

Criminal Appeal
Present : The Hon'ble Mr. Justice Ashim Kumar Banerjee
And
The Hon'ble Mr. Justice Kishore Kumar Prasad

C.R.A. No.60 of 2004
Judgment on: April 12, 2010.

Ajoy Pramanick
-VS-
The State of West Bengal

C.R.A. No.61 of 2004
Ashutosh Pramanick & Another
-VS-
The State of West Bengal

POINTS:

INVESTIGATION ON TELEPHONIC MESSAGE, WITNESS OF RELATIVES: Victims carried on country liquor business from their house-Altercations amongst two groups of the same family- Police started investigation on the telephonic message received by them- Thereafter police received written complaint and treated the same as F.I.R- Learned Judge, whether correct in depending upon relatives as witnesses in absence of any outsider- Arms Act Ss.25/27- Indian Penal Code, S.302/34- Code of Criminal Procedure, 1973 Ss. 154,157, 161,164, 313.

FACTS:

Victims carried on business of country liquor from their house. The accused were their cousins. Over the sale of country liquor, there had been altercations with the customers. The customers also, under the influence of liquor, used to spoil the toilet belonging to the accused. On that score, there had been altercation between the accused and the victims. The accused were arrested and chargesheeted by the Police, inter alia, for killing the victims using firearms and thereby

committing offence under Section 302/34 of the Indian Penal Code as also under Sections 25 and 27 of the Arms Act. The accused pleaded innocence and faced trial.

HELD:

The Police started investigation on the basis of the telephonic message received by them. It is not important who informed the Police. The Police took cognizance and started investigation by treating such telephonic message as the first hand information about the crime. Hence, the Court does not find any illegality on that score. It is true that the Police after starting investigation received the written complaint and treated it as FIR. Whether it was an FIR or a statement under Section 161 is not very much important. The requirement of FIR is to activate the investigative agency. Any technical or procedural defect on that score, could not vitiate the entire investigation or the trial or the result there from.

PARA---54

While examining evidence of interested witnesses the Court should be cautious and should find corroboration from any other circumstantial evidence.

PARA-----56

It is well-settled that the statement of witness recorded under Section 164 before the Magistrate is not substantive evidence and it can be used only to corroborate or contradict that witness. Where a prosecution witness himself does not support his version, his statement earlier recorded under Section 164 of the Criminal Procedure Code would not be available to the prosecution for corroboration and conviction of the accused. It was a fight between two groups from the same family. The victims as well as the accused are cousins. Eyewitnesses were relatives. Hence, the learned Judge was right in depending upon those witnesses in absence of any outsider.

PARA---59

CASES CITED:

- 1) Nazir Ahmad –VS- King-Emperor (All India Reporter, 1936, Privy Council, Page-253 (2)
- 2) A.W. Khan –VS- The State (All India Reporter, 1962, Calcutta, Page-641)
- 3) Somappa Vamanappa Madar Shankarappa Ravanappa Kaddi –VS- The State of Mysore (All India Reporter, 1979, Supreme Court, Page-1831)
- 4) Sunil Kumar and Others –VS- State of Madhya Pradesh (1997, Criminal Law Journal, Page-1183)
- 5) B. Subba Rao and Others –VS- Public Prosecutor, High Court of Andhra Pradesh at Hyderabad (All India Reporter, 1997, Supreme Court, Page-3427)
- 6) Golla Jalla Reddy and Others –VS- State of Andhra Pradesh (1996, Volume-VIII, Supreme Court Cases, Page-565)
- 7) State of Rajasthan –VS- Bhanwar Singh (2004, Volume-XIII, Supreme Court Cases, Page-147)
- 8) Arjun Marik and Others –VS- State of Bihar (1994, Supreme Court Cases (Criminal), Page-1551)
- 9.) Marudanal Augusti –VS- State of Kerala (1980, Supreme Court Cases (Criminal), Page-985)
- 10) Jang Singh and Others –VS- State of Rajasthan (2002, Supreme Court Cases (Criminal), Page-1027)
- 11) Moti and Others –VS- State of Uttar Pradesh (2003, Volume-IX, Supreme Court Cases, Page-444)
- 12) Pratap Singh and Another –VS- State of Madhya Pradesh (2005, Volume-XIII, Supreme Court Cases, Page-624)
- 13.) Ram Charan and Others –VS- The State of Uttar Pradesh (All India Reporter, 1968, Supreme Court, Page-1270)

