

Raj Kishore and Others Vs. State of U.P.

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Court : Allahabad

Decided On : Nov-20-2010

Judge : Abdul Mateen; Yogendra Kumar Sangal, J.

Appeal No. : CRIMINAL APPEAL No. - 418 of 1981

Appellant : Raj Kishore and Others

Respondent : State of U.P.

Advocate for Def. : Govt. Advocate; Sharwan Kumar, Advs

Advocate for Pet/Ap. : Kr. M. Rakesh; Mohan Singh; Mukul Rakesh, Advs

Judgement :

1. This appeal is at the instance of the six accused-persons namely Raj Kishore, Hira Lal, Raj Bux, Subedar, Ramdhani, Deo Prasad who were convicted by the Court of 3rd Additional Sessions Judge, Gonda in Session Trial No. 242 of 1978 State vs. Raj Kishore & Ors. All the six accused-appellants have been convicted and sentenced for the offence under Section 302/149 for life imprisonment. In addition, Raj Kishore, Hira Lal and Raj Bux were sentenced for three years rigorous imprisonment for the offence under Section 148 IPC. Subedar, Dev Prasad and Ramdhani were sentenced for two years rigorous imprisonment for the offence under Section 147 IPC. All the sentences were ordered to run concurrently.

2. Accused Ramdhani died during the pendency of the appeal. Report of his death was sent by the learned Chief Judicial Magistrate, Gonda dated 20.07.2007 is available on the record, hence appeal stands abated on his behalf.

3. Prosecution story as stated in the FIR is that on 28.06.1977 at about 4.30 p.m. when Harihar Saran (deceased) along with Raghav Ram (complainant), Ram Nath, Babu Ram and Nand Lal was returning home from Bazar and they reached upto the West of Village Kanchanpur, all the accused-persons having "Kanta", "Ballam" and "Lathi" in their hands came out from the side of the road. They all were in ambush there under "bail-tree". Complainant Raghav Ram etc. tried to escape from there raising alarm but one out of them Harihar Saran could not flee and came in the clutches of the assailants. All the accused persons dealt him with the blow of "Kanta", "Ballam" and "Lathi". Complainant etc. tried to rescue him from their clutches after return but of no avail. In the meantime, people from the village Kanchanpur came there. Accused-persons succeeded in escaping from there towards West. When they reached on the spot, they found Harihar Saran dead lying there on the roadside. Accused-persons have left there two bicycles underneath the bail-tree. On the dictation of Raghav Ram (complainant), Ram Nath present on the spot scribed the FIR there. The same was presented at the police station Colonelganj at about 7'O clock in the same evening. Case was registered against all the accused-persons named in the FIR under Crime No. 157 for the offence under Section 147, 148, 149, 302 IPC.

4. Investigation in the matter was started by the police of P.S. concerned. Sri Ram Shanker Divedi Investigating Officer immediately reached on the spot. Dead body of Harihar Saran found on the spot was taken by him in his custody. Inquest proceedings were started but not completed due to paucity of the light. In the following morning, inquest proceedings were held and completed and report was prepared. Dead body was sealed and photo lash, challan lash and letter to C.M.O. etc. were prepared and body was sent for post-mortem. Two bicycles of the accused-persons and one of the deceased were recovered from the spot. Blood-stained and "Sada-Mitti" were also collected. Site plan was prepared. Statement of witnesses were recorded. Later on, Sri Divedi (investigating officer) was transferred. Further investigation was entrusted to another investigating officer

who had recorded the statement of the rest witnesses. Doctor H.C. Srivastava conducted the post-mortem on the dead body. He prepared the report and had given the details of ante-mortem injuries found on the body of the deceased. He had also given general condition of the body in the report. After concluding the investigation and seeing the involvement of all the named accused persons in the occurrence he submitted charge-sheet against them. As the case was exclusively triable by the Court of Session, so after taking cognizance in the matter, learned Magistrate has committed the case to the Court of Session where all the accused persons were charged to face the trial, but they have pleaded not guilty and they claimed their trial.

