evidence to show that any other shots were fired.

67. It thus needs to be considered whether the said infirmity in the evidence of the witnesses i.e. regarding the number of shots fired on the date of the incident dislodges the whole of the testimony of the witnesses.

68. It is well settled that the principle 'falsus uno falsus omnibus' does not apply to criminal trials in India. Witnesses just cannot help in giving embroidery to a story, however, true in its essence. One hardly comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggeration, embroideries or embellishments. Sometimes there is a deliberate attempt to offer embellishment and sometimes on account of over anxiety a witness gives slightly exaggerated account. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of acceptance, and merely because in some respects the court considers the same to be insufficient for placing reliance on the testimony of a witness, it does not necessarily follow as a matter of law that it must be disregarded in all respects. It is the duty of the court to disengage the truth from falsehood, to sift the grain from the chaff instead of taking an easy course of rejecting the evidence of the witnesses merely on the basis of few infirmities. (See the decision of Supreme Court reported as Mani @ Udattu Man v. State : 2009 CriLJ2268 and Keshoram Bora v. State of Assam : 1978 CriLJ1089 .)

69. In the decision reported as Leela Ram v. State of Haryana : 1997 CriLJ3178 the High Court had acquitted the appellants primarily for the reason that eye-witnesses' account regarding the number of shots fired by the accused at the deceased stand contradicted by the medical evidence. After noting that one hardly comes across a witness whose evidence does not contain some exaggeration or embellishment and that number of shots fired at the deceased can be termed to be immaterial in the matter of assessing the culpability of the accused, Supreme Court believed the testimony of the eye-witness and convicted the accused.

70. In view of the afore-noted discussion, we hold that the infirmity in the evidence of the eye-witnesses regarding the number of shots fired on the date of the incident can be ignored in light of the fact that their evidence otherwise inspires confidence as already discussed by us in paras 51 to 54 of the judgment.

71. In view of the fact that we have held that the witnesses were exaggerating the number of shots fired on the date of the incident, the contradictions pertaining to the sequence of shots fired by the appellants and place of hitting of the said shots have become superfluous.

72. The discrepancy regarding the situs of the bullet injury suffered by the deceased as inter se the testimony of Akbar and the post-mortem report should be considered in the light of the fact that the son who saw his father has been shot at and thereafter fell dead would be totally stunned and it is on this score that the hair splitting on the evidence on record ought not to be undertaken and instead the totality of the situation should be reviewed. The rationale and normal human conduct should be kept in mind while subjecting the deposition of a witness to a scrutiny.

73. There is absolutely no foundation for the submission that blackening/tattooing of a wound is not possible in case of firing from close range when the victim is wearing apparel over the situs of the said wound as no suggestion was given to the doctor who had conducted the post-mortem on said score.

74. Pertaining to the decisions relied upon by the counsel, the facts of Amar Singh's case (supra) were that the eye-witness deposed that the accused persons who were all armed with sharp weapons had inflicted number of blows on the person of the deceased and that many of the said blows fell on the ribs and abdomen of the deceased. The medical report recorded that not a single incised wound was found on the body of the deceased and that no injury was noted on the ribs and abdomen of the deceased. Supreme court held that the evidence of the eye-witness is totally inconsistent with the medical evidence, for if the evidence of eye-witness is to be accepted, then there would have been incised wounds all over the body of the deceased; whereas the medical report showed that not a single incised wound was found on the body of the deceased. Thus, the accused were acquitted. The instant case is not one which is totally inconsistent with the medical evidence, inasmuch as the evidence of the eye-witnesses that the appellants had fired at the deceased and particularly the version of Haseena Bano PW-1, that the bullets fired by the appellants had hit the chest and left abdomen of the deceased stands duly corroborated by the post-mortem report Ex.PW-18/A of the deceased which records that the deceased died of gunshot wounds and that bullet entry wound was found on the chest as also the left abdomen of the deceased.