- 14) Gurjant Singh –VS- State of Rajasthan (All India Reporter, 1970, Supreme Court, Page-1305)
- 15) Ram Kishan Singh –VS- Harmit Kaur and Another (All India Reporter, 1972, Supreme Court, Page-468)
- 16) Dhanabal and Another –VS- State of Tamil Nadu (All India Reporter, 1980, Supreme Court, Page-628)
- 17) Suraj Mal –VS- The State (Delhi Administration) (All India Reporter, 1979, Supreme Court, Page-1408)
- 18) Deepak Kumar –VS- Ravi Virmani and Another (2002, Supreme Court Cases (Criminal), Page-470)
- 19) Rajinder Singh Alias Kada –VS- State of Punjab (1993, Supreme Court cases (Criminal), Page-135)
- 20) Lakshmi Singh and Others –VS- State of Bihar (1976, Volume-IV, Supreme Court Cases, Page-394)
- 21) Vikramjit Singh Alias Vicky –VS- State of Punjab (2006, Volume-XII, Supreme Court Cases, Page-306)
- 22) S. Harnam Singh –VS- The State (Delhi Administration) (All India Reporter, 1976, Supreme Court, Page-2140)
- 23) Harijan Megha Jesha –VS- State of Gujarat (All India Reporter, 1979, Supreme Court, Page-1566)
- 24) Sharad Birdhichand Sarda –VS- State of Maharashtra (All India Reporter, 1984, Supreme Court, Page-1622)
- 25) Shaikh Maqsood –VS- State of Maharashtra (2009, Volume-VI, Supreme Court Cases, Page-583)

26) State of Rajasthan –VS- Netrapal and Others (2007, Volume-IV, Supreme Court Cases, Page-45)

27) State of Rajasthan –VS- Lala alias Abudul Salam (2008, Volume-XI, Supreme Court Cases, Page-145)

28) Sumersinbh Umedsinh Rajput –VS- State of Gujarat (2007, Volume-XIII, Supreme Court Cases, Page-83)

29) State of Maharashtra –VS- Raju Bhaskar Potphode (2007, Volume-XI, Supreme Court Cases, Page-261)

30) Bhimappa Jinnappa Naganur –VS- State of Karnataka (1993, Supreme Court Cases (Criminal), Page 1053)

For the Appellants in both : Mr. Arunendu Sekhar Roy
the appeals Mr. Om Prakash Dubey
Mr. Pinaki Bhattacharya

For the State in both the : Mr. Ashimesh Goswami
appeals Mr. Subir Gangully
Ms. Rupa Bandyopadhyay

THE COURT:

BACKDROP :

1) Victim Biswa Pramanick and Bhuban Pramanick are brothers. At all material times they carried on business of country liquor from their house. The accused Ashutosh Pramanick, Debu Pramanick, Ajay Pramanick, Jhantu Pramanick, Jagannath Pramanick were their cousins. Over the sale of country liquor, there had been alterations with the customers. The customers also, under the influence of liquor, used to spoil the toilet belonging to the accused. On that score, there had been altercation between the accused and the victims. Angurbala, the mother of the accused and Aunt of the victim lodged a complaint with the police station on the day previous to the date of the unfortunate incident.

2) We, however, do not find any incident of altercation either between the customers and victims or between the accused and the victims on the fateful day.

INCIDENT :

3) On the evening of May 18, 1998 Biswa was taking tea at the Tea Stall of Bimal Gharami. Biswa was watching “Janmabhumi” in Doordarshan, being played in the television set of Bimal in his house, through the window. Soon thereafter, Biswa left the shop for his house. Within a short while he came back and started gossiping with Jugal (PW-5) in front of the tea stall of Bimal. At about 7:00/7:30 p.m., Ashu, Ajoy, Dasu and others came to the spot and fired at Biswa. As per the written complaint made by Gour, brother of the victims, Ashu, Dasu and Ajoy shot Biswa from the pipe gun, they were carrying. The lady folks of the house including Gour came to his rescue when they threatened to kill Gour also. Bimal saved Gour by guarding him and then made a passage for Gour through his house. The accused then shot Bhuban while he was coming out of his house.

F.I.R. :

4) Gour lodged the written complaint at 11:55 p.m. as would appear from the endorsement of Tilzala Police Station having its camp at Bainchtala (Dakshin). The evidence further reveals that Rama, wife of Biswa along with her daughter went to the house of one Pradip Mandal and therefrom made a phone call to the Police Station. The local MLA also made a phone call to the Police Station. The telephonic message so received and recorded by the Police was tendered in evidence.

CHARGES :

5) Ashutosh Pramanik, Dasu Pramanik, Ajoy Pramanik, Jagannath Pramanik, Bhanu Pramanik and Biswa Nath Baidya were arrested and they were chargesheeted by the Police, inter alia, for killing Biswa Pramanik and Bhuban Pramanik by using firearms and thereby committing offence under Section 302/34 of the Indian Penal Code as also under Sections 25 and 27 of the Arms Act.

