

**HIGH COURT OF ALLAHABAD****Bench: Hon'ble Arvind Singh Sangwan, J. and Hon'ble Ram Manohar Narayan Mishra, J.****Date of Decision: 30th May 2024**

CRIMINAL APPEAL No. 4116 of 2015

CRIMINAL APPEAL No. 3950 of 2015

CRIMINAL APPEAL No. 4087 of 2015

**CHANDRAPAL AND 3 OTHERS ...APPELLANT(S)****VERSUS****STATE OF U.P. ...RESPONDENT(S)****Legislation:**

Sections 147, 148, 302/149, 392 of the Indian Penal Code (IPC)

Section 313 of the Criminal Procedure Code (Cr.P.C.)

**Subject:** Criminal appeals against the conviction and sentencing by the Special Court (S.C./S.T. Act)/Additional Sessions Judge, Bulandshahar, involving charges of murder, rioting, and robbery. The appeals focus on the reliability of eyewitness testimony, the presence of motive, and the handling of forensic evidence.

**Headnotes:**

Criminal Law – Appeal against Conviction – Eyewitness Reliability – Criminal Appeal challenging the conviction for offenses under Sections 147, 148, 302/149, and 392 IPC – Prosecution's case primarily based on the testimony of a sole eyewitness, PW-1 – Trial court acquitted one accused (Mahendra Kumar Kaushik) based on disbelieving part of the testimony of PW-1 regarding the alleged conspiracy – High Court found

significant inconsistencies and lack of corroboration in the testimony of PW-1 – Evidence suggested that PW-1 and his father were not present at the crime scene – Held, conviction based on unreliable and contradictory testimony is unsustainable. [Paras 43-54]

Forensic Evidence – Non-corroboration – Lack of ballistic and forensic evidence to support the prosecution's case – No recovery of alleged murder weapon or looted rifle – Destruction of case property including the car allegedly used by the accused – High Court noted the absence of forensic examination of crucial evidence – Held, absence of corroborative forensic evidence further weakens the prosecution's case. [Paras 43(n)-(o)]

Ante-timing of FIR – Discrepancies in FIR timing and inquest report – Evidence suggested that sections of IPC were added later to the inquest report – Delay in sending special report to Magistrate unexplained – High Court found FIR was likely ante-timed – Held, this raised serious doubts about the credibility of the prosecution's narrative. [Paras 50-54]

Motive – Lack of Evidence – Trial court acquitted accused of conspiracy charge under Section 120B IPC – Prosecution failed to establish motive for the crime – High Court upheld the trial court's finding on the absence of motive – Held, absence of motive adds to the doubt regarding the prosecution's case. [Paras 42-43]

Decision – Appeals Allowed – Conviction and sentencing set aside – Appellants acquitted of all charges – Direction for the release of appellants in custody if not required in any other case. [Paras 54-55]

### **Referred Cases:**

- Vadivelu Thevar vs. State of Madras, 1957 AIR SC 614
- Javed Shaukat Ali Qureshi vs. State of Gujarat, (2023) 9 SCC 164
- Kaur Sain vs. State of Punjab, 1974 AIR SC 329

Representing Advocates:

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Govt. Advocate, Ajay Panday, Vijay Tripathi for respondents

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(Per Hon'ble Arvind Singh Sangwan, J. )

1. These appeals have been filed challenging the judgment of conviction dated 03.08.2015, passed by Special Court (S.C./S.T. Act)/ Additional Sessions Judge, Court No.13, Bulandshahar holding the appellants Sanjay Dixit, Yogendra, Sanjay Kumar Sahni @ Sanjeev Kumar guilty of offence punishable under Sections 147, 148, 302/149 I.P.C., additionally accused Pramod Sharma and Chandra Pal were held guilty of offence under Section 147, 302/149 I.P.C. and accused Veerpal and Harpal were held guilty of offence under Sections 147, 148, 302/149, 392 I.P.C. whereas one of the accused Mahendra Kumar Kaushik was acquitted of the charge under Section 302 read with Section 120-B I.P.C. as well as the order of sentence dated 04.08.2015 by which the appellants were held guilty of offence and awarded life imprisonment under Section 302/149 I.P.C. along with a fine of Rs. 10,000/- each and in the event of non-payment of fine, to further undergo six months additional simple imprisonment and under Section 147 I.P.C., two years rigorous imprisonment along with Rs. 1000/- each, in default of payment of fine to further undergo one month additional simple imprisonment. Additional accused Sanjay Dixit, Yogendra, Sanjay Kumar Sahni and Harpal were sentenced to three years rigorous imprisonment under Section 148 I.P.C. with a fine of Rs. 1500/- each, in default of payment of fine to further undergo 45 days simple imprisonment. Accused Harpal was additionally sentenced 10 years rigorous imprisonment under Section 392 I.P.C. along with a fine of Rs. 5,000/- and in default of payment of fine to further

undergo three months simple imprisonment. It was further directed that 50% of the fine recovered will be paid to the dependent of the deceased under Section 357 (1)(C) of Cr.P.C.

2. Heard Sri Bankim Kulshrestha, assisted by Sri Chandra Kant Bharadwaj, learned counsel for the appellant No.2, Sri Vivek Kumar Singh, learned counsel for the appellant No.4, Sri Vijay Tripathi and Sri Ajay Kumar Pandey, learned counsel for the informant (in Criminal Appeal No.4116 of 2015), Sri Kumar Parikshit, learned counsel for the appellant (in Criminal Appeal No.3950 of 2015), Sri Brijesh Sahai, learned Senior Counsel assisted by Sri Rahul Kumar, Sri Bhavya Sahai, Sri Pawan Bhardwaj and Sri Abhey Singh Yadav, learned counsel for the appellant (in Criminal Appeal No.4087 of 2015) and learned A.G.A. for the State-respondent.

3. It is worth noticing that separate charges were framed under the aforesaid sections against Chandrapal, Mahendra Kumar Kaushik, Veerpal and Sanjay Sahni, Harpal and Yogendra on 11.09.2009, whereas charges were framed against Sanjay Dixit and Pramod Kumar on

16.01.2006. It is also worth noticing that as per the verification report submitted by the concerned C.J.M. Chandrapal accused died on 10.07.2022 whereas Sanjay Sahni died on 01.01.2016. The appeal of both these accused stands abated. It is also worth noticing that accused Chandrapal was granted bail on 30.10.2018, Sanjay Dixit and Harpal were granted bail on 24.10.2016 and Pramod Kumar was granted bail on 05.10.2016. The third bail application of Yogendra was dismissed on 27.04.2024 directing that the main appeal be listed for final arguments on 06.05.2024 and this is how arguments in the main and connected appeals have been heard.

4. With the assistance of learned counsel for the parties, the entire evidence is re-scrutinized and re-appreciated.

5. The facts as stated by the informant in the FIR are as under:

“The brother of the informant Devendra Prakash Gaur, son of Kanti Prasad Gaur is serving in U.P. Police. He was having enmity with Yogendra, Sanjay Dixit and Veerpal etc. Previously they had fired upon his brother in police station- Naraura and FIR in this regard was registered in Police Station- Naraura. Today, at 09:45 AM, I along with my brother Devendra Prakash Gaur, my father Kanti Prasad Gaur and Mahendra Kumar Kaushik, Inspector, U.P. Police, presently resident of Naraura, in our car bearing no. DMC0966 were going from Naraura to Bulandshahar for some

urgent work. When we reached on the Dibai railway crossing the gate was closed. In the meantime, on one bullet motorcycle driven by Pramod Kumar and Sanjay Dixit was sitting on the pillion seat along with one white colour ambassador car in which Yogendra, Veerpal, Harpal and Sanjay came and got down. Sanjay as well as Yogendra were carrying guns. Yogendra and Sanjay Dixit fired on my brother with their respective weapons. My brother was hit by the bullet and he fell down. We picked him up and made him lie down on the rear seat of the car, thereafter these persons picked up rifle of my brother which was lying in the car and then Harpal and Veerpal one by one fired shot upon him due to which my brother died at the spot. Pramod Kumar who is resident of Bhangiwara Dibai was keeping the motorcycle engine on and Chandrapal was keeping the car engine on. Both the vehicles were not having number plate. They escaped from the spot while taking away the rifle of my brother. My brother is lying on the rear seat of the car. Due to firing people got terrorised and by closing their shops ran away. Please take action.

Dated 09.10.1989.”

6. On this Assistant Sub-Inspector, Charan Singh registered chik FIR. After registration of the FIR, the investigation was carried out by Prahlad Singh, Inspector. He visited the spot and conducted the Panchayatnama/Inquest Report of the deceased, recorded the statement of Narendra Kumar and father of the deceased Kanti Prasad Gaur. On the identification of both of them he prepared the site plan. Thereafter, dead body was recovered and was sent for post mortem from Chief Medical Officer. From the spot blood stained earth along with empty cartridge of a rifle were taken in possession by preparing the separate memos which were written in the handwriting of Assistant Sub-Inspector P.N. Dixit and efforts for the search of the accused was made. On 10.10.1989, statement of Yatendra Kumar Kaushik was recorded and from the spot the statement of the shopkeeper were also recorded. The post mortem report was recovered which was entered in the C.D. Some affidavits of people were received on 18.11.1989, which were sent to the Additional Superintendent of Police. On 15.03.1990, he was transferred to other Police Station and further investigation was carried out by Inspector, Ravindra Kumar Singh who has also recorded the statement of the witnesses and subsequently submitted the charge-sheet before the Court.

7. It is worth noticing that on the direction of the court the further investigation was handed over to C.B.C.I.D. and Inspector Satish Chandra Pachouri also conducted the investigation and recorded the statements of the parties.