5. On behalf of the prosecution ten witnesses were examined. PW-1 Raghav Ram (complainant), PW-2 Ram Nath (scriber of the FIR) and PW-4 Nand Lal are said to be eye-witnesses of the occurrence. PW-3 Doctor H.C. Srivastava conducted the post-mortem on the dead body and he proved the post-mortem report and had given the details of ante-mortem injuries on it found by him on the dead body. He had also opined that cause of death was shock and hemorrhage due to ante-mortem injuries. He had also given probable time of death and also given detail of the weapons which might have been used in inflicting injuries to the victim. PW-5 Ram Khilawan is the father of the deceased not named in the charge-sheet, but on the application moved on behalf of the prosecution, his statement was recorded. He has given motive of accused persons to commit the offence. PW-6 the second investigating officer who had completed the investigation of the case and submitted charge-sheet after transfer of first investigating officer Sri Ram Shanker Divedi. PW-7 Ram Vilash is the witness of the fact to the effect that in his presence bicycle of Harihar Saran and accused persons and other articles from the bicycle were taken into custody by the Investigating Officer and who prepared the memo and also collected the blood-stained and "Sada-Mitti" from the place of occurrence. He is also witness of the inquest proceedings and he also signed inquest report as witness. PW-8 Constable Suresh Chandra Yadav has proved the entry of G.D. copy Exhibit-Ka-12 and Exhibit-Ka-13 and chik report Exhibit-Ka-14. He brought sealed bundle of blood-stained and "Sada-Mitti" in the Court from Malkhana. PW-9 Head Constable Brij Bihari Pandey had proved the entry of register depositing the bicycle at the police station Exhibit-Ka-16. He also

produced both the bicycles in the Court and proved the Municipal Board report about entry of the bicycles in register Exhibit-Ka-2 and Exhibit-Ka-3. PW-10 Ram Shanker Divedi is the first investigating officer of the case had given all the details of the investigation done by him and proved the documents prepared by him during the course of investigation.

6. In their statement under Section 313 Cr PC accused-persons have denied the correctness of the prosecution case and evidence and further pleaded that they have been falsely implicated in this case due to enmity. Accused Subedar claimed that he is uncle of accused Deo Prasad; Deo Prasad claimed that he is son of Ram Karan. He and his father have contested the election of Village Pradhan against deceased Harihar Saran. Always Harihar Saran lost the election. As his father is an old man, so he has been falsely implicated in this matter. Accused Ramdhani (already died) has claimed that he is at enimical terms with the brother of Ram Khilawan and Raghav Ram namely Shiv Saran. Accused Raj Kishore and Hira Lal claimed that they are at enimical terms with Shiv Saran, who is brother of Ram Khilawan and Raghav Ram and Ram Bux has also stated in the same way. In defence accused persons have examined DW-1 Badal who had stated that near the pathway of Colonelganj to Baseriya his house and field are situated at a distance of 200 and 100 yards respectively. About three years, two and a half months ago before sun rise when he went to his field he saw that 10 to 15 persons were standing near the pathway and they were seeing the dead body lying their which was of Harihar Saran resident of Baseriya. Village Chowkidar and Vikram Singh who were there have taken responsibility to inform the family of Harihar Saran and also to police of P.S. concerned. Later on, he left that place and went to his house after seeing his field. No one related to Harihar Saran was present there. Two witnesses CW-1 Amresh Singh and CW-2 Vishwanath were examined as court witnesses to state to whom the other two bicycles recovered from the spot belongs.