75. In Ram Narain's case (supra) the eye-witnesses deposed that one shot was fired at the deceased by the accused persons whereas medical evidence showed that the deceased died of two gunshot injuries. Noting the afore-noted contradiction as also the fact that the evidence of the eye-witnesses does not inspire confidence as it was full of serious contradictions and infirmities; that there was variance between the scientific and ocular evidence and that the conduct of the eye-witnesses was most unnatural after the incident, Supreme Court acquitted the accused persons. On an analysis of the said case, it is clear that acquittal of the accused persons was on account of various infirmities in the evidence of the eye-witnesses including the variance between ocular and medical evidence, which is not the position in the said case.

Unnatural Conduct of The Eye-Witnesses

76. The next submission advanced by the learned Counsel was that the conduct of the so-called eye-witnesses after the incident is most unnatural. The first instance of the unnatural conduct pointed out by the counsel was that the witnesses Haseena Bano and Safdar returned to the place of occurrence after receiving the news of the death of the deceased instead of remaining at the hospital which is most strange behavior inasmuch as a grief stricken wife and son would remain by the side of his husband/father at the time of his death. According to the counsel, the said strange conduct of the said witnesses shows that they had not removed the deceased to the hospital. The second instance of the unnatural conduct pointed out was that the witnesses did not inform the other adult son of the deceased namely Arshad who was sleeping at a place which was at a stone throw distance from the place of occurrence about the incident before leaving for the hospital/police station. In support of the contention that the evidence of the witnesses should not be believed on account of their unnatural conduct, the counsel placed reliance upon the decisions of Supreme Court reported as *Selveraj v. State of Tamil Nadu* : 1976 CriLJ1541 and *Chanan Singh v. State of Haryana* 1971 Cri LJ 1554.

77. Pertaining to the submission relating to the conduct of the mother of the deceased, it would be beneficial to note the following observations made by

Supreme Court in the decision reported as *Leela Ram v. State of Haryana* : 1997 CriLJ3178 :

The court shall have to bear in mind that different witnesses react differently under different situations: whereas some become speechless, some start wailing some others run away from the scene and yet there are some who may come forward with courage, conviction and belief that the wrong should be remedied. As a matter of fact it depends upon individuals and individuals. There cannot be any set pattern or uniform rule of human reaction and to discard a piece of evidence on the ground of his reaction not falling within a set pattern is unproductive and a pedantic exercise.

78. In the decision reported as *State of Karnataka v. K. Yellappa Reddy* : 2000 CriLJ400 it was held by Supreme Court that unless the reaction demonstrated by an eye-witness is so improbable or so inconceivable from any human being pitted in such a situation it is unfair to dub his reaction as unnatural.

79. In the instant case, the deceased was declared as brought dead at the hospital. The body of the deceased would have been handed over to the family members after a considerable time as it was a case of a murder. The witnesses could not have achieved anything by remaining at the hospital as the deceased was dead. It is the human tendency to seek the solace of his loved ones and be in his familiar surroundings in the time of crisis. In view of said circumstances, the fact that the witnesses returned to the place of occurrence instead of remaining at the hospital cannot be viewed with suspicion.

80. A comparable situation had arisen before Bombay High Court, in the decision reported as *Sanjay v. State of Maharashtra* , wherein the injured witnesses who were the relatives of the deceased who was declared as brought dead left the hospital after getting treatment for their injuries. It was held by the Court that the conduct of the witnesses who were in a disturbed state of mind in leaving the hospital as the completion of the formalities were to take time cannot be viewed with suspicion.

81. There is nothing unnatural in the conduct of the witnesses in not informing the other adult of the son of the deceased about the incident before leaving for the hospital/police station. The mental faculties of a person become slow in a crisis situation. The possibility that the thought of informing the other son of the deceased did not cross the mind of the said witnesses is highly likely in the said circumstances.

82. Facts of Selveraj's case (supra) were that the appellant demanded sexual favor from the deceased and on her denial, stabbed the deceased. The husband of the deceased and one other person had witnessed the said incident. While the appellant was running away, he was questioned by three persons, whereupon he replied that he had taken revenge from the deceased by stabbing her. Acquitting the appellant, the Supreme Court held that it is difficult to believe that the appellant was so inflamed with passion as to demand sexual intercourse with the deceased in presence of her husband and that the conduct of husband of the deceased was highly unnatural and difficult to accept as there were two persons on his side, and yet, he quietly watch proceedings without making any attempt to save the deceased; that it is difficult to believe the story of the witnesses that after committing murder of the deceased, the appellant would be running in open street holding in hand for every one to see knife with which he stabbed the deceased and would stop for purpose of answering question and boastfully proclaim that he killed the deceased and wreaked vengeance. Under said circumstances the recovery of the knife from the person of the appellant was held to be suspicious.

