

**Neutral Citation No. - 2024:AHC:107281-DB**

**Reserved on 30<sup>th</sup> May, 2024**

**Delivered on 3<sup>rd</sup> July, 2024**

**Court No. - 47**

**Case :- CRIMINAL APPEAL No. - 1902 of 2004**

**Appellant :- Jwala Prasad And Others**

**Respondent :- State of U.P.**

**Counsel for Appellant :- Jagdish Singh Sengar, Babu Lal Ram, Ram Babu Sharma**

**Counsel for Respondent :- Govt. Advocate, M. Sarwar Khan, Rajesh Yadav, Ram Ji Yadav, Vineet Kumar Yadav**

**Hon'ble Rajiv Gupta, J.**

**Hon'ble Shiv Shanker Prasad, J.**

**(Delivered by Hon'ble Shiv Shanker Prasad, J.)**

1. This criminal appeal has been preferred by the accused-appellant Shanker Yadav against the judgment and order dated 25<sup>th</sup> March, 2004 passed by the Additional Sessions Judge/F.T.C.-IV, Jaunpur in Sessions Trial No. 41 of 1990 (State of U.P. Vs. Jwala Prasad & Others), arising out of Case Crime No. 110 of 1989, under Sections 148, 149 and 302 of I.P.C., Police Station-Baxa, District-Jaunpur, whereby the accused-appellants, namely, Jwala Prasad, Bankey Lal, Shyam Bahadur and Mithai Lal along with co-accused Shanker, have been convicted and sentenced to undergo one year simple imprisonment for the offence punishable under Section 148 of I.P.C. and life imprisonment for the offence punishable under Section 302/149 I.P.C. with a fine of Rs. 20,000/- each, in default thereof he has to further undergo one year additional imprisonment.

2. We have heard Mr. V.P. Srivastava, learned Senior Advocate, assisted by Mr. Muktesh Kumar Singh, and Sri Sanjay Kumar Yadav, learned counsel for the accused-appellant no. 3 Shyam Bahadur, Sri Ashok Kumar Singh, learned counsel for accused-appellant no.2 Bankey Lal, Sri Rajesh Yadav, learned counsel for accused-appellant no. Mithai Lal, Mr. Arun Kumar Pandey, learned A.G.A. for the State and Mr. Dharendra Kumar Srivastava, learned counsel assisted by Mr. Siddhartha Shukla, learned counsel for the first informant and also perused the entire materials available on record.

3. During the pendency of the instant criminal appeal, accused-appellant Jwala Prasad has already expired and the appeal at his behest has been abated by this Court vide order dated 27<sup>th</sup> April, 2022.

4. We may also record that the criminal appeal no. 1731 of 2004 filed by the accused-appellant Shaker Yadav against the same judgment and order of conviction dated 25<sup>th</sup> March, 2004 has already been allowed by this Bench vide judgment and order dated 24<sup>th</sup> April, 2024.

5. The prosecution case is based upon a written report dated 26<sup>th</sup> August, 1989 (Exhibit-Ka/1) of first informant, namely, Lal Ji Yadav (P.W.-1) wherein he has stated that there was a rivalry between his family and the family of the accused Jwala Prasad due to certain litigations. Earlier, the accused persons had beaten the father of the informant, which case under Section 107 was pending in the court. Because of the said case, the accused Jwala Prasad along with other accused persons had grudge. On 26<sup>th</sup> August, 1989 at around 6:00 p.m., when the brother of the informant, namely, Rambali was returning to his house after taking medicine for the use of his child from Lakhaunwa market, the informant himself and Harishankar were also following him. As soon as the brother of the informant crossed the railway line and reached the unpaved road, the accused Jwala Prasad, Banke Lal, Shyam Bahadur, Shankar and Mithai, who resided in the same village, arrived. The accused Jwala, Bankey Lal, Shyam Bahadur and Shankar (accused-appellant) had Gandasas in their hands and the accused Mithai had stick in his hand. The above accused persons, after surrounding the brother of the informant, started beating him brutally. On hearing the scream of the informant and when the informant and Harishankar shouted, Sukhdev and Santram, who were coming from the market, arrived. On this, the accused ran away threatening them. The brother of the informant had fallen down due to injuries sustained by him. His condition was serious. He was taken to Sadar Hospital by auto rickshaw and was admitted where he died at 11:30 in the night. On the basis of such written report dated 27<sup>th</sup> August, 1989 (Exhibit-Ka/1), first information report (Exhibit-Ka/4) came to be lodged at 04.30 a.m. on 27<sup>th</sup> August, 1989 in respect of the incident which occurred on 26<sup>th</sup> August, 1989 at about 06:00 p.m. (evening).

6. Thereafter, the inquest followed and the inquest report dated 27<sup>th</sup> August, 1989 came on record (Exhibit-ka/6). It is mentioned in the inquest report that the death of the deceased relates to an offence, which requires doctor's opinion and the body of the deceased be sent for post-mortem.

7. The post-mortem has been conducted on 27<sup>th</sup> August, 1989 at 04:30 p.m. and in the post-mortem report (Exhibit-ka/16), the cause of death of the deceased has been reported to be shock and haemorrhage as a result of following ante-mortem injuries:

- “1. Incised wound 4 cm x 4 cm above right eye brow on the seal.*
- 2. Incised wound 1.5 cm x 4 cm above incised wound no. 1.*
- 3. Incised wound 5 cm. bone deep on right ... 5 cm. above injury no.1*
- 4. Incised wound stitched 7 cm above injury no.1 or temporal bone.*
- 5. Incised wound 5 cm. stitched on 10 cm. above root of the nonjections wound.*
- 6. 0.2 cm x 0.2 cm on the frontal aspect of left elbow joint.*
- 7. Incised 4 cm. stitched, 4 cm below left knee joint on anteromedial aspect,*
- 8. Incised wound 1 cm x 0.5 cm on the anteromedial aspect of left leg 4 cm. below knee.*
- 9. 2 parallel incised wounds 6 cm each stitched 1 cm. apart 10 cm injury no.7 on anteromedial aspect of left leg.*
- 10. Incised wound 2 cm x 0.5 cm anteromedial aspect of left leg 14 cm. below injury no.7.*
- 11. Incised wound 5.5 cm. stitched 10 cm. below right knee joint on anterolateral part.*
- 12. Incised wound 7 cm. x 4 cm. below injury no.11.*
- 13. Incised wound 2.5 cm. x 0.5 cm. 3 cm. below injury no. 11 antero lateral aspect.*
- 14. Incised wound 2.5 cm. x 1 cm. on right antero lateral of the right leg 2 cm. above lateral malleolus .*
- 15. Incised wound 7 cm. x 01 cm. on heel 7.5 cm. below ankle joint on the dorsal aspect on lateral side. ”*

8. The investigation was conducted by the Inspector Jagannath Tiwari (P.W.-4). He has recorded the statements of witnesses and prepared the site plan. He has also collected the blood stained earth and plain earth and prepared the recovery memo. After conclusions of the statutory investigation under Chapter XII Cr.P.C.. P.W.-4 has submitted the charge-

sheet against the accused persons including the present appellant, namely, Jwala Prasad @ Achhey Lal, Bankey Lal, Shaym Bahadur, Shanker and Mithai.

9. On submission of charge-sheet, the concerned Magistrate took cognizance in the matter and committed the case to the Court of Sessions by whom the case was to be tried. On 5<sup>th</sup> November, 1992, the concerned Court framed following charges against the accused-persons:

*“Firstly; that you, on 26.8.1989 at about 6 P.M. in the evening near kuchcha road of village Lakhawan besides Railway Line, within the circle of P.S.Buxa, district Jaunpur, were member of an unlawful assembly armed with deadly weapon, like Gandasa and lathi, and in prosecution of the common object of that assembly, used force, committed the offence of rioting with the said weapon, punishable under section 148 of I.P.C., and within the cognizance of this Court; and*

*Secondly; that you, on the aforesaid date, time and place, being member of above unlawful assembly and in prosecution of common object of murder of Rambali Yadav son of Jaishri Yadava you assaulted Rambali Yadava with Gandasa and lathi resulting his death, and thereby you committed an offence punishable under section 302 read with section 149 of I.P.C., and within the cognizance of this court.*

*And, I hereby direct that you be tried by this court on the said charges.”*

10. The charges were read out and explained to the accused persons including the appellant in simple Hindi, who denied the accusation and demanded trial.

11. The trial started and the prosecution has examined six witnesses, who are as follows:-

1	Lalji Yadav (complainant), brother of the deceased Ram Bali	P.W.-1
2	Dr. D. Mandal, who medically examined the injured Ram Bali Yadav (since deceased)	P.W.-2
3	Hari Shanker Yadav, alleged independent eye-witness	P.W.-3
4	Jagannath Tiwari, Investigating Officer	P.W.-4

5	Mahmood Alam, who prepared the inquest report of the deceased	P.W.-5
6	Dr. S.S. Banarjee, who conducted the post-mortem examination of the deceased	P.W.-6

12. The prosecution in order to establish the charges levelled against the accused-appellant has relied upon following documentary evidence, which were duly proved and consequently marked as Exhibits:

1	Written report dated 26 <sup>th</sup> August, 1989	Ex.Ka.-1
2	First Information Report dated 27 <sup>th</sup> August, 1989	Ex.Ka.-4
3	Recovery memo of blood stained and plain earth dated 27 <sup>th</sup> August, 1989	Ex. Ka.-13
4	Injury report dated 26 <sup>th</sup> August, 1989	Ex.Ka.-2
5	Letter qua information for death of deceased in the hospital	Ex.Ka.-3
6	Copy of the G.D. entry about the first information report	Ex.Ka.-5
7	Copy of the letter for sending the post-mortem of the deceased	Ex.Ka.-8
8	Photo lash	Ex.Ka.-8
9	Police Paper no.33	Ex.Ka.-9
10	Sample of seal	Ex.Ka.-10
11	Informations to the Kotwali	Exts.Ka-11 & 12
12	Post Mortem Report dated 27 <sup>th</sup> August, 1989	Ex.Ka.-16
13	Inquest Report (Panchayatnama) dated 27 <sup>th</sup> August, 1989	Ex. Ka.-6
14	Charge-sheet original dated 27 <sup>th</sup> September, 1989	Ex.Ka.-15
15	Site plan with index dated 27 <sup>th</sup> August, 1989	Ex.Ka.-14

13. After completion of the prosecution evidence, statement of the accused was recorded under Section 313 Cr.P.C. The accused-appellant denied the prosecution version and stated that due to litigation between the accused side and prosecution side, a false case has been concocted and also stated that the deceased was killed somewhere in the dark and they have been falsely implicated. In their defence, a copy of the charge sheet related to the case has been filed by the accused persons.

14. On the basis of above evidence adduced during the course of trial, the court below has come to the conclusion that the accused persons, namely, Bankey Lal, Jwala Prasad, Shanker, Shyam Bahadur and Mithai Lal, who armed with Gandasa and Lathi, organized a riot. The accused Mithai Lal had a lathi in his hand, while remaining accused persons had Gandasa in their hands. Because of the said riot created by the accused, all the accused gathered near Sarpat's tuft with the intention to kill the deceased. The deceased Rambali was returning to his house after shopping in the market and after crossing the railway line, when he came on the unpaved road, all the accused, who indulged in old rivalry, assaulted the deceased by Gandasa and Lathi due to which he sustained injuries. All the accused armed with weapons and having common object to kill the deceased Ram Bali. As many as 18 injuries were found on the body of the deceased Rambali. Most of the injuries were caused by Gandasa, as is evident from the medical examination report and the post-mortem report of the deceased. All the accused unanimously agreed to inflict injuries on the deceased Ram Bali, due to which he later died in the hospital. Thus, all the accused persons were made responsible for causing the death of deceased Ram Bali by creating a riot with a common intention. Thus, the trial court found the accused Jwala Prasad, Bankey Lal, Shankar, Mithai Lal and Shyam Bahadur guilty under Section 148, 302, read with Section 149 of I.P.C.