7. On behalf of the prosecution FIR Exhibit-Ka-1; Post-mortem report Exhibit-Ka-2; Memos of recovery of bicycle Exhibit-Ka-3 to Exhibit-Ka-5; Inquest report Exhibit-Ka-6; Diagram of the dead body, Challan Lash, Letter to C.M.O., etc. Exhibit-Ka-7 to Exhibit-Ka-10; Site plan of the place of occurrence Exhibit-Ka-11; extracts of

G.D. Exhibit-Ka-12, Exhibit-Ka-13 and Exhibit-Ka-15; Chik Report Exhibit-Ka-14 and copy of Malkhana Register Exhibit-Ka-16 were produced and proved. Three cycles materials Exhibit-1 to Exhibit-3 and blood stained and simple earth material Exhibits-4 to 5 were also produced and identified by the witnesses.

8. After going through the evidence available on the record, hearing the arguments of parties counsel and perusing the record, learned Sessions Judge found guilty the accused persons for the charges leveled against them and they were sentenced as above. Aggrieved by this judgment and order, this appeal has been filed.

9. Heard Sri Mukul Rakesh, Sri S.M. Nasir and Sri Sharavan Kumar learned counsel for the appellants as well as Sri O.P. Srivastava learned Additional Government Advocate for the State and perused the record.

10. The grounds for challenge of the judgment of the learned trial court on behalf of the appellants taken are that (i) learned trial court wrongly held the occurrence of day-light; (ii) presence of eye-witnesses at the time of murder of Harihar Saran is not established and they have not seen the occurrence; (iii) the whole prosecution story is fabricated; (iv) investigation was tainted and it did not inspire confidence; (v) different sets of case of diaries said to have been prepared by the investigating officer for the purpose of antedating the matter; (vi) there was no independent credit-worthy evidence and there is no injured and natural witness; (vii) recovery of cycles from the spot indicates towards the real culprits but no admissible and probable evidence was adduced on behalf of the prosecution to connect the cycles with the accused persons; (viii) findings of learned trial court are perverse and sentence awarded is too severe, accused persons are of very young age; (ix) medical evidence not corroborated the ocular evidence and the medical evidence did not rule out the possibility of murder in the dark hours of the night; and (x) one accused Subedar was minor at the time of the occurrence as such sentence cannot be awarded to him under the provisions of Juvenile Justice Act.

11. On the other hand, learned AGA has supported the correctness of the judgment of the trial court and argued that sufficient and detailed reasons are

given by the learned trial court in convicting the accused persons and evidence adduced on record was properly scrutinized. From the evidence available on the record, charges framed against the accused persons were established beyond reasonable doubt and they have been rightly convicted.

12. Undisputed facts of the case are that Harihar Saran who was the son of PW-5 Ram Khilawan is now no more in the world. He died his natural death, it is not the case of the accused-persons. It was suggested to PW-2 on behalf of the accused-persons that he was murdered by unknown person in the night. Moreover, from the medical evidence i.e. post-mortem report Exhibit-Ka-2 as well as the statement of PW-3 Dr. H.C. Srivastava, it is clear that deceased was having 17 ante-mortem injuries on different parts of his body. These injuries were contusion, punctured wound and abrasions. On internal examination of the dead body, the surgeon found multiple fracture of skull and right side of back. Brain matter was coming out through punctured wound. Ribs were found fractured and right side lung was punctured. In the opinion of the PW-3 Dr. H.C. Srivastava cause of death was shock and hemorrhage due to ante-mortem injuries. Number of injuries on different parts of the body of the deceased which were found by the doctor clearly shows that this is a case of ghastly outrage and more than one persons were involved in inflicting injuries to the victim. As suggested on behalf of prosecution weapon used in inflicting the injuries were also not totally denied by the doctor i.e. blunt object (as "Lathi"), penetrating sharp edged weapon (as "Ballam") and sharp edged weapon (as "Kanta"). Although in earlier part on his statement, Doctor Sri H.C. Srivastava stated that injuries found on the body were not of "Kanta", but latter on, he had accepted that if Kanta is having sharp and pointed edge, some injuries are possible from such weapon. PW-1 Raghav Ram, PW-2 Ram Nath and PW-4 Nand Lal are eye-witnesses of the occurrence. They are named in the FIR which was promptly lodged at the police station by PW-1 Raghav Ram and scribed by PW-2 Ram Nath. All the three have stated that injuries found on the body of the victim were inflicted by using "Lathi", "Kanta" and "Ballam". This all establishes that Harihar Saran has not died with natural death and he was murdered.