83. In Chanan Singh's case (supra) the eye-witnesses fled from the place of occurrence after witnessing the incident and did not inform the family members of the deceased about the incident despite the fact the house of the deceased fell on his way when he was fleeing. The witness informed the police about the occurrence after a considerable delay. Noting that there was no evidence to show that the witness was struck by terror or fear, the Supreme Court held that the conduct of the witness in not informing the police or family members of the deceased about the occurrence is most unnatural. The accused was acquitted. Relevant would it be to note that besides the factum of unnatural conduct of the witness, the other reasons which weighed with the Supreme Court for acquitting

the accused were that there were many inherent improbabilities and infirmities in the evidence of the eye-witness and that there was material variance between the ocular and medical evidence.

Improbabilities in The Case of The Prosecution

84. It was urged that there are following improbabilities in the case of the prosecution; namely, (i) that the place of occurrence was a small slum-dwelling ad-measuring, at the most, 10 X 10 feet where 7 persons besides the deceased were present and therefore it is highly improbable that the shots fired by the appellants did not miss their target and hit the other persons present therein; (ii) that the evidence on record establishes that there was a room on the first floor of the slum-dwelling and therefore it is most difficult to believe that 8 persons including 4 adults were sleeping in one room when one spare room was available at their disposal and (iii) it is difficult to believe that the door of the slum-dwelling was not bolted from inside at 10.30 P.M. in the night on the date of the incident as deposed to by the so-called eye-witnesses.

85. The answer to the question as to why none of the other persons present at the place of occurrence at the time of the incident receive any bullet injuries lies in the post-mortem report Ex.PW-18/A of the deceased. The said report records that the blackening and tattooing was noticed around the two gunshot entry wounds found on the person of the deceased, which indicates that the shots were fired at the deceased from a closed range. The doctor who conducted the post-mortem of the deceased also opined that the injuries found on the person of the deceased were caused by the projectile of a firearm fired from a closed range. The fact that the shots were being fired from a close range increases the probability of the shots hitting their target. In such circumstances, the fact that none of other persons present at the place of occurrence receive any bullet injury is clearly explainable.

86. The family of the deceased belongs to the economically weaker sections of the society evident from the fact that they were living in a slum-dwelling. The said section of the society is constrained and used to live in cramped spaces because of scarcity of funds which could enable them to have an adequate accommodation for a living. Courts cannot be oblivious to the ground realities. Considering the

economic status of the family of the deceased, there is nothing unusual in the fact that 8 persons were sleeping in one room on the date of the incident.

87. Insofar as the submission pertaining to the locking of the door of the house of the deceased is concerned, it is relevant to note the testimony of Haseena Bano PW-1, that they used to bolt the door of their house only when all of the family members were about to sleep. The eye-witnesses have categorically deposed that the deceased, Haseena Bano, Safdar and Akbar were awake at the time of the arrival of the appellants in their house; therefore, the circumstance of the door of the house of the appellants on not being locked at the time of the incident is explainable. Even otherwise, there is nothing improbable in the fact that the door of a slum-dwelling was not locked in the night as the slum-dwellers can bother to leave their house unlocked inasmuch as thieves hardly bother to trouble them because of the non-availability of valuable things in their house.

Genesis of The Occurrence not Being Proved

88. The next submission advanced by the learned Counsel for the appellants was that the evidence pertaining to genesis of the occurrence suffers from serious infirmities, which is fatal to case of the prosecution. The first infirmity pointed out by the counsel was that the so-called eye-witnesses have deposed that a quarrel had ensued between the deceased and appellant Sanno on account of a sum of money demanded by appellant Sanno which led to the murder of the deceased whereas Haseena Bano PW-1, in her cross-examination stated that appellant Sanno did not demand any money from the deceased and that there was no quarrel between them on the date of the incident. The second infirmity pointed out by the counsel was that Akbar PW-3, stated in his cross-examination that appellant Afsar had taken money from the deceased 7-8 days from the incident, which is contrary to the case of the prosecution.