15. On the basis of the above exhaustive analysis of the evidence, the trial court has held that since the accused persons armed with Gandasa and lathi, came to a consensus and attacked the deceased Rambali in such a way that he died at around 6:00 p.m. in the evening (this time has wrongly been mentioned by the trial court in his impugned judgment, as at

around 06:00 the alleged incident took place, whereas the deceased died in hospital at 11:30 p.m. (night) with Gandasa and lathi, the accused persons are liable to be punished to undergo one year simple imprisonment for the offence 148 I.P.C. and life imprisonment for the offence under Section 302 read with section 149 I.P.C. along with a fine of Rs 20,000/- each, which would be fair in the eyes of justice. The trial court has further held that in case of non-payment of fine, additional imprisonment of one year would be appropriate.

16. Being aggrieved with the impugned judgment and order of conviction passed by the trial court, the accused-appellant has preferred the present jail appeal.

17. In support of his case, the learned counsel for the accused-appellant has advanced following submissions:

(i) As per the prosecution, alleged incident occurred at 06:00 p.m. (evening) on 26<sup>th</sup> August, 1989, whereas the first information report was registered on 27<sup>th</sup> August, 1989 at 04:00 a.m. (morning), meaning thereby that there is delay of 10 hours in lodging of the first information report for which no plausible explanation has been given by the prosecution.

(ii) The dying declaration of the deceased which has heavily been relied upon by the learned counsel for the informant/prosecution in the form of an information given by the deceased to his father, when he reached at the place of occurrence and such information has also been received by P.W.-1 and P.W.-3, is not reliable in the eyes of law, as the ingredients of acceptance of such dying declaration are missing in the present case.

(iii) The father of the deceased, namely, Jai Shree, to whom the deceased told as to who has assaulted him, as per the testimonies of P.W.-1 and P.W.-3, was not even produced in the court to support the prosecution version, as such, the alleged dying declaration of the deceased as well as the testimonies of P.W.1 and P.W.-3 are not trustworthy. Apart from the above, Sukhdeo and Santraj who are stated to be eye witnesses and also charge-sheeted witnesses, as per the prosecution, were not produced during the course of trial, which also makes the prosecution so weak.

(iv) P.W.1, who is real brother of the deceased and P.W.-3, who is close friend of the deceased are interested witnesses and from their testimonies, it is apparent that they were not present at the time and place of occurrence and they reached there after the accused ran away, as such their presence at the time and date of occurrence, is doubtful.

(v) The deceased did not die on the spot, as per the oral as well as documentary evidence relied upon by the prosecution. He was killed somewhere in the dark.

(vi) There are major contradictions in the testimonies of the prosecution witnesses specially P.W.-1 and P.W.-3.

(vii) The prosecution evidence is very weak in which the accused-appellants have been implicated only on the basis of suspicion and no evidence exist to hold the accused-appellants guilty.

18. On the cumulative strength of the aforesaid, learned counsel appearing for the accused-appellants submits that in view of the inconsistency and contradiction in the statements of the prosecution witnesses; the prosecution has failed to establish the guilt of accused-appellant beyond reasonable doubt, as such the impugned judgment is liable to be set aside.

19. Per contra, the learned counsel for the informant and the learned A.G.A. for the State, supporting the judgment and order of conviction, submits that the first information report has been lodged promptly naming the accused persons; there is clinching evidence to support the prosecution's case in the form of witnesses of fact (P.W.-1 and P.W.-3); there is strong motive for the accused-persons, as there was dispute qua certain litigations between the families of both the parties; the prosecution case has also been supported by the medical evidence.

20. Mr. Dharendra Kumar Srivastava, learned counsel assisted by Mr. Siddhartha Shukla, learned counsel for the informant has heavily relied upon the testimony of P.W.-3 in which it has been stated that when the accused persons escaped from the spot, the father of the deceased, namely, Jai Shree reached there and asked the deceased as to who has



assaulted him, in reply, the deceased disclosed that accused Jwala Prasad, Bankey Lal, Shyam Bahadur and Shanker (appellant) assaulted him by Gandasa and accused Mithai assaulted him by Lathi with intention to kill him. Drawing the attention of the Court to the aforesaid testimony of P.W.-3, Mr. Srivastava further relied upon the testimony of P.W.-1 in which it has been stated that after the escape of the accused, his father and other people also came to the spot from their house and his brother i.e. the deceased disclosed the names to his father as to who assaulted him.

21. Mr. Srivastava on the basis of such testimony submits that the disclosure given by the deceased to his father Jai Shree, in an injured state as to who had beaten him, be treated to be his dying declaration as the same have been duly supported by P.W.-1 and P.W.-3, who are eye-witnesses.

22. Learned counsel for the informant and the learned A.G.A. for the State, therefore, submits that the prosecution has proved the charges levelled against the accused-appellants beyond reasonable doubt.

23. On the cumulative strength of the aforesaid, learned A.G.A. urges that in such circumstances the conviction and sentence awarded to the accused-appellants, by the court below, merits no interference.

24. We have examined the respective contentions urged by the learned counsel for the parties and have perused the records of the present appeal including the trial court records.

25. The only question requires to be addressed and determined in this appeal is whether the conclusion of guilt arrived at by the learned trial court and the sentence awarded is legal and sustainable in law or it suffers from infirmity and perversity.