8. Charges were framed on 11.09.2009 under Sections 147, 148, 120B, 302 read with 149 and 395 read with 149 I.P.C. and accused did not plead guilty and claimed trial. In prosecution evidence, PW-1 Narendra Gaur, brother of the deceased Devendra Gour appeared and stated on the line of version given in the FIR. He has also given the details of the firing done by the accused persons. He has stated that his brother was having enmity with Yogendra, Sanjay Dixit, Chandrapal Singh, Harpal and Veerpal etc. On 09.10.1989, he along with his father Kanti Prasad Gaur and Mahendra Kumar Kaushik and deceased Devendra Prakash Gaur were travelling in Maruti Car No. DMC0966 from Naraura to Bulandshahar at about 09:45 A.M. they reached at Kaserkala railway crossing/ Dibai railway crossing which was closed. They stopped the car and his brother Devendra Prakash Gaur got down from the car and started eating tobacco. In the meantime, one bullet motorcycle came from the backside which was driven by Pramod Kumar and Sanjay Dixit was pillion rider. Sanjay Dixit was carrying a gun. One white colour ambassador car also came from the backside in which Veerpal, Yogendra, Harpal and Sanjay Sahni came. Yogendra was carrying a gun, Sanjay Sahni was carrying a country made pistol and Chandrapal was driving the car. Sanjay Dixit and Yogendra fired on his brother when he was about to sit in the car. When Devendra Prakash Gaur was hit by firearm, he and his father took his brother on the back seat of car. His brother Devendra's rifle lying in the car was picked by Veerpal and firstly Veerpal and then Harpal, one by one, from the same rifle fired on his brother Devendra Prakash Gaur which hit him and he died at the spot. The accused ran away after firing and taking away rifle of deceased. This witness further stated that about six months prior to the incident, Sanjay Dixit, Yogendra and Veerpal etc. had fired upon his brother in Police Station- Naraura and in this regard his brother has recorded a complaint in the police station.

9. He further stated that in November 1988, the election of Chairman-Naraura was held. His brother supported one Om Veer Singh, and Mahendra Kumar Kaushik and other accused were supporting Madan Kumar Vashisht. Mahendra Kumar Kaushik asked his brother Devendra to

support the Madan Kumar Vashisht but his brother did not agree. In the election, Madan Kumar Vashisht had won. After the election, Kaushik, Sanjay and Veerpal etc. came to their house and fired upon and Devendra Prakash Gaur in this regard made a police to report. The houses of Mahendra Kumar Kaushik and Devendra Prakash Gaur were abutting each other and later on his father got compromised the matter between Mahendra Kumar Kaushik and Devendra Prakash Gaur but the accused were carrying enmity against him. This witness specifically stated that this murder was committed by Mahendra Kumar Kaushik in conspiracy with other accused. He exhibited his complaint made to the police as Ex.Ka.1. In cross-examination, this witness stated that he did not remember the date of the election. He further stated that regarding the incident of firing in the police station, he was not present there and came to know after three days. He pleaded ignorance if any arrest in this regard was made. However, his brother did not suffer any injury. He further stated that in 1992 one Banwari and his son were murdered in Kesopur Sarla in which PW-1, his father and nephew were nominated as accused and went to jail. His brother deceased Devendra Prakash Gaur remained S.O. of Baghpat. However, he pleaded ignorance that at that time the infamous Maya Tyagi murder scandal took place and he and his other police officials faced a trial under Section 302 I.P.C. However, he stated that his brother obtained stay order from the High Court. He further pleaded ignorance that the other police officials were convicted by the court and sentenced to life imprisonment. He further stated that his brother has constructed a house in Naraura and has purchased 100 Bigah of land after constructing the house. He further pleaded ignorance that deceased was having a share in the contract of lifting sand in Naraura or that the deceased was having a share in the liquor vends. He further stated that he did not know, on the date of incident where deceased Devendra Prakash Gaur was posted. Regarding the incident, he has stated that Sanjay Dixit and Yogendra fired from the driver side whereas Pramod Kumar kept the engine of motorcycle on and Chandrapal was keeping the engine of the car on. Veerpal took away the rifle of the deceased from the left side and fired from that side whereas Harpal fired from same rifle from the side of driver. He further stated that he did not remember if he has mentioned in the complaint that his brother got down from car to eat tobacco. He stated that when Yogendra fired, his brother after taking tobacco, was about to sit in the car and when the fire hit, his body was outside the car. He denied that he has made a statement to the I.O. that after taking tobacco, his brother did not sit in the car. He stated that he did not remember when he and his father picked up deceased and kept him on the rear seat of the car and he was bleeding.

He stated that his clothes and his father's clothes were blood stained but I.O. did not take their clothes in possession. The backside of the car was also blood stained but he did not remember, if any, empty cartridge fell inside the car or not. On the rear seat, there were marks of the bullets. This witness further stated that on 11.10.1989, he has taken back the possession of car from the S.H.O. and further stated that he did not remember if any memo in this regard was prepared. He further stated that he did not remember whether the car was with him or sold out. He further stated that Sanjay Sahni with the country made pistol was covering him and his father and none of the accused fired upon them and only extended threat. He further stated about the conspiracy hatched by Mahendra Kumar Kaushik. He has informed the I.O. in this regard but did not know why this fact was not recorded. He further stated that after 20-25 days of the incident, he has moved an application for transfer of the case to C.B.C.I.D. He further stated that in the FIR, it is not mentioned that Veerpal has taken away the rifle of his brother. It is also not mentioned in the FIR that firstly Veerpal by picking the rifle fired. He further stated that he had given the car no. as DNC0966 but he does not know how the I.O. has written the car no. in his statement as DMC0966. On a specific question under what authority he has taken the possession of the car, this witness stated that being younger brother of the deceased, he has given an application for releasing the car. At this stage of cross-examination, on the request of the counsel of the accused, the trial court tried to locate the application given by PW-1- Narendra Kumar Gaur for taking the car on Supurdginama/ release deed but the same was not found in General Diary.

10. This witness further stated that in the Supurdginama/ release deed of the car is Ex.Ka.14. This witness stated that the car was given to him and on his application, he has endorsed regarding the recovery of the car. It was stated in Ex.Ka.14 that as and when directed by the court, he will produce the car and he has received a notice from the court for producing the car. However, he admitted that despite notice he could not produce the car, as he does not know to whom the children of the deceased have sold the car. This witness further stated that he has given an application on 27.05.2010 that the car was destroyed in fire in the year 2008 and the application is at S.No. 128-B. On a specific question as to whose name the car was registered and witness stated that he has no knowledge. Regarding the rifle of his brother this witness further stated that the license of the rifle was with his brother and after the incident he has never seen



the license. He denied a suggestion that his brother was not having any license or licensed gun.

11. PW-2- Dr. P.K. Agarwal who conducted the post mortem of the deceased Devendra Prakash Gaur and reported the following injuries:

“मृत्यु पूर्व चोटों का विवरण

(1) आग्नेयास्त्र द्वारा गोली के घुसने व निकलने का घाव साइज 16 X 14 से०मी० X मस्तिष्क तक गहरा दाये कान के ऊपर स्थित। ऊपर से नीचे की तरफ जाता हुआ। दोनों कान के पीछे से। घुसने वाली चोट के चारों तरफ कलौंच, झुलसन मौजूद थे। उसके किनारे फटे हुए व अन्दर को मुड़े हुए व निकलने वाले घाव के किनारे बाहर आते हुए फटे हुए बिना कलौंच व झुलसन के। इन दोनों के मध्य की खाल हड्डी व मस्तिष्क फटा व टूटा पाया गया। हड्डियों के टुकड़े मस्तिष्क का भाग इस चोट से बाहर आता हुआ। अन्दर व बाहर जाने वाले भाग एक चोट के ही भाग है।

(2) आग्नेयास्त्र का प्रवेश व घुसने का घाव साइज 3 X 3 से०मी० X केविटी तक गहरा छाती पर सामने की ओर दोनों निपल के बीच में। किनारे अन्दर को मुड़े व फटे हुए। कालिका व झुलसन के निशान के साथ थी। यह चोट पीछे ऊपर कमर की तरफ जाती हुई सीधी दिशा में ऊपर के पीछे की ओर।

(3) आग्नेयास्त्र का बाहर निकलने का घाव 5 X 4 ½ से०मी० X गुहा तक गहरा सीधी तरफ कमर के ऊपरी हिस्से में कन्धे की तरफ। किनारे बाहर को मुड़े व फटे हुए। खून बाहर निकलता हुआ। बिना कालिस व झुलसन लिये।

चोट सं० 2 व 3 एक दूसरे से सम्बन्धित थी।

(4) आग्नेयास्त्र अन्दर जाने वाला घाव 1 X 1 से०मी० X गुहा तक गहरा चोट सं०-2 से 6 से०मी० नीचे। कालिस व झुलसन सहित किनारे अन्दर को मुड़े व फटे हुए, जो पीछे कमर की ओर बांये तरफ जाते हुए थे।

(5) आग्नेयास्त्र का Exit घाव साइज 5 से० X 4 ½ से०मी० X गुहा तक गहरा बांयी तरफ कमर पर ऊपर स्केपुलर रीजन में कन्धे की तरफ जाता हुआ। किनारे बाहर को निकले हुये। खून झलकता हुआ। चोट संख्या-4 व 5 एक दूसरे से संबंधित थी।

- (6) आग्नेयास्त्र घाव निकलना व घुसना एक सीध में 12 X 6 X मांसपेशी तक गहरा, दांयी ऊपर भुजा पर कालिख व झुलसन इन्ट्री पर था। इन्ट्री अन्दर को व exit बाहर को निकला हुआ।
- (7) आग्नेयास्त्र की चोट exit & entry 5 X 3 X मांसपेशी तक गहरा सभी जाँघ पर बाहर से अन्दर को आती थी। इन्ट्री पर जलन झुलसन थी।
- (8) आग्नेयास्त्र 2 X 1 X मसल डीप बांयी हसली गर्दन पर नीचे की तरफ। कालिख व झुलसन सहित। एक बड़ी धातु की गोल गोली इस चोट के नीचे से प्राप्त हुई।
- (9) कई आग्नेयास्त्र के छरों के घाव खाल पर 8 X 6 से०मी० एरिया में बांयी जाँघ पर प्रत्येक 2 X 2 से०मी० से 3 X 3 सेंटीमीटर तक थे।”

12. This witness stated that one big size mettled bullet, which was recovered from the neck of the deceased, was kept in the sealed packet along with a pellets of the bullet recovered from the right thigh and were sealed and were given to the constable who had come for the post mortem. In cross-examination this witness stated that the injury no.1 can be received if the person firing is having his hand over the head of the injured. However, he could not give any specific opinion in this regard if the deceased was in a lying position and is fired from the side of the head, he can sustain such injury. Regarding injury no.1, he stated that an entry and exit wound are in similarity. Regarding injury no.2, he stated that the same can be sustained if the person firing is having his hand below the body of the injured. He further stated that if the injured is in lying situation and if the bullet is fired from the side of his feet, this injury can be sustained. The injury has directions up moves. Regarding injury no.5, the direction is from upper side to lower side with an entry wound. He further stated that he did not know whether any sample seal was given to him along with dead body as he could not find the sample seal in the file. He denied the suggestion that the report was later on changed. He further stated that he did not mention in the post mortem report that any gun powder smell was emitting from the wound. With regard to the nature of the weapon used this witness stated that only a ballistic expert can tell about the weapon used for injury no. 1. He cannot tell the nature of the weapon regarding injury no.2. He further stated that regarding injury no. 9 there is no symptom of fire arm injury. This witness stated that he has not seen 306 bore rifle therefore, he cannot say any that any bullet injury was received from 306 bore rifle.