89. The FIR Ex.PW-8/A which was registered on the basis of the statement of Haseena Bano PW-1, clearly records that the genesis of the occurrence was a quarrel which had ensued between the deceased and appellant Sanno because of a sum of money demanded by appellant Sanno from the deceased. Haseena Bano PW-1, in her examination-in-chief categorically deposed about the said fact.

The other two eye-witnesses, Safdar and Akbar, also deposed about the said fact. It is highly possible that Haseena Bano got overawed and confused by the court atmosphere and piercing and lengthy cross-examination due to which she mixed up facts. As already noted in para 49(IV), a hyper technical approach by taking sentences torn out of context here or there from the evidence does not ordinarily permit rejection of the evidence of a whole. 90. The deposition of Akbar PW-3, that appellant Afsar had money dealings with the deceased does not negate the evidence on record that appellant Sanno had demanded a sum of money from the deceased on the date of the incident. It is possible that the deceased was having money dealings with appellant Sanno as also Afsar.

Suspicious Circumstances in The Case of The Prosecution

91. The next submission advanced by the learned Counsel for the appellants was that there are various suspicious circumstances in the case of the prosecution which raises a big question mark on the genuineness of the same. The suspicious circumstances pointed out by the counsel were that:- (i) DD Entry No. 28A Ex.PW-6/A records that the deceased was shot dead at an electric transformer situated near Brahmipuri Pulia which corroborates the defence of the appellant that the dead body of the deceased was shifted to his residence to contrive evidence against the appellants; (ii) that there is an overwriting in the name 'Afsar' recorded in the DD Entry No. 28A Ex.PW-6/A; (iii) that the name of Akbar has been surreptitiously included in the list of witnesses filed by the prosecution before the trial court evident from the change in seriatim of the witnesses in the said list; (iv) that there is considerable delay in the admission of the deceased in the hospital inasmuch as the incident had occurred at 10.30 P.M. and the deceased was admitted in GTB hospital at 11.30 P.M. whereas the distance between the place of occurrence and the hospital was hardly one kilometer; (v) that the case of the prosecution that Akbar had gone to police station Seelampur after the incident is falsified as there is no piece of evidence which could establish the said visit of Akbar; (vi) that Haseena Bano and Safdar have deposed that their clothes were stained with the blood of the deceased but no such clothes were seized by the police; (vii) that the rough site plan Ex.PW-12/B of the place of occurrence does not indicate the position of the so-called eye-witnesses; (viii) that only the relation

of the person and not the name of the person who had brought the deceased to the hospital has been recorded in the MLC Ex.PW-4/A of the deceased; (viii) that there is no evidence to show that thumb impression on the MLC of the deceased are that of Haseena Bano; (ix) that the names of the assailants of the deceased do not find a mention in the MLC of the deceased.

92. The eye-witnesses as also the police officials who had conducted the investigation of the said case have deposed that the electric transformer situated near Brahmpur Pulia was very close to the residence of the deceased. There is a tendency among persons to associate a particular place with a prominent landmark situated near the said place for the purposes of identification. It is apparent that the person who informed the police did not know the municipal number of the place of the occurrence i.e. the residence of the deceased, or has otherwise for the purposes of identification, associated the place of occurrence with the electric transformer as the same was a prominent landmark situated close to the place of occurrence. 93. HC Umesh Singh PW-6, who is the scribe of DD Entry No. 28A Ex.PW-6/A, has denied the suggestion that he had made interpolations in the said document to include the name of appellant Afsar therein. Typing or writing errors being noted contemporaneously and corrected there and then are not unknown.