26. Before entering into the merits of the case set up by the learned counsel for the accused-appellants and the learned A.G.A. qua impugned judgment and order of conviction passed by the trial court, it is desirable for us to briefly refer to the statements of the prosecution witnesses.

27. P.W.-1/informant, Lalji Yadav who happens to be the brother of the deceased Ram Bali, in his examination-in-chief has stated that before the

present incident, a civil case and a case under Section 107 were going on between informant's side and accused's side. Earlier there was quarrel between both parties qua a land. The accused had beaten the father of the informant, whose case is pending in civil court. The court had stayed the civil case. Even at the time of the incident, the stay continued. On the same land, his Arvi/Arooi (taro roots) was buried and the accused Jwala Prasad and others were uprooting it. When the informant's side objected not to do the same, they were beaten. There is a rivalry between both the parties regarding land and criminal cases.

28. P.W.-1 has further stated that it has been almost 8 years since the incident happened. The incident is of 26 August 1989. The time was 6 o'clock in the evening. His brother i.e. deceased Ram Bali had gone to the Lakhwan market to buy medicine for his children. When the brother of the informant was coming home through the unpaved road after crossing the railway line, the informant and P.W.-3 Harishankar were also following him from the market towards home. When his brother reached near Sarpat on the unpaved road, the accused Jwala Prasad alias Achhe Lal, Bankey Lal, Mithai Lal, Shyam Bahadur and Shankar came out of the tuft of Sarpat and started beating his brother Ram Bali. The accused Jwala Prasad, Shyam Bahadur, Shankar and Bankey Lal were holding Gandasa in their hands and the accused Mithai Lal was holding a lathi in his hand. On howling of his brother, the P.W.-1/informant and P.W.-3 Hari Shankar also moved towards the spot. P.W.-1 and P.W.-3 also started shouting loudly, hearing their noise, Sukhdev and Santram reached the spot from the village. When those people arrived, the accused ran towards the south. The informant/P.W.1 went to his brother. His brother had fallen when the accused were beating him. Even after he fell down, the accused were beating his brother. His brother was conscious at that time. After the escape of the accused, his father and other people also came from the house. His brother had disclosed the names of those who had beaten him.

29. P.W.-1 has further stated that after arranging an auto rickshaw, the deceased was taken to Sadar Hospital, Jaunpur and admitted there and he was treated. Even at that time his brother was conscious but his condition was getting serious. The deceased brother died in the hospital at around 11:15 p.m. P.W. 1 left the body at Sadar Jaunpur Hospital and wrote the

report there and along with the medical examination, went to Baksa police station where his report was registered. Amarnath Yadav also went to the hospital with him. His brother i.e. deceased had disclosed the names of those who had beaten him in front of Amarnath also. The statement of P.W.1 has been recorded by the Investigating Officer. The accused had attacked his brother with the intention to kill him due to some existing rivalry and due to the injuries sustained by his brother, he died.

30. P.W.-1 has then stated that from home his brother i.e. deceased went to the market first and he went later (about an hour later, he went to the market). P.W.-1 did not scribe any report until he went to the hospital from the place of incident and his brother died in the hospital. Whatever the deceased was saying in the hospital and at home, he did not write in the report.

31. In the cross-examination, P.W.-1 has stated that when he went to the police station, his signature was made on the report. His clothes were not taken, where the Investigating Officer had only seen. His statement was recorded by the Investigating Officer at the police station. Statement of Amarnath was also recorded there. In his statement recorded by the Investigating Officer, he had stated that his brother was conscious at that time.

32. In the cross-examination, when the defence counsel put a question to P.W.-1, the accused did not kill you?, P.W.-1 replied that the accused did not kill him.

33. P.W.-1 in his cross-examination has further stated that when his brother Ram Bali went to the market to buy medicine, he was not there. Ram Bali had gone to get medicine for his two children, as they were suffering from boils and fever. P.W.-1 has further stated that on that day, he was free but he did not go to take the medicine. P.W.-1 had taken ointment for boils and tablets. P.W.-1 did not know as to which medicines Ram Bali had received on the day of the incident. The deceased Ram Bali met him in the market and when he went to the spot where Ram Bali fell down in injured condition, he did not see any medicine there as also he did not find any prescription. P.W.-1 also did not find the money which the deceased had with him at that time. He did not see whether the deceased had anything in his pocket or not. P.W.-1 came at the spot when the

Panchayatnama (inquest) was taking place. He did not see whether the deceased had any luggage or not.

34. P.W.-1 has further stated that he had gone to the market for a walk, not for any specific work. P.W.-3 Harishankar had also gone for a walk, there was no special work. P.W.-3 Harishankar is from his village and he is his old friend.

35. P.W.-1 has again stated that he did not remember that after the accused ran away, his brother was conscious and his father and other people also came and his brother disclosed the name of those who had beaten him, to his father.

36. P.W.-1 has stated that when P.W.-1 reached to rescue his brother, the accused had run away towards south. No man or witness from the south side came to the spot. P.W.-1 has denied that he did not see anyone beating or killing Ram Bali. He was beaten/killed in the darkness of the night.

37. P.W.-2 Dr. D. Mondal, Retired Senior Medical Officer, District Hospital, Jaunpur has medically examined the deceased Ram Bali when he was admitted. P.W.-2 has found as many as 18 injuries on the body of the then injured Ram Bali. P.W.-2 has stated that at the time when he was examining the deceased, he found that the condition of the patient was critical and he was in a semi-conscious state. P.W.-2 has opined that injuries of the deceased were fresh and life-threatening and all injuries were kept under observation. He also stated that the deceased did not die in his presence.