6) The accused pleaded innocence and faced trial.

PROSECUTION EVIDENCE :

7) Altogether twenty-seven witnesses deposed before the Trial Judge.

PW-1 (Gour Pramanick) :

8) Gour Pramanik, the younger brother of the victims was saved by Bimal (PW-6). Gour almost corroborated what he had stated in his written complaint before the Police. According to Gour, Biswa and himself were taking tea at the tea stall of Bimal. At about 7:00/7:30 p.m. he left the tea stall. When he was proceeding to his house he heard some sound of firing at his back. On hearing the sound he rushed to the spot and found two successive firing being made to Biswa. He could not come to his rescue as they threatened him. Bimal intervened and guarded him. After firing at Biswa, while leaving the place they met Bhuban on the way. They also fired at him. Out of fear Gour took shelter in the shop. Thereafter, he went to the thana and reported the matter. The Police came and made investigation. The Police took him as well as Gopal Mondal to thana. Gopal wrote the complaint as per his dictation. He then came back to his house. He identified all the accused on dock. During cross-examination he deposed that for about two hours the Police had consultation with him and Gopal. Thereafter the complaint was written. In his deposition he admitted that

Biswa was selling country liquor at his residence and, very often, disturbance took place between Biswa and other country liquor sellers.

Gopal Mondal (PW-2) :

9) PW-2 Gopal Mondal was the scribe of FIR. At about 11:30 p.m. Police came to his house along with Gour and took him to thana. As per dictation of Gour he wrote the complaint. Gour put his LTI. He almost corroborated what Gour had said about preparation of the FIR.

Bithika Pramanick (PW-3) :

10) PW-3 Bithika Pramanick was the daughter of Biswa. She was sitting on the varandah. When she heard the sound of firing, she along with her older sister Supriya and mother rushed outside and found Ashu pointing his firearm at the back of Biswa. Nobody allowed them to approach her father. They became afraid and did not proceed. Gour then came running to the spot. Ashu, Punte and Ajoy threatened Gour. Bimal guarded him. Her mother also guarded Gour. Then those three persons while going away fired at Bhuban.

11) In cross-examination she deposed that both Bhuban and Biswa were selling country liquor in their respective houses. She also admitted that on the previous night Angurbala along with the accused went to thana and lodged complaint that they were being abused by the customers of Biswa and Bhuban. The said customers were spoiling their toilet under the influence of liquor. They also complained that Biswa threatened Angurbala and others. The Police initially came and local leader Subhash Malik intervened and settled the dispute. She also stated that she had told the Police that Bimal guarded her uncle Gour. According to her, Bhuban was alive for fifteen minutes and then

died. She also stated that she had told the Police that Ashu was pointing firearm at the back of Biswa.

Jharna Pramanik (PW-4) :

12) Jharna Pramanik was the wife of Gour. She rushed to the tea shop of Bimal after hearing the sound of firing and found Biswa lying dead. Bhuban was also found shot dead. She identified the accused on dock. She found both the deadbodies near Krishnachura Tree.

Jugal Halder (PW-5) :

13) PW-5, Jugal Halder was taking tea in Bimal's tea shop when he heard three sounds and left the place.

Bimal Gharami (PW-6) :

14) PW-6, Bimal Gharami was the owner of the tea stall. He was working as a guard in a nearby fishery and during spare time he used to run the tea stall. According to his deposition, he heard some sounds. However, he could not notice anything. He found people running abruptly. He also saw two persons being Biswa and Bhuban lying at near Krishnachura Tree. Biswa was found dead whereas Bhuban was gasping. He closed his shop and left the place. He identified the accused as his neighbours.

Kalyani Gharami (PW-7) :

15) Kalyani was the daughter of Bhuban. She was in her residence when the incident occurred. After hearing sound of firing she came out and found Ashu firing at Biswa. Biswa fell down and

died. Ajoy and Punte thereafter fired at Bhuban who was standing on the road. Ashu struck him with a firearm. She started weeping. She identified the accused on dock. In cross-examination, she admitted that her husband Joydev was also selling country liquor. However, Biswa and Joydev could not see each other on the issue of sale of country liquor. They had separate area of operation. However, they did not have any dispute with regard to the area of operation.

Bapi Pramanick (PW-8) :

16) Bapi was the son of Bhuban. He was not at his residence. On coming back he found the deadbodies. He heard that Ashu, Punte and Ajoy had committed the murder. He also identified the accused on dock. In cross-examination he stated that her mother Anjana was in the residence during the incident.