13. Place of occurrence of his murder shown on behalf of the prosecution is on the pathway running from Colonelganj to Village Baseriya near a bail-tree. Dead body

of Harihar Saran was found by the investigating officer from the same place which is clear from the site plan Exhibit-Ka-11 prepared by him. He also collected blood-stained and "Sada Mitti" from that place which is also clear from his on oath statement. Dead body of Harihar Saran was lying there, it is also not disputed to the accused persons which is clear from the statement of DW-1 Badal who had stated that 3 years, 2 and 1½ months before in the morning hours he saw the dead body of Harihar Saran at this place. In his cross-examination, he has also admitted that near the place where dead body was lying a bail-tree exists. Place of recovery of dead body is not other than what stated by the eye-witnesses of the occurrence and also located by the investigating officer, it is not claimed by the accused persons. It is also nowhere suggested on behalf of the accused-persons to the witnesses of the prosecution or to the investigating officer and also no evidence in this regard was adduced by the accused that this murder has taken place somewhere else and dead body was placed there by the assailants. Inquest proceedings were done and inquest report was prepared at the same place as stated by investigating officer PW-10. Three cycles are said to have been recovered nearby this place of occurrence, one is said to be of the deceased Harihar Saran and rest two belongs to the accused persons as per prosecution case. From the cycles of Harihar Saran Jack-fruit and other household articles were also recovered which supports the prosecution case that he made the purchase of these articles from the market of Colonelganj before reaching on the spot. This all establishes the place of occurrence of murder of Harihar Saran as stated on behalf of the prosecutions.

14. Learned counsel for the accused-appellants argued that it is admitted to PW-1 complainant that accused persons were not at enmity with deceased. Enmity between Raghav Ram, Ram Nath etc. was there, but without inflicting injury to any of them and having no enmity with Harihar Saran, they will commit his murder, it is not probable and believable. PW-5 Ram Khilawan father of the deceased was examined on behalf of the prosecution in this regard. In his on oath statement, he had given details of enmity of the accused-persons with Harihar Saran (deceased). It is correct that his name does not figure in the charge-sheet as witness but from the order dated 12.09.1979 of the learned Sessions Judge, it reveals that with the permission of the Court his statement was recorded during

trial. It is also clear from the record and the order dated 12.09.1979 that his statement was recorded by the investigating officer during the course of investigation, under Section 161 Cr PC, but copy of the same was not supplied to the accused-persons earlier and before recording his statement in the court in trial of the accused-persons, copy of the same was ordered to be supplied to the counsel for the accused-persons. From his statement on oath, it is clear that there was long standing enmity between the accused-persons and the deceased Harihar Saran on different counts. It is correct that motive of committing the murder of Harihar Saran not stated in the FIR, but it is also clear from the record that FIR was not lodged by the family members of the deceased. Possibility cannot be ruled out that they both might have not knowing of such details of enmity between the accused persons and the deceased. From the statement of PW-10 the investigating officer of the case, it is also clear that firstly he has recorded the statement of Ram Khilawan father of the deceased to see the cause of the crime to the accused persons, who were named in the FIR as an assailant. So from the details given by the witness PW-5 Ram Khilawan in his on oath statement, it cannot be said that accused persons were not having any cause of committing the murder of Harihar Saran. Further it is in the statement of the prosecution witnesses that Harihar Saran was having bicycle with him and the other who were in his company i.e. Ram Nath and Raghav Ram etc. were not having any bicycle and they were going on foot. It is also in their statement that they were at some distance from Harihar Saran on the pathway as some times Harihar Saran was using bicycle and some time not, after seeing the condition of the road. As his other companions were at some distance from him and they were not having any bicycle so if they tried to save themselves from the attack of the accused persons and Harihar Saran has come in the clutches of the accused persons, there is no unnaturality in this story of the prosecution. Although it is established law that in case of direct evidence against the accused persons of the offence motive loses its significance but in the present case prosecution has established the motive of the accused persons of committing the offence which further strengthened the prosecution case.