38. P.W.-3 Hari Shanker Yadav, who happens to be the old friend of P.W.-1 in his examination-in-chief has stated that the incident is of 26<sup>th</sup> August, 1989. On the evening of the incident, he was returning to his home along with P.W.-1 Lal ji Yadav from Lakhouwan market. A little ahead of them, the deceased Rambali Yadav was also returning to his home from Lakhouwan market. He and P.W.1 could see Rambali Yadav, who was walking ahead. At around 6 o'clock in the evening, when Ram Bali had reached the unpaved road south of the railway line that goes from Lakhouwan Bazaar to Pakadi Bazaar, the accused Jwala Prasad alias Achhe Lal, Bankey Lal, Shankar, Shyam Bahadur armed with Gandasa and Mithai Lal armed with Lathi, who were already behind tuft of Sarpat,

came out and surrounded Rambali and started assaulting him with Gandasa and lathi with intention to kill him. Rambali suffered fatal injuries due to the assault of those five accused. Rambali i.e. deceased, he and P.W.-1 had raised alarm. At the time of the incident, Sukhdev and Sant Ram, who were coming from the village towards the market, had reached the spot shouting. P.W.-1 Lal ji, Sukhdev and Santram/Saptram saw the entire incident very well and made the same statement. At the time of the incident it was sunset but there was ample light at that time and Rambali had fallen due to injury. There was rivalry and litigation between Rambali and the accused before the present incident.

39. P.W.-3 has further stated that after the accused ran away from the spot, the deceased Rambali's father, namely, Jai Shri also came to the place of incident and when Jai Sri inquired from the deceased Rambali as to who has assaulted him, in his presence, then Ram Bali, disclosed to his father Jai Shri that the accused Jwala Prasad, Baken Lal, Shyam Bahadur and Shankar had hit him by Gandasa and the accused Mithai had hit him by lathi with intention to kill him, as such, he would not survive.

40. In the cross-examination, P.W.-3 has stated that before the present case, on the report of accused Shyam Bahadur, a case under Sections 325, 323, 308 etc. of I.P.C. was going on and the same is pending before the Court of Additional District Judge-IX. A cross case was also pending in the same court against the accused Shyam Bahadur, Achhelal, Devraj, Shanker etc. who were accused in the said case on the report of Harilal son Jagan in which he, P.W.-1 Lal Ji and his father Jai Sri were the witnesses against the accused. P.W.-3 was also an injured person and a witness in both the cases. P.W.-3 was also a witness in the case of State vs Shyam Bahadur etc. and apart from him, P.W.-1 Lal ji and his father Jai Sri were also witnesses in the said case. P.W.-3 has also stated that he did not know whether the deceased Rambali was a witness or an accused in the above two cases or not. The above two cases were going on before the instant case. A case under Sections 107/116 was also going on between the parties. In reply to a question put by the defence counsel that when his family members and villagers came to the spot, whether the accused ran away from the spot or not, in answer to this, P.W.3 has stated

that before his family members and villagers came to the spot, the accused ran away.

41. P.W.-3 has further stated that he did not always come along with the deceased Rambali. On that day, he and P.W.1 were behind the deceased. He had gone to the market wearing shirt and slippers. Lal ji was wearing pyjama, kurta and slippers. Rambali was carrying a wooden sieve and medicines in his hand. When they were carrying him to the hospital, blood was falling from Rambali's body. His sieve, slippers and medicine were left behind. The investigating officer had not prepared any paper regarding the present incident.

42. This witness has further stated that he and P.W.-1 were a little away from the place of incident, therefore they did not look at the people stooping down. He did not remember whether it was dark or bright from the time of the incident till returning home. P.W.-3 has denied that any incident about which he has given his statement was not seen by him. He has also denied that he was not coming behind the deceased. He has further denied that he did not see as to who has assaulted the deceased. He has then denied that on the date and time of incident, the deceased Rambali did not go to the market nor was he returning after taking goods. He has lastly denied that the accused persons have been falsely implicated due to earlier litigations between the parties.

43. P.W.-4 Inspector Jagannath Tiwari has investigated the case and after conducting the same in terms of statutory provision under Chapter XII of the Code of Criminal Procedure, he has submitted the charge-sheet against the accused persons including the appellants.

44. P.W.-4 in his cross-examination has stated that he never went to the hospital during the investigation nor did he see any register of the hospital on which the inspection took place or the form on which the patient was admitted. He has also stated that during investigation he did not find out from where the informant/P.W.1 was coming and also no doctor's prescription and medicine were found. He knew that the patient's name is recorded in the register of the doctor's office but he did not find out. The informant/P.W.-1 did not say about the same in his statement recorded under Section 161 Cr.P.C. He has further stated that in his statement recorded under Section 161 Cr.P.C., the informant/P.W.1 did not say that

his brother was conscious at that time. He also did not say that after the accused ran away, the people of his village had also come and his brother i.e. the deceased had disclosed the names of those who hit him to his father. P.W.-1 did not say that Amarnath Yadav had also gone to the hospital along with him. His brother had also revealed the names of those who hit him in front of Amarnath.

45. P.W.-5 Inspector Mahmood Alam, who after appointing five witnesses had conducted the inquest of the deceased has stated that after getting the dead body of the deceased sealed and after preparing the form 13 and photo lash, form no. 3, letter to the Chief Medical Officer, had sent the dead body of the deceased to the Hospital along with two constables, namely, Harshnath Yadav and Surendra Nath Tiwari. This witness has also proved the same before the Court.

46. Dr. Shitanshu Shekhar Banerjee has been examined as P.W.-6. This witness has conducted the post-mortem of the body of the deceased.

47. For coming to the conclusion that the prosecution has been able to prove its case against the accused including the appellants beyond reasonable doubt, it is important for this Court to scrutinize the testimonies of the prosecution witnesses deeply, which have been relied upon by the trial court while passing the impugned judgment.