Sanatan Pramanick (PW-9) :

17) Sanatan was the niece of Bhuban and Biswa. He was not present at the time of incident.

Mir Hasnat Ali (PW-10) :

18) Mir Hasnat Ali, the police constable took the dead bodies to Mominpore Morgue for post mortem.

P.K. Ghosh (PW-11) :

19) P.K. Ghosh, Sub-inspector registered formal FIR on the basis of the written complaint forwarded by Sub-inspector S. Bose through constable Sunil Bhattacharya.

Jaydev Gharami (PW-12) :

20) Jaydev was the son in-law of Bhuban and husband of Kalyani. He heard the sound of firing when he was near the tea stall. He found Biswa and Bhuban lying on the road. According to him, Biswa was lying near Krishnachura Tree whereas Bhuban was lying near the tea shop. He rushed to bring a vehicle. On return, he found them lying dead.

Sunita Pramanik (PW-13) :

21) Sunita Pramanik was the wife of Sukumar Pramanik, another brother of Biswa and Bhuban. Sunita heard the sound of firing two times and then came out of the house when she found Dasu firing at Bhuban. She also found Ajoy firing at Bhuban.

Mahadev Mondal (PW-14) :

22) Mahadev Mondal was the seizure witness. He put his signature at the instruction of the Police on a plain paper. He was declared hostile and cross-examined by the prosecution.

Dilip Kumar Sardar (PW-15) :

23) Dilip Kumar Sardar was also a seizure witness. He put his LTI on some paper on the instruction of the Police. He was also declared hostile and cross-examined by the prosecution.

Rama Sankar Ghosh (PW-16) :

24) Rama Sankar Ghosh, the Sub-inspector, seized blood stained earth and other articles from the spot and prepared a seizure list.

Rathindra Kumar De (PW-17) :

25) Rathindra Kumar De, the Habildar, accompanied the I.O. when one shoter was recovered from the pond behind Aripada Primary School. Spot was identified by the accused Ashutosh Pramanick. He was witness to the seizure list.

Saradindu Banik (PW-18) :

26) Saradindu Banik, a Sub-inspector of Police, accompanied I.O. when improvised shoter and one cartridge was seized. He signed the seizure list as seizure witness.

Asish Senapati (PW-19) :

27) Asish Senapati, the Judicial Magistrate recorded the statement of Bimal Ghorami under Section 164 of the Criminal Procedure Code. He identified the statement being written and signed by him.

Rama Pramanick (PW-20) :

28) Rama Pramanick was the window of Biswa Pramanick. On hearing the sound of firing she ran towards the tea stall when she found Dasu and Ashu firing at Biswa. Gour reached the spot. When Dasu chased him, Gour, out of fear entered into the shop of Bimal. She requested Bimal to save Gour. Bimal asked Dasu and Ashu to leave his shop. Then as per the advice of Bimal she took Gour inside Bimal's house and helped him to escape through the backside of Bimal's shop. She along with her daughter Supriya followed Ashu, Dasu and Ajoy. When Bhuban reached near Krishnachura Tree, Ashu and Ajoy fired at Bhuban. Dasu assaulted Bhuban with his pipe gun. Bhuban fell down. Accused then left the place. She along with Supriya went to the house of Pradip Guha, a friend of Biswa. From there, she telephoned the Tilzala Police Station and narrated the incident to the Police. She was, however, not aware of any political clout Pradip had.

According to her, Pradip was one of their relations. She then visited the Thana when she found Gour present there. She had a talk with Gour at Thana.

Dalim Sen (PW-21) :

29) Dalim Sen, the Sub-inspector of Police, became a seizure witness of one single shoter pipe gun like pistol.

Supriya Pramanick (PW-22) :

30) Supriya was the daughter of Biswa. On hearing the sound of firing she came out of the house and found Ashu, Dasu and Ajoy firing at the Biswa. Dasu attempted to fire at Gour when Bimal saved him. Ashu, Dasu and Ajoy then proceeded towards the victim's house and fired at Bhuban while he was coming out of his room. Bhuban died on the spot. She along with her mother left the house and took shelter in the house of Pradip Guha at Tangra. She identified the accused on dock.

Sulekha Gharami (PW-23) :

31) Sulekha was the daughter of Bimal. She heard the sound of bursting of tyre. She came out of her room and found all running towards Krishnachura Tree. She also followed and found two persons lying on the road whom she could not recognize because of darkness.

Sukumar Pramanick (PW-24) :

32) Sukumar was the brother of Biswa. On hearing the sound of firing he came out his room and found Ashu, Dasu and Ajoy having pipe guns in their hands firing incessantly. He also found

Manick Pramanick, Biswanath Baidya and Jagannath Pramanick standing in front of the tea stall. He then went back to his house. Bhuban came out of the house. Ashu and Dasu fired him.