94. The list of witnesses filed by the prosecution is at page 695 of the trial court record. It is no doubt true that a correction has been made in the said list to include the name of Akbar. But therefrom itself, it cannot be inferred that an interpolation has been made. It is most relevant to note that same pen with which the list of witnesses has been prepared is the one used to insert the name of Akbar in the said list, which establishes that the person who had prepared the said list committed an inadvertent error by omitting to include the name of Akbar therein, which mistake had been duly corrected there and then.

95. The eye-witnesses have approximately fixed the time of occurrence as 10.30 P.M. It cannot be taken as gospel truth that incident had occurred at 10.30 P.M. The incident had occurred in the late hours of the night, therefore, the witnesses, namely Haseena Bano and Safdar must have taken considerable time in arranging

the transport for removing the deceased to the hospital. They would have also taken some time for transporting the deceased to the hospital. The doctor would have taken time to examine the deceased and thereafter prepare his MLC. In such circumstances, the time gap of one hour between the time of the occurrence and preparation of the MLC of the deceased is most reasonable, in any case not unreasonable.

96. HC Umesh Singh PW-6, who was posted as duty officer at Police Station Seelampur on the date of the incident, deposed that a person who claimed himself to be the son of the deceased visited the police station on the date of the incident. The said police official has not deposed that any inquiry was made from said person. No document was prepared by him recording the visit of the son of the deceased in the hospital. It is possible that no attention was paid to the son of the deceased as some police officers had already left for the place of occurrence for investigation. The conduct of HC Umesh Singh PW-6, in not paying any attention to the son of the deceased, brings out the apathy of the police officials towards the economically weaker sections of the society. Be that as it may, it establishes that a son of the deceased did visit the hospital and that the same was Akbar.

97. Insofar submission pertaining to non-seizure of the clothes of the eye-witnesses is concerned, suffice would it be to note the decision of Supreme Court in Gurunath's case (supra) wherein a similar contention was advanced on behalf of the accused persons. Repelling the said contention, it was held by the Court that the said fact merely points out an error on the part of the Investigating Officer and the same, by itself, is not sufficient to discard the entire prosecution case.

98. The site plan is not substantive evidence as held by Supreme Court in the decisions reported as State of UP v. Babu : 2003 CriLJ4982 and Surinder Singh v. State of UP : 2003 CriLJ4446 . Therefore, not indicating the position of the eye-witnesses in the site plan has no bearing on the case of the prosecution.

99. The submissions which were predicated upon the MLC of the deceased can again be dealt with reference to the decision of Supreme Court in Gurunath's case (supra). In the said case, one of the submissions advanced on behalf of the accused persons was that case of the prosecution is doubtful inasmuch as the

names of all the four persons who had removed the deceased to the hospital were not recorded in the medical certificates and that the nature of the weapon used as also the names of the assailants do not find a mention in the hospital register. While repelling the said contention, the Court held that the deceased was seriously injured and therefore, it was not expected of the doctor who was treating the deceased to have recorded in details the names of the persons who had brought the deceased to the hospital inasmuch as the priority of the doctor was to save the life of the injured and not to make entries. It was held that there is no requirement in law that the doctors must note down every bit of the details of the incident in the registers maintained by them.

Perfunctory Investigation

100. It was urged that there are serious lacunas in the investigation conducted in the present case and that the same are fatal to the case of the prosecution. The lacunas pointed out by the counsel were that: (i) that seizure memos of the articles allegedly seized from the residence of the deceased bear the signatures/thumb impressions of Haseena Bano, Safdar, Akbar, Const.Shokeender, Const. Billu Singh and SI Jagveer Singh whereas Const. Shokeender has deposed that Haseena Bano was not present at the time when the case property was seized from the place of occurrence and that no other person besides him, Const. Billu Singh and SI Jagveer Singh had signed the said memos. Particular emphasis was laid on the testimony of Haseena Bano that Safdar had got affixed thumb impressions of Haseena Bano on certain documents given by the police few days after the incident and that seizure memo Ex.PW-1/C was one of the said documents; (ii) Const. Shokender has deposed that SI Jagveer Singh had prepared the site plan of the occurrence at his own instance. Much emphasis was laid on the testimony of Haseena Bano that the Investigating Officer had prepared the site plan on his own accord; (iii) that 90 pellets were recovered from the body of the deceased whereas only 88 pellets were sent to the FSL as evident from the FSL report Ex.PW-19/C which shows that there was tampering with the case property; (iv) FSL report Ex.PW-19/C records presence of one hole which was caused by the bullet on the back of the shirt of the deceased whereas no entry wound was found on the back of the deceased as recorded in the post-mortem

report Ex.PW-18/A of the deceased and (v) that no weapon of offence was recovered.