13. S.I. Charan Singh (PW-3) stated that he was posted as Computer Clerk in Police Station-Dibai and on the complaint of Narendra Kumar Gaur, he prepared Chik F.I.R. No. 292 of 1989. This witness proved the Chik F.I.R. (Ex.Ka-3) and entry the in GD No. 22 dated 9.10.1989 as Ex.Ka-4. The report of record keeper for sending a copy to office of Superintendent of Police was Ex.Ka-5. This witness stated that at the time when the informant came for lodging the F.I.R., Inspector M.K. Kaushik was accompanying him. In further cross examination, he stated that in the G.D. for registration of F.I.R., there is no mention of sending S.R. (Special Report). He further stated that in Ex.Ka-3 addressed to C.O. Anoopshahr bears his signature but there is no date though there is a date on the endorsement by the Chief Judicial Magistrate, Bulandshahr dated 16.10.1989.

14. Prahlad Singh (PW-4), Sub Inspector (Retd.) stated that on 9.10.1989, he was posted in Police Station-Dibai, District– Bulandshahr and the case was registered in his presence by C.C. Charan Singh and he along with other police officials had gone to the place of occurrence. At the spot, he recorded statement of Narendra Kumar and his father-Kanti Prasad Gaur and prepared Naksha Nazri (Ex.Ka-6). The Panchayatnama/Inquest Report (Ex.Ka-7) was prepared by Sub Inspector P.N. Dixit and other documents regarding the recovery of dead body, letter to C.M.O., photographs etc. were also prepared by Sub Inspector P.N. Dixit which are Ex.Ka-8 to Ex.Ka.-11. The bloodstained earth and one empty cartridge of rifle were taken by the police vide separate memos which are Ex.Ka-12 and Ex.Ka-13. This witness identified the signature of S.I. P.N. Dixit on the same. He further stated that on 10.10.1989, statement of one Yatendra Kumar Kaushik was recorded and statements of some shopkeepers of nearby area of the place of incident was recorded in the C.D. On 18.11.1989, affidavits of some persons were received which were sent to Superintendent of Police and their details were mentioned in the C.D. He conducted investigation till 15.3.1990 when he was transferred. In cross examination, this witness stated that it is correct that in the C.D., there is no mention that Special Report was sent on the date of incident. He further stated that he did not remember on which date copy of the F.I.R. was sent to the concerned Court. He further stated as under :

“This is correct that at the time of incident, Mahendra Kumar Kaushik was with Devendra Prakash Gaur. This is also correct that Mahendra Kumar Kaushik in his statement told him that at the time of incident, brother of deceased, Narendra Kumar Gaur, and his father were not present at the place of occurrence.”

15. He stated that he did not remember if Narendra Kumar Gaur when came to the police station, he was wearing bloodstained clothes or not. He further stated that, this is correct if clothes worn by Narendra Kumar Gaur were bloodstained, he would have taken them in possession. This witness stated that Narendra Kumar Gaur had made a wrong statement that his clothes were bloodstained and were taken by Investigating Officer (PW-4). This witness further stated as under :

“When I reached at the place of occurrence, the dead body of the deceased was lying inside the vehicle. I have inspected the vehicle thoroughly but I do not remember if on the seat or roof of the vehicle, there was bloodstain or not. I do not remember if there was any mark of bullets on the body of the vehicle or the seat etc. I do not remember if any smell of gun powder was emitting from the vehicle. It is correct that make of the car is not mentioned in the C.D. The detail of place of occurrence was inadvertently not mentioned in the C.D. It is correct that no empty cartridges or pellet was found inside the vehicle. I did not find any evidence that the deceased-Devendra Prakash Gaur was murdered inside the car, therefore, I did not get photography of the car from outside or inside. I did not even get the inspection of the vehicle done from ballistic expert.”

16. This witness denied a suggestion that photography and inspection by ballistic Expert was not done because the car was not present at the place of occurrence. This witness further stated as under :

“Narendra Gaur had given an application dated 11.10.1989 to me for taking Car No. DMC0966 on Supurdginama. I have rightly recorded in C.D. that Maruti Car No. DMC0966 of deceased Devendra Prakash Gaur is parked in premises of Police Station and informant has given an application for taking the same on Supurdgi, as the vehicle is not connected with the commission of offence of murder, therefore, as per Rules, the vehicle be released in favour of the informant on Supurdgi.”

17. This witness further stated that Supurdginama/ release deed (Ex.Ka-14) was prepared on his direction. He further stated that he has not taken in possession any document relating to ownership of the car and has not seen the registration certificate to verify whether it is in the name of deceased-Devendra Prakash Gaur or any other family member.

18. This witness further stated as under :

“It is correct that I had no legal right to hand over the case property to anyone on Supurdginama as this right lies only with the concerned Court. He further self stated that I had committed a mistake. It is correct that while

giving car to Narendra Kumar Gaur on Supurdginama I have not taken any surety bond. I do not know at present this vehicle is with whom. It is correct that due to releasing the vehicle on Supurdginama in favour of Narendra Kumar Gaur, against the provisions of law, an important evidence is destroyed.”

19. He denied that in collusion with Narendra Kumar Gaur, he prepared the Supurdginama to show the presence of the car at the spot and further denied that he has planted the empty cartridge and, therefore, no ballistic expert opinion was taken. This witness further stated as under :

“ This is correct that I recorded statement of Mahendra Kumar Kaushik on 10.10.1989. Mahendra Kumar Kaushik stated that in the car, apart from him, Yogendra, Jeevan Singh and Pankaj Chaudhary were there. However, I did not try to investigate regarding Chaudhary and even did not try to search for him. In C.D. No.2, I have recorded a conclusion that people knew about known criminal history of deceased-Devendra Prakash Gaur and, therefore, no person came forward to make statements. Till now, as per the investigation at the spot, only two persons came on a bullet motorcycle and after firing on Devendra Prakash Gaur, they had gone towards Khokha. However, this is not verified at the spot and further deep investigation is going on. Devendra Prakash Gaur was a known person of criminal history. I do not know at the time of incident, he was posted in which police station. I did not know that he was under suspension for the last three years prior to the incident or not. I do not know how many cases were pending against Devendra Prakash Gaur and how many were pending in the Court. I do not know that he had taken stay from the High Court in Maya Tyagi Scandal Case and the other accused were sentenced to life imprisonment. I do not know that two accused Sub Inspectors in Maya Taygi Scandal Case were murdered and relatives of Pankaj Chaudhary were named in the said case or not.”

20. This witness further stated as under :

“This is correct that on the basis of the statements of the people at the place of occurrence and of Narendra Kumar Gaur and Kanti Prasad Gaur, I came to a conclusion that the presence of ambassador car at the spot was not verified. It is correct that till the time the investigation was with me, I did not find any believable evidence that ambassador car came at the spot and by firing upon Devendra Prakash Gaur, his rifle was taken away.”

21. This witness further stated in cross examination as under :

“This is correct that statements of people around the place of occurrence namely, Ram Kishor, Veer Singh, Sheodan, Nawab Harpal, Balvir Singh, Agwan Singh, Om Prakash and Munne Khan were recorded and none of them told me the number of Maruti Car. The incident reported in the First Information Report was not fully proved. None of the above named had supported this statement that in the ambassador car Veer Pal etc. came with a rifle and had committed murder of Devendra Prakash Gaur and had snatched his rifle. These persons did not support presence of Narendra Gaur and Kanti Prasad at the time of incident, at the place of occurrence. Mahendra Kausik was an eye-witness. After recording statement of Mahendra Kaushik, I did not record statement of Narendra Gaur as to how he was present at the stop at the time of incident. I have mentioned in the Case Diary and attached all the affidavits of people given to me during investigation. I did not record their statements in the C.D.”

22. This witness further stated that it is correct that after recording of the case, the G.D. report was not sent along with documents for the post mortem. In the Panchayatnama regarding departure from the police station there is no mention of G.D. Number and there is overwriting of Section 147, 148, 149 & 302 I.P.C.. However, he denied that till the time the Inquest report was prepared, the F.I.R. was not registered and, therefore, the sections 147, 148, 149 & 302 I.P.C. were added later on.

23. Sub Inspector Uday Singh (PW-5) stated that he had prepared Ex.Ka-14 for handing over Maruti Car No. DMC 0966 belonging to deceased-Devendra Prakash Gaur in favour of his brother Narendra Kumar Gaur son of Kanti Prasad Gaur. This witness admitted in cross examination that on record, there is no such order issued by the then Inspector directing him to release the case on Supurdgi in favour of Narendra Kumar Gaur.