48. As per the prosecution case, P.W.-1 Lalji Yadav, P.W.-3 Hari Shanker Yadav and Amarnath were the eye-witnesses but Amarnath was not examined as prosecution witness as he died during the course of trial.

49. Therefore, first this Court may peruse the testimony of P.W.-1. In the examination-in-chief, P.W.-1 has stated that on screaming of the deceased, he and P.W.-3 moved towards the spot and on shouting of P.W.-1 and P.W.-3, charge-sheeted witnesses Sukhdeo and Santram reached at the place of occurrence and when they reached there, all the accused ran away towards south, then P.W.-1 reached to his injured brother i.e. deceased, meaning thereby that when P.W.-1 reached at the alleged place of occurrence, the incident had already taken place and P.W.-1 has not seen as to who has assaulted the deceased and by which weapon, which makes the presence of this witness as an eye witness is doubtful. For ready reference, the above statement is extracted here-under:

*"भाई के चिल्लाने पर मैं व हरि शंकर भी कुछ दूर पर पहुंच गये थे। हम लोग भी जोर से चिल्लाने लगे। हम लोगों का शोर सुनकर गांव की तरफ से सुखदेव व*

*संतराम पहुंच गये। इन लोगों के आने पर मुल्जिमान भाग कर दक्षिण तरफ भागे। मैं अपने भाई के पास गया।"*

50. Similarly, in his cross-examination, this witness has stated as under:

*"जब हम लोग अपनी भाई को ऊठाने के लिए पहुंचे तो मुल्जिमान भाग गए थे। दक्षिण की तरफ भाग गए। दक्षिण की तरफ से कोई आदमी या गवाह मौके पर नहीं आया था।"*

51. In the cross-examination, this witness has stated that from home his brother i.e. deceased went to the market first and he went later. About an hour he went to the market.

52. Further in the cross-examination this witness has stated that when the deceased was injured, he went, where he did not see any medicine or any prescription nor any money was found by him. This statement will also go to show that when the deceased had already sustained injuries, then this witness reached to the deceased, which also cast a dent in the presence of P.W.-1.

53. This witness has not stated anywhere in his statement as to why he went to the market. In the cross-examination he has only stated as under:

*"मैं वैसे टहलने के लिए बाजार चला गया था, कोई खास काम से नहीं गया था। हरिशंकर भी वैसे घूमने टहलने चले गए थे कोई खास काम नहीं था।"*

54. In the examination-in-chief, P.W.-1 has stated that the after the accused ran away, his father Jai Sri and other people came from the house and the deceased disclosed the names of persons, who assaulted him to his father, whereas in his cross-examination, he has stated that his statement was recorded by the Investigating Officer in which he has stated that his brother i.e. deceased was conscious and after the accused ran away, his father and other people came and his brother i.e. deceased disclosed the names of accused to his father. This witness has also stated in his cross-examination that when the deceased disclosed the names of accused to his father, Amarnath was also present there. When as a matter of fact father of the deceased, namely, Jai Sri and Amarnath to certify such disclosure were not produced during the course of trial. However, such



statements of P.W.-1 have not been supported by the Investigating Officer i.e. P.W.-4. The relevant statements of P.W.-4 are extracted here-under:

*"वादी ने अपने ब्यान मे यह नही बतलाया था कि, " मेरे भाई उस समय होश में थे। मुल्जिमान के भागने के बाद मेरे पिता जी वा अन्य लोग भी आ गये थे। और भाई ने मारने वालो का नाम पिता जी को बतलाया था।" यह बात भी गवाह ने नही बताया था कि मेरे साथ अमरनाथ यादव भी अस्पताल गये थे, मेरे भाई ने अमरनाथ के सामने भी मारने वालो का नाम बतलाया था।"*

*(Emphasis supplied)*

55. Such statements of P.W.-1 also create a doubt on the ground that when P.W.-1 qua his presence at the time of occurrence, who happens to be brother of the deceased, was already present at the place of occurrence along with P.W.-3 and Amarnath, why the deceased, who was in serious condition, has not disclosed the names of accused to his brother i.e. P.W.-1 and why he waited his father to disclose the same to him.

56. There is major contradictions in the testimony of P.W.-2. In the cross-examination, at one place this witness has stated that at the time of incident the deceased was conscious but at another place he has stated that he did not remember after the accused ran away, whether his brother i.e. deceased was conscious or not? Similarly, in the cross-examination, at one place, this witness has stated that when the deceased went to the market for taking medicine, he was not there, but at another place this witness has stated that in the market, he met the deceased Rambali.

57. Apart from the above, from the statements of P.W.-1, it is apparently clear that there was inimical terms between his side and the accused side as there were litigations pending before the concerned court against each other as per the own statement of P.W.-1. Even otherwise, P.W.-1 being the brother of the deceased, is an interested and partisan witness.

58. There is major contradiction in the statement of P.W.-3. In-examination-in- chief, this witness has stated that at the time of incident, the sun had set but at that time there was adequate light. However, in the cross-examination this witness has stated that he did not remember

whether that there was dark night or bright after the incident till his returning to home? Before this statement this witness has stated that he and P.W.-1 were a little away from the place of occurrence.