15. Other challenge thrown by the learned counsel for the appellants is that as per case of the prosecution out of six accused persons, two namely Raj Kishore and

Raj Bux were having "Kanta", Hira Lal was having "Ballam" and rest three accused persons were having "Lathis" in their hands and they all have used their respective arms in inflicting injuries to the victim. "Kanta" is a sharp edged weapon and "Ballam" is pointed sharp edged weapon but PW-3 Dr. H.C. Srivastava at the time of the post-mortem has not found any injury on the body of the victim inflicted by "Kanta". Learned counsel for the appellants said that this inconsistency in the ocular evidence and medical evidence create doubt on the correctness of the prosecution story and also belies the presence of the witnesses on the spot who claimed themselves eye-witnesses of the occurrence. Penetrating wound, contusions, abrasions on different parts of the body were found by the doctor which is clear from his on oath statement as well as post-mortem report Exhibit-Ka-2. Use of "Ballam" and "Lathi" by the assailants in inflicting injury to the victim finds corroboration from the medical evidence. In his on oath statement, it is correct that firstly PW-3 Doctor H.C. Srivastava had stated that there was no injury of "Kanta" on the body of the victim but later on, in his statement, he had admitted that some injuries found might have been received from the blow of "Kanta" which have pointed sharp edge. It is established law that medical evidence is always an evidence of opinion and it cannot be given preference on the ocular evidence.

16. In the case of State vs. Hakam, reported in (2005) 7 S.C.C. 408, the Hon'ble Apex Court held that conflict between the medical evidence and ocular evidence if found, ocular testimony should be preferred unless belies the fundamental facts. Attention of the court was drawn on the statement of PW-1 Raghav Ram by the learned counsel for the accused-persons who had given specification of "Kanta" used in the occurrence by the accused persons. His this statement was recorded on 11.09.1979 while the occurrence took place on 28.06.1977 i.e. after more than two years of the occurrence. Some exaggeration, contractions and lapses in the statement of witnesses after such a long time are not unexpected. In 1988 CrI.J. 848 Aapa Bhai vs. State, the Hon'ble Apex Court held that "the witnesses nowadays go on adding embellishments to their versions perhaps for the fear of their testimony being rejected by the court. The Court however should not disbelieve the evidence of such witness altogether if they are otherwise trustworthy". In 1989 CrI.J. 288 State of U.P. vs. Krishna Gopal, the Hon'ble Apex Court held that "eye-witness account if credible, medical opinion pointing to

alternative probabilities not to be accepted as conclusive. Witnesses are the eyes and ears of justice. Hence the importance and primacy of the quality of the trial process, eye witnesses' account would require a careful independent assessment and evaluation for their credibility which should not be adversely prejudged making any other evidence, including medical evidence, as the sole touch stone for the test of such credibility". In another case *Mayar vs. State of U.P.* reported in 1982 CrI.J. 1977, the Hon'ble Apex Court held that statement of medical officer will be looked as the other witnesses of the occurrence, there is no such presumption that medical officer will always speak truth.

17. In the instant case, from the statement of the medical officer, possibility of the injuries caused by sharp edged weapon on the body of the deceased are not completely ruled out so it cannot be accepted that there is no corroboration of the ocular evidence from the medical evidence.