24. S.H.O. Ravindra Kumar Singh (PW-6), Police Station – Dibai stated that he has submitted report of recovery of the articles before the Court. The report was prepared by Head Moharir Vinod and is Ex.Ka.15. In cross examination, this witness stated that on 27.5.2010 while giving Ex.Ka-15 in the Court, no recovered articles of Case No. 292 of 1989 were in custody of the police station. In custody register, at S.No.69 dated 14.8.1999, there is an endorsement that entire case property is destroyed. He further stated that the empty cartridge cannot be destroyed.

25. R.K. Sharma (Retired Inspector) (PW-7) stated that he received the further investigation from Inspector Mahesh Chandra Gautam and stated about arrest of accused persons and submitting of the challan report (Ex-Ka-16). He also stated about recording of statement of Inspector-Prahlad

Singh and other police officials which are recorded in the C.D. In the cross examination, he stated that on an application given by Harish Kumar Sahni, the Investigating Officer investigation was further transferred to C.B.C.I.D. In the application, Harish Kumar Sahni has mentioned that deceased Devendra Prakash Gaur was an accused in an infamous Maya Tyagi scandal case and he is an accused of rape and murder in many police station. This witness stated that he had not inspected the car in which deceased was travelling nor the same was sent for ballistic inspection. This witness further stated as under:

“ It is correct that before my investigation, statement of the people nearby the place of incident, namely, Shami Ullah, Shankar Lal, Amarpal Kumar, Chandra Dutt, Banvari and Mahaveer were recorded and none of them have stated that at the time of incident, Veer Pal was present and his name was not found in the incident. It is also correct that the above named witnesses did not inform the car number as well as the presence of Narendra Kumar Gaur and Kanti Prasad Gaur at the place of occurrence at the time of incident. It is correct that Narendra Kumar Gaur and Kanti Prasad Gaur are resident of village Kesopur Sathla and Devendra Prakash Gaur used to reside in Naraura there is distance of 60-70 km. Narendra Kumar Gaur and Kanti Prasad Gaur have no property or business in Naraura.”

26. He further stated that he has recorded the statement of Mahendra Kumar Kaushik. He further stated that regarding the rifle used in the commission of murder, he has not made any investigation and the wife of deceased or any other family members, despite asking for providing original documents or license, could not provide the same.

27. Amar Pal Singh, Constable ( PW-8) stated that he had worked with Inspector Satish Chandra Pachauri who had died in a road accident. He has prepared two documents which are Ex.Ka.17 and Ex.Ka18 and he identified his handwriting.

28. It is worth noticing that the statement of PW-7- Constable Jograj Singh was recorded for the second time (i.e. this PW-7 number was given to two witnesses) in which he has stated that he has brought the register for the year 1988-90 at S.No. 69, the details of the recovery is entered which are one packet of blood stained earth, plain earth, one packet of empty cartridge and one car bearing no. DMC0966 which was handed over to the brother of the deceased by the I.O. There is entry of post mortem report of the clothes of the deceased and bullets received from the body of the deceased. These articles were deposited in P.S.- Dibai. On 02.05.2013, it

is entered that the entire case property is destroyed. This report is signed by one H.M.- Usman Ali and verified by S.H.O.- Ambika Prasad. He had identified their signatures and the copy of which is Ex.Ka.21. The entry of burning and destroying of the case property is at S.No. 69 copy of which is Ex.Ka.22. He stated that the case property was not destroyed under the order of any court or higher police officer. Regarding the Car DMC0966 which was given to Narendra Kumar Gaur on Spurdginama was never called back from him and he was not asked to produce it in the court. He denied the suggestion that the entry regarding destroying of the case property is manipulated in order to create fake evidence.

29. Thereafter, the statement of accused under Section 313 Cr.P.C. was recorded separately in which all the incriminating evidence was put to them.

30. Accused Sanjay Dixit stated that he has been falsely implicated due to political rivalry in village-Naraura and denied all the evidence. Similarly, accused- Harpal denied all the questions put to him and also stated that he has been falsely implicated on account of political rivalry in Naraura. Accused Pramod Kumar and Sanjay Dixit, Yogendra and Chandrapal also made similar statements.

31. Accused-Mahendra Kumar Kaushik who was acquitted by the Trial Court, in his statement under Section 313 Cr.P.C. stated that at the time of incident, he was posted in the police vigilance department and his children were residing in Naraura and due to party faction, he is falsely implicated.

32. In defence Yogendra produced three witnesses. Bhagwan Singh (DW-1) stated that about 20 years ago Devendra Pratap Gaur was murdered near Kaserkala Railway crossing when the railway gate was closed. Two unknown persons did firing. He was having a medical store and had seen from inside the door that unknown persons came on the motorcycle and ran away. This witness stated that the S.H.O. got his signature on the memo Ex.Ka.7. He stated that he informed the S.H.O. that two unknown persons fired upon the deceased. He signed on 09.10.1989 and later on came to know that the deceased is a police officer who was involved in Maya Tyagi scandal case. Till the time police arrived at the spot, there was no family member of the deceased. In cross-examination by public prosecutor, he denied that Yogendra was a history-sheeter and under his influence he has given the statement. He further stated that he did not know him previously.



33. DW-2 Balraj Singh stated that on 09.10.1989, he had a shop near the railway crossing in Kaserkala. On that day, at about 09:10 AM, one suspended S.H.O. was murdered. He was sitting in his shop and person who fired were unknown. This witness was asked to identify unknown Yogendra that he was at the spot. The witness stated that this person was not at the spot and he had seen him for the first time. The crowd gathered at the spot and police came after half an hour then he came to know that the deceased is one Gaur. This witness stated that on that day it was Navami Day and there was a fair due to which there was huge crowd. He had signed memo on 09.10.1989 i.e. Ex.Ka-7. In cross-examination, he denied the suggestion that he came to give statement on the asking of Yogendra.

34. DW-3- Yogendra Kumar Kumar stated that he along with deceased Devendra Prakash Gaur and Mahendra Kumar Kaushik started from Naraura. He had to go to Shikarpur and the others have to go further. Around 9:45 the car was near Kaserkala railway crossing, Devendra Prakash Gaur got down from the car to eat tobacco and he got down to buy cigarette. When Devendra Prakash Gaur was about to sit in the car, two unknown persons came and fired upon Devendra Prakash Gour and he died at the spot. At that time, his brother Narendra Kumar Gaur and his father Kanti Prasad Gaur were not there. This witness was asked to identify Yogendra and on seeing him, he stated that he was not there who fired on the deceased. He further stated that Devendra Prakash Gaur was involved in Maya Tyagi scandal case in which two S.H.O.s' were also murdered and accused were convicted by the court and were sentenced for death. He stated that Mahendra Kumar Kaushik is his cousin brother, and he used to visit him frequently. He denied a suggestion that being cousin of Mahendra Kumar Kaushik or under the influence of Yogendra, he is making wrong statements.

35. Thereafter, vide impugned judgment, the trial Court held the appellants guilty for the offence punishable under Sections 302,147, 148, 149 and 392 of I.P.C whereas one of the accused Mahendra Kumar Kaushik was acquitted of the charge. All the accused were also acquitted of charge under Section 120-B of I.P.C.

36. The accused persons were further sentenced to undergo substantive sentence of life imprisonment along with fine and the aforesaid three appeals have been filed.

37. Learned counsel for the appellant-Yogendra has argued that the deceased was having a chequered criminal history as it has come in the

statement of the Investigating Officer that he was involved in number of cases of rape and murder. It is also stated that he was an accused in one Maya Tyagi scandal case, where he had filed a petition before the High Court and a stay was granted. However, the other police officials involved in that case were convicted to life imprisonment. The main thrust of argument of the counsel for appellant is that the presence of PW-1-Narendra Kumar Gaur, who is brother of Devendra Prakash Gaur at the spot is highly doubtful and therefore, he is not a reliable witness.

a) Learned counsel for the appellant submits that at the first instance when the FIR was registered, it is stated that in the Maruti car, informant-PW-1 along with his brother deceased-Devendra Prakash Gaur, father Kanti Prasad Gaur and Mahendra Kumar Kaushik, Inspector of U.P. Police were travelling, however, later on PW-1 took a somersault after 25 days by stating that the murder of his brother was committed by Mahendra Kumar Kaushik in conspiracy with other accused. PW-1 has attributed a motive towards Mahendra Kumar Kaushik that in the election of Chairman, Naraura, the deceased was supporting one Omveer Singh whereas Mahendra Kumar Kaushik and other accused were supporting Madan Kumar Vashisht who won the election and thereafter the accused person came to the house of deceased and indulged in the firing. However, later on, the matter was got compromised by father of PW-1, but the accused were carrying enmity in their mind. Thus, PW-1 by changing the entire version of FIR is not a reliable witness.

b) Learned counsel for the appellant submits that on the scrutiny of the entire evidence, the trial court found that testimony of PW-1 is not reliable so far the allegation of conspiracy against Mahendra Kumar Kaushik is concerned and, therefore, he was acquitted of the charge. Learned counsel argued that on the same set of allegation, the other accused though acquitted of charge of conspiracy, however, have been wrongly convicted.

c) Learned counsel for appellant has referred to the statement of Mahendra Kumar Kaushik which is recorded after moving an application under Section 315 Cr.P.C. The statement dated 7.8.2012 under the signature of Mahendra Kumar Kaushik regarding the incident read as under :

“ On the date of incident, I along with deceased- Devendra Prakash Gaur were going in a car from Naraura to Bulandshahr. At that time in the car, father of Devendra Prakash Gaur, Kanti Prasad Gaur or his brother Narendra Kumar were not there. At about 10:00 A.M., two unknown

assailants committed murder of Devendra Prakash Gaur. He had gone to the Police Station Dibai immediately and from Dibai through wireless message, the family members of Narendra Kumar Gaur from village Kesopur Sathla were called. From the police station, I had gone to my house at Naraura and regarding this incident, my statement was recorded by the Inspector, P.S.- Dibai and I have given the same statement to him. The family members of Devendra Prakash Gaur has put pressure on me in this case to record a false statement against the accused persons. When I refused, in a false conspiracy, I have been nominated in this case. I have no connection with the accused persons.”

d) Learned counsel for the appellants submits that this written statement given by Mahendra Kumar Kaushik before the Court by following the procedure of law is duly corroborated from the statement of PW-4-Prahlad Singh, Inspector of Police (Rtd.), who was the first Investigating Officer and from his investigation, the presence of PW-1 was not verified. It is next argued that PW-1 has stated that his clothes as well as clothes of his father were blood stained when the deceased Devendra Prakash Gaur was put inside the car, however, PW-4 has stated that when PW-1- Narendra Kumar Gaur came to the police station, his clothes were not blood stained and if there was any blood on his clothes, he would have taken his clothes in possession.

e) It is next argued that as per the version given by the PW-1, at the first instance, when their car reached near a railway crossing which was closed, his brother deceased Devendra Prakash Gaur got down from the car to eat tobacco and two accused came on a bullet motorcycle and four on white colour ambassador car, they were carrying firearms. Pramod Kumar kept the engine of motorcycle on and Chandrapal kept on engine of car on. First, Sanjay Dixit and Yogendra opened fire on his brother and when he and his father kept his brother inside the car, Veerpal Singh took the rifle of his brother which was kept in the car and then Veerpal and Harpal one by one from the same rifle fired upon Devenda and he died at the spot.