59. There is also contradiction in the testimonies of P.W.-1 and P.W.-3. In his examination-in-chief, P.W.-1 has stated that on screaming of the deceased, P.W.-1 and P.W.-3 reached at some distance and they also started shouting and on hearing the same, Sukhdeo and Santram reached and when they came, all the accused ran away towards south. The relevant statement is extracted hereunder:

*"भाई के चिल्लाने पर मैं व हरि शंकर भी कुछ दूर पर पहुंच गये थे। हम लोग भी जोर से चिल्लाने लगे। हम लोगों का शोर सुनकर गांव की तरफ से सुखदेव व संतराम पहुंच गये। इन लोगों के आने पर मुल्जिमान भाग कर दक्षिण तरफ भागे। मैं अपने भाई के पास गया।"*

60. When as matter of fact in the examination-in-chief P.W.-3 has stated that when the accused assaulted the deceased, the deceased himself, P.W.-1 and P.W.-3 shouted, then at that time, Sukhdeo and Santram, who were coming to the village from the market, while exhorting reached there. P.W.-1, P.W.-3, Sukhdeo and Santram saw the incident very well. The relevant statement is extracted here-under:

*"रामबली मैं तथा लाल जी ने शोर किया था। मौके पर घटना के समय सुखदेव तथा स्तराम जो गांव की तरफ से बाजार की तरफ आ रहे थे ललकारते हुए मौके पर पहुंच गये थे मैंने लाल जी, सुखदेव तथा सन्तराम ने पूरी घटना भली भांती देखा तथा वहीं बयान किया।"*

61. P.W.-3 had also inimical terms with the accused persons including the appellants, which has been admitted by P.W.-3 in his cross-examination itself. For ready reference, the same is quoted here-under:

*"मेरे नाम बल्दियत का दूसरा व्यक्ति मेरे गांव मे कोई नहीं है। इस मुकदमा के पहले श्याम बहादुर अभियुक्त की रिपोर्ट पर थाना बक्साल से धारा 325, 323, 308 आदि का मुकदमा चल रहा है। यह मुकदमा ADJ 9 के यहा लम्बित है। इसका Cross Case हरिलाल पुत्र जगन की रिपोर्ट पर श्याम बहादुर अच्छेलाल देवरान, शंकर आदि जो इस मुकदमे में अभियुक्त है उनके खिलाफ उसी न्यायालय में पहले से चल रहा है। यह मुकदमा हरिलाल के रिपोर्ट पर चल रहा है जिसमें मैं गवाह लाल जी और जय श्री पुत्र जगरूम मुल्जिमान के खिलाफ गवाह है। इन दोनो मुकदमो में मैं भी चोटईल व गवाह हूँ। मैं स्टेट बनाम श्याम बहादुर आदि मे गवाह हूँ मेरे अलावा लाल जी और जयश्री जो लाल जी के पिता है उसमे गवाह व चोटईल है। कहा मुझे पता नहीं कि उपरोक्त दोनो मुकदमे में मृतक रामबली गवाह या मुल्जिम है या नहीं। यह मुकदमे घटना के पहले से चल रहे है। इन पार्टीयो के बीच में 107/116 का मुकदमा भी पुलिस ने चलाया था।"*

62. P.W.-3 is also an interested witness, as he is old friend of P.W.-1, as is admitted by P.W.-1 in his testimony. He is also a chance witness. Like P.W.-1, P.W.-3 also reached at the place of occurrence along with P.W.-1, when the incident had already taken place.

63. From bare scrutiny of the aforesaid testimonies of P.W.-1 and P.W.-3, who are stated to be eye-witnesses of the incident as per the prosecution, it is crystal clear that such testimonies of P.W.-1 and P.W.-3 are not reliable and trustworthy, on the basis of which it can be said that the accused has committed the alleged crime and they could be held guilty for the same.

64. Now this Court comes to examine the submission made by Mr. Dharendra Kumar Srivastava, learned counsel appearing for the informant that the disclosure made by the deceased to his father Jai Sri who reached at the place of occurrence after the accused ran away as to who has assaulted him, be treated to be dying declaration of the deceased.

65. It is the duty of the prosecution to establish the charge against the accused beyond the reasonable doubt. The benefit of doubt must always go in favour of the accused.

66. It is true that dying declaration is a substantive piece of evidence to be relied on provided it is proved that the same was voluntary and truthful and the victim was in a fit state of mind. It is just not enough for the court to say that such dying declaration like the disclosure made by the deceased to his father in an injured condition, is reliable as the accused is named in such disclosure/ dying declaration as the assailant.

67. It is unsafe to record the conviction on the basis of a dying declaration alone in the cases where suspicion, like the case in hand is raised, as regards the correctness of the dying declaration. In such cases, the Court may have to look for some corroborative evidence by treating the dying declaration only as a piece of evidence. The evidence and material available on record must be properly weighed in each case to arrive at an appropriate conclusion.

68. In the case of **Irfan alias Naka Vs. State of Uttar Pradesh** reported in *2023 SCC OnLine SC 1060*, the Hon'ble Supreme Court in paragraph-60 has opined as follows:

*"62. There is no hard and fast rule for determining when a dying declaration should be accepted; the duty of the Court is to*

*decide this question in the facts and surrounding circumstances of the case and be fully convinced of the truthfulness of the same. Certain factors below reproduced can be considered to determine the same, however, they will only affect the weight of the dying declaration and not its admissibility: -*

- (i) Whether the person making the statement was in expectation of death?*
- (ii) Whether the dying declaration was made at the earliest opportunity? "Rule of First Opportunity"*
- (iii) Whether there is any reasonable suspicion to believe the dying declaration was put in the mouth of the dying person?*
- (iv) Whether the dying declaration was a product of prompting, tutoring or leading at the instance of police or any interested party?*
- (v) Whether the statement was not recorded properly?*
- (vi) Whether, the dying declarant had opportunity to clearly observe the incident?*
- (vii) Whether, the dying declaration has been consistent throughout?*
- (viii) Whether, the dying declaration in itself is a manifestation / fiction of the dying person's imagination of what he thinks transpired?*
- (ix) Whether, the dying declaration was itself voluntary?*
- (x) In case of multiple dying declarations, whether, the first one inspires truth and consistent with the other dying declaration?*
- (xi) Whether, as per the injuries, it would have been impossible for the deceased to make a dying declaration?"*

69. In a case where a person was in serious state, it was necessary to ascertain the fit mental state of the injured before accepting the dying declaration. Paragraph- 9 of the judgment is reproduced hereunder:-