Dr. Arun Kumar Saha (PW-25) :

33) He was the attending doctor at police morgue. He held post mortem of two dead bodies and submitted report. He opined that the deaths were caused to gun-shot injuries, ante-mortem and homicidal in nature.

Prabir Banerjee (PW-26) :

34) He identified the signature of J.C. Saha, D.S.P.(Armed Police) who submitted the ballistic report.

Sanat Kumar Bose (PW-27) :

35) He was the Investigating Officer. On receipt of telephonic information from Bhadreswar Mondal, the then MLA, he made a G.D. entry being exhibit-8. He left the place along with the other officers and on reaching the spot found two dead bodies lying in front of the tea stall of Bimal and the victims' house respectively. Both the bodies were having multiple bullet injury. Gour Pramanick, the third brother appeared before him and submitted a written complaint to be written by one Gopal Mondal who was present at that time. The complaint was forwarded to the Tilzala Police Station through Sunil Bhattacharyay. Two fired empty cartridges were found at the place of occurrence near the tea stall of Bimal. Those were seized. One live cartridge was found near the dead body of Bhuban that was also seized. Witnesses on the spot were examined under Section 161 of the Criminal Procedure Code. Bimal later on gave statement before the Magistrate under

Section 164. The accused were arrested on July 20, 1998. The firearm was recovered from the pond of Sannashi Mondal in the presence of the accused Ashu Pramanick.

36) In cross-examination he stated that Bhadreswar Mondal informed about the incident. He admitted that the sketch map was not drawn according to the scale and he did not mention about the source of light. It also did not show where the cartridges were found or wherefrom the witnesses saw the incident.

DEFENCE WITNESSES :

37) The accused did not adduce any evidence. They were, however, examined under Section 313 of the Criminal Procedure Code where they pleaded innocence apart from denying the allegations.

JUDGMENT :

38) Learned Trial Judge after considering the evidence on record as discussed above held Ashu, Dasu and Ajoy guilty of the offence and acquitted Jagannath, Jhantu and Biswanath from all the charges. Ashu, Dasu @ Punte and Ajoy were convicted under Section 302 read with Section 34 of the Indian Penal Code. However, Ashu was acquitted from the charge brought against him under Sections 25 and 27 of the Arms Act.

39) All the three accused were sentenced for imprisonment for life together with fine of Rs.5000/- each in default to suffer rigorous imprisonment for two months.

APPEAL :

40) Being aggrieved and dissatisfied with the judgment and orders of the learned Additional Sessions Judge, Fast Track Court-III, Alipore, 24-Parganas (South) dated December 22 and 23,

2003, all the three convicts preferred the instant appeals inter alia on the ground mentioned in the memorandum of appeal. The appeals were heard by us on the above mentioned dates.

CONTENTION OF THE APPELLANTS :

41) Mr. Arunendu Sekhar Roy, learned counsel appearing for the appellants being assisted by Mr. Om Prakash Dubey contended as follows :-

- i) There had been unexplained delay in sending the written complaint to the Magistrate.
- ii) It was not clear as to whether the telephonic message received by the Police was treated as FIR or the written complaint.
- iii) The written complaint was nothing but an after thought as would appear from the prosecution evidence to the extent that there had been two hours long discussion Police had with Gour and Gopal at the Police Station.
- iv) The incident occurred in early part of the evening, even then no independent witness came forward to support the prosecution case.
- v) The prosecution witnesses deposed that they could see the accused committing the crime. They could identify them in the twilight as it was a full-moon night whereas the calendar would show otherwise.
- vi) There had been material contradictions on the prosecution evidence and benefit of such contradiction must go in favour of the accused.
- vii) The learned Judge based the conviction on the alleged statement made under 164 of the Criminal Procedure Code whereas during trial Bimal denied having seen the accused committing the crime. He was not confronted with the alleged statement made by him before the learned Magistrate.

viii) The recovery of arm was not proved as all the seizure witnesses were declared hostile and in absence of proof of the seizure list the learned Judge was not entitled to rely on the same.

Moreover the seizure articles were not produced at the time of trial.