Learned counsel submits that it has come in the statement of first Investigating Officer i.e. PW-4 as well as of second Investigating Officer, PW-7 that from the statements recorded during the investigation of the shopkeepers who were having their shops nearby the place of incident, which is near to a railway crossing, neither the presence of PW-1 was verified nor the presence of white colour ambassador car was proved. Both these witnesses have named five persons/ shopkeepers, Ram Kishor,

Veer Singh, Sheodan, Nawab Harpal, Balvir Singh, Agwan Singh, Om Prakash and Munne Khan etc. who have not stated that in the ambassador car, accused came and even did not support that PW-1 Narendra Gaur or his father Kanti Prasad Gaur were present at the spot.

f) It is next argued that the presence of PW-1 also stands falsified at the spot for the reason that the incident is of 09.10.1989 in which, it is stated that in one Maruti Car No. DNC0966, the deceased and PW-1 were travelling when the deceased Devendra Prakash Gaur was murdered. However, in a strange manner, without there being any order of the court, PW-4 released the said car on the Spurdginama in a favour of the informant. It has come in the statement of the PW-4- I.O. that he could not find any evidence regarding involvement of Maruti Car in the case and therefore, he has released the car in favour of the informant within three days of his own. Special reference is drawn to the cross-examination whether this witness clearly admitted that it was not in his legal domain to release this car and only the competent court can only release the car. This shows that false evidence is created to introduce the car at spot.

g) Learned counsel further submits that this car was never subsequently produced before the trial court despite issuance of a notice by court and PW-1 gave an explanation that in a fire incident the car was destroyed in 1988. Counsel argues that though it is stated by PW-1 that accused Veerpal, picked the rifle of the deceased, when PW-1 and his father had kept the deceased in an injured condition on the rear seat of the car, firstly Veerpal fired from the licensed gun of the deceased and then Harpal from the same rifle fired upon his deceased brother one by one and he died at spot. Learned counsel submits that in cross-examination this witness has stated that there were marks of blood stain on the seat of the car and there were marks of bullet inside the car. However, PW-4 has clearly stated that when he inspected the car, neither he found the blood stained marks nor any marks of bullet on the body of the car or inside the car, therefore, he had released the car in favour of the informant- PW-1. Learned counsel argued that this raises a suspicion that car no. DMC0966 was ever used by the deceased or PW-1 for travelling and the deceased being the police officials, the police manipulated the entire evidence.

h) Learned counsel further submitted that even the presence of the second vehicle, namely, white colour ambassador car is not verified by I.O. during the investigation on the basis of the statements of the aforesaid six persons as noticed above and therefore, the presence of the accused persons is highly doubtful.

i) It is next argued that Mahendra Kumar Kaushik who is the eye witness of the incident and later on, was nominated as the accused by PW-1 by making improvements in the FIR version has also not supported the presence of PW-1 at the spot in view of his written statement dated 07.08.2012 made before the trial court wherein he has stated that neither father of the deceased Kanti Prasad Gaur nor Narendra Kumar Gaur was present at the spot and two unknown motorcycle-borne assailants committed the murder of Devendra Prakash Gaur. Learned counsel further submits that it is stated by Mahendra Kumar Kaushik that when he went to the police station to give an information regarding the incident, on a wireless message PW-1 and his family members were informed and only thereafter, they came in the police station. In the meantime, police has reached the spot and started the inquest proceedings. Learned counsel submits that since in the inquest proceedings, there is no details of the FIR, therefore, there is overwriting regarding relevant sections of the I.P.C. in the inquest report which proves that the FIR was ante timed and the inquest proceedings were conducted in a manner that unknown persons have committed the murder of deceased Devendra Prakash Gaur and later on, the accused persons were nominated in the case. Learned counsel next argued that even after the transfer of the case to C.B.C.I.D. which was conducted by PW-7, it is not proved that PW-1 was present at the spot or that the ambassador car carrying four accused persons came at the spot. It is argued that in the investigation of both PW-4 and PW-7 it has come that two unknown motorcycle-borne persons came and committed the offence.

j) It is next argued that the car no. DMC0966 was released in favour of the informant within three days of the incident and was never subjected to ballistic examination also raises a suspicion about the presence of PW-1 at the spot. It is further argued that PW-1 regarding the allegation of the conspiracy against co-accused Mahendra Kumar Kaushik stands disbelieved by the trial court and therefore, he is an witness who cannot be believed with regard to the statement against the other accused persons. Learned counsel next argued that it has come on record that no recovery of any weapon of offence was effected from any of the accused which also proves that they are not involved in the commission of offence.

k) Learned counsel submits that though PW-1 states that a licensed rifle of deceased was taken away by Veerpal after he and Harpal fired from the same yet it has come in the statement of PW-7 that despite asking the family members of the deceased including PW-1 to produce original license of the gun, the said was not produced and therefore, there is

absolutely no evidence on record that the deceased was either having a license to hold the rifle or was in fact holding a gun at the time of the incident.

l) It is also argued that as per the statement of PW-4, the entire case property i.e. the recovery memo etc. were destroyed in the police station due to an act of god and were not produced. Learned counsel submits that in the absence of any such evidence, the benefit of doubt should be given to the appellant as in fact no such documents were prepared by the police and since the deceased was a police official, the I.O. has created the evidence in favour of the informant.

m) Learned counsel further submits that another witness Kanti Prasad Gaur, father of deceased was never appeared before the trial court as a witness. It is next argued that PW-1 is not an eye witness and he is planted as an eye witness. It is also submitted that no reliability can be placed on PW-1 as he has even taken a somersault by changing his version in the FIR and nominating the eye witness Mahendra Kumar Kaushik as an accused being a conspirator who was ultimately acquitted by the trial court.

n) It is next argued that there is no scientific investigation conducted in the case to connect the appellants with the commission of offence. It is argued that as per own version of the I.O. the entire recovery effected with any was destroyed in fire and no weapon of offence was recovered from the appellant.

o) Learned counsel further submits that even the empty bullet which was recovered at the spot was also not sent for forensic science examination and the entire case is based on the solitary statement of PW-1 which is not at all reliable.

p) Learned counsel for the appellant further argued that it has come in the statement of PW-7 that the entire case property was destroyed due to fire including the metal empty cartridge which cannot be destroyed. It is argued that incriminating evidences of case property like car no. DMC0966 in which the deceased was travelling along with the empty bullet and case diary of the police station were destroyed and therefore in the absence of the same, the appellants have wrongly been convicted. It is submitted that PW-4 has stated that if PW-1 was wearing the blood stained clothes, he would have taken it to the custody but even the clothes were not produced before court.

q) It is next argued that looking from all angles, the presence of PW-1- Narendra Kumar Gaur at the place of occurrence is not proved, therefore,

he is not an eye witness. Learned counsel submits that this witness has even made material improvements as the fact stated by him in court that deceased got down from the car to eat tobacco is not mentioned in the FIR. Similarly, the fact that accused Sanjay Sahni has covered him and his father and they did not receive any injury, is also not mentioned in the FIR; PW-4 has stated that as per his verification PW-1- Narendra Kumar Gaur and his father-Kanti Prasad Gaur were not present at the place of occurrence and even in the statements made by Mahendra Kumar Kaushik in terms of Section 315 Cr.P.C. also, he categorically stated that PW-1 was not present at the spot and all these factors were not considered by the trial court. Learned counsel submits that PW-1 was introduced later on, just to cover up the case against the accused person is also apparent from the prosecution evidence that Firstly, within three days of the incident PW-4 released the car which was case property without there being any order of the competent court as admitted by him by saying that he has committed a mistake. Secondly, as per PW-7, the entire case property was destroyed which is entered in Case Diary at S.No. 69. Thirdly, it is submitted that in fact there was no such recovery and rather only evidence is created in this regard. Fourthly, even there is no recovery of any weapon from any of the accused which shows that they had been falsely implicated. Fifthly, as per PW-4, the special report sent to superior officers bears no date, however, it bears the endorsement of CJM dated 16.10.1989 which means it was sent after delay of nine days after manipulating the evidence. It is lastly argued that the deceased had chequered criminal record and it has come in the prosecution evidence that he was involved in number of cases of murder and rape including one infamous Maya Tyagi scandal case, wherein, other police officials were convicted and subsequently two police officers were murdered and there is every possibility that in the same manner, the deceased was murdered by unknown persons and on account of personal enmity the accused persons were named in the FIR. The counsel has submitted that the testimony of PW-1 is not reliable. The counsel relies upon Javed Shaukat Ali Qureshi vs. State of Gujarat, (2023) 9 SCC 164 to submit that it is held by the Supreme Court while relying upon earlier judgment in Vadivelu Thevar Vs. State of Madras, 1957 0 AIR (SC) 614 that generally speaking, oral testimony of a witness can be classified into three categories namely (i) Wholly reliable; (ii) Wholly unreliable and (iii) Neither wholly reliable nor wholly unreliable. Therefore, this Court finds that the statement of PW-1 is not at all reliable.