*"9. It is true that the medical officer Dr. K.Vishnupriya Devi (PW 10) at the end of the dying declaration had certified patient is conscious while recording the statement. It has come on record that the injured Smt. Venkata Ramana had sustained extensive burn injuries on her person. Dr. P.Koteswara Rao (PW 9) who performed the post mortem **stated that injured had sustained 90% burn injuries.** In this case as stated earlier, the prosecution case solely rested on the dying declaration. It was, therefore, necessary for the prosecution to prove the dying declaration being genuine, true and free from all doubts and it was recorded when the injured was in a fit state of mind. In our opinion, the certificate appended to the dying declaration at the end by Dr. Smt. K.Vishnupriya Devi (PW 10) did not comply with the requirement inasmuch as she has failed to certify that the injured was in a fit state of mind at the time of recording the dying declaration. The certificate of the said expert at the end only says that patient is conscious while recording the statement. In view of these material omissions, it would not be safe to accept the dying declaration (Ex.P-14) as true and genuine and was made when the injured was in a fit state of mind. From the judgments of the courts below, it appears that this*

*aspect was not kept in mind and resultantly erred in accepting the said dying declaration (Ex.P-14) as a true, genuine and was made when the injured was in a fit state of mind. **In medical science two stages namely conscious and a fit state of mind are distinct and are not synonymous. One may be conscious but not necessarily in a fit state of mind. This distinction was overlooked by the courts below.***

*(Emphasis supplied by us)*

70. The observation made in the case of **Paparambaka Rosamma** (supra) has been reiterated in a subsequent decision of the Supreme Court in the case of **Naresh Kumar Vs. Kalawati & Others** reported in *2021 SCC OnLine SC 260*, wherein the Supreme Court after referring to the above quoted paragraph no. 9 observed as under in para-13:-

*“13. In the facts and circumstances of the present case, considering that the statements of the deceased have vacillated, **there is no evidence about the fitness of mind of the deceased to make the dying declaration including the presence of the Doctor, the veracity and truthfulness of the dying declaration remains suspect.** It would not be safe to simply reject the probable defence of suicide, to reverse the acquittal and convict the respondents.”*

*(Emphasis supplied by us)*

71. In the facts of the present case, neither the contents of the dying declaration were read out to the injured/deceased nor to the father of the deceased, namely, Jai Sri, who could certify such disclosure, as in his presence such disclosure has been made by the deceased in respect of the person, who has assaulted him. As also the father of the deceased certifying such disclosure of the deceased, was not produced during the course of trial so that the defence could have an opportunity to cross-examine such disclosure. In **Suriender Kumar Vs. State of Haryana** reported in *(2011) 10 SCC 173*, the Supreme Court questioned the dying declaration also on the ground that such a satisfaction about the contents of the dying declaration having read out to the victim was missing. In paragraph no. 25 of the judgment, the Supreme Court observed as under:-

*“25.As per the prosecution, the incident took place at 2 a.m. on 26.06.1991 and as per her statement, the occurrence of burning was in the evening of 25.06.1991, that is, the previous day. **The dying declaration did not carry a certificate by the Executive Magistrate to the effect that it was a voluntary statement made by the deceased and that he had read over the statement to her. The dying declaration was not even attested by the doctor. As stated earlier, though the Magistrate had stated that the statement had***

*been made in mixed dialect of Hindi and Punjabi and the statement was recorded only in Hindi. Another important aspect is that there was evidence that Kamlesh Rani was under the influence of Fortwin and Pethidine injections and was not supposed to be having normal alertness. In our view, the trial Court rightly rejected the dying declaration altogether shrouded by suspicious circumstances and contrary to the story of prosecution and acquitted the appellant."*

*(Emphasis supplied by us)*

72. We also find substance in the submission made by the learned counsel for the accused-appellants that there is a delay in lodging of the first information report. It is clear from the first information report that the alleged incident took place at 06:00 p.m. (evening) on 26<sup>th</sup> August, 1989, whereas the first information report was registered on 27<sup>th</sup> August, 1989 at 04:00 a.m. (morning), for which there is no explanation, which also cast a dent in the prosecution version.

73. It is also not clear from the prosecution version as to where the deceased has been done to death because of inconsistency in the testimony of P.W.-1 Lalji Yadav and P.W.-3 Hari Shanker Yadav.

74. In such circumstances, we are of the view that the court below has not examined the evidence led by the prosecution in correct perspective and the finding returned by it that the prosecution has succeeded in proving its case beyond reasonable doubt cannot be sustained. The prosecution has failed to establish the guilt of the accused-appellants on the basis of evidence led at the stage of trial by the prosecution. The conviction and sentence of accused-appellants is consequently reversed.

75. In view of the discussions and deliberations held above, the present appeals succeed and are allowed. The judgment and order of conviction and sentence dated 25<sup>th</sup> March, 2004 passed by the Additional Sessions Judge/F.T.C.-IV, Jaunpur in Sessions Trial No. 41 of 1990 (State of U.P. Vs. Jwala Prasad & Others), arising out of Case Crime No. 110 of 1989, under Sections 148, 149 and 302 of I.P.C., Police Station-Baxa, District-Jaunpur against the accused appellants, is set aside.

76. Since the accused appellants Bankey Lal, Shyam Bahadur and Mithai Lal are reported to be on bail, they need not surrender before the court below. Since the accused-appellant Jawala Prasad has already died and the instant criminal appeal has been abated by this Court vide order dated 27<sup>th</sup> April, 2022 at his behest, no further orders are required to be passed qua him.

77. Let a copy of this judgment be sent to the Chief Judicial Magistrate, Jaunpur, henceforth, for necessary compliance.

(Shiv Shanker Prasad, J.) (Rajiv Gupta, J.)

**Order Date :- 03.7.2024**

Sushil/-