42) In addition to the above submissions, Mr. Roy also filed written notes on argument highlighting the following issues :

- i) FIR was lodged in violation of Section 154-157 of the Criminal Procedure Code.
- ii) On the basis of the oral statement given to the Police, the investigation started and thereafter the written complaint was lodged. Hence, the written complaint could not be treated as FIR.
- iii) Since the names of the witnesses were not mentioned in the FIR, it would vitiate the trial.
- iv) Discrepancy and delay in lodging the FIR would certainly cast doubt in the mind of the Court.
- v) The source of light was not properly explained by the prosecution through evidence and as such the benefit should go to the accused.
- vi) The sketch map was not properly drawn. Krishnachura Tree under which one of the dead bodies was found, was not properly shown. Similarly the sketch map did not show wherefrom the witnesses watched the incident.
- vii) The learned Magistrate while recording the statement of Bimal under Section 164 did not caution him as required in law and as such the said statement was not entitled to be relied upon.
- viii) Inconsistency in prosecution evidence would lead to an inference that such evidence was unworthy of being relied upon.
- ix) The place of occurrence was not proved beyond doubt.

- x) Non-corroboration of the testimony of the interested witnesses and independent witnesses cast doubt in the mind of the Court resulting acquittal of the accused.
- xi) Blood stained earth was not sent for chemical examination.
- xii) While two views were possible the view favouring the accused should have been accepted.
- xiii) Motive could not be proved.
- xiv) Contradictions, inconsistencies and exaggerations raised doubt and made the circumstance suspicious and thus the trial was vitiated.

43) In support of his contentions Mr. Roy relied on the following decisions.

1) *Nazir Ahmad –VS- King-Emperor (All India Reporter, 1936, Privy Council, Page-253 (2)*

2) *A.W. Khan –VS- The State (All India Reporter, 1962, Calcutta, Page-641)*

3) *Somappa Vamanappa Madar Shankarappa Ravanappa Kaddi –VS- The State of Mysore (All India Reporter, 1979, Supreme Court, Page-1831)*

4) *Sunil Kumar and Others –VS- State of Madhya Pradesh (1997, Criminal Law Journal, Page-1183)*

5) *B. Subba Rao and Others –VS- Public Prosecutor, High Court of Andhra Pradesh at Hyderabad (All India Reporter, 1997, Supreme Court, Page-3427)*

6) *Golla Jalla Reddy and Others –VS- State of Andhra Pradesh (1996, Volume-VIII, Supreme Court Cases, Page-565)*

7) *State of Rajasthan –VS- Bhanwar Singh (2004, Volume-XIII, Supreme Court Cases, Page-147)*

8) *Arjun Marik and Others –VS- State of Bihar (1994, Supreme Court Cases (Criminal), Page-1551)*

9.) *Marudanal Augusti –VS- State of Kerala (1980, Supreme Court Cases (Criminal), Page-985)*

- 10) *Jang Singh and Others –VS- State of Rajasthan (2002, Supreme Court Cases (Criminal), Page-1027)*
- 11) *Moti and Others –VS- State of Uttar Pradesh (2003, Volume-IX, Supreme Court Cases, Page-444)*
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- 13.) *Ram Charan and Others –VS- The State of Uttar Pradesh (All India Reporter, 1968, Supreme Court, Page-1270)*
- 14) *Gurjant Singh –VS- State of Rajasthan (All India Reporter, 1970, Supreme Court, Page-1305)*
- 15) *Ram Kishan Singh –VS- Harmit Kaur and Another (All India Reporter, 1972, Supreme Court, Page-468)*
- 16) *Dhanabal and Another –VS- State of Tamil Nadu (All India Reporter, 1980, Supreme Court, Page-628)*
- 17) *Suraj Mal –VS- The State (Delhi Administration) (All India Reporter, 1979, Supreme Court, Page-1408)*
- 18) *Deepak Kumar –VS- Ravi Virmani and Another (2002, Supreme Court Cases (Criminal), Page-470)*
- 19) *Rajinder Singh Alias Kada –VS- State of Punjab (1993, Supreme Court cases (Criminal), Page-135)*
- 20) *Lakshmi Singh and Others –VS- State of Bihar (1976, Volume-IV, Supreme Court Cases, Page-394)*
- 21) *Vikramjit Singh Alias Vicky –VS- State of Punjab (2006, Volume-XII, Supreme Court Cases, Page-306)*

- 22) *S. Harnam Singh –VS- The State (Delhi Administration) (All India Reporter, 1976, Supreme Court, Page-2140)*
- 23) *Harijan Megha Jesha –VS- State of Gujarat (All India Reporter, 1979, Supreme Court, Page-1566)*
- 24) *Sharad Birdhichand Sarda –VS- State of Maharashtra (All India Reporter, 1984, Supreme Court, Page-1622)*
- 25) *Shaikh Maqsood –VS- State of Maharashtra (2009, Volume-VI, Supreme Court Cases, Page-583)*
- 26) *State of Rajasthan –VS- Netrapal and Others (2007, Volume-IV, Supreme Court Cases, Page-45)*
- 27) *State of Rajasthan –VS- Lala alias Abudul Salam (2008, Volume-XI, Supreme Court Cases, Page-145)*
- 28) *Sumersinbh Umedsinh Rajput –VS- State of Gujarat (2007, Volume-XIII, Supreme Court Cases, Page-83)*
- 29) *State of Maharashtra –VS- Raju Bhaskar Potphode (2007, Volume-XI, Supreme Court Cases, Page-261)*
- 30) *Bhimappa Jinnappa Naganur –VS- State of Karnataka (1993, Supreme Court Cases (Criminal), Page 1053)*