Learned counsel further relied upon the decision in *Kaur Sain Vs. State of Punjab*, 1974 AIR (SC) 329 wherein in paragraph no. 4, it is observed that defence witnesses are often untrustworthy but it is wrong to assume that they always lie and the prosecution witnesses are always trustworthy, the prime infirmity from which the judgment of the high court suffers consists in this double assumption. It is submitted that the trial court has given no weightage to the defence evidence led by the appellants to prove that firstly they were not present at the spot and secondly even PW-1 was not present at the spot and he is not an eye witness. Learned counsel further submits that the statement of three defence witnesses DW-1 to DW-3 if read in the light of the statement of the two I.Os. PW-4 and PW-7 it becomes apparently clear that even during investigation both the Investigating Officers found that PW-1 or his father- Kanti Prasad Gaur was not present at the spot. It is submitted that even Mahendra Kumar Kaushik, an eye witness of the incident, in his statement before the trial court which is under Section 315 Cr.P.C. has stated that two unknown persons committed murder of deceased Devendra Prakash Gaur and the accused persons were not there and even PW-1 or his father was not present at the spot in the car.

r) Learned counsel submits that even there is no forensic evidence to connect the case of the prosecution with the appellants as it has come in the statement of PW-4 that he did not even get the Maruti car inspected from any ballistic expert as he did not find any evidence that the car was hit by any bullet inside or outside and there were no blood stains in the car. It is also argued that PW-4 has stated that the clothes of the PW-1 were not blood stained and therefore, he has not taken the same in custody which also falsified the statement of PW-1 as if he and his father have picked up the deceased in an injured condition and he was kept in the backside of the car. It is also argued that the story set up by the prosecution that the accused Veerpal took away the licensed gun of the deceased Devendra Prakash Gaur. It is also not proved in evidence that any documents or license of rifle could be produced before the I.O. despite his asking from family members of the deceased.

38. The learned counsel appearing for the other accused have additionally argued that no evidence has come on record that rifle was recovered from him and in the absence of any forensic science lab or ballistic report to prove the nature of injury sustained by the rifle, the prosecution case is highly doubtful.



i) It is further argued that though in the FIR it is stated by the informant that on the previous occasion the accused persons fired upon the deceased at P.S.- Naraura and similarly firing incident took place after the candidates supported by Mahendra Kumar Kaushik won the election, and the candidate of the deceased lost election, however, except for the bald statement of PW-1 neither any G.D.R. nor any FIR in this regard registered with the police station is placed on record which falsify the plea of motive. Learned counsel further submits that the plea set up by the informant that Mahendra Kumar Kaushik conspired the murder of his brother after the 25 days of this incident, is already disbelieved by the trial court. It is submitted that testimony of PW-4 to PW-7 regarding the presence of PW-1 at the place of occurrence is corroborated by DW-1 to DW-3 who are natural witnesses as they are having shop near railway crossing where the incident took place.

ii) Learned counsel submits that while cross examining DW-1 to DW-3 by the State counsel, no suggestion was given either that they do not have a shop nearby the railway crossing or they were not present at the spot. It is also submitted that both PW-4 and PW-7 has nowhere stated that accused persons were either present at the spot or perpetuated the crime. Learned counsel further submits that finding recorded by the trial court that as per the opinion of PW-2- Doctor who conducted the post mortem, multiple weapons were used, is not supported by any ballistic expert report and rather trial court has misread the statement of the doctor as he has nowhere stated that multiple weapons were used rather he has pleaded ignorance in cross-examination about the nature of the weapon used. It is submitted that the most important piece of evidence, the Maruti Car in which the deceased was travelling was never produced before the trial court despite the directions issued by the court. Therefore, the identity of the car is not proved and even no independent recovery memo of this car was prepared by the I.O. as stated by PW-7 that after it was recovered by the I.O., it was released in favour of the PW-1 on Supurdginama. It is also submitted that in the site plan Ex.Ka.6 which is prepared at the instance of PW-1, nowhere depicts the presence of the accused persons and rather it depicts the Khokha, small shops of various persons whose statement was recorded by the I.O. who come to a conclusion that PW-1 was not present at the spot. It is also submitted that in site plant Ex.Ka.6, it is also not mentioned at what place the assailants were standing and from where the PW-1 has seen them which also shows that he was not present at the spot. It is also submitted that it is admitted case of the prosecution as PW-4 the first I.O. that accused Mahendra Kumar Kaushik was present at the spot

but he was not cited as a witness as later on, on the application given by the informant he was made an accused, however, he made a written statement before the court under Section 315 Cr.P.C. completely destroying the evidence of PW-1. Similarly, the second I.O.- P.W.-7 has not stated that any independent person of the vicinity has verified that PW-1 was present at the place of occurrence and rather the defence witnesses have proved that there were two shooters who came on a motorcycle, corroborate the version of PW-4 and PW-7. It is also submitted that even in the case diary the I.O. has noticed that two unknown shooters have committed the murder. It is submitted that no credibility can be given to PW-1 as nothing has come on record at what place or time or date the accused conspired to commit the murder of deceased Devendra Prakash Gaur.

iii) It is argued that the FIR is ante timed. Counsel has submitted that at the time of preparation of inquest report the FIR was not in existence, a reference is drawn to inquest report is Ex.Ka.7 where above Sections 302, 395, 147, 148 and 149 I.P.C. are mentioned. It is argued that in the FIR sections were written as 147, 149, 302, 392 I.P.C. in one sequence and this demonstrates that in the inquest report sections were added later on. It is also submitted that similarly in Ex.Ka.9- letter to CMO, Ex.Ka.10- letter to R.I., Ex.Ka.11- photo of the dead body and Ex.Ka.8- form no.13 entered in police report where Sections 147, 148 and 149 I.P.C. are added later on which show that all these documents were prepared prior to registration of the FIR which is ante timed and this also raises suspicion on the prosecution case.

iv) It is also argued that as per Ex.Ka.9 police form no. 13, the time to send the dead body in the hospital is 20:10 minutes which show that for a period of seven and a half hours the dead body was not sent to the hospital. This also demonstrates that till the time inquest proceedings were completed, the FIR was not registered. Counsel submits that the trial court has wrongly recorded the finding that since Devendra Prakash Gaur has died therefore, I.O. was not in a hurry to take his body to hospital and only after completing the inquest proceedings, information was sent to head office from where the mortuary van was arranged which reached at the spot and took the dead body to the hospital. Another argument is raised that in the FIR, it is mentioned that five persons have looted the rifle, however, in the FIR, only Section 392 I.P.C. is mentioned instead of Section 395 I.P.C. which also shows that at the time of registration of the FIR less than five persons have committed the offence.

v) Counsel submits that as per the copy of the FIR was sent to Magistrate on 16.10.1989 whereas the same was required to be sent to the concerned Magistrate immediately. Counsel submits that the trial court has recorded wrong finding that the I.O. was busy in searching for the accused person as the police official was murdered therefore, the I.O. sent report on the next date to the Magistrate. It is next submitted that the Magistrate endorsed on the FIR on 16.10.1989 by writing 'seen' and therefore, this aspect also reflect that the FIR is ante timed. It is also submitted that neither PW-3 nor PW-4 could explain the delay in sending the report to the Magistrate on 16.10.1989 i.e. after seven days.

vi) Counsel further submits that trial court has wrongly taken notice of two letters at S.No. 173-B regarding a copy of the license issued from D.M.-Pilibhit whereas this document was neither proved by the informant or by the I.O. Counsel has next argued that the defence has produced two documents Chik A.7/1 and A.7/3. Chik Ex. A.7/1 bearing no. 65 in Case Crime No. 82-A under Section 394, 406 I.P.C. is attached in which one Govind Ram Kumar has registered the case against deceased Devendra Prakash Gaur. Vide Ex.A.7/2 Chik No. 101, Case Crime No. 82-C under Sections 147, 148, 149, 307, 394, 323, 504 I.P.C. is registered in which one Sanjay son of Shyam Bihari has registered case against deceased Devendra Prakash Gaur, his father and others for extending threat and opening fire by unknown persons. In that case, accused Yogendra was cited as a witness. In Ex.A.7/3 Chik No. 66, Case Crime No. 82-B under Sections 147, 148, 307, 342 I.P.C. was registered in P.S.- Naraura by one Satya Prakash Agarwal. Similarly, vide Ex.A.7/5 one Ganga Sharan Kumar has registered FIR in P.S.- Naraura stated that he had gone to a tent house for depositing the articles and when he was coming back along with Jayanti Prasad and Ram Bharose and 2-3 labourers when reached the house of Inspector, Mahendra Kumar Kaushik, some miscreants did firing and declared that Devendra Prakash Gaur is done away. Those persons encircled them and snatched licensed gun of Ram Gopal and then they ran away. Counsel submits that all these documents were not considered by the trial court by observing that they have not been properly proved.

39. In reply, learned counsel for the informant has argued that the FIR pertains to the year 1989 whereas the charges were framed after 10 years as some of the accused were arrested later on. The trial was concluded after a long time and, in the meantime, in the month of March 2008, Kanti Prasad Gaur, father of the victim and PW-1, had died, prior to framing of the charges therefore, he could not be examined as a witness. Learned counsel has placed reliance upon the affidavit of the informant to submit

that as many as 32 cases were pending against Yogendra and some other cases are also pending against the other accused and this fact is noticed while dismissing the bail application of Yogendra. It is also argued that the narration of the events, the manner in which the accused have committed the offence with their respective weapons is explained by PW-1 who is the natural witness as he was accompanying his brother-Devendra Prakash Gaur (deceased) in the car. It is also argued that no independent witness came forward and therefore, the police could not record the statement of any witness. Learned counsel submits that the offence was committed in broad day light and a prompt FIR was registered. Counsel submits that medical evidence by way of statement of PW-2 who conducted the post mortem of the deceased duly support that the deceased died due to firearm injuries. It is also argued that the accused have not disputed the date, time and place of occurrence where the deceased was murdered. It is also submitted that no suggestion was given to PW-1 that accused persons were not present at the spot. Counsel submits that DW-1 to DW-3 which are produced by the defence are interested witnesses and their statement has been rightly not relied upon by the trial court. Learned counsel further argues that on account of the faulty investigation by the I.O. in not keeping the case property in tact or not preparing the site plan properly is not a fault of the informant and no benefit can be taken by the accused person.