101. Save and except Const.Shokeender, all the other witnesses to the seizure memos in question, namely Haseena Bano, Safdar, Akbar, Const.Billu Singh and SI Jagveer have deposed that Haseena Bano, Safdar and Akbar were present at the time of the seizure of the articles in question from the place of occurrence. Insofar as the testimony of Haseena Bano and Safdar that Safdar had got affixed thumb impressions of Haseena Bano on certain documents given by the police few days after the incident is concerned, it be noted here that site plan to scale Ex.PW-13/A was prepared few days after the incident therefore, it is quite possible that the thumb impressions of Haseena Bano were obtained in connection with preparation of the said plan or some other documents relating to the investigation. The testimony of Haseena Bano that seizure memo Ex.PW-1/C is one of the documents on which her thumb impressions were obtained a few days after the incident is clearly an error on the part of Haseena Bano who has obviously mistaken said document for some other document, inasmuch as she is an illiterate lady and probably recognized a document only by looking at it and recollecting its broad features. The testimony of Const. Shokeender is the only piece of evidence which strikes a discordant note and is explainable as a mix up of facts. In any case, the same is trivial.

102. Haseena Bano, Const. Billu Singh and SI Jagveer Singh have deposed that the site plan Ex.PW-12/B was prepared at the pointing of Haseena Bano. Haseena Bano had first stated that she had pointed out the relevant spots to the Investigating Officer while he was preparing the site plan and has later deposed that the site plan was prepared by him on his own accord. From a conspectus reading of the two statements as also the fact that Haseena Bano was an illiterate lady, it is apparent that she had meant the Investigating Officer was drawing the site plan and that she had shown relevant spots to him. 103. The last submission which related to the discrepancy in the number of pellets recovered from the body of the deceased can be dealt with reference with to the FSL reports Ex.PW-19/C and Ex.PW-19/D. The FSL report Ex.PW-19/D records that 90 pellets were received in the biology division of the laboratory. Since some of the queries raised

pertained to the domain of the ballistic division, the necessary parcel including the parcel containing the pellets were forwarded to the ballistic division. The FSL report Ex.PW-19/C records that 88 pellets were received by the ballistic division. It is therefore clear that no tampering was done with the case property by the police officials and that an error occurred in the biology division of the FSL while re-sealing the parcel containing the pellets recovered from the body of the deceased.

104. Insofar as the discrepancy between the medical and scientific evidence is concerned, it be noted here that the injury No. (iii) noted on the post-mortem report of the deceased, which is a firearm exit wound, was found on the back of the deceased which answers the presence of a hole caused by a bullet on the back of the deceased.

105. Pertaining to the submission that the weapon of offence(s) were not recovered, suffice would it be to state the decision of this Court reported as Abdul Mursalin v. State : 2005(84)DRJ430 wherein it was held that the non-recovery of the weapon of offence is immaterial where there is direct evidence of an eye-witness to an incident.

106. From the evidence on record it is apparent that all the appellants had visited the jhuggi of the deceased with a pre-determined intention to make him pay money and upon his refusal to do so, the appellants took out firearms. Only two appellants fired a shot each resulting in the death of the deceased. Two appellants took out firearms, obviously to intimidate everybody who was present in the jhuggi. It is apparent that the two shots were fired by Afsar and Akbar, the two persons named in the DD Entry 28A. The other two just took out the firearms to intimidate the residents of the jhuggi. That the witnesses have attributed firing by all the appellants is obviously a result of the witnesses being overtaken by fear and being from a humble background, attributing firing at the instance of all the appellants, being the conclusion arrived by the mind which sees somebody take out a pistol and hold it out in a threatening manner. 107. In view of above discussion, the appeals are dismissed.