18. As per prosecution case murder of Harihar Saran had taken place on 28.06.1977 at about 4.30 p.m. It is as such mentioned in the FIR which was promptly lodged and also stated so by all the three witnesses of the fact i.e. PW-1 Raghav Ram, PW-2 Ram Nath and PW-4 Nand Lal. PW-3 Doctor H.C. Srivastava has also stated that possibility is there that the death of Harihar Saran might have taken place at this time. He has opined as such after seeing the condition of the body as well as the injuries. It is also in later part of his statement, that death of Harihar Saran might have been caused between one and a half day to two and a half day prior to the performance of autopsy. Post-mortem work was done by the doctor on 30.06.1977 at about 1.30 p.m. and death of Harihar Saran as stated by the prosecution at about 4.30 p.m. on 28.06.1977. There is nothing in autopsy report and on oath statement of surgeon to improbabilise the prosecution story of murder being committed at the time as stated by the prosecution witnesses. Another argument raised on behalf of the accused-appellants about time of death was that as per the statement of PW-4 Nand Lal some sweet (Barfi) was eaten by the deceased in the market, but as per doctor statement stomach and small intestine of the deceased was found empty, when the post-mortem was conducted. Learned counsel for the accused-appellants argued that this also suggests that from last 5 and 6 hours deceased has not eaten any such material.

As per argument of learned counsel this disbelieves the time of death of victim given by the prosecution witnesses. What type of sweet (Barfi) was eaten by the deceased, it is not clear from the statement of the witnesses. It was made only by "sugar" or some other material Khoya (Mawa) or Suzi etc. used in preparation in that Barfi, it is not clear from the statement of the witnesses. If it was made only from sugar, it will take 5 to 6 hours to digest, it cannot be accepted. How much in weight this Barfi was consumed by the deceased, it is also not clear from the record. Process of digestion varies from persons to persons and also depends upon the type of food taken. It also depends upon the nature of the contents of the articles consumed by the deceased before his death. The learned trial court had dealt this issue in its judgment and held that "In the instant case, there is no such case of the prosecution that victim had taken any meal or snacks at Colonalganj market. At any rate the causal observation made by Nand Lal as regards the victim taken sweet-meats could not make the prosecution make it Waterloo of any dichotomy between medical and ocular evidence. There was time lag of more than 4 hours between taking of sweet-meat if any taken and the incident. Sweet-meat was easily digestible so as to leave stomach and intestine empty during this interval. Large intestine of the victim were found by the surgeon to be full of fecal matter which fact indicated that the victim was yet to attend to evening call of the nature". Medical evidence is not yet so perfect as to determine the exact time of death nor can the same be determined in a computerized and mathematical fashion say as to be accurate to the last second. This also shows that the appellants failed to show different time of death of Harihar Saran as given on behalf of the prosecution.

19. It was argued on behalf of the accused-appellants that witnesses of the fact examined on behalf of the prosecution were at enmity with the accused persons. No independent witness on behalf of the prosecution was examined although it is there in the evidence of the prosecution that inhabitants of village Kanchanpur also reached on the spot and accused persons have left the place of occurrence after seeing them. All the three witnesses i.e. PW-1 Raghav Ram, PW-2 Ram Nath and PW-4 Nand Lal are unanimous, in their on oath statement on the point of presence of the accused on the spot, weapon used by them in assaulting the victim and their involvement in the occurrence. Name of all the three witnesses

figured in the FIR lodged on behalf of the prosecution, which is prompt one. They have also given probable explanation of their presence on the spot at the time of occurrence. One of them PW-1 Raghav Ram is the complainant/informant and PW-2 Ram Nath is the scribe of the FIR which was submitted at the police station. All three have faced lengthy cross-examination by the learned counsel for the accused-persons but nothing was pointed out in their statement on behalf of the accused to discredit and disbelieve their on oath version. In 1993 SCC (Criminal) 590 State vs. Nagan Bhai, the Hon'ble Apex Court held that mere fact that witnesses are related and interested would not itself be sufficient to discard their testimony straightway unless it is proved that their evidence suffers from serious infirmities which raises considerable doubt in the mind of the court. In another case 1995 SCC (Criminal) 452 State vs. Ballabh Dass, the Hon'ble Apex Court held that testimony of the interested witness is reliable if otherwise trustworthy but should be evaluated with care and caution. In a fraction ridden village where the independent witnesses are not available, it would be manifestly unjust to reject the prosecution case merely because the witnesses produced by it were interested. It was observed by the Hon'ble Apex Court in this matter that generally it is seen in the village life that independent witnesses remains unavailable to support the prosecution case. Under Section 134 of the Evidence Act, it is provided that no particular number of witness shall in any case be required for the proof of any fact. In the aforesaid facts and circumstances if other witnesses are not examined on behalf of the prosecution, it does not affect the merit of the case of the prosecution.