Counsel further submits that even if a ballistic expert was not called to examine the car by I.O. does not make prosecution case doubtful. Similar arguments are raised by learned counsel appearing for the State that the defence could not make a dent on the credibility of PW-1 who is a natural witness.

40. In reply, learned counsel for the appellant has argued that in pursuance to the statement of PW-1 neither any motorcycle was recovered which was used by accused Pramod Kumar in commission of the crime nor any ambassador car was recovered from accused Chandrapal which was also used in the crime. Even no firearm were recovered from any of the accused including the licensed rifle of the deceased and therefore, the testimony of PW-1 is not reliable and in the absence of corroborating evidence, and appellants are entitled to be acquitted. It is also argued that as per supplementary affidavit, accused Yogendra stands acquitted in number of cases or has undergone sentence in petty offence cases.

41. After hearing learned counsel for the parties and on perusal of the judgment of the trial court, the following points were framed and decided.

(i) Whether there is a delay in recording the FIR and start of investigation? The trial court recorded that there is no delay on the part of the prosecution.

(ii) Whether the FIR is ante timed? The trial court recorded the FIR is not ante time.

(iii) Regarding the previous enmity it is held that the prosecution has failed to produce any document that there was previous enmity between the parties.

(iv) Regarding the credibility of the sole eye witness-PW-1, the trial court recorded that this witness was present at the time of the occurrence.

(v) Regarding the corroboration of the medical evidence with prosecution version, the trial court has recorded the finding that the same corroborates ocular version of PW-1.

42. So far as motive is concerned, the trial court recorded the finding that prosecution has failed to prove any motive against all the accused and they were acquitted of charge under Section 120-B I.P.C. including Mahendra Kumar Kaushik who is also acquitted under Section 302 I.P.C. Thus, the trial court recorded the finding that the motive is not proved.

43. After hearing the counsel for the parties and carefully going through the trial court record and on re-scrutinizing the entire evidence, we find merit in the present appeal for following reasons:

**A) Reliability of PW-1**

All the counsel for the appellants-accused have hammered on the credibility of PW-1 and the court find merit in the same as:

(a) At the first instance, PW-1 recorded the FIR that his brother- Devendra Prakash Gaur (deceased) was having enmity with Yogendra, Sanjay Dixit, Chandrapal, Harpal and Veerpal etc. and when he along with his father and brother and Mahendra Kumar Kaushik were travelling in car no. DMC0966 and reached near a railway crossing which was closed, his brother got down to eat tobacco in the meantime one Bullet Motorcycle driven by accused Pramod Kumar and Sanjay Dixit as pillion driver came from backside, Sanjay Dixit was having a gun. Pramod Kumar kept the engine of the motorcycle on. Similarly, one white colour ambassador car also came from the backside in which Veerpal, Harpal, Yogendra and Sanjay Sahni came. Yogendra was carrying a gun, Sanjay Sahni was carrying a country made pistol, Chandrapal kept the car engine on.

Thereafter, Sanjay Dixit and Yogendra fired on his brother who was about to sit in the car and when he was injured by firearm, PW-1 and his father took his brother on the back seat of the car. His brother's rifle was lying in the car and Veerpal picked up the gun and fired upon his brother and then Harpal from the same licensed rifle fired on his brother Devendra Prakash Gaur and he died at the spot.

However, it is a matter of record that after 25 days of the incident, PW-1 changed the story and gave an application for transfer of the investigation to C.B.C.I.D. stating that Mahendra Kumar Kaushik is the principal conspirator who got his brother murdered. Thereafter, the investigation was transferred to C.B.C.I.D. and two challans were presented before the court and charges were framed under Section 302 read with Section 120-B of I.P.C. against all the accused including Mahendra Kumar Kaushik. The trial court while disbelieving the statement of PW-1 with regard to Mahendra Kumar Kaushik acquitted him that the charge under Section 120-B I.P.C. is not proved against him as well as other accused. However, the trial court believed the version of PW-1 with regard to other accused while holding them guilty.

Once PW-1 has taken a complete somersault with regard to allegations in the FIR where Mahendra Kumar Kaushik was cited as a witness and then citing him as an accused/ principal conspirator, this court has carefully re-scrutinized the statement of PW-1 in the light of partial disbelief by the trial court and find that the version given by PW-1 regarding presence of all other accused is not reliable.

(b) Mahendra Kumar Kaushik- the eye witness has nowhere stated that any of the accused came either on the motorcycle or on white ambassador car and committed the offence rather he has taken up the stand that family members of informant were putting pressure on him to name other accused persons and when he refused, even he himself has been nominated as an accused falsely. It appears to be plausible explanation. Mahendra Kumar Kaushik, after recording his statement under Section 313 of Cr.P.C. has also moved an application for recording his statement in terms of Section 315 of Cr.P.C. by way of an affidavit and in the said affidavit dated 07.08.2012, he has stated that he along with deceased Devendra Prakash Gaur were going in the car from Naraura to Bulandshahar and at that time in the car neither the father of Devendra Prakash Gaur, namely, Kanti Prasad Gaur nor his brother Narendra Kumar Gaur- PW-1 were there. At about 10:00 AM, two unknown persons committed the murder of Devendra Prakash Gaur and he has gone to P.S.-

Dibai immediately to report the matter and police gave wireless message to the family of the deceased Devendra Prakash Gaur who reached later on at the spot.

This statement has some evidential value on the case as at no point of time Mahendra Kumar Kaushik had stated either before the two I.O.s or in his statement under Section 313 of Cr.P.C. that the other accused/ present appellants were present at the spot and committed the offence.

(c) It has come in the statement of both the I.O.s as PW-4 stated that he has recorded the statement of shopkeepers who were having small vends near the railway crossing and they have stated that both PW-1- Narendra Kumar Gaur and his father- Kanti Prasad Gaur were not present at the spot. They have also not stated that any of the accused came or committed the offence. PW-1 has stated that he has even collected the affidavits of all these 6-7 shopkeepers whose name are mentioned above who have not stated that the accused came in an ambassador car and the affidavits were recorded in C.D. and sent to higher police officers.

(d) Very strangely and surprisingly within three days, after the incident dated 09.10.1989, Maruti car no. DNC0966 in which PW-1 was allegedly travelling with his father and deceased brother- Devendra Prakash Gaur was released on Supurdari in favour of PW-1 without making it a case property though, in a statement PW-1 has stated that they all were travelling together in the Maruti car and stopped at the railway crossing. Even, PW-1 has stated that they put Devendra Prakash Gaur in the back seat of the car, when he was already hit by bullets and PW-1 and his father's clothes were blood stained and after he was lying in the car accused Veerpal took out licensed rifle of the deceased lying in the car and then fired upon him and subsequently Harpal from the same rifle also fired upon deceased and he died at the spot. All facts relating to the car were never proved before the trial court. PW-1 has stated that he has taken the car on Supurdari from the I.O. PW-4 and later on the car was destroyed in a fire. PW-4 clearly admitted that he had no legal authority to release car in favour of PW-1 and only competent court of law could release it but still he released the car vide Ex.Ka.14. PW-1 could not produce any document of registration of ownership of the car. He admitted that he has received summon from the court to produce the car but the same was not produced. This all makes prosecution case highly doubtful whether the car no. DMC0966 was actually used by the deceased while travelling along with PW-1 and his father.

(e) The details of the car were never given by Mahendra Kumar Kaushik- the eye witness. Even PW-4 in cross-examination admitted that he had no authority to release the car on Supurdari in favour of the accused. Though, he has taken the car in a possession as case property. He gave an explanation that due to mistake he has given the car though it can be given by the Magistrate only. Therefore, the provisions of Section 451 of Cr.P.C. were not at all complied with by the I.O. which also raises suspicion about the identity of the car. PW-4 has even gone to the extent by stating that he inspected Maruti car at the spot, but he could not find any evidence of blood stains on the rear seat or any outer body of the car. Similarly, he has stated that he also could not find any mark of Bullets either outside or inside the body of car. This falsify the version of PW-1 that when he and his father kept deceased Devendra Prakash Gaur on the rear seat of the car, accused Veerpal picked the licensed gun of the deceased and fired from the left side of the car and then Harpal from the right side of the car fired upon the deceased. In such eventuality, there should be blood stains on the clothes of PW-1 or his father and on the body of the car especially the seat and the doors. As per the post mortem report, there were bullet marks and exit wound, however, no such evidence was found inside the car.

(f) PW-4 has stated that when informant PW-1 has come to report that matter, his clothes were not blood stained and if there was any blood on his clothes, he would have taken the same in custody. Even the clothes of father of PW-1 were not produced before the police. PW-1 has clearly admitted that when they picked up the deceased Devendra Prakash Gaur to keep him inside the car, he was already injured and therefore, their clothes were blood stained. However, this important link of evidence is missing and not proved and raise doubt about presence of PW-1 at spot.

(g) PW-4 has even gone to the extent that he did not deem it appropriate to call the ballistic expert to inspect the car for this purpose and therefore, the reliability of PW-1 for this part of the incident, qua use of Maruti car and presence of PW-1 and his father becomes doubtful.