CONTENTION OF THE PROSECUTION :

44) Mr. Subir Gangully, learned counsel appearing for the prosecution contended as follows :

- i) The factum of death was proved by the prosecution witnesses. Cartridges were recovered from the place of occurrence. Weapon was seized at the instance of the accused after his arrest.
- ii) The post mortem report was proved. The bullet injury would corroborate the ocular evidence of the prosecution witnesses.
- iii) FIR specifically mentioned the overt act which was corroborated by the prosecution witnesses.
- iv) FIR need not refer to the minute details of the incident. The FIR informant gave a cryptic version of the incident in the FIR. However while deposing he narrated the entire incident in detail that could not be said to be inconsistent.
- v) When the incident was proved, recovery was proved and injury was proved through post mortem report there could be no doubt in the mind of the Court as it would raise pointer to the accused and accused only that they had committed the crime.
- vi) When the accused were neighbours and relatives and known to the witnesses they could be identified even when there was insufficient light.

45) Mr. Ganguly however admitted that Bimal should have been declared hostile and should have been confronted by the prosecution with the statement made by him under Section 164. However, such statement after being corroborated by the other witnesses was sufficient enough to support the conviction.

OUR VIEW :

46) Before we proceed to deal with the present case let us first discuss the law on the subject. Altogether thirty cases were cited by Mr. Roy. We, however, find five cases relevant to be discussed. The others are either repetition of the same proposition of law or not so much relevant for the present case.

47) In the case of Sharad Birdhichand Sarda (Supra), the Apex Court, after considering the law on the subject framed a guideline to be followed in a criminal trial in absence of any ocular evidence. Five points were highlighted by the Apex Court which are as follows :

“1. the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned ‘must or should’ and not ‘may be’ established.

2. the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.

3. the circumstances should be of a conclusive nature and tendency.

4. they should exclude every possible hypothesis except the one to be proved, and

5. there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.”

48) If we take a sum total of those five eventualities we would find that to convict an accused based on circumstantial evidence a chain must be built without any missing link and after excluding all possibilities of any other story based on any hypothesis.

49) In the case of Deepak Kumar (Supra), the Apex Court observed that non-availability of independent witness creates an uncanny feeling as to why this avoidance.

50) In the case of Dhanabal and Another (Supra), the Apex Court while dealing with a statement recorded under Section 164 observed as follows :

“During the investigation the Police Officer, sometimes feels it expedient to have the statement of a witness recorded under S. 164, Cr.P.C. This happens when the witnesses to a crime are closely connected with the accused or where the accused are very influential which may, result in the witnesses being gained over. The 164 statement that is recorded has the endorsement of the Magistrate that the statement had been made by the witness. The mere fact that the Police had reasons to suspect that the witnesses might be gained over and that it was expedient to have their statements recorded by the Magistrate, would not make the statements of the witnesses thus recorded, tainted.”

51) In the case of Moti and Others (Supra), the Apex Court while considering the issue of insufficiency of light to identify the accused observed that absence of proper light contributed to the doubt in the prosecution case. This observation, however, was made by the Apex Court coupled with a further observation that the accused had no motive to commit such crime.

52) In the case of A.W. Khan (Supra), the Division Bench of this Court was of the view, *“a First Information Report is not an indispensable requisite for the investigation of a crime specially*

where the accused was committed to sessions, the charge was framed and explained to him and he was tried on the charge. The lack of First Information Report in such a case would not and cannot vitiate the trial outright.”

53) Let us now apply the ratio decided as discussed above in the present case.

OUR CONCLUSION :

FIR :

54) From exhibit 8, it appears that the Police started investigation on the basis of the telephonic message received by them either from Pradip Guha or from Bhadreswar Mondal. It is not important who informed the Police. The Police took cognizance and started investigation by treating such telephonic message as the first hand information about the crime. Hence, we do not find any illegality on that score. It is true that the Police after starting investigation received the written complaint and treated it as FIR. Whether it was an FIR or a statement under Section 161 is not very much important. The requirement of FIR is to activate the investigative agency. Any technical or procedural defect on that score, in our view, could not vitiate the entire investigation or the trial or the result therefrom. In this regard we are supported by the Division Bench of this Court in the case of A.W. Khan (Supra).