20. Learned counsel for the accused-appellants argued that as per prosecution case Exhibit-Ka-1 written report was prepared by PW-2 Ram Nath on the dictation of PW-1 Raghav Ram but from the statement of PW-1 Raghav Ram, it is clear that he had conceded the fact that what has been written in Exhibit-Ka-1, he is unable to state as such in his own language and he cannot dictate the facts mentioned in it. Learned counsel argued that his this statement shows that it belies the story of the prosecution that on his dictation Exhibit-Ka-1 was prepared by PW-2 Ram Nath. From his statement, it is clear that he has stated that he had dictated the facts of the occurrence in his own "Avadhi" language. PW-2 is a literate person. He is also an eye-witness of the occurrence. He had scribed the FIR. If certain

facts are translated by him in the FIR in his own language regarding the occurrence, it cannot be taken that there is any infirmity in the FIR. It is clear from his statement that on the request from the defence side he was tested in his on oath examination for writing of such type of FIR. Record shows that he wrote out Exhibit-Kha-1 in five minutes. Learned trial court held that the language used in Exhibit-Kha-1 if compared with the language mentioned in the written report Exhibit-Ka-1 there appears no discrepancy and it cannot be said that PW-2 Ram Nath was not having any capacity to prepare the FIR Exhibit-Ka-1. Statement of this witness was recorded in presence of learned Judge who had completed the judgment. Conduct and demeanor of witness was also seen by him. In the circumstances, we are in full agreement with the findings of the learned trial court that it cannot be accepted in the facts and circumstance of the case that Exhibit-Ka-1 is the result of prior consultation and confabulation with the police. Learned AGA has also cited law of Hon'ble Apex Court in Alagarsamy and others vs. State of Deputy Superintendent of Police, reported in 2010 CrI.J. 29, where it was held by the Hon'ble Apex Court that it is not a universal rule that once FIR is found to be with discrepancies, the whole prosecution case as a rule has to be thrown. Such can never be the law.

21. The simple case of the accused persons in defence is that they have been falsely implicated in this case due to enmity. No such evidence in defence was adduced on their behalf to accept this case of the accused-persons in the facts and circumstance of the case. It is clear from the record and the impugned judgment of the learned trial court that after a careful consideration of entire evidence on record and all the facts and circumstance of the case arrived at the conclusion that prosecution has established its case beyond any shadow of doubt that the accused-persons formed unlawful assembly and with the common object of that assembly they caused bodily injury to Harihar Saran resulting in his death on the spot. It is day-light occurrence. All the accused and witnesses are named in the FIR which was promptly lodged at the police station. They are unknown to each of them, it is not case of defence. Injuries of the victim were examined by the doctor at the time of post-mortem of the dead body. Harihar Saran victim had died due to the injuries received by him during the occurrence, it is clear from the statement of PW-3 Doctor H.C. Srivastava. Doctor had also opined that injuries

found on the body of the victim were sufficient to cause his death in ordinary course. It is established law that once genesis of the occurrence is proved, the contradictions and improvements which are minor in nature would not be sufficient to dispel the entire prosecution case. Record shows that there are some fault in the investigation and record shows that the investigating officer has prepared 2-3 case dairies during the course of investigation, but he had given reasons for the same. It appears that he was not having sufficient experience of investigation of such type of cases. However, assuming the investigation was faulty for the reason alone the accused persons cannot be let off or acquitted. For the fault of the prosecution the perpetrators of such crime cannot be allowed to go scot-free. In Allarakha vs. State reported in 2002 Cr.L.J. 1489, the Hon'ble Apex Court laid down that miscarriage of justice from acquittal of a guilt is no less than from convicting an innocent. In these circumstances, we do not find any reason to interfere with the conclusion drawn by the learned Session Judge in convicting the accused-persons for the charges leveled against them. No miscarriage of justice is found done by learned Session Judge in convicting the accused persons.