(h) Even the presence of white colour ambassador car in which four accused persons namely Yogendra, Veerpal, Harpal and Sanjay Sahni allegedly came is not verified in the investigation by both the Investigating Officers. As per the verification conducted by both the Investigating Officers from the shopkeepers, who were having their shop vends nearby the railway crossing, the presence of white colour ambassador car was not proved, rather it has come on record that it was a Navami day and there



was a fair at the place of incident and a huge crowd has gathered and two unknown assailants came on a motorcycle and after committing murder ran away.

(i) Even Mahendra Kumar Kaushik, who is the eye witness of the incident, either his statement under Section 313 Cr.PC or in written statement before the Court, the date 7.8.2012 has not mentioned about any white colour ambassador car in which four accused persons had come.

(j) Even during the investigation, after the arrest of the accused persons, no weapon of the offence including the licensed rifle of deceased Devendra Prakash Gaur was recovered. Devendra Prakash Gaur was an Inspector in UP Police. Similarly, Mahendra Kumar Kaushik is also an Inspector in UP Police, who was an eye witness and, therefore, it cannot be believed that two Investigating Officers, one from the State police and another from C.B.C.I.D. i.e. (PW-4 and PW-7), on their custodial investigation could not recover any weapon including the licensed rifle which was allegedly taken by Veerpal and Harpal. This also raises suspicion on the prosecution version.

(k) From the spot, only one empty cartridge was recovered and as per the statement of PW-2, one cartridge was recovered from the neck of the deceased, who has conducted post mortem of the dead body but were never sent for forensic examination.

(l) Similarly, neither there was recovery of any weapon nor blood stained earth, blood stained clothes of victim or PW-1 or his father or the empty cartridges were never sent for forensic science investigation, despite the fact that the deceased was Inspector in UP Police. Even during investigation, no licence of the gun was recovered by the police, though it has come that a copy of the letter from the District Magistrate, Pilibhit regarding one licence is produced, but it was not exhibited in accordance with law, by either of the Investigating Officers, who have stated that despite their asking the family of the victim, did not produce any such evidence, and therefore, the trial court has wrongly relied on a letter, which not proved and exhibited by the informant PW-1 and two Investigating Officers (PW-4 and PW-7 respectively).

(m) In the absence of recovery of rifle, the licence of rifle cannot be matched with the gun which is allegedly looted by Veerpal and Harpal.

(n) It has come in the statement of PW-7 Jograj Singh (wrongly numbered twice) that the entire case property was destroyed due to fire and therefore there is nothing on record to connect the appellant with the commission of

offence. The trial court has wrongly discarded this argument by observing that maintenance of the record room where the case property is kept is not good in State of U.P. and therefore, it may have been destroyed due to lapse of time. However, in our opinion, benefit of doubt would go to the accused as case property like blood stained earth, the clothes worn by the deceased or the bullet recovered from the spot or retrieved from the dead body or the car were never sent to forensic science examination and never produced before the trial court, on the plea that everything has been destroyed including the original case diary etc.

(o) It is stated but not mentioned in FIR by PW-1 that his brother got down from the car to eat tobacco. It is also not stated in FIR that when deceased was about to sit in the car, Yogendra fired upon his brother. However, an explanation is given that he does not know why police has not mentioned this fact. Therefore, it is an improvement made by PW-1 in the court. As even at the time when the application was moved after 25 days of arraying, Mahendra Kumar Kaushik as an accused such plea was not taken. PW-1 also not admitted in the FIR it is not stated that at the first instance, Veerpal picked up the licensed rifle of the deceased and fired upon him and again stated that he does not know why police has not recorded. It is also not recorded in FIR as stated by PW-1 that accused Sanjay Dixit gave cover to him and his father. There is a discrepancy of number of the car as well. As PW-1 stated that he has given the car no. as DNC0966 whereas it was recorded as DMC0966. PW-1 further admitted that without any order of the court he has taken the car on Supurdgari, though, it was taken in possession by police.

(p) PW-1 admitted that in the release deed/ Supurdari Ex.Ka.14 there was an endorsement that he will produce the car before the court as and when required and despite receiving the notice from the court he failed to produce the car by saying that it was in possession of the children of the deceased and he does not know whether they have sold the car and rather stated that car was destroyed in the fire in the year 2008. No evidence of such firing incident like a D.D.R. with the police is placed on record. This also makes the case of the prosecution highly doubtful.

(q) Nothing has come on record regarding the ownership of the car in which the deceased was travelling. I.O. did not try to verify and conduct investigation in this regard which suggest that this car was just introduced as an evidence and by showing that it has been released on Supurdari to PW-1 within three days of the incident and later on an explanation is given that the car was destroyed in fire appears to be an after thought, just to

create evidence as the deceased was a police inspector. It is admitted case that there is no FSL report regarding the cartridge, picked up from the spot as well as retrieved from the body of the deceased which show that there is no corroboration of the ocular version of the prosecution, at the cost of repetition it may be noticed that no weapon of offence was recovered from any of the accused after their arrest despite custodial investigation and even the licensed gun of the deceased which was allegedly taken away by accused Veerpal and Harpal was also not recovered and even no license of gun in this regard was proved in accordance with law. All this show that PW-1 is not a reliable witness and rather prove that he or his father were not present at spot and PW-1 is not an eye-witness.

(r) PW-2- Dr. P.K. Agarwal who conducted the post mortem in cross-examination had admitted that he cannot tell about the nature of the weapon used for the injuries and only an expert can tell. On a question whether he has seen 306 bore rifle, this witness stated that he has no knowledge about the bullet fire from 306 bore rifle and thus, this important medical evidence was withheld by the prosecution and the version given by Mahendra Kumar Kaushik that two unknown motorcycle-borne assailants fired upon deceased- Devendra Prakash Gaur resulting into his death seems to be plausible from the investigation carried out by Investigating Officers PW-4 and PW-7. Thus, from the entire evidence, the statement of the PW-1 is not reliable that he was present at the spot and has given a natural eye witness account. The trial court has totally disbelieved the motive on a part of any of the accused while recording a finding that the charge under Section 120B is not proved and therefore, in the absence of any motive, the benefit of doubt is to be given to the accused persons that they have not committed the offence.

(s) The trial court has wrongly discarded the statement of DW-1 to DW-3. Firstly, because in cross-examination no suggestion was given by A.D.G.C. that they are not having any shop near the railway crossing and they were not present at the spot. Secondly, it has come in the statement of PW-4 that he has collected the affidavit of DW-1 and DW-2 along with some other persons who have stated that the accused were not present at the spot and even white ambassador car was not seen at the spot. The A.D.G.C. did not put any question to these witnesses asking them to identify the other accused person, however, to the contrary DW-1 and DW-2 have stated that accused Yogendra was not present at the spot. In view of judgment of Kaur Sain Vs. State of Punjab (supra), the statement of DW-1 and DW-2 could not be discarded outrightly when read along with

the statement of PW-1, PW-4 and PW-7 and therefore, both these witnesses are natural witnesses and have stated that they are having shops near the railway crossing where the incident took place and both PW-1 and his father were not there at the spot when two unknown motorcycle-borne assailants fired upon the deceased- Devendra Prakash Gaur. Statement of the defence witnesses is also corroborated by the written statement made by Mahendra Kumar Kaushik (an eye witness) who was later on was assigned as accused that PW-1 and his father were neither travelling in the car nor present at the spot when the incident took place.

49. The prosecution could not explain the cuttings made at the inquest report thereby adding relevant sections of I.P.C.

50. The FIR gives all the sections of I.P.C. in a sequence whereas Sections 147, 148 and 149 I.P.C. added later on, in the inquest report and other documents which were prepared at the spot which also raise a suspicion about the investigation conducted by the police and support the version of the defence that these were added later on as the deceased was a police inspector and murdered by unknown person. Similarly, no explanation is given by I.O. regarding adding of Sections 147, 148 and 149 I.P.C., subsequently, in letter written to the C.M.O. is Ex.Ka.9, letter to R.I. is Ex.Ka.10, photographs of dead body is Ex.Ka.11 as well as form no. 13 is Ex.Ka.8 which also makes the prosecution case suspicious. The trial court has recorded a finding that sending of the dead body for post mortem to hospital vide Ex.Ka.9, after seven and a half hours of delay was due to the fact that the deceased has already died and the I.O. was not in a hurry to take his body to the hospital and he has completed the inquest report is not plausible. Even the prosecution could not explain that the incident which is of dated 09.10.1989 and special report was sent to the Magistrate on 16.10.1989, why it was not sent promptly also raises a suspicion as endorsement by the Magistrate on the FIR is dated 16.10.1989 i.e after seven days.

51. It has also come in evidence that deceased was an accused in one Maya Tyagi scandal case in which number of police officials were convicted and sentenced life imprisonment, however, the trial of the deceased was stayed by the High Court. It has also come in the statement of I.O. that the deceased was an accused in some cases of murder and rape and he was under suspension for the last three years.

52. It has also come in the evidence that two of the police officials in Maya Tyagi scandal case were murdered and therefore, there is a force in the

argument raised by the defence counsel that the possibility of murder of Devendra Prakash Gaur who was Inspector of Police in a similar fashion committed by unknown assailants and the appellants have been falsely nominated in the case.

53. So far the charge under Section 392 I.P.C. is concerned neither the rifle in question was recovered nor any license of gun was proved that the deceased Devendra Prakash Gaur was in fact holding a valid gun license or was owner of a gun and therefore, the trial court has wrongly recorded the finding holding the appellants- Veerpal and Harpal guilty of offence under Section 392 I.P.C.

54. The appellants Chandrapal and Veerpal have already died, therefore, their appeal stands abated. The appellants- Sanjay Dixit, Veerpal and Pramod Kumar Sharma are already on bail whereas Yogendra was never granted bail and as per custody certificate dated 05.11.2022, he is in jail for more than 13 years.

55. In view of above, we find merit in all these appeals. Accordingly, the same are allowed. The impugned judgment of conviction and order of sentence are set aside. The appellants are acquitted of the charges. Let appellant- Yogendra be released from custody if he is not required in any other case. A copy of this order along with the trial court records be transmitted forthwith.

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