55) The incident occurred at about 7:00/7:30 p.m. The telephonic message was received by the Police on the same day as would appear from exhibit 8. The written complaint was also received on the same day. It is true that Gopal Mondal was taken to the thana to assist Gour in lodging the written complaint. It is true that there had been some discussion between the Police, Gour and

Gopal, possibly the Police was taking account of the situation from the verbal statement of Gour which was later on recorded by Gopal in the form of a written complaint. Gopal categorically deposed that whatever had been stated by Gour was written by him. He also read it over to Gour before he put his LTI. Hence, we do not find any illegality on that score. We do not find any delay in lodging the FIR. Hence, the submissions, on that score, is rejected.

INCIDENT :

56) There was no straight jacket formula to suggest that the relative witnesses could not be believed. What the Apex Court cautioned, is that while examining evidence of interested witnesses the Court should be cautious and should find corroboration from any other circumstantial evidence. In this case the incident happened at 7:00/7:30 p.m. PW-1, 3, 4, 7, 8, 9, 12, 13, 20, 22 and 24, all relatives of the victims consistently deposed as to the occurring of the incident and the incident followed by the occurrence. There might be some minor anomaly as highlighted by the defence. But such minor anomalies, in our view, did not or could not raise any doubt in the mind of the Court with regard to the happening of the incident and involvement of the accused. It would have been better if Jugal and Bimal could support the incident being outsider to the said family. Unfortunately, they did not choose to do so, may be for extraneous reasons. The very fact that the bullets were fired, found corroboration even from the independent witnesses. Factum of casualty of two victims also found corroboration from the independent witnesses. The bullet injury was proved through medical evidence. Recovery of weapon was proved through seizure witnesses, may be, the Police personnel. It is pertinent to note that no categoric suggestion was given to the seizure witnesses that there had been no recovery at all. Such recovery was made in presence of the

accused. We do not find any plausible reason to disbelieve any of the prosecution witnesses merely on the ground that they were relatives of the victim.

57) From the calendar shown to Court, it appears that the incident occurred on the seventh day after the full-moon. The parties were known to each other. They were close relatives as well as neighbours. Hence, it could not be said to be improper if the witnesses say that they could identify the victim and the accused in the twilight available at 7:00/7:30 p.m. on a summer day. It further appears from the information supplied by Mr. Roy that the sun had set off at eight minutes past six on that day. Hence, at 7:00/7:30 p.m. twilight was very much available. Hence, the plea of insufficient light and the improbability of having identified the victim as well as the accused from the distance so mentioned in the evidence, is not tenable and as such is rejected.

MOTIVE :

58) From the prosecution witnesses it is evident that there were disputes on the issue of sale of country liquor. The accused were dissatisfied as their toilets were being spoiled by the customers. Angurbala, in fact, lodged a complaint on the day before as would appear from the prosecution witnesses on a query made by the defence counsel. Hence, motive was clear.

STATEMENT OF BIMAL UNDER SECTION 164 :

59) It is well-settled that the statement of witness recorded under Section 164 before the Magistrate is not substantive evidence and it can be used only to corroborate or contradict that witness. Where a prosecution witness himself does not support his version, his statement earlier recorded under Section 164 of the Criminal Procedure Code would not be available to the prosecution for

corroboration and conviction of the accused. Merely because Bimal did not support the prosecution case as regards the participation of the appellants in the crime, we cannot brush aside the ocular evidence of other witnesses which we have already discussed earlier. It was a fight between two groups from the same family. The victims as well as the accused are cousins. Eyewitnesses were relatives. Hence, the learned Judge was right in depending upon those witnesses in absence of any outsider.

60) We do not find any scope of interference on the ultimate finding of the learned Judge.

RESULT :

61) The appeals fail and are, hereby, dismissed.

DIRECTION :

62) The appellants namely Ashutosh Pramanick and Dasu Pramanick, in CRA no. 61, 2004 are now in jail. They are directed to serve out the remainder part of their sentence as awarded by the learned Trial Court.

63) The appellant Ajoy Pramanick in CRA No.60 of 2004 is now on bail. His bail bond is cancelled. He is directed to surrender before the learned Trial Court forthwith for being committed to custody for undergoing the remaining part of the sentence as awarded by the learned Trial Judge.

64) Let a copy of this judgment along with Lower Court Records be sent down at once to the learned Trial Court for information and necessary action.

65) Urgent xerox certified copy will be given to the parties, if applied for.

Kishore Kumar Prasad, J:

66) I agree.

[ASHIM KUMAR BANERJEE,J.]

[KISHORE KUMAR PRASAD,J.]