22. Learned counsel for the accused-appellants argued that one of the accused-appellant Subedar was minor below the age of 18 years at the time of occurrence but this aspect of the case was not considered by the trial court at the time when sentence was awarded to him. He had also referred the statement of accused Subedar recorded under Section 313 Cr PC where he stated his age only 19 years. His this statement was recorded on 31.07.1980. This occurrence has taken place on 28.06.1977. Learned counsel argued that this shows on the date of occurrence Subedar was below the age of 18 years and he cannot be sentenced as provided under the provisions of Juvenile Justice Act. On the other hand, learned AGA argued that since very beginning of the case before the trial court from the stage of bail nowhere the plea of juvenility was taken on behalf of the accused-appellant. At the time when the accused persons were heard by the trial court on the point of sentence, record shows that even that time also nowhere plea of juvenility of the accused Subedar was taken. Record of the appeal also shows even no such ground in memo of appeal taken. At the time of final argument only for the first time this plea of juvenility on the date of occurrence of the accused Subedar has been raised. No step was taken on behalf of the accused to adduce

any other evidence before the appellate court also to show that on the date of occurrence, appellant Subedar was below the age of 18 years. Learned AGA with the reference of the case law 1993 SCC (Criminal) 251 State of Haryana vs. Balwant Singh argued that age given by the accused in his statement under Section 313 Cr PC cannot be held sufficient for the purpose of declaring him juvenile and entitled for the benefit of the provisions of Juvenile Justice Act. Learned AGA further relied on the law laid down by the Hon'ble Apex Court held in case Sidhartha Vashisht alias Manu Sharma vs. State reported in (2010) 6 S.C.C. 1 that statement of accused recorded under Section 313 Cr PC are not per se evidence because these are not on oath and prosecution does not get opportunity to get cross-examine the accused. It was further held that these statements are subject to consideration by the court to limited extent of drawing an adverse inference against the accused for any false answers voluntarily offered by him and to provide an additional/missing link in chain of circumstance to prove guilt of accused. It was held that it cannot be urged merely to suit his convenience that his statement under Section 313 Cr PC be treated as evidence and facts therein as true unless contradicted by prosecution. Considering the circumstances of the case and law referred by learned AGA and after going through the record, we are also of the opinion that at this stage only on the basis of the facts that accused has given his age only 19 years in his statement under Section 313 Cr PC, it cannot be taken established that he was juvenile on the date of occurrence. Why any steps was not taken on his behalf even at the stage of appeal in this Court in this regard to file additional evidence to show his age at the time of occurrence, it is not explained, hence, accused Subedar is not entitled for any relief by this Court in this regard.

23. Already minimum prescribed sentence was awarded by the trial court to the accused persons for the offence committed by them. No further leniency in sentence is required in the matter.

24. Seeing the facts and circumstances of the case, We are of the view that appeal has no force and liable to be dismissed.

25. Accordingly, appeal is hereby dismissed. Findings of conviction and sentence of trial court to accused appellants (except accused Ramdhani who had already died) are confirmed. Accused-appellants are not present in the Court today. Their bail bonds stand cancelled. Copy of the judgment along with record be sent immediately to the trial court concerned for issuing process against the accused appellants Raj Kishore, Hira Lal, Raj Bux, Subedar, Deo Prasad to procure their attendance and if they appear or brought before the court, they shall be taken into custody and will be sent to jail along with warrant to serve out the sentence awarded to